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Without Actual Collection of Damages, Mere CERCLA Liability Not Barred as Double Recovery, Says Ninth Circuit Ground Water Quality Standards

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On April 15, in *Santa Clarita Valley Water Agency v. Whittaker Corp., et al.*, No. 22-55727, slip op., -- F.4th – (9th Cir. 2024) (SCVWA), the U.S. Court of Appeals for the Ninth Circuit (Court of Appeals) held that in a matter where multiple sources of liability for environmental costs were at issue, a mere finding of liability under the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) did not amount to a barred double recovery because there had not yet been an actual multiple recovery of the same damages. Accordingly, where the trial court had denied CERCLA liability using the potential for a double recovery as its basis, the Court of Appeals reversed and remanded for further proceedings.

Case Background

This case arises from volatile organic compound (VOC) contamination in the Saugus Formation, which is a source of potable water in the area of the Santa Clarita Valley in

Southern California. Plaintiff the Santa Clarita Valley Water Agency (SCVWA) is a public body responsible for supplying potable water from the Saugus Formation (among other sources) to its customers in Northern Los Angeles. The VOC contamination at issue is primarily trichloroethylene and perchloroethylene, and it was allegedly caused by a number of potential industrial sources, including the historical operations of defendant Whittaker Corp. (Whittaker) and its predecessor landowners.

The SCVWA's predecessor agency discovered the VOC contamination in or around 1997, when it reviewed samples of groundwater extracted from two specific wells that drew water from the Saugus Formation. The wells were initially taken out of service, but the California Division of Drinking Water allowed the wells to reopen after VOC treatment facilities were installed. In addition to the treatment facilities, however, the SCVWA was required to blend the treated water with contaminant-free water at the point in the treatment process at which VOCs were non-detect. Pursuant to an agreement later negotiated between the SCVWA and Whittaker, Whittaker was to cover the cost of that treatment and pay for any necessary replacement water.

Later, in or around 2010, additional VOC contamination was found at a separate well. The SCVWA and Whittaker entered into a new agreement in 2015, which required Whittaker to install a treatment facility at the additional well and restore the potable water supply in accordance with applicable regulations. As of the date of the Court of Appeals' opinion, that well had not yet been restored for use as a source of potable water. It is instead used as a containment and treatment well. To meet its water supply needs for that well, the SCVWA has been required to purchase water for blending. Whittaker apparently covered the cost of that water from 2012 to 2017, but from 2017 to the date of the opinion, the cost was covered by the SCVWA.

Yet more VOC contamination was found at another well in or around 2012, and while the levels were below the then-existing maximum contaminant levels (MCLs), that well was immediately taken out of commission. Since the discovery of that contamination, the SCVWA has purchased replacement water to meet its supply needs. In 2018, the VOC contamination at this additional well was discovered to have risen above the applicable MCLs. The discovery of those exceedances triggered the SCVWA to commence litigation against Whittaker.

In the litigation, the SCVWA pled a number of counts against Whittaker, alleging multiple violations of state and federal laws and seeking various forms of relief, including recovery of damages and injunctive relief. Among other potential theories of liability, the SCVWA asserted claims against Whittaker for common law negligence, trespass, public

nuisance, and private nuisance, as well as cost recovery, contribution, and injunctive relief claims under CERCLA and the federal Resource Conservation and Recovery Act (RCRA).

After an 11-day trial, the jury returned a verdict finding Whittaker liable under the common-law theories and awarding the SCVWA damages for past harm and restoration costs. However, the damages were offset by the jury's determination that the SCVWA and other third parties were also negligent and the SCVWA had failed to mitigate damages.

After the jury trial, the trial court issued Findings of Fact and Conclusions of Law with respect to the statutory claims being tried by the bench. The trial court denied the SCVWA's RCRA claim because the risk of harm from the migration of VOCs was not "imminent and substantial" as a result of prior remediation and existing containment, monitoring, and government oversight. As to CERCLA, the trial court held that the SCVWA had incurred $675,000 for investigation, permitting, and design, and it allocated the majority of those costs to Whittaker consistent with the jury's apportionment of fault. But the trial court held that the SCVWA could not establish CERCLA liability against Whittaker for the costs it incurred for water blending and replacement water because recovery of such costs would be duplicative of the jury award and thus precluded by CERCLA under 42 U.S.C. § 9614(b) (barring double recovery of damages). The trial court also held that the SCVWA was not entitled to a finding of CERCLA liability because it had shown that the replacement water costs were consistent with the National Contingency Plan (NCP). The trial court made a number of other ancillary findings related to, among other things, prejudgment interest, and entered a final judgment in the SCVWA's favor. Both Whittaker and the SCVWA appealed several of the trial court's findings.

Analysis

After disposing of Whittaker's three grounds for appeal (which included challenges to (1) the trial court's decision to allow the SCVWA to assert restoration costs in its theory of damages after discovery had closed; (2) the jury's reliance on the groundwater treatment facilities as a measure of damages for the SCVWA's restoration costs claim; and (3) the reasonableness of the total restoration costs award by the jury), the Court of Appeals turned to the SCVWA's appeal of the trial court's rulings on RCRA and CERCLA. The Court of Appeals upheld the trial court's ruling on RCRA injunctive relief because "any threat posed by Whittaker's contamination is not imminent and substantial" as a result of the extensive cleanup performed by Whittaker under governmental oversight.

As to CERCLA, after reviewing the statute's general principles and noting that the majority of the elements of CERCLA liability are not contested, the Court of Appeals addressed the double recovery bar. The trial court denied CERCLA liability for the blend

and replacement water costs because the SCVWA had sought "just over $2.9 million in blend water costs . . . and just over $4.1 million in replacement water costs" and the jury had returned a verdict of $7 million for past damages. In light of that jury award, the trial court concluded that an additional finding of CERCLA liability would be a double recovery. Yet the Court of Appeals noted that while the trial court was correct that CERCLA bars a party from "receiving compensation for the same costs," it had misconstrued the SCVWA's request for a CERCLA liability finding. According to the Court of Appeals, the SCVWA had not sought an award of damages under CERCLA but rather sought a holding that Whittaker was liable under CERCLA.

Prior to *SCVWA*, the Court of Appeals had not had an opportunity to clarify the reach of the CERCLA double recovery bar. In resolving this appeal, the Court of Appeals formally held that CERCLA "does not bar a finding of liability as long as the [trial] court fashions the relief such that the plaintiff will not recover double compensation." In so holding, the Court of Appeals noted that other courts had done just that. In *Price v. U.S. Navy*, 818 F. Supp. 1326, 1332-33 (S.D. Cal. 1992), *aff'd* 39 F.3d 1011 (9th Cir. 1994), the trial court found various parties to be liable under CERCLA but barred any recovery by the plaintiffs because they had already received compensation from the State of California and a settlement, which negated their damages.

The Court of Appeals also noted the potential importance of a CERCLA liability finding, even if there is no immediate recovery of damages. Such a holding "ensures that a party can recover [past response costs] if the damage award otherwise remains unsatisfied . . . ." It also "provides a party access to other remedies under CERCLA that it may be entitled to in the future," such as a mandatory declaratory judgment on liability for any future costs, as set forth in 42 U.S.C. § 9613(g)(2).

For those reasons, and after holding that the blended water costs satisfied the NCP element of CERCLA liability but the replacement water costs did not, the Court of Appeals reversed the trial court's decision denying CERCLA liability for the SCVWA's blended water costs and remanded for further proceedings.

Conclusion

As most litigators know, there are critical differences between a liability holding and an actual recovery of damages. Regardless of whether damages are ever collected, a finding by a court that a party is liable can have significant long-term implications. That is particularly so with CERCLA, where–as noted by the Court of Appeals–a liability finding can, among other things, drastically reduce the time and effort needed to secure compensation for future costs that are related to the same contaminated site. As a result,

even where damages might be collected under a different theory of liability, or potentially where damages may not be recovered at all, plaintiffs should carefully consider whether pursuing CERCLA liability is a sensible strategic maneuver.

Final Rules Ramping Up Endangered Species Act Regulations Now in Effect

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Takeaways

- The rules address the listing process for critical species and habitat designations, as well as protections for threatened species.
- In a reversal, the rules also revise the ESA Section 7 interagency consultation process and open the door for mitigation requirements.

Introduction

On April 5, 2024, the U.S. Fish and Wildlife Service (USFWS) and the National Oceanic and Atmospheric Administration's National Marine Fisheries Service (NMFS) (together, the Services) published three final rules that implement substantial changes to the Endangered Species Act (ESA). The long-awaited rules, which expand species conservation in the wake of loosened restrictions under the prior administration, address (1) the listing process for species and critical habitat designations; (2) protections for threatened species; and (3) the ESA Section 7 interagency consultation process.

The new rules went into effect on May 6, 2024, and are codified in 50 C.F.R. pt. 424, 50 C.F.R. pt. 402, and 50 C.F.R. pt. 17. The most significant changes, and the most likely to garner legal challenges, include (1) revisions to ESA regulations allowing the Services to impose compensatory mitigation obligations in the process of interagency consulting, and (2) revisions to the way critical habitats are designated.

Section 4 Listings and Critical Habitat Determinations (50 C.F.R. pt. 424)

The Services revised the implementing regulations for ESA Section 4 relating to the determination of threatened and endangered species and critical habitat designations in 89 Fed. Reg. 24,300. Particularly, the revisions focus on the procedures and criteria used for listing, delisting and reclassifying species listed on the Lists of Endangered and Threatened Wildlife and Plants and critical habitat designations. Broadly, each of the changes increases the Services' leeway to designate species as endangered and to designate critical habitat areas.

Most importantly for critical habitat designations, the rule revised 50 C.F.R. § 424.12, "Criteria for Designating Critical Habitat," to remove a limitation on the ability to designate critical habitat. The limitation, which was imposed in 2019, identified circumstances under which the Services may decide it is not prudent to designate critical habitat. 88 Fed. Reg. 50,764, 40,768. Ultimately, the Services concluded that the 2019 revision was not consistent with the ESA and that the 2019 rule had been interpreted by the public as allowing the Services to decline designation of critical habitat for species under threat of climate change. Eliminating this limitation will give the Services greater leeway to designate land as critical habitat.

The rule also revised § 424.12(b)(2) to address unoccupied critical habitat designations, which would refer to specific areas not within the geographical area the species occupies at the time it is listed under the ESA. 88 Fed. Reg. at 40,768 (finalized in 89 Fed. Reg. 24,300). The ESA distinguishes between occupied and unoccupied areas in its "critical habitat" definition. This rulemaking changed the standard for determining whether unoccupied areas are considered critical habitat. Particularly, the revision lays out a logical approach for identifying unoccupied critical habitat using the best scientific data available. 88 Fed. Reg. at 40,769. The revision also removed a sentence added in 2019 providing "that the Secretary 'will only consider' unoccupied areas to be essential where a critical habitat designation limited to occupied areas would be inadequate to ensure the conservation of the species." 88 Fed. Reg. at 40,769 (finalized in 89 Fed. Reg. 24,300). Finally, the final rule strikes the requirement for the secretary to determine "with reasonable certainty" that the area will support the conservation of the relevant species and that the area contains at least one physical or biological feature that is considered essential to conserve the species. 88 Fed. Reg. at 40,769. Therefore, this revision deemphasizes the sequencing that the Services previously used whereby it would first determine that occupied habitat is inadequate to conserve the species before considering the designation of unoccupied habitat as critical. Ultimately, because these changes have pushed off substantive decisions to specific designations of critical habitat, litigation over individual critical habitat designations is likely, especially in light of the trend of the Services designating large, state-sized areas of critical habitat.

In a major shift for the listing of endangered species, the revised rule interprets the definition of "threatened species." Threatened species are those that are likely to become endangered in the "foreseeable future." 16 U.S.C. § 1532(2). This final rule clarified the definition of "foreseeable future" to extend "as far into the future as the Services can make reasonably reliable predictions." 89 Fed. Reg. at 24,301. The Services noted that they would

continue to follow their preexisting framework for determining the extent of the foreseeable future.

The rule also revised 50 C.F.R. § 424.11(e), regarding delisting of endangered species, to state that a species may be delisted if, after considering the standards and factors set forth in the regulations, the best commercial and scientific data available demonstrates that: "(1) [t]he species is extinct; (2) [t]he species has recovered to the point at which it no longer meets the definition of an endangered species or a threatened species; (3) [n]ew information that has become available since the original listing decision shows the listed entity does not meet the definition of an endangered species or a threatened species; or (4) [n]ew information that has become available since the original listing decision" demonstrates that the entity listed does not comply with the definition of "species." 89 Fed. Reg. at 24,303. These revisions, however, are not likely to substantially change delisting efforts.

Blanket Rule Reinstatement for Threatened Species (50 C.F.R. pt. 17)

Another of the rules reinstates the "blanket 4(d) rule," providing that threatened species receive the same protections as endangered species. The final rulemaking in 89 Fed. Reg. 23,919 revised 50 C.F.R. pt.17, and thus expands protections for threatened wildlife and plant species that have been newly listed pursuant to Section 4(d) of the ESA, consistent with the blanket protections that were in place prior to their repeal in 2019. 89 Fed. Reg. at 23,920.

Specifically, the two blanket rules, one for plants and one for animals, provide that it is illegal for a person subject to U.S. jurisdiction to:

(1) take endangered fish and wildlife within the United States or possess, sell, transport, carry or deliver any such fish or wildlife that has been illegally taken;

(2) remove and reduce to possession, destroy or maliciously damage any plants under federal jurisdiction, or to remove, dig up, damage, cut or destroy plants knowingly in violation of state laws or regulations; and

(3) import or export any endangered fish, wildlife or plants, or deliver, receive, transport, ship or carry in interstate or foreign commerce any such species in the course of a commercial activity, or sell the species in interstate or foreign commerce.

89 Fed. Reg. at 23,920. These blanket rules are subject to several exceptions. However, overall, the blanket rule provides for a streamlined process of endangered species protection and ensures that there are no gaps in protection. 89 Fed. Reg. at 23,921. The

blanket rule also means the Services will be less likely to issue tailored rules for threatened species under 4(d).

Notably, the revisions also extended to federally recognized tribes certain exceptions to threatened species prohibitions that are currently provided to agents and employees of the Services and state and federal agencies to aid, dispose of or salvage threatened species. 89 Fed. Reg. at 23,921.

Revisions to Section 7 Consultation Regulations (50 C.F.R. pt. 402)

ESA Section 7 requires federal agencies to consult with the Services to ensure those agencies' actions do not jeopardize the continued existence of any listed species or cause destruction to critical habitat. Previously, when proposed federal actions may adversely impact a critical habitat or listed species, the Services would consult and issue a biological opinion or, if take is likely to occur, an incidental take statement that allows a take so long as "reasonable and prudent measures" (RPMs) to minimize impacts from the incidental take are implemented. The Services' position had been that Section 7 of the ESA requires take levels to be minimized, and that it was not appropriate to require mitigation for incidental take impacts.

The final rule, however, does a complete reversal of the Services' longstanding position that mitigation cannot be required in Section 7 consultations by making two foundational changes: (1) the Services expand the purpose of the RPMs to include offsetting impacts resulting from the take as opposed to minimizing the take, and (2) the Services change the scope of RPMs to include onsite and offsite offsets or mitigation. 88 Fed. Reg. at 40,758.

More specifically, this rulemaking amended 50 C.F.R. § 402 to clarify that the Services may consider, for inclusion as RPMs, measures offsetting remaining incidental take impacts that cannot be avoided. 88 Fed. Reg. at 40,758. The additional measures are not an alternative to RPMs reducing or avoiding incidental take, but instead address residual impacts that remain after measures are applied to avoid incidental take. *Id.* at 40,759. The Services added that priority should be given to RPMs that reduce or avoid the anticipated future incidental take in the area. *Id.* at 40,759. This provision may, for the first time, require applicants for federal authorizations to complete compensatory mitigation (offsets) as part of the consultation process. The Services did not provide specifics on how the compensatory mitigation will be imposed but have indicated their intent to update their Consultation Handbook to provide additional guidance. *Id.* at 40,759.

Of the three new rules, this revision is the most certain to be the subject of legal challenges, as it is a significant departure from prior regulations, and some commentators have cited its facial inconsistency with the plain language of the ESA, which specifies in Section 7 only that RPMs are necessary to *minimize* impacts. By contrast, ESA Section 10 requires that incidental take permit applicants must "minimize *and mitigate*" the impacts of takings. Furthermore, it will likely impose significant additional financial and administrative burdens on applicants for federal authorizations.

Path Forward

Considerable uncertainty still remains about implementation of these final rules. However, the Services have indicated that they will release an updated ESA Consultation Handbook to provide much-needed clarity, guidance and specific examples of how the Services expect these rules to be implemented, and further discussion of the definitions of key terms. A public comment period will be provided on the updated Handbook, which is expected to be published imminently.

Tribes Gain Clout in Setting Water Quality Standards

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EPA is for the first time requiring states to consider Tribal treaty rights and other reserved rights when adopting or revising water quality standards (WQS) under the Clean Water Act (CWA).[1] The new rule could impact WQS throughout the United States where a recognized Tribe asserts a treaty or other reserved right dependent upon a CWA protected aquatic resource. The regulation could well spark litigation for states and point source dischargers in areas where certain Tribes hold on- and off-reservation reserved rights.

The rule applies to rights to use water-dependent resources reserved by a Tribe through any federal treaty, statute, or executive order.[2] This includes fishing, hunting, gathering, and ceremonial use rights reserved by Tribes, to the extent the exercise of such rights is dependent on water quality.[3] According to EPA, the rule is not intended to address water allocation issues (i.e., *Winters*[4] rights).[5] The rule could impact water rights allocation, as EPA notes the rule could mandate instream flow rates where necessary to protect a Tribal use.[6] Implementation across the country will be a daunting task for many state water quality agencies.

I. Rulemaking

EPA originally published a draft rule in December 2022.[7] The agency received comments from 162 organizations and individuals and input from numerous Tribes

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[1] U.S. Env't Prot. Agency, Water Quality Standards Regulatory Revisions to Protect Tribal Reserved Rights [hereinafter "WQS Rule"], 89 Fed. Reg. 35717–48 (May 2, 2024) (codified at 40 C.F.R. part 131).

[2] Under the rule, EPA defines "Tribal reserved rights" as "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." 40 C.F.R. § 131.3. The rule defines "right holders" as "any Federally recognized Tribes holding Tribal reserved rights, regardless of whether the Tribe exercises authority over a Federal Indian reservation." *Id.*

[3] *See* WQS Rule, 89 Fed. Reg. at 35721 (discussing hunting, fishing, and gathering rights); *id.* at 35726 (discussing ceremonial uses and noting that EPA decided "not to enumerate potentially covered rights in the definition of 'Tribal reserved rights'").

[4] *Winters* v. *United States*, 207 U. S. 564, 576–77 (1908) (finding Tribe entitled to federally reserved rights to water from Milk River).

[5] WQS Rule, 89 Fed. Reg. at 35726–27.

[6] *Id.* EPA notes this analysis would not be done under *Winters*.

[7] 87 Fed. Reg. 74361–79 (Dec. 5, 2022).

during a 90-day public comment and a tribal consultation and coordination period. Several commenters questioned EPA's authority for proposing the changes.[8] EPA estimated the total economic burden on all 50 states to range between only $5.4 and $10.8 million to comply with the rule.[9] But given the magnitude of potential reserved rights that may be asserted by recognized Tribes and the sheer number of WQS that may need to be revised in response to the new rule,[10] the actual cost is likely much, much higher.[11]

II. Clean Water Act Framework & Tribal Reserved Rights

Congress passed the CWA in 1972 to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[12] The Act provides that "wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983."[13] Section 303(c) gives states primary responsibility to adopt WQS for "waters of the United States" within their jurisdictions.[14] These standards include designated uses, water quality criteria, and antidegradation requirements. WQS serve as the basis for certain CWA programs, including development of total maximum daily loads (TMDLs) (sections 303(d) and 305(b)); certification of federal licenses and permits (section 401); effluent limits in National Pollutant Discharge Elimination System (NDPES) permits (section 402); and dredge or fill permits (section 404). The Act includes a provision for state hearings to review and, if appropriate, revise or adopt new WQS every three years.[15]

Though the CWA discusses Tribes in other contexts,[16] nothing in the Act mentions Tribal reserved rights or developing or implementing any water quality program to satisfy such rights. In this sense, the new WQS rule breaks new ground.

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[8] U.S. Env't Prot. Agency, Response to Comments for Water Quality Standards Regulatory Revisions to Protect Tribal Reserved Rights (May 1, 2024), www.regulations.gov/document/EPA-HQ-OW-2021-0791-0359.

[9] WQS Rule, 89 Fed. Reg. at 35743.

[10] A current list of federally recognized Indian Tribes is found at 88 Fed. Reg. 2112–16 (Jan. 12, 2023). The U.S. Bureau of Indian Affairs recognizes 347 Indian Tribal entities within the contiguous 48 states.

[11] *See, e.g.*, Comment of The Petroleum Alliance of Oklahoma, EPA-HW-OW-2021-079, at 7 (Mar. 3, 2023) (arguing the rule would likely cost more than $5 million for Oklahoma alone to implement).

[12] 33 U.S.C. § 1251(a).

[13] *Id.* § 1251(a)(2).

[14] *Id.* § 1313(c); 40 C.F.R. § 131.4; Federal Baseline Water Quality Standards for Indian Reservations, WQS Rule, 89 Fed. Reg. at 29497 ("CWA section 303(c) gives states the primary responsibility to establish, review, and revise WQS applicable to their waters").

[15] 33 U.S.C. § 1313(c)(1).

[16] *See id.* § 1377(a) (recognizing Tribes' authority over water allocation in their jurisdictions).

Tribal "reserved" rights may be recognized in treaties, statutes, or executive orders, and may be explicit or implied. For example, the Stevens treaties in the Pacific Northwest expressly reserve to many Tribes the right to fish in their "usual and accustomed" fishing grounds and at stations both within and outside their reservation boundaries and to hunt and gather throughout traditional territories.[17] Multiple court cases have been filed and decided concerning treaty reserved rights, including an entire body of caselaw before the U.S. Supreme Court.[18] However, the Supreme Court has not decided whether the CWA must be implemented to protect Tribal reserved rights.[19] In the new rule, EPA asserts that its authority to require states to protect Tribal reserved rights by setting WQS that support the uses associated with those rights stems from the agency's state oversight role set out by section 303(c) of the Act and the requirement that WQS "protect the public health or welfare."[20] EPA's new position is sure to be tested, particularly if it will change established WQS and disrupt established permits dependent upon previously known conditions.

III. How We Got Here

Beginning in 2015 EPA has been requiring at least a few states to consider Tribal reserved rights in reviewing water quality submittals. For example, in promulgating human health criteria for the State of Washington, EPA found it was appropriate to interpret the state's relevant designated use to "include or encompass a subsistence fishing component" since most waters covered by the state's WQS were subject to federal treaties that reserved Tribal fishing rights.[21] EPA identified a similar position in its January 2017 letter to the State of Idaho regarding its human health criteria submittal.[22] EPA also rejected certain proposed WQS in Maine in 2015 based on a conclusion that "Maine's human health criteria do not protect the designated uses and therefore must be disapproved." In making that decision, EPA concluded it "must harmonize the CWA requirement that WQS must protect uses with the fundamental purpose for which land

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[17] *See, e.g.*, Treaty with the Nez Perces, 1855, art. 3, 12 Stat. 957; Treaty with the Nisquallys, etc. 1854, art. 3, 10 Stat. 1132 (Treaty of Medicine Creek).

[18] *See generally* WQS Rule, 89 Fed. Reg. at 35720–21, ns.14–28.

[19] To that end, EPA's rule contains new interpretation and legal argument to justify its position. *See* WQS Rule, 89 Fed. Reg. at 35722–24.

[20] *Id.* at 35723.

[21] U.S. Env't Prot. Agency, Revision of Certain Federal Water Quality Criteria Applicable to Washington, 81 Fed. Reg. 85417, 85424 (Nov. 28, 2016).

[22] Letter from Dennis McLerran, Regional Administrator, EPA Region 10, to John Tippets, Director, Idaho Department of Environmental Quality, "The EPA's Preliminary Review of DEQ's December 13, 2016 Submittal of New and Revised Human Health Criteria" at 10 (January 19, 2017).

was set aside for the Tribes under the Indian settlement acts in Maine."[23] But in 2019 the approach EPA used in rejecting the Maine and Washington WQS was disavowed, when EPA approved Idaho's human health criteria.[24] In other words, the agency's approach has been inconsistent as to how Tribal reserved treaty rights apply in the context of WQS and CWA programs.

In the rule just published, EPA is reverting to a position advanced under the Obama Administration.[25] The Biden Administration's new rule includes specific criteria for the states to evaluate in adopting WQS. Whenever a federally recognized tribe asserts a "Tribal reserved right" in writing to the state and EPA for consideration in establishment of WQS, to the extent supported by available data and information, the state must:

(1) consider the use and value of their waters for protecting the reserved right in adopting or revising designated uses;

(2) consider anticipated future exercise of the right unsuppressed by water quality; and

(3) establish water quality criteria to protect the right where the state has adopted designated uses that expressly incorporate or encompass the right.

The state must further ensure the criteria protect Tribal 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 general population, paired with exposure inputs (e.g., fish consumption rate) representative of right holders exercising their reserved right.[26]

EPA envisions Tribes asserting their reserved rights within the context of the states' triennial review of WQS. Once requested, the burden appears to fall on the states to "seek further information . . . to determine the nature and geographic scope of the right, and whether and how state WQS may need to be revised,"[27] though the rule provides that

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[23] Letter from H. Curtis Spalding, Regional Administrator, EPA Region 1, to Patricia W. Aho, Commissioner, Maine Dept. of Env't Prot., "Re: Review and Decision on Water Quality Standards Revisions", Attachment A at 1 (Feb. 2, 2015).

[24] U.S. EPA, Letter and Technical Support Document from Chris Hladick, Regional Administrator, EPA Region 10, to John Tippets, Director, Dept. of Env't Quality, Re: EPA's Approval of Idaho's New and Revised Human Health Water Quality Criteria for Toxics and Other Water Quality Standards Provisions at 10–11 (Apr. 4, 2019).

[25] WQS Rule, 89 Fed. Reg. at 35747–48 (amending and adding to 41 C.F.R. part 131).

[26] WQS Rule, 89 Fed. Reg. at 35748.

[27] *Id.* at 35728. The rule does not require a state to consider an asserted right "at the time" the right is asserted; rather, the requirement is that the state consider the right at the next WQS revision. *Id.*

states and Tribes may request EPA assistance in this "consultation process."[28] Again, the regulatory and economic burden on states subject to such a request will be substantial.

IV. What Happens Now?

The rule is scheduled to take effect on June 3, 2024. Because of the extent of Tribal reserved fishing rights in some states, the rule could affect WQS—and thus, pollutant discharge permits—throughout much of the country. The issue of where Tribal reserved rights apply is not simply a question of where reservation boundaries lie; for example, treaty rights to subsistence fishing may extend beyond the boundaries of particular Indian reservations to Tribes' "usual and accustomed places" of fishing. Moreover, a waterbody arising upstream or flowing through a reservation's boundary could implicate treaty reserved rights. Accordingly, the rule has major implications for WQS at off-reservation locations. The rule also has broad implications for WQS requirements in states located upstream from a protected Tribal reserved right that include transboundary or tributary waters (e.g., the Snake River in Idaho, Oregon, and Washington).

The rule does not set a formal dispute resolution process for when a state's and a Tribe's interpretations as to how and when a given reserved right must be protected. Instead, it anticipates that EPA will "work with states, right holders, and Federal partners" to interpret the right at issue.[29] Where a Tribal reserved right is asserted, the process to determine whether such a right is applicable to the WQS for a given waterbody, as well as the process to amend WQS to protect the right if it is applicable, will be complex. Whether a particular portion of a stream is subject to a reserved right will in many cases depend on specific factual findings, including the treaty language and historical evidence of traditional practices. Where the right is found to apply, the new rule may require different or stricter WQS, or require states to re-evaluate whether the designated uses will adequately protect the Tribe's reserved rights. This is because the rule requires WQS to protect Tribal members to the same extent as members of the general population. For example, subsistence fishing implicates consumption of fish at a higher rate than other uses; thus, applicable WQS must use human health criteria that consider the higher potential for exposure to pollution.[30] It will be another fact-intensive process to determine, pursuant to the rule, what the "anticipated future exercise" of the reserved right would be,

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[28] *Id.* at 35748.

[29] WQS Rule, 89 Fed. Reg. at 35759.

[30] *See* WQS Rule, 89 Fed. Reg. at 35721 (discussing EPA's prior actions in Idaho, Maine, and Washington related to tribal reserved rights and WQS); 35735–36 ("water quality criteria to protect human health for fish/shellfish and water consumption uses that were written with a state's general population in mind may not protect Tribal consumers of those resources who have higher consumption rates and therefore are exposed to greater risk").

if unhindered by water quality concerns—uncertainties include to what degree the use is currently "suppressed" (e.g., how much less fish right holders are taking due to contamination concerns), as well as how much broader an unsuppressed use would be.[31]

The rule likely will face legal challenges from states and/or the regulated community. Notably, several states raised constitutional and statutory authority concerns with EPA's proposed rule during the comment period. For example, Idaho's attorney general argued the rule will improperly place states in a position as trustees of Tribal rights and commandeer state agencies to do so.[32] South Dakota has argued that the rule violates section 304(a)(1) of the CWA by assigning water quality criteria development to states.[33] How the rule will interface with ongoing or past general stream adjudications is another potentially contentious issue. Although EPA states that "[n]othing in this rule affects a state's or Tribe's authority to allocate water quantities nor provides a basis to supersede or abrogate rights to quantities or water," it later qualifies that position by asserting that "if a Tribe has a right to fish and provides data that a certain flow rate is necessary for fish survival, that would be potentially relevant under this rule."[34] Accordingly, the full scope of how this rule could disrupt ongoing water right deliveries, administration, and adjudications or threaten past adjudications or settlements is going to evolve and likely result in years of litigation. Tribes asserting reserved rights could also sue states when disputes arise regarding the applicability of a reserved right to a WQS, or the adequacy of protection a revised WQS accommodating the reserved right offers. Pollutant discharge permittees may also find they need to challenge the rule and/or its implementation.

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[31] *See id.* at 35733.

[32] *See* State of Idaho, Comment on EPA-HQ-OW-2021-0791 (Mar. 6, 2023).

[33] *See* State of South Dakota, Comment on EPA-HQ-OW-2023-0791 (Mar. 3, 2023).

[34] WQS Rule, 89 Fed. Reg. at 35727.