PETITION SEEKING RECONSIDERATION OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY'S TRIBAL RESERVED RIGHTS RULE, 89 FED. REG. 35,717 (MAY 2, 2024), AND RULEMAKING TO AMEND 40 C.F.R. PART 131

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February 18, 2025

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Re: Petition for Reconsideration of the Tribal Reserved Rights Rule, 89 Fed. Reg. 35,717 (May 2, 2024), and Rulemaking to Amend 40 C.F.R. Part 131

Administrator and Assistant Administrator:

Pursuant to the Administrative Procedure Act, 5 U.S.C. § 553, the Institute for Energy Research respectfully requests that the U.S. Environmental Protection Agency ("EPA") reconsider the final rule entitled *Water Quality Standards Regulatory Revisions To Protect Tribal Reserved Rights*, 89 Fed. Reg. 35,717 (May 2, 2024), and initiate notice-and-comment rulemaking to rescind the Rule's preamble and to amend the requirements for State water quality standards at 40 C.F.R. Part 131.

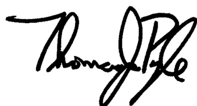
For the first time in the decades-long history of the Clean Water Act of 1972, the Tribal Reserved Rights Rule requires States to interpret and enforce asserted Tribal rights to water resources when developing water quality standards for waters within the States' sovereign territory. This sweeping mandate far exceeds the EPA's remit to review State standards for compliance with the CWA's requirements and cannot be squared with Congress's express and unmistakable policy of preserving the traditional authority of States to regulate land and water uses.

As detailed in the attached petition, the EPA lacked statutory authority to impose such requirements for State designated uses and water quality criteria, let alone on the

subject of reserved rights to water and water resources asserted under Federal treaties, statutes, or Executive Orders with connection to the CWA. Nor did the EPA adequately consider the shattering costs to States and regulated parties, including small businesses, of mandating the protection of express or implied Tribal reserved rights. Unless the EPA reconsiders its novel position, the Rule will require wholesale revision of water quality standards in any State where any Tribe asserts any reserved right involving water. On its own terms, the Rule jeopardizes the orderly administration of the CWA by upending decades of established practice without resolving critical threshold questions about who may assert rights, how such rights are to be interpreted, and when and how the EPA will deem State standards insufficient to protect such asserted rights. The resulting uncertainty is unnecessary to achieve the objectives of the CWA—to promote the public health and welfare through enhanced water quality—and cannot be justified by a desire to protect the asserted water rights of particular entities at the expense of State sovereignty.

The Institute for Energy Research respectfully requests that the EPA reconsider and rescind the preamble of the Tribal Reserved Rights Rule and amend 40 C.F.R. Part 131 to comply with the text, structure, and express purposes of the CWA. Specifically, the EPA should initiate notice-and-comment rulemaking to strike 40 C.F.R. § 131.3(r) and (s), 40 C.F.R. § 131.5(a)(9), 40 C.F.R. § 136(g), and 40 C.F.R. § 131.9, and amend 40 C.F.R. § 131.5(b) and 40 C.F.R. § 131.20 to remove references to the requirements added by the Rule.

Sincerely,



Tom Pyle, President
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Enclosures

Cc (with enclosures): Assistant Administrator, Office of Water, U.S. Environmental Protection Agency

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Pursuant to the Clean Water Act ("CWA") and 5 U.S.C. § 553(e), the Institute for Energy Research hereby petitions the U.S. Environmental Protection Agency ("EPA") to reconsider the final rule entitled *Water Quality Standards Regulatory Revisions To Protect Tribal Reserved Rights*, 89 Fed. Reg. 35,717 (May 2, 2024) ("Rule"), and to initiate notice-and-comment rulemaking to rescind the Rule's preamble and amend the requirements for State water quality standards at 40 C.F.R. Part 131.[1]

INTRODUCTION

In the Clean Water Act, Congress struck a deliberate balance between national objectives and States' sovereign authority to regulate land and water use. *See Sackett v. EPA*, 143 S. Ct. 1322, 1330 (2023) (citing 33 U.S.C. § 1251(b)). Accordingly, the CWA instructs States to develop "water quality standards" that "protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter." 33 U.S.C. § 1313(c)(2)(A). The EPA's role is limited to reviewing new and revised State standards, which "shall" go into effect so long as "such standard meets the requirements of this chapter." *Id.* § 1313(c)(3).

For decades, the EPA correctly understood that its oversight role is limited to determining whether States designated "water uses to be achieved and protected" and set "water quality criteria necessary to support those water uses." *Compare* 40 Fed. Reg. 55,334, 55,341 (Nov. 28, 1975), *with* 40 C.F.R. § 131.5(a)(1)–(2) (2023). This approach recognized that States have broad discretion to make "risk management decision[s]" about the uses and criteria required to protect "the general population." *Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health* 1-8 (Oct. 2000) ("2000 Methodology").

That all changed with the Tribal Reserved Rights Rule. For the first time, States *must* comply with substantive mandates when a federally recognized Tribe "asserts" a right to water resources that are reserved, "either expressly or implicitly, through Federal treaties, statutes, or executive orders." 89 Fed. Reg. at 35,725. If anyone asserts such a right, the State must "consider the use and value of their waters for protecting applicable

[1] The Institute for Energy Research has a significant interest in preserving the CWA's careful balance between the States' primary authority to develop water quality standards, including designating uses and establishing water quality criteria, and EPA's limited oversight authority to ensure that State standards protect the public health and welfare and enhance the quality of the Nation's waters.

Tribal reserved rights in adopting or revising designated uses." *Id.* at 35,730. And if the State's designated uses "either expressly incorporate" or "encompass the right," *id.* at 35,727, the State must "establish criteria to protect" that right, including by evaluating risk based on the rightsholders' unique circumstances rather than the general population, *id.* at 35,734. Under the new regime, States must consider and protect not just existing use of water resources under current conditions, but also the "future exercise" of rights "unsuppressed by water quality." *Id.* at 35,733.

None of this was required or authorized by the CWA, and none of it can be justified by the Rule's asserted interest in furthering the statute's pollution-reduction purpose at the expense of the statute's express policy of preserving State sovereignty. The EPA should reconsider and rescind the Rule for three overarching reasons:

First, the Rule exceeds the EPA's authority to review whether State water quality standards meet "the requirements of this chapter." 33 U.S.C. § 1313(c)(3); *see also id.* § 1361(a) (authorizing regulations "necessary to carry out … this chapter"). The Supreme Court has made clear that the EPA's actions must be consistent with "the best reading of the statute," *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2266 (2024), and that the EPA cannot significantly alter the balance between State and federal power or assert unprecedented authority over major policy questions without clear congressional authorization, *Sackett*, 143 S. Ct. at 1341; *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022). The CWA neither requires States to consider and protect *rights* to water resources, nor authorizes the EPA to impose such additional requirements on States as part of the water quality standards program. So long as States designate *uses* and protect those uses with criteria sufficient to protect the public health and welfare and enhance water quality, their standards "shall" go into effect. 33 U.S.C. § 1313(c)(2)(A), (c)(3).

Second, the Rule fails to consider the costs of requiring States to protect the "unsuppressed" exercise of reserved rights on the flawed theory that *States* will be responsible for the additional costs imposed by the EPA's new mandates. 89 Fed. Reg. at 35,741, 35,744. The EPA's authority to promulgate rules "necessary" to implement the CWA requires "attention to cost," *Michigan v. EPA*, 576 U.S. 743, 752 (2015), and the Regulatory Flexibility Act further requires an analysis of significant economic impacts on small entities, 5 U.S.C. § 610(b). The Rule violates both requirements by not even attempting to justify the immense costs of the more stringent standards that will necessarily be required to protect the speculative future exercise of Tribal reserved rights to water resources—and the EPA cannot simply shift the duty to consider costs onto the States.

Third, the Rule "failed to consider an important aspect of the problem" by deferring critical questions to future case-by-case adjudication. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The Rule does not resolve, for example, who may assert reserved rights on behalf of a Tribe, 89 Fed.

Reg. at 35,728; the standard for determining whether a right was "implicitly" reserved, *id.* at 35,725; the standard for determining the scope of an asserted right, *id.* at 35,726; how conflicts between competing assertions of rights should be resolved, *id.* at 35,739; or how the EPA will determine whether a State's designated uses "encompass" a right, such that the State must protect the unsuppressed exercise of such right, *id.* at 35,730, 35,740. On each issue, the Rule refuses to adopt existing statutory or judicial standards capable of answering the question without setting out standards of its own. The resulting regime is unworkable and unreasonable, and further demonstrates the need for reconsideration and rescission of the Rule.

The Tribal Reserved Rights Rule is inconsistent with the Clean Water Act, upends the careful balance between federal and State authority struck by Congress, and threatens immense costs and regulatory uncertainties that undermine the core objectives the EPA supposedly intended to further through the Rule. For the reasons stated below, the Institute for Energy Research respectfully requests that the EPA reconsider and rescind the Rule. At a minimum, the Institute for Energy Research urges the EPA to initiate a further rulemaking to address the most glaring flaws introduced by the Rule into 40 C.F.R. Part 131.

BACKGROUND

This section reviews the CWA's statutory history and the EPA's longstanding policy of recognizing States' substantial discretion to make sound risk-management decisions in developing water quality standards. The key to interpretation often "lies in some statutory history," *Holmes v. Secs. Inv. Prot. Corp.*, 503 U.S. 258, 267 (1992), and "'the longstanding practice of the government'—like any other interpretive aid—'can inform [the] determination of what the law is,'" *Loper Bright*, 144 S. Ct. at 2258 (quoting *NLRB v. Noel Canning*, 573 U.S. 513, 525 (2014)).

I. The Clean Water Act

Under the Constitution's federal structure, States retain the sovereign power to regulate land and water use "subject only to the rights since surrendered by the Constitution to the general government." *Martin v. Lessee of Waddell*, 41 U.S. (16 Pet.) 367, 410 (1842); *see also Pollard v. Hagan*, 44 U.S. (3 How.) 212, 230 (1845). "For most of this Nation's history, the regulation of water pollution was left almost entirely to the States and their subdivisions," while "federal regulation was largely limited" to protecting navigation on the "'traditional navigable waters'" that served as channels of interstate commerce. *Sackett*, 143 S. Ct. at 1330 (citing *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1871)); *see also id.* at 1346 (Thomas, J., concurring).

In 1972, Congress enacted the Clean Water Act "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" through a suite of planning and pollution-control programs. 33 U.S.C. § 1251(a). At the same time, Congress declared an express policy to "recognize, preserve, and protect *the primary*

responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development *and use* (including restoration, preservation, and enhancement) of land and water resources." *Id.* § 1251(b) (emphases added). Congress further provided that nothing in the CWA shall "be construed as impairing or in any manner affecting *any right or jurisdiction of the States* with respect to the waters (including boundary waters) of such States." *Id.* § 1370(2) (emphasis added). The CWA thus "anticipates a partnership between the States and the Federal Government," *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992), and reflects an "independent emphasis on state autonomy" in addition to its emphasis on improving water quality, *NRDC v. EPA*, 859 F.2d 156, 174 (D.C. Cir. 1988).

To accomplish these policies, Congress established a water quality standards program wherein States "have the primary role" in "establishing water quality standards" and the "EPA's sole function, in this respect, is to review those standards for approval." *NRDC v. EPA*, 16 F.3d 1395, 1401 (4th Cir. 1993). The CWA instructs States to develop "water quality standards" that "consist of designated uses" and "water quality criteria" that protect those designated uses. 33 U.S.C. § 1313(c)(2)(A). So long as a State standard "meets the requirements of this chapter," the EPA must approve it, and the standard "shall thereafter be the water quality standard for the applicable waters of that State." *Id.* § 1313(c)(3).

In setting out "the requirements of this chapter," Congress specified a closed set of requirements for State water quality standards that the EPA must apply in exercising its limited review authority. *First*, State standards must "protect the public health and welfare, enhance the quality of water and serve the purposes of this chapter." 33 U.S.C. § 1313(c)(2)(A). *Second*, States must establish designated uses for their waters "taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes," as well as "use and value for navigation." *Id.*[2] *Third*, States must establish "water quality criteria for such waters based upon on such uses," *id.*, that include such limitations as are "necessary to support such designated uses" for a particular body of water, *id.* § 1313(c)(2)(B).[3]

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[2] Designated uses reflect a State's judgment about the best use of a particular body of water. 40 C.F.R. § 131.10(a) (2023). Common examples include aquatic life uses (such as fish spawning), recreational uses (such as swimming and fishing), water supply uses (such as for domestic, industrial, and agricultural purposes), navigational uses, and uses for aesthetic value. *See, e.g.*, WAC 173-201A-200, 210.

[3] Water quality criteria may include numerical or narrative criteria, including "effluent limitations" and "monitoring or assessment" requirements. 33 U.S.C. § 1313(c)(2)(B); 40 C.F.R. § 131.11(b)(1)–(2) (2023). States may utilize guidelines promulgated by the EPA but are free to develop criteria supported by scientifically defensible methods. 33 U.S.C. § 1314(a); 40 C.F.R. § 131.11(b)(1)(i)–(iii) (2023).

Importantly, Congress required States to consider public *uses* of waters, not individual *rights* to water or water resources. Beyond providing that States should hold "public hearings" and encourage "public participation" in the standards-setting process, the statute leaves the particulars to State law and State discretion. 33 U.S.C. §§ 1251(e), 1313(c)(1). The CWA expressly provides "that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter," *id.* § 1251(g), and that the statute cannot be interpreted "in any manner affecting any right" held by any State, *id.* § 1370(2). Only other *sovereigns* may impact State water quality standards under certain conditions, and even then, only with respect to differences in designated uses between two States. For example, upstream States may be required to account for the impact of their standards on downstream States with more restrictive standards. *See El Dorado Chem. Co. v. EPA*, 763 F.3d 950, 958–59 (8th Cir. 2014).

In 1987, Congress amended the CWA to authorize the EPA to address the role of federally recognized Tribes in the water quality standards program. Section 518 provides that a Tribe may qualify for treatment "as a State" and set its own standards if the Tribe "exercise[s] governmental authority over a Federal Indian reservation," has "a governing body carrying out substantial governmental duties and powers," manages "water resources" held by the Tribe, and is "capable" of fulfilling the statute's requirements for States. 33 U.S.C. § 1377(e), (e)(1)–(3), (h)(3).

Section 518 was particularly contentious for legislators concerned that the provision would "result in an expansion or enhancement of the substantive water rights of Indian tribes in terms of quantity or quality." 133 Cong. Rec. 1589 (1987) (statement of Sen. Hatch). The bill's sponsors clarified that Tribes' water quality standards "will not be used off reservation borders" and that "nothing in the existing act or in the proposed amendments" gave the EPA "the power to force one State to change its approved water quality standards … to accommodate the water quality needs of another State or States." *Id.* To mitigate potential conflicts, the final bill expressly required the EPA to "provide a mechanism for the resolution of any unreasonable consequences that may arise as a result of differing water quality standards that may be set by States and Indian tribes located on common bodies of water" that includes "explicit consideration" of certain economic and administrability factors set out in the statute. 33 U.S.C. § 1377(e).

II. EPA's Review of State Water Quality Standards

For decades, the EPA closely adhered to the CWA's regulatory scheme by tying review of State water quality standards to the requirements set out in the statute. EPA's regulations provided that review of State standards would be limited to determining whether State submissions adequately considered the statutory factors and backed up their designated uses and protective criteria with sufficient data. Under the 2000 Methodology, the EPA has long maintained that States have broad discretion to protect the general population through risk-management decisions that inform the inputs used to

develop water quality criteria. Tribal reserved rights entered into consideration only when States voluntarily chose to protect such rights.

a. From 1975 onward, the EPA's regulations largely mirrored the language of the statute and refrained from imposing substantive requirements divorced from the CWA's express requirements for State water quality standards. Accordingly, the EPA required States to "[s]pecify appropriate water uses to be achieved and protected" and "appropriate water quality criteria necessary to support those water uses." *Compare Water Quality Standards Regulation*, 40 Fed. Reg. 55,334, 55,341 (Nov. 28, 1975), *with* 33 U.S.C. § 1313(c)(2)(A).

Subsequent revisions redesignated the regulations to 40 C.F.R. Part 131 while retaining the same core operative language. In 1983, the EPA revised the regulations to provide that EPA would determine "(a) Whether the State has adopted water uses which are consistent with the requirements of [the CWA]; (b) whether the state has adopted criteria that protect the designated water uses; (c) whether the State has followed its legal procedures for revising or adopting standards; (d) whether the State standards which do not included the use specified in [the CWA] are based upon appropriate technical and scientific data and analyses, and (e) whether the State submission meets" minimum submission requirements. *Water Quality Standards Regulation*, 48 Fed. Reg. 51,400, 51,406 (Nov. 8, 1983). The minimum "requirements" provided, in turn, that State submissions must include designated uses "consistent with" the considerations set out in the statute, "methods" and "analyses" that support the standards, "criteria sufficient to protect the designated uses," and a certification that the standards "were duly adopted pursuant to State law." *Id.*

As of 2023, the EPA's regulations continued to reflect that framework. The EPA reviewed whether the State "adopted designated water uses that are consistent with the requirements of [the CWA]," "adopted criteria that protect the designated water uses based on sound scientific rationale," "followed applicable legal procedures for revising or adopting standards," and "[w]hether the State standards which do not include the uses specified in [the CWA] are based upon appropriate technical and scientific data and analyses." 40 C.F.R. § 131.5(a)(1)–(2), (6)–(7) (2023). The minimum "requirements" for submissions remained virtually unchanged, *id.* § 131.6, as did the provisions for designated uses, water quality criteria, and triannual review of existing standards, all of which continued to mirror the statutory language, *compare id.* §§ 131.10, 131.11, 131.20, *with* 33 U.S.C. § 1313(c)(1), (c)(2)(A)–(B).

b. The EPA's 2000 Methodology informs the development of State water quality criteria by setting out guidelines for analyzing and mitigating risk. Under this longstanding guidance, the EPA recommended that States use a formula that considers, among other things, a "fish consumption rate" and a "cancer risk level." While some risk inputs are "grounded in science," the EPA recognized that others were "more obviously risk management decisions (such as the determination of default fish consumption rates and cancer risk levels)." 2000 Methodology at 2–4.

The fish-consumption rate is the estimated amount of fish an 80-kilogram adult consumes every day from his or her twenty-first birthday until death, thereby driving potential exposure to pollutants that accumulate in biological tissues. The EPA uses survey and other data to derive a national default fish consumption rate while, at the same time, encouraging States to use local data when available. 2000 Methodology at 1-12. In 2015, the EPA updated its national default rate to 22 grams per day (g/day) based on data showing that "this rate represents the 90th percentile consumption rate of fish and shellfish from inland and nearshore waters for the U.S. adult population 21 years of age and older." EPA, Human Health Ambient Water Quality Criteria: 2015 Update (accessed Nov. 18, 2024).[4] The 2000 Methodology also included a default fish consumption rate for subsistence fish consumers of 142 g/day, which represents the 99th percentile of all fish consumption. 2000 Methodology 1-5.

The cancer-risk level is the excess lifetime cancer risk to the general population caused by exposure to a given water pollutant. In the 2000 Methodology, the EPA authorized States to use a rate of 10^{-5} for the general population (1 excess cancer case in 100,000) and 10^{-4} for highly exposed subpopulations, including subsistence fishers and sport fishers (1 excess case in 10,000). 2000 Methodology at 1-12. The EPA recognized that "[a]doption of a 10^{-6} or 10^{-5} risk level … represents a generally acceptable risk management decision" and stated that the agency "intends to continue providing this flexibility to States and Tribes." *Id.* at 2-6.

III. EPA's Tribal Reserved Rights Rule

In the waning years of the Obama Administration, the EPA issued a policy memorandum introducing the concept of "Tribal reserved rights" for the first time into the CWA water quality standards program. *See* EPA, Commemorating the 30th Anniversary of the EPA Indian Policy (Dec. 1, 2014). The memorandum asserted that the EPA "has an obligation to honor and respect tribal rights and resources protected by treaties" and "must ensure that its actions do not conflict with tribal treaty rights." *Id.* at 1. The ten-year odyssey that followed has seen the EPA change positions at least two additional times and adopt three distinct theories to justify the use of Tribal reserved rights to exercise greater control over State water quality standards.

a. In 2015 and 2016, the EPA effectively disapproved water quality standards submitted by Idaho, Maine, and Washington on the ground that their standards were insufficiently stringent to protect Tribal reserved rights to subsistence fishing and harvesting identified by the EPA in treaties between relevant Tribes and the United States. *See* 89 Fed. Reg. at 35,722. The EPA reasoned that it was required to ensure that State standards adhered to Tribal reserved rights because the legal instruments that reserved them have the force of federal law. *See id.* Accordingly, the EPA asserted the

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[4] https://www.epa.gov/sites/default/files/2015-10/documents/human-health-2015-update-factsheet.pdf.

power to "harmonize" States' designated uses with Tribal reserved rights by interpreting existing uses to encompass subsistence fishing and to require States to protect such rights by treating Tribal subsistence fishers as the "target general population" when developing risk inputs under the 2000 Methodology. *Id.*

In 2019 and 2020, the EPA rebuked that underlying legal theory and reversed the disapprovals for Idaho, Maine, and Washington. The EPA returned to its longstanding policy of affording States considerable discretion to make risk-management decisions and rejected the agency's prior view that it had the authority to reinterpret State designated uses in light of Tribal treaties. *See* Letter of Chris Hladick, Regional Administrator, to Maia Bellon, Director, Wash. Dep't of Ecology 23 (May 10, 2019); Letter of Chris Hladick, Regional Administrator, to John Tippets, Director, Idaho Dep't of Envt'l Quality 14 (Apr. 4, 2019).

In 2022, the EPA again reversed course and purported to rely on a second legal theory in proposing the Tribal Reserved Rights Rule. *See Water Quality Standards Regulatory Revisions To Protect Tribal Reserved Rights*, 87 Fed. Reg. 74,361 (Dec. 5, 2022). This time, the EPA asserted authority under Section 303(c), the CWA's water quality standards provision, and Section 511(a)(3), which provides that nothing in the CWA "affect[s] or impair[s] the provisions of any treaty of the United States." 33 U.S.C. § 1371(3); 87 Fed. Reg. at 74,370.

In 2024, the EPA finalized the Tribal Reserved Rights Rule based on its third, and most recent, legal theory. The EPA announced it was "not relying" on Section 511(a)(3) or "specific Federal treaties and statutes" as substantive grants of rulemaking authority. 89 Fed. Reg. at 35,722–73. Instead, the EPA purported to rely on its Section 303(c) authority to review water quality standards and its Section 501(a) authority to "prescribe such regulations as are necessary to carry out … this chapter." *Id.*; *see* 33 U.S.C. §§ 1313(c), 1361(a).

b. The Tribal Reserved Rights Rule imposes substantive mandates on States by regulation for the first time in the CWA's history. Unlike every other statutory or regulatory requirement, the Rule's mandates are triggered when "a rights holder asserts a Tribal reserved right in writing to a state and the EPA for consideration in establishment of" water quality standards. 89 Fed. Reg. at 35,727. The requirement for asserting rights is "not intend[ed] … to be onerous," and "an email with information about the rights would suffice." *Id.* at 35,728. Reserved rights "may be express or implied" in "treaties, statutes, or Executive Orders," *id.* at 35,721, and rightsholders are not limited to Tribes that qualify for treatment "as a State" under Section 518, *id.* at 35,726.

Once triggered, the Rule mandates that States (1) "take into consideration the use and value of its waters for protecting the Tribal reserved right in adopting or revising designated uses;" (2) "take into consideration the anticipated future exercise of the Tribal reserved right unsuppressed by water quality in establishing relevant [water quality standards];" and (3) "establish water quality criteria to protect the Tribal reserved

right where the state has adopted designated uses that either expressly incorporate protection of the Tribal reserved right or encompass the right." 89 Fed. Reg. at 35,727. Inadequate compliance at any stage is grounds for disapproval and the imposition of federal standards. *See id.* at 35,729, 35,740–41.

1. *Designated Uses.* States bear the burden of determining the existence and content of an asserted right, including by "seek[ing] further information from the right holder and other sources, if needed, to help the state determine the nature and geographic scope" of reserved rights. 89 Fed. Reg. at 35,728; *see also id.* at 35,738. The Rule acknowledges this is a "complex inquiry" that "will be determined on a case-by-case basis given the facts and the relevant Federal treaties, statutes, and Executive orders." *Id.* at 35,724, 35,728 n.81. Nevertheless, the EPA declined to provide "a formal dispute mechanism" to resolve disputed rights, *id.* at 35,739, and reserves the right to disapprove State standards after the fact if the agency later determines the State evaluated reserved rights incorrectly, *id.* at 35,729.

Once States receive or solicit adequate information about reserved rights, the Rule requires each State to "consider whether those rights are already encompassed by a state's designated uses, or whether a new or revised use may be needed to protect the Tribal reserved right." 89 Fed. Reg. at 35,730. The Rule provides that the consideration requirement "was not intended as a mandate" to adopt new designated uses, but it also clarifies that "the EPA expects that a state would either explicitly adopt a use to protect the Tribal reserved rights or conclude that its current uses encompass the rights" if its waters "have significant environmental, social, cultural and/or economic use and value for protecting those rights." *Id.* at 35,730. Moreover, the Rule separately provides that States *must* adopt water quality standards to "protect" the exercise of Tribal reserved rights whenever an existing designated uses "encompass[es]" the right. *Id.* at 35,734. Because common designated uses like "fishing" "likely encompass protection of certain Tribal reserved rights," *id.* at 35,730, States have no choice but to revise or reinterpret their designated uses in order to develop criteria that comply with the Rule.

The Rule asserts authority to mandate consideration of new designated uses under Section 303(c)(2)(A), which requires States to "tak[e] into consideration" an enumerated list of designated uses that includes the catch-all term "other purposes." 33 U.S.C. § 1313(c)(2)(A). According to the EPA, "the full scope of uses that states are required to consider under the CWA includes those that are explicitly listed in sections 303(c)(2)(A) and 101(a)(2) of the CWA, and those that are not, as evidenced by Congress' inclusion of the phrase 'and other purposes.'" 89 Fed. Reg. at 35,730.

2. *Unsuppressed Exercise.* Next, States must "consider the effect suppression is having on the exercise of Tribal reserved rights" to "inform [the] development of criteria that protect applicable designated uses and are based on sound scientific rationale." 89 Fed. Reg. at 35,733. This inquiry is necessarily counterfactual, but the Rule declines to provide further guidance beyond noting that "States should already be considering data regarding suppression effects pursuant to the existing [water quality standards]

regulation and guidance." *Id.* States may, but are not required to, rely on "historic or heritage data" about pre-settlement conditions and fish-consumption rates, and may, but are not required to, use a "default fish-consumption rate of 142 grams per day" as a "reasonable fish consumption subsistence rate floor" when establishing protective criteria. *Id.* at 35,732–34.

The Rule appears to rely on Section 303(c)(2)(A)'s "other purposes" clause in requiring States to consider unsuppressed exercise in setting designated uses, although the basis for this aspect of the mandate is less than clear. The Rule also invokes the CWA's goals to "restore … the Nation's waters" and "enhance the quality of water," 89 Fed. Reg. at 35,732 (quoting 33 U.S.C. §§ 1251(a), 1313(c)(2)(A)), and the 2000 Methodology's reference to "health goals," *id.* (quoting 2000 Methodology at 1-5 (emphasis omitted)).

3. *Protecting Reserved Rights.* Finally, States must develop criteria to protect the exercise of Tribal reserved rights "using at least the same risk level [*i.e.*, cancer-risk level] as the State would otherwise use to develop criteria to protect the State's general population, paired with exposure inputs [*i.e.*, fish-consumption rate] representative of rights holders exercising their reserved right." 89 Fed. Reg. at 35,734. The Rule asserts that "a Tribal member utilizing such rights is more appropriately viewed as an individual with 'average' or 'typical' exposure" because "Tribal members exercising reserved rights are a distinct, identifiable class of individuals holding legal rights under Federal law to resources with a defined geographic scope." *Id.* at 35,735. "In EPA's judgment," the Rule continues, "their unique status as rights holders warrants treating them as a target population for purposes of deriving human health criteria." *Id.*

The Rule abrogates the 2000 Methodology in part by removing States' discretion to protect the subpopulation of Tribal subsistence fishers using a less stringent cancer-risk level than that applied to the general population that consumes less fish. According to the Rule, the 2000 Methodology "did not take into account the unique circumstances addressed here—*i.e.*, the unique attributes of Tribes with reserved rights as described above." 89 Fed. Reg. at 35,735. In effect, the Rule requires States to protect Tribal subsistence fishers to the cancer-risk level formerly assigned to the general population, meaning the general population that consumes less fish is protected to a substantially more stringent cancer-risk level. *Id.* Under the new regime, the minimum cancer-risk level for any State where rightsholders have asserted a reserved right is 10^{-5} (1 in 100,000), and the minimum fish-consumption rate is 142 g/day (the default minimum subsistence rate)—up from the 2000 Methodology's prior allowance for protecting subpopulations to a risk level of 10^{-4} (1 in 10,000) and using a 90th-percentile default fish-consumption rate of 22 g/day.

PETITION FOR RECONSIDERATION

For the reasons set out below, the Institute for Energy Research respectfully requests that the EPA initiate notice-and-comment rulemaking to rescind the Tribal

Reserved Rights Rule and all corresponding amendments to 40 C.F.R. Part 131. *See* 5 U.S.C. § 553(e); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); *State Farm*, 463 U.S. at 42.

I. Statement of Grounds and Argument

The Rule's legal and practical flaws are fundamental and cannot be cured by application on a case-by-case basis. Because nothing in the CWA requires States to "consider" or "protect" particular rights asserted by particular rightsholders, the EPA lacks authority to impose such mandates under Sections 303 and 501. The sweeping consequences of the Rule also trigger the federalism canon and major-questions doctrine, both of which require clear congressional authorization—yet the EPA lacks any authority, let alone clear authority, for any of the Rule's mandates. The Rule also ignored costs and left critical implementation questions unanswered on the flawed theory that such problems can be addressed by the EPA and the States in individual cases. But the Rule imposes national mandates, and those mandates must be justified on their own terms to satisfy reasoned decisionmaking requirements.

The EPA should correct these errors by reconsidering and rescinding the Rule. *See CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1079 (D.C. Cir. 2009) ("'Wisdom,' Justice Frankfurter once said, 'too often never comes, and so one ought not to reject it merely because it comes late.'" (quoting *Henslee v. Union Nat'l Bank & Tr. Co.*, 335 U.S. 595, 600 (1949) (Frankfurter, J., dissenting))).

A. The Rule exceeds the EPA's authority to review State standards for compliance with the Clean Water Act.

The Rule relied on CWA Sections 303 and 501 as authority for mandating that States "consider" and "protect" reserved rights to water resources asserted by Tribes. *See* 89 Fed. Reg. at 35,722–23. Section 303(c) invites States to establish water quality standards that "protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter," 33 U.S.C. § 1313(c)(2)(A), and instructs the EPA to approve a new or revised standard if "such standard meets the requirements of this chapter," *id.* § 1313(c)(3). Section 501(a), in turn, permits the EPA to prescribe regulations "necessary to carry out [its] functions under this chapter." *Id.* § 1361(a).

Neither provision can bear the weight of the Rule's unprecedented mandates. As the Supreme Court recently explained, statutes "have a single, best meaning," and agency action must adhere to "the best reading of the statute." *Loper Bright*, 144 S. Ct. at 2266. Because the Rule flunks this rule of interpretation, it should be rescinded.

1. Section 303(c) does not authorize the EPA to mandate that States "consider" and "protect" Tribal reserved rights.

With respect to Section 303(c), the "traditional tools of statutory construction," *Loper Bright*, 144 S. Ct. at 2266, all point in the same direction—Section 303(c) limits the EPA's role to determining whether State standards comply with the requirements Congress set out in the statute. That oversight role is not a grant of authority to expand EPA's review into substantive considerations that Congress left to States discretion, and the Rule's contrary interpretation conflicts with other provisions of the statute. Because no provision of the CWA requires States to consider or protect reserved rights to water resources, the Rule exceeds the EPA's oversight authority.

a. The plain meaning of Section 303(c) makes the limited nature of the EPA's oversight role abundantly clear. Congress specified that if the EPA, "within sixty days after the date of submission of the revised or new standard, determines that such standard meets *the requirements of this chapter*, such standard *shall* thereafter be the water quality standard for the applicable waters of that State." 33 U.S.C. § 1313(c)(3) (emphases added). That language is both mandatory and exclusive, setting out a "shall issue" regime that directs the EPA to approve State standards if the statute's requirements are satisfied.

The EPA's oversight authority is limited to "the requirements of this chapter," meaning the requirements set out in the CWA. 33 U.S.C. § 1313(c)(3); *see also id.* ("consistent with the applicable requirements of this chapter"), (c)(4)(A) ("consistent with the applicable requirements of this chapter"), (c)(4)(B) ("necessary to meet the requirements of this chapter"), (c)(4) ("in accordance with this chapter"). That choice is intentional, since Congress knows how to distinguish between an exclusive set of statutory criteria and an open set of regulatory standards to be developed by an agency. *Compare Pereira v. Sessions*, 585 U.S. 198, 215 (2018) (interpreting "a notice to appear under section 1229(a)" as a notice containing the elements listed in 8 U.S.C. § 1229(a)), *with Telecoms. Rsch. & Action Ctr. v. FCC*, 801 F.2d 501, 518 (D.C. Cir. 1986) (interpreting "obligation[s] imposed … under this Act" to encompass public-interest rules promulgated "under" the Communications Act).[5]

So long as State standards meet "the requirements of this chapter," approval is mandatory—such standard "shall" go into effect. *See Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 661 (2007) ("shall" is "mandatory"); *NRDC v. Regan*, 67 F.4th 397, 402 (D.C. Cir. 2023) ("It is well established that the word 'shall' generally indicates a command that admits of no discretion on the part of the person instructed to carry out the directive." (quotation and alterations omitted)). The EPA lacks discretion to disapprove State standards for any reason other than the failure to meet requirements set out in the CWA.

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[5] Unlike the Communications Act, for example, Section 303(c) does not authorize the EPA to promulgate rules defining the "public interest, convenience, and necessity" and apply such rules to approve or deny individual submissions. 47 U.S.C. §§ 257(b), 307(c)(1), 309(a), 310(d); *see Telecoms. Rsch. & Action Ctr.*, 801 F.2d at 518.

b. None of the CWA's requirements pertain to Tribal reserved rights. State standards must (1) "protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter," 33 U.S.C. § 1313(c)(2)(A); (2) consider their waters' "use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes and also … conside[r] their use and value for navigation," *id.*; and (3) include water quality criteria "necessary to support such designated uses," *id.* § 1313(c)(2)(B). The CWA's cross-referenced "other purposes" do not mention any rights to water resources, let alone Tribal reserved rights. *See id.* § 1251(a) ("to restore and maintain" the "integrity of the Nation's waters"), *id.* § 1251(a)(2) (to achieve, "wherever attainable, … water quality which provides for the propagation of fish, shellfish, and wildlife, and provides for recreation in and on the water"), *id.* § 1251(b) ("to recognize, preserve, and protect the primary responsibilities and rights of States").

i. The Rule asserts that the new mandates further the goals of the CWA by protecting the public health and enhancing water quality through more stringent criteria. *See* 89 Fed. Reg. at 35,723. But Congress determined *for itself* the "requirements of this chapter" necessary to further the CWA's goals and instructed the EPA to review State standards for compliance with those enumerated requirements. 33 U.S.C. § 1313(c)(3). The discretion to innovate is vested not in the EPA, but in the States, which continue to exercise sovereign judgment about the restrictions needed to protect the public and enhance water quality. *See id.* §§ 1251(b), 1313(c)(1)–(3); *see also id.* § 1370(1) (authorizing States, but not the EPA, to go beyond the requirements of the CWA in regulating emissions and water uses).

The Rule's lack of any limiting principle demonstrates the danger of setting aside the statutory scheme. The EPA attempted to justify the Rule's mandates by asserting that Tribal members are a "unique," "distinct," and "identifiable class of individuals holding legal rights under Federal law to resources with a defined geographic scope." 89 Fed. Reg. at 35,735. But that description extends to other classes of individuals as well. Unionized workers, for example, hold legal rights to "concerted activities for the purpose of collective bargaining or other mutual aid or protection" under the National Labor Relations Act, 29 U.S.C. § 157, and nothing in the Rule's internal logic prevents unionized fishermen or longshoremen from asserting rights to particular water resources or water quality as part of workplace negotiations. Religious practitioners have the right under the Religious Freedom Restoration Act to be free from "substantia[l] burden[s]" on religious exercise, 42 U.S.C. § 2000bb-1(a), and Tribal and non-Tribal members alike use lakes and rivers for "ceremonial practices," 89 Fed. Reg. at 35,730. These hypotheticals only serve to demonstrate that the Rule's focus on *rights* held by a favored group is incompatible with the statute. The CWA *does* contain limiting principles that bar using the EPA's standards review authority in this manner; the Rule simply ignores them.

First, the CWA deals from start to finish with water "uses," not rights. *See* 33 U.S.C. § 1251(a)(2) (listing the achievement of wildlife and recreational uses as policy

goals); *id.* § 1251(b) (recognizing States' continued rights "to plan the development and use" of waters); *id.* § 1313(c)(2)(A) (instructing States to establish and protect "designated uses"). Every instance in which the CWA mentions rights is a declaration that rights to particular water resources are not affected by the statute in any way. *See id.* § 1251(g) (no impact on "rights to quantities of water"); § 1370(2) (no impact on "any right … of the States with respect to the waters (including boundary waters) of such states"). Perhaps because of this clear statutory language, the Rule attempts to disclaim any impact on disputed rights to particular quantities of water. 89 Fed. Reg. at 35,727. Yet the Rule ultimately concedes that the rights-based mandates may require "a certain flow rate … necessary for fish survival," thereby allowing the EPA to do exactly what the statute forbids—force States to allocate quantities of water to Tribes to support the exercise of asserted rights. *Id.*

Second, the CWA's requirements are written to protect the general public, not particular individuals or classes of rightsholders. State standards must protect the "public health or welfare," a familiar regulatory concept that refers to the community at large. 33 U.S.C. § 1313(c)(2)(A); *see Public*, Black's Law Dictionary 1483 (11th ed. 2019) ("The people of a country or community as a whole."); *id.* at 865 (defining "public health" as the "health of the community at large" and the "healthful or sanitary condition of the general body of the people or the community en masse"); *id.* at 1910 (defining "public welfare" as "society's well-being in matters of health, safety, order, morality, economics, and politics"). Such terms have long been understood to refer to generally applicable rules, not actions that single out particular regulated parties or beneficiaries. *See, e.g.*, *Tenn. Wine & Spirits Ass'n v. Thomas*, 588 U.S. 504, 523 (2019) (explaining that the dormant Commerce Clause permits "States' use of the police power … to protec[t] the public health, the public morals or the public safety" but bars regulations targeting out-of-state producers); *Kelo v. City of New London*, 545 U.S. 469, 477–83 (2005) (explaining that the Takings Clause's "public use" requirement bars "conferring a private benefit on a particular private party" and emphasizing States' discretion to determine appropriate public uses). Moreover, State standards must "enhance the quality of water" without respect to individual rights, and consider designating uses for "*public* water supplies" and other activities that connote general public use, including "recreatio[n]" and "navigation." 33 U.S.C. § 1313(c)(2)(A) (emphasis added).

ii. The Rule also purports to rely on Section 303(c)'s reference to "other purposes" as a grant of authority to mandate that States consider designated uses that protect the unsuppressed exercise of Tribal reserved rights. 89 Fed. Reg. at 35,747–48. Specifically, the Rule asserts that "the full scope of uses that states are required to consider under the CWA includes those that are explicitly listed … and those that are not, as evidenced by Congress' inclusion of the phrase 'and other purposes.'" *Id.* at 35,730 (quoting 33 U.S.C. § 1313(c)(2)(A)). But that general phrase is "too thin a reed" to support such an expansive assertion of authority "in the context of other more specific provisions of the Act." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 19 (1981). Instructing States to consider "other purposes" does not empower the EPA to mandate

the consideration of additional, *particular* uses beyond those specified in the statute. So long as States consider "other purposes," the standards "shall" go into effect. 33 U.S.C. § 1313(c)(3).

Under the *ejusdem generis* and *noscitur a sociis* canons, the "other purposes" clause is informed by the surrounding terms and cannot be read to encompass the exercise of Tribal reserved rights. *See Fischer v. United States*, 144 S. Ct. 2176, 2184 (2024). Here, the "other purposes" clause appears at the end of a list that includes "agricultural" and "industrial purposes," neither of which shares commonality with subsistence fishing, harvesting, or ceremonial uses. *Compare* 89 Fed. Reg. at 35,730, *with* 33 U.S.C. § 1313(c)(2)(A). The clause also appears alongside the terms "public water supplies," "propagation of fish and wildlife," "recreational purposes," and "navigation," none of which encompasses the exercise of Tribal reserved rights, and at least some of which (propagation of fish and wildlife in particular) are inconsistent with substantially greater levels of harvesting. 33 U.S.C. § 1313(c)(2)(A).

Here, too, the interpretation set out in the Rule has no limiting principle and arrogates to the EPA the power to mandate consideration of *any* use—and to disapprove State standards when a State fails adequately to consider an *unlisted* use. Were this interpretation correct, there was no need for Congress to enumerate any considerations at all—as with many other statutes, Congress could simply have granted the EPA authority to define which designated uses States must consider. But it did not do so, and ordinary principles of statutory interpretation counsel that "Congress would not ordinarily introduce a general term that renders meaningless the specific text that accompanies it." *Fischer*, 144 S. Ct. at 2184.

c. The structure and history of the CWA reinforce the conclusion that Section 303(c) does not authorize the EPA to mandate that States consider and protect Tribal reserved rights. *See United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988). The Rule entirely fails to justify the new mandates in light of these considerations, and the EPA should reconsider its position to ensure the requirements for State water quality standards comport with the statutory scheme.

i. Congress was at pains to emphasize that the CWA retains and promotes States' sovereign power to regulate land and water use. Courts have long understood that the statute reflects an "independent emphasis on state autonomy, which is repeated throughout the legislative history of the Act" and "enshrined in the Act as the basic policy to 'recognize, preserve, and protect the primary responsibilities and rights of States.'" *NRDC*, 859 F.2d at 174 (quoting 33 U.S.C. § 1251(b)). No less than the goal of improving water quality, "the goal of limited federal supervision" is "undeniably a pivotal part of Congress' intent." *Id.*; *see also NRDC*, 16 F.3d at 1401 (States "have the primary role" in "establishing water quality standards" and the "EPA's sole function, in this respect, is to review those standards for approval").

That policy has constitutional dimensions because the "[r]egulation of land and water use lies at the core of traditional state authority." *Sackett*, 143 S. Ct. at 1341–42. Congress sought to "preserve" that authority even while enacting the CWA to further national objectives under the Commerce Clause. *See id.*; *see also id.* at 1346 (Thomas, J., concurring) (federal authority "does not displace States' traditional sovereignty over their waters"). That choice must be respected both as a matter of horizontal separation of powers (by adhering to the limits of the EPA's statutory authority) and vertical separation of powers (by respecting the sovereign authority retained by the States). *Id.* at 1342 (quoting 33 U.S.C. § 1251(b)).

That congressional policy reflects practical considerations as well. The CWA calls for water quality standards in all 50 States, 33 U.S.C. § 1313(c)(1), the District of Columbia and six federal territories, *id.* § 1362(3), and dozens of Tribes that qualify for "treatment as States," *id.* § 1377(a). Each of these jurisdictions contains a diverse array of waters, local conditions, and regulated parties. By vesting the authority to develop standards in States, Congress envisioned "a partnership between the States and the Federal Government, animated by a shared objective" that the EPA alone could not achieve. *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992). States are in a superior position to collect and apply local considerations, and the EPA cannot micromanage that process without losing the benefit of such local considerations or becoming a bottleneck that frustrates the development and triannual review of new and revised water quality standards. *See* 33 U.S.C. § 1313(c)(1).

ii. Congress also wrote savings clauses into the CWA that expressly declare the outer boundaries of federal authority. These provisions must be given effect, and they demonstrate that the Rule's interpretation "produces a substantive effect that is [not] compatible with the rest of the law." *United Sav. Ass'n*, 484 U.S. at 371; *see also FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (statutes must be interpreted "as a symmetrical and coherent regulatory scheme").

Section 101(g) declares "that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter." 33 U.S.C. § 1251(g). As noted above, the Rule goes out of its way to argue that the new mandates do not impact disputes over allocations of quantities of water before ultimately admitting that water allocation is "potentially relevant" because the exercise of reserved rights can, for example, impact "flow rate … necessary for fish survival." 89 Fed. Reg. at 35,727. The Rule does not even attempt to address how States are to determine the outer bounds of reserved rights when the same treaty asserts rights to harvest fish *and* rights to particular quantities of water—a dilemma significantly worsened by the Rule's insistence that reserved rights can be either "express *or implied*." *Id.* at 35,721 (emphasis added).

Section 510(2) provides that nothing in the CWA shall "be construed as impairing or in any manner affecting *any right* or jurisdiction of the States with respect to the

waters (including boundary waters) of such States." 33 U.S.C. § 1370(2) (emphasis added). That provision can be read in harmony with Section 303(c) only if the EPA's review of water quality standards is limited to "designated uses" and "water quality criteria" set by States, which account for their own rights and jurisdiction in developing water quality standards. But it falls apart if the EPA's review includes mandating the consideration and protection of "right[s]" asserted to particular water resources at States' expense.

Section 511 further provides that the CWA "shall not be construed" as "limiting the authority or functions of any officer or agency of the United States under any other law or regulation not inconsistent with this chapter" or "affecting or impairing the provisions of any treaty of the United States." 33 U.S.C. § 1371(1), (3). Read together, this provision declares that the CWA neither incorporates nor overrides any duty of the United States under another federal law or treaty, including treaties with federally recognized Tribes. Such obligations are neither "affect[ed]" nor "impair[ed]," *id.* § 1371(3), and other "officer[s] or agenc[ies] of the United States" may continue carrying out those duties without regard to the CWA, *id.* § 1371(1). Here again, this provision is easily read together with Section 303(c) if the EPA's role is limited to reviewing State designated uses and criteria for consistency with the requirements of the CWA. But it cannot be squared with the Rule's underlying assumption that the EPA has an obligation under the CWA to enforce rights under *other* legal authorities when reviewing State water quality standards. *See* 89 Fed. Reg. at 35,725 (asserting that "state [water quality standards] must be consistent with any applicable treaty requirements").

iii. When Congress intended a role for Tribes under the CWA, it said so expressly by providing for "treatment as States" under Section 518. Tellingly, this provision answers many of the questions that the Rule leaves unanswered, including how disputes will be resolved when State and Tribal interests conflict, 33 U.S.C. § 1377(e) (providing for a formal dispute mechanism), and the geographic bounds of Tribes' authority to assert their interests, *id.* § 1377(e)(1)–(3), (h)(2) (limiting "treatment as states" to Tribes that exercise governmental authority over an Indian Reservation). As noted above, Congress specifically debated every jot and tittle of this provision given concerns that recognizing certain Tribal authorities under the CWA could impact ongoing disputes over water and water resources, particularly in the Western States. *See supra*, at 19–20. This history has outsized importance here because Section 518 represents Congress' most significant foray into the issues at play—and Congress did not adopt any of the rationales that the EPA has put forward in support of asserting novel authority to inject Tribal reserved rights into the CWA.

The Rule simply casts Section 518 aside, stating that the "EPA's authority for these new regulatory requirements is distinct from the treatment as a state authority granted in CWA section 518." 89 Fed. Reg. at 35,726. But the Rule fails to grapple with the clear congressional judgments in Section 518 that the potential for disputes over rights requires careful attention and that the CWA's water quality standards program is not an appropriate mechanism for adjudicating disputes over water and water-resource rights.

Relatedly, the Rule simply assumes that Congress intended the EPA to resolve disputes over Tribal reserved rights under the CWA. But Congress expressly assigned disputes "brought by any Indian tribe or band … aris[ing] under the Constitution, laws, or treaties of the United States" to federal district courts, 28 U.S.C. § 1362, and in certain circumstances to State courts under the McCarran Amendment, 43 U.S.C. § 666. While these jurisdictional provisions do not deprive federal agencies of authority to adjudicate disputes falling within their purview, the CWA does exactly that by excluding treaty considerations from the statute and provides that nothing in the statute interferes with other officials' and agencies' duties in carrying out treaty obligations. *See* 33 U.S.C. § 1371(1), (3). The EPA seriously erred by recasting the CWA standards-setting process as the forum for determining and enforcing rights that Congress intended to be handled elsewhere by courts and agencies with greater expertise in treaty interpretation and rights adjudication.

* * *

Section 303(c) instructs the EPA to perform a limited review of State water quality standards for compliance with an exclusive and mandatory set of statutory requirements, none of which pertain to the exercise of Tribal reserved rights. Because the Rule instead interpreted Section 303(c) as a plenary grant of rulemaking authority, the EPA should reconsider its position and rescind the Rule.

2. Section 501 does not authorize the EPA to promulgate rules that go beyond the requirements of the CWA.

With respect to Section 501(a), the Rule similarly erred in relying on a general grant of rulemaking authority to promulgate rules that are *not* "necessary to carry out" any of the EPA's functions under the CWA. Even when a statute delegates rulemaking authority, the agency must adhere to "the boundaries" of its authority and "engage[] in reasoned decisionmaking within those boundaries." *Loper Bright*, 144 S. Ct. at 2263 (quotations omitted). Because Section 303(c) does not empower the EPA to impose the Rule's substantive mandates on States, Section 501(a) cannot be used as a freestanding license to rewrite the statute to incorporate such mandates.

It is settled law that a general grant of authority to promulgate rules in aid of an agency's "functions" does not allow the agency "to define other functions well beyond the statute's specific grants of authority." *Gonzalez v. Oregon*, 546 U.S. 243, 264–65 (2006) (interpreting the Attorney General's authority under 21 U.S.C. § 871(b) to "promulgate and enforce any rules … necessary and appropriate for the efficient execution of his functions under this chapter"); *see also Am. Library Ass'n v. FCC*, 406 F.3d 689, 700 (D.C. Cir. 2005) (interpreting the FCC's authority under 47 U.S.C. § 154(i) to "make such rules … as may be necessary in the execution of its functions"). Congress does not, in other words, "hide elephants in mouseholes" by "alter[ing] the fundamental details of a regulatory scheme in vague terms or ancillary provisions." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

Section 501(a) is such a general authority: "The Administrator is authorized to prescribe such regulations as are necessary to carry out *his functions* under *this chapter*." 33 U.S.C. § 1361(a) (emphases added). The EPA cannot rely on this authority to promulgate rules for functions it does not have under the CWA—and the EPA does not have authority under Section 303(c) to mandate that States consider and protect Tribal reserved rights. *See Gonzalez*, 546 U.S. at 264–65 (Attorney General lacked authority to preempt certain drugs authorized by state law that were not otherwise within the scope of his statutory authority); *Am. Library Ass'n*, 406 F.3d at 700 (FCC lacked authority to regulate television broadcast receivers when not engaged in the transmission activities within the scope of the statute).

The Rule acknowledges that Section 303(c) is the only "substantive source of authority" relied upon and does not assert that Section 501 would be sufficient on its own to sustain the new mandates. 89 Fed. Reg. at 35,723. Thus, for the same reasons the EPA lacks authority under Section 303(c), it erred in relying on Section 501(a) and should reconsider and rescind the Rule.[6]

B. The Rule violates the CWA's state-federal balance.

Although the Rule exceeded the EPA's statutory authority under ordinary principles of statutory interpretation, reconsideration is warranted for an additional, independent reason: The Rule "significantly alter[s] the balance between federal and state power" without "exceedingly clear language" from Congress. *Sackett*, 143 S. Ct. at 1341 (quoting *U.S. Forest Serv. v. Cowpasture River Preservation Ass'n*, 140 S. Ct. 1837, 1849–50 (2020)). Because the Rule "offers only a passing attempt to square its interpretation" with Section 101(b) and the CWA's deliberately balanced regulatory scheme, its "theory is particularly implausible." *Id.*

1. The Supreme Court has long cautioned that agencies cannot take actions that disrupt the balance between federal and State authority without clear authority from Congress. *See Bond v. United States*, 572 U.S. 844, 858 (2014); *BFP v. Resol. Tr. Corp.*, 511 U.S. 531, 544 (1994). Even where Congress's authority is potentially broad, State authority is not displaced until Congress "exercise[s]" it. *License Tax Cases*, 72 U.S. 462, 471 (1866); *see, e.g.*, *Cowpasture*, 140 S. Ct. at 1849 (rejecting interpretation that would have placed millions of acres of private land under the regulatory jurisdiction of the National Park System without clear statutory authority).

With respect to the CWA, Congress provided a clear statement cutting in the opposite direction: Section 101(b) provides that the statute "'preserve[s]' the States'

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[6] Notably, the EPA's prior invocations of Section 501 have involved procedural rules tied to an express grant of substantive authority in the CWA. *See, e.g.*, *Serv. Oil, Inc. v. EPA*, 590 F.3d 545, 550 (8th Cir. 2009) (rules "governing the timing and content of permit applications"); *Pronsolino v. Nastri*, 291 F.3d 1123, 1131 (9th Cir. 2002) (rules relating to the approval or disapproval of attainment designations and TMDLs).

'primary' authority over land and water use." *Sackett*, 143 S. Ct. at 1342 (quoting 33 U.S.C. § 1251(b)); *accord SWANCC v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001); *Rapanos v. United States*, 547 U.S. 715, 738 (2006) (plurality op.). "Regulation of land and water use lies at the core of traditional state authority," and the "States can and will continue to exercise their primary authority to combat water pollution by regulating land and water use" over matters into which the CWA does not inject federal authority. *Sackett*, 143 S. Ct. at 1341, 1343.

2. Here, the Rule triggers the federalism canon not by expanding the CWA's *geographic* jurisdiction, but by expanding the EPA's regulatory authority into matters of State discretion and sovereignty that Congress never intended to trod. Under the new mandates, the EPA sets itself up as superintendent of a new regime for adjudicating substantive rights to water and water resources under the guise of reviewing water quality standards.

Regardless whether States have previously entertained assertions of Tribal reserved rights, and irrespective of States' existing procedures for adjudicating such claims, the Rule now compels States to join issue whenever a putative rightsholder sends an email asserting an expressly or implicitly reserved right under a treaty, statute, or Executive Order. 89 Fed. Reg. at 35,728. Once the mandates are triggered, State compliance is compulsory, and the failure to comply to the EPA's satisfaction risks disapproval of their standards and the potential imposition of federal regulations informed solely by Tribal rightsholders' perspectives. *See* 89 Fed. Reg. at 35,741; *id.* at 35,740 (because final consultation between EPA and Tribes "is government-to-government," it would "not be appropriate to add other parties to those consultations"). States bear the burden of evaluating the existence, scope, and content of asserted rights. *See id.* at 35,738, 35,741. And because the Rule provides that States must protect asserted rights that the EPA deems "encompassed" within existing designated uses, States are forced either to revise or reinterpret their designated uses in order to develop water quality criteria that adequately protect the EPA's interpretation of the existing designated uses. *See id.* at 35,734.

While the additional burdens imposed on the water quality standards process may be understood as falling within the existing federal-state balance, critical aspects of the Rule's mandates plainly intrude into unprecedented areas. Until the Rule forced States to adjudicate water and water-resource rights, the CWA had never before been applied to compel States to engage in rights *adjudication*. The Rule contemplates intrusion into areas the CWA left to the States as well, including the *allocation* of water when relevant to an asserted reserved right. *See* 89 Fed. Reg. at 35,727; *but see* 33 U.S.C. § 1251(g). The Rule also contemplates that Tribal reserved rights can override State conservation decisions when the right to harvest fish and wildlife conflicts with State efforts to promote population growth or discourage such harvesting. *See* 89 Fed. Reg. at 35,730; *but see* 33 U.S.C. §§ 1251(b), 1370.

3. The Rule does not seriously engage with the federalism implications of the new mandates and certainly does not identify the requisite "exceedingly clear language" authorizing these new intrusions into State authority. *Sackett*, 143 S. Ct. at 1341. Astonishingly, the Rule states that the "EPA has concluded that this action *does not have federalism implications*" because it "does not impose substantial compliance costs" and "will not have substantial direct effects on the states, on the relationship between the Federal Government and the states, or on the distribution of power and responsibilities among the various levels of government." 89 Fed. Reg. at 35,744 (emphasis added); *see* Exec. Order No. 13,132, 64 Fed. Reg. 43,255 (Aug. 10, 1999) (requiring additional consultation with States when federal agency action has federalism implications). That conclusion blinkers reality; the Rule notes that multiple States objected to the lack of further consultation, 89 Fed. Reg. at 35,744, and a sizeable coalition of States have since challenged the Rule on constitutional and statutory grounds in *Idaho v. EPA*, No. 24-cv-00100 (D.N.D.).

C. The Rule violates the major-questions doctrine.

The Rule also violates the major-questions doctrine, and for similar reasons: The mandates intrude "into an area that is the particular domain of state law," *Ala. Ass'n of Realtors v. DHS*, 594 U.S. 758, 764 (2021), and assert an unheralded "breadth" of authority with "political" and "economic" significance to regulated parties located throughout the Nation, *West Virginia*, 142 S. Ct. at 2608. Because the Rule does not, and cannot, identify "clear congressional authorization" for the exercise of such authority by the EPA, *West Virginia*, 142 S. Ct. at 2614 (quoting *UARG v. EPA*, 573 U.S. 302, 324 (2014)), the Rule should be reconsidered and rescinded.

1. Agencies must point to "clear congressional authorization" when asserting an interpretation that marks "a transformative expansion in [its] regulatory power." *West Virginia*, 142 S. Ct. at 2610, 2614 (quoting *UARG*, 573 U.S. at 324). Whether viewed as a standalone doctrine or an "ordinary too[l] of statutory interpretation," *Biden v. Nebraska*, 143 S. Ct. 2355, 2376 (2023) (Barrett, J., concurring), the major-questions analysis applies when the breadth of the authority asserted involves "basic and consequential tradeoffs" that "are ones that Congress would likely have intended for itself," *id.* at 2376 (quoting *West Virginia*, 142 S. Ct. at 2613).

2. The Rule checks all the boxes for a major-questions case. In addition to significantly altering the balance of federal and State authority, *supra*, at 22–24, the Rule asserts unprecedented authority under 1972 statutory provisions that have never been understood to mandate that State water quality standards protect substantive rights to water resources asserted by Tribes, *supra*, at 14–22. The EPA's limited foray into Tribal reserved rights in 2015 and 2016 involved a different legal theory, was quickly abandoned and reversed by the EPA, and cannot, in any event, justify repeating the same mistake

now. *See West Virginia*, 142 S. Ct. at 2615 (explaining that controversial past assertions of authority do not establish a consistent practice capable of showing Congress granted such an authority by statute).

Despite the Rule's systematic downplaying of its consequences as speculative, 89 Fed. Reg. at 35,744, there is no doubt that the new mandates carry immense political significance. The Rule requires States to join issue on long-running disputes over water and water-resource rights that have occupied federal and State courts for decades and are inherently politically charged, particularly in Western States where water and water resources are at a premium. *See supra*, at 19–21; *see, e.g.*, *Arizona v. Navajo Nation*, 599 U.S. 555 (2023) (long-running dispute over water-allocation rights); *In re CSRBA Case No. 49576 Subcase No. 91-7755*, 448 P.3d 322, 359 (Idaho 2019) (dispute over water rights outside reservation boundaries).

On the economic side of the ledger, the Rule's mandate that States protect Tribal rightsholders to the same level as the general population will require many States to ratchet up the risk inputs that inform water quality criteria under the 2000 Methodology. 89 Fed. Reg. at 35,734. Per the Rule, States must protect subsistence fishers to a minimum 10^{-5} cancer-risk level, which has the effect of protecting the general population at levels of 10^{-6} or beyond. *Id.* at 34,735. States must also conform to the "reasonable floor" subsistence fish-consumption rate of at least 142 g/day, up from the current national 90th-percentile default rate of 22 g/day. *Id.* at 35,737. That means raising two key risk inputs by nearly 10x, resulting in more stringent criteria and more severe emissions limits and other restrictions tied to those criteria. The costs of repeating this change across the Nation are plain, and plainly extraordinary.

3. The Rule plainly fails the major-question doctrine. Nowhere in the Rule did the EPA identify the "clear congressional authorization" required to justify a novel assertion of sweeping regulatory power. *West Virginia*, 142 S. Ct. at 2614 (quoting *UARG*, 573 U.S. at 324). This is not even a case where the EPA's interpretation has "a colorable textual basis," *id.* at 2609, as the CWA's unusually explicit limitations and clearly delineated regulatory scheme foreclose the Rule's animating legal theory under ordinary principles of statutory interpretation, *supra*, at 14–22. Because the Rule violates the major-questions doctrine and therefore exposes the EPA to needless and disruptive litigation risk, the EPA should reconsider and rescind its mandates.

D. The Rule did not adequately consider cost.

Another troubling aspect of the Rule is its refusal to meaningfully consider cost. Under principles of reasoned decisionmaking and the Regulatory Flexibility Act, agencies must pay "attention to cost" when promulgating regulations. *Michigan*, 576 U.S. at 752. Yet the Rule wrote off virtually every cost of implementing the new mandates for States, regulated parties, and small entities on the theory that the EPA "cannot anticipate precisely how states will implement the rule and because of a lack of data." 89 Fed. Reg.

at 35,741. That was inadequate, and the EPA should reconsider and rescind the Rule in recognition of this analytical shortcoming.

The Rule acknowledged that the new mandates "could ultimately lead to additional compliance costs to meet permit limits put in place to comply with new [water quality standards] adopted by states because of this final rule." 89 Fed. Reg. at 35,741. But it estimated only the direct administrative burden on States and Tribes, assuming that each State would engage in three rulemakings as a result of the Rule and that each Tribe would dedicate 10 hours of labor because of the Rule. *Id.* at 35,742–43. The resulting estimate predicted total one-time costs between $11 and $21.6 million—a figure the Rule described as an "over-estimat[e]." *Id.* at 35,743. Given its assumption that all other costs of implementation could not be estimated or further explained, the EPA certified that "this action will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act." *Id.* at 35,744.

To start, even the Rule's estimate of administrative burdens is implausible. The EPA assumed that three rulemakings would entail between 1,325 and 2,650 man hours per State, or between 442 and 883 man hours per State per rulemaking. At the low end, this means that ten employees working one forty-hour week—an unreasonable figure, since the EPA well knows that State procedural requirements (as backed up by the CWA and EPA regulations) generally mandate a multi-month procedure involving public hearings, economic analyses, and a notice-and-comment period. *See, e.g.*, Wash. Dep't of Ecology, Rulemaking at Ecology (accessed Nov. 12, 2024). Indeed, an estimate completed by the Idaho Transportation Department found that the costs of implementing the rule for the Department alone would exceed $23.6 million, suggesting that a more reasonable estimate of administrative burdens would have been in the hundreds of millions of dollars at a minimum. *See Idaho v. EPA*, No. 24-cv-00100, Dkt. 5-12 ¶ 30.

The estimated administrative costs alone should have given the EPA reason to pause given the dearth of benefits and the undoubtedly large—if unquantified—costs to regulated parties and small entities of implementing the Rule's mandates. Given the stakes, the EPA cannot simply defer analysis of such costs on the theory that they will be incurred in the future when States comply with the new mandates. That will be too late to take such costs into account when deciding whether the new mandates are worth the candle in the first instance. The EPA should therefore reconsider and rescind the Rule for failure to consider cost as well.

E. The Rule leaves critical questions unanswered that cannot simply be deferred to case-by-case adjudication.

Setting aside the Rule's multiple legal flaws, reconsideration is warranted because the new mandates are fundamentally unworkable. The new regime leaves critical threshold questions unanswered, thereby setting States, Tribes, and regulated parties adrift and jeopardizing the EPA's administration of an important environmental program. This costly regulatory uncertainty is entirely avoidable, and the EPA should reconsider

and rescind the Rule to afford the agency additional time to formulate an approach that addresses administrability concerns.

1. Agencies are not required to address the entirety of a problem in one fell swoop, but a rule cannot avoid considering "important aspect[s] of the problem" before deciding on a path forward. *State Farm*, 463 U.S. at 43. The Rule acknowledges but fails to resolve critical flaws pointed out to the EPA during the rulemaking process, and deferring these questions to case-by-case adjudication is not a reasonable response under the circumstances.

a. At the outset, the Rule does not resolve who may assert reserved rights on behalf of a federally recognized Tribe—a problem worsened by inviting rightsholders to assert rights through as little as an email, 89 Fed. Reg. at 35,728, and divorcing the new mandates from the "treatment as States" requirements of Section 501, *id.* at 35,726. This shortcoming leaves States in limbo when it is not clear whether an individual rightsholder has standing to assert reserved rights on behalf of one or more of the 574 federally recognized Tribes covered by new mandates. The Rule makes no provision for States to disregard an assertion based on a rightsholder's lack of standing—for example, by clarifying whether a State can ask for confirmation of Tribal membership—and no provision for resolving conflicts within a Tribe over whether to assert a particular right and the scope and content of the right once asserted—for example, if a Tribe's executive disagrees with the position of a Tribe's legislature, or both disagree with the position of dissenting Tribal members.

Congress resolved such problems in Section 518 by requiring that Tribes qualifying for treatment "as a State" exercise governmental authority over an Indian reservation and possess a governing body exercising substantial authority. 33 U.S.C. § 1377(e)(1), (h)(2). These requirements narrow the universe of assertible rights and promote clarity with respect to the governing body capable of acting on behalf of a given Tribe. But the Rule rejects this framework without providing any replacement, leaving States without the guidance required to understand their obligations at this critical threshold stage.

b. The Rule injects further uncertainty by providing that Tribes may assert rights either expressly *or implicitly* reserved in a treaty, statute, or Executive Order. 89 Fed. Reg. at 35,721. Judicial precedent supplies a ready standard for determining when a reserved right is express, as courts require an express reservation of rights to determine that a treaty imposes duties on the United States. *See, e.g.*, *Navajo Nation*, 143 S. Ct. at 1813 ("The Federal Government owes judicially enforceable duties to a tribe only to the extent it expressly accepts those responsibilities." (quotation omitted)).

Yet the Rule supplies no comparable standard for States and the EPA to apply in determining when a treaty, statute, or Executive Order *implicitly* reserves a right to water or water resources. That gap is critical, because determining whether any right exists is the first step States are required to complete under the new mandates. Because

the EPA reserves the right to disapprove State standards for inadequately considering asserted rights, States cannot await the results of guidance forthcoming from "case-by-case" review years in the future. 89 Fed. Reg. at 35,724. The EPA could have avoided this problem entirely by refraining from imposing the mandates in the first instance, or by limiting reserved rights to those *expressly* reversed, consistent with judicial precedent. But at a minimum, finalizing the Rule without providing further guidance was an error warranting reconsideration.

c. Similarly, the Rule does not provide a discernable standard for determining the scope and content of a right once a State confirms that the right exists. The Rule hedges on this question, both acknowledging that the inquiry is "complex," 89 Fed. Reg. at 35,728 n.81, and insisting that "a full analysis of every legal instrument" will not always be necessary, *id.* at 35,738. This oversight is critical because States must determine whether a right applies on a water-by-water basis and adjust designated uses and water quality criteria on a similarly granular basis to protect particular rights. Here again, the EPA could have avoided this problem by refraining from imposing mandates or, at a minimum, limiting the mandatory aspects of the Rule to express rights that are more likely to have been meaningfully adjudicated in the past.

d. Nor does the Rule provide any mechanism for resolving disputes between competing rightsholders—an eminently foreseeable problem in States with multiple resident Tribes, including Tribes with intertwined legal histories and competing claims to the same reserved rights. The Rule expressly refused to adopt the dispute resolution mechanism in Section 518, 33 U.S.C. § 1377(e), and declined to adopt any other formal dispute mechanism, 89 Fed. Reg. at 35,739. This oversight leaves States to muddle through such disputes in the first instance and to discover what approach the EPA finds acceptable only after the agency approves or disapproves the State's standards. The EPA could have avoided this problem by withholding the mandatory aspects of the rule, by relying on the existing dispute resolution mechanism under Section 518, or by providing a new mechanism tailored to the requirements of the Rule. The only irrational option was leaving the question entirely unresolved—and that is the option the EPA selected in the Rule.

e. Finally, the Rule leaves open precisely how the EPA will determine whether a State's existing designated uses "encompass" the exercise of Tribal reserved rights. 89 Fed. Reg. at 35,730, 35,740. The Rule identifies "fishing" as an example designated use that the EPA will reinterpret to mean "subsistence fishing." *Id.* at 35,730. But State designated uses vary broadly, and it remains unclear whether the EPA will take the same position with respect to more specific "harvesting" uses or "recreational" uses that could be construed as "ceremonial." Under the circumstances, it was unreasonable to declare that the EPA would read such uses as encompassing reserved rights without providing clarity on which designated uses are, and are not, vulnerable to being so designated.

2. These practical flaws are particularly troubling because there was no obvious need for the EPA to finalize the Rule without resolving them in the first instance. The

regulatory uncertainty threatened by this lack of clarity, the potential for delay of State revisions and EPA review, and the risk of judicial intervention to correct particular instances of unreasoned decisionmaking jeopardize the Rule's purported benefits and the EPA's broader mission. Given the breadth and intensity of these problems, the best course of action is to reconsider and rescind the Rule.

II. Requested Actions

For the reasons set out above, the Institute for Energy Research respectfully requests that the EPA grant this petition for reconsideration and initiate further rulemaking to rescind the Rule's preamble and corresponding modifications to 40 C.F.R. Part 131, as follows:

- Rescind the entirety of the Preamble and Final Rule entitled *Water Quality Standards Regulatory Revisions To Protect Tribal Reserved Rights*, 89 Fed. Reg. 35,717 (May 2, 2024);
- Strike 40 C.F.R. § 131.3(r) and (s);
- Strike 40 C.F.R. § 131.5(a)(9);
- Amend 40 C.F.R. § 131.5(b) to read "paragraphs (a)(1) through (8) of this section" where the language "paragraphs (a)(1) through (9) of this section" currently appears;
- Strike 40 C.F.R. § 136(g), (g)(1), and (g)(2);
- Strike 40 C.F.R. § 131.9; and
- Amend 40 C.F.R. § 131.20 to remove references to "§ 131.9" and remove "This review shall include evaluating whether there is any new information available about Tribal reserved rights applicable to State waters that needs to be considered to establish water quality standards consistent with § 131.9."

CONCLUSION

For the reasons set forth above, the Institute for Energy Research respectfully requests that the EPA reconsider the Rule and initiate a rulemaking to rescind the Rule's preamble and corresponding amendments to 40 C.F.R. Part 131.

APPENDIX

Proposed Amendments to 40 C.F.R. Part 131

40 C.F.R. § 131.3 - Definitions

(a) The Act means the Clean Water Act (Pub. L. 92-500, as amended (33 U.S.C. 1251 et seq.)).

(b) Criteria are elements of State water quality standards, expressed as constituent concentrations, levels, or narrative statements, representing a quality of water that supports a particular use. When criteria are met, water quality will generally protect the designated use.

(c) Section 304(a) criteria are developed by EPA under authority of section 304(a) of the Act based on the latest scientific information on the relationship that the effect of a constituent concentration has on particular aquatic species and/or human health. This information is issued periodically to the States as guidance for use in developing criteria.

(d) Toxic pollutants are those pollutants listed by the Administrator under section 307(a) of the Act.

(e) Existing uses are those uses actually attained in the water body on or after November 28, 1975, whether or not they are included in the water quality standards.

(f) Designated uses are those uses specified in water quality standards for each water body or segment whether or not they are being attained.

(g) Use attainability analysis is a structured scientific assessment of the factors affecting the attainment of the use which may include physical, chemical, biological, and economic factors as described in § 131.10(g).

(h) Water quality limited segment means any segment where it is known that water quality does not meet applicable water quality standards, and/or is not expected to meet applicable water quality standards, even after the application of the technology-based effluent limitations required by sections 301(b) and 306 of the Act.

(i) Water quality standards are provisions of State or Federal law which consist of a designated use or uses for the waters of the United States and water quality criteria for such waters based upon such uses. Water quality standards are to protect the public health or welfare, enhance the quality of water and serve the purposes of the Act.

(j) States include: The 50 States, the District of Columbia, Guam, the Commonwealth of Puerto Rico, Virgin Islands, American Samoa, the Commonwealth of the Northern Mariana Islands, and Indian Tribes that EPA determines to be eligible for purposes of the water quality standards program.

(k) Federal Indian Reservation, Indian Reservation, or Reservation means all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation."

(l) Indian Tribe or Tribe means any Indian Tribe, band, group, or community recognized by the Secretary of the Interior and exercising governmental authority over a Federal Indian reservation.

(m) Highest attainable use is the modified aquatic life, wildlife, or recreation use that is both closest to the uses specified in section 101(a)(2) of the Act and attainable, based on the evaluation of the factor(s) in § 131.10(g) that preclude(s) attainment of the use and any other information or analyses that were used to evaluate attainability. There is no required highest attainable use where the State demonstrates the relevant use specified in section 101(a)(2) of the Act and sub-categories of such a use are not attainable.

(n) Practicable, in the context of § 131.12(a)(2)(ii), means technologically possible, able to be put into practice, and economically viable.

(o) A water quality standards variance (WQS variance) is a time-limited designated use and criterion for a specific pollutant(s) or water quality parameter(s) that reflect the highest attainable condition during the term of the WQS variance.

(p) Pollutant Minimization Program, in the context of § 131.14, is a structured set of activities to improve processes and pollutant controls that will prevent and reduce pollutant loadings.

(q) Non-101(a)(2) use is any use unrelated to the protection and propagation of fish, shellfish, wildlife or recreation in or on the water.

~~(r) Tribal reserved rights, for purposes of this part, are any rights to CWA-protected aquatic and/or aquatic-dependent resources reserved by right holders, either expressly or implicitly, through Federal treaties, statutes, or Executive orders.~~

~~(s) Right holders, for purposes of this part, are any Federally recognized Tribes holding Tribal reserved rights, regardless of whether the Tribe exercises authority over a Federal Indian reservation.~~

40 C.F.R. § 131.5 - EPA Authority

(a) Under section 303(c) of the Act, EPA is to review and to approve or disapprove State-adopted water quality standards. The review involves a determination of:

(1) Whether the State has adopted designated water uses that are consistent with the requirements of the Clean Water Act;

(2) Whether the State has adopted criteria that protect the designated water uses based on sound scientific rationale consistent with § 131.11;

(3) Whether the State has adopted an antidegradation policy that is consistent with § 131.12, and whether any State adopted antidegradation implementation methods are consistent with § 131.12;

(4) Whether any State adopted WQS variance is consistent with § 131.14;

(5) Whether any State adopted provision authorizing the use of schedules of compliance for water quality-based effluent limits in NPDES permits is consistent with § 131.15;

(6) Whether the State has followed applicable legal procedures for revising or adopting standards;

(7) Whether the State standards which do not include the uses specified in section 101(a)(2) of the Act are based upon appropriate technical and scientific data and analyses, and

(8) Whether the State submission meets the requirements included in § 131.6 of this part and, for Great Lakes States or Great Lakes Tribes (as defined in 40 CFR 132.2) to conform to section 118 of the Act, the requirements of 40 CFR part 132.

~~(9) Where applicable, whether State adopted water quality standards are consistent with § 131.9.~~

(b) If EPA determines that the State's or Tribe's water quality standards are consistent with the factors listed in paragraphs (a)(1) through (8)~~(9)~~ of this section, EPA approves the standards. EPA must disapprove the State's or Tribe's water quality standards and promulgate Federal standards under section 303(c)(4), and for Great Lakes States or Great Lakes Tribes under section 118(c)(2)(C) of the Act, if State or Tribal adopted standards are not consistent with the factors listed in paragraphs (a)(1) through (8)~~(9)~~ of this section. EPA may also promulgate a new or revised standard when necessary to meet the requirements of the Act.

(c) Section 401 of the Clean Water Act authorizes EPA to issue certifications pursuant to the requirements of section 401 in any case where a State or interstate agency has no authority for issuing such certifications.

40 C.F.R. § 131.6 – Minimum requirements for water quality standards submission.

The following elements must be included in each State's water quality standards submitted to EPA for review:

(a) Use designations consistent with the provisions of sections 101(a)(2) and 303(c)(2) of the Act.

(b) Methods used and analyses conducted to support water quality standards revisions.

(c) Water quality criteria sufficient to protect the designated uses.

(d) An antidegradation policy consistent with § 131.12.

(e) Certification by the State Attorney General or other appropriate legal authority within the State that the water quality standards were duly adopted pursuant to State law.

(f) General information which will aid the Agency in determining the adequacy of the scientific basis of the standards which do not include the uses specified in section 101(a)(2) of the Act as well as information on general policies applicable to State standards which may affect their application and implementation.

~~(g) Where applicable, information that will aid the Agency in evaluating whether the submission is consistent with § 131.9, including:~~

~~(1) Any information provided by right holders about relevant Tribal reserved rights and documentation of how that information was considered; and~~

~~(2) Data and methods used to develop the water quality standards.~~

~~40 C.F.R. § 131.9 – Protection of Tribal reserved rights.~~

~~(a) Where a right holder has asserted a Tribal reserved right in writing to the State and EPA for consideration in establishment of water quality standards, to the extent supported by available data and information, the State must:~~

~~(1) Take into consideration the use and value of their waters for protecting the Tribal reserved right in adopting or revising designated uses pursuant to § 131.10;~~

~~(2) Take into consideration the anticipated future exercise of the Tribal reserved right unsuppressed by water quality in establishing relevant water quality standards; and~~

~~(3) Establish water quality criteria, consistent with § 131.11, to protect the Tribal reserved right where the State has adopted designated uses that either expressly incorporate protection of or encompass the right. This requirement includes developing criteria to protect right holders using at least the same risk level (e.g., cancer risk level, hazard quotient, or illness rate) as the State would otherwise use to develop criteria to protect the State's general population, paired with exposure inputs (e.g., fish consumption rate) representative of right holders exercising their reserved right.~~

~~(b) States and right holders may request EPA assistance with evaluating Tribal reserved rights. EPA will provide such assistance to the extent practicable. In providing assistance to States as they adopt and revise water quality standards consistent with paragraph (a) of this section, EPA will engage with right holders.~~

~~(c) In reviewing State water quality standards submissions under this section, EPA will initiate the Tribal consultation process with the right holders that have asserted their rights for consideration in establishment of water quality standards, consistent with applicable EPA Tribal consultation policies, in determining whether State water quality standards are consistent with paragraph (a) of this section.~~

40 C.F.R. § 131.20 – State review and revision of water quality standards.

(a) State review. The State shall from time to time, but at least once every 3 years, hold public hearings for the purpose of reviewing applicable water quality standards adopted pursuant to §§ 131.~~9~~10 through 131.15 and Federally promulgated water quality standards and, as appropriate, modifying and adopting standards. ~~This review shall include evaluating whether there is any new information available about Tribal reserved rights applicable to State waters that needs to be considered to establish water quality standards consistent with § 131.9.~~ The State shall also re-examine any waterbody segment with water quality standards that do not include the uses specified in section 101(a)(2) of the Act every 3 years to determine if any new information has become available. If such new information indicates that the uses specified in section 101(a)(2) of the Act are attainable, the State shall revise its standards accordingly. Procedures States establish for identifying and reviewing water bodies for review should be incorporated into their Continuing Planning Process. In addition, if a State does not adopt new or revised criteria for parameters for which EPA has published new or updated CWA section 304(a) criteria recommendations, then the State shall

provide an explanation when it submits the results of its triennial review to the Regional Administrator consistent with CWA section 303(c)(1) and the requirements of paragraph (c) of this section.

(b) Public participation. The State shall hold one or more public hearings for the purpose of reviewing water quality standards as well as when revising water quality standards, in accordance with provisions of State law and EPA's public participation regulation (40 CFR part 25). The proposed water quality standards revision and supporting analyses shall be made available to the public prior to the hearing.

(c) Submittal to EPA. The State shall submit the results of the review, any supporting analysis for the use attainability analysis, the methodologies used for site-specific criteria development, any general policies applicable to water quality standards and any revisions of the standards to the Regional Administrator for review and approval, within 30 days of the final State action to adopt and certify the revised standard, or if no revisions are made as a result of the review, within 30 days of the completion of the review.