March 6, 2023

The Honorable Radhika Fox
Assistant Administrator
Office of Water
Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Re: Water Quality Standards Regulatory Revisions To Protect Tribal Reserved Rights/EPA-HQ-OW-2021-0791; FRL-8599-01-OW

Dear Assistant Administrator Fox:

This Coalition consists of national trade associations from sectors across the economy, including agriculture, construction, energy, manufacturing, mining, and the broad business community. Coalition members would be directly affected by the proposed rulemaking through changes to the water quality standards program and associated state and tribal treatment as a state (TAS) programs that are likely to result in widespread impairment designations and changes to discharge permit conditions. The Coalition supports sustainable regulation to uphold our shared environmental, social, and economic priorities. The Coalition also supports efforts to promote tribal self-determination; however, the proposed rule is not sustainable or implementable, and if finalized as proposed, it will not create the human health or water quality outcomes that the Environmental Protection Agency (EPA or the Agency) desires.

The proposed rule would displace state and TAS tribal authority and discretion to manage water resources and make risk management decisions and authorize EPA to dictate how states and TAS tribes manage resources. The proposed rule would require states, TAS tribes, and EPA to protect broadly defined "tribal reserved rights" through the Clean Water Act (CWA or the Act) water quality standards program. This proposal represents a material agency overreach, and it would have significant and demonstrable detrimental effects on largely state- and TAS tribe-administered water quality standards programs and entities regulated by those programs. The CWA does not provide EPA the authority to promulgate this rule, and neither states, TAS tribes, nor EPA would be equipped to interpret tribal treaties or other instruments that may grant reserved rights to sovereign tribes. Additionally, EPA has not done the minimum analysis that is required to assess this policy proposal's costs and implications.

More broadly, EPA proposes to create an entirely new structure for developing and implementing water quality standards without any evidence that existing water quality standards are not protective. As required by the CWA, existing water quality standards programs require that designated uses be protected and are subject to public input and EPA oversight. In the proposal, EPA has not provided any information or data to suggest that existing water quality standards are insufficient to protect tribal uses.

As demonstrated below, the business community favors policies that promote tribal self-determination and human health, environmental, and economic well-being. However, EPA has failed to provide an adequate rationale or explanation for the proposal, has failed to consider important aspects of the legal, governance, and water quality challenges facing states and TAS tribes, and has proposed a rule that exceeds its statutory authority and is not in accordance with the law. The Coalition respectfully requests that EPA withdraw this proposal and conduct legitimate and appropriate engagement with states, TAS tribes, regulated entities, and the interagency community with expertise in tribal law and policy issues to better understand the relevant concerns and develop a workable path forward. There are options that are less costly for all stakeholders.

I. The existing CWA framework and programs are robust and more than adequate to protect water quality and tribal uses

The CWA is based on a federal-state partnership, known as "a program of cooperative federalism." *PUD No. 1 of Jefferson Cnty. v. Wash. Dept. of Ecology,* 511 U.S. 700, 703-04 (1994); *City of Abilene v. U.S. E.P.A.,* 325 F.3d 657, 659 (5th Cir. 2003) (quoting *Arkansas v. Oklahoma,* 503 U.S. 91, 101 (1992)); *New York v. United States,* 505 U.S. 144, 167 (1992). Under this framework, states and TAS tribes are primarily responsible for implementing much of the statute, and EPA retains an oversight role to ensure that state actions comply with the CWA. 33 U.S.C. § 1251(b) ("It is the policy of Congress to recognize, preserve, and protect the primary responsibilities and right of States to prevent, reduce, and eliminate pollution.")

The CWA explicitly assigns to the states the primary authority for adopting water quality standards. 33 U.S.C. § 1313(a), (c). State water quality standards must protect designated uses and "must be based on sound scientific rationale." 40 C.F.R. §131.11(a). "In designating uses of a water body and the appropriate criteria for those uses, the State shall take into consideration the water quality standards of downstream waters and shall ensure that its water quality standards provide for the attainment and maintenance of the water quality standards of downstream waters." 40 C.F.R. §131.10(b). When establishing numeric water quality criteria, states are encouraged to rely on recommendations adopted by EPA pursuant to CWA section 304(a); EPA's 304(a) recommendations, as modified to reflect site-specific conditions; or other scientifically defensible methods. 40 C.F.R. § 131.11(b).

State water quality standards adopted pursuant to the CWA must be reviewed by EPA for consistency with the CWA. Federal regulations set out specific elements that state submittals must include and the factors EPA must consider as it reviews state standards. 40 C.F.R. §§ 131.6, 131.5(a). After review, EPA may either approve or disapprove the standards. 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. § 131.5(a). If EPA determines that the standards are consistent with the factors in 40 C.F.R. § 131.5(a), EPA must, within 60 days of the date of submission, approve the standards. 33 U.S.C. §1313(c)(3); 40 C.F.R. § 131.5(b). If EPA concludes that the state's standards are not consistent with federal regulations, then EPA has 90 days in which to notify the state and specify the changes necessary to meet the CWA's requirements. *Id.* If the state fails to adopt the changes within 90 days of notification by the EPA, then EPA must promulgate a water quality standard for the state. 33 U.S.C. §§ 1313(c)(3)-(4).

In 1987, Congress amended the CWA to allow tribes to obtain TAS authority and administer and enforce tribal programs under the CWA. 33 U.S.C. §1377(e). In 1991, EPA updated its regulations to include standards and procedures for tribes to obtain TAS. 56 Fed. Reg. 64876 (Dec. 12, 1991). And in 1994, EPA updated its regulations to streamline the TAS program and make it less burdensome for tribes to seek TAS status. 59 Fed. Reg. 64343 (Dec. 14, 1994). The TAS authority puts a tribe on the same footing as a state, with the ability to establish water quality standards, designate uses in accordance with tribal policy and culture, and issue discharge permits with limits protective of those standards and uses. *See* 33 U.S.C. §1377(e), 40 C.F.R. §131.8.

The CWA and EPA's existing regulations provide a robust water quality standards program, including significant and meaningful opportunities for states and TAS tribes to protect waters based on state and tribal uses, policies, and priorities. The proposed rule would upend the cooperative federalism foundation of the CWA and would strip states and TAS tribes of their ability to establish designated uses, make risk-based resource management decisions, and promulgate water quality standards that are based on sound science. Indeed, the proposed rule would unlawfully hinder states and TAS tribes' exercise of their fundamental authorities as sovereigns and as primary regulators under the CWA.

II. The CWA does not authorize the proposed rule

The proposed rule would require states and TAS tribes to protect reserved tribal rights when establishing CWA water quality standards. The proposed rule states that the CWA authorizes this proposal; however, EPA has not pointed to any specific provision in the statute that authorizes it to require that states adopt certain designated uses, interpret treaties or other agreements between sovereigns, or translate reserved rights into water quality standards. In the proposal's preamble, EPA spends three pages (out of 19) weaving together various court decisions that address interpretations of specific treaties, describing provisions of the CWA and how those programs work, and then cites to a single reference in the CWA to the word "treaty." None of the cited court decisions, CWA programs, or statutory provisions authorize EPA to take the action it has proposed.

a. EPA's cited statutory authorities do not support the proposed rule

The Agency relies on CWA section 501, which grants EPA authority to make "such regulations as are necessary to carry out" the Act. But this general grant of rulemaking authority does not authorize EPA to overlook the text of other CWA provisions or seek to expand its authority under the guise of authorities found outside of the CWA.

The proposed rule quotes only one provision from the CWA concerning treaties: "This Act shall not be construed as… affecting or impairing the provisions of any treaty of the United States." CWA section 511(a), 33 U.S.C. § 1371(a). On its face, this provision obligates the federal government *not to* affect and *not to* impair the provisions of *any treaty* with *any* sovereign (including, but not limited to, tribes). But EPA improperly interprets this clause as congressional approval to expand EPA's authority whenever the CWA intersects with "any treaty of the United States." This provision does not compel EPA to take any particular action; rather, it serves as a

limit on actions that EPA is authorized to carry out under the Act. In other words, this discrete provision does not create an affirmative responsibility for EPA or any other federal or state agency to manage water resources for the benefit, the best interest, or the needs of parties to treaties with the United States.

If Congress intended for states and EPA to protect tribal reserved rights through the CWA or for EPA to have any role at all in interpreting reserved rights, it would have said so. Section 511(a) simply lacks the force EPA has attempted to give it in order to support its atextual interpretation of section 303(c).

Similarly, EPA cannot draw authority to limit state discretion (and expand its own authority) from tribal treaties themselves. Treaties between the United States and tribes are not grants of authority to EPA, and EPA points to no treaty or set of treaties that would grant EPA the authority it claims. As a general matter, we are aware of no tribal reserved rights that EPA could rely on to expand its CWA authority or to require a state or TAS tribe to designate a particular use for its waters or to set standards in line with EPA's proposed rule. Tribal reserved rights similarly do not limit or prohibit a state, TAS tribe, or EPA from taking an otherwise lawful action under the CWA, and EPA has failed to explain why it is authorized and compelled to promulgate additional requirements based on such reserved rights.

b. The proposal would impermissibly restrict state and TAS tribe authority to set designated uses

The proposed rule would unlawfully mandate states and TAS tribes to adopt specific designated uses. As described above, the CWA requires states and TAS tribes to adopt water quality standards which "shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses." 33 U.S.C. § 1313(c)(2)(A). Water quality standards "shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter." *Id.* In establishing the standards, states and TAS tribes are required to consider the standards' "use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and . . . their use and value for navigation." *Id.* Beyond that, states and TAS tribes are provided discretion under the statute to establish uses appropriate for their waters, and then protect those uses through water quality standards.

EPA's existing regulations and guidance implement these statutory provisions. Specifically, 40 C.F.R. § 131.10(a) provides, "Each State must specify appropriate water uses to be achieved and protected." EPA guidance materials underscore the state and TAS tribe role in establishing designated uses. *See e.g.,* Water Quality Standards Key Concepts, Module 2: Use ("Designated uses are incorporated into State/Tribal law. They are used to determine water quality criteria, which serve as the basis for discharge permit limits. . . . 'Designated uses' (defined in 40 C.F.R. § 131.3(e)) are uses specified by a State or Tribe in its water quality standards regulations for each water body or segment, regardless of whether the uses are currently being attained. These uses describe the State/Tribe's management objectives and expectations for its waters and allow the State/Tribe to work with its stakeholders to identify the collective goal.").[1]

[1] Available at https://www.epa.gov/wqs-tech/key-concepts-module-2-use.

Contrary to the statutory, regulatory, and guidance materials quoted above, the proposed rule would remove the ability for states and TAS tribes to establish uses to be achieved and protected. In place of states and TAS tribes, EPA would require "tribal reserved right" designated uses be established over any water or land where such reserved rights may apply. Mandating a tribal reserved right designated use would almost certainly preclude a state or TAS tribe from designating other CWA-authorized uses in those areas, such as agricultural or industrial. EPA has not identified any legal authority allowing it to mandate or prohibit the adoption of certain designated uses and the proposal is not in accordance with the law.

Indeed, the CWA grants states and TAS tribes' broad authority to set designated uses as part of the CWA's carefully struck balance between the federal government and the states. Courts have recognized that the CWA does not necessarily grant states this authority but rather preserves existing state authority. *See, e.g.*, *Miss. Comm'n on Nat. Res. v. Costle*, 625 F.2d 1269, 1276 (5th Cir. 1980) ("[T]he specification of a waterway as one for fishing, swimming, or public water supply is closely tied to the zoning power Congress wanted left to the states."); *see also* 33 U.S.C. § 1251(b) ("It is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter."). EPA's proposed rule would deprive states of this authority specifically preserved by the CWA and would dramatically reduce state discretion to set designated uses in instances where a tribal reserved right may be implicated. To be sure, states and TAS tribes may adopt designated uses that protect higher levels of fish consumption, for example, so long as they are grounded in a factual record, based on a "sound scientific rationale," 40 CFR §§ 131.5(a)(2) & 131.119(a)(1), and "scientifically defensible methods," *id*. 131.11(b)(iii). But EPA lacks the authority to compel these outcomes by rule.

c. EPA lacks legal authority to interpret the scope and effect of tribal treaties

The proposed rule would also require states, TAS tribes, and EPA to interpret agreements between the federal government and tribes and incorporate them into CWA decision making. *See e.g.,* proposed 40 C.F.R. § 131.5(a)(9) (requiring EPA to determine "[w]hether water quality standards protect tribal reserved rights. . . ."). Notably, the proposed definition of "tribal treaty rights" includes those held "either expressly or implicitly, through treaties, statutes, executive orders, or other sources of Federal law." The proposed rule does not explain what "other sources of federal law" could apply or be incorporated into the CWA or the water quality standards program. Regardless, neither the CWA nor any other act of Congress has authorized EPA to undertake or assign to states and TAS tribes these new responsibilities. The proposal therefore exceeds EPA's statutory authority.

To the extent that EPA's interpretations of the statutes it administers may receive deference in certain circumstances pursuant to *Chevron U.S.A. v. Natural Resources Defense Council,* 467 U.S. 837 (1984), a precondition to any such deference is a congressional delegation of administrative authority. *See Adams Fruit Co., Inc. v. Barrett,* 494 U.S. 638, 649-50 (1990). EPA has not been delegated the authority to interpret tribal treaties or other instruments, and EPA's

interpretations under the proposed rule would not be entitled to any deference. *See Maine v. Johnson,* 498 F.3d 37, 45 (1st Cir. 2007). The federal courts have sole jurisdiction over questions of treaty-guaranteed rights. *See* 28 U.S.C. § 1362; *Confederated Salish and Kootenai Tribes of Flathead Reservation, Montana v. Flathead Irr. & Power Project,* 16 F. Supp. 1292, 1295 (D. Mont. 1985).

d. EPA lacks expertise to interpret the scope and effect of tribal treaties

In addition to its lack of legal authority, EPA fundamentally lacks the expertise or the competency to interpret treaties or other agreements between sovereigns. There is a significant and extremely complex body of law that would inform the interpretation of treaties and other instruments, such that even federal courts struggle with these interpretations. The reality is that EPA as an agency, even with its extraordinarily talented and dedicated staff, is not equipped to interpret tribal reserved rights or to establish state obligations to protect those rights.

EPA's lack of expertise in this field is evident in its proposal. Indeed, EPA repeatedly directs its own staff to rely on rights holders to delineate the scope and effect of the reserved rights at issue. And EPA suggests that states preparing standards should do the same: "EPA encourages ongoing communication between states and right holders to help states ascertain where reserved rights apply and what data are available to inform the level of water quality necessary to protect those rights." 87 Fed. Reg. 74368. This approach seems to delegate substantial responsibility for interpreting the scope and nature of the reserved right to the right holder, which would then be used by EPA to determine whether a state- or TAS tribe-issued standard complies with the Act's requirements. This approach turns section 303(c) on its ear.

If finalized, the proposed rule would be a significant federal overreach that infringes on the authority and discretion of sovereign states and TAS tribes. The CWA does not authorize EPA to promulgate this rule, and EPA would not have the expertise to administer it.

e. EPA's proposal lacks foundation and is replete with unsupported assumptions

EPA posits that it has an affirmative duty, indeed an "obligation[,] to ensure that its actions are consistent with treaties, statutes, executive orders, and other sources of Federal law reflecting tribal reserved rights." 87 Fed. Reg. 74364. But the proposal provides no support for the proposition that Congress intended for states or EPA to search far and wide for all sources of federal law that may potentially implicate tribal reserved rights in order to discharge its routine obligations under the CWA. Indeed, tribal reserved rights do not limit or prohibit a state or EPA from taking an otherwise lawful action under the CWA, and EPA has failed to explain why it is authorized or compelled to promulgate additional CWA requirements limiting state discretion based on such reserved rights. *See* Letter from Dennis Deziel, Regional Administrator, EPA Region 1, to Gerald Reid, Commissioner, Maine Department of Environmental Protection, *Withdrawal of Certain of EPA's February 2, 2015 Decisions Concerning Water Quality Standards for Waters in Indian Land*, Attachment A at 10, Attachment B, at 12 (May 27, 2020) ("[T]he Settlement Acts do not expand EPA's CWA authority, nor do they require Maine to designate a general fishing use with a sustenance component or EPA to recharacterize a

designated use to mean sustenance fishing. The Settlement Acts similarly do not limit or prohibit EPA from taking an otherwise lawful action under the CWA, such as approval of Maine's fishing designated use that does not mean sustenance fishing.").

EPA then suggests as a general matter that "tribal reserved rights encompass subsidiary rights that are not explicitly addressed in treaty or statutory language but are necessary to render those rights meaningful." 87 Fed. Reg. 74364. But EPA's assertion that water quality—or, more precisely, a certain level of water quality as identified by EPA—is one such "subsidiary right" lacks support. First, EPA admits that such subsidiary rights are atextual and derived through EPA's interpretations of a small subset of tribal reserved rights—interpretations that EPA is neither expressly authorized nor well-equipped to perform. Second, EPA's analysis is based on a select handful of tribal reserved rights. At no point in EPA's proposal does the Agency explain why these particular examples are representative of tribal reserved rights nationwide or should form the factual basis for EPA's proposed rule. Third, the case law on which EPA relies does not relate to water quality or achieving a certain contaminant level in the aquatic resources. Rather, these precedents turn on *access*—either of tribal members to a hunting or fishing area or of aquatic resources to the surface water body subject to the reserved treaty right. 87 Fed. Reg. at 74364 fn. 26, fn.27. It is a significant leap from interpreting such rights to include a subsidiary right of access to interpreting such rights to include a subsidiary right to a specific level of water quality for tens or hundreds of different pollutants. EPA's only support for its position that tribal reserved rights implicate water quality at all is a letter sent to EPA from the DOI solicitor eight years ago pertaining to a specific set of tribal treaties in one state. *Id*. at 74364 fn. 28. And even this letter couches the rights at issue as "*some* subsidiary rights to water quality"—a far cry from EPA's proposed approach that would reduce the discretion of states and TAS tribes and would require specific designated uses and vastly more stringent water quality standards nationwide.[2]

EPA reached vastly different conclusions in its actions within the last five years approving state water quality standards in Washington, Idaho, and Maine. 87 Fed. Reg. at 74366 fn. 42, fn. 43; 87 Fed. Reg. at 74369 fn. 57 (citing EPA decisions). EPA may of course reconsider previously held positions or interpretations, but it must do so knowingly and specifically, while considering all relevant aspects of the problem. Yet, in its proposal, EPA notes only in passing that it has reconsidered a small handful of specific "assertions" or "statements" in those prior decisions. 87 Fed. Reg. at 74366 & 74370. Although much of EPA's proposal contradicts elements of these prior decisions, EPA did not adequately acknowledge each issue on which it has changed position from those prior decisions for Washington, Idaho, and Maine, and it has not explained with specificity why its new interpretations are permissible under the CWA and why it believes its new interpretations to be "better." *FCC v. Fox Television Stations,* 556 U.S. 502, 515 (2009).

[2] EPA also fails to consider another relevant letter from DOI to EPA. Letter from Daniel H. Jorjani, Principal Deputy Solicitor, to Matthew Z. Leopold, General Counsel, Re: Maine's WQS and Tribal Fishing Rights of Maine's Tribes (April 27, 2018). As EPA described in its 2020 final action in Maine, in its 2018 letter, "DOI does not opine that EPA must take action beyond what it is statutorily authorized to do under the CWA as a result of such fishing rights." U.S. EPA, Response to Comments on EPA's Proposal to Revise EPA's 2015 Decisions on Sustenance Fishing Designated Use and Human Health Criteria in Maine at 21 (May 27, 2020) ("DOI's letter did not mention that EPA must take any specific action under the CWA in light of any Tribal fishing rights.").

III. The proposal is arbitrary and capricious because it undermines the cooperative federalism framework of the CWA and because EPA has failed to consider the harmful effects that would occur if the proposal were made final

The proposed rule would affect every aspect of the CWA regulatory programs and unlawfully interfere with fundamental state and TAS tribal authorities to manage their resources. The proposal's preamble also downplays the novel nature and potential reach of the proposed rule and fails to address implementation in any meaningful way. EPA has not considered these important aspects of the problem, making the proposal arbitrary and capricious.

a. EPA's requirement to incorporate heritage FCRs and highly protective risk levels has no basis in the CWA

The proposal would require states and TAS tribes to incorporate historic and pre-settlement fish consumption rates into EPA's human health criteria (HHC) equation, which would drive the stringency of the resulting water quality standards by orders of magnitude compared to current fish consumption rates and EPA's recognized national average. Similarly, the proposal would require states and TAS tribes to apply the same cancer risk rate to small tribal subpopulations as is applied to the general population, further driving stringency by orders of magnitude. These proposed changes are not supported by the CWA and are based on assumptions lacking adequate factual, scientific, and practical support. The proposed rule is arbitrary and capricious and unlawful under the Administrative Procedure Act (APA)and should be abandoned.

The CWA gives states and TAS tribes broad discretion to set water quality standards. The Act prescribes that such standards, which include designated uses and water quality criteria to protect those uses, "shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter," and "shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation." 33 U.S.C. § 1313(c)(2)(A). The Act does not prescribe precisely how a state or TAS tribe must weigh each factor, so long as the resulting standards are protective. Yet EPA's proposal would cabin the discretion that the Act affords to states and TAS tribes, without any authority for doing so.

By requiring states and TAS tribes not only to consider but also to adopt unsuppressed fish consumption rates and unduly stringent risk levels, EPA's proposed rule would afford the Agency increased authority to disapprove and replace state and TAS tribal water quality standards that are entirely lawful and consistent with CWA section 303(c). Moreover, this is not an area where EPA can claim deference for its interpretation, because Congress has spoken directly to the question of the breadth of State authority to set designated uses and criteria. *Chevron, U.S.A. v. Nat. Res. Def. Council*, 467 U.S. 837, 842 (1984) ("First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress"). EPA's attempt to cabin that clear discretion afforded by Congress should be accorded no deference.

EPA provides only a limited basis for why states *must* employ a fish consumption rate (or rate of consumption for other aquatic resources) based on an estimate of "unsuppressed" consumption instead of on actual, real-world consumption data or observations. Indeed, as noted in the proposal, EPA just four years ago in its 2019 approval of Idaho's water quality standards stated that "[n]othing in the CWA or the EPA's regulations and guidance, including the 2000 Methodology, requires a state to set a FCR based on an estimate of unsuppressed consumption." EPA's Approval of Idaho's New and Revised Human Health Water Quality Criteria for Toxics and Other Water Quality Standards Provisions at 12 (Apr. 4, 2019). EPA's proposal provides no detailed or persuasive rationale for departing from this interpretation, and it does not identify any provisions of the CWA that *require* states to employ a counterfactual estimate of "unsuppressed" consumption.

EPA's only statutory support for limiting the discretion afforded to states and TAS tribes in section 303(c) is the overarching goals section of the statute in CWA section 101(a). 33 U.S.C. § 1251(a). But a statutory goals section is neither a grant of additional authority to EPA nor is it a license to an agency to impose additional requirements on states in contravention of other statutory text. EPA's reliance on it here is misplaced. Even if EPA could look to the Act's goals section to inform its interpretation of section 303(c), EPA has identified no ambiguous text in section 303(c) that requires interpretation through the lens of section 101(a). Furthermore, simply the proposition that one of the Act's goals is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" does not mean that EPA has authority to compel states or TAS tribes to "restore" all waters to pre-settlement uses and conditions. EPA erred by not considering the goals in section 101(a) in the context of the stated policy of Congress in the next subsection of the Act, which emphasizes the important roles that states play under the CWA framework and that such state authority predates the CWA and thus was "preserved." 33 U.S.C. § 1251(b) ("It is the policy of Congress to recognize, preserve, and protect the primary responsibilities and right of States to prevent, reduce, and eliminate pollution.").

EPA's proposed requirement for states and TAS tribes to employ an estimate of "unsuppressed" consumption instead of actual, real-world consumption data or observations contravenes the CWA's statutory directive to states to promulgate standards that take into account "their use and value for" various enumerated factors. At no point does the Act either compel states to consider historical, prior uses (uses that may have been relevant decades if not centuries in the past) or direct states to prioritize historical uses over current or reasonably anticipated future uses. Likewise, the Act does not compel states to define reasonably anticipated future uses by employing estimates of historical or "heritage" use patterns. What's more, EPA's requirement of what counts as "unsuppressed" consumption is so ill-defined as to be almost certain to yield arbitrary outcomes. It also provides states and TAS tribes with inadequate information for what EPA will require upon reviewing their standards.[3] And EPA's proposed mandate likely will lead to violations of EPA's existing regulatory provision requiring that water quality standards must

[3] EPA further muddies the waters by stating that "the unsuppressed level should balance heritage use of a resource with what is currently reasonably achievable for a particular waterbody." 87 FR 74369. But EPA provides limited guidance on what "balancing" means in this context. In essence, EPA has proposed a formless, boundaryless standard that leaves EPA, and only EPA, as the ultimate arbiter of whether states and TAS tribes have properly divined an "unsuppressed" level of consumption.

be based on a "sound scientific rationale." 40 CFR § 131.5(a)(2); *id*. § 131.119(a)(1). EPA's proposal assumes, without evidence, that unsuppressed consumption rates for aquatic resources must be used because tribal members would return to subsistence levels of consumption but for "suppression" of these resources. But it is inconsistent with a sound scientific rationale to assume conditions such as subsistence levels of consumption that are neither reflective of the world as it is today nor grounded in a fact-based, reasonably foreseeable estimate of the future.

EPA's approach to mandating that states must use a risk rate to protect tribal members who may consume large amounts of aquatic resources "to at least the same risk level as provided to the general population of the state" is not rooted in the CWA and lacks a record foundation. The CWA provides no support for mandating treatment of high-consuming subpopulations as the target population for setting or revising water quality standards, particularly when the existing standards meet the statutory standard of "protect[ing] the public health or welfare" and "enhanc[ing] the quality of water." The prospect of tribal reserved rights does not endow EPA with additional statutory authority to restrict state or TAS tribe discretion to set lawful standards under the CWA.

The Agency also assumes without any analysis that tribal reserved rights to aquatic resources across the country compel states and TAS tribes to take this approach to setting a risk rate. The rulemaking record lacks adequate analysis from EPA substantiating why such rights are sufficiently similar such that all states must take this approach.

To the extent EPA's proposal is based on the proposition that a tribe's status as a sovereign demands that a tribal subpopulation be protected to the same degree as the general population, this is not a scientific, technical, or public health based determination and, contrary to its obligations under the APA, EPA has not provided any technical support for the proposed mandate. EPA has also not explained why the CWA would demand that tribal subpopulations be protected to a greater degree than other high consuming subpopulations besides general allusions to the "unique" status of tribes and their "unique" relationship with the environment. Under this approach, EPA could determine that any high-consuming subpopulation was sufficiently "unique" to warrant mandatory treatment as the target population. Such an approach would be unmoored from the CWA, EPA's existing regulations, and the 2000 Methodology.

b. EPA has not considered the effects of the proposed rule, including unreasonably and unnecessarily stringent water quality standards

EPA has not recognized, much less considered the effect that its proposed regulatory changes would have on water quality standards, the ability of states and TAS tribes to set, achieve or maintain such stringent standards, the thousands of regulated entities that could be affected, or the regulatory and economic impacts of designating vast new areas of the country as having impaired waters. These changes may also lead to the inability to permit discharges associated with important economic and social development. Finally, EPA has not provided any technical or scientific support for the proposed mandates. The proposed rule is therefore arbitrary and capricious and unlawful under the APA.

Since 2015, EPA has recommended that HHC water quality standards incorporate a fish consumption rate of 22 grams per day (g/day) where local data is not available. EPA Human Health Ambient Water Quality Criteria (2015). By contrast, the heritage consumption rate studies EPA included in the docket for this rulemaking range from 62 g/day to 1,646 g/day. Increasing the fish consumption rate in EPA's HHC equation has a direct and linear effect of increasing the stringency of the resulting HHC. Assuming populations consume hundreds or thousands of grams of fish per day increases the stringency of the resulting HHC water quality standards by orders of magnitude. Also, requiring that water quality standards be calculated based on a single fish consumption rate that does not account for both the general population and high-consuming subgroups is not consistent with current risk protection science.

Historically, states have had discretion to establish risk rates within a range that EPA and other federal agencies have determined to be protective of human health. The proposed rule would require states to apply the same risk rate to small tribal subpopulations as it applies to the general population. This is problematic because applying a particular risk rate to different population sizes changes the effective risk rate. For example, applying a 10^{-6} risk rate (meaning one additional person in a population of 1,000,000) to a population of 10,000 people would have an effective risk rate that is orders of magnitude more protective than 10^{-6}. These extremely conservative risk rates are inconsistent with modern risk protection science. *See* Attachment: Summary of Health Risk Assessment Decisions in Environmental Regulations (Arcadis, 2022) (previously submitted to EPA with public comments on EPA's Proposed Human Health Water Quality Criteria for the State of Washington (87 Fed. Reg. 19046 (April 1, 2022))).

The proposed risk rate mandate would fundamentally change EPA's longstanding policy allowing states and TAS tribes to make risk-management decisions, would be a substantial change in EPA's longstanding risk recommendations, and would result in water quality standards that are orders of magnitude more stringent than would be required under existing regulations. The proposed rule would result in water quality standards that are more stringent than the natural background or even detection levels, and standards that cannot be met using cost-effective technologies. *See* Memorandum from National Council for Air and Stream Improvement (NCASI) to the American Forest & Paper Association, Technical Comments on EPA's Proposed Rule: Water Quality Standards Regulatory Revisions to Protect Tribal Reserved Rights, Docket No. EPA-HQ-OW-2021-0791 (Feb 28, 2023). Importantly, modern risk science indicates that these extremely conservative risk rates and the resulting standards are unlikely to actually reduce risk to exposed populations and EPA has not presented any information or data to indicate otherwise. The only rationale that EPA has provided for the new risk rate mandate is the "unique status as right holders" of tribal members. 87 Fed. Reg. 74730. To be clear, these proposed changes are not based on scientific, technical, or public health considerations and, contrary to its obligations under the APA, EPA has not provided appropriate explanation or technical support for the proposed mandate.

Overly stringent risk levels that result in overly stringent water quality standards can also result in tremendous societal costs. At a minimum, EPA's proposed changes would result in the vast majority of covered waters being deemed impaired under the proposed stringent standards. Beyond an impairment designation, states and TAS tribes would be required to develop and implement Total Maximum Daily Loads (TMDLs) for likely hundreds of newly impaired waters.

Discharge permits under the National Pollutant Discharge Elimination System (NPDES) program would be required to include extremely conservative effluent limitations to ensure that dischargers did not cause or contribute to impairments.

EPA admits that it did not consider any of these almost-certain effects of the proposed rule, as the APA requires. *See e.g.,* EA, 5 ("EPA did not estimate where or how tribal reserved rights will impact state WQS actions."). EPA further admits that tribes in at least twelve states notified EPA that they plan to assert reserved rights, but EPA has not investigated the scope of the asserted reserved rights or how the proposed rule would affect CWA programs in these states.[4] There are likely many other states where reserved rights could be asserted under the proposed rule, underscoring the likely significant impacts the proposal would have across the country. EPA's failure to identify, quantify, or consider these significant impacts from the proposal, and the agency's failure to present any scientific or public health information to support or justify these changes, would render any final rule arbitrary and capricious, and therefore unlawful under the APA.

c. EPA unreasonably downplays the magnitude of impacts the proposal would have on state and TAS tribal water management programs

The agency has also failed to acknowledge or consider how the proposal would accelerate EPA's ability to interfere with state and TAS tribal water and resource management programs, including water quantity and flow. The CWA explicitly reserves this role to the states, but the proposed rule would significantly undermine states' rights to manage water and land use. EPA's failure to consider these important aspects of the problem is arbitrary and capricious. In addition, as further explained below, EPA's proposal would unlawfully "alter[] the federal-state framework by permitting federal encroachment upon a traditional state power," even though Congress did not clearly authorize any such encroachment in the CWA. *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Engin'rs*, 531 U.S. 159, 173 (2001) (*SWANCC*).

Under the current water quality standards program, a state or TAS tribe could establish designated uses that specifically protect flow; however, those decisions would be made by the state or TAS tribe, not the federal government. Under the proposal, EPA would have the ability to disapprove state standards if EPA determines that the standards are not sufficiently protective of an asserted reserved right, including for a certain quantity or flow of water. This would put EPA in the position of choosing whose claim to water should be protected, undermining and interfering with the states' longstanding role, not to mention negotiated and litigated claims to water rights.

Disputes over water rights, flow, and volume have spanned generations and continue today. Indeed, the U.S. Supreme Court will hear oral arguments on March 20 in a case where the Navajo Nation has asserted a breach of trust claim against the United States for failing to secure an adequate supply of water for the Nation to farm its land. *State of Arizona, et al., v. Navajo*

[4] The EA states, "during pre-proposal tribal consultation, several tribes asserted in written comments that they have reserved rights to aquatic and aquatic-dependent resources in areas where states have WQS jurisdiction, including portions of the Great Lakes, Maine, Idaho, New York, Minnesota, Michigan, Wisconsin, Montana, Oregon, Idaho, Washington, Wyoming and Alaska." EA, 5.

Nation, et al.; Department of Interior et al. v. Navajo Nation, et al. (Nos. 21-1484 and 22-51). The Navajo Nation's claims are based on implied reserved rights, the same rights EPA's proposal would require states, TAS tribes, and EPA to protect through the water quality standards program. In fact, EPA's proposed rule preamble is substantively aligned with legal arguments and positions presented by the Navajo Nation, and is inconsistent with the Justice Department's legal arguments and positions.[5] This suggests that EPA has proposed a rule that is contrary to the federal government's position concerning tribal reserved rights and that the Department of Justice may choose not to defend. The proposal does not acknowledge this pending Supreme Court case, nor does it explain how the proposed regulation might affect future water rights disputes between sovereigns.

d. The proposal raises significant implementation questions

The proposal's preamble does not provide any context or guidance for how EPA expects the proposed rule would be implemented. For example, the proposed rule would require states to protect reserved tribal rights, but EPA admits that it does not know the geographic or substantive scope of those rights. While there are cases where the meaning and extent of certain reserved rights have been adjudicated and determined by a court of competent jurisdiction, these cases represent a slim minority. Most tribal claims to reserved rights have not been adjudicated, nor is their geographic or substantive extent established by legal precedent. In other words, EPA is mandating a requirement, the scope of which it has not ascertained or even attempted to ascertain. This is not the hallmark of sound agency decision making and runs afoul of basic APA requirements. It is unclear how states, TAS tribes, or EPA will go about identifying the extent of such reserved rights or what resources are available for that purpose. It is also unclear how states and TAS tribes would translate reserved rights—including implied reserved rights and rights protecting the undefined "aquatic-dependent resources"—into achievable numeric water quality standards or meaningful narrative standards, or how these would be applied in other CWA programs such as the sections 401, 402, and 404 programs.

What is clear is that states and TAS tribes will have significant challenges and burdens attempting to comply with any final rule. The proposal does not recognize, let alone address these significant burdens. For example, given the extremely broad definition of "tribal reserved rights," even finding out what treaties or other agreements apply, and as importantly, what they mean, is a difficult and uncertain task. Many treaties have been specifically abrogated by Congress, others impliedly so. Some treaties thought long inapplicable have recently been given new force. *See e.g.,* McGirt *v. Oklahoma*, 140 S. Ct. 2452 (2020). A recent decision of the U.S. District Court for the District of Minnesota illustrates the difficulty of ascertaining treaty rights:

> When interpreting Indian treaties, courts "give effect to the terms as the Indians themselves would have understood them." *Minnesota v. Mille Lacs Band of Chippewa*

[5] The Department of Justice brief is available here: http://www.supremecourt.gov/DocketPDF/21/21-1484/250399/20221219215422061_22-51%20Interior%20FINAL.pdf; the Navajo Nation's brief is available here: http://www.supremecourt.gov/DocketPDF/21/21-1484/253739/20230201172442801_State%20of%20Arizona%20v.%20Navajo%20Nation%20Merits%20Brief%20FILE.pdf.

> *Indians*, 526 U.S. 172, 196 (1999). "[T]he treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians." *Fishing Vessel*, 443 U.S. at 676 (*quoting Jones v. Meehan*, 175 U.S. 1, 11 (1899)). Interpreting a treaty thus requires "look[ing] beyond the written words to the larger context that frames the Treaty, including 'the history of the treaty, the negotiations, and the practical construction adopted by the parties.'" *Mille Lacs Band*, 526 U.S. at 196 (quoting *Choctaw Nation v. United States*, 318 U.S. 423, 432 (1943)). Any ambiguous term must be "liberally construe[d] . . . in favor of tribal interests." *United States v. Gotchnik*, 222 F.3d 506, 509 (8th Cir. 2000). Treaties "are to be read with the tradition of Indian sovereignty in mind." *Sac & Fox Tribe of Miss in Iowa. v. Licklider*, 576 F.2d 145, 150 (8th Cir. 1978).

Order, *Fond Du Lac Bank of Lake Superior Chippewas v. Cummins,* Case No 0:22-cv-00170-PJS-LIB, at 5 (D. Minn. Feb 24, 2023). EPA's definition of "tribal reserved rights" also refers to Executive Orders. While some reservations and tribes were recognized and lands set aside by Executive Order, there are many other Executive Orders purporting to recognize tribal rights, but not specifically referring to reservations. EPA must at least identify which, or what kind, of Executive Orders would be necessary for a state to consider.

The complexity of the implementation issues presented by the proposed rule would be multiplied based on the number of tribes that claim treaty rights in a state or TAS tribal territory and the number and extent of watersheds where these rights may apply. In states and TAS tribal territory with many tribes, the magnitude of the work could be extraordinary and could require resources that states and TAS tribes simply do not have. For example, there will be especially burdensome requirements in Alaska, where there are 228 federally recognized tribes. To implement the proposed rule, the State of Alaska could be required to consider and establish separate standards that reflect the reserved rights of each tribe. The proposed rule does not acknowledge, let alone consider these significant implementation challenges.

Additionally, the proposal explains that when EPA reviews a state's or TAS tribe's water quality standard, it will consult with tribal right holders to evaluate whether the state or TAS tribe has properly identified and protected reserved rights. The proposal does not provide a timeline or standards for what this consultation would entail, the kinds of information EPA would gather, or whether a certain quality of information or data would be needed from the tribe to evaluate asserted reserved rights. Given the lack of objective standards and procedures, it is unclear how EPA could conduct these consultations and review and act on state water quality standards, all within the 60 or 90 days allotted in CWA section 303 and EPA's regulations. *See* 33 U.S.C. § 1313; 40 C.F.R. §131.21. EPA's proposal is not consistent with the timeline for review required by Congress in the CWA. *See generally Flint Ridge Development Co. v. Scenic Rivers Assn. of Okla.*, 426 U.S. 776, 788-89, 791 (1976) (holding that National Environmental Policy Act's environmental impact statement (EIS) requirement did not apply to agency action that must be completed in 30 days, as requiring an EIS would create "a clear and fundamental conflict of statutory duty") ("It is inconceivable that an environmental impact statement could, in 30 days, be drafted, circulated, commented upon, and then reviewed and revised in light of the comments."); *Jamul Action Comm. v. Chaudhuri*, 837 F.3d 958, 965 (9th Cir. 2016) ("an agency cannot prepare an EIS in ninety days").

Finally, it is unclear how water quality standards protecting reserved rights would be evaluated by EPA. All other water quality standards must be based on "sound scientific rationale" and "scientifically defensible methods." 40 C.F.R. §§131.5(a)(2); 131.11(a)-(b). To date, the minimum federal standards under the CWA have been set by statute and regulation and are intended to be transparent so that states and TAS tribes can easily understand what is required of them, and how to establish compliant standards. Under the proposed rule, the minimum federal CWA standards would no longer be dictated by a CWA section 304(a) recommendation based on the best available science, or a 304(b) technology-based effluent limitation established after scientific study, as the CWA requires. Rather, the proposal would allow a new minimum standard to be established on a case-by-case basis after identifying and interpreting all applicable tribal reserved rights, a term that is defined unreasonably broadly in the proposal. Under the proposed rule, a new federal minimum standard could be established by an implied tribal reserved right that is memorialized in some unspecified form of federal law and that entirely lacks an objective standard or connection to the best available science.

It is unclear how standards derived from an undefined historic "unsuppressed" reserved right, for example, would be evaluated against the regulatory requirements for water quality standards. What level of certainty or data quality must be demonstrated for a state to incorporate historic or unsuppressed expressions of reserved rights into water quality standards? How should a state or TAS tribe evaluate population growth and other variables distinct from water pollution that could affect the ability of historic uses to be supported across time? What level of deference would states get in their consideration of reserved rights and formulation of water quality standards? What level of information or evidence would be required to overrule a state's assessment and protection of reserved rights?

EPA has also not explained whether general or individual discharge permits issued under the NPDES program would receive a different level of review if the discharger is located in or near an area subject to tribal reserved rights. For example, would EPA review effluent limits to ensure they are protective of reserved rights? Would compliance schedules or variances be considered under a different standard of review if the permittee is located in or near a reserved rights area?

EPA's failure to consider or address these basic questions runs afoul of the agency's obligations under the APA.

e. The proposal would have serious and indefensible federalism implications

The proposal preamble states, "EPA has concluded that this action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government." 87 Fed. Reg. 74375. For all of the reasons described in detail above, this proposed conclusion is deeply flawed and EPA's failure to consider the significant federalism implications of the proposal render the proposal arbitrary and capricious and not in accordance with law.

If finalized, the proposed rule would completely upend the carefully crafted and comprehensive cooperative federalism framework of the CWA. EPA attempts to downplay the potential impacts on states and TAS tribes by assuming that, in cases where reserved rights may expand across multiple jurisdictions, states and tribal interests would be aligned. This assumption is unreasonable and therefore arbitrary, just as it would be unreasonable to assume that any two states in the same geographic area would be aligned on matters of economic, environmental, or foreign policy.[6] Even setting aside the strong likelihood that sovereigns will not infrequently have differing views on major policies, the proposal would require both sovereigns to submit to EPA for adjudication of disputes over potentially serious environmental, human health, risk management, and economic policy decisions. The proposal plainly has very significant federalism implications, and EPA's contrary conclusion is unreasonable, in violation of the APA.

f. The Coalition supports a Probabilistic Risk Assessment approach for the water quality standards program

If EPA wants to develop granular criteria that adequately protect high consuming subpopulations, including tribal subpopulations, the use of Probabilistic Risk Assessment (PRA) is very well-suited to this task, and we recommend that EPA adopt it for the water quality standards program. *See* U.S. Environmental Protection Agency, Office of the Science Advisor, Risk Assessment Forum White Paper: Probabilistic Risk Assessment Methods and Case Studies, iii (2014) (noting that "risk assessors, risk managers and others, particularly within the scientific and research divisions, have recognized that more sophisticated statistical and mathematical approaches could be utilized to enhance the quality and accuracy of Agency risk assessments"). As an alternative, PRA allows different risk levels to be targeted to different subsets of the population, and final water quality standards can be chosen such that the risk levels are concurrently met for each subpopulation. PRA aligns with current EPA risk recommendations, while the departure described in the proposed rule is not consistent with EPA recommendations, nor has it been justified from past EPA interpretations of what the CWA requires.

Inconsistent with EPA's longstanding recommendations, the proposed rule would disallow states and TAS tribes from applying a 10^{-4} risk rate for tribal subpopulations. According to EPA's methodology for developing human health water quality standards, a 10^{-4} risk target is considered *de minimis* and protective of public health, and therefore the use of risk targets lower than 10^{-4} may decrease the numerical water quality criteria but does not necessarily increase the associated level of protection. *See* U.S. EPA Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health (2000). Eliminating the 10^{-4} rate as a potential risk target for subpopulations unnecessarily limits the utility of modern risk assessment approaches, such as PRA, which has the ability to consider multiple risk targets in various subpopulations, and protect all subpopulations concurrently at different levels. *See* Memorandum from National Council for Air and Stream Improvement (NCASI) to the American Forest & Paper Association (AF&PA), Technical Comments on EPA's Proposed Rule: Water Quality Standards Regulatory Revisions to Protect Tribal Reserved Rights, Docket No. EPA-HQ-OW-2021-0791 (Feb 28, 2023).

[6] EPA admits that tribes "may choose to incur costs, such as legal fees or costs to complete scientific studies to support their position on the scope and nature of their rights and/or water quality necessary to protect them." EPA Economic Analysis (November 2022), 3.

Eliminating consideration of baseline risk (e.g., 10^{-4}) for small subpopulations reduces the scientific validity and efficiency of risk assessments and increases the propensity of compounded conservatism. These outcomes do not reduce risk to exposed populations and can lead to unachievable water quality criteria, where the numeric criteria are more stringent than the natural background or even detection levels, or the resulting criteria cannot be met using cost-effective technologies. *Id.*

As some states have begun to rely on PRA, EPA has recognized its value as best available science. *See* U.S. Environmental Protection Agency, Office of the Science Advisor, Risk Assessment Forum White Paper: Probabilistic Risk Assessment Methods and Case Studies, iii (2014). Therefore, as EPA considers developing risk levels, the agency should use PRA as a more granular approach that can enable EPA to achieve specific levels of risk for specific populations.

IV. The proposed rule exceeds CWA authorities and implicates the "major questions" doctrine

As an executive agency, EPA has only those powers given to it by Congress. After fifty years of CWA implementation, the proposed rule would purport to grant new authorities to EPA and would upend the CWA's longstanding framework that puts states and TAS tribes on equal footing as the primary administrators of CWA programs. The proposal would grant EPA powers to interpret treaties and other agreements among sovereigns, incorporate explicit or implied reserved rights into the CWA framework, and adjudicate disputes among sovereigns.[7] EPA cites no authority in the CWA for this expansive proposal, because there is none. Rather, EPA asserts that its discretionary authority to implement the CWA allows it to create these new rights and obligations under a statute that is more than 50 years old.

As noted above, the proposed rule quotes only one provision from the CWA concerning treaties: "This Act shall not be construed as… affecting or impairing the provisions of any treaty of the United States." 87 Fed. Reg. 74363, 74365, citing 33 U.S.C. 1371(a). This provision does not create an affirmative responsibility for EPA or any other federal or state agency to manage water resources for the benefit, the best interest, or the needs of any other party to a treaty with the United States. To be clear, CWA section 511 applies to all treaties and does not specifically reference tribal treaties or any other instrument related to tribes.

As recently as 2014, EPA argued in court that compliance with the CWA and its regulations was sufficient to satisfy any treaty-driven trust obligation. In *Sierra Club v. McLerran*, No. 2:11-cv-01759-BJR Dkt. No. 91 at 40-43 (W.D. Wash. Jan. 29, 2014), EPA argued that, "in the absence

[7] The Coalition recognizes the existing dispute resolution provision in 40 CFR §131.7 that is authorized by CWA section 518(e) and referenced in the proposed rule. However, section 518(e) only authorizes EPA to implement dispute resolution when a state and tribe have different water quality standards on a common waterbody. As a general matter, the stringency of a water quality standard is appropriately within EPA's expertise and managing disputes on this topic has been expressly authorized by Congress. However, Congress did not, in section 518(e), authorize EPA to arbitrate disagreements among sovereigns over the meaning of treaties and other instruments of federal law. The proposed rule exceeds the authority provided in CWA section 518 (e). 33 U.S.C. §1377(e).

of a specific duty that has been placed on the government with respect to the Tribe, the United States' general trust responsibility is discharged by the agency's compliance with general regulations and statutes not specifically aimed at protecting Indian tribes." The court agreed with EPA and held that the agency had satisfied its trust duty by complying with the CWA. Contrary to its obligations under the APA, EPA has not acknowledged this prior agency position in the proposed rule, nor has EPA provided an explanation for the change in position.

Additionally, EPA has published this proposal at the same time that the Supreme Court is considering whether implied tribal reserved rights create federal trust obligations—these are the same "implied reserved rights" that the proposal would require states, TAS tribes, and EPA to protect. The proposed rule raises many questions about EPA's authority to incorporate such rights into the statutory CWA program, including whether the agency intends to establish a trust obligation through this rulemaking.

The proposal presents issues of great "economic and political significance," and there is no evidence in the CWA, the proposal, or the rulemaking docket that Congress granted EPA these authorities. The Supreme Court has observed that "[e]xtraordinary grants of regulatory authority are rarely accomplished through 'modest words,' 'vague terms,' or 'subtle device[s].'" *W. Virginia v. Env't Prot. Agency*, 142 S. Ct. 2587, 2609 (2022) (citations omitted). In this case, there are no modest, vague or subtle statements by Congress because there are no congressional words or statements at all that support EPA's proposal. The Supreme Court has recently rejected similar agency actions. *See, e.g., Nat'l Federation of Indep. Bus. v. OSHA*, 142 S.Ct. 661, 665(2022) (*per curiam*); *Alabama Ass'n. of Realtors* v. *DHS*, 141 S.Ct. 2485, 2487 (2021) (*per curiam*); *W. Virginia,* 142 S. Ct. at 2615-16. The Court has been clear that an agency "must point to 'clear congressional authorization' for the power it claims" when it asserts extraordinary authorities. *W. Virginia*, 142 S. Ct. at 2609 (2022).

The proposed rule implicates the "major questions" doctrine for other reasons. After more than four decades administering the CWA, EPA has now "'claimed to discover in a long-extant statute an unheralded power' representing a 'transformative expansion in its regulatory authority," *W. Virginia*, 142 S. Ct. at 2610 (cleaned up), that it used for the first time in 2015 on a limited and state-specific basis, and which has never applied nationwide. EPA's reliance on section 511(a), 33 U.S.C. § 1371(a), as support for expanding its authority to narrow state and TAS tribal discretion under section 303(c) has parallels to the Agency's location of "newfound power in the vague language of an ancillary provision of the Act" that the court rejected in *W. Virginia*. *Id*. And just as in *W. Virginia*, "the Agency's discovery allowed it to adopt a regulatory program that Congress had conspicuously and repeatedly declined to enact itself"—in this case, a different water quality standards program for waters subject to tribal reserved rights. *Id*.

Relatedly, the proposed rule does not pass muster under *SWANCC*. In that case, EPA and the Army Corps of Engineers claimed federal jurisdiction under the CWA that "would result in a significant impingement of the States' traditional and primary power over land and water use." 531 U.S. at 174. The Supreme Court explained that "[w]here an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result," *id.* at 172, especially "where the administrative interpretation alters the

federal-state framework by permitting federal encroachment upon a traditional state power." *Id.* at 173. As Congress had not provided any such clear statement, the Court "reject[ed] the [Agencies'] request for administrative deference" to their claim of jurisdiction. *Id.* at 174. Similarly, in this case, there is no evidence, much less clear evidence, that Congress intended to grant EPA the power to override states' land use powers by claiming a power to authoritatively interpret tribal reserved rights in reviewing and approving state water quality standards.

For all of the reasons detailed above, the proposed rule violates the APA, exceeds EPA's statutory authority, and implicates the "major questions" doctrine.

V. The Economic Analysis is flawed and underestimates potential impacts of the proposed rule

The agency's Economic Analysis (EA) significantly underestimates the likely costs for states and TAS tribes to implement the rule and completely ignores the likely significant costs to the regulated community. The EA is fatally flawed and must be withdrawn.

The EA acknowledges that "states and EPA would bear the majority of the burden for determining the extent of reserved rights and water quality necessary to protect those rights." EA 3. To assess these costs, EPA estimated that states would undertake three rulemakings to update CWA programs to meet the requirements in the proposal. EPA estimated that the first rulemaking would be the most burdensome for states, requiring a range of 100-500 hours of effort to promulgate a new state rule. EPA estimates the second and third rules to be less burdensome, with 90-450 and 75-375 hours of effort, respectively.

EPA asserts that, for the most burdensome rulemaking, five state employees working full time (40 hours per week) could complete a rulemaking process—from development, drafting, proposal, public engagement, responding to public comments, revising, and finalizing a rule—in a little more than two weeks' time (5 employees x 100 hours each / 40 hours per week = 2.5 weeks). Alternatively, EPA would assume that a single state employee could work full time and complete this process in a little over three months. (1 employee x 500 hours / 40 hours per week = 12.5 weeks). These estimates of state staff hours needed to develop, propose, and finalize a rule are unreasonably low and must be reworked to acknowledge that state rulemaking procedures, like federal rulemaking procedures, typically take years to complete. EPA also unreasonably assumes that there would be no ongoing costs for states to implement or enforce the proposed rule. EPA's estimates lack credibility.

Notably, the EA cost estimates do not include the time or resources that states would incur to investigate claims relating to tribal reserved rights, including the geographic or substantive extent of those rights, or to develop tools to assess whether such rights are already protected, or what additional incremental protection may be necessary to meet the requirements of the rule. Further, the EA assumes that all states have equal amounts of staffing, resources, and expertise in tribal-related matters to devote to such an effort. Not all state agencies have the same resources, and some may have very little experience dealing with tribal reserved rights, if any at all. If the proposed rule is finalized, such states would likely have to increase staffing, hire expert consultants, or otherwise develop the competency needed to address complex tribal matters. This

would likely increase the cost and time needed for states to complete rulemakings. As noted above, the proposed rule could lead to vast numbers of impaired waters that would require significant long-term dedication of qualified resources for monitoring, assessment, and TMDLs. EPA makes no attempt to define these resource requirements in the proposed rule.

Also as noted above, the EA cost estimates also do not include the likely billions of dollars in costs that the regulated community would incur across the nation as a result of the proposal. When EPA promulgated federal water quality standards in Washington, employing the policies that the proposed rule would codify, businesses estimated that the compliance costs would be in the billions of dollars. *See* Attachment: Treatment Technology Review and Assessment (HDR, 2022) (previously submitted to EPA with public comments on EPA's Proposed Human Health Water Quality Criteria for the State of Washington (87 Fed. Reg. 19046 (April 1, 2022))). The proposed rule would mandate these practices in all states with tribal reserved rights, easily elevating costs into the tens or hundreds of billions of dollars. Such costs would be borne by communities and businesses of all sizes, including small businesses. EPA and the SBA Office of Advocacy should convene a Small Business Advocacy Review panel to evaluate the proposed rule in accordance with the Small Business Regulatory Enforcement Fairness Act. Additionally, there may be significant cost impacts on small and disadvantaged communities that EPA has not considered.

VI. EPA Has Failed to Reasonably Consider the Potential Impacts of the Proposed Rule, Including Costs, and Must Perform and Consider a Full Cost-Benefit Analysis

In the economic analysis section of the preamble, EPA states the following:

> "Pursuant to Executive Orders 12866 (Regulatory Planning and Review) and 13563 (Improving Regulation and Regulatory Review), EPA has prepared an economic analysis to inform the public of potential costs and benefits of this proposed rule. *This analysis is not required by the CWA."*

87 Fed. Reg. 74373 (emphasis added). EPA acknowledges that the rule could lead to additional compliance costs for regulated entities to meet permit limits that would be put in place as a result of this rule. However, EPA states that, because of uncertainty, it was unable to estimate costs to regulated entities and instead focuses on administrative costs to state governments. EPA sought comment on its economic analysis. 87 Fed. Reg. 74373.

In a line of cases from *Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29 (1983) to *Entergy Corp. v. Riverkeeper,* 556 U.S. 208 (2009), to *Michigan v. EPA*, 135 S. Ct. 2699 (2015), the Supreme Court has made clear that agencies such as EPA *must* weigh costs and benefits, absent a statutory prohibition to the contrary.

In *Michigan*, the Court made clear that statutory language such as "appropriate and necessary" is the kind of "capacious" language that *requires* the consideration of all relevant factors, including cost. *See* 135 S. Ct. at 2707. All nine justices agreed that "[c]ost is almost always a relevant, and usually, a highly important factor in regulation. Unless Congress provides otherwise, an agency

acts unreasonably in establishing a standard-setting process that ignore[s] economic considerations." *Id.* at 2716-17 (Kagan, J., dissenting). Nothing in the relevant language of the CWA relieves EPA from this obligation, and the proposed rule fails to provide meaningful estimates of the costs that would result from the rule and does not attempt to estimate costs on regulated entities. EPA likewise does not reasonably compare the costs with the benefits likely to occur, nor does EPA consider reasonable alternatives. Indeed, Section 501(1) of the CWA—cited by EPA as authority for the Proposed Rule—delegates to the EPA Administrator the authority to "prescribe such regulations *as are necessary* to carry out his functions" under the Act. 87 Fed. Reg. at 74363; 33 U.S.C. § 1361(a) (emphasis added). This capacious phrase, "as are necessary," requires the Administrator to consider all relevant factors, including cost. Likewise, Section 304(a) directs the Administrator, in developing water quality criteria, to develop information "on the factors *necessary*" to restore and maintain the relevant waters and wildlife. 33 U.S.C. § 1314(a) (emphasis added). Furthermore, Section 303(c) makes clear that water quality standards "*shall be established taking into consideration their use and value for public water supplies*, propagation of fish and wildlife, *recreational purposes*, *and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation*." 33 U.S.C. § 1313(c) (emphasis added). Thus, EPA has broad discretion to consider all relevant factors, including impacts such as costs, and must do so to avoid being arbitrary.

EPA acknowledges in the preamble that the rule, if finalized as proposed, would impose costs on regulated entities and non-point sources. While non-point sources are not typically subject to NPDES permitting, states and TAS tribes can and do regulate non-point sources through water quality standards, as mandated by CWA section 208(b)(2). In short, if EPA proceeds to require states and TAS tribes to implement an interpretation of tribal reserved rights in state water quality standards, that would lead to more stringent TMDLs, and states and TAS tribes foreseeably would allocate some reductions to non-point sources. Examples of reductions would likely come from stormwater management or other control measures. EPA must fully account for and consider all such foreseeable likely consequences of its rule, including likely costs that would be imposed on various sources, including point and non-point sources.

VII. Conclusion

The proposed rule exceeds EPA's statutory authority and would impose significant costs and burdens on states, TAS tribes, and the regulated communities represented by this Coalition. EPA has not acknowledged, let alone considered, these significant costs and burdens, nor has it weighed the costs and benefits, as the agency is required to do by law. EPA has also not demonstrated that the existing water quality standards program and framework are inadequate to protect the environment or human health or presented any scientific, technical, or public health information to support the proposed rule. The Coalition supports efforts to promote tribal self-determination and believes that the existing water quality standards framework provides more than adequate tools to ensure the protection of tribal uses. The proposed rule is not lawful or implementable and the Coalition respectfully requests that EPA withdraw the proposal and work in a cooperative manner with state, tribal, and private sector stakeholders to address all relevant concerns.

Please feel free to contact us with questions or if you wish to discuss.

Sincerely,

American Exploration & Mining Association
American Farm Bureau Federation
American Forest & Paper Association
Essential Minerals Association
National Mining Association
The Fertilizer Institute
U.S. Chamber of Commerce