

## Appendix A

# Background and Implementation of the EPA Treaty Reserved Rights Rule in EPA Region 5

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## Background and Summary of the Clean Water Act as it Relates to the Treaty Reserved Rights (TRR) Rule

The Clean Water Act (CWA) provides the basic structure for regulating pollutant discharges into the waters of the United States (U.S.).<sup>1</sup> It establishes that a permit is required before any person discharges any pollutant from a point source into U.S. waters. It also provides a mechanism to delegate that authority to states and tribes, with oversight by the Environmental Protection Agency (EPA). The CWA was originally called the Federal Water Pollution Control Act, and it was enacted in 1948. In 1972, it was significantly revised and expanded and became commonly known as the Clean Water Act. Tribes, similar to states, may assume the authority to set water quality standards that apply on reservations. There are eight Tribes in Minnesota, Wisconsin, and Michigan that have EPA approved water quality standards in place.<sup>2</sup>

- I. Fond du Lac Band of Minnesota Chippewa (MN)
- II. Grand Portage Band of Minnesota Chippewa (MN)
- III. Leech Lake Band of Ojibwe (MN)
- IV. Red Lake Band of Chippewa (MN)
- V. Lac du Flambeau Band of Lake Superior Chippewa (WI)
- VI. Sokaogon Chippewa Community (Mole Lake Band) (WI)
- VII. Bad River Band of Lake Superior Chippewa (WI)
- VIII. Keweenaw Bay Indian Community (MI)

On May 2, 2024, the Environmental Protection Agency (EPA) published its final rule requiring state consideration of tribal reserved rights (TRR) when revising its water quality standards (WQS).<sup>3 4</sup> Tribal reserved rights are defined as “any rights to CWA-protected aquatic and/or aquatic-dependent

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<sup>1</sup> 33 U.S.C. §1251 et seq. (1972).

<sup>2</sup> U.S. Environmental Protection Agency. “Tribal Assumption of Federal Laws – Treatment as a State (TAS).” EPA, January 14, 2025. <https://www.epa.gov/tribal/tribal-assumption-federal-laws-treatment-state-tas>.

<sup>3</sup> **Note:** The final rule became effective on June 3, 2024, 30 days after its publication in the Federal Register.

<sup>4</sup> Water Quality Standards Regulatory Revisions To Protect Tribal Reserved Rights, EPA-HQ-OW-2021-0791; FRL-8599-02-OW § (2024).

resources reserved by right holders, either expressly or implicitly, through Federal treaties, statutes, or executive orders.”<sup>5</sup> Under this rule, when a tribe asserts its treaty-reserved rights to the state and to the EPA for consideration, the state must examine a number of things. The state must factor in the value and use of state waters in protecting Tribal reserved rights when it comes to adopting or revising designated uses. They must account for the anticipated future exercise of Treaty reserved rights unsuppressed by water quality when creating water quality standards. Lastly, the state must develop water quality criteria to protect Tribal reserved rights when designated uses encompass or explicitly protect those rights.

The latter requirement ensures that water quality criteria protect right holders using the same risk levels (e.g., cancer risk, illness rate, or hazard quotient) as those applied to the general population (non-rights holders), matched with exposure inputs (e.g., fish consumption rates) reflecting right holders' exercise of their reserved rights. The EPA must also follow these standards when setting federal water quality standards. This new rule commits the EPA to assist states and right holders in reviewing Tribal reserved rights upon request and initiating tribal consultations with right holders who have asserted their rights for consideration in establishing WQS.<sup>6</sup> The rule updates requirements for state submissions of WQS under the CWA. These updates include submissions of Tribal reserved rights information provided by right holders plus documentation on how states considered it, as well as EPA review factors to ensure state-adopted WQS comply with the rule's requirements. Lastly, the new rule includes state triennial reviews that must incorporate any new information on Tribal reserved rights.

The following case study is an example of how this rule may be used in Minnesota.

## Minnesota's Water Quality Standards

Minnesota's water quality standards are comprehensive. This summary will note one place where Tribes may be initially inclined to challenge those standards as inadequate. The first is the wild rice designated use and its associated sulfate standard. One of the designated uses described in the Clean Water Act has to do with the protection of wildlife, fish, and shellfish in designated use waters, wild rice falls into this category. Wild rice is especially important for tribal communities as it has been one of their staple food sources for centuries. The state of Minnesota currently has a 10mg/L standard for sulfate in class 4A waters where wild rice is present.<sup>7</sup> Wild rice is especially susceptible to harm from sulfate and there are currently 32 water bodies that were added to Minnesota's 2020 Impaired Waters List due to having sulfate that exceeds the 10mg/L standard.<sup>8</sup>

States exercising delegated authority for water quality standards under the Clean Water Act must review standards (such as the sulfate standard) every three years. As part of this “triennial review” process, the state must hold a public hearing that is open to rights holders. (Section 131.20(b)) Over

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<sup>5</sup> *Ibid.*

<sup>6</sup> US EPA. 2019. “Water Quality Standards Handbook | US EPA.” US EPA. October 4, 2019. <https://www.epa.gov/wqs-tech/water-quality-standards-handbook>.

<sup>7</sup> Weiss, Steve, Scott Kyser, Matt Lindon, Dennis Wasley, and Emily Brault. “Procedures for Implementing the Class 4A Wild Rice Sulfate ...” Procedures for implementing the Class 4A wild rice sulfate standards in NPDES wastewater permits in Minnesota, January 2024. <https://www.pca.state.mn.us/sites/default/files/wq-wwprm2-109.pdf>.

<sup>8</sup> “Minnesota's Impaired Waters List.” Minnesota Pollution Control Agency, April 2024. <https://www.pca.state.mn.us/air-water-land-climate/minnesotas-impaired-waters-list>.

the three years of the triennial review, the state revises its WQS, adopts final standards, and submits them to EPA. Accompanying the standards must be information provided by the rights holders and an explanation of how that information was considered, as well as the data and methods used to develop the water quality standards. Once the EPA receives the standards, it evaluates whether they are consistent with the protection of tribal reserved rights (40 CFR 131.9), consults with tribes under EPA's tribal consultation policy, and approves or disapproves the state's standards.

## Potential Scenario – Minnesota State Triennial Review Process

**Initial Approach:** Would the state be willing to consider these water bodies as eligible for listing as wild rice waters under the wild rice designated use? Would there be other data that the state would want with respect to those lakes (e.g. characteristics like sediment type that would show that the lake might be able to support wild rice in the future)? Would the state limit the time frame relative to when these lakes supported wild rice (e.g. within the last 25 years)?

**Secondary Questions:** If the state argues that the current designated use language (that is "water used for the production of wild rice") precludes listing lakes that don't currently support wild rice: Would the state be willing to consider a change to the designated use language so that it could encompass waters where wild rice existed in the past and may again exist in the future? If so, there could be discussion about removing the wild rice designated use from the agriculture and wildlife class and moving it to the aquatic life class. What would be the consequences of such a change?

## Policy Steps to Advance the Above Scenario Under the Treaty Reserved Rights Rule

- I. Rights holder (a tribe or tribes) asserts its treaty reserved right to EPA's regional office and the relevant state (Minnesota, in this example). Section 131.9(a). This assertion is not intended to be onerous; it can be accomplished via email. EPA encourages rights holders to identify:
  - The applicable treaty,
  - The nature of the right (e.g. the right to gather wild rice), and
  - The geographic location (e.g. in a particular area or waterbody).
- II. EPA has urged rights holders to assert their rights at the time of a state triennial review, calling it "an ideal opportunity" (89 Fed. Reg. 35728), although that is not required.

The State or the rights holder may request the assistance of EPA with evaluating reserved rights. Section 131.9(b)]

- III. The rights holder and the State (with the assistance of EPA if requested), evaluate data and information related to the rights holder's assertion that a resource is not adequately protected by the state's current water quality standard (WQS).
  - In this case, the tribe(s) would be making the argument that the list of waters with the designated use "water used for the production of wild rice" should include additional waters that supported wild rice in the past and are reasonably capable of supporting wild rice in the future. [See Step V.a., below.]

- IV. If the State and the Tribe(s) agree that the designated use language is too restrictive, then a new designated use would need to be developed. [See Step V.b., below.]

[Note: The State or the rights holder may request the assistance of EPA with data and information gathering. Section 131.9(b)]

## Data Requirements

Assuming that EPA and/or the State agree with the Tribe(s) that the existing designated use can include additional water bodies (III.a. above), the Tribe(s) (with the assistance of Freshwater) would need to:

- I. Present information that supports the use and values associated with wild rice (applicable to the specific waterbody(ies) that supported wild rice in the past if possible).
- II. Present data on the anticipated future exercise of the right should rice be restored.
- III. Present data on the potential for rice restoration (addressing reasons that the waterbody no longer supports wild rice).

There may be other data that would need to be presented (see Initial Questions, above) depending on interactions with the State and questions/concerns that they may raise.

## Potential for the TRR Rule to be Short-Lived

As of the time of this report, there are currently 12 western states suing the EPA, making a number of arguments that the new rule is improper.<sup>9</sup> States argue that this new rule strips them of authority to designate water uses, imposes vague and burdensome obligations relating to permit costs, and unconstitutionally disrupts state-tribal relations. The states contend that the EPA is exceeding its statutory authority under the CWA, intruding on state water rights, and imposing significant economic and political costs without clear congressional authorization. States seek to halt implementation, block enforcement, and have the rule declared invalid.

Since then, several tribes, including the Fond du Lac Band of Minnesota Chippewa, have intervened to defend the rule.<sup>10 11</sup> They have cited its recognition of tribal rights and the fact that it protects water quality at a time when climate change and environmental degradation continue to pose a threat. Because the TRR Rule is a final rule, it cannot be undone by a new administration without going through the federal rulemaking process. If the new administration does propose to withdraw the rule, it would require a notice in the federal register and a public comment period.

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9 State of Idaho v. EPA. Case 1:24-cv-00100-DLH-CRH (<https://www.epa.gov/system/files/documents/2024-06/complaint-idaho-et-al-v-epa-tribal-reserved-rights-rule-5.28.24.pdf> May 28, 2024).

10 State of Idaho v. EPA. Case 1:24-cv-00100-DLH-CRH (<https://www.narf.org/nill/documents/20240712amended-mti-epa-rule.pdf> July 12, 2024).

11 **Note:** The original motion to intervene was filed on June 18, 2024. On July 12, 2024, an amended motion to intervene was filed. As of July 12, the motion to defend the EPA's Tribal Reserved Rights Rule includes seven Tribes from Region 5: Bay Mills Indian Community (MI), Lac du Flambeau Band of Lake Superior Chippewa Indians (WI), Sokaogon Chippewa Indian Community (WI), Red Lake Nation (MN), Fond du Lac Band of Lake Superior Chippewa Indians (MN), Grand Traverse Band of Ottawa and Chippewa Indians (MI), White Earth Band of the Minnesota Chippewa Tribe (MN).