Fredric P. Andes, Coordinator
Barnes & Thornburg LLP
One North Wacker Drive
Suite 4400
Chicago, IL 60606
(312) 214-8310

Federal Water Quality Coalition

March 6, 2023

EPA Docket Center
Office of Water Docket (Mail Code 28221T)
U.S. Environmental Protection Agency
1200 N. Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Re: FWQC Comments on EPA's Proposed Rule, Water Quality Standards Regulatory Revisions to Protect Tribal Reserved Rights, EPA-HQ-OW-2021-0791

Dear Sir or Madam:

The Federal Water Quality Coalition (FWQC or the Coalition) appreciates the opportunity to file these comments on EPA's proposed rule, Water Quality Standards Regulatory Revisions to Protect Tribal Reserved Rights (the "Proposal"). The Proposal was published in the Federal Register on December 5, 2022 (87 Fed. Reg. 74361), with a comment deadline of March 6, 2023.

I. The FWQC's Interest

The FWQC is a group of industrial companies, municipal entities, agricultural parties, and trade associations that are directly affected, or which have members that are directly affected, by regulatory decisions made by EPA and States under the Federal Clean Water Act (CWA). FWQC membership includes entities in the aluminum, agricultural, automobile, chemicals, coke and coal chemicals, electric utility, home building, iron and steel, mining, municipal, paper, petroleum, pharmaceutical, rubber, and other sectors. FWQC members, for purposes of these comments, include: The Aluminum Association; American Chemistry Council; American Coke and Coal Chemicals Institute; American Forest & Paper Association; American Iron and Steel Institute; American Petroleum Institute; Association of Idaho Cities; Auto Industry Water Quality Coalition; Cargill, Incorporated; China Clay Producers Association; City of Pueblo (CO); City of Superior (WI); City of Tempe (AZ); Corn Refiners Association; Eli Lilly and Company; Freeport McMoRan Inc.; Hecla Mining Company; Mid America CropLife Association; National Association of Home Builders; National Oilseed Processors Association; Portland Cement Association; Shell; Treated Wood Council; U.S. Tire Manufacturers Association; Utility Water Act Group; and Western States Petroleum Association.

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FWQC member entities or their members own and operate facilities located throughout the country. Those facilities operate pursuant to NPDES permits that impose control requirements based on water quality standards. The Proposal provides new requirements that must be followed by States in adopting water quality standards. The FWQC, therefore, has a direct interest in the Proposal.

II. FWQC CONCERNS AND RECOMMENDATIONS

The FWQC supports the needs and concerns of Tribes and their members for clean water. Those needs and concerns must be protected in ways that are consistent with the procedures and requirements established by applicable laws, including the Clean Water Act. Any new requirements imposed in this area must also be based on sound science and must be capable of being implemented in effective, non-arbitrary ways. Unfortunately, EPA's Proposal does not meet those tests. The new proposed requirements are not authorized by the Clean Water Act. They also rest on unproven scientific rationales, and we believe that they would be difficult to implement as States set water quality standards. The FWQC has raised these concerns before, when EPA has considered taking other actions in this area, and we raise these concerns again in these comments as to the specific provisions of the Proposal. We urge EPA to withdraw the Proposal, and to instead begin a dialogue with the Tribes and other stakeholders, to determine the best and most effective ways to protect Tribal rights within the structure of EPA's Clean Water Act programs.

A. Relevant Sources of Federal Law

As an initial matter, the FWQC has concerns regarding the sources of Federal law on which EPA bases its Proposal. EPA cites Tribal treaties, but also mentions several other potential sources. But EPA fails to recognize that there are fundamental differences, legally, between Tribal treaties and the other "sources of Federal law" that are mentioned. And those other "sources" do not provide a clear legal basis for imposing new requirements that go beyond what has been adopted – and what is authorized – under the Clean Water Act. For instance, EPA refers to executive orders. But an executive order issued by the President cannot override a statute, such as the CWA. EPA also refers to "statutes." But the Supreme Court has stated clearly, in *National Association of Home Builders v. Defenders of Wildlife,* 551 U.S. 644 (2007), that another statute (even one as important as the Endangered Species Act) cannot change the requirements set forth in the CWA. Beyond executive orders and statutes, EPA refers generally to "other sources of Federal law," but we have no idea what that means. If EPA decides, despite the concerns that we lay out in these comments, to continue work on a proposal to protect Tribal rights, it should delete all references to these "sources" of Federal law. The only issue that EPA should be considering is as to rights provided in Tribal treaties. But even those treaties, we believe, do not provide a clear legal basis for the Proposal, as we explain next.

B. **Effect of Tribal Treaties**

As to Tribal treaties, it is important to consider the background as to how EPA has dealt with this issue over time. The CWA was enacted over 50 years ago, and obviously, the treaties were created over 100 years ago. But at no point, from the time that the CWA became law until 2015, did EPA voice the view that the treaties could modify or overrule the CWA. In fact, EPA has taken precisely the opposite position in court, stating in briefs that the treaties do not affect its authority under the CWA or impose any additional obligations. In that case, EPA argued that its compliance with the CWA and its regulations satisfied any Federal trust responsibility owed to the Spokane Indian Tribe. *Sierra Club v. McLerran*, Case No. 2:11-cv-01759-BJR Docket No. 91 at 40-43 (January 29, 2014). EPA explained as follows:

> There is a "distinctive obligation of trust incumbent upon the Government in its dealings with [Indian tribes]." *Gros Ventre Tribe v. United States*, 469 F.3d 801, 810 (9th Cir. 2006) (quoting *United States v. Mitchell*, 463 U.S. 206, 225 (1983)). However, "[w]ithout an unambiguous provision by Congress that clearly outlines a federal trust responsibility, courts must appreciate that whatever fiduciary obligation otherwise exists, it is a limited one only." *Shoshone-Bannock Tribes v. Reno*, 56 F.3d 1476, 1482 (D.C. Cir. 1995). While that general trust relationship allows the federal government to consider and act in the tribes' interests in taking discretionary actions, it does not impose a duty on the federal government to take action beyond complying with generally applicable statutes and regulations. *Jicarilla,* 131 S. Ct. at 2325. Accordingly, in the absence 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." *Morongo Band of Mission Indians v. F.A.A.*, 161 F.3d 569, 574 (9th Cir. 1998); *Okanogan Highlands Alliance v. Williams*, 236 F.3d 468, 479 (9th Cir. 2000) (Bureau of Land Management's approval of gold mine satisfied trust obligations by the agency's compliance with NEPA); *Gros Ventre*, 469 F.3d at 814.

In that case, the judge ruled in favor of EPA on the trust responsibility issue, agreeing that EPA had discharged its trust duty by complying with the CWA. *Sierra Club v. McLerran*, 45 ELR 20052, Case No. 2:11-cv-01759-BJR Docket No. 120 at 23 (March 16, 2015). In the Proposal, EPA fails to mention its prior position, and provides no explanation for its change in position. While agencies are entitled to reconsider their positions, they cannot do so without convincing explanations of the reasons for the change, and EPA has failed to comply with that obligation here.

It is also important to consider EPA's legal basis for the Proposal, based on Tribal treaties, in the context of recent Supreme Court rulings. In

the case of *West Virginia v. EPA* (U.S. Case No. 20-1530, June 30, 2022), the Court gave increased force to the "major question" doctrine. Under that doctrine, major changes to existing statutory programs should not be undertaken without clear Congressional authorization. In this case, no such authorization has occurred. At no point since the CWA was enacted, in 1972, has Congress spoken to the issue of how Tribal treaties interact with the CWA. And, as stated above, EPA's position for most of that time has been that the treaties do not modify EPA's or States' obligations under the CWA. For EPA now, without Congress speaking to the issue at all, to announce that treaties overrule the CWA violates the "major question" doctrine. Therefore, the Proposal should not be finalized.

C. Definition of Tribal Reserved Rights

Even if EPA does need to find a way to incorporate Tribal treaty rights into its CWA programs, the definition of those rights in the Proposal is far broader than the rights actually referred to in those treaties. For instance, the Proposal refers to "aquatic-dependent animals." But the treaties generally refer to fishing rights. Protection of bears and other animals that eat fish goes well beyond the human-focused fishing rights incorporated in the treaties. EPA also refers to protecting aquatic plants – but again, this does not relate to the fishing rights in the treaties. These other issues have no place in any regulatory proposal that is based on protection of treaty-based fishing rights.

A more fundamental problem in the Proposal is how EPA defines protected rights. The Agency assumes that the right to fish, as provided in the treaties, means that States must ensure that all waters that are covered by treaties must have water quality that meets water quality standards that are based on EPA policies as to how human health standards should be set to ensure safe fish consumption. This new Agency position imports EPA policies – some of which are only in guidance documents, not regulations, and all of which have only been set in the last two decades – into Tribal treaties that were established over 100 years ago. There is simply no legal basis for that position.

D. Use of "Unsuppressed" Fish Consumption Rates

Beyond the general legal concerns laid out above, the FWQC is also concerned about the specific requirements set forth in the Proposal. One of those mandates is that State water quality standards (WQS) must reflect fish consumption rates that are not "suppressed" by water quality or availability of fish. We see no basis for that mandate in the CWA.[1] States have been issuing WQS for many years, and EPA has never required that before. If using "unsuppressed" rates is now a CWA mandate, does that mean that it must be reflected in all

[1] Beyond the lack of legal basis for importing this requirement into the CWA, we also see no definition of "suppressed" or "unsuppressed" in the Proposal. The lack of definition on a critical regulatory requirement creates a significant risk of arbitrary decisions, particularly when connected to terms that are inherently so subjective.

State WQS? If EPA is requiring this where there is a treaty, but not otherwise, then it needs to provide some justification for that position, which is absent from the Proposal.

It is also unclear how using "unsuppressed" rates squares with the CWA focus on future, attainable uses. Society has changed in many ways since the treaties were signed; does the State have to figure out all of the factors that have affected fish consumption over the years, positively and negatively, and then determine which of those will change going forward and which will not, in order to isolate exactly how consumption rates would change if the levels of various pollutants were lower? There is no basis for importing that type of analysis into the CWA as a requirement on States issuing WQS. Further, in the Proposal, EPA states that WQS have to balance heritage use with what is reasonably achievable for a waterbody. That is a fundamental change in the CWA requirements.[2] Is EPA saying that a WQS must be based, at least sometimes, on a heritage use, even if that use is not reasonably achievable? That would be directly contrary to the CWA language on attainable uses.

The Proposal also reflects a major change in the type of information that States use in setting WQS. Over the last 50 years, States have issued WQS – and EPA has approved them – based on actual, documented fish consumption rates. The proposal would change that system entirely, requiring States to rely on subjective information, including people's statements as to what prior generations may have consumed and unsupported assumptions as to how much fish people might consume in the future if various water quality and other conditions are changed (some of which cannot practically be changed). The potential for arbitrary and capricious decisions is very high

Beyond those general concerns, there are a number of specific issues in use of "unsuppressed" fish consumption rates (which we have raised before, with respect to past EPA guidance), which include the following:

- EPA does not account for other factors, beyond fish contamination, that may have affected the "heritage" consumption level;
- The proposal ignores changes in social customs, social makeup and dietary preferences that are independent of potential contamination in fish;
- EPA seems to treat regulations that protect fish populations from overfishing as a form of "suppression;"
- EPA assumes that people's tastes and preferences, as well as economic and social conditions, are constant over time, which is obviously not the case; and
- EPA ignores factors other than fish contamination that could affect the availability of fish, even though fish populations are constantly changing, due to a variety of ecological and non-ecological factors.

[2] This change also raises the risk of arbitrary decisions, since the term "reasonably achievable" has not been defined in the Proposal, and is not a regulatory term that is used elsewhere in the CWA or associated rules.

For all of the reasons set forth above, EPA's requirement for States to use "unsuppressed" fish consumption rates is flawed – legally, policywise, and technically – and should be withdrawn.

E. Risk Levels for Tribal Members and the General Population

Another mandate in the Proposal is that Tribal members with reserved rights must have their health protected to "at least the same risk level as provided to the general population of the State." This requirement is actually impossible to meet. As EPA recognizes, the Tribal group will likely have a fish consumption rate that is higher than the general population. Indeed, this is part of the reason that EPA wants to provide the Tribal group with a greater level of protection. But if this group eats more fish than the general population, it will ALWAYS have a greater risk from eating contaminated fish than the general population would, by definition. Therefore, the EPA requirement cannot possibly be met.[3]

The legal basis for the EPA requirement is also unclear. EPA recognizes that as to other subpopulations with high fish consumption rates, such as subsistence fisherpeople, their risk will necessarily be higher than the risk for other people who eat less fish, and EPA policy allows that to be the case. But as to Tribal members, EPA refuses to allow that, due to "their unique status as rights holders." But that simple declaration carries no legal analysis as to why tribal fishing rights under treaties compel a new requirement under the CWA (not recognized until now) that the risk for Tribal members must be exactly the same as the risk to the general population (which, as noted above, is not possible anyway).

EPA provides no reason why this new "equal risk" requirement is necessary. As EPA concedes, the current WQS regulations can be used by States to adopt (and have EPA

[3] It is possible that EPA meant to require that protection levels for Tribal members with reserved rights should be set to at least the same risk level as previously provided to the general population of the State—generally, 10^{-5} or 10^{-6}. We see no legal basis for imposing such a requirement. In addition, this change would necessarily shift the risk targets for the general population to higher, overly stringent levels that are not justified. EPA, in its own current methodology for developing human health WQS, recognizes that these more-stringent risk levels are not necessary to protect human health. Changing these risk levels could also limit the ability for States to use modern risk assessment approaches, such as probabilistic risk assessment (PRA). PRA can be used to connect the general population and the more-vulnerable or high-consuming sub-populations to tiered risk targets in a granular, transparent, and highly data-driven manner.

approve) more stringent site-specific WQS when it is necessary to attain designated uses. This has been done many times, and there is no need to impose new requirements.

F. Other Concerns with EPA Proposal

1. Availability of Tools to Address Unattainable Uses

The FWQC has several other concerns with the Proposal that also need to be addressed. One of those concerns relates to the interaction between Tribal rights and the basic CWA system for issuing – and modifying – designated uses. EPA is asking for comment on how States can revise designated uses while also protecting Tribal reserved rights. States should have flexibility in how they address designated uses, consistent with the clear allocation of WQS–setting responsibility to States in the CWA. As an example, EPA should make it clear that protecting Tribal reserved rights cannot and should not restrict the availability of Use Attainability Analyses (UAAs) and variances under State programs. The focus of the CWA is on protecting designated uses that are attainable. That is why EPA has consistently, over the course of implementing the CWA, made it clear that UAAs and variances are acceptable ways to address situations where WQS are not attainable, whether in the short term (with variances) or in the long term (with UAAs). Any action by EPA to eliminate or restrict use of those tools, on the basis of Tribal reserved rights, would be in conflict with the clear structure of the CWA.

2. Consultation with All Stakeholders

Several other issues with the Proposal relate to the process and analyses that EPA must conduct – both in issuing any rules in this area, and in implementing those new requirements. For instance, EPA, in the Proposal, requires consultation with Tribes by both EPA and States in the adoption and approval of WQS. Of course, consultation with the Tribes is important, but EPA should add that there should also be opportunities for other stakeholders, including the regulated community, to participate.

3. Use of Antidegradation Policy

The Proposal specifies several ways in which a State could revise their WQS to comply with the new Federal requirements. One of those alternatives is for the State to use its antidegradation policy to protect Tribal reserved rights. Within that antidegradation alternative, EPA provides two options: to assign a water body as an Outstanding National Resource Water (ORNW) or to amend the antidegradation policy to specify that any lowering of water quality in a high-quality water must continue to protect applicable reserved rights. The FWQC has strong concerns with the ONRW option. While EPA does not specify the full consequences of ONRW designation in the Proposal, Agency policies on antidegradation provide that once a waterbody is designated as an ONRW, no new or increased discharges are allowed to that waterbody (with very limited exceptions), even if they have no significant adverse impact on water

quality. This is an extremely onerous restriction, which should only be imposed for a very limited set of waterbodies where development of the watershed should be prohibited entirely. ONRW designation should not be used for situations where application of existing antidegradation requirements for high-quality waters will be fully protective.

4. EPA Analysis of Compliance Costs

We also have concerns with how EPA has analyzed the costs of complying with the new requirements in the Proposal. EPA has estimated that the Proposal will cost States only $5 million to implement. Given the breadth of the new requirements, and the analysis that will be required each time that a State reviews and considers revisions to its WQS, we believe that figure is greatly understated.

EPA refuses to estimate the costs to regulated entities that will result from the new requirements, on the basis that it would be too difficult to come up with an estimate at this time. EPA cannot shirk its responsibility to consider compliance costs by simply stating that it would be too hard to do. There is no question that the proposal would result in higher compliance costs for regulated dischargers. It would clearly require States to set lower WQS – which would generally cost more to comply with, if they can be met at all. EPA can certainly develop some hypothetical examples, using conservative risk levels and assumed higher fish consumption rates, and then estimate the change in compliance costs that would result for various kinds of facilities. This information is critical, both for EPA to consider and for stakeholders to be able to comment on, before EPA issues a final regulation.

5. Implementation Challenges for New Requirements

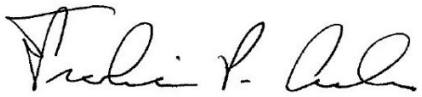
In considering any changes to its regulations governing WQS, EPA needs to keep in mind that those standards need to be objective and scientifically defensible. They must be based on equations that are transparent and lead to repeatable outcomes, so permit holders and other stakeholders can rely on those equations to know what the outcomes will be, since enforceable effluent limits will be based on those outcomes. EPA's Proposal does not meet this basic test. The process that it sets out for setting standards, using arbitrary "unsuppressed" consumption rates and "equal" risk levels that cannot be attained, is so subjective that the results cannot be predicted, leading to a wide range of outcomes that are not supported by objective scientific evidence.

In addition, we are concerned that States will not be able to effectively and efficiently implement the new requirements. The Proposal calls for State water agencies to collect and analyze data on issues that they have neither the expertise nor the resources to address adequately. Also, it will lead to substantial delays in State actions to adopt and revise their water quality standards, since it will make that task much more difficult and time-consuming. Before adopting any such requirements, EPA needs to conduct the broad dialogue suggested above, with State agencies, Tribes, regulated parties, and other stakeholders, to determine how best to protect Tribal rights in the process

of setting WQS under the CWA. The FWQC looks forward to participating in such a dialogue.

III. CONCLUSION

The FWQC appreciates the opportunity to submit these comments on the EPA Proposal. Please feel free to call or e-mail if you have any questions, or if you would like any additional information concerning the issues raised in these comments.



Fredric P. Andes
Coordinator

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