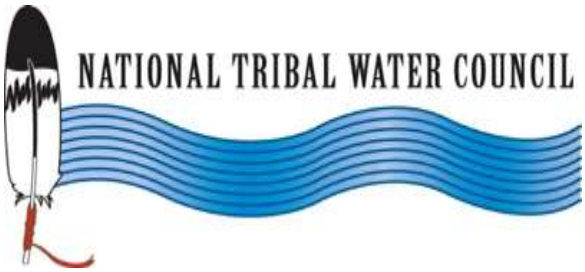

September 10, 2021

Michael S. Regan, Administrator
U.S. Environmental Protection Agency
Office of the Administrator, 1101A
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Submitted via email to brundage.jennifer@epa.gov

Re: Revisions to the Federal Water Quality Standards Regulations to Protect Tribal Reserved Rights

Dear Administrator Regan,

In 2006, the National Tribal Water Council (NTWC) was formed by the U.S. Environmental Protection Agency (EPA) to provide EPA with technical input from Indian Country to strengthen EPA's coordination with Indian tribes, and to allow EPA to better understand issues and challenges faced by tribal governments and Alaska Native Villages as they relate to EPA water programs and initiatives. The NTWC provides tribes and associated tribal communities and tribal organizations with research and information for decision-making regarding water issues and water-related concerns. Furthermore, the NTWC advocates for the best interests of federally-recognized Indian and Alaska Native tribes and tribally-authorized organizations in matters pertaining to water. The NTWC also advocates for the health and sustainability of clean and safe water, and for the productive use of water for the health and well-being of Indian country. The NTWC takes its role seriously and has provided input to EPA on many water issues since the Council's inception.

On June 11, 2021, EPA issued a letter to Tribal Leaders (Letter) initiating consultation and coordination with federally recognized Indian tribes to discuss potential revisions to the federal Water Quality Standards (WQS) regulations to protect "tribal reserved rights" in waters "outside the boundaries of federal Indian reservations, or in areas otherwise subject to state and federal jurisdiction." NTWC strongly supports EPA's effort to recognize tribal reserved rights and to

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revise the federal WQS regulations to protect them, in all the ways outlined in EPA's Letter. NTWC also recommends that EPA expand its effort by interpreting Clean Water Act (CWA) Section 401 in a manner that provides for tribal participation in comments on and objections to discharges within off-reservation state and federal lands both as to ceded territories where tribes exercise their treaty rights to hunt, fish, and gather and where Winters rights depend on the protection of water quality.[1] Finally, NTWC suggests that EPA could protect both categories of tribal reserved rights by encouraging tribal co-management of water quality impacting those rights on off-reservation federal lands.

Clarification of EPA's Terminology

Before providing specific comments on revisions to the federal WQS regulations and to EPA's approach to CWA § 401, NTWC first is providing clarifying comments on EPA's terminology in the Letter and accompanying enclosure.

Tribal Reserved Rights

NTWC interprets EPA's use of the term "tribal reserved rights" as incorporating two categories of tribal reserved rights that exist outside reservation boundaries: tribal treaty rights and federally reserved water rights.

Many tribes have treaty rights to hunt, fish, and gather that extend to ceded lands and other lands outside reservation boundaries.[2] These treaties are recognized in the Constitution as being the highest law of the land, Const. Art. VI, cl. 2, making it imperative to protect the rights they grant, which include the resources on which these rights depend and the water quality those resources depend on.

Separately, tribes have federally reserved water rights, based on either the "*Winters Doctrine*" or treaties,[3] which attach to waters located on and near Indian reservations to satisfy these reserved water rights. Tribes rely on these water rights to satisfy permanent homeland purposes, which include domestic water use, cultural and recreational uses, and economic development and commercial uses, as well as other uses that will support a permanent homeland for at least 100 years.[4] Furthermore, there is no distinction in federal Indian water law as to whether these water courses must be present solely on Indian lands, and as a general matter these waters typically

[1] *Winters v. United States*, 207 U.S. 564 (1908).

[2] For example, some tribes' treaty rights extend to all "unoccupied" lands. *See, e.g., Herrera v. Wyoming*, 139 S. Ct. 1686, 587 U.S. __ (2019).

[3] U.S. v. Adair, 723 F.2d 1394 (9th Cir. 1983) (treaty rights to fish necessarily require sufficient water to maintain plants and fisheries).

[4] *In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 35 P. 3d 68 (Az. Sup. Ct. 2001) ("Gila V"); *In re Rights to Use Water in Big Horn River*, 753 P.2d 76(Wyo. 1988), *aff'd by an equally divided court sub. nom., Wyoming v. United States*, 492 U.S. 406 (1989) ("Big Horn II").

flow from off-reservation lands onto reservation lands.[5] In addition, it is not necessary for these federally reserved water rights to have been fully and finally adjudicated or settled. They are created upon establishment of the reservation, or upon treaty execution.[6] Tribes' reserved water rights and the waters that satisfy those rights are trust assets subject to federal protection and jurisdiction.[7] For tribes that have settled or adjudicated their water rights, the United States has a confirmed trust responsibility and legal obligation to protect the waters subject to those rights.[8]

NTWC supports EPA's goal of protecting both categories of tribal rights.

Areas Otherwise Subject to State and Federal Jurisdiction

In the opening paragraph of its Letter, EPA states that "Many tribes, through treaties and equivalent agreements with the U.S. government, hold reserved rights to aquatic or aquatic-dependent resources in waters outside the boundaries of federal Indian reservations, or in areas otherwise subject to state and federal jurisdiction." EPA does not explain what areas of federal jurisdiction it is referring to, and after this opening statement EPA, refers to state jurisdiction only.

NTWC points out that the federal government (not the states) has CWA jurisdiction over waters on allotted lands outside reservation boundaries, because allotted lands are included in the federal definition of Indian country. Tribes have jurisdiction over allotted lands also, but the CWA does not allow them "treatment as a state" (TAS) over these lands. The same holds true for dependent Indian communities. Thus, for CWA purposes, tribes must depend on EPA to set appropriate federal WQS for waters in these areas. The federal government also has jurisdiction over waters in national parks and other federal lands, where some tribes exercise treaty rights.

Further, use of the word "or" in this sentence is misleading; the word should be deleted. There are no areas within federal Indian reservations that are subject to state jurisdiction, because EPA

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[5] *See U.S. v. Adair*, 723 F.2d at 1417-18.

[6] *See supra Winters, US .v Adair*.

[7] Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims, 55 F.R. 9223 (1990); *see also* Ak-Chin Water Rights Settlement Act, P.L. 95-328 (July 28, 1978) ("The Congress hereby declares that it is the policy of Congress to resolve . . . the claims of the Ak-Chin Indian community for water based upon failure of the United States to meet its trust responsibility to the Indian people.").

[8] *See* Fallon Paiute Shoshone Indian Water Rights Settlement Act, P.L. 101-618, Sec. 103(a) (Nov. 16, 1990) ("Title to all lands, water rights and related property interests acquired . . . shall be held in trust by the United States for the Tribes as part of the Reservation."); Arizona Water Rights Settlement Act, P.L. 108-451, Title II, Sec. 204(a)(2) ("The water rights and resources described in the Gila River agreement shall be held in trust by the United States on behalf of the Community and the allottees as described in this section."); Claims Resolution Act of 2010, P.L. 111-291, Title V, Sec. 504(a) ("Those rights to which the [Taos] Pueblo is entitled under the Partial Final Decree shall be held in trust by the United States on behalf of the [Taos] Pueblo and shall not be subject to forfeiture, abandonment, or permanent alienation.").

reads the CWA as a statutory (congressional) delegation to tribes of jurisdiction over waters within reservation boundaries.

Revisions to WQS Regulations to Protect Tribal Reserved Rights

In the enclosure to its Letter, EPA identifies the following revisions that it is considering proposing to its WQS regulations:

- The requirement that states and EPA must not impair tribal reserved rights when establishing, revising, and evaluating WQS.
- The requirement 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.
- Requirements outlining that the scope/definition of these reserved rights and their protection must be informed by consultation with the affected tribe(s).
- Providing options for regulatory approaches that states and EPA can use to ensure tribal reserved rights are protected:
    - Designated uses that explicitly incorporate protection of resources covered by tribal reserved rights.
    - Criteria that protect tribal reserved rights in waters where those rights apply.
    - Assignment of Tier 3 antidegradation protection (i.e., 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.

NTWC supports all of these proposed revisions, with one slight modification. We recommend including under the second bullet point that the reserved rights at issue be related to "a certain level of CWA protection that can be defined by available data *or data that can be acquired through typical monitoring or relevant environmental information systems (e.g., GIS, LiDAR).*"

The NTWC recognizes that these revisions under consideration could, if promulgated, provide a framework for the protection of tribally significant aquatic resources in a manner consistent with what tribes across the nation have long urged the agency to ensure through their CWA authorities. For example, EPA's promulgation of WQS in the States of Washington and Maine specifically for the protection of tribal subsistence fish consumption was welcomed by all tribal nations as a clear example of EPA fulfilling its trust responsibility by exercising its CWA oversight authorities when the states would not establish sufficiently protective standards. Similarly, tribes in the Great Lakes region and in the State of Minnesota have been encouraged by EPA's recognition of tribal rights (both on- and off-reservation) to harvest manoomin, or wild rice, and the need to protect the level of water quality necessary to sustain this ecologically sensitive, culturally significant aquatic resource through implementation of protective WQS.

Interpretation of CWA Section 401 to Protect "Tribal Reserved Rights"

The NTWC recommends that EPA also examine how CWA Section 401(d)(2) certifications could best protect tribal reserved rights – both treaty rights and *Winters* rights – in areas outside reservation boundaries. Under this approach, EPA would interpret the scope and implementation of 401(d)(2) broadly to include the protection of "tribal reserved rights." EPA also would make a 401(d)(2) determination on behalf of tribes lacking TAS. Principles of statutory construction support a broad interpretation of statutory language, especially on behalf of tribes, in instances such as this one where Congress has not restricted the Agency's authority to protect tribal rights and resources.

Scope of CWA § 401(a)(2) – Protecting Water Quality on Reservations from Off-Reservation Discharges

Although a tribe has the right to object to a permit under Section 401(a)(2), the permissible scope of tribal objections has not been clearly interpreted by EPA or by the courts. Section 401(a)(2) directs that, once a state or tribe has determined that a "discharge will affect the quality of its waters so as to violate any water quality requirements in such State [or tribe]" and requests a public hearing, the licensing or permitting agency must hold the requested hearing.[9] In addition, Section 401(d) provides that "other appropriate requirement[s]" may be included as conditions in federal permits or licenses, and does not preclude these other appropriate requirements from applying to the downstream states provisions of Section 401(a)(2).[10]

EPA should interpret Section 401(a)(2) to allow tribal objections to off-reservation discharges that would have an impact on a tribe's use of its reserved rights due to impairment of water quality within the reservation. This interpretation would view tribal reserved rights as "other appropriate requirements," and would effectuate the principle that tribes may propose "conditions and limitations on the activity as a whole."[11] By doing so it would serve the purpose of Section 401(a)(2), which is to protect the waters of states or tribes affected by discharges originating upstream, and it would be consistent with EPA's fiduciary responsibilities to tribes under executive order and Agency policies.

Moreover, in instances where the affected tribe does not have TAS, EPA should itself determine whether the discharge would affect the quality of tribal waters, after providing notice and consulting with the tribe as to the potential impacts of the permitted activity.

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[9] 33 U.S.C § 1341(a)(2) (2012).

[10] *Id*. § 1341(d). The text applies to "[a]ny certification provided under this section," and is not limited to paragraph 401(a)(1). *Id.* Since the preceding paragraphs of Section 401, including paragraphs 401(a)(3), 401(a)(4), and 401(a)(5), explicitly limit their application to a certification obtained pursuant to paragraph (a)(1), the absence of this limitation in Section 401(d) should be interpreted to allow "other appropriate requirements" to be raised and included under paragraph 401(a)(2).

[11] *See PUD No.1 of Jefferson Cnty. v. Wash. Dep't of Ecology*, 511 U.S. 700, 712 (1994); see *also S.D. Warren Co. v. Me. Bd. of Envtl. Prot*., 547 U.S. 370, 374 (2006).

Therefore, the NTWC proposes that EPA would: 1) allow tribes with TAS to request a hearing to object to a permit on the basis of the discharge adversely affecting tribal use of its reservation waters reserved under the *Winters* doctrine and/or treaties; and 2) provide notice of the proposed discharge to downstream tribes regardless of their TAS status, and request and participate in a hearing before the permitting or licensing agency on behalf of a non-TAS tribe, upon the request of the tribe and after consultation with the tribe to determine whether and how the permitted activity threatens tribal reserved rights that depend on water quality.

Scope of CWA § 401(a)(2) – Protecting Off-Reservation Treaty Rights from Discharges

Similar to the situation discussed above, protection of off-reservation tribal treaty rights would be best served if EPA consulted with the potentially affected treaty tribe(s) as to any threatened impact a permitted activity might have on the tribe's treaty rights. EPA would first notify all tribes with treaty rights in the area in question, regardless of the tribes' TAS status. EPA could then either request a hearing itself (most likely in the case of non-TAS treaty tribes) and represent the tribe's interests before the licensing or permitting agency, after proper consultation and upon request, or allow a treaty tribe (most likely one with TAS) to object to and request a hearing on impacts that would threaten tribal treaty rights.

As in the situation discussed above, EPA would be viewing the tribe's treaty rights as "other appropriate requirements" protected by CWA § 401(d). This proposal extends somewhat beyond 401(a)(2), however, in that it addresses water quality impacts outside of rather than within the reservation. For that reason, EPA may choose to limit its proposal to or offer for EPA to request and represent a tribe at a hearing, although the provisions of 401(a)(2) read in conjunction with the federal government's trust responsibility and legal obligation to protect treaty rights may provide sufficient authority.

Co-Management of Waters in Ceded Lands

Finally, when ceded lands are under the control of the federal government, protection of off-reservation treaty rights would be best served if EPA allowed for tribal co-management of water resources in those lands. Direct tribal involvement in the federal government's protection of water quality, rather than merely the potential for tribal consultation, would increase the likelihood that treaty rights to hunt, fish and gather would be protected in the face of proposals for pipelines, mineral extraction, and other industrial development on these federal lands.

The tribe would need to show that the water resources that the tribe seeks to co-manage are, in fact, held by the federal government. The tribe would also need to demonstrate that its members retain reserved rights to hunt, fish or gather on this federal land, and that treaties, statutes, regulations, or other federal authorities establish fiduciary responsibilities to protect tribal reserved rights on the federal land at issue. EPA could require other eligibility criteria as well, such as a requirement that the tribe have qualified for TAS under CWA § 303. And EPA could establish procedures for how tribal input would be considered and incorporated into regulation of the water quality at issue.

In sum, the NTWC recommends that the proposed rule include the revisions EPA proposes to the federal WQS regulations, as further discussed in these comments; an expansion of EPA's interpretation of Section 401(a)(2) certification; and an opportunity to participate in co-management with the federal government of certain off-reservation waters. Increasing the scope of tribal participation under the CWA in these ways will further the recognition of tribal interests and inherent sovereignty in protecting water quality and will allow for better informed management of these precious resources.

Thank you for the opportunity to express our comments and recommendations.

Sincerely,

Ken Norton, Chair
National Tribal Water Council

Cc: Karen Gude, US EPA Office of Water, gude.karen@epa.gov