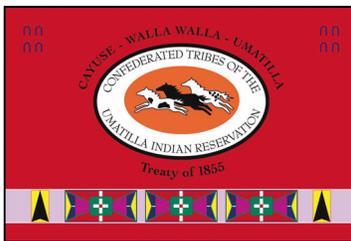


**Confederated Tribes *of the*
Umatilla Indian Reservation**

Department of Natural Resources



46411 Timine Way
Pendleton, OR 97801

www.ctuir.org ericquaempts@ctuir.org
Phone: 541-276-3165 Fax: 541-276-3095

September 13, 2021

Ms. Jennifer Brundage,
Office of Water, Standards and Health Protection Division (4305T)
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460
Transmitted Electronically: Brundage.jennifer@epa.gov

RE: Comments on Potential Revisions to the Federal Water Quality Standards Regulations to
 Protect Tribal Reserved Rights

Dear Ms. Brundage:

The Confederated Tribes of the Umatilla Indian Reservation (CTUIR) Department of Natural Resources (DNR) offers the following comments on Potential Revisions to the Federal Water Quality Standards Regulations to Protect Tribal Reserved Rights. The CTUIR supports revising the regulations to better protect tribal Treaty and other reserved rights. Revised regulations will better effectuate the policies and directives of Executive Order (EO) 13175: Consultation and Coordination with Indian Tribal Governments, giving some much-needed additional weight and actual substance to its beneficial procedural provisions. It is also consistent with and provides practical reinforcement to President Biden's Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships.¹ Our comments incorporate by reference those of the Columbia River Inter-Tribal Fish Commission (CRITFC).

Introduction

The CTUIR is a federally-recognized Indian tribe, with a reservation in Northeast Oregon and ceded, aboriginal, traditional use areas, and usual and accustomed areas in Oregon, Washington, Idaho, and other Northwest states. In 1855, predecessors to the CTUIR—ancestors with the Cayuse, Umatilla, and Walla Walla Tribes—negotiated and signed the Treaty of 1855 with the United States, 12 Stat. 945. The Treaty is a contract between sovereigns and is “the supreme Law of the Land” under the United States Constitution. In the Treaty the CTUIR ceded millions of acres of land to the federal government, and in exchange received assurances that our sovereignty would be recognized and respected, our various pre-existing tribal rights would be honored, and our interests would be considered and safeguarded, in perpetuity. EPA has a legal duty and a moral obligation to honor and uphold the Treaty of 1855 and all Indian treaties and to act as a steward and trustee to ensure that the terms and commitments of such treaties are fulfilled. The agency must ensure that the rights reserved in the Treaty can be exercised now and in the future.

¹ <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/26/memorandum-on-tribal-consultation-and-strengthening-nation-to-nation-relationships/> (Jan. 26, 2021).

The CTUIR, through the Treaty of 1855 and its inherent sovereignty and pre-existing rights and authorities, holds reserved rights to aquatic or aquatic-dependent resources in waters outside the boundaries of federal Indian reservations, and in areas otherwise subject to state and federal jurisdiction. Specifically, the CTUIR reserved the pre-existing right of taking fish—anadromous and non-anadromous—exclusively on-reservation, and in common with non-tribal citizens off-reservation. The reserved right of taking fish contains within it the necessary, concurrent, implicit right to the healthy, sustainable habitats and environmental conditions needed to ensure that there will be fish to take, and that those fish will be safe and healthy to consume, free from pollution and toxic contaminants. Water, in sufficient amounts and of adequate, suitable quality, must be present and available to assure fulfillment of the right, and adopting and implementing appropriate Water Quality Standards (WQS) is a vital means to achieve this.

The 2016 EPA Policy on Consultation and Coordination with Indian Tribes: Guidance for Discussing Tribal Treaty Rights is worth noting, stating in part that:

“ . . . [P]rotecting fish may involve protection of water quality in the watershed.”

“ . . . [T]reaty rights most likely to be relevant to an EPA action are rights related to the protection or use of natural resources, or related to an environmental condition necessary to support the natural resource, that are found in treaties that are in effect.”

“Treaties also may contain necessarily implied rights. For example, an explicit treaty right to fish in a specific area may include an implied right to sufficient water quantity or water quality to ensure that fishing is possible. Similarly, an explicit treaty right to hunt, fish, or gather may include an implied right to a certain level of environmental quality to maintain the activity or a guarantee of access to the activity site.”²

A paramount objective in the Treaty of 1855 was protecting and maintaining our tribal First Foods—water, fish, big game, roots, berries, and other plants—and the habitats and environmental conditions that support and sustain them, then, now, and forever. This remains a paramount objective of the CTUIR. Protecting and maintaining our tribal First Foods is essential to safeguarding our reserved rights and the traditions, culture, and way of life they were meant to uphold.³ EPA actions such as interpretation, application, and implementation of the Clean Water Act can and do significantly impact (both directly and indirectly) the existence and health of the First Foods and their habitats.

² https://www.epa.gov/sites/default/files/2016-02/documents/tribal_treaty_rights_guidance_for_discussing_tribal_treaty_rights.pdf.

³ Vital to our authority to protect and maintain the First Foods are our legally-recognized rights as resource co-managers. CTUIR members were sole resource managers since time immemorial, but beginning less than two centuries ago we began to share this responsibility with federal and state managers. Tribal management is now jointly based on traditional knowledge and expertise combined with the latest, most reliable, state-of-the-art science.

General Comments

Regulations should be revised to enhance EPA's ability to honor and uphold Indian treaties and its Trust Responsibility to tribes. Changes to the federal WQS regulations at 40 CFR Part 131 to explicitly and sustainably protect tribal reserved rights in state waters are consistent with EPA's existing legal obligations and are warranted and welcomed by the CTUIR. We acknowledge the potential benefits of this rulemaking, which would include providing sustainable protection of tribal reserved rights, and clarity and transparency about how states and EPA must protect tribal reserved rights when establishing and revising WQS.

Unfortunately, many fish in the Pacific Northwest have already gone extinct, many populations are precariously low (with multiple populations listed as endangered and threatened under the Endangered Species Act listings), and many are already contaminated to various degrees with toxics and other pollutants in many locations. States should be encouraged to adopt WQS that increase the likelihood that fish populations of significance to the tribes will continue to exist, that they will not be diminished or depleted, and that they will not suffer from pollution or toxic contamination.

As you have noted, WQS must comply with both the Clean Water Act and any applicable tribal reserved rights, and that "states' human health criteria must be set at levels that would make fish safe to eat in subsistence/sustenance quantities in waters where reserved rights to fish for subsistence/sustenance exist." Notwithstanding the recent past that includes changing, political-driven positions, we believe that this remains a true and accurate statement and that federal regulations should reflect this position. The CTUIR DNR also maintains that making fish "safe to eat" means that risks of cancer and other non-cancer effects should be no greater than one in one million (10^{-6}), the most commonly-accepted, long-standing benchmark for such criteria. Also, a state's designated uses must include subsistence fishing, and a state's target population for human health criteria equally considers tribal fish consumers and the general population. Ultimately, water quality must be adequate to allow tribal members to safely consume fish taken pursuant to their treaty-reserved rights.

At this initial stage, the CTUIR DNR generally views favorably potential regulatory language that would:

- Require that states and EPA must not impair tribal reserved rights when establishing, revising, and evaluating WQS;
- Require that if reserved rights exist in the geographic area where a given set of WQS will apply, and the rights are related to a certain level of CWA protection that can be defined by available data, upholding those rights requires providing that level of CWA protection;
- Require that the scope/definition of these reserved rights and their protection must be informed by consultation with the affected tribe(s); and
- Provide options for regulatory approaches that states and EPA can use to ensure tribal reserved rights are protected, including (a) designated uses that explicitly incorporate protection of resources covered by tribal reserved rights, (b) criteria

that protect tribal reserved rights in waters where those rights apply, (c) assignment of appropriate antidegradation protection (requirement to maintain and protect current and future improved water quality) in waters where tribal reserved rights apply and where current water quality is sufficient to protect those rights.

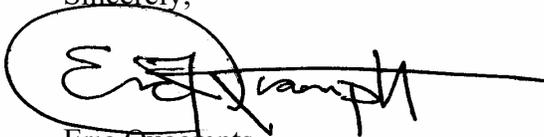
The CTUIR DNR looks forward to examining more detailed language as these concepts are fleshed out further in a draft proposed rule.

Conclusion

The Treaty of 1855 explicitly guarantees to the CTUIR and its members the right of “taking fish.” Associated with that right is the implicit, concurrent assurance that there will be fish to take—they will exist—and that those fish will be safe to eat—they will not be contaminated by pollution. The waters necessary for that existence—for fish survival, health, and sustainability—must also be protected and maintained. Water is the first of the tribal First Foods. Implicit in the Treaty Right to fish is the right to water—clean, available water necessary to effectuate tribal fishing rights. WQS are an essential mechanism to protect that water.

The CTUIR DNR appreciates EPA’s consideration of our comments on Potential Revisions to the Federal Water Quality Standards Regulations to Protect Tribal Reserved Rights. We support EPA’s renewed emphasis on protecting tribal reserved rights to water resources, and your efforts to “restor[e] the 2016 paradigm of harmonizing WQS with tribal reserved rights in a transparent and sustainable way.” We endorse greater attention to and protection of tribal reserved rights in developing Water Quality Standards, and support regulatory revisions to encourage such efforts. Regulations should promote development of WQS that reduce or eliminate further environmental damage and degradation that unjustified risks to too many, including present and future generations of tribal and non-tribal citizens alike. The CTUIR DNR looks forward to the forthcoming rule proposal, and anticipates further engagement with EPA on this matter. As always, the CTUIR welcomes the opportunity to work with you in partnership and collaboration to honor the Treaty of 1855, implement EPA’s federal Trust Responsibility, and protect our shared natural and environmental resources for the benefit of all people.

Sincerely,



Eric Quaempts
Director, Department of Natural Resources
Confederated Tribes of the Umatilla Indian Reservation

Cc: Fish and Wildlife Commission
Tribal Water Commission