



Department of Environmental Quality

To protect, conserve and enhance the quality of Wyoming's environment for the benefit of current and future generations.



Mark Gordon, Governor

Todd Parfitt, Director

March 2, 2023

United States Environmental Protection Agency
EPA Docket Center
Office of Water Docket
Mail Code 28221T
1200 Pennsylvania Avenue NW
Washington, DC 20460

Submitted online via <https://www.regulations.gov>

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

To Whom It May Concern,

Pursuant to both the Federal Clean Water Act (CWA) and Wyoming Statutes, the Wyoming Department of Environmental Quality (WDEQ) is responsible for overseeing development and implementation of Wyoming's surface water quality standards. As such, WDEQ takes considerable interest in the Environmental Protection Agency's (EPA) proposed revisions to the CWA water quality standards regulation at 40 CFR Part 131 to prescribe how water quality standards must protect aquatic and aquatic-dependent resources reserved to tribes through treaties, statutes, executive orders, or other sources of Federal law. EPA's insufficient engagement with states and tribes has resulted in proposed regulations that fail to identify an implementable approach to ensure water quality standards protect applicable tribal reserved rights. In addition, the complexities and uncertainties associated with identifying and protecting applicable tribal reserved rights will easily overwhelm the already complicated and resource-intensive water quality standards revision process. This letter outlines the questions about legal authorities, the untenable proposed process for tribal consultation and EPA review, and the regulatory ambiguities associated with the proposed revisions that support these conclusions.

The proposed revisions impose significant, unfunded, and largely undefined requirements on WDEQ, tribes, and EPA. WDEQ would be required to determine whether there are explicit or implicit tribal reserved rights associated with state waters, and if so, to establish water quality standards that would protect tribal reserved rights "unsuppressed by water quality or availability of the aquatic or aquatic-dependent resource" and the health of the right holders "to at least the same risk level as provided to the general population of the state." WDEQ would also be required to submit to EPA information on the "scope, nature, and current and past use of reserved rights, as informed by the right holders." After consultation with tribes, EPA would use this information to determine whether surface water quality standards submitted by WDEQ sufficiently protect tribal reserved rights. If EPA determined that Wyoming's water quality standards failed to sufficiently protect tribal reserved rights, EPA would be required to disapprove and promulgate water quality standards for Wyoming.

200 West 17th Street, Cheyenne, WY 82002 · <http://deq.wyoming.gov> · Fax (307)635-1784

ADMIN/OUTREACH (307) 777-7937	ABANDONED MINES (307) 777-6145	AIR QUALITY (307) 777-7391	INDUSTRIAL SITING (307) 777-7369	LAND QUALITY (307) 777-7756	SOLID & HAZ. WASTE (307) 777-7752	WATER QUALITY (307) 777-7781
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Among WDEQ's primary concerns with the revisions is the fact that many of the potentially applicable tribal reserved rights have not yet been identified, quantified, defined, agreed to by states, tribes, and the Federal government, or otherwise fully determined by a court of competent jurisdiction. The CWA state surface water quality standards revision process cannot be used as a means to identify, quantify, define, negotiate, or litigate tribal reserved rights. Neither WDEQ nor EPA have authority to define the nature and extent of tribal reserved rights. In addition, the ability of right holders to exercise their rights are dependent on a multitude of factors that extend well beyond surface water quality protections. Both the reserved rights and these factors must be identified, defined, and negotiated or otherwise fully determined by a court of competent jurisdiction on a waterbody-specific basis prior to the development of surface water quality protections for such rights. If this critical step is absent, incorporating tribal reserved rights into state water quality standards will inevitably entangle the already complex standards revision process in arenas far outside its scope. Furthermore, the proposed requirements are much too ambiguous; the process for standards development, tribal consultation, and EPA review are problematic; and established methodologies to implement the revisions are lacking.

Engagement with state coregulators, elected state and local leaders, and other stakeholders is critical to the development of implementable regulations. However, such engagement appears to have been minimal, and engagement with the WDEQ was almost non-existent despite our repeated feedback to EPA that it was imperative they engage with state coregulators.

Given the lack of engagement with states, concerns about legal authorities, and the inability to clearly define regulatory requirements, the proposed revisions are premature at best. WDEQ recommends that EPA withdraw the proposed rule to address these concerns and conduct meaningful engagement with states, tribes, and other stakeholders. WDEQ further recommends that EPA consider whether tribal reserved rights are suitable for inclusion in the federal regulations, or whether addressing tribal reserved rights on a case-by-case basis through collaboration between tribes, states, and the Federal government would be a more productive course of action. Our detailed comments are provided below.

1. The CWA Does Not Include the Requirement That Water Quality Standards Broadly Protect Tribal Reserved Rights. Section 303(c) of the CWA identifies that whenever states revise or adopt water quality standards, "such standards shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter. Such 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." In addition, 40 CFR 131.12(a), requires "existing instream water uses and the level of water quality necessary to protect the existing uses" to "be maintained and protected." As such, states are already required to establish water quality standards that protect currently exercised tribal reserved rights. Likewise, 40 CFR § 131.21 already confers EPA authority to ensure that water quality standards meet the requirements of the CWA and regulations. Congress did not include within these requirements, or within the goals and objectives of the CWA, a specific directive that water quality standards broadly protect tribal reserved rights, including rights that may not currently be exercised and rights that may not be explicitly related to water quality. The lack of explicit authority in the CWA and the often undefined nature of tribal reserved rights will likely make Wyoming state water quality standards, developed to comply with the proposed revisions, vulnerable to legal challenges.

2. Determining Tribal Reserved Rights Exceeds WDEQ's Authority. The proposed revisions would require the WDEQ to work with tribes to identify tribal reserved rights associated with "aquatic or

aquatic dependent resources” held through “treaties, statutes, executive orders, or other sources of Federal law” as part of the CWA surface water quality standards revision process.

As acknowledged by EPA, tribal reserved rights are complicated and often require considerable deliberation, negotiation, or litigation. Rights may have been included in a treaty, treaties may not have been ratified, and rights may have been modified or not discussed in subsequent treaties. Rights may have been granted or limited in an Executive Order. Rights may have been granted or expressly abrogated by Congress. Reserved rights may be constrained by factors that both can and cannot be remedied. Rights may be implicit, vague, and ambiguous. Tribes may wish to exercise their reserved rights or not to exercise their reserved rights. Wyoming, like much of the United States, was historically home to a number of tribes that were party to treaties with the United States government. And while some of these treaties may reserve rights implicitly or otherwise, the nature and extent of many of these rights is currently unknown.

The CWA surface water quality standards revision process is not an appropriate means to determine the nature and extent of these rights. The Wyoming Environmental Quality Act (EQA) charges WDEQ with preserving and exercising the primary responsibilities and rights of the state of Wyoming. Specific to water quality standards, the EQA authorizes WDEQ to develop standards to protect waters of the state. The EQA does not authorize WDEQ to determine the nature and extent of reserved rights, nor does it authorize WDEQ to relinquish responsibility for establishing water quality standards to EPA. Therefore, because tribal reserved rights associated with state waters in Wyoming have not been clearly defined and identified, the revisions attempt to force WDEQ into a situation where it has no authority to comply with the proposed revisions.

3. Determining Tribal Reserved Rights Exceeds EPA’s Authority. Under the proposed revisions, EPA would determine whether states have sufficiently identified and protected applicable tribal reserved rights after tribal consultation and based on information submitted by states on the “scope, nature, and current and past use of reserved rights, as informed by the right holders.” If a state failed to comply, EPA would be required to promulgate water quality standards that protect applicable tribal reserved rights. Therefore, EPA would need to determine the potentially applicable tribal reserved rights when either acting on water quality standards submitted to EPA or when promulgating water quality standards. Although Section 511(a)(3) of the CWA outlines that the CWA should “not be construed as...affecting or impairing the provisions of any treaty of the United States,” the CWA does not authorize EPA to determine the nature and extent of tribal reserved rights; arbitrate, negotiate, or litigate reserved rights; or determine how a tribe may or may not exercise a reserved right. Determination of tribal reserved rights is governed directly by tribal-state negotiations, specific lines of authority found in U.S. Supreme Court case law, state-specific water adjudications, and other specifically binding sources of legal authority, not indirectly through unilateral agency rulemaking. As such, EPA should not assert such authorities in future discussions regarding tribal reserved rights.

4. The Proposed Revisions Will Burden Wyoming’s Surface Water Quality Standards Revision Process and Create Legal Vulnerabilities. If finalized, the proposed regulations would immediately require Wyoming to identify potentially applicable tribal reserved rights and establish water quality standards necessary to protect reserved rights. If Wyoming failed to do so, EPA would be required to promulgate such standards. If such protections were not included in Wyoming’s water quality standards, both Wyoming and EPA would be out of compliance with the regulations and vulnerable to legal challenges. However, to sufficiently protect reserved rights, Wyoming (or EPA) may need to review and potentially update Wyoming’s water quality criteria for aquatic life, wildlife, and consumption of aquatic life. Wyoming may also need to develop new or site-specific water quality criteria to protect reserved rights.

This process is extremely complex, resource-intensive, and likely must be carefully negotiated, or litigated, between states, tribes, and the Federal government. The surface water quality standards revision process is already complicated, resource-intensive, and subject to delays. EPA already often fails to meet statutory deadlines, even without the complexity of addressing tribal reserved rights.

5. Formal Consultation Must Occur Before States Initiate a Triennial Review, Water Quality Standards Developed Once Applicable Tribal Reserved Rights Have Been Agreed Upon. The proposed revisions require states to submit information to EPA “on the scope, nature, and current and past use of the tribal reserved rights, as informed by the right holders.” In reviewing state water quality standards, EPA would be required to “initiate tribal consultation with the right holders...in determining whether State water quality standards protect applicable reserved rights.” The proposed process does not require EPA to formally consult with the tribes or provide feedback to Wyoming on reserved rights and the level of water quality necessary to support the reserved rights until after our water quality standards revision process has been completed. Although WDEQ could reach out to tribes early in the water quality standards revision process, some tribes prefer to only engage with the Federal government and may not engage directly with WDEQ. Therefore, by the time of formal consultation, WDEQ would have already invested significant resources to develop, revise, and adopt water quality standards. Partner agencies and stakeholders would have also invested significant resources into the process—the standards would have been through scoping and multiple public notices. The standards would have been reviewed by legal counsel and our Water and Water Advisory Board, adopted by the Environmental Quality Council, and approved by the governor. As such, the proposed process does not provide critical information early enough in the rule revision process, nor does it sufficiently recognize the resources Wyoming expends in revising water quality standards or the resources that Wyoming would need to expend if water quality standards are disapproved. WDEQ’s previous efforts to engage EPA early in the rule revision have not prevented disapprovals, as EPA has not always been forthcoming about which revisions they view as problematic.

Not only is the proposed process inefficient, the process is also unlikely to result in EPA and states being able to meet regulatory timeframes. Section 303(c) of the CWA requires states to review their water quality standards at least every three years and for EPA to review and approve submissions within 60 days or disapprove submissions within 90 days. Federal guidance¹ on tribal consultation directs federal agencies to provide tribes with 30 days written notice and a 30-day comment period, after which EPA must provide responses to the comments received. Therefore, as proposed, EPA would not have sufficient time to conduct the tribal consultation and approve state water quality standards submissions. Moreover, because tribal reserved rights and the levels of water quality sufficient to protect the rights are so complex, delays with the approval process appear inevitable. This makes states and EPA vulnerable to legal challenges.

Further, 40 CFR § 131.3(l) defines “Indian Tribe or Tribe” as “any Indian Tribe, band, group, or community recognized by the Secretary of the Interior and exercising governmental authority over a Federal Indian reservation.” Some tribes have clearly defined governance structures that can serve in an official capacity during the water quality standards revision process, but others do not. In circumstances where a tribe does not have a defined governance structure, a formal consultation process may not be possible.

¹ [TTR BEST PRACTICES FLOWCHART \(bia.gov\)](#)

6. Insufficient Local and State Consultation Process, as Required in Executive Order 13132². In the federal register notice, EPA concludes that Executive Order 13132 does not apply to this action. Executive Order 13132 outlines that the Agency cannot promulgate rules with federalism implications,³ including those that pre-empt state and local laws, unless the agency provides all affected State and local officials notice and an opportunity for appropriate participation in the proceedings. As part of evaluating whether surface water quality standards sufficiently protect tribal reserved rights, the proposed revisions grant EPA the authority to determine the scope, nature, and extent of tribal reserved rights. The ability of a tribal member to exercise their reserved rights associated with aquatic and aquatic-dependent resources undoubtedly requires consideration of state and local laws, particularly as they relate to access, allocation of water, and fish and wildlife conservation and management. As such, the proposed revisions have the potential to conflict with state and local laws and authorities.

EPA described in the preamble that they provided a conceptual overview of the draft regulations for the Association of Clean Water Administrators (ACWA) Monitoring, Standards and Assessment Subcommittee and held three additional one-on-one meetings with individual states upon request. EPA did not describe any additional consultation with elected state and local officials, nor is WDEQ aware of any efforts made by EPA to engage beyond water quality management agencies. Due to the potential implications of the proposed revisions to local and state laws, EPA is required under Executive Order 13132 to consult with state and local officials as part of the regulation revision process.

7. Insufficient State Consultation Process in Developing the Proposed Revisions. The preamble states that the core of the water quality standards regulation was established in 1983 and that EPA has revised the regulations only three times since 1983. The preamble further describes that the EPA's state consultation process consisted of providing a conceptual overview of the draft regulations for the ACWA's Monitoring, Standards and Assessment Subcommittee and holding three additional one-on-one meetings with individual states upon request. WDEQ requested additional outreach and engagement on the proposed revisions on multiple occasions; however, these requests were not honored by EPA.

Given that states have the primary responsibility for developing surface water quality standards, WDEQ/WQD is alarmed by EPA's lack of engagement with states during development of the proposed revisions. The fact that the proposed revisions impose new, significant, and far-reaching requirements on states that may conflict with other state laws and authorities emphasizes that engagement with states is critical. ACWA and the Environmental Council of States are important national organizations that represent states. However, these organization do not represent all states, and engagement with these organizations should be in addition to, not instead of, engagement with individual states.

In addition, EPA never addressed questions that states posed through ACWA. For example, EPA relayed during one of these discussions that hundreds of reserved rights exist, but EPA never provided individual states with information about where the rights may be applicable so that states could have this invaluable context when reviewing the proposed revisions.

Since cooperative federalism is essential to successful development and implementation of water quality standards under the CWA, states must be more thoroughly integrated into the regulation

² Executive Order 13132, Federalism: <https://www.govinfo.gov/content/pkg/FR-1999-08-10/pdf/99-20729.pdf>

³ Federalism implications are defined as having substantial direct effects on states or local governments (individually or collectively), on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

development and revision process. EPA should have provided states and tribes with early engagement opportunities in order to provide meaningful feedback to inform the regulation revision process. WDEQ recommends EPA initiate a meaningful collaborative cooperative federalism and nation-to-nation consultation process with states and tribes collectively.

8. The Proposed Revisions Lack Clarity Regarding Aquatic and Aquatic-Dependent Resources. The proposed revisions require states to protect tribal reserved rights “to the extent supported by available data and information,” associated with “aquatic and aquatic-dependent resources that are either reserved or held by tribes, either expressly or implicitly.” The proposed revisions do not further define these terms, nor do they limit the proposed revisions to those reserved rights directly dependent on surface water quality. The proposed revisions do not consider the existing body of directly applicable case law specifically addressing treaty rights (e.g., hunting, fishing, gathering). Since many tribal reserved rights may be broad and these broad rights may depend to some extent on surface water quality, the proposed revisions have the potential to greatly expand the factors that must be considered during development of surface water quality protections. As a result, WDEQ would need to expend considerable resources determining and negotiating whether a particular reserved right would require water quality protections. WDEQ would then need to expend considerable resources determining and negotiating the levels of water quality necessary to protect the reserved right. Therefore, despite the limitation that the protections be based on “available data and information,” the proposed regulations do not provide sufficient clarity to avoid protracted negotiations and legal liabilities regarding which reserved rights require protections under the proposed rule.

9. The Proposed Revisions Lacks Clarity Regarding Tribal Reserved Rights “Unsuppressed by Water Quality and Availability.” The proposed revisions require water quality standards to “the extent supported by available data and information” to protect “the exercise of tribal reserved rights unsuppressed by water quality or availability of the aquatic or aquatic-dependent resource.” However, the proposed revisions do not further define these considerations. Determining whether a reserved right is suppressed via water quality versus some other direct or indirect factor is complex and resource intensive, particularly on the scale that may be necessary to protect reserved rights. For example, fishing rights are affected by population management, which may be limited due to surface water quality as well as habitat degradation, invasive species, disease, and a number of other factors. And although EPA has offered resources to assist states, “available data and information” is subject to interpretation and EPA’s resources to assist states are limited. Therefore, the proposed regulations do not provide sufficient clarity to avoid protracted negotiations and legal liabilities regarding the level of water quality necessary to protect potentially applicable tribal reserved rights.

10. Neither EPA nor States Have Water Quality Criteria or Methodologies to Derive Water Quality Criteria to Protect the Potentially Applicable Tribal Reserved Rights. Development of water quality standards to protect tribal reserved rights may require the establishment of designated uses and water quality criteria that have not been contemplated under either Wyoming’s surface water quality standards or EPA’s nationally recommended water quality criteria. The potential breadth of tribal reserved rights contemplated under the proposed revisions may require derivation of water quality criteria for which there are currently no agreed-upon methodologies. The potentially applicable reserved rights must be identified and methodologies must be developed, agreed upon, and finalized prior to imposing requirements to protect such uses.

11. The Proposed Revisions Do Not Provide Sufficient Flexibility to Not Include Tribal Reserved Rights or for Tribes to Decline Consultation When Appropriate. The proposed revisions require the

identification and protection of tribal reserved rights, as informed by the right holders, and require EPA to consult with tribes. The proposed revisions do not explicitly provide a means for tribes to decline protections associated with a reserved right or for a tribe to decline consultation. There are likely a number of factors that will influence tribes' interest in protecting reserved rights and consulting with EPA. The proposed revisions should be revised accordingly so that states do not face legal challenges when reserved rights are not included in surface water quality standards.

12. The Proposed Revisions Lack Clarity Regarding Quantities of Water. Although 40 CFR § 131.4 describes "Consistent with section 101(g) and 518(a) of the CWA, water quality standards shall not be construed to supersede or abrogate rights to quantities of water," the federal register notice states that "Tribal reserved rights as defined in this proposed rulemaking generally do not address the quantification of *Winters* rights" that reserve sufficient water to accomplish the purposes of a reservation⁴. WDEQ is concerned with EPA's unwillingness to definitively say that the proposed revisions will not interfere with the allocation of *Winters* rights, despite (1) the fact that most of the reserved rights contemplated under the proposed revisions are likely to be associated with off-reservation waters and (2) both the CWA and the federal regulations include explicit statements that water quality standards are not to supersede or abrogate rights to quantities of water. Since the topic of water rights extends well beyond WDEQ's, EPA's, and CWA authorities, discussions regarding water quality protections associated with tribal reserved rights must explicitly exclude any determination, quantification, or definition of federal reserved water rights.

13. Water Quality Standards Protective of Tribal Reserved Rights Must Recognize Limitations. Since many tribal reserved rights are broad (e.g., hunting, fishing, gathering) and therefore dependent on a number of factors outside the scope of water quality standards, there are likely a number of instances where tribal reserved rights are no longer supported or attainable. Efforts by states to develop water quality standards to protect tribal reserved rights must recognize these limitations without requiring states to conduct use attainability analyses, discharger-specific variances, or other in-depth and resource-intensive evaluations. Without this allowance, the extensive nature of reserved rights and the multitude of factors that influence reserved rights place an unreasonable burden on states.

WDEQ appreciates the opportunity to provide comments on the proposed revisions. Given WDEQ's extensive concerns with the proposed regulations, WDEQ recommends EPA withdraw the proposed rule and conduct meaningful engagement with states and tribes. To this end, WDEQ is ready to engage further with EPA and tribes on this important issue. Please contact Lindsay Patterson, Surface Water Quality Standards Supervisor, at 307-777-7079 or Lindsay.Patterson@wyo.gov, should you have any questions regarding these comments.

Sincerely,



Todd Parfitt, Director

⁴ Footnote 6 of the proposed describes that "Under *Winters v. United States* and its progeny, the establishment of a Federal reservation (Indian or otherwise) implicitly reserves sufficient water to accomplish the purposes of the reservation 207 U.S. 564, 576 (1908); *Cappaert v. United States*, 426 U.S. 128, 139 (1976); *Arizona v. California*, 373 U.S. 546, 597-602 (1963).

cc: Jennifer Zygmunt, Water Quality Division Administrator
David Waterstreet, Watershed Protection Section Manager
Chris Brown, Attorney General's Office
Kit Wendtland, Office of the Governor
Nolan Rap, Office of the Governor