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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 undersigned States appreciate 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 "baseline" federal water quality standards ("WQS") under the Clean Water Act ("CWA") for navigable waters on most "reservations." We urge EPA to withdraw the Proposed Rule and to apply State-promulgated water quality standards over the waters covered by this rule, as Congress intended.

BACKGROUND

In 1987, Congress amended the Clean Water Act to allow Tribes to be treated like States for some provisions of the CWA upon meeting certain requirements.[1] Tribes with treatment-as-States ("TAS") status have authority to establish WQS, administer permits,

[1] The EPA Administrator may treat a Tribe as a State "only if" the following conditions are met: "(1) the Indian [T]ribe has a governing body carrying out substantial governmental duties and powers; (2) the functions to be exercised by the Indian [T]ribe pertain to the management and protection of water resources which are held by an Indian [T]ribe, held by the United States in trust for Indians, held by a member of an Indian tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of an Indian reservation; and (3) the Indian [T]ribe is reasonably expected to be capable, in the Administrator's judgment, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of this chapter and of all applicable regulations." 33 U.S.C. § 1377(e).

and manage nonpoint source pollutants.[2] Tribes that have not attained TAS status have no such authority. EPA's role in the world of WQS is twofold: (1) to serve as a "backstop,"[3] stepping in only when a State or TAS Tribe is failing to meet the requirements of the Clean Water Act;[4] and (2) to "support"[5] States and TAS Tribes by providing technical services like § 304(a) national recommended water quality criteria for use by States and TAS Tribes when setting WQS.[6]

The Proposed Rule would establish the following federal water quality standards for all navigable waters in non-TAS Tribal reservations,[7] nationwide:

- "Designated uses consistent with the CWA protection and restoration goals for aquatic life and users of surface water" including "a designated use that protects cultural and traditional uses";
- "water quality criteria to protect those uses" in narrative form, to be translated later by EPA using one of five binding "options";

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2 33 U.S.C. §§ 1313, -1315, -1318, -1319.

3 *Nw. Env't Advocs. v. EPA*, 2021 WL 2206497, at *2 (W.D. Wash. 2021); *Gulf Restoration Network v. McCarthy*, 783 F.3d 227, 230 (5th Cir. 2015) (EPA has "secondary" role).

4 *See* CWA § 303(c)(4)(B); 33 U.S.C. § 1313(c)(4)(B).

5 CWA § 101(b); 33 U.S.C. § 1251(b) ("It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.").

6 CWA § 304(a); 33 U.S.C. § 1314(a); *see City of Albuquerque v. Browner*, 97 F.3d 415, 425 (10th Cir. 1996) ("Congress clearly intended the EPA to have a limited, non-rulemaking role in the establishment of water quality standards by states and tribes[.]").

7 EPA notes exceptions in "a few instances" in Footnote 4 of the Proposed Rule, including specified Tribes in Maine, potentially some Tribes in Oklahoma, and one Tribe in Washington. 88 Fed. Reg. at 29498. EPA also indicates that Tribes may request to be excluded from the Proposed Rule if they act within a very short time frame following finalization of the rule (90 days). 88 FR at 29502.

- "an antidegradation policy with associated implementation procedures," including requirements for the development of total maximum daily loads ("TMDLs") and requirements for recognizing impaired waters and revising this status; and
- "general WQS polic[i]es such as a mixing zone policy and compliance schedule authorizing provision."[8]

The Proposed Rule's water quality criteria are in narrative form. EPA would not translate this narrative criteria into numeric criteria until implementation, when it would, on a site-specific basis, select from 5 translation "options" to use to promulgate numeric criteria. The resulting numeric criteria would inform NDPES permits, EPA-issued § 401 certifications, and § 404(c) vetoes over upstream projects.[9]

The Proposed Rule rests on an assertion of authority under CWA § 303(c)(4)(B),[10] which requires EPA to first make a determination that a new or revised standard is necessary to meet the requirements of the CWA (a "necessity determination"[11]).

EPA's necessity determination is factual. In the Proposed Rule, EPA discusses a gap in CWA protections, explaining that "[w]hile more than 300 Tribes within Indian reservations are eligible to apply for TAS, only 84 Tribes have applied and been approved to administer a WQS program"[12] and that "[t]he lack of CWA-effective WQS for most Indian reservations means that those waters do not have the human health and environmental objectives in place that form the basis for CWA protections."[13] EPA estimates, accordingly, that roughly "76,000 miles of rivers and streams" and "1.9 million acres of lakes, reservoirs, and other open surface waters" are presently unprotected by the CWA.[14] EPA notes the unprecedented speed at which Tribes are currently attaining TAS status (27, or approximately 33% of TAS Tribes, attained TAS status in the last 6 years), and the fact that "Tribal interest in obtaining TAS and adopting their own WQS has increased in recent years."[15] Yet, then EPA states that "acquiring TAS authorities and adopting WQS is a time and resource-intensive process," and that "[a]t the current pace, it could take more than a decade for CWA-effective WQS to be put in place for all Indian

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8 88 Fed. Reg. at 29499.

9 *Id.* at 29506–29508, 29522–29523.

10 *Id.* at 29500.

11 EPA has rebranded this an "Administrator's Determination" in the Proposed Rule.

12 88 Fed. Reg. at 29499.

13 *Id.*

14 *Id.*

15 *Id.*

reservations"[16] which is why, EPA concludes, the Proposed Rule is necessary. In other words, EPA believes that: (1) there is a gap in CWA protections over waters on reservations of non-TAS Tribes; (2) this gap exists because Tribes are not attaining TAS Status fast enough; and (3) it is EPA's prerogative to promulgate comprehensive, nationwide water quality criteria to fill this gap.

DISCUSSION

EPA is charged with protecting human health and the environment under the authority conferred and circumscribed by Congress. In the WQS context, Congress has required EPA to play a supportive role to States as they protect the health of their environment while juggling multiple other policy considerations, like protecting the health of their economy and providing for the overall well-being of their people. In its 1987 amendments, Congress carved out a similar role for EPA vis-a-vis Tribes who have met Congress's TAS requirements. The Proposed Rule upsets this considered division of responsibility. For reasons detailed below, EPA lacks authority to promulgate this rule and it is arbitrary and capricious.

1. EPA lacks authority to promulgate this rule.

The Proposed Rule relies on the authority conferred by CWA § 303(c)(4). This provision requires that the EPA Administrator "promptly prepare and publish proposed regulations setting forth a revised or new water quality standard for the navigable waters involved" in two situations:

> (A) if a revised or new water quality standard submitted by such State under paragraph (3) of this subsection for such waters is determined by the Administrator not to be consistent with the applicable requirements of this chapter; or
> (B) in any case where the Administrator determines that a revised or new standard is necessary to meet the requirements of this chapter.

16 *Id.*

The Proposed Rule invokes only subsection (B).[17] To lawfully invoke this power, EPA must make a "necessity determination."[18] Assuming a valid necessity determination, EPA is "subject to the same policies, procedures, analyses, and public participation requirements established for States in these regulations" when promulgating WQS.[19]

As detailed below, the Proposed Rule: (a) disregards Congress's intent that State WQS apply in Tribal navigable waters until Tribes attain TAS status and promulgate Tribe-specific WQS; (b) exceeds Congress's limited grant of power to EPA under § 303(c)(4)(B); and (c) rests on a demonstrably false necessity determination.

a. EPA disregards Congress's intent that State WQS apply in Tribal navigable waters until Tribes attain TAS status and promulgate Tribe-specific WQS.

States have spent more than 50 years establishing science-based water quality standards that recognize each State's unique topography, hydrogeology, geology, climate, and the resulting rivers, streams, and lakes that make up the State's surface waters. Not only is relying on State WQS to protect reservation waters sensible, adherent to cooperative federalism precepts, and consistent with EPA past policy—it is required by the CWA. Congress has plenary authority over Indian affairs,[20] which includes Tribal navigable waters regulatable under the CWA. Determining which WQS Congress intended to apply to non-TAS reservation waters is a straightforward matter of statutory construction.

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[17] EPA points to a previous EPA's Administrator's necessity determination. 88 Fed. Reg. at 28955. Since this determination never made it past the draft stage before being withdrawn, EPA is for all practical purposes simply re-adopting this previous statement as its own. EPA cannot evade accountability by pointing to something that was never finalized.

[18] *Gulf Restoration Network*, 783 F.3d at 230.

[19] *Id.* at 231.

[20] *Haaland v. Brackeen*, 143 S. Ct. 1609, 1629 (June 15, 2023) ("Congress's power to legislate with respect to Indians is well established and broad.").

The CWA's comprehensive nationwide environmental regulatory structure does not omit Tribal waters from the scope of State-promulgated WQS protections.[21] Under the CWA, States have the primary right, responsibility, and authority to plan for the development and use of water resources and to create, review, and revise WQS for "all intrastate waters."[22] The CWA requirement that States promulgate WQS for all intrastate waters, by its plain language, is necessarily inclusive of all Tribal reservation waters within State boundaries.[23]

Supreme Court precedent supports this reading. In *Federal Power Commission v. Tuscarora Indian Nation*, the Supreme Court recognized that "a general statute in terms applying to all persons includes Indians and their property interests."[24] The analogous context of the Safe Drinking Water Act, which establishes "national policy with respect to clean water," was broadly held to apply to Tribal lands consistent with *Tuscarora* rule, prior to Congress's amendment explicitly stating so.[25] EPA's own WQS regulations and

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21 *PUD No. 1 of Jefferson Cnty. v. Wash. Dep't of Ecology*, 511 U.S. 700, 700 (1994); 33 U.S.C. §§ 1251, 1313; *see also* 57 Fed. Reg. 60848, 60849 (Dec. 22, 1992) (EPA acknowledgment that CWA is designed to ensure that "all waters" are sufficiently clean); *id.* at 60851 (EPA's initial efforts under the 1972 CWA aimed to expand coverage to "all interstate and intrastate surface waters").

22 33 U.S.C. §§ 1251(b), 1313(a)–(c); Following enactment of PL 92-500 in 1972, the CWA required states to promulgate WQS for all intrastate waters of the United States by specific benchmarked deadlines in the early 1970s. 33 U.S.C. § 1313(a)–(b). *See also PUD No. 1*, 511 U.S. at 704 (stating that the CWA is a "comprehensive water quality statute" that establishes "distinct roles for the Federal and State Governments" and "requires each State, subject to federal approval, to institute comprehensive water quality standards establishing water quality goals for all intrastate waters"); *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 557 U.S. 261, 299 n.2 (2009).

23 *See Thomas v. Jackson*, 581 F.3d 658, 661 (8th Cir. 2009) (CWA requires each state to establish WQS for waterbodies "within the state's boundaries"); *National Wildlife Federation v. Browner*, 127 F.3d 1126, 1127 (D.C. Cir. 1997) (CWA requires state WQS for "every" body of water within a state); *Friends of Merrymeeting Bay v. Olsen*, 839 F.Supp.2d 366, 370 (D. Me. 2012) (CWA requires states to establish WQS for "all" of their waterbodies); *see also* 33 U.S.C. 1370 (nothing in the CWA "shall . . . be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.").

24 362 U.S. 99, 116 (1960).

25 *Phillips Petroleum Co. v. EPA*, 803 F.2d 545, 555–57 (10th Cir. 1986).

historical guidance on WQS, too, emphasize the role of States in comprehensively promulgating WQS for all intrastate waters.[26]

Examining the timing of CWA amendments confirms this understanding. The CWA required States to comprehensively promulgate WQS for intrastate waters by specific benchmarked deadlines in the early 1970s. The CWA's Tribal TAS provisions were added later, in 1987, and only thereafter permitted eligible Tribes, if approved for TAS by EPA, to be treated as if they were States for WQS purposes on a prospective basis.[27] Congress's intent was plainly for State WQS to protect all navigable waters unless and until Tribes attain TAS status and promulgate Tribe-specific WQS. Congress did not mistakenly legislate a "gap" in coverage into the CWA, consisting of non-TAS waters.

EPA's § 303(c)(4)(B) power is narrow and limited, and cannot support such a broad and sweeping rule. Invocation of this power requires a valid necessity determination, which EPA has not made. Congress's intent is that State WQS apply until TAS Tribes promulgate Tribe-specific WQS, which EPA is not free to disregard.

b. The Proposed Rule exceeds EPA's power under § 303(c)(4)(B).

In 1989, EPA undertook a rulemaking to establish the criteria and procedures by which a Tribe can qualify for TAS status. Speaking about federal promulgation of water quality standards, EPA stated in this rulemaking that:

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[26] *See* 40 C.F.R. §§ 131.1, 131.2, 13 l.3(j), 131.4, 131.8, 131.10; *see* Questions and Answers on Water Quality Standards Under PL 92-500, U.S. EPA, Office of Water (1972), *available at* https://tinyurl.com/39dbv5w2, question no. 4 (WQS apply to all interstate and intrastate waters), no. 6 (states must establish WQS for all intrastate waters); no. 8 (states set WQS and EPA may promulgate WQS only when states fail to timely adopt WQS consistent with CWA), no. 9 (WQS are approved for all states), and Chronological Timetable of Events and Requirements (outlining deadlines in 1972–1973 for the promulgation of all intrastate WQS)); *see* Questions & Answers on: Water Quality Standards, U.S. EPA, Office of Water (1983), *available at* https://tinyurl.com/476j6av8, question no. 2 (WQS are established by states), no. 9 (WQS apply to waters of the United States), no. 22 (all states have WQS)); Introduction To Water Quality Standards, U.S. EPA, Office of Water (1988), *available at* https://tinyurl.com/4yyknxn5, Section I, question no. 7 (WQS should be adopted for each waterbody within a State's boundaries), no. 8 (states adopt WQS), no. 10 (WQS apply to all waters of the United States).

[27] 33 U.S.C. § 1377(e); 40 C.F.R. §§ 131.4, 131.7, 131.8.

> EPA emphasizes that [f]ederal promulgation is not consistent with the intent of CWA sections 303(c) and 518(e) to provide States, and Tribes qualifying for treatment as States, with the first opportunity to set standards.[28]

The relevant statutes have not been materially revised since EPA made this statement. In 2014, this time to a federal judge, EPA stated that its §303(c)(4)(B) power "is . . . used only when the State has made every other effort" to comply with CWA requirements and the State "will not, or cannot, act":

> Unlike the authorities in CWA section 303(a) and (b) and (c)(1)-(3), which form the basic framework of the WQS program under the CWA, the section 303(c)(4)(B) necessity determination is an extraordinary authority that is judiciously and rarely used when the State has made every other effort to comply with the CWA under the preferred procedures of CWA section 303(c)(3), and EPA believes that the State either will not, or cannot, act.[29]

EPA explained to the court that such an approach "is consistent with the cooperative federalism embodied in the Act, and as reflected in the legislative history."[30] That is why, EPA told the court, "[t]he section 303(c)(4)(B) authority . . . is used only in unusual circumstances."[31]

Far from demonstrating that non-TAS Tribes "will not, or cannot, act," EPA acknowledges that Tribes are actively applying for TAS status and that *twenty-seven* Tribes have been approved in the last *six years*.[32] The fact that 33% of all TAS Tribes have been approved in the last six years demonstrates that Tribes "can," and "will" attain TAS status and promulgate Tribe-specific WQS. There is no indication that all non-TAS Tribes are unwilling or unable to act. As such, any rule covering all aspects of WQS,

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[28] EPA, *Amendments to the Water Quality Standards Regulations That Pertain to Standards on Indian Reservations*, 54 Fed. Reg. 39098-01, 39103 (September 22, 1989).

[29] *United States' Cross-Motion for Summary Judgment: Combined Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment and in Support of Cross-Motion for Summary Judgment*, *Puget Soundkeeper Alliance v. EPA*, No. 2:13-cv-01839-JCC, at 5 (W.D. Wash. Mar. 24, 2014) (emphasis added).

[30] *Id.* at 5 (quoting H.R. Rep. No. 92-911, at 105, reprinted in 1A *Federal Water Pollution Control Act Amendments of 1972* at 792 (Comm. Print 1973)).

[31] *Id.* at 9.

[32] 88 Fed. Reg. at 29499 (stating that "Tribal interest in obtaining TAS and adopting their own WQS has increased in recent years" and this interest has resulted in 27 Tribes attaining TAS status in the last six years).

applicable to all non-TAS reservations, nationwide, cannot rationally be described as "judicious" or a "tool of last resort."

Section 303(c)(4)(B)'s limited applicability is plain from the text. The grant of power applies to "any *case*" and extends only to the promulgation of "*a* revised or new water quality *standard*." "Case," "a," and "standard" are all singular. Seemingly recognizing this, EPA previously stated that "[a] necessity determination would have to identify *a particular standard* that requires revision to meet the requirements of the Act."[33] The power to promulgate a particular standard in one case at a time does not encompass the power to promulgate every type of WQS in innumerable cases, nationwide, over an EPA-estimated 76,000 miles of rivers and streams and 1.9 million acres of lakes, reservoirs, and other open surface waters.[34]

c. EPA's "necessity determination" rests on a false premise.

EPA cannot lawfully invoke its § 303(c)(4)(B) power until it makes a valid "necessity determination." In the Proposed Rule, EPA estimates that 76,000 miles of rivers and streams and 1.9 million acres of lakes, reservoirs, and other open surface waters (EPA's estimation of non-TAS reservation waters) constitute a gap of waters presently unprotected by the CWA.[35] This is false. EPA (again) contradicts itself: in the Proposed Rule, EPA explains that "EPA is typically the NPDES permitting authority in Indian country" and "[i]n the absence" of WQS established by TAS Tribes, "EPA permit writers have utilized various tools to write *protective* NPDES permits, *such as relying on downstream state WQS* to inform relevant permit limits."[36] In other words, EPA is the entity charged with implementing NPDES for non-TAS reservation waters, and EPA acknowledges that its NPDES permits do not leave these waters unprotected.[37] Rather, these permits incorporate State WQS—or, "at a minimum," EPA's 304(a) national

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33 *United States' Cross-Motion for Summary Judgment: Combined Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment and in Support of Cross-Motion for Summary Judgment*, *Puget Soundkeeper Alliance v. EPA*, No. 2:13-cv-01839-JCC, at 8 (W.D. Wash. Mar. 24, 2014) (emphasis added).

34 *See* 88 Fed. Reg. at 29499.

35 *Id.* ("50 years after enactment of the CWA, the majority of Indian reservations do not have this foundational protection laid out by Congress in the CWA for their waters.").

36 *Id*.

37 If EPA's NDPES permits *are* leaving Tribal waters unprotected, EPA should review its own permitting policies, or address those State WQS considered to be "unprotective" of tribal waters on a case-by-case basis. Developing a national rule is an incongruous solution.

numeric recommendations.[38] While, as described in Section 1(a) of this Letter, the former is lawful and the latter is not, both work to protect non-TAS reservation waters.

But-for the Proposed Rule, in other words, reservation waters will remain protected under the CWA—by EPA's application of State WQS or EPA's 304(a) national recommended criteria in NPDES permits and § 401 certifications.[39]

2. The Proposed Rule is arbitrary and capricious.

The Administrative Procedure Act requires EPA "to engage in reasoned decisionmaking, and directs that agency actions be set aside if they are arbitrary or capricious."[40] Courts will evaluate whether the Proposed Rule "was based on a consideration of the relevant factors and whether there has been a clear error of judgment."[41] Among other things, EPA must show that it "examined the relevant data and articulated a satisfactory explanation for [its] decision, including a rational connection between the facts found and the choice made."[42] "Unsubstantiated or bare assumptions" are not enough.[43]

The Proposed Rule would not survive arbitrary-and-capricious review.

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38 EPA Region 9, *EPA's Water Quality Certifications on Tribal Lands of the Pacific Southwest* at 2 (Nov. 2016), available at https://www.epa.gov/sites/default/files/2016-11/documents/wqc_fact_sheet_november_2016_0.pdf. EPA elaborates that "[t]his national framework protects different water uses with different criteria for specific substances."

39 EPA has expressly stated that State WQS may inform § 401 certifications. EPA Region 9, *EPA's Water Quality Certifications on Tribal Lands of the Pacific Southwest* at 2 (Nov. 2016), available at https://www.epa.gov/sites/default/files/2016-11/documents/wqc_fact_sheet_november_2016_0.pdf.

40 *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1905 (2020) (cleaned up).

41 *Id.* (cleaned up).

42 *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2569 (2019) (cleaned up).

43 *Nat. Res. Def. Council v. EPA*, 31 F.4th 1203, 1207 (9th Cir. 2022) (cleaned up).

a. The Proposed Rule unlawfully vests policy-decisionmaking power in EPA.

EPA's Proposed Rule covers all three major WQS components: (i) designated uses, (ii) water quality criteria, and (iii) antidegradation requirements.[44] EPA has made several clear errors of judgment in each.

i. Designated Uses

Designated uses "establish, and communicate to the public, the environmental management objectives and water quality goals for a state or authorized Tribe's waters."[45] EPA proposes to establish three designated uses for all non-TAS reservation waters: (1) cultural and traditional uses; (2) aquatic life; and (3) primary contact recreation.[46] Under the Proposed Rule, these three uses would apply to all covered waters until EPA revises a specific water's designation.[47] The Proposed Rule does not require consideration of whether these uses are attainable.

(1) *Cultural and Traditional Use*

The Proposed Rule creates a new classification entitled *cultural and traditional use*. Neither this classification, nor permission to create this classification, appears anywhere in the CWA.[48] EPA's implementing regulations contain no such classification. In the Proposed Rule, EPA offers only a circular definition of this new classification, providing, in full:

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44 The Proposed Rule goes even further and advances additional general WQS policies including a mixing zone policy, which this Letter does not get into.

45 88 Fed. Reg. at 29502–03.

46 *Id.* at 29522.

47 *Id.* at 29526.

48 EPA ties this new use to a provision of the CWA with the thinnest of threads, stating only that "[c]ultural and traditional uses serve to protect the health and welfare of Tribal members exercising such uses and are thus within the purposes enumerated in the Act." 88 Fed. Reg. at 29503. The States respect the freedom of all individuals to engage in religious and spiritual practices, including those involving water. The States do not, however, believe that Congress intended EPA to police the religious, spiritual, or cultural uses of water. EPA's job is more secular, and more limited to helping States and TAS Tribes reduce pollution in their navigable waters to improve physical health.

> *Cultural and traditional uses.* Protection of cultural and traditional uses of reservation waters.[49]

EPA further states that such uses "can include a variety of uses specific to the ceremonies and traditions of each Tribe, and each use may require different levels of protection."[50] Apparently envisioning this designation to function as some sort of catch-all, EPA lastly states that "Tribal treaty or other reserved rights to fish, hunt, and/or gather on Indian reservations could generally be protected by such cultural and traditional designated uses, to the extent they are not protected by an aquatic life use or primary contact recreation use."[51] Other than hinting at the potentially vast coverage of this designation, the Proposed Rule provides little clue as to how EPA will apply this standard during implementation, including what data EPA will rely on (heritage or historic data, for example). And the Proposed Rule departs from EPA's own regulations, which predicate new use designations on a reviewable use-attainability analysis.[52]

Whatever uses this new category might encompass, Congress has chosen to protect them under another Act—the National Historic Preservation Act,[53] which establishes a comprehensive cultural and historic resource protection and preservation program at the national level. Nowhere in that Act or in the CWA is there a hint of congressional intent that EPA should play a role in the identification and protection of cultural and traditional resources through a mechanism such as this.

With only a circular definition, and absolutely no standards or guidelines, EPA writes itself a blank check to require extremely (perhaps impossibly) stringent WQS for all waters covered by the Proposed Rule. Once a designation is made, a Tribe may only "request" that EPA revise the designation—actual power to revise the designation, once established, would reside exclusively with EPA.[54] EPA provides no rational justification for this new designation use, points to no authority for its creation, and offers no good reason why EPA should be the one making such important policy decisions. Congress has

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49 88 Fed. Reg. at 29503.

50 *Id*.

51 *Id*.

52 40 C.F.R. § 131.10(g), (j).

53 54 U.S.C. §§ 300101 *et seq*.

54 88 Fed. Reg. at 29526 ("The Regional Administrator may upon request of a Tribe for its reservation waters, or based on the Regional Administrator's identification, revise one or more designated uses in paragraph (c) of this section and associated criteria, add additional designated uses and associated criteria where such revisions will more appropriately reflect the Tribe-specific use and value of waters covered by paragraph (a) of this section, or establish water quality standards variances . . . .").

already determined that these policy decisions lie with the States and the TAS Tribes except in very rare circumstances.

(2) *Aquatic Life Use*

EPA's selection of the aquatic life classification, while a recognizable classification, is similarly inappropriate. By EPA's description, this classification would protect all covered waters for human consumers of fish, shellfish, and other aquatic life. In other words, EPA would give itself the power to establish human health criteria for all non-TAS Tribes with reservations covered by the Proposed Rule. By giving itself the option to impose a high fish consumption rate (an important component of the human health criteria formula), EPA lays another foundation for imposing extremely stringent WQS. While the States agree that waters that are used by consumers of fish, shellfish, and other aquatic life should be protected, EPA has provided no indication that every water covered by the Proposed Rule contains fish and other consumable aquatic life. Moreover, Congress intended that this type of protection first be set by States, and then by Tribes with TAS status. Not by EPA.

(3) *Primary Contact Use*

The primary contact use designation "protects people from illness due to activities involving the potential for ingestion of, or immersion in, water" and usually is reserved for bodies of water that people use to "swim, water-ski[], skin-div[e], surf[], or other activities likely to result in immersion."[55] This designation can be contrasted to a secondary contact recreation classification, which is protective when immersion is unlikely (e.g., when a water is used for boating, wading, and rowing.)[56] In its *Water Quality Standards Handbook*, EPA offers States and TAS Tribes four options to choose among when deciding whether and which waters to protect for use as recreation, and which level (primary, secondary, or subcategories of either) to protect under.[57] These options provide States and TAS Tribes the flexibility to protect waters consistent with their unique circumstances, values, and other policy goals. While being swimmable is a long-term policy goal we can all get behind, it may not be necessary in every circumstance. Flexibility for policymakers is key.

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55 EPA *Water Quality Standards Handbook*, EPA-823-B-17-001. EPA Office of Water, at 2.3.1 (2017), *available at* https://www.epa.gov/wqs-tech/water-quality-standards-handbook (hereinafter "*EPA WQS Handbook*").

56 *Id.*

57 *Id*.

Designated use classifications reflect the type of decisionmaking that Congress intended to be exercised by States and Tribes with TAS status—not EPA.[58] EPA provides little to no explanation for applying all three designations to all covered waters, and further giving itself the ability to create numeric criteria applicable to each designation, is arbitrary and capricious and beyond EPA's authority.

ii. Water Quality Criteria

EPA's Proposed Rule makes water quality criteria decisions for non-TAS Tribes. EPA's decisions to (a) promulgate narrative,[59] as opposed to numeric, criteria in this rulemaking; and (b) give itself 5 "options" for translating this narrative criteria into numeric criteria when implementing this rule, function together to allow EPA unchecked discretion to promulgate extremely stringent standards.

EPA's proposed narrative criteria include requirements that discharges be free from pollutants at levels preventing attainment of designated uses; free from substances forming "objectionable" deposits, color, odor, etc., or matter that floats to form a "nuisance"; free from conditions likely to jeopardize threatened or endangered species; and discharged at levels that do not violate applicable downstream WQS.[60] EPA lays out 5 "options" that EPA may select from when translating narrative into numeric criteria. The process of translation would be completed by EPA outside of this rulemaking.

Option 1 allows EPA to use the national recommended water quality criteria published under section 304(a), which are already in numeric form. Option 2 starts with the national recommended criteria, with an important addition: EPA may "modif[y]" these criteria "to reflect site-specific conditions and aquatic communities." Buried in the list of conditions EPA may take into account under Option 2 are: "[a] fish consumption rate protective of Tribal fish consumers"; and "[o]ther scientifically defensible

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58 To the extent EPA seeks to rely on a "general Trust responsibility," it cannot: the Supreme Court has explicitly stated that "the Federal Government must expressly accept trust responsibilities in a treaty, statute, or regulation that contains rights-creating or duty-imposing language." *Arizona v. Navajo Nation*, 143 S. Ct. 1804, 1815 (June 22, 2023) (internal quotations omitted). EPA makes no effort to identify specific language imposing a trust responsibility related to WQS for each non-TAS Tribes whose lands are covered by the Proposed Rule.

59 "Narrative criteria are qualitative descriptions of the conditions necessary to protect a water body's designated use, while numeric criteria—expressed as levels, concentrations, toxicity units or other values—are quantitative descriptions of those conditions." 88 Fed. Reg. at 29504.

60 *Id.* at 29506.

assessments, for example . . . those related to Endangered Species Act consultation."[61] Option 3 allows EPA to adopt WQS submitted by TAS Tribes that are already pending approval, or to adopt State WQS. Option 4 is limited to the Great Lakes System, and Option 5 is a catch-all, stating in full: "EPA may rely on existing CWA implementation provisions to translate applicable narrative criteria, as necessary."

Two legal flaws with this approach are immediately apparent. First, none of these options require the application of State-promulgated water quality criteria. They are therefore not lawful under the CWA.[62] Second, EPA disregards its own regulation allowing use of narrative standards in only two instances: (1) to supplement numeric criteria; or (2) in situations where numeric criteria cannot be determined.[63] EPA offers no explanation for this deviation.

The remaining flaws are also immediately apparent. Option 1 appears to be already used by EPA in the NPDES permitting process, and doesn't explain the need to expend agency time and resources into promulgating this rule. Option 1 is perhaps a red herring.

Option 2 raises a red flag, and is likely EPA's preferred option. Indeed, EPA shows its hand in the environmental justice section of the Proposed Rule, where it explains that this rule "is likely to reduce existing disproportionate and adverse effects on Indigenous people" specifically because it gives EPA the "flexibilit[y] allowing for the consideration of Tribe-specific fish consumption rates when translating narrative criteria into numeric values" which EPA may avail itself of "to address disproportionate and adverse effects to Indigenous people."[64] Option 2, in conjunction with EPA's newly created ability to designate waters for consumption of aquatic life, is how EPA gets there. Nothing in the Proposed Rule would prevent EPA from applying Option 2 in most, or every, instance. In practice, this means that EPA may select a high fish consumption rate to generate stringent numeric criteria, which are then applied to all water covered by the Proposed Rule. Further, subsistence use is a condition that States do, or can, account for

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61 *Id.* at 29506.

62 *See* Section 1(a) of this Letter.

63 40 C.F.R. part 131.11(b)(2) (emphasis added).

64 88 Fed. Reg. at 29521.

in their HHC (as EPA suggested the State of Alaska do[65]), and is something that Tribes may consider once they have attained TAS status. Additionally, Option 2 appears to vest in EPA some type of discretionary power to implement the Endangered Species Act. This power, of course, was never granted to EPA. The State of Alaska can attest to the use and abuse of the Endangered Species Act to stop projects, and is not eager to experience more at the hands of EPA.

Options 3, 4, and 5 are no better. Option 3 simply allows EPA to short-circuit the TAS WQS approval process, and should be disallowed on that basis. Option 4, which is region-specific, is inappropriate in a nationwide rule. The catch-all provision of Option 5 has hardly any accompanying explanation, and should not exist.

iii. Anti-Degradation Requirements

State-established WQS must include an antidegradation policy, which is "a policy requiring that state standards be sufficient to maintain existing beneficial uses of navigable waters, preventing their further degradation."[66] Existing uses must be maintained unless the State or a TAS Tribe makes a finding that allowing for lower water quality is "necessary to accommodate important economic or social development in the area in which the waters are located[.]"[67] In its *Water Quality Standards Handbook*, EPA notes that "[a]ntidegradation . . . is a policy that allows public decisions to be made on important environmental actions." Waters can be protected at levels of Tier 1 (existing uses), Tier 2 (high-quality waters), and Tier 3 (Outstanding Natural Resource Waters ("ONRWs")). Tier 3 designations, in particular, can be exceedingly controversial. EPA's *Water Quality Standards Handbook* recognizes some States' concern that "the Tier 3 ONRW provision [i]s so stringent that its application would likely prevent States from taking actions in the future that were consistent with important social and economic development on, or upstream of, ONRWs" and that "[t]his concern is a major reason that

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65 *See* Michael Szerlog, Acting Dir. Ltr. from EPA to DEC Re: EPA Response to Alaska Human Health Criteria Development Letter at 3 (July 3, 2023) (stating that "adopting statewide HHC that are protective of subsistence fishing would be a reasonable approach[]"); *id.* at 8 ("EPA recommends that DEC select the inputs to derive revised HHC for Alaska, particularly the FCR and cancer risk level inputs, with protection of subsistence consumers as the focus. More specifically, this would mean selecting an FCR that represents a value at the high end (e.g., 90th percentile) of the state's subsistence population, rather than a mean or median, paired with a cancer risk level of 10-5 or 10-6.").

66 *PUD No. 1 of Jefferson County*, 511 U.S. at 705.

67 40 C.F.R. part 131.12(a)(2).

relatively few water bodies are designated as ONRWs."[68] The process of designating Tier 3 waters is laden with value- and policy judgments.[69]

Regarding Tier 2 designations, EPA's Proposed Rule appears to allow EPA, without Tribal input, to make an initial designation of a covered water as Tier 2.[70] A Tribe may not lower the protection of a Tier 2 water unless (1) the Tribe provides written consent, (2) the EPA Regional Administrator agrees, *and* (3) the EPA Regional Administrator memorializes his agreement in a "finding" indicating that "such a lowering is necessary to accommodate important economic or social development in the area in which the waters are located."[71] Such a finding can "only" be made if the Regional Administrator determines that it is supported by socio-economic and alternatives analyses.[72] But why does EPA—a federal agency with one narrow mission—get to decide what types of "economic or social development" are "important" for the community this affects? EPA's mission, and expertise, is limited to environmental protection. EPA has no expertise on economic or social development, and has no place making decisions like this, which Congress reserved for States and TAS Tribes.

Regarding Tier 3 designations, the Proposed Rule allows "any person or entity," including non-Tribal members and EPA, to nominate bodies of water on reservations for Tier 3 status using a new basis of "cultural significance."[73] Under the Proposed Rule, agreement from both the Tribe and EPA are required to designate a water as Tier 3. Once made, a Tier 3 designation can only be undone if the Tribe agrees in writing *and* the EPA

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68 *EPA WQS Handbook* at § 4.2.

69 In the past several Alaska legislative sessions, for example, bills have been introduced in the Alaska State Legislature that would vest exclusive authority to make Tier 3 designations in the Legislature.

70 88 Fed. Reg. at 29523 ("In determining which waters will receive high quality water protection consistent with paragraph (e)(2) of this section [laying out general policy of Tier II protection], the Regional Administrator will identify high quality water on a parameter-by-parameter basis.").

71 *Id.*

72 *Id.* at 29524 ("The Regional Administrator shall make a finding that a lowering of high water quality is necessary to accommodate important social and economic development in the area in which the water is located only if the information in paragraph (f)(3)(i) of this section supports such a conclusion and the Tribe has provided written agreement."); *see also id.* ("If compliance with the highest statutory and regulatory requirements for all new and existing point sources and all Tribal-regulated cost-effective and reasonable best management practices for non-point sources cannot be assured, the Regional Administrator will not allow a lowering of high water quality.")

73 *Id.* at 29524–29525.

Administrator makes a specific finding similar to that required for Tier 2. This suffers from the same fundamental flaw as the Tier 2 process: EPA asserts policymaking power that it does not have. As a practical matter, this means that EPA can singlehandedly prevent a water from being de-designated by declining to make the requisite finding. If a Tribe is ever inclined to develop its land on or upstream of a Tier 3 body of water, the Tribe's economic future will be at the mercy of EPA.

Perhaps most irrationally, EPA fails to explain why under a "baseline" rule, EPA is protecting anything beyond Tier 1 existing uses. Providing designation and revision processes for Tiers 2 and 3 is entirely inconsistent with a rulemaking aimed at creating only a baseline layer of protection.

In a scheme where Congress left primary responsibility for land- and resource-use decisions to States and TAS Tribes—those juggling multiple policy considerations including but not limited to water protection—EPA has no place deciding what types of economic or social development are "important" enough to justify a lowering of WQS.

The Proposed Rule additionally gives EPA control over impaired designations on covered waters and TMDL establishment under CWA § 303(d). A TMDL calculates the amount of a pollutant that a water body can assimilate in one day from all sources of pollution within the watershed, point and non-point, and still meet water quality standards. The TMDL then allocates to total limit of pollutants allowable from point and non-point source discharges, respectively. After a TMDL has been developed, effluent limitations in NPDES permits must be consistent with the assumptions and requirements underlying the allocated limits. To comply with the more stringent effluent limitations that often result from this process, point source dischargers frequently must implement more stringent controls, which can impose significant additional costs and disincentive to develop. EPA asserts, without citation, that it has the power to establish impaired water lists and TMDLs for non-TAS Tribes. Neither § 303(d) nor 40 CFR 130.7 confer authority to EPA for assessment and identification of impaired waters. This is a decision with significant economic effects that, again, is not EPA's to make.

b. The Proposed Rule is fiscally irresponsible.

Alarmingly, EPA has based its entire economic analysis on the use of Option 1, not Option 2. Because the cost to upstream permittees skyrockets under Option 2 as compared to Option 1, basing costs only on Option 1 is inaccurate and misleading.

As a practical matter, translating narrative criteria into numeric criteria applicable to specific Tribal navigable waters will require a far greater capacity in terms of staff, time, and data collection than EPA has. Unlike States, Tribes may not have water quality experts on staff to assist EPA. EPA admits as much in the Proposed Rule, recognizing that "there is a general lack of Federal funding to support operation and maintenance

(O&M) of . . . wastewater facilities" that stand to be affected by this rule.[74] EPA further estimates that "some Tribal communities"—potentially those in Alaska, who experience some of the worst wastewater and other critical infrastructure issues—"may need to contribute toward O&M needs, which are estimated to range from approximately $50,000 to $500,000 aggregate per year."[75] EPA suggests that perhaps Tribes can "impos[e] an additional burden on ratepayers" to cover this increase.[76] But the suggestion that Tribes should simply have "ratepayers"—i.e., Tribal members—absorb this added cost is absurd. How are Tribes supposed to create job opportunities for their members with an EPA set on thwarting development, and thus job creation, at every turn?

CONCLUSION

The undersigned States promulgate WQS with the goal of protecting the general well-being of our people, which includes the health of our environment and the health of our economy. TAS Tribes may make WQS decisions that are similarly informed by multiple values, policy preferences, and goals. States and TAS Tribes are directly accountable to their constituents; EPA is not. EPA is charged with one goal: protect human health and the environment. Congress's considered division of roles in the CWA reflect these fundamental differences. EPA is not free to rewrite these roles.

Congress did not give EPA the power asserted by the Proposed Rule.[77] Section 303(c)(4)(B) is a limited backstop power exercisable only when a State or TAS Tribe is failing to meet CWA requirements. This has not happened. Section 303(c)(4)(B) provides EPA limited power to promulgate "a particular standard." This has not been adhered to. The "gap" premise that EPA relies on is so demonstrably false that it hints at something more: one would be forgiven for suspecting that this rule might truly be aimed at giving

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74 *Id.* at 29522

75 *Id.*

76 *Id.*

77 The Proposed Rule, if finalized, will also violate the major question doctrine. *See W. Virginia v. E.P.A.*, 142 S. Ct. 2587, 2607–09 (2022) (major questions doctrine provides that for issues of major national significance, a regulatory agency must have clear statutory authorization from Congress to take certain actions and cannot rely on its general agency authority).

EPA a blank check to issue overly stringent NPDES permits,[78] deny § 401 certifications,[79] and buttress § 404(c) vetoes of non-Tribal projects.[80]

The undersigned States respectfully request that EPA withdraw this rule.

Sincerely,

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Lynn Fitch
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Alan Wilson
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78 EPA's intent to use this as a mechanism for greater EPA control over development is express: "In short, implementing CWA-effective WQS in Indian reservation waters would provide a strong basis for NPDES permit limits and other controls that is not presently available to protect such waters." 88 Fed. Reg. at 29521.

79 *Id.* at 29516 ("[I]f the proposed baseline WQS are finalized, the Administrator would be able to rely on the baseline WQS among other water quality requirements when deciding whether to grant or deny section 401 certifications, or to develop conditions.")

80 Indeed, EPA expressly threatens to use its 404(c) veto power whenever it believes that activities governed by a 404 permit "cause or contribute" to a violation of EPA's new standards and the Corps disagrees after EPA provides comments to the Corps. *Id.* at 29515.