THE STATE of ALASKA
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August 3, 2023

United States Environmental Protection Agency
Attn: Administrator Michael S. Regan
1200 Pennsylvania Avenue NW
Washington, DC 20004

Re: Dkt. No. EPA-HQ-OW-2016-0405 *Federal Baseline Water Quality Standards for Indian Reservations*

Dear Administrator Regan:

The Alaska Department of Environmental Conservation ("DEC") appreciates the opportunity to comment on the Environmental Protection Agency ("EPA")'s proposal, *Federal Baseline Water Quality Standards for Indian Reservations*, 88 Fed. Reg. 29496 (May 5, 2023) ("Proposed Rule"), which would establish nationally applicable federal water quality standards ("WQS") under the Clean Water Act ("CWA") for navigable waters on "reservations" as defined by EPA. For reasons articulated in the August 3, 2023 letter signed by eight States, the Proposed Rule, if finalized, would be unlawful if applied anywhere in the United States. This Letter supplements the August 3 letter and my letter dated May 31, 2023 by providing additional reasons why the Proposed Rule cannot apply in Alaska.

The Proposed Rule cannot apply in Alaska because Alaska's Tribal landscape is unique. Congress passed the Alaska Native Claims Settlement Act ("ANCSA") in 1971 to settle claims of aboriginal title, to promote economic development, and to "maxim[ize] participation by Natives in decisions affecting their rights and property . . . without establishing a reservation system or lengthy wardship or trusteeship."[1] At that time, "Alaskans, both Native and non-Native, opposed creation of reservations on the grounds that reservations were socially divisive and tended to perpetuate a wardship rather than equality for the Natives."[2] As consideration for this settlement, the State relinquished its land selection priorities under the Alaska Statehood Act and provided half of the monetary settlement ($500 million).[3] "In no clearer fashion," summarized the United States

[1] 43 U.S.C. § 1601(a) & (b).
[2] *United States v. Atlantic Richfield Co.*, 436 F.Supp. 1090, 1015 (D. Alaska 1977), *aff'd*, 612 F.2d 1132 (9th Cir. 1980).
[3] 43 U.S.C. §§ 1605, 1608, 1610.

Supreme Court about ANCSA, "could Congress have departed from its traditional practice of setting aside Indian lands."[4]

But EPA, once again, has proposed a rule in blissful ignorance of Alaska's unique history. As detailed below, under either the CWA's or the Proposed Rule's definition of "reservation," the Proposed Rule cannot apply in most, or all, of Alaska.

1. The CWA's definition of "reservation" cannot apply to areas occupied by non-Metlakatla Tribes in Alaska.

The Proposed Rule applies to navigable waters in "reservations."[5] ANCSA's abolition of all non-Metlakatla[6] reservations in Alaska[7] has been recognized and reaffirmed by the United States Supreme Court,[8] Circuit Courts,[9] and EPA itself.[10] The Proposed Rule, therefore, cannot apply to non-Metlakatla Tribal land or waters. But EPA included no notation or other indication that the Proposed Rule cannot so apply. In a briefing hosted by EPA on May 2, 2023 EPA indicated that it believed the Proposed Rule *did* apply to non-Metlakatla Tribes in Alaska—though it could not identify where, how, or why. The State of Alaska is at a loss as to how, exactly, EPA believes it may apply this rule to non-Metlakatla Tribes in Alaska.

2. The Proposed Rule's definition of "reservation" cannot apply anywhere in Alaska.

In the Proposed Rule, EPA disregards the Clean Water Act's definition of "reservation" as "all land **within the limits** of an Indian reservation under the jurisdiction of the United States Government . . ."[11] in favor of its own definition, which includes "formal and informal reservations

[4] *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520, 532 (1998).
[5] 88 Fed. Reg. at 29497–29498.
[6] The Metlakatla Indian Community resides in the Annette Island Reserve, the sole reservation in Alaska. Metlakatla is distinct from other Tribes in Alaska in that its members are not Alaska Natives, but rather nineteenth-century emigrants from British Columbia. *See Metlakatla Indian Cmty., Annette Islands Rsrv. v. Egan*, 369 U.S. 45, 48 (1962).
[7] ANCSA provides that "the various reserves set aside by legislation or by Executive or Secretarial Order for Native use or for administration of Native affairs, including those created under the Act of May 31, 1938 (52 Stat. 593), are hereby revoked . . ." 43 U.S.C. § 1618(a).
[8] *Yellen v. Confederated Tribes of Chehalis Rsrv.*, 141 S. Ct. 2434, 2439 (2021) ("ANCSA officially dispensed with the idea of re[-]creating in Alaska the system of reservations that prevailed in the lower 48 States."); *Venetie*, 522 U.S. at 532 ("ANCSA transferred reservation lands to private, state-chartered Native corporations . . .").
[9] *United States v. Roberts*, 185 F.3d 1125, 1133 (10th Cir. 1999) (stating there is "no possibility" that lands of an Alaska Tribe (not Metlakatla) "could qualify as a reservation . . . because the ANCSA had explicitly abrogated its reservation status."); *Akiachak Native Cmty. v. United States Dep't of Interior*, 827 F.3d 100, 103 (D.C. Cir. 2016) ("ANCSA extinguished aboriginal claims and revoked all designated reservations, except for one: the Annette Island Reserve inhabited by the Metlakatla Indians, who, as immigrants from Canada, had no aboriginal claims to Alaska lands.").
[10] *Amendments to the Water Quality Standards Regulations That Pertain to Standards on Indian Reservations*, 54 FR 39098-01, 39105 (1989) (concluding, based on the Clean Water Act's definitions of "reservation" and "Indian Tribe" that "Alaska Native Villages, with one exception [Metlakatla] do not exercise governmental authority over Federal Indian Reservations" and are therefore "not eligible to apply for 'treatment as States' status").
[11] 33 U.S.C. § 1377(h)(1).

such as trust land that has been validly set apart for use by a Tribe even if such land is located **outside of the exterior boundaries** of a formally designated reservation.[12] "Informal reservations," per EPA, include all of Indian country as defined by Criminal Code. [13]

There are two problems with this departure from Congress's definition. First, EPA's proffered legal support provides no actual support for its new definition. The majority of EPA's citations speak to the scope of "Indian country" in other contexts[14] and are devoid of any rationale for applying the Indian country concept to the CWA. The remaining citation, *Arizona Public Service Company*, speaks to the scope of a "reservation" as defined by the Clean Air Act.[15] *Arizona Public Service Company* expressly distinguishes the term "reservation" as it is defined in the Clean Water Act context[16] and warns that "other sources of statutory interpretation offer no insight into congressional intent with respect to the meaning of 'reservation'" in the specific Act before it.[17] The Proposed Rule, in other words, offers no legal basis for departing from the CWA's definition of "reservation."

The second problem with EPA's approach is that there *is* no legal basis—whether cited or not—for this departure. The CWA definition of "reservation" does not include, or encompass, the Criminal Code's definition of "Indian country."[18] The definition of "Indian country" was added to the Criminal Code in 1948, which suggests that Congress's addition in 1987 of § 518 to the CWA, but omission of the term "Indian country," was intentional. If Congress wanted the Criminal Code's definition of "Indian country" to apply, Congress could have said as much, like it did in the Indian Child Welfare Act.[19] But Congress chose not to. Perhaps Congress sought to avoid the patchwork result of having different WQS applicable to waters that run through trust- and non-trust lands. Or maybe Congress wished to sidestep the question of whether and to what extent allotments constitute Indian country. Or, it could have had whatever reasoning it wanted—it is not for EPA to judge. Congress makes laws; EPA executes them. EPA is not free to substitute a definition expressly provided by Congress with a definition from another context, even if EPA would prefer the expanded coverage.[20]

[12] *Compare* CWA § 518 (h)(1) *with* 88 Fed. Reg. 29498.
[13] 88 Fed. Red. at 29497–29498.
[14] 88 Fed. Reg. 29498 (citing *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 508 U.S. 114 (1991) and *HRI v. EPA*, 198 F.3d 1224 (10th Cir. 2000)).
[15] *Id.* (citing *Ariz. Public Serv. Co. v. EPA*, 211 F.3d 1280 (D.C. Cir. 2000)).
[16] *Ariz. Pub. Serv. Co.*, 211 F.3d at 1291.
[17] *Id.* at 1293.
[18] Indeed, reservations are a subset of Indian country. 18 U.S.C. § 1151(a).
[19] The Indian Child Welfare Act defines "reservation" as "Indian country as defined in section 1151 of Title 18 and any lands, not covered under such section, title to which is either held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation." 25 U.S.C. § 1903(10).
[20] Where, as here, the agency action is one of vast "economic and political" significance, the absence of clear congressional authorization violates the major questions doctrine. *See W. Virginia v. EPA*, 142 S. Ct. 2587, 2595 (2022).

Even if EPA could lawfully expand the CWA's definition of "reservation" to include Indian country (which it may not), the Alaska Supreme Court has recognized that "[t]here is not now and never has been an area of Alaska recognized as Indian country."[21] As the Department of the Interior has emphasized, "[ANCSA] precludes the treatment of lands received under that Act as Indian country" and Congress "sought an unambiguous rejection of the reservation system or any categories of trust or restricted land."[22] Historically, even the Annette Islands Reserve was "not 'Indian country.'"[23] These conclusions reflect the fact that "[ANCSA] differs from usual models for resolving Indian claims and adjusting federal-Indian relationships in that it gives an extraordinary degree of control to Native people and Native operated institutions."[24] Because of "the anomalous condition of Alaska," in other words, in Alaska, Indian country simply does not exist.[25] This means that no Tribe in Alaska, including Metlakatla, can fall under the Proposed Rule's new definition.

3. EPA must exclude Alaska from this rulemaking.

From the organization of Alaska's first civil government in 1884 forward, Alaska Natives have been subject to the same laws as non-Natives, including the criminal code, taxes, and civil laws governing matters such as hunting and fishing, employment, and even domestic issues.[26] Therefore, the United States Supreme Court has recognized "the simple truth" that "Alaska is often the exception, not the rule."[27]

If EPA elects to unlawfully push forward with the Proposed Rule, EPA must exclude the navigable waters of all Alaska Tribes, including Metlakatla, from coverage under the final rule.

[21] *Native Village of Stevens v. Alaska Management & Planning*, 757 P.2d 32, 35 (Alaska 1988).
[22] Dep't of the Interior, Governmental Jurisdiction of Alaska Native Villages over Land and Nonmembers, Sol. Op. M-36975, pp. 88, 112 n.276, 131, 133 (Jan. 11, 1993). The Department of the Interior has never revoked or rescinded this Opinion.
[23] *Egan*, 369 U.S. at 51–52.
[24] Felix S. Cohen, Handbook on Federal Indian Law 740 (1982 ed.).
[25] *United States v. Kie*, 26 F. Cas. 776, 778 (D. Alaska 1885).
[26] *See, e.g.*, *Native Village of Stevens v. Alaska Management & Planning*, 757 P.2d 32, 35 (Alaska 1988) (state laws and taxes); *United States v. Sitarangok*, 4 Alaska 667 (D. Alaska 1913) (territorial public works laws); *United States v. Doo-Noch-Keen*, 2 Alaska 624 (D. Alaska 1905) (territorial fishing laws).
[27] *Sturgeon v. Frost*, 577 U.S. 424, 440 (2016).

Sincerely,

Jason Brune
Commissioner

cc:

The Honorable Lisa Murkowski, United State Senate
The Honorable Dan Sullivan, United States Senate
The Honorable Mary Peltola, United States House of Representatives