



State Engineer's Office

MARK GORDON
GOVERNOR

BRANDON GEBHART, P.E.
STATE ENGINEER

HERSCHLER BUILDING, 2 WEST
CHEYENNE, WYOMING 82002
(307) 777-6150

March 3, 2023

United States Environmental Protection Agency
EPA Docket Center
Office of Water Docket
Mail Code 28221T
1200 Pennsylvania Avenue NW
Washington, DC 20460

Submitted online via <https://www.regulations.gov>

Re: Water Quality Standards Regulatory Revisions to Protect Tribal Reserved Rights
Docket ID No. EPA-HQ-OW-2021-0791

To Whom It May Concern,

The Wyoming State Engineer's Office (WSEO) appreciates the opportunity to comment on the proposed Water Quality Standards Regulatory Revisions to Protect Tribal Reserved Rights rulemaking as outlined in the December 5, 2022 Federal Register Notice. WSEO also supports and joins the comments from Wyoming Governor Mark Gordon and the Wyoming Department of Environmental Quality in whole.

Wyoming holds title to water within its borders in a sovereign capacity as representative of all the people for the purpose of guaranteeing that the common rights of all are equally protected. Wyo. Const. art. 8 § 1; art. 1 § 31; *Merrill v. Bishop*, 287 P.2d 620, 625 (Wyo. 1955); See also *Farm Inv. Co. v. Carpenter*, 61 P. 258, 265 (Wyo. 1900). Wyoming constitutional and statutory provisions charge the State Engineer and the State Board of Control with the supervision, appropriation, distribution, and diversion of surface and groundwater use within the state. Wyo. Const. art. 8 §§ 2, 5; See, e.g., Wyo. Stat. Ann. §§ 41-4-502 through -511. The need for the state to control the use of its limited and precious water resources compelled Wyoming's Constitutional declaration of water ownership, and its history of water law and water administration that has since developed.

Wyoming's Environmental Quality Act, under which Wyoming regulates water quality, further respects the diversion and use of water, as well as the State Engineer and State Board of Control's authority over those activities. "Nothing in this act shall be construed to supersede or abrogate any valid water right. It is recognized that diversion of water caused by the exercise of a valid water right is an allowable practice." Wyo. Stat. Ann. § 35-11-302(c). "Nothing in this

act:...Limits or interferes with the jurisdiction, duties or authority of the state engineer, the state board of control..." Wyo. Stat. Ann. § 35-11-1104(a)(iii).

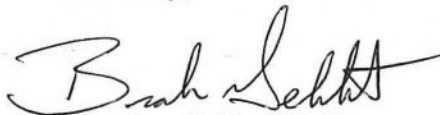
The Clean Water Act (CWA) provides that it is the "policy of Congress to recognize, preserve, and protect the primary responsibilities of States to . . . plan the development and use of land and water resources." 33 U.S.C. § 1251(b). Additionally, the CWA states: "It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter. It is the further policy of Congress that nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any State." 33 U.S.C. § 1251(g). As recognized by the CWA, Wyoming has an important, sovereign interest in protecting its ability to plan for the use of its limited water resources, and to allocate its waters for those uses according to state law. The proposed rule does not give sufficient weight and deference to state interests, needs, priorities, and concerns. In Wyoming, where water scarcity is pervasive, it is important that any rule also explicitly acknowledge the primary and often exclusive role of the States in allocating and administering rights to the use of water under authorities to which the Congress has a long history of deference.

Due in part to the widely variable nature of tribal reserved rights, the proposed rule is so vague and ambiguous that it is impossible to predict the full extent of its impact on Wyoming's exclusive authority to allocate and administer quantities of water within its jurisdiction. EPA acknowledges the complexity of determining the nature and geographic scope of tribal reserved rights, and whether they even apply in water subject to state water quality standards. At the same time, EPA offers no helpful guidance about making those determinations other than requiring engagement with potential right holders. Those potential right holders, and EPA itself, have no authority to determine the nature or geographic scope of tribal reserved rights outside of established and legally binding methods of review, as laid out in a multitude of court decisions. Further, no consideration is given to the holders of other lawful rights that may be impacted by the rule's application. In fact, EPA acknowledges its uncertainty regarding the outcome of the proposed rule's application. The proposed rule establishes newly created, potentially far-reaching consequences and concepts which are undefined and subject to agency discretion. The rule threatens to impair—not recognize, preserve, and protect—Wyoming's ability to plan for the use of its limited water resources, and to allocate its waters for those uses according to state law.

The proposed rule was also created without state consultation. Like other states, Wyoming plays a significant role in ensuring effective implementation of the CWA. Our co-regulator status, shared by the other states and many tribes, elevates Wyoming and other co-regulators above the multitude of stakeholders now engaged in the public review process. It is imperative that with a rulemaking process of this magnitude, which directly impacts the states' implementation of CWA programs, that significant input and review be provided to co-regulator entities on the substance of the proposed rule before it is drafted. However, Wyoming and other states were not included in this rulemaking process in any meaningful way.

Thank you for the opportunity to comment on the proposed rule, and we ask that EPA withdraw it due to its deficiencies.

Sincerely,

A handwritten signature in black ink, appearing to read "Brandon Gebhart". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Brandon Gebhart, P.E.
Wyoming State Engineer

Cc: Nolan Rap, Natural Resources Policy Advisor, Governor Mark Gordon
Todd Parfitt, Director, Wyoming Department of Environmental Quality
Chris Brown, Wyoming Attorney General's Office