



**EPA Region 10 Tribal Operations Committee (RTOC)
P.O. Box 689
Spokane, Washington 99210
www.region10rtoc.net**

March 6, 2023

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

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

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

Dear Administrator Regan:

This letter is sent on behalf of the Tribal Caucus of the Region 10 Tribal Operations Committee's ("RTOC") on Environmental Protection Agency's ("EPA") Water Quality Standards Regulatory Revisions to Protect Tribal Reserved Rights, 87 Fed. Reg. 74361 (Dec. 5, 2022) ("Proposed Rule"). These comments are not sent on behalf of EPA Region 10 or any employees of EPA, but solely on behalf of the tribal government representatives of the RTOC.

If enacted, the Proposed Rule will enhance the protection of treaty rights as it explicitly states that the water quality standards set by the state are dependent upon the reserved rights of Tribes. The Proposed Rule has the additional benefit of furthering the EPA's obligation to protect the rights reserved by Tribes. Here, EPA is prioritizing their fiduciary duty to tribes by setting water quality standards that are high enough to protect tribal treaty rights.

While supporting the Proposed Rule, the RTOC offers the following comments:

1. Definition of Tribal Reserved Rights Should be Expanded to Include Subsistence Rights in Alaska.

The RTOC requests that the Proposed Rule specifically address subsistence rights of Alaska Natives.

In Proposed Rule § 131.3, EPA defines “tribal reserved rights” as “any 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.” The RTOC request that this language be expanded to include subsistence rights established by federal law and exercised by Alaska Native.

The Alaska National Interest Lands Conservation Act (“ANILCA”) explicitly protects Native Alaskans’ subsistence uses “mandating a hunting and fishing preference for rural residents in Alaska,” 16 U.S.C. § 3101(c), and describing subsistence as “essential for rural Alaskans--specifically Alaska Natives--to maintain physical, economic, traditional, and cultural existence.” 16 U.S.C. § 3111(1).

The history of ANILCA enforcement illustrates the federal government's strong commitment to protecting native subsistence. Originally, ANILCA offered Alaska the option of managing subsistence on federal public lands if the State would adopt a law granting “rural” users, primarily Alaska natives, subsistence priority. When Alaska refused, declaring the preference for rural residents impermissible under the Alaskan constitution, the federal government intervened and took back management authority over fish and wildlife on federal lands. By resuming management of these lands, the federal government ensured that rural users, particularly Alaskan native communities, would continue to have subsistence preference.

Other federal laws, such as the Marine Mammal Protection Act (“MMPA”), recognize and protect subsistence rights of Alaska Natives. In enacting the MMPA, Congress put in place a dominant use regime, granting a protected status and heightened protections to the subsistence use of marine mammals by Alaska Natives. 16 U.S.C. §1371(b) (stating that the “provisions of this chapter shall not apply with respect to the taking of any marine mammal by any Indian, Aleut or Eskimo, who resides in Alaska and who dwells on the coast of the North Pacific Ocean or the Arctic Ocean”); *Katelnikoff v. United States Dep't of Interior*, 657 F. Supp. 659, 666 (D. Alaska 1986) (noting that Congress's concern in enacting the Native exemption was “the preservation of traditional aspects of native culture and lifestyle”); 118 Cong. Rec. 25,258 (1972) (statement of Sen. Stevens) (“If this exception were not included, Alaskan Natives would lose their traditional way of life, the way they have lived for centuries....”).

EPA could alleviate confusion and ambiguity moving forward by explicitly incorporating these subsistence rights into the Proposed Rule.

2. The Proposed Rule should Provide Mandatory Requirements for States and EPA to Consult with and Provide a Response to Materials Provided by Tribes.

RTOC recommends EPA adopt a process that requires states to contact all Tribes with reserved 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 and provide the Tribe and EPA with a written response to any input provided. In addition, EPA should require states to notify 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 a mandatory duty of the state and stringently enforced by EPA.

Moreover, the Proposed Rule should provide for specific requirements for EPA to consult with Tribes prior to taking any action on a state proposal that may impact reserved rights. The RTOC recommends that Proposed Rule § 131.9(b) be amended to include dispute resolution procedures when Tribes disagree with EPA conclusions of whether state water quality standards are protective of the reserved rights, including the right to elevate the matter directly to the EPA Administrator.

3. Designation of Beneficial Uses must be tied to Reserved Rights.

The RTOC supports the requirement in Proposed Rule § 131.9(c) that WQS must designate uses and establish appropriate water quality criteria to protect those uses, pursuant to § 131.11. RTOC supports a requirement that states, after consultation with tribes, designate water as “Reserved Rights Protection” as a beneficial use of water, with water quality criteria for that use.

We also note some waters may not include designated beneficial uses that cover reserved resources like salmon rearing, spawning, or migration, but may play a critical role in supporting the habitat of treaty resources and the sustainable exercise of treaty rights by tribal members downstream. Many RTOC member Tribes exercise their rights in interconnected waters and ecosystems that depend on healthy water quality from upstream sources. EPA should clarify that water quality standards be developed to protect reserved resources and rights apply both within the location of place-based rights, as well as in adjacent and connected waters, as determined by Tribes.

4. Protection of Unsuppressed Use.

Proposed Rule § 131.9(a) would require that, “to the extent supported by available data and information, to protect applicable tribal reserved rights WQS must be established to protect: 1) The exercise of tribal reserved rights unsuppressed by water quality or availability of the aquatic or aquatic-dependent resource; and 2) The health of the right holders to at least the same risk level as provided to the general population of the State.” The RTOC agrees that tribal reserved rights must be protected at levels unsuppressed by water quality or the availability of the resource.

Nearly all tribal reserved resources exist today at suppressed levels due to degraded habitat, including poor water quality. EPA suggests that in determining the level of protection required, states should balance heritage use of a resource with what is currently reasonably achievable for a particular waterbody. RTOC disagrees with this approach. This contradicts EPA’s objective to protect unsuppressed use. This also does not address EPA’s trust obligation to protect these reserved rights.

The RTOC recommends that the language be altered to require protection of unsuppressed rates unless agreement is otherwise reached with applicable Tribes.

5. Protecting Tribal Fish Consumption Rates.

The RTOC supports 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 Proposed Rule § 131.9(a)(2). However, RTOC suggests EPA require states to utilize the more frequently used 10^{-6} risk level even if the state uses the less stringent 10^{-5} risk level for the general population.

In Region 10, risk levels have been used to offset benefits of increased fish consumption rates. Given the amount of fish consumption that occurs by Tribes across the Region, a 10^{-6} risk level should be used as a default unless a state can provide evidence that it is not appropriate.

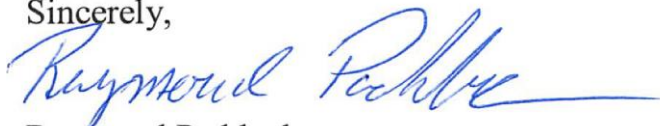
6. Protection of Culturally Sensitive Information.

The Proposed Rule encourages Tribes to provide information and data to the state for determining where and how the reserved rights apply, “as informed by the right holder.” The RTOC recommends that the request for culturally sensitive information must occur under strict confidential procedures. Proposed Rule § 131.6 (g) should provide that Tribes may request certain information about tribal reserved rights to be kept confidential, in which the state and EPA must honor that request. For example, a Tribe may want to keep the location of a resource confidential, as well as precisely how it is used if for a traditional cultural purpose.

In addition to these comments, the RTOC specifically incorporates by reference the comments submitted by the National Tribal Water Council and the Northwest Indian Fisheries Commission.

The RTOC looks forward to working with the EPA in a joint effort to improve and secure protection of treaty-reserved rights in federal water quality standards. The Proposed Rule the potential to positively and meaningfully impact Region 10 Tribes’ rights and their associated resources.

Sincerely,

A handwritten signature in blue ink that reads "Raymond Paddock". The signature is fluid and cursive, with a long horizontal stroke at the end.

Raymond Paddock

Region 10 RTOC, Tribal Caucus Co-chair