

March 6th, 2023

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Via electronic mail and regulations.gov docket

Re: ACWA Comments in response to proposed [Water Quality Standards Regulatory Revisions to Protect Tribal Reserved Rights](#)

The Association of Clean Water Administrators (“ACWA”) is the independent, nonpartisan, national organization of state, interstate and territorial water programs (“states”) that, on a daily basis, implement the water quality programs of the Clean Water Act (“CWA”), including the development and implementation of Water Quality Standards (WQS). Under the tenets of cooperative federalism, states, authorized tribes, and EPA are co-regulators who jointly implement the CWA. States appreciate the opportunity to comment on the proposed Water Quality Standards Regulatory Revisions to Protect Tribal Reserved Rights (“the rule”). ACWA is providing higher-level perspectives. Not all states concur with all positions and recommendations in this letter; several have stronger concerns with a TRR amendment to the WQS Regulation, and ACWA urges EPA to closely consider comments of individual states that, especially for this proposed rule, may have concerns uniquely applicable to them.

Most states agree that the federal government’s obligation to protect Tribal Reserved Rights (“TRR”) should be explicit. All states are committed to establishing water quality criteria and WQS which protect the general and vulnerable populations living within their jurisdictions, including tribes. For this reason, states are fundamentally supportive of the intent and spirit of this rule.

Unfortunately, EPA did not work with EPA programs, states, and right-holders (“the parties”) to craft an implementable framework that could achieve the desired outcome. After careful review, too many states have significant concerns with the rule’s implementation framework and unanswered questions for ACWA to support it. Despite their support for the parties working together to protect TRR, some states recommend EPA does not finalize the TRR Rule.

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ACWA is not taking a position on whether EPA should withdraw the proposed rule, but urges EPA to work with the parties to craft implementable approaches that ensure EPA's obligations to tribes under federal law, ensure right holders' due protections under state and federal actions on WQS, and ensure states and authorized tribes can feasibly implement WQS programs given the timeline and resource constraints they face under applicable laws, regulations, and budget limitations. ACWA believes states should be expected to incorporate water quality protections for TRR only after EPA identifies relevant TRR and then appropriate water quality protections have been identified, negotiated, and agreed upon by states and right holders with assistance as needed from EPA and other federal agencies¹.

Whether EPA pursues implementation approaches in or outside the WQS Regulation, ACWA stands ready to support the parties in creating workable, effective paths forward. ACWA's concerns about the rule does not preclude states' support of the protection of tribal members and right holders to at least the same risk level as provided to the general population of a state, as outlined in proposed § 131.9(a)(2). All state water quality programs work to meet the mission of protecting the health of *any* people dependent on the aquatic resources within or downstream of their jurisdiction.

States have and will continue to work with tribes, right holders, and EPA to ensure current and new WQS do not interfere with TRR and ensure water quality is attained or maintained sufficient to support tribally-significant waters and water-dependent resources consistent with treaties and EPA's federal trust responsibilities. Regardless of ACWA's feedback in this letter or the outcome of EPA's rulemaking effort, states are keenly interested in working with tribes of any status, EPA, and relevant federal agencies charged with protecting TRR and overseeing the federal trust responsibility to tribes, to establish effective and efficient CWA processes that result in un-suppressed TRR.

1. Summarized Recommendations for an Implementable TRR/WQS Framework

See Section 3, "ACWA's Concerns with the Rule" for further discussion. Please note that not all states concur with each recommendation and their independent comments should be carefully considered.

- A. **Use this rule to recognize EPA's obligation to protect TRR in WQS only.** If EPA determines it must amend the WQS Regulation to protect TRR despite historically contending otherwise, in this approach the Regulation would only be revised to recognize that EPA must ensure TRR. EPA's recognition would drive the parties to promptly convene to determine and interpret TRR, consider implementation guidance

¹Among some states there is a great concern that in the proposed rule, (1) EPA has not identified where and to what extent tribal reserved rights apply. The preamble indicates all treaties apply, but in practice they cannot because some federal instruments including treaties, statutes, executive orders and others have been superseded by court rulings. (2) The proposed rule implies that for the states to develop, modify, or review their WQS and specifically address TRR, tribes will inform EPA and the state what their reserved rights are and where they apply. There is no recourse for the state if there is disagreement.

and establish long-term plans, collect necessary data, and make appropriate WQS revisions and submission consultations /approvals. This approach reflects the reality that regardless of the outcome of this rulemaking, the parties agree that they need to convene to address TRR and relevant WQS processes because neither EPA, nor tribes, nor states alone can ensure TRR. If this approach is not taken, see applicable recommendations B-D below.

- B. **Include an EPA-only duty to conduct the initial inquiry² and provide states with TRR information pursuant to existing federal law and guidance.** Consistent with federal guidance and current practice, EPA needs to assemble TRR data into a national database. States should not be compelled to complete unfunded mandates, and EPA should be enabled to act in its role as primary contact with tribes on CWA matters reflecting EPA's Nation-to-Nation relationship with tribes and the US Government's trust responsibility.
- C. **Phase in implementation.** A phase-in timeline in the WQS regulation and/or future guidance on TRR/WQS is essential to enable the parties to determine and negotiate TRR protections, followed by state actions on WQS, without added costs or delays from litigation.
- D. **Explicitly include EPA-tribe consultation upon draft WQS publication for comment.** Explicitly identify the comment period for a state's draft WQS as the legal trigger to begin tribal consultation to verify TRR protections. (States prefer consultation begin earlier than this stage if possible.) This is essential to preventing a larger WQS backlog, states from submitting inadequate WQS, and/or EPA having to promulgate WQS on states' behalf.

2. General Concurrence with the Rule

- A. Processes to ensure TRR should incorporate and result in clarity, transparency, and predictability.
- B. Tribes are among those populations that are exceptionally vulnerable to surface water pollution and/or water quality degradation. Proposed §131.9(a)(2) clarifies that right holders are the target population for deriving human health criteria ("HHC") (i.e., should be protected to the same risk level as a state's general population rather than being considered a highly-exposed population when deriving a cancer risk level) while states should be able to decide if a new designated use is appropriate to protect TRR or if the protection can be applied to existing uses. Additionally, protecting TRR through WQS is a critical component of reducing the impact of increasing stressors to water resources, aquatic and aquatic-dependent resources and health risks faced by right holders.
- C. EPA has identified appropriate minimum critical information necessary to evaluate whether WQS need to be revised to ensure TRR, but more exploration is warranted with the parties. The preamble identifies minimum critical information as:
 - (1) the nature of the right (i.e., a fishing, hunting, resource gathering, etc.);

² In the preamble, "the initial inquiry" describes the process for determining whether TRR exist and apply, and how those reserved rights could be protected through implementation of the requirements of the proposed rule.

- (2) where the right applies (i.e., to a specific set of waterbodies or to waters generally within a broad geographic area); and,
- (3) how the right is exercised (e.g., subsistence or ceremonial purposes).

3. ACWA's Concerns with the Rule

Please note that some states have unique circumstances and concerns relative to the TRR Rule. EPA should carefully review their independent comments.

A. EPA failed to meaningfully consult state co-regulators on a rule approach or the draft rule. The WQS Regulation is modified infrequently, for good reason, and has direct implications to EPA's CWA co-regulators. As a general matter, states expect substantive co-regulator discussion on the nature of a proposed modification before EPA proposes a WQS Rule revision.

EPA claims in the preamble that Pursuant to EO 13132L the Agency conducted pre-proposal discussions with states. There, it heard that states "requested additional clarification about EPA's expectations," and "took these discussions into account during the drafting of this rule." It is not clear how EPA took these discussions into account.

EPA approached states via an ACWA listening session in September, 2021, and ACWA requested EPA participate in a session of ACWA's Annual Meeting in August, 2022 (which also included discussion of the pending "Tribal Baseline WQS Rule"). In the listening session, EPA provided a presentation of its intentions³ in developing a proposed rule. EPA did not ask states to participate in discussion among the parties to consider implementable approaches, nor did EPA ask states for ideas on an implementable approach(es), given states' primary role in developing WQS. States also asked key questions – see the non-exhaustive list below – that should have been addressed prior to proposing revisions to the WQS Regulation. These went largely unaddressed in the rule. EPA did not reply to ACWA otherwise.

- *Has EPA reviewed all treaties for reserved rights, and if so, how can a state obtain EPA's opinion on those reserved rights related to treaties affecting our state?*
- *If you incorporate a broad framework without a map or detail of where reserved rights exist, how will a state know where EPA considers where TRR apply?*
- *How should [state clean water programs] approach a situation where a state [government] and tribe disagree about TRR?*
- *How does a state identify the aquatic resources to which a reserved right applies (and for which tribes)? Is it anticipated that this information would become known in public engagement processes for WQS?*

³ "Questions Asked During September 2021 ACWA MSA-EPA Meeting" available at <https://www.regulations.gov/document/EPA-HQ-OW-2021-0791-0023>

- *Even though they do not have a full inventory of TRR, can EPA describe generally the scope of TRR to the best of their understanding? Are they, for example, very common, likely to occur in most states, or very uncommon, etc.?*
- *Does EPA plan to provide states with additional resources to conduct [TRR] evaluations [during Triennial Reviews and WQS revisions/development]?*
- *So if states and tribes agree on areas of rights then EPA would [concur], right?*

B. EPA should work with states and tribes to evaluate implementable approaches. According to the preamble, during development of the rule, EPA held a 90-day consultation with federally recognized tribes, in addition to two national tribal listening sessions and 20 EPA/tribal staff and leadership meetings. States are aware of only two EPA engagements with states, via ACWA. Almost all states reported to ACWA that EPA did not reach out to them otherwise. ACWA does not request parity with tribes/right holders regarding EPA’s level of engagement on the rule; rather, EPA should have increased engagements and extended the engagement period with both tribes and CWA co-regulators. ACWA requests EPA convene the parties to consider an implementable approach while the rule is still draft. Just as the rule requires TRR be determined and protected through a process of mutual consideration and discussion between the parties, ACWA believes arriving at an implementable framework will require mutual consideration and discussion.

C. The rule aims for “uniformity and consistency,” but the rule preamble and framework are inconsistent. The rule states an objective of creating a “uniform approach for establishment of WQS where tribal reserved rights apply and clearly laying out how EPA will review such WQS.”⁴ In the same preamble, EPA notes that “the effect of these proposed revisions on the establishment or revision of a state’s WQS will be case-specific.”⁵ Additionally, all states will experience impact. Some states with tribes may need to revise WQS. States without tribes may need to revise WQS if exercisable TRR are discovered to apply, even if right holders reside entirely outside the state. All states will need to conduct an initial inquiry to satisfy the WQS submittal requirements. Thus, all states and territories will experience impact. Case-specific circumstances could exacerbate this impact.

- i. **EPA is not consistent or transparent about EPA’s awareness of TRR.** The rule would require states to make efforts to identify applicable TRR, in part because no national inventory of TRR exists and because EPA has stated that it does not have an inventory of TRR. However, EPA’s Information Collection Request to collect data pursuant to this rule states, “EPA does not anticipate this rule will impose any compliance costs on the District of Columbia or any U.S. territories because EPA is not aware of any federally recognized tribes with reserved rights in or downstream of these jurisdictions.”⁶ This suggests EPA has at least partially inventoried TRR.

⁴ Preamble Section IV(A), pg. 74366, available at <https://www.federalregister.gov/documents/2022/12/05/2022-26240/water-quality-standards-regulatory-revisions-to-protect-tribal-reserved-rights>

⁵ Preamble Section IV(A), pg. 74367, available at <https://www.federalregister.gov/documents/2022/12/05/2022-26240/water-quality-standards-regulatory-revisions-to-protect-tribal-reserved-rights>

⁶ Information Collection Request for Water Quality Standards Regulatory Revisions to Protect Tribal Reserved Rights (Proposed Rule) - Supporting Statement. Pg. 6. Available at <https://www.regulations.gov/document/EPA-HQ-OW-2021-0791-0145>

EPA has not responded to ACWA's questions about the extent of TRR information EPA has gathered to date.

- ii. The preamble claims Proposed 40 CFR 131.6(g)(1) would require WQS submissions include information about TRR, as informed by rights holders, where applicable. This is inconsistent with the rule language. Proposed 40 CFR 131.6(g)(1) ensures right holders have an opportunity to engage. States are concerned that some right holders will not (since EPA, not states, is a tribe's sovereign peer) or, critically, cannot (due to resource constraints) engage with states during key WQS processes or timeframes. In those circumstances, states will be unable to fulfill the proposed 40 CFR 131.6(g)(1) responsibility if interpreted as "informed by right holders" rather than "made opportunities for right holders to inform." States cannot guarantee tribes will inform state efforts to protect TRR and therefore cannot be held responsible for meeting the requirements. ACWA recognizes that EPA cannot, either, but submits that EPA has a greater chance of success given its position and role among the parties.
- iii. The rule adds to inconsistent EPA and federal direction on appropriate state consultation with tribes. Outside the rule, EPA has instructed different state agencies and environmental media programs to coordinate with tribes differently. In some cases, states are expected to defer to EPA on engagement and consultation entirely without interference. This is one reason some CWA co-regulators do not have the relationships with tribes that they desire or need to expediently implement the rule. We request EPA internally coordinate across EPA program offices towards a single, holistic recommended approach for states to engage tribes across programs, especially given the federal trust and TRR responsibilities EPA seeks to achieve with the rule.
- iv. The rule does not address state-recognized tribes or agreements. ACWA requests EPA clarify the obligations of states and EPA in determining approaches to protect TRR of state-recognized tribes and agreements, and/or provide written guidance on the topic.
- v. The rule is inconsistent on "unsuppressed" exercise of rights. Proposed § 131.9(a)(1) requires that WQS protect the exercise of TRR unsuppressed by water quality or availability of the aquatic or aquatic-dependent resource. The rule states also that defining the unsuppressed exercise of a right should account for planned waterbody restoration projects that would result in increased opportunities to use the water resource in the future. In that scenario, "EPA is proposing to require that WQS must be set at levels that reflect unsuppressed exercise of the reserved right." EPA should clarify the implication here that if no restoration projects are planned/underway, WQS do not need to reflect unsuppressed exercise of the right – which contradicts Proposed § 131.9(a)(1).

D. The rule includes unfunded and redundant mandates. EPA states in the preamble, "This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531–1538."⁷ While the rule likely would not qualify as an "unfunded mandate" based on annual financial burden thresholds, the rule imposes new

⁷ Preamble pg. 74375, available at <https://www.federalregister.gov/d/2022-26240/p-254>

requirements upon states to ensure the federal government remains in compliance with federal law without supplying additional funds or resources. Additionally, proposed 40 CFR 131.20(a) “would require states to evaluate whether there are applicable tribal reserved rights relevant to waters subject to the state’s WQS during the public triennial review process.” To do so, EPA expects states to “explicitly request information regarding the nature and scope of [TRR] in each triennial review.” It is not mentioned why this is necessary after a TRR is determined to not exist/apply, and redundantly burdens states. If TRR changes through new federal treaties or law, a federal representative should inform the parties immediately. States should not need to repeatedly request updates from EPA and tribes.

E. The Rule identifies essential actions to ensure TRR in WQS but passes EPA obligations and roles to states that are not feasible to implement. States agree with the EPA Administrator that explicitly recognizing TRR in WQS will ensure tribal aquatic resources are abundant and safe to consume. However, states disagree that adding state responsibilities to this recognition will reaffirm the Nation-to-Nation partnership.⁸ The rule shifts the burden of implementing existing EPA authorities and responsibilities to states, likely to the detriment of tribe-state and state-EPA relationships. States that maintain very strong relationships with local tribes share this concern.

- i. EPA should recognize that WQS must protect TRR, but also recognize that federal guidance requires EPA to determine the location and nature of those rights. EPA notes in the rule’s press release that Bureau of Indian Affairs in late 2022 published TRR Best Practices documents for adherence by Federal agencies. The Best Practices Flowchart⁹ clearly states, “[federal] field staff should have a list of relevant treaties in their service areas and be familiar with them in advance of any agency actions or decisions. Develop a list of relevant treaties and associated rights through consultation with local tribes.” To apply this guidance to the rule, it would be most appropriate for EPA Regions to inventory treaties and TRR through tribal consultation, not states.

This guidance and precedence all indicates the same duty: collating and determining TRR are responsibilities are of the United States, not individual states, and lie within the bounds of the Nation-to-Nation partnership and the federal trust responsibility. As the 2022 interagency memorandum *Best Practices For Identifying And Protecting Tribal Treaty Rights, Reserved Rights, And Other Similar Rights In Federal Regulatory Actions And Federal Decision-Making*¹⁰ notes, “In total, the U.S. ratified approximately 374 treaties with Native nations.” If EPA/states are to live up to honoring TRR in the CWA context, EPA should not consider shifting those significant federal responsibilities to states that by definition lack the consultation

⁸ “EPA News Release: EPA Announces Proposal to Protect Tribal Reserved Rights in Water Quality Standards and Best Practices for Tribal Treaty and Reserved Rights.” 11/30/2022. Available at <https://www.epa.gov/newsreleases/epa-announces-proposal-protect-tribal-reserved-rights-water-quality-standards-and-best>

⁹ Available at https://www.bia.gov/sites/default/files/dup/inline-files/trr_flowchart.pdf

¹⁰ Pg. 6. Available at: [Best Practices For Identifying And Protecting Tribal Treaty Rights, Reserved Rights, And Other Similar Rights In Federal Regulatory Actions And Federal Decision-Making](#)

role established under federal law. As noted in the *Summary Report of Tribal Consultation for the Proposed Rule*, some tribal commenters raised “the need for meaningful consultation with affected tribal reserved right holders on the scope and definition of their reserved rights,” and that “EPA cannot delegate its trust responsibility to consult with tribes and protect tribal reserved rights to states, noting that tribes’ government-to-government relationship is with the federal government rather than states.”¹¹

States support establishing co-regulator understanding of water quality necessary to fully protect TRR, not reinforcing existing suppressed uses, and elevating Indigenous Traditional Ecological Knowledge (ITEK)¹² in decision-making. EPA and other federal agencies with directives and/or deep experience consulting with tribes need to work with tribes to gather WQS-related input and ITEK, as well as information about existing TRR, before states conduct Triennial Reviews or finalize WQS. This is not to suggest that states are unwilling to engage tribes on these matters – states will collaborate with the parties regardless of the outcome of this rulemaking – but instead recognizes the Nation-to-Nation relationship, as well as current federal guidance and historical precedent: federal agencies have been, and are, expected to lead such engagement, multi-party facilitation, and information management. Accordingly, EPA should focus on identifying and clarifying the nature and scope of all TRR, and their waterbody applicability, and inventorying these data into a national clearinghouse/database.

- ii. **The rule is redundant of existing federal authorities providing that federal agencies inventory and not interfere with TRR.** During past efforts to revise the WQS Regulation (including 1983 and 2015), EPA chose to not include language explicitly stating that WQS not interfere with TRR because EPA had existing authority to do so. The rule preamble discusses EPA’s recent WQS experiences concerning Washington and Maine, and EPA also discussed experiences concerning Oregon in discussion with ACWA. These experiences reflect EPA’s existing authorities. ACWA requests EPA clarify if EPA’s interpretation of its own authorities and duty to protect TRR in WQS has changed since 1983 and/or 2015. Further, in the rule EPA states: “With respect to carcinogens, the 2000 Methodology states that 10-5 and 10-6 risk levels may be acceptable for the general population and that highly exposed populations should not exceed a 10-4 risk level.” EPA also notes, “Future iterations of this methodology may make different recommendations regarding cancer risk level.” EPA has elsewhere committed to, in the next few years, updating the 2000 methodology to protect higher fish consumers at the same level as the general population. If true, the need for proposed §131.9(a)(2) appears unnecessary given existing §131.11(b)(1). This is another indicator that EPA already has authorities necessary to protect TRR.

¹¹ “Summary Report of Tribal Consultation for the Proposed Rule: Water Quality Standards Regulatory Revisions to Protect Tribal Reserved Rights.” Pg. 8. Available at <https://www.epa.gov/system/files/documents/2022-11/summary-report-tribal-consultation-proposed-rule-wqs.pdf>

¹² *Memorandum for the Heads of Departments and Agencies: Indigenous Traditional Ecological Knowledge and Federal Decision Making*. November 2021. Available at: <https://www.whitehouse.gov/wp-content/uploads/2021/11/111521-OSTP-CEQ-ITEK-Memo.pdf>

- iii. The rule framework conflates states' local expertise with existing obligations and responsibilities. EPA has communicated that states and EPA are bound by federal laws, and this proposed framework compels the parties to work together on determining and ensuring TRR; specifically, states gain obligations under the rule owing to their local expertise. While states have local expertise, they do not necessarily have expertise on federally-established TRR, especially in instances where right holders reside entirely outside the state. EPA has also communicated that states have stronger relationships with their tribes. While many states have strong relationships with tribes, the preamble of this rule notes, "The foundation of this coordination in this WQS context necessarily includes the state, with CWA authority to set standards in the reserved rights areas in question[;] local governments, who often have even more direct contact with tribal members and their governments[;]..."¹³ In many cases, local governments and EPA have stronger ties to right holders than state clean water programs. In states with strong ties to right holders, those relationships may be in multiple agencies, or primarily in state agencies that do not address water quality.
- iv. The rule is an opportunity to positively affect engagement among the parties. During tribal consultation on the rule, some commenters noted frustration with how states have handled tribes' input during Triennial Reviews. States view renewed focus on TRR as an opportunity to reestablish tribes' input on clean water decisions and state-tribal relationships where strained. Federal agencies with primacy and experience in consultation can support this. This is one reason states recommend EPA consult the parties earlier in WQS processes than the rule outlines: significant discussion may be needed to implement TRR protections. It is possible that concurrence will be needed between states and right holders with a history of impasse on water quality policy.
- v. EPA notes the need for mutual consideration among the parties but does not accommodate it in the rule. Under the rule, "determinations regarding protection of TRR should be made through a process of mutual consideration and discussion between right holders, states, and the Federal government." However, the rule requires states to consult tribes to complete the initial inquiry after receiving Triennial Review "kick off letters" from EPA that may contain TRR information (i.e., the start of the rule process); and EPA's consultation with tribes, which is essential in completing the initial inquiry, would not begin until WQS are submitted (i.e., the conclusion of the rule process). Under the rule timeline, there is no point where the parties mutually consider and consult on protecting TRR.
- vi. States want to protect TRR and will implement WQS that protect TRR once identified and clarified. To protect TRR, states are requesting EPA collect and share all initial inquiry information with states and tribes, and update states and tribes accordingly if EPA's awareness changes. EPA should not require states to duplicate EPA's effort in collecting information about the scope, nature, and current and past use of the TRR through initial inquiries every Triennial Review cycle. Further, EPA leading consultation among the parties will be essential in achieving the desired outcome and reaching concurrence on difficult open questions. For example, a longstanding canon of the Supreme Court is that doubtful or ambiguous expressions in a treaty should be

¹³ 87 FR 74378, available at <https://www.federalregister.gov/d/2022-26240/page-74378>

resolved in favor of tribes. Where treaties with such language exist, it is appropriate that EPA lead consultation with the parties to determine treaty clarifications in tribes' favor, for states to then incorporate in WQS. EPA should not require states to (1) consult tribes and request tribes clarify ambiguous federal treaties – which is above and beyond existing state/tribe coordination in existing WQS public participation processes – and (2) separately request EPA verify that the state is accurately applying the language in favor of the tribe. It is the federal government's duty to consult tribes on federal policy.

F. Operationalizing the rule's intentions should be done in phases using plans developed by the parties, to allow open questions to be clarified and avoid unnecessary costs. If finalized, ACWA recommends that proposed §131.20(a) specify Triennial Reviews beginning in a future year. As one tribal commenter requested, "EPA should require states to develop long-term plans in collaboration or in close consultation with affected Native Nations to bring affected water bodies into (or closer to) compliance."¹⁴ EPA can achieve the rule's objective to protect TRR in WQS (as federal law has provided since prior to the establishment of CWA) by helping the parties establish long-term plans to address TRR in WQS. EPA noted in the preamble and a listening session with ACWA that, to paraphrase, implementation of the rule will be site-specific and the parties will need to work together to discover the best approach(es) to implementation. States believe a planned implementation approach will accomplish this and the rule's objectives, but with fewer legal costs/delays and improved data and WQS. Implementation plans would likely outline components in the rule: identifying what TRR exist, translating them into WQS, determining which WQS need to be established/modified, and a feasible timeline for completion given available data and the parties' resource constraints.

Without phased implementation, states are concerned that legal action will be taken if the parties' actions do not "satisfy" the rule upon the first applicable Triennial or WQS submission review. Legal action would cause further delays and divert state WQS and legal staff attention from implementing the rule. The parties should not face legal exposure upon rule finalization when the rule preamble and EPA communication with ACWA acknowledges that it will take time for the parties to cooperate and operationalize the intentions of the rule – intentions that, to reiterate, states support.

Additionally, the preamble notes the term "unsuppressed level" which does not mean heritage uses but instead a balance of past, present, and future uses. To operationalize the term, the parties will need to convene and reach concurrence (and EPA likely will need to publish implementation guidance). It is important that each tribe, state, and EPA Region, or potential litigation from other stakeholders, does not establish an array of unique interpretations (particularly if EPA does not operationally define the term or tie it to overarching federal guidance in the rule). These are examples of why the rule

¹⁴ "Summary Report of Tribal Consultation for the Proposed Rule: Water Quality Standards Regulatory Revisions to Protect Tribal Reserved Rights." Pg. 10. Available at <https://www.epa.gov/system/files/documents/2022-11/summary-report-tribal-consultation-proposed-rule-wqs.pdf>

would benefit from including a phased implementation; other examples are provided below. EPA cannot expect the concept of this rule to be successful if states and tribes must comply immediately upon finalization.

- i. Timing of relevant actions needs greater consideration. EPA expects states may need to revise WQS to address Human Health Criteria (“HHC”), Aquatic Life Criteria, and then any other changes. If finalized, the rule would require some states to modify their HHC immediately. Meanwhile, EPA has not finished updating exposure factors in a number of current 304(a) HHC, nor issued 304(a) HHC for any PFAS. States will need EPA support on exposure factors protective of TRR, and PFAS are a major concern of states’ with respect to some tribes’ consumption of fish and/or TRR to gather and consume fish. If those HHC are deemed necessary to protect TRR, states would be in a position of needing to adopt HHC that neither states nor EPA have finished developing to comply with the rule. In effect, the expediency required by the rule would require states to duplicate regulatory effort and/or take steps prematurely.
- ii. Definitions. It is unclear how EPA plans to contextually define “aquatic resources and aquatic-dependent resources.” For example, if hunting is a reserved right, does this include ungulates drinking from lakes/streams? How would EPA respond in this example to states that have existing criteria to protect ungulates vs. states that do not? Here, other state agencies managing natural resources need to be engaged on WQS. This is one reason the rule underestimates states’ implementation burden.

States also seek clarity on many aspects of the rule that tribes raised during consultation in the pre-proposal period, including how to determine water quality levels which protect TRR; recourse when the parties disagree and/or if one right holder interferes with the rights of another (would 40 CFR § 131.7 be triggered?); managing multiple TRR and uses (i.e., varying fish consumption rates) within one geographic area; and, if consistent WQS can be established across TRR and complex jurisdictional boundaries in a geographic area.¹⁵ States also share tribes’ recommendation that EPA convene the parties to explore these aspects.

- iii. Initial inquiry cost is not estimated. EPA states: “EPA considered the costs associated with labor from economists, engineers, scientists, and lawyers for development of state regulations.”¹⁶ Performing an initial inquiry in order to be aware of TRR prior to Triennial Review is unrelated to development of state regulations – in this context, modifying WQS according to information gleaned in the initial inquiry. It is related to the responsibility EPA is assigning states via this rule. Thus, a significant cost is unaccounted for in the rule. States are also concerned that among states and the parties, it is not possible to attain the capacity of legal expertise and WQS employee bandwidth to implement this rule immediately. Legal expertise specializing in Indian law and TRR, given the absence of a searchable national database of all sources of law reflecting TRR, will need to be onboarded or developed among states, tribes, and EPA Regions – and given the resource constraints of many states and tribes, this would jeopardize other WQS actions and priorities. Personnel equipped to facilitate

¹⁵ “Summary Report of Tribal Consultation for the Proposed Rule: Water Quality Standards Regulatory Revisions to Protect Tribal Reserved Rights.” Pg. 8, 9. Available at <https://www.epa.gov/system/files/documents/2022-11/summary-report-tribal-consultation-proposed-rule-wqs.pdf>

¹⁶ <https://www.federalregister.gov/d/2022-26240/p-229>

dialogue among the parties will also need to be onboarded or developed. Reaching such capacity will take new resources and time.

- iv. EPA uses a one-time cost estimate. It does not incorporate the requirement that states consider TRR in every Triennial Review. EPA also does not specify if an initial inquiry needs to be performed for each WQS action regardless of the Triennial Review cycle.
- v. EPA does not estimate costs and public health/environmental externalities related to addressing point and nonpoint sources of pollution pursuant to TRR. Per the preamble, “EPA acknowledges that achievement of any benefits associated with cleaner water would involve additional control measures, and thus costs to regulated entities and nonpoint sources, that have not been included in the economic analysis for this proposed rulemaking.” During consultation on the rule, some tribes noted that “nutrient pollution is a key obstacle to exercising their reserved rights”. EPA has recently published 304(a) recommended nutrient criteria for lakes and reservoirs¹⁷, but acknowledges that it, “focuses on the implementation of nutrient criteria under the authority of CWA. States and authorized tribes may have additional authority to manage nonpoint sources, which are a major contributor of nutrient pollution.”¹⁸ This rightly recognizes that authority to manage nutrients and nonpoint sources under CWA is limited, and some states and authorized tribes *do not* have additional authority to manage nonpoint sources of nutrients. Regardless of WQS, it is possible that complete elimination of nutrient contributions via regulated point sources fails to protect certain right holders, given the extent of nonpoint source contributions generally. In this scenario, many states will be unable to address nonpoint source contributions through regulation; achieving TRR protection will not be a question of nutrients WQS, but instead will require that the federal government – through its legal duty to protect TRR –increase nonpoint source control investments to address nutrient impairments.

Furthermore, the rule does not estimate treatment costs for point sources of pollutants, including nutrients. EPA has recently assessed that increased treatment of point source nutrient concentrations varies directly with health and environmental tradeoffs that are relevant to TRR. Requiring point sources to conduct the highest achievable nutrient reductions also results in the greatest potential for health externalities¹⁹ that affect not only right holders, but general populations in a state.

- vi. The rule language suggests EPA gives itself authority to establish uses beyond 101(a)(2) uses and related WQS in certain situations. EPA asks, “*Should EPA include in 40 CFR 131.9 specifics on whether or how a state can revise designated uses and still protect tribal reserved rights?*” ACWA urges EPA to discuss this with states further before opining in final regulation. Treaties and the CWA provide EPA authority to ensure WQS do not interfere with TRR regardless of the designated uses. States disagree that there are situations during the Use Attainability Analysis process

¹⁷ [Ambient Water Quality Criteria to Address Nutrient Pollution in Lakes and Reservoirs](#), EPA-822-R-21-005, 2021.

¹⁸ [Frequently Asked Questions: Implementing the 2021 Recommended Clean Water Act Section 304\(a\) Ambient Water Quality Criteria to Address Nutrient Pollution in Lakes and Reservoirs](#), EPA-820-P-23-001, 2023. Pg. 9

¹⁹ [Life Cycle and Cost Assessments of Nutrient Removal Technologies in WWTPs](#), EPA-832-R-21-006. Externalities include eutrophication, cumulative energy demand, global warming, acidification, fossil depletion, smog and particulate matter, ozone depletion, water depletion, cancer and non-cancer human health risks, and aquatic ecotoxicity.

where it is essential that designated uses be maintained and strived for to protect TRR; the only essential is that EPA and tribes help states develop, and EPA approve, WQS that protect TRR regardless of the designated use.

More pressingly, states are concerned about the potential for federally-required designated uses that are not state-established. In some situations, a TRR exists but right holders do not exercise the right and may (1) inform EPA that they do not intend to resume exercising the right, or (2) not respond to EPA or state inquiries or invitations to consult. If EPA determines the TRR still must be protected, EPA must resolve in favor of right holders. This could result in EPA disapproving Triennial Reviews/WQS submissions until they contain EPA's interpretation of TRR-protective uses and WQS. In effect, the rule would create situations where EPA establishes designated uses on behalf of states and tribes, without input from states and tribes. The CWA provides states and authorized tribes WQS primacy.

- vii. The rule's impacts to CWA Section 304(a) Criteria obligations are unclear. The CWA requires states to consider adopting CWA 304(a) recommended criteria but permits states to alternatively adopt alternative or site-specific scientifically-defensible criteria. Where waters subject to TRR involve parameters addressed under 304(a) but not yet addressed by a state in WQS, will EPA require the state to immediately adopt the 304(a) criteria, or allow the state to develop a state-specific criteria that would, when derived, protect the TRR? If EPA publishes 304(a) criteria for parameters that no states currently address in WQS, and those parameters are considered required to protect some or all TRR, would applicable states need to immediately adopt the 304(a) criteria? Would states be permitted time to develop their own criteria?
- viii. Water quantity obligation conflicts not considered. Generally, CWA actions are not to take primacy over water quantity management decisions by state or federal agencies, and most CWA co-regulators do not have authority over water quantity. However, states have noted that because (1) treaties are the supreme law of the United States and (2) ensuring some treaty-based TRR may require increased streamflows, EPA has not fully considered and clarified which would have primacy: water resources management decisions or treaties, or CWA obligations to protect TRR. Several tribes shared this concern during consultation: "...tribes with water rights requested clarification about how this rule would impact adjudicated water rights and/or urged EPA to ensure this change to the WQS regulations would protect flow sufficient to effectuate tribal reserved rights to aquatic and aquatic-dependent resources."²⁰ Proposed § 131.9(a)(1) explicitly states that WQS must protect the exercise of TRR unsuppressed by water quality or availability of the aquatic or aquatic-dependent resource. Availability may vary directly with water quantity or altered duration and frequency of quantity relative to current or seasonal conditions. Proposed § 131.9(a)(1) likely creates obligation conflicts with federal or state requirements (treaties, contracts, laws, and other instruments) which dictate water

²⁰ "Summary Report of Tribal Consultation for the Proposed Rule: Water Quality Standards Regulatory Revisions to Protect Tribal Reserved Rights." Pg. 9. Available at <https://www.epa.gov/system/files/documents/2022-11/summary-report-tribal-consultation-proposed-rule-wqs.pdf>

quantity management of streams, river systems, natural lakes, and dammed reservoirs.

It is also possible that obligation conflicts exist within the same treaty or set of treaties applicable to a set of right holders – for example, treaty obligations to divert water to tribal lands or water right holder at volumes which might suppress the availability of an aquatic resource for that tribe or other TRR holders within the watershed. Regardless of obligation conflicts, multiple state and federal agencies beyond state clean water programs and EPA need to be consulted on the rule and discuss protecting TRR in situations with complex legal water rights/protections related to both quality and quantity. Full discussion on water quality and quantity needs to protect TRR needs to occur before the rule could be implemented.

- ix. **Cumulative impacts unclear.** The summary of tribal engagement feedback notes tribes' interest in understanding and protecting against cumulative impacts of point/nonpoint source pollution to migratory species that move through territorial waters of different states and countries. States are interested in new or improved approaches to address cumulative impacts and would like to raise this in discussion with the parties. States also request EPA clarify what approaches it is using or considering for species that move through other countries before moving through waterbodies and/or terrain in the United States.

G. ACWA recommends an alternative implementation approach to avoid a WQS backlog. States are highly concerned about their ability to develop or revise WQS in a timely manner under the rule. To successfully revise WQS, TRR need to be fully identified and negotiated prior to revisions. If the process for consulting between the parties to determine appropriate water quality to protect TRR ultimately resembles the 40 CFR § 131.7 dispute resolution mechanism²¹, states are concerned that the parties will not have sufficient lead time to properly revise or approve WQS under existing timeframe obligations.

In situations where TRR protections have not been fully negotiated or adjudicated, states need to be able to proceed with WQS management using the best information they have. Under the rule, it is unclear how long a state should provide a right holder to engage in consultation before proceeding with WQS revisions. States are concerned that they may need to eventually proceed without tribal input and submit WQS to EPA. Should the right holders engage with EPA at that stage, the state's only recourse to correct the WQS is for EPA to disapprove it and provide states 90 days to resubmit. Should a state fail to meet this tight timeline, EPA would be obligated to promulgate WQS for the state. ACWA recommends EPA perform the work supporting the identification and negotiation of TRR/water quality protections as early in the WQS process as possible, so that states and tribes can be confident that submitted WQS ensure TRR.

²¹ Applicable to disputes between states and tribes as a result of differing water quality standards on common bodies of water. See <https://www.law.cornell.edu/cfr/text/40/131.7>.

Federal guidance²² on tribal consultation, updated in 2022, notes that federal agencies should send a letter to tribes with 30 days' notice, followed by 30 days for tribes to provide written comments, followed by EPA preparing a written summary of received comments with the Agency's response, followed by consultation to materially determine if the action affects TRR and, if taken, would protect TRR. States are concerned that EPA's 60/90-day review timeline for WQS submissions cannot be met if the tribal consultation process begins after WQS are submitted. As EPA knows, it is essential that WQS submissions be reviewed promptly to ensure CWA protection of all Waters of the United States.

States publish draft WQS for public comment before adopting the WQS and submitting to EPA. During draft WQS public comment periods, EPA routinely provides written comments to advise whether EPA considers the draft WQS to be potentially unprotective of uses or otherwise includes elements that may force EPA to disapprove the WQS. As EPA notes elsewhere, "[EPA] Regional offices have the responsibility to review [WQS] submissions for consistency with the CWA and regulation, and approve or disapprove the WQS. The WQS staff in Regional offices work closely with their states on WQS issues, including review of both draft and final submissions of WQS. EPA headquarters provides support to the Regional offices in the review of these submissions."²³

Because EPA policy allows EPA Regions to comment on draft WQS, ACWA recommends EPA interpret its decision on whether to comment on a state's draft WQS as an Agency decision relevant to tribes pursuant to EO 13175²⁴. This would allow EPA to consult with tribes during the draft WQS' comment period to determine if the draft WQS would protect TRR, and in turn allow EPA to consult and provide comment to co-regulators on the draft WQS. This would improve the likelihood that submitted WQS protect TRR and may support faster WQS package review. It would also prevent:

- States from assuming the untenable position of submitting a WQS to EPA without indication of whether the WQS protects TRR in the view of right holders and EPA;
- EPA from conducting tribal consultation only after receiving submitted WQS from states, which would likely contribute to the growing WQS backlog; and,
- EPA from potentially disapproving state-adopted WQS and being forced to promulgate WQS on behalf of the state.

H. The preamble overreaches with regard to narrative criteria. EPA states, "Where data and information are not currently available to support establishing

²² https://www.bia.gov/sites/default/files/dup/inline-files/trr_flowchart.pdf

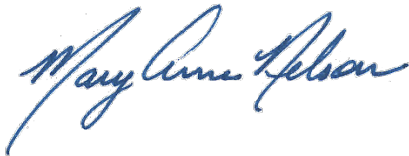
²³ Information Collection Request for Water Quality Standards Regulatory Revisions to Protect Tribal Reserved Rights (Proposed Rule) - Supporting Statement. Pg. 9. Available at <https://www.regulations.gov/document/EPA-HQ-OW-2021-0791-0145>

²⁴ "When a federal agency is engaging in regulatory action, undertaking decisions, or commenting on legislation that affect tribes, the federal-tribal relationship or on the distribution of power between the federal government and Tribes, the agency shall engage, through consultation, with tribes to determine whether tribal treaty, reserved rights, or other similar rights would be impacted by the proposed federal action." ([Best Practices For Identifying And Protecting Tribal Treaty Rights, Reserved Rights, And Other Similar Rights In Federal Regulatory Actions And Federal Decision-Making, pg. 8](#)) ... "[federal agencies shall] have an accountable process to ensure meaningful and timely input by Tribal officials in the development of regulatory policies that have tribal implications." (Executive Order 13175, [Section 5\(a\)](#)).

numeric levels of water quality, or where data are inconclusive, states **may** adopt narrative WQS to protect the right” [emphasis added]. This language is an overreach. The CWA does not give EPA authority to determine when states may or may not establish numeric vs narrative criteria, so long as WQS and criteria derivation processes are and scientifically defensible. EPA must replace “may” with non-directive language, such as “...data are inconclusive, narrative WQS are anticipated to satisfy federal requirements to protect the right.”

Thank you for considering ACWA’s comments on the rule. Please be sure to carefully consider any comments submitted by individual states. ACWA looks forward to co-regulator discussion and conversations with the parties to implement the concepts of this rule, and as necessary, future iterations of the WQS Regulation. Please contact Julia Anastasio, ACWA’s Executive Director and General Counsel (202.756.0600) with any questions on the contents of this comment letter.

Sincerely,



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