

**SPECIAL ENVIRONMENTAL COUNSEL  
MEMORANDUM NO. 2024-3**

DATE: July 30, 2024

TO: Tribal Environmental Professionals

FROM: Tribal Government Practice Group\*  
Ogden Murphy Wallace, PLLC

RE: EPA Water Quality Standards Tribal Reserved Rights Rule

---

On June 3, 2024, EPA issued a new rule titled “Water Quality Standards Regulatory Revisions to Protect Tribal Reserved Rights” (WQS Treaty Rule). Under the new WQS Treaty Rule, the EPA confirms its existing obligation to ensure that water quality standards (WQS), whether developed by a Tribe, State, or EPA, are protective of the Federal government’s Treaty or executive order obligations to Tribes.

**1. The WQS Treaty Rule**

The WQS Treaty Rule imposes three general requirements on states when establishing or revising the state’s WQS. First, the state must “take into consideration the use and value of their waters for protecting the Tribal reserved right in adopting or revising designated uses...”<sup>1</sup> EPA notes that the intent of this provision is not to impose a new use designation requirement,<sup>2</sup> but rather to “make explicit that designating a use to protect rights to aquatic and/or aquatic-dependent resources” is one option available to states.<sup>3</sup>

Second, states must “take into consideration the anticipated future exercise of the Tribal reserved right unsuppressed by water quality in establishing relevant water quality standards.”<sup>4</sup> EPA acknowledges that the WQS Treaty Rule does not mandate that states “must protect” the unsuppressed exercise of those rights, nor does it mandate that states increase the availability of resources. Rather, the EPA suggests that this requirement is “intended to address situations where existing water quality does not allow for right holders to fully exercise their reserved rights.”<sup>5</sup>

---

\*The OMW Tribal Government Practice Group would like to thank our Summer Associate Mag Larrain for her assistance in the preparation of this memo. Ms. Larrain is a rising 3L at the Seattle University School of Law.

<sup>1</sup> C.F.R § 131.9(a)(1)

<sup>2</sup> For established “designated uses” *see* C.F.R § 131.10

<sup>3</sup> 89 Fed. Reg. 35731

<sup>4</sup> C.F.R § 131.9(a)(2)

<sup>5</sup> 89 Fed. Reg. 35731

Third, states must establish WQS “to protect Tribal reserved rights where the state has adopted designated uses that either expressly incorporate protection of or encompass the right.”<sup>6</sup> This requirement is intended to clarify that where the designated use either expressly incorporates protection or encompasses Tribal reserved rights, Tribal members are the population that the designated use that the applicable WQS is designed to protect.

## **2. State Challenge to The WQS Treaty Rule**

On June 14, 2024, the States of Idaho, North Dakota, Alaska, Iowa, Nebraska, South Carolina, South Dakota, and Wyoming (Objecting States), filed a complaint in the United States District Court for the District of North Dakota, challenging the WQS Treaty Rule. The Objecting States are requesting the Court to hold that the challenged rule is invalid.<sup>7</sup>

The Objecting State’s main contention is that the EPA has exceeded its authority under the Clean Water Act (CWA), by imposing new and burdensome requirements on states by requiring that states consider Tribal reserved rights.<sup>8</sup> Specifically, Objecting States argue that the “CWA cannot be expanded by the EPA to require states to protect tribal reserved rights.”<sup>9</sup>

The Objecting States fundamental contention is incorrect. The WQS Treaty Rule does not impose a new requirement on states to protect Tribal reserved rights. Rather, the WQS Treaty Rule is intended to clarify EPA’s existing obligation to consider Tribal reserved rights and provide greater transparency to State’s regarding the EPA’s expectations for WQS in waters where Tribal reserved rights apply.

## **3. Purpose of the WQS Treaty Rule**

In sum, EPA is attempting to articulate and clarify the existing obligation of the Federal government under existing law, to protect the treaty interests of Tribes where such interests may be adversely impacted by WQS that are not sufficiently protective. Prior to this rule, the EPA has used its oversight authority to address Tribal reserved rights in specific WQS actions and has previously disapproved of state WQS when such standards were inadequately protective of Tribal reserved rights.<sup>10</sup> Accordingly, the WQS Treaty Rule is an attempt by EPA to harmonize EPA’s prior actions and its current regulatory obligations with Federal treaties, statutes, and executive orders establishing and acknowledging Tribal Treaty and executive order rights and entitlements.

The WQS Treaty Rule does not impose new obligations on states. In effect, in enacting the WQS Treaty Rule, EPA is providing notice to the public, states, and local governments that when it

---

<sup>6</sup> C.F.R § 131.9(a)(3).

<sup>7</sup> In response, a number of Tribes have asked the court to intervene in the case in support of EPA’s defenses of the WQS Treaty Rule. Tribes filed a Tribes’ Memorandum in Support of Motion To Intervene. For the full memorandum, see [Tribes' Memorandum](#)

<sup>8</sup> See Complaint and Petition for Review, 22, *State of Idaho, et al., v. EPA*, No. 1:24-cv-00100 (D.N.D).

<sup>9</sup> Complaint and Petition for Review, 23, *State of Idaho, et al., v. EPA*, No. 1:24-cv-00100 (D.N.D).

<sup>10</sup> 89 Fed. Reg. 35721.

evaluates a state WQS proposal, all interested parties should be mindful of the EPA's existing obligations as an instrumentality of the federal government, to protect the treaty interests of Tribes. The EPA's obligation to consider Tribes when approving WQS is consistent with the EPA's prior actions in accordance with applicable law, and is within the EPA's authority under the CWA.

#### **4. Recommendations and Conclusions**

The recent challenge by the Objecting States is significant because not only does it attempt to undermine the EPA's own obligations to Tribes, but also attempts to limit the EPA's authority to approve or disapprove WQS that may not be protective of Tribal reserved rights. The OMW Tribal Government-Environmental Practice Group will continue to follow the developments in the *State of Idaho v. EPA* case as it proceeds through the judicial process. Please let us know if you have any questions or if we may be of assistance.

#### **Tribal Government Practice Group Members:**

Richard A. Du Bey	rdubey@omwlaw.com
Jennifer L. Sanscrainte	jsanscrainte@omwlaw.com
Andrew Fuller	afuller@omwlaw.com
Nick Thomas	nthomas@omwlaw.com
Aaron Riensche	ariensche@omwlaw.com
Drew Pollom	dpollom@omwlaw.com

#### **Summer Associates:**

Mag Larrain	mlarrain@omwlaw.com
Hannah Waskom	hwaskom@omwlaw.com