WMC
Wisconsin's Chamber

March 6, 2023

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

Submitted via www.regulations.gov

RE: WMC Comments on 87 Fed. Reg. 74,361 *Water Quality Standards Regulatory Revisions to Protect Tribal Reserved Rights* (Dec. 5, 2022)

Dear Ms. Brundage,

Wisconsin Manufacturers and Commerce (WMC) appreciates the opportunity to provide written comment on U.S. EPA's proposed revisions to requirements applicable to state water quality standards under 40 C.F.R. Part 131.

WMC is Wisconsin's combined state chamber of commerce and manufacturers' association. We represent approximately 3,800 member companies of all sizes, and from every sector of the economy. Our mission is to make Wisconsin the best state in the country to do business.

WMC's members have a specific direct interest in the proposed rulemaking. Wisconsin is a "Great Lakes State" under Part 131, and portions of the state are subject to rights reserved under the Treaties of 1837, 1842, and 1854. The State of Wisconsin has established regulations recognizing and implementing usufructuary rights reserved under the Treaty of 1837, and implements a delegated National Pollutant Discharge Elimination System (NPDES) permit program in areas of the state subject to those treaties.

First and foremost, WMC urges the EPA to withdraw this proposed rule. The proposed rule represents an egregious overreach by the U.S. EPA. The agency lacks the authority to promulgate the rule, failed to properly consider implementation concerns and the rule's incredible costs, and ignored federalism implications associated with the rulemaking.

However, if the EPA refuses to withdraw the rule, WMC requests important modifications related to the following rule requirements:

- Requirement to adopt additional designated uses and water quality standards to address tribal treaty rights.
- Use of the "unsuppressed level" of resource consumption in setting water quality standards.
- Requiring that designated uses be set for wild rice areas that have not supported the resource since November 28, 1975.

As set forth below, Wisconsin's existing regulations already address reserved treaty rights, and the proposed rule should include a mechanism for U.S. EPA to recognize programs that already achieve this requirement (see *Section #2* of WMC's comments). In addition, many waterways in the portions of Wisconsin in the Ceded Territory are small streams with a limited carrying capacity, such that the proposed evaluation of "unsuppressed levels" of fish consumption at a subsistence level is historically inaccurate and unrealistic (see *Section #3*). Finally, the proposal to require designation of areas for wild rice that have not supported that use since at least November 28, 1975 is contrary to U.S. EPA's existing regulations and should be corrected in the Preamble to the final rule (see *Section #4*).

1. EPA should withdraw the proposed rule

To begin, the best solution is for the EPA to simply withdraw the proposed rule. The EPA lacks the necessary statutory authority to promulgate the rule, and has not properly considered the significant implementation questions or substantial costs associated with it. Further, the EPA has erroneously concluded the proposed rule has no implications for federalism.

1.A. EPA lacks authority under the Clean Water Act to promulgate this rule

The EPA cites the Clean Water Act (CWA) as providing the proper authority to promulgate this proposed rule. However, there is no specific provision in the statute that authorizes this broad rulemaking. Nor does any court case cited by the EPA authorize this action.

The proposed rule would unlawfully mandate that states, including Wisconsin, adopt new designated uses inconsistent with CWA. The Clean Water Act sets the framework for states to adopt water quality standards, requiring states to base such standards on designated uses of the waterbody. In establishing such standards, states are required to consider factors including the value of waterbodies for public water supplies, wildlife, recreation, agriculture, industry, and navigation.

This proposed rule would violate the existing CWA statutory framework by stipulating "tribal reserved right" designated uses would supersede the other factors considered by states when establishing water quality standards. This is not lawful; the Clean Water Act affords states like Wisconsin the ability to set standards that consider a range of designated uses.

1.B. EPA has failed to consider implementation challenges and costs

It is unclear how the EPA expects states to implement this rule. Within the rule, the EPA requires states to protect tribal rights, but the agency does not know the scope of such rights. The vast majority of claims to tribal reserved rights have not been adjudicated. This proposed rule puts states in the extremely difficult position of deriving water quality standards from implied reserved rights without objective standards or procedures to follow.

This raises the question of how such water quality standards will be evaluated by the EPA. Under the proposed rule, the EPA intends to evaluate minimum standards on a case-by-case basis after identifying and interpreting all applicable tribal reserved rights. Conversely, CWA generally provides that minimum standards under the law utilize the best available science.

In other words, the proposed rule upends current practice for standard setting and forces states to guess as to set the appropriate standards via tribal reserved rights. This undermines transparency and predictability for the setting of water quality standards, the opposite of what the EPA claims is a goal of this rulemaking.

Just as critically, the EPA failed to conduct a robust cost analysis with this proposed rule. When the EPA promulgated federal water quality standards in the State of Washington, businesses estimated compliance costs in the billions of dollars. Notably, the standards prescribed a fish consumption rate to protect tribal subsistence anglers with a 10^{-6} risk rate for the general population. Since the proposed rule would mandate such practices in all states with tribal reserved rights, the cost of this rule could easily exceed tens of billions of dollars, or more.

The EPA needs to consider such costs, both to ensure conformity with the Administrative Procedure Act (APA) and to inform the regulated community and the public of the incredible compliance costs associated with this proposed rule.

1.C. EPA erroneously concluded the proposal has no federalism implications

Surprisingly, the EPA concludes that the rulemaking does not have federalism implications. The EPA further concludes that the rulemaking does not have "substantial direct effects" on the relationship or division of power between the national government in Washington and state governments.

However, the proposed rule plainly impacts the federalism framework established by the Clean Water Act. Under the proposal, water quality standards established by a state could be usurped by another sovereign entity. Such a sovereign entity could be a tribe or even the EPA itself, if the EPA elected to recognize water quality standards proposed via tribal reserved rights over other lawfully-enacted state standards.

The EPA's conclusion that the rule has no federalism implications is disconnected from reality, and arbitrary and capricious. Thus, it is a violation of the APA.

2. Wisconsin's existing regulations already comply with proposed 40 CFR § 131.9(c)

To reiterate, WMC urges the EPA to withdraw the proposed rulemaking for the aforementioned reasons. However, if the agency insists on moving forward with this deeply flawed rule, WMC urges the following modifications to lessen the burden on Wisconsin's business community.

To begin, EPA has requested comment on the proposed 40 CFR § 131.9, which would require states to designate uses that either expressly incorporate protection of the tribal reserved treaty rights or encompass such rights (proposed section 131.9(c)(1)); establish water quality criteria to protect tribal reserved rights (proposed section 131.9(c)(2)); and/or use applicable antidegradation requirements to maintain and protect tribal reserved rights (proposed section 131.9(c)(3)).

But in proposing these requirements, EPA is not writing on a blank slate. Wisconsin has been a leader in implementing treaty rights for decades, under the "Voigt Commission" established to implement the decision in *Lac Courte Oreilles v. Voigt*, 700 F. 2d 341 (7th Cir. 1983). Wisconsin has a long-standing process whereby the Wisconsin Department of Natural Resources (DNR) works with

the Great Lakes Indian Fisheries and Wildlife Commission (GLIFWIC) to ensure compliance with existing usufructuary treaty rights and manage sustainable harvests. Wisconsin has also designated numerous water bodies in the Ceded Territory as either "Exceptional Resource Waters" (ERW) or "Outstanding Resources Waters" (ORW) under chapter NR 102, Wis. Admin. Code, subjecting these waters to heightened protections, including antidegradation requirements.

Given the above, Wisconsin has already established a comprehensive regulatory scheme to ensure that water quality standards are set at levels protective of usufructuary rights established by treaty. To recognize this, WMC requests that EPA add a provision to proposed 40 CFR § 131.9(d), providing a mechanism by which a state may meet the requirements of proposed 40 CFR § 131.9(c)(1)-(3) by submitting a demonstration that existing designated uses and water quality criteria encompass protection of tribal reserved rights and are already set at levels protective of tribal rights.

3. Requirement to consider "unsuppressed" consumption of resources

EPA is also taking comments on proposed 40 CFR § 131.9(a)(1) regarding whether to "require that where tribal reserved rights apply, and where supported by available data and information, WQS must be established to protect the exercise of the tribal reserved rights unsuppressed by water quality or availability of the aquatic or aquatic dependent resource" by setting a fish consumption rate ("FCR") representative of a traditional subsistence lifestyle. 87 Fed. Reg. at 74,369, 74,370. While this approach may be workable for large water bodies with a significant carrying capacity, many of the small rivers and streams within the Ceded Territory in Wisconsin have low or intermittent flows and have a limited carrying capacity that would not support full-time subsistence fishing. Requiring the state to establish water quality standards that explicitly ignores the "availability of the aquatic dependent resource" for all such waters may force DNR to set water quality standards based upon the potential presence of sensitive species that may or may not even be present in the regulated streams and that historically were not consumed from those streams at a subsistence level. To address this, WMC requests that EPA delete the phrase "or availability of the aquatic or aquatic-dependent resource" from proposed 40 CFR § 131.9(a)(1) to account for natural limitations in the carrying capacity of these waters.

4. Establishing wild rice protection areas based on future restoration plans

Finally, EPA proposes to designate areas for wild rice protection in the Great Lakes region that do not currently support wild rice uses, based on consideration of historical growing patterns and planned efforts to restore the hydrological regime and reduce nonpoint sources of pollution. 87 Fed. Reg at 74,369, 74,370. Specifically, EPA states that "A state might consider historical growing patterns and planned efforts to restore the hydrologic regime and reduce nonpoint sources of pollution, while also accounting for hydrologic changes and legacy contaminants that may not be feasible to remedy at this time." *Id.* at 74, 369. But this proposal goes far beyond the current designated use framework and would instead require states to knowingly designate uses that are not "existing uses" and that cannot be met in the future. "Existing uses are those actually attained in the water body on or after November 28, 1975 . . . " *See id.* at 74,372 n.71, *citing* 40 CFR § 131.3(e).

The proposed rule would require Wisconsin and other states to establish designated uses and water quality standards, specifically for wild rice protection, for waters within the state based upon the somewhat vague criteria of "proposed restoration efforts." This proposal would require states to assign designated uses and water quality standards that cannot currently be met by certain waters, due to hydrologic changes or legacy contaminants—which would then force those states to subsequently classify the waters so designated as "impaired" for purposes of Section 303(d) of CWA.

Such a proposal goes far beyond EPA's mandate. It also creates a disincentive to states to attempt restoration of wild rice growing areas, given the requirement to establish designated uses that may not be met and the potential for an impaired designation. Furthermore, it potentially would create conflict with other upstream practices that are exempt from regulation under CWA, specifically areas subject to silviculture harvesting and to cranberry cultivation, which has traditionally been treated as an "agricultural return flow" excluded from regulation under state and federal law. To avoid these concerns, WMC requests that EPA clarify in the final rule that states are not required to establish designated uses for wild rice production for areas that have not supported that use since November 28, 1975.

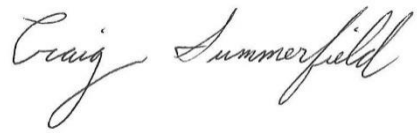
5. **Conclusion**

WMC again urges the EPA to withdraw its proposed rulemaking, as the proposed rule is arbitrary and capricious, and therefore unlawful. However, if the EPA does move forward, WMC urges the EPA to consider the aforementioned modifications to reduce the rule's impact on Wisconsin's business community.

Finally, WMC encourages the EPA to review the detailed written comments submitted by the U.S. Chamber of Commerce, which further highlights the significant problems with this proposed rule.

Thank you for your consideration of WMC's comments. Please do not hesitate to contact me with any questions.

Sincerely,



Craig Summerfield
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