March 6, 2023

Mr. Michael S. Regan
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Submitted via https://www.regulations.gov/

Re: NTWC Comments on Docket ID No. EPA-HQ-OW-2021-0791, Proposed Water Quality Standards Regulatory Revisions to Protect Tribal Reserved Rights

Dear Administrator Regan:

The National Tribal Water Council (NTWC) submits the following comments to the U.S. Environmental Protection Agency (EPA) on EPA's proposed Water Quality Standards Regulatory Revisions to Protect Tribal Reserved Rights, 87 Fed. Reg. 74361 (Dec. 5, 2022) (Proposed Rule).

Introduction

As EPA recognizes, many tribes hold rights to natural and cultural resources that are "reserved or held by tribes, either expressly or implicitly, through treaties, statutes, executive orders, or other sources of Federal law." Proposed Rule, 87 Fed. Reg. at 74363. The health and welfare of tribal members who rely on these vital resources for sustenance and long-standing cultural practices are often placed at disproportionate risk because applicable regulatory schemes have not recognized or protected tribal reserved rights. Compounding that risk is the fact that most tribal reserved rights are located outside Indian country, and thus beyond the reach of tribal sovereignty and tribal primacy via the so-called tribal "treatment-as-a-state" (TAS) environmental authority that could protect those rights.

Tribal sovereignty is nonetheless still relevant in these situations, as it exists to protect and promote the health and welfare of the tribal community. EPA correctly notes that tribal resources use can be "pivotal to the economic well-being of the community," affecting "the very foundation of tribal social and political organizations." *Id*. at 74377. Additionally, and of critical importance, indigenous peoples have a unique and ancient connection to the natural environment that is central to their cultural identity. Because tribes' cultural self-determination depends on that connection, EPA was correct in saying environmental impacts on tribes "may be *disproportionate by definition*." *Id*. (emphasis added). In addition, climate change exacerbates such environmental

injustice; tribal reserved rights are "particularly vulnerable" to climate impacts on water quality. *Id*. at 74366.

NTWC agrees with EPA that ensuring WQS protect tribal reserved rights "is a critical component of reducing the impact of climate change on tribes."[1] *Id*. For reasons stated above and others, we see EPA's Proposed Rule for the first time is taking important steps to protect the aquatic and aquatic-dependent resources reserved to tribes by proposing revisions to the federal water quality standards (WQS) regulations. EPA explains that "by amending EPA's WQS regulations, rather than addressing [tribal reserved rights] on a case-by-case basis as state WQS are submitted for review . . ., EPA is proposing a uniform approach for establishment of WQS where tribal reserved rights apply and clearly laying out how EPA will review such WQS." *Id*. NTWC agrees that incorporating the duty to protect tribal reserved rights into the WQS regulations is the best way to achieve clarity, predictability, transparency, and consistency in fulfilling this goal. NTWC fully supports this long-overdue initiative.

NTWC also agrees that EPA should interpret this obligation consistent with its 2015 and 2016 decisions on the Maine and Washington WQS, respectively, as discussed in the Proposed Rule, *id*. at 74365 (n. 34-35 and accompanying text).[2]

The Idaho WQS process provides a salient example of why the Proposed Rule is fundamentally needed. In 2012, the Idaho Department of Environmental Quality (IDEQ) began a comprehensive revision of their WQS and corresponding fish consumption rate (FCR). The FCR at that time in Idaho was 6.5 grams/day with a 10^{-6} acceptable cancer risk rate. Recognizing that Idaho's FCR was inadequate to protect high fish-consuming tribal members, EPA committed to work closely with the five Idaho tribes throughout the process. Along with coordinating with the Idaho tribes on the Idaho rulemaking process, EPA funded both a contemporary fish consumption survey, implementing both food frequency questionnaire (FFQ) and 24-hour recall/National Cancer Institute (NCI) methodologies, and historical, unsuppressed fish consumption reports. Given that three of the Idaho tribes had completely or nearly lost all access to culturally important fish species, only the Nez Perce Tribe (NPT) and Shoshone-Bannock Tribes (SBT) participated in the fish consumption survey.

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[1] Protecting tribal reserved rights through WQS requirements has a significant bearing on reducing adverse impacts of climate change on tribal communities, EPA recognizes. *Id.* at 74366. However, NTWC thinks the issues raised by this relationship are complex enough that they should be addressed separately rather than in these comments. NTWC would be glad to work with EPA in the future to explore this connection.

[2] NTWC also agrees with EPA's interpretation that the treaty, statute, executive order, or other legal instrument need not explicitly reference water quality for the reserved right to exist. 87 Fed. Reg. at 74366.

Prior to survey initiation, the five Idaho tribes collectively agreed that an updated FCR must, at a minimum, be 175 grams/day at 10^{-6}. Once developed and initiated, the survey questionnaires asked respondents about seven different fish groupings. The NPT and SBT agreed that Group 2 (near-coastal and inland anadromous species) was the most appropriate grouping for developing Idaho WQS. At survey conclusion and at the 95th percentile, it was found that the NPT consumed 327.9 (FFQ) and 233.9 (NCI) grams/day, respectively. The SBT, at the 95th percentile, consumed 427.1 (FFQ) and 80.0 (NCI) grams/day, respectively.

IDEQ advanced a number of policy choices in the rulemaking process that would be used in determining final WQS. Those included: 1) who the target population would be, 2) criteria calculation (deterministic vs. probability risk assessment (PRA), 3) fish to be included in determining a FCR (key being inclusion/exclusion of market and anadromous fish), 4) acceptable cancer risk rate, 5) no backsliding in WQS, and 6) downstream waters protection. The Idaho tribes were unified on their preferred policy choices and the EPA supported the tribes' choices in their entirety.

Missing from IDEQ's policy choices were tribal treaty rights and suppression, both strongly advocated for by the Idaho tribes and EPA. Neither were factored into IDEQ's final rule. IDEQ determined that tribal treaty rights were an "unresolved issue." In the Proposed Rule at 74369 (n. 57), EPA discusses the Idaho process and their lack of authority to require states to consider suppression.

Throughout the lengthy rulemaking process, the Idaho tribes and EPA provided hours of oral comments and questions and submitted hundreds of pages of written comments to IDEQ. Rarely did IDEQ adequately respond to those comments. When the Idaho tribes requested a meeting with IDEQ's Director, with the backing of EPA, that request was denied.

IDEQ's development of its final rule incorporated not a single preferred policy choice of the Idaho tribes and EPA. The highest fish-consuming population (tribes) were not the target population. Criteria calculation was based on PRA. Market and anadromous fish were excluded from survey results. Acceptable cancer risk rate was reduced to 10^{-5}. There was backsliding in updated WQS. Narrative downstream waters protection measures did not protect tribal, Oregon, and Washington waters. The final rule, with WQS based on 66.5 grams/day at 10^{-5}, was submitted to the EPA on December 13, 2016. Ultimately, EPA approved IDEQ's final rule on April 4, 2019. While EPA strongly supported the Idaho tribes throughout the process, they were hamstrung by their own guidance and regulations, leading to their approval of Idaho's inadequate WQS that do not protect tribal reserved rights.

Comments on Specific Provisions in the Proposed Rule

The key component of EPA's proposed regulatory initiative is the addition of 40 C.F.R. § 131.9 to the WQS regulations. That section would require that WQS "protect tribal reserved rights

applicable to the waters subject to such standards." § 131.9(a); *See also* § 131.5(a)(9). Moreover, the Agency's revisions to § 131.5 make clear that EPA has the authority and in fact is required to disapprove state WQS that do not satisfy this requirement, along with the others listed in existing § 131.5(a)(1)-(8), and must promulgate federal standards that do comply. The NTWC provides the following comments and recommendations regarding these provisions and other aspects of the proposal to ensure the protection of tribal reserved rights.

Section 131.3 (Definitions)

NTWC agrees with EPA's proposed definition of "tribal reserved rights" in new 40 C.F.R. § 131.3(r) as "rights to aquatic and/or aquatic-dependent resources reserved or held by tribes, either expressly or implicitly, through treaties, statutes, executive orders, or other sources of Federal law" but with one revision. NTWC suggests that the definition should be prefaced with the words "as used in this Part," or "for purposes of this Part," because tribal reserved rights are broader than aquatic or aquatic-dependent resources. Although those other resources are not likely affected by WQS, they are relevant in other contexts outside of these proposed regulations.

For example, the Shoshone-Bannock Tribes, in southeastern Idaho, have rights under the ratified Fort Bridger Treaty of 1868 to hunt on all unoccupied lands of the United States, not just in or adjacent to water bodies that are covered under the Clean Water Act. Similarly, many tribes across the country have treaty rights to gather plants that may not always be found in or adjacent to waters of the United States.

Section 131.5 (EPA Authority)

As previously mentioned, NTWC strongly supports the proposed mandatory requirements that WQS must protect tribal reserved rights, § 131.5(a)(9), and that EPA **must** disapprove WQS that do not meet this requirement and promulgate federal standards that do, *id*. EPA has exercised this authority in the past. For example, in 2016 EPA promulgated standards for Washington State based on a fish consumption rate of 175 for all contaminates, instead of accepting the state's weaker standards. As noted above, EPA took similar course of action regarding the Maine WQS. EPA must continue to follow this practice.

The last sentence of § 131.5(b) appears to backtrack, however, EPA's obligation to promulgate federal WQS, by stating that EPA "may" promulgate new or revised standards. As this sentence is surplusage it should be deleted. Alternatively, if it is intended to refer to another additional requirement, EPA should clarify what that is and make certain to remove any ambiguity about the mandatory nature of EPA's authority and duty to promulgate new or revised standards.

Section 131.6 (Minimum Requirements for WQS Submission)

NTWC generally supports the spirit of EPA's proposed subsection (g). We note it seems odd the first sentence is phrased permissively; that is, information on the scope, nature and current

and past use of tribal rights holders is said to "aid" EPA in evaluating WQS submissions. Shouldn't EPA be required to develop such information, since it is the factual basis for determining in § 131.9 whether the WQS protect reserved rights? More concerning, perhaps, is the ambiguous process suggested by the phrase "as informed by the right holders." The preamble says this "provide[s] a role for right holders" to participate in protecting reserved rights.

In its 1984 Indian Policy, EPA said it would encourage tribes, states, and local governments to communicate and cooperate on matters of mutual concern. It is true that many tribes have worked cooperatively and productively with states and state subdivisions. There is every reason to assume that, particularly in the context of WQS, tribes would want to influence state regulatory programs. The sheer number of consultation requests that tribes receive from federal agencies, and the relative lack of tribal consultation resources undermine this ideal. In addition, most states and tribes have no established consultation protocols, especially in comparison to EPA's long tribal consultation experience. States also lack the legal and political background that helps animate federal consultation.

In light of these concerns, it is possible that states will simply rely on their usual public participation processes to become "informed' by right holders, *if* they comment. Tribes can and should participate in notice and comment processes. The regulation here, though, envisions genuine discussions between two sovereign governmental entities on a discrete topic with special sensitivities. True dialogue requires intentionally designed procedures.

NTWC recommends EPA consider developing or at least suggesting processes for these state-tribe exchanges. If they are not productive, tribes will renew their concerns with EPA during consultation under § 131.9(b). As noted below, EPA-tribal consultation is important and should be retained. At that point in time, however, the state will have already selected criteria and devoted resources to supporting it, which puts the burden on the tribe to show the criteria, are inadequate rather than the state showing they are adequate. That may also inadvertently set the state and tribe up for unnecessary conflict when the spirit of the requirement is clearly to foster respectful and genuine engagement.

We have three related recommendations here. The preamble says § 131.6 "provides *clarity* on EPA's expectations" for "how states must *document their efforts to ascertain information*." *Id.* at 74367 (emphases added). The proposed regulatory language, however, is not clear on that point. Subsection (g)(1) requires information on the reserved right(s), "informed by the right holders," and (g)(2) requires "methods used to develop the water quality standards." We recommend explicitly requiring that state submissions explain the procedures used to identify and engage right holders, describe any substantive suggestions the right holders made that the state did not adopt, and explain the state's justifications for not adopting them.

Second, the proposed rule encourages the right holder to provide information and data to the state for determining where and how the reserved rights apply, "as informed by the right holder." *Id* at 74367. The NTWC and tribal leaders recommend that the request for culturally sensitive information include procedures for keeping such information confidential. Section 131.6 (g) should provide that right holders may request certain information about tribal reserved rights to be kept confidential, in which case the state and EPA must honor that request. For example, a right holder may want to keep the location of a resource confidential, as well as precisely how it is used if for a traditional cultural purpose.

Our third recommendation is for this provision to explicitly recognize Traditional Ecological Knowledge (TEK) as one method for developing standards protecting tribal reserved rights uses. EPA has recognized the value of TEK in other contexts. *See* *TEK in RCRA/CERCLA Cleanup*. This addition parallels our suggested addition of TEK in § 131.9(a) below.

Another concern about sharing tribal information and data with the state is that it could be used against tribes in court proceedings challenging their reserved rights. For example, in 2016 tribes in Idaho were hesitant to participate in fish consumption surveys. Tribes feared that if they could not demonstrate that they were consuming enough fish (including but not limited to burbot, lamprey, salmon, steelhead, and sturgeon), the state could use that fact to claim that the tribes were not fully exercising their reserved right. Tribes do not want their reserved rights adjudicated in front of the courts unless they choose to bring such cases. The NTWC recommends that §131.6 (g) identify language that any shared information or data gathered by a tribe will not be used in a manner that limits or challenges the tribe's reserved rights.

Finally, the proposed rule also does not provide or refer to any resources to assist right holders in participating in state WQS revision processes and assumes tribes will be able to provide requested information from states or EPA. Many tribes that have reserved rights lack the technical and financial capacity to take on added responsibilities to gather, evaluate, and provide the necessary information and data that may be requested. The NTWC urges EPA to compensate tribes for the costs they accrue in conducting legal review, data compilation and analysis for requested reserved right information. EPA can consider using its discretionary funding to compensate tribes for their information-sharing efforts.

Section 131.9 (Protection of Tribal Reserved Rights)

This proposed provision is the heart of the initiative, and NTWC enthusiastically endorses the mandatory language of proposed subsection (a), that WQS "must" protect tribal reserved rights, and subsection (c), that WQS "must" designate uses and establish appropriate water quality criteria to protect those uses, pursuant to § 131.11. NTWC agrees that this process could involve creating a new designated use to protect tribal reserved rights, perhaps called "supports tribal reserved

rights" or simply "tribal reserved rights," with associated water quality criteria for that use, or developing revised criteria to protect the reserved right under an existing designated use, such as fishing, for example, so long as the reserved right's inclusion is explicit and clearly analyzed, or both of these options.

Section 131.9(a)

NTWC supports the proposed requirement in § 131.9(a)(1) that WQS must protect "the exercise of tribal reserved rights unsuppressed by water quality or availability of the aquatic or aquatic-dependent resource." NTWC does not, however, agree with EPA's proposed interpretation of this requirement as being limited to protecting "reasonably anticipated future uses, taking into account factors that may have substantially altered a waterbody." Proposed Rule at 74366-67.

Although resources may have been more abundant when the reserved rights were established, as for example is the case with fishery resources in the Pacific Northwest and in Maine, EPA's limited interpretation is too restrictive: tribes and other interested parties are working toward restoration of those resources, including by removing dams along some of the waterbodies, and improving fish passage, which are actions that may not have been "reasonably anticipated" not so long ago, and which shows that "factors that may have substantially altered a waterbody" can be changed (e.g., Penobscot River Restoration Project (nrcm.org). A similar example is provided by tribal efforts in the upper Midwest to restore habitat supporting the growth of wild rice. Designating waters for wild rice habitat even if some may claim those waters are not "reasonably anticipated" to support it is essential to protecting the resource and tribal reserved rights to gather that resource. EPA's interpretation of this requirement therefore may result in an unnecessary diminishment of tribal reserved rights.

Because NTWC supports requiring WQS to protect unsuppressed tribal reserved rights, NTWC also supports adding a provision to § 131.9 requiring the designated use attainability analysis in § 131.10 to take this requirement into account. *See* Proposed Rule at 74372. Otherwise, a finding that a designated use protecting tribal reserved rights is not currently feasible under § 131.10 could undermine EPA's and the states' obligations to protect tribal reserved rights and essentially negate the core provisions and purpose of § 131.9. Language addressing this issue could be added as a fourth criterion under § 131.9(c) or as a new § 131.9(d). Moreover, when restoration activities lead to an abundance of fish or other resources subject to tribal reserved rights, designated uses should be reviewed and revised if needed to protect these resources.

NTWC agrees with EPA's observation that any currently practiced reserved rights are "presently attained uses," that must be treated as designated uses pursuant to 40 C.F.R. § 131.10(i), and therefore require criteria for protection under 40 C.F.R. § 131.12(a)(1). *See* 87 Fed. Reg. at 74370, 74372.

EPA appropriately recognizes the sad reality that historical land uses have suppressed the

availability of traditional aquatic resources and the water quality needed for their protection, so that some tribes can no longer fully exercise their reserved rights at "heritage" rates. *Id*. at 74368, n. 50. Over two decades ago, EPA's National Environmental Justice Advisory Council raised concerns over the "suppression" effect on treaty rights to fish. *See* FISH CONSUMPTION AND ENVIRONMENTAL JUSTICE (NEJAC 2002). NTWC fully supports EPA's express requirement in § 131.9(a)(1) that WQS must protect "unsuppressed" tribal reserved rights.

We are concerned whether the intention behind the qualification "to the extent supported by available data and information" is clear. Logic, and the backdrop of administrative law, support an expectation that technical decisions are adequately supported. The specific topic here—heritage rates, and locations formerly but no longer used for reserved rights because of contamination and degradation—is perfectly supported by TEK. Yet, some might read the data qualification as imposing a highly technical bar for setting WQS that protect unsuppressed tribal reserved rights. We suggest indicating that "available" is a relatively low threshold, and that TEK is a key piece of data/information in determining unsuppressed tribal reserved rights.

EPA's suggestion that unsuppressed rights "balance heritage use of a resource with what is currently reasonably achievable for a particular waterbody," 87 Fed. Reg. at 74369, is probably the most reasonable accommodation, assuming the intent is to set the level *above* what is currently reasonably achievable. That intent is consistent with the CWA's goal to "restore and maintain the chemical, physical and biological integrity of the Nation's waters," CWA § 101(a), and more generally with the many restoration themes of modern environmental law like, in the context of the CWA, setting MCLs as close as possible to MCLGs, wetlands mitigation ratios, and restoration or replacement of aquatic resources injured by hazardous substance releases.

NTWC fully agrees that tribal citizens exercising reserved rights are "a distinct, identifiable class of individuals holding legal rights to resources, whose reserved rights are unique to them and have a defined geographic scope." 87 Fed. Reg. at 74370. That unique status, against the backdrop of the United States' long political relations with Indian tribes, clearly "warrants treating them as the target population for … deriving human health criteria," *id*., rather than as subpopulations of highly exposed individuals.

We support the protection of tribal reserved rights so that the health of tribal members will not be subject to any greater risk level than the general population, as provided in § 131.9(a)(2). However, in light of the chronic health challenges facing indigenous peoples, the suppression of traditional foods and the lack of healthy alternatives, NTWC suggests EPA require the more frequently used 10^{-6} risk level even if the state uses the less stringent 10^{-5} risk level for the general population. *Id*. at 74369.

To determine tribal risk levels, EPA and the states should be required to use Native American risk analyses when available. The Wabanaki Traditional Cultural Lifeways Exposure Scenario (by Harper and Ranco), available on www.epa.gov and used by EPA to derive tribal fish

consumption rates in Maine, is an example.

In addition to our suggestion above for more detail on discussions between states and tribal right holders, we endorse proposed § 131.9(b)'s provision for EPA consultation, consistent with applicable EPA tribal consultation policies, in determining whether state water quality standards protect applicable tribal reserved rights in accordance with paragraph (a) of this section.

We understand EPA's use of fish consumption rates and water quality necessary for wild rice as classic and helpful examples of suppression and differing health criteria. But we decline the call for additional specific examples of reserved rights or key aquatic species. Just as EPA declines here to set national unsuppressed threshold rates because of situation-specific variation, it makes no sense to use this rulemaking as the location for a definitive, comprehensive list of all indigenous reserved rights and associated species.

Finally, the NTWC supports limiting the use of narrative water quality to situations where numeric criteria cannot be established or to supplement numeric criteria, per existing § 131.11. Proposed Rule at 74368 says, "EPA is available to assist states in gathering more information, in coordination with the right holders, for future use" when data and information are not available or are inconclusive. To be clear, the NTWC would not support EPA approving a state's WQS revision where existing, technically supported numeric criteria are replaced with narrative criteria, as was the case in the state of Minnesota, where it recently revised their Class 3 (Industrial consumption) and Class 4 (Agriculture and wildlife) standards for a number of conventional pollutants, in some cases withdrawing numeric criteria and replacing them with narrative standards. Minnesota tribes objected to this lowering of water quality standards which included protections for Manoomin (wild rice, a culturally significant aquatic plant) and wildlife drinking water (including traditional subsistence species like moose) under Class 4 standards. Even after government-to-government consultation, extensive technically supported written comments, and testimony to an administrative law judge, the state adopted their revisions and submitted them to EPA for approval. And, despite additional comments and formal consultation, EPA approved those revised standards in spite of ample scientifically based evidence as well as expressly communicated tribal objections. The CWA and its implementing regulations provide no legal authority for a state to convert clear and enforceable numeric standards into subjective narrative standards. The Proposed Rule should clearly ensure that aquatic and aquatic-dependent plant and animal species are protected under state water quality standards.

<u>Section 131.9(b)</u>

Proposed Rule § 131.9(b) provides: "In reviewing state water quality standards submissions under this section, EPA will initiate tribal consultation with the right holders, consistent with applicable EPA tribal consultation policies in determining whether state water quality standards protect applicable tribal reserved rights in accordance with paragraph (a) of this section."

However, the proposed rule does not define in its tribal consultation process a dispute resolution procedure when rights holders disagree with EPA's conclusions of whether state WQS are protective of the tribal reserved rights. The NTWC recommends the proposed rule identify a dispute resolution process, under which rights holders can request to meet directly with the EPA Administrator to address those disagreements. Additionally, the NTWC recommends that, when necessary, the EPA utilize their Conflict Prevention and Resolution Center to mediate and resolve disputes.

Section 131.9(c)

As previously noted, NTWC supports the requirement in § 131.9(c) that WQS must designate uses and establish appropriate water quality criteria to protect those uses, pursuant to § 131.11. NTWC agrees that this process could involve creating a new designated use to protect the tribal reserved right, with associated water quality criteria for that use, or developing revised criteria to protect the reserved right under an existing designated use, such as fishing, or both of these options. However, NTWC maintains that to protect tribal reserved rights, the antidegradation requirements referenced in § 131.9(c)(3) should be required *in addition to* the designated uses and water quality criteria required in § 131.9(c)(1)-(2), not instead of those requirements. In other words, the regulatory text should say "and" instead of "and/or" when listing the requirements in § 131.9(c). The antidegradation options of designating Outstanding National Resource Waters to protect tribal reserved rights and of ensuring that any lowering of water quality will continue to protect tribal reserved rights (Options 1 and 2 in the Proposed Rule at 74371) can both be used to support designated uses and related water quality criteria that protect reserved rights.

Section 131.20 (State Review and Revision of WQS)

NTWC agrees with the inclusion of the new sentence in § 131.20(a) requiring the triennial review of WQS to "include evaluating whether there are tribal reserved rights applicable to state waters and whether water quality standards need to be revised to protect those rights pursuant to § 131.9." However, the only process specified for determining whether the WQS satisfy § 131.9 is the public participation required in existing § 131.20(b). Consistent with our comment above that EPA should describe processes for right holders to give input on suppressed reserved rights, NTWC requests that EPA provide a specific process to ensure that states directly ask for and obtain information from right holders as to their reserved rights. States must engage in that process while they are reviewing their WQS, rather than leaving it up to EPA to determine whether there are tribal reserved rights at issue once the states have already submitted the WQS to EPA for review and approval, which is when § 131.9(b) comes into play.

The NTWC recommends that EPA adopt a process that requires states to contact all tribes with treaty protected rights within their borders, meet with them separately from the general public hearing provided in § 131.20, and take their input into account when reviewing WQS. In addition,

EPA should require states to notify both the tribe or tribes affected and EPA if the state disagrees with the tribe's claim to a reserved right in a particular resource. These additions to the regulation should be mandatory and stringently enforced by EPA. It must be recognized that treaty rights to hunt, harvest, and gather within ceded territories or usual and accustomed places often apply to multiple tribes that signed those treaties and may cross state boundaries. This situation may add complexity to the consultation requirements for state WQS revisions, and it falls upon EPA to ensure that all affected tribes have that consultative opportunity to identify treaty resource use and the level of water quality necessary to support it.

Finally, it is common knowledge that the triennial review process does not in fact take place every three years. To ensure that a review of WQS takes place in a timely fashion in response to these revised WQS regulations, another sentence should be added to § 131.20(a) to require that, within two years of the effective date of this rulemaking, all states must review and, if needed, revise their WQS to protect tribal reserved rights. These rights, which are protected not only by the Clean Water Act, but also by the Constitution, have been neglected far too long.

Before we conclude, we offer one final suggestion. Like tribes in the "lower 48," our sisters and brothers in Alaska have also waited a long time for attention to reserved rights critical to maintaining their sustenance and cultural lifeways. Because of the U.S. Supreme Court's unilateral decision that with a single exception there is no Indian country in Alaska, Alaska v. Native Village of Venetie Tribal Government, 522 U.S. 520 (1998), Alaskan tribes arguably have no territory over which to implement WQS via the TAS model, and so their aquatic reserved rights are entirely subject to state CWA implementation. The federal Alaska National Lands Conservation Act, Pub. L. 96-487 (December 2, 1980), set out in detail the federal subsistence rights of Alaska Natives, which include aquatic resources. Nothing in the proposed rule excludes Alaska from its important requirements. Nonetheless, Congress' different legal treatment of Alaska tribes may lead some to assume that Alaska is exempt from this new rule protecting tribal reserved rights. EPA should prevent such assumptions from the beginning by explicitly stating that the rule applies to Alaska WQS.

Conclusion

EPA has long distinguished itself as the leading federal agency embracing tribal sovereignty and environmental self-determination. The boldness of this proposal in requiring the protection of aquatic environmental conditions able to support the full exercise of tribal reserved rights follows nearly 50 years of creative and innovative administrative mechanisms helping protect the cultural survival of the nation's indigenous peoples. Those efforts chart a consistent course of action implementing EPA's ground-breaking Indian Policy, discharging the federal government's trust responsibilities to tribes, and addressing the longstanding environmental justice challenges in Indian country. In fact, and despite the United States' initial hesitation in supporting it, the proposed rule helps implement the United Nations Declaration on

the Rights of Indigenous Peoples, A/RES/61/295 (2 Oct. 2007), which recognizes indigenous peoples' human rights to "[p]ractice [sic] and revitalize their cultural traditions and customs," *id* Art. 11, § 1, and "[m]aintain and strengthen their distinctive spiritual relationship with their traditional lands, territories, waters and other resources," *id* Art. 25.

We trust EPA takes into account the information and recommendations provided in this letter to strengthen the Agency's effort requiring that WQS regulations protect tribal reserved rights.

Sincerely,

Ken Norton, Chairman
National Tribal Water Council

Cc: Karen Gude, EPA Office of Water

Northern Arizona University
PO Box 15004
Flagstaff, AZ 86011-5004
Elaine H. Wilson, NTWC Project Manager

928-523-9555 office
928-523-1266 fax
nau.edu/itep
Elaine.Wilson@nau.edu
480-452-6774 cell