



# Northwest Indian Fisheries Commission

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November 2, 2022

Felicia Wright, Acting Director  
American Indian Environmental Office  
Office of International and Tribal Affairs  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, NW  
Mail Code 2690R  
Washington, DC 20460

Re: Potential Revisions to Clean Water Act Water Quality Standards Regulations to Protect Tribal Reserved Rights

Dear Ms. Wright:

On behalf of the Northwest Indian Fisheries Commission (NWIFC) and its member tribes<sup>1</sup>, I write to express our support for the Environmental Protection Agency's (EPA) proposed amendments to the Clean Water Act (CWA) water quality standards (WQS) regulation to explicitly provide for the protection of tribal treaty-reserved rights in waters subject to state WQS. EPA's proposal is a positive step towards protecting treaty rights because it expressly recognizes that state water quality standards are subject to the reserved rights of tribal nations. The proposal is also consistent with EPA's fiduciary trust obligation to tribes: where a tribe has reserved rights, the federal government has a duty to protect those rights. In this case, EPA is recognizing that water quality standards must be stringent enough to protect treaty-reserved resources and treaty rights.

EPA's proposal, while positive, does raise some concerns and questions that we would like addressed as the agency moves forward with rulemaking.

## **EPA Must Clarify that Tribes Alone, not States, Determine where Treaty Rights are Exercised and where Treaty-Reserved Resources Exist.**

Without this clarification, states could claim that treaty-reserved resources do not exist, or rights are not exercised, in a particular waterbody, and therefore, may attempt to enact less

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<sup>1</sup> The NWIFC member tribes are the Hoh, Jamestown S'Klallam, Lower Elwha Klallam, Lummi, Makah, Muckleshoot, Nisqually, Nooksack, Port Gamble S'Klallam, Puyallup, Quileute, Quinault, Sauk-Suiattle, Skokomish, Squaxin Island, Stillaguamish, Suquamish, Swinomish, Tulalip, and Upper Skagit.

stringent water quality standards. Through their treaties,<sup>2</sup> member tribes of the NWIFC reserved their fishing, hunting and gathering rights both on reservation and, importantly, at all “Usual and Accustomed” (U&A) places. This covers an extensive geographic area, crossing multiple state and federal jurisdictions. Tribes generally do not define the location or extent of their U&A’s in state proceedings, but under EPA’s proposal, such a scenario is likely to occur. Tribes would be forced to closely monitor state water quality agencies to ensure that when they establish, revise or evaluate water quality standards, the standards are protective of tribal rights.

As fiduciary with a trust responsibility, EPA is required to support a tribe’s position on where its rights are exercised and where treaty resources exist. As an example, consider a headwater stream where salmon spawn, but where tribes do not fish in order to achieve escapement goals for the population. Conceivably, a state may argue that because the tribe does not exercise its treaty rights in this headwater stream, water quality standards could be less protective. Similarly, if salmon are not currently present in a waterbody due to a passage barrier (e.g., a dam or culvert), but could be in the future when the passage barrier is removed, a state could argue that treaty resources do not exist in this area and, therefore, less protective standards are warranted. In both scenarios, tribes would be required to defend their rights and enlist the support of EPA. In the context of this proposal, EPA must recognize that the treaty-reserved rights of NWIFC’s member tribes applies to all surface waters in western Washington, including estuaries and the ocean.

### **Does EPA’s Proposed Rule Apply to Treaty Resources (e.g., Salmon, Shellfish), their Habitat, or Both?**

Conceivably, the answer is both, but clarifying this issue is important to ensure the maximum protection of treaty rights and treaty-reserved resources.

### **EPA Should Clarify that the Proposed Rule Covers Connected Waters that Support the Habitat of Treaty-Reserved Resources.**

Some water bodies may not include designated beneficial uses that cover treaty-reserved resources like salmon rearing, spawning or migration, but these waters may play a critical role in supporting the habitat of treaty resources and the sustainable exercise of those treaty rights. Many tribes exercise their rights in interconnected waters and ecosystems that depend on healthy water quality from upstream sources. EPA should clarify that WQS developed to protect treaty-reserved resources and rights apply both within the location of place-based rights as well as in adjacent and connected waters. As noted above, all surface waters in western Washington support treaty-reserved resources and the exercise of treaty rights.

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<sup>2</sup> Treaty of Point No Point, 1855, Treaty of Point Elliott, 1855, Treaty of Olympia, 1856, Treaty of Neah Bay, 1855, Medicine Creek Treaty, 1854

**EPA Should Require States to Apply their Anti-Degradation Policies to Waters Supporting Treaty-Reserved Rights and Resources.**

The CWA requires states to include an Anti-Degradation policy when establishing water quality standards. Anti-Degradation is a powerful, but rarely used, tool that prevents states from allowing discharges to impair current good water quality conditions. Generally, it's utilized by designating waters as "Outstanding Resource Waters," which are waters that are largely pristine and without impairment. EPA's proposed rule could and should require states to apply their anti-degradation policies to waters where treaty-reserved rights and resources exist. This would be consistent with EPA's fiduciary responsibilities to protect treaty rights and resources and is consistent with the fact that treaties are the supreme law of the land under the U.S. Constitution. When in conflict, the U.S. Constitution takes precedent over state law.

**Determining Appropriate Level of Water Quality and Funding to Support Analyses**

EPA's proposal includes language stating that proposed new WQS would apply where "*the level of water quality necessary to protect those rights is known.*" We recommend that these levels be science-based and determined through collaboration and consultation between EPA and affected tribes. Where data gaps exist, EPA should provide the necessary technical and financial support to conduct the needed analyses to determine the level of water quality protection that the WQS must achieve to be protective of treaty-reserved resources and rights. EPA could perform these analyses in collaboration with tribes or provide the funding to the tribes to do this work.

We look forward to continuing to work with EPA to improve and secure protection of treaty-reserved rights in federal WQS. This action would have meaningful benefits to NWIFC's member tribes and their treaty resources and rights. For additional information, please contact Greg Haller, Environmental Protection Policy Analyst, at [ghaller@nwifc.org](mailto:ghaller@nwifc.org).

Sincerely,



Justin R. Parker  
Executive Director

cc: Radhika Fox, Assistant Administrator, Office of Water, Environmental Protection Agency