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Submitted via regulations.gov portal.

Clean Wisconsin, on behalf of its members and supporters around the state, submits these comments along with Midwest Environmental Advocates and River Alliance of Wisconsin.

Clean Wisconsin advocates for clean water and clean air for *all* who reside within the state's borders, including those who have been here long before Wisconsin became a state.

Midwest Environmental Advocates is a nonprofit law center that combines the power of law with the resolve of communities facing environmental injustice to secure and protect the rights of all people to healthy water, land, and air.

River Alliance of Wisconsin is a statewide nonprofit, nonpartisan advocacy organization that has empowered people to protect and restore Wisconsin's waters for thirty-years.

The State of Wisconsin includes areas ceded by treaty—the Ceded Territory—in which Tribes reserved the right to hunt, fish, and gather, including the harvesting of wild rice. Wisconsin's territorial and state governments did not respect these Tribal reserved rights, however, and Tribes in Wisconsin have endured a long struggle to vindicate their treaty rights.¹ Full exercise of these Tribal reserved rights relies on clean water, and water pollution has been and continues to be a problem in parts of the Ceded Territory.

We therefore welcome EPA's proposed rule to require water quality standards (WQS) to protect Tribal reserved rights ("the Proposed Rule"). The Proposed Rule is squarely within the purpose and design of the Clean Water Act and will bring much needed clarity and consistency to how WQS protect Tribal reserved rights. It will also prevent an

¹ See e.g., Bennet Goldstein, *How Ojibwe tribes in Wisconsin resisted efforts to deny treaty rights*, Wisconsin Watch (February 24, 2023), <https://wisconsinwatch.org/2023/02/how-ojibwe-tribes-in-wisconsin-resisted-efforts-to-deny-treaty-rights/>.

unnecessary replay of EPA’s harmful and illegal 2020 disavowal of the critical role of Tribal reserved rights in WQS actions.²

We submit these comments to highlight a few Wisconsin-specific issues, encourage EPA to avoid implementation pitfalls, and weigh in on issues for which EPA has requested comment.

Water Quality Challenges Impacting Tribal Reserved Rights in Wisconsin

The Proposed Rule acknowledges that lowered water quality threatens the full exercise of Tribal reserved rights like the right to hunt, fish, and gather, and that this threat includes the growing specter of climate change. We note a few challenges and opportunities in Wisconsin, and how the Proposed Rule might affect them.

It is axiomatic that meaningful exercise of these treaty rights depends on clean water.³ Aquatic plant and animal species cannot thrive in contaminated water. And what does grow may be unsafe to consume if it is contaminated with harmful pollutants. The right to fish or gather wild rice thus risks becoming illusory where water quality suffers.

We have unfortunately seen contamination in waters that support, or could support, the exercise of treaty rights in Wisconsin. Fish are often contaminated with PFAS, PBCs, mercury, and/or other contaminants.⁴ Wisconsin has a general statewide fish advisory because of these contaminants.⁵ Where these and other pollutants render fish unsafe to eat in quantities commensurate with the customary and traditional fishing behavior of the rights holders, those rights treaty rights are fundamentally compromised.

We also know that wild rice faces a series of threats, including water quality impacts from contaminants like sulfate.⁶ Unless water quality is protected, there is reason to fear that wild rice growth will continue to be impaired in Wisconsin.

We would be remiss if we did not note the impact of climate change on treaty rights in Wisconsin. Lake Superior is one of the fastest warming lakes in the world, and this warming will have profound effects on the plants, animals, and people that reside in this region. This will put stress on fish and plant species underlying the exercise of Tribal

² See Water Quality Standards Regulatory Revisions to Protect Tribal Reserved Rights, 87 Fed. Reg. 74366 (December 5, 2022).

³ See, e.g., *Michigan v. U.S. EPA*, 581 F.3d 524, 525 (7th Cir. 2009) (finding that Tribal activities “require the use of pure natural resources derived from a clean environment.”).

⁴ See, e.g., Bennet Goldstein, *Great Lakes pollution threatens Ojibwe treaty rights to fish*, Wisconsin Watch (February 24, 2023), <https://wisconsinwatch.org/2023/02/great-lakes-pollution-ojibwe-treaty-rights-to-fish/>.

⁵ See Wisconsin Department of Natural Resources, “Eating Your Catch – Making Healthy Choices,” <https://dnr.wisconsin.gov/topic/Fishing/consumption> (accessed March 3, 2023).

⁶ See Wisconsin Department of Natural Resources, *Strategic Analysis of Wild Rice Management in Wisconsin* (September 2021) at ii (noting that wild rice “abundance and distribution ... has decreased significantly over the past century.”) and 23-26 (discussing water quality impacts on wild rice growth), https://widnr.widen.net/s/kdzjncbfbg/wildricemgmtsa_finalreport_sept2021_with-appendices (accessed Mar. 6, 2023).

reserved rights in the Ceded Territory. We need dramatically increased efforts to build resilience into our ecosystems and, where necessary, adapt to a warming climate. Improving water quality where it is impaired and preserving water quality where it is high is one step we can and must take as soon as possible as the effects of climate change increasingly impact northern Wisconsin and the Ceded Territory.

Recognition of Tribal Knowledge Must be Meaningful for the Proposed Rule to Protect Tribal Reserved Rights

While supportive of the Proposed Rule, we note a couple of pitfalls that could frustrate the Rule's desired effect.

First, the Proposed Rule will be ineffective in supporting the full exercise of treaty rights in Wisconsin unless EPA, DNR, and other government actors listen to the Tribes and their members, i.e., the rights holders, when it comes to where treaty rights are currently being exercised, could be exercised in the future, and where aquatic and aquatic-related resources are located. This must be a core component of the "available data and information" referenced in the proposed 40 C.F.R. § 131.9(a). This is necessary to ensure that water quality standards are applied to *all* waters that support the exercise of Tribal reserved rights, and not a reduced geographical area that fails to reflect the lived experience and knowledge of the Tribes.

EPA observes that determining where treaty rights apply, and where the aquatic and aquatic-related resources can be found, can be a difficult and complicated inquiry. This is true to some extent, but we note that both DNR and Tribes have made efforts to collect data and map the distribution and location of wild rice and other aquatic and aquatic-related resources.⁷ Recognizing and incorporating the tremendous work the Tribes have done, and continue to do, would facilitate application of water quality standards that protect treaty rights in Wisconsin.

Second, and related, in proposed 40 C.F.R. § 131.9(a)(1) EPA is proposing that water quality standards be determined such that the exercise of rights be "unsuppressed by water quality or availability of the aquatic or aquatic-related resource." EPA states that determining what "unsuppressed" means in a given context should "balance heritage use of a resource with what is currently reasonably achievable for a particular waterbody." EPA further states that current and planned restoration efforts should be considered when determining whether a given water could again support the exercise of a Tribal reserved right, including the specific example of wild rice gathering. We agree. But we also observe that the Proposed Rule will not fully respect Tribal reserved rights if past pollution and development are too readily taken as a reason to give up on waters that could again support the aquatic and aquatic-related resources underlying the Tribes' treaty rights. And as with our first point, the voice and input of the rights holders themselves regarding which waters might fit this description must be given great weight. The Tribes have undertaken extensive wild rice restoration efforts, and these must be

⁷ *Id.* at 44 (acknowledging the extensive efforts of the Great Lakes Indian Fish and Wildlife Commission to inventory wild rice locations in the Ceded Territory).

fully credited. Otherwise, what state regulators subsequently determined to be “reasonable” or “feasible” may result in incomplete achievement of the Proposed Rule’s objectives.

The Proposed Rule Would Clarify Wisconsin’s Duty to Protect Tribal Reserved Rights; Proper Implementation of the Proposed Rule Helps Fulfill That Duty.

The Proposed Rule would help clarify Wisconsin’s options for fulfilling its duty to protect Tribal Reserved Rights, including addressing water quality impacts to wild rice in the Ceded Territory. EPA discusses multiple compliance options for states, including the adoption of designated uses that explicitly reflect Tribal reserved rights. DNR has previously considered establishing wild rice as a designated use.⁸ DNR has also explored creation of a corresponding sulfate water quality criteria for wild rice.⁹ Creation of these WQS could help alleviate water quality impacts to wild rice in Wisconsin.

While laying out the benefits of these WQS, DNR has also identified “legislative opposition and legal challenges” as practical obstacles to promulgation.¹⁰ The Proposed Rule would help clear any legal ambiguity around the appropriateness of these WQS. In other words, Wisconsin has been ready to take additional steps to revise WQS to protect Tribal reserved rights, and this rulemaking would solidify the legal basis for doing so. Indeed, whatever option EPA selects, DNR would be required to update its delegated program accordingly to ensure that program remains in compliance with the Clean Water Act.

But even if EPA promulgates the Proposed Rule and DNR adopts appropriate WQS that comply with the Proposed Rule, permitting and enforcement decisions must consistently implement those WQS. Permitting authorities must not only have the authority, but also have the staff time and resources necessary, to turn these WQS into meaningful permit terms that protect water quality, and bring enforcement actions when those terms are not being met. For this reason, we urge that EPA’s review of state programs and state proposed WQS pay special attention to how WQS promulgated pursuant to this rule are being implemented and enforced by each state.

Issues for Which EPA Requested Comment: The Role of Antidegradation Policy and Revising Designated Uses for Waters Where Attainment Not Currently Feasible.

1. The Role of Antidegradation in Protecting Tribal Reserved Rights.

EPA asks for comment on whether antidegradation policy options could be used “in lieu of” the designated use and water quality criteria-based options in proposed 40 C.F.R. § 131.9(c)(1) and (2).¹¹ EPA raises two potential options. First, assigning Outstanding

⁸ *Id.* at 99.

⁹ *Id.*

¹⁰ *Id.*

¹¹ 87 Fed. Reg. 74371.

National Resource Water (ONRW) status to water bodies with water quality higher than necessary to protect Tribal reserved rights. Second, by amending a state's antidegradation policy to require that any lowering of water quality in a high quality water continues to protect applicable reserved rights.

DNR is currently in the process of promulgating revisions to its antidegradation policy. Clean Wisconsin and Midwest Environmental Advocates were members of the stakeholder advisory group DNR convened to aid drafting of those much-needed updates to Wisconsin's antidegradation rules. If DNR's current proposed revisions to its antidegradation policy are enacted, DNR would have the authority to treat any ONRW as high quality waters and subject them to antidegradation review. To achieve the second option would require amending DNR's antidegradation policy *after* finalization of the Proposed Rule. It is unclear whether the administrative burden associated with attempting to amend DNR's antidegradation policy almost immediately after amending that policy for the first time in over 25 years is feasible.

Regardless of any state-level administrative burden, we hesitate to support an antidegradation-only approach because, while EPA is potentially correct that protecting waters where the quality is already high may be cheaper in the short run than restoring waters with diminished water quality, this would limit the reach of the Proposed Rule in a way that would fail to fully respect Tribal reserved rights. Given ongoing efforts to restore waterways in the Ceded Territory, for aquatic life and wild rice growth, an antidegradation approach in lieu of the proposed approach would be incomplete. Such an approach would also be antithetical to a core objective of the Clean Water Act, i.e., to both maintain *and* restore "the chemical, physical, and biological integrity of the Nation's waters."¹²

For these reasons, we prefer the use of currently proposed 40 C.F.R. § 131.9(c)(1) and (2) to set designated uses and water quality criteria, with the requirement that states also includes provisions in the antidegradation policy that protect Tribal reserved rights. In other words, the use of "and/or" in proposed 40 C.F.R. § 131.9(c)(2) should be changed to simply "and" to avoid the option of an antidegradation-only approach for complying with the Proposed Rule.

2. Revising Designated Uses that Protect Tribal Reserved Rights.

EPA asks for comment on whether there should be "discrete additions" to the current framework, providing for whether and how designated uses can be revised by states while also ensuring protection of Tribal reserved rights.¹³ EPA should have specific rules for revising designated uses for waters implicated by the Proposed Rule, because revising a designated use in a way that fails to protect Tribal reserved rights could potentially violate federal law, i.e., the underlying treaty. There should therefore be special solicitude for "continu[ing] to strive for attainment", as EPA suggests, to ensure that these Clean Water Act implementing regulations square with the federal

¹² 33. U.S.C. § 1251(1)(a).

¹³ 87 Fed. Reg. 74372.

government's legal obligations. This is particularly salient given the fact that Tribal members are not the ones who created the "human caused conditions or ... pollution" that have made waters in the Ceded Territory too polluted to sustain traditional and customary levels of fish consumption or historical levels of wild rice growth.¹⁴ We therefore recommend that EPA consider adding provisions that understand use attainability in this unique context.

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¹⁴ 40 C.F.R. § 131.10(g)(3).