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via email only eichstaedt@gonzaga.edu

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Re: Downstream Tribal Water Quality Standards Limits on State Variances

Dear Mr. Eichstaedt,

Per your request on behalf of Gonzaga University Legal Services, this letter provides a legal opinion regarding limits under the Clean Water Act ("CWA") on a State's authority to adopt variances from its water quality standards ("WQS") and EPA's authority to disapprove such variances based on downstream Tribal WQS. You have requested this opinion for reference in comments to the Washington State Department of Ecology regarding proposed variances for five dischargers into the Spokane River notwithstanding downstream WQS by the Spokane Tribe. In this letter, we summarize our opinions, then state our relevant qualifications, identify relevant documents reviewed, explain material background and our analysis, recap our basic opinions, and note relevant limitations.

In summary, first, per 40 C.F.R. § 131.14(a)(4), a State may not adopt WQS variances if the designated use and criterion addressed by the applicable WQS can be achieved by implementing technology-based effluent limits required under CWA Sections 301(b) and 306. Second, EPA has authority to require upstream jurisdictions and dischargers to comply with more stringent downstream tribal WQS in State WQS variance approval decisions under 40 C.F.R. § 131.14, and in those decisions EPA must address how WQS variances affect stricter downstream Tribal WQS following timely and meaningful tribal consultation. Third, per 40 C.F.R. § 131.14(b)(2)(i)(A), EPA must disapprove WQS variances that affect fish consumption use if attaining the designated use is feasible. Fourth, per 40 C.F.R. § 131.14(b)(1)(ii), EPA must disapprove WQS variances if their requirements either do not represent the highest attainable condition of the applicable water body or water body segment throughout the term of the variance or would result in any lowering of the currently attained ambient water quality. Fifth and finally, downstream Tribes that are authorized by EPA for treatment as a state ("TAS") regarding WQS may object to such upstream discharges or WQS variances to protect their own designated uses pursuant to EPA's dispute resolution mechanism in 40 C.F.R. § 131.7.

I. QUALIFICATIONS

Between the two partners at our law firm, we have over 38 years of experience in advising and representing Indian tribes and federal officials and agencies regarding environmental and other matters. Among other experience, we both have worked for the U.S. Environmental Protection Agency ("EPA") Office of General Counsel ("OGC") in Washington, D.C., on application of federal environmental standards in Indian country, including addressing WQS and tribal-state jurisdiction disputes. For example, Dan Rey-Bear worked at the EPA OGC on the jurisdictional analysis for the first tribal WQS TAS decision under CWA Section 518(e), 33 U.S.C. § 1377(e). He subsequently published a national award-winning law review article about that. Daniel I.S.J. Rey-Bear, *The Flathead Water Quality Standards Dispute: Legal Bases for Tribe Regulatory Authority Over Non-Indian Reservation Lands*, 20 Am. Indian L. Rev. 151 (1995-1996). In private practice, Dan relevantly has advised and represented Indian tribes regarding jurisdictional statements to qualify for WQS TAS, conducted tribal WQS training, prepared tribal environmental laws including wetlands regulations to qualify for CWA TAS, and negotiated tribal-state cooperative agreements for non-point source management under the CWA and underground storage tank oversight. Dan also has analyzed, addressed, and litigated environmental remediation on tribal lands and litigated jurisdictional issues under the Safe Drinking Water Act, *see HRI, Inc. v. U.S. E.P.A.*, 198 F.3d 1224 (10th Cir. 2000).

In turn, before going into private practice, Tim McLaughlin was an Honors Trial Attorney at the United States Department of Justice ("DOJ") in Washington, D.C., where he served in the Indian Resources Section of the Environment and Natural Resources Division. In that position, Tim represented the United States in its trust capacity on behalf of Indian tribes to quantify Indian water rights in Oregon and on water rights transfers in Arizona. Before working at DOJ, Tim was an Attorney-Advisor at the EPA OGC in Washington, D.C. There, he worked on environmental issues affecting EPA and Indian tribes, including TAS issues, Indian and federal regulatory authority, tribal consultation, and federal general counsel matters involving various environmental laws affecting Indians and international environmental law. Among other things, Tim worked on the agency remand from *HRI, Inc. v. EPA*, 198 F.3d 1224 (10th Cir. 2000), regarding regulatory authority for in-situ injection uranium mining in western New Mexico.

II. DOCUMENTS REVIEWED

In rendering the opinions in this letter, we have reviewed the following materials:

A. Federal statutes and regulations – CWA Sections 101, 301, 303, and 518 (codified as amended at 33 U.S.C. §§ 1251, 1311, 1313, 1377) and 40 C.F.R. Parts 122, 123, and 131;

B. Cases – *County of Maui, Hawaii v. Hawaii Wildlife Fund*, 140 S. Ct. 1462 (2020); *Arkansas v. Oklahoma*, 503 U.S. 91 (1992); *El Dorado Chem. Co. v. U.S. E.P.A.*, 763 F.3d 950 (8th Cir. 2014); *Pronsolino v. Nastri*, 291 F.3d 1123 (9th Cir. 2002); *Wisconsin v. E.P.A.*, 266 F.3d 741 (7th Cir. 2001); *American Wildlands v. Browner*, 260 F.3d 1192 (10th Cir. 2001); *City of Albuquerque v. Browner*, 97 F.3d 415 (10th Cir. 1996); *Upper Missouri Waterkeeper v. U.S. E.P.A.*, 377 F. Supp. 3d 1156 (D. Mont. 2019), *reconsid. denied*, 2019 WL 7020145 (D. Mont. 2019), *appeals filed*, Nos. 20-35135, 20-35136, and 20-35137 (9th Cir. Feb. 18, 2020); *Northwest*

Envtl. Advocates v. U.S. E.P.A., 855 F. Supp. 2d 1199 (D. Or. 2012), *clarified*, 2012 WL 13195656 (D. Or. 2012); *Pennaco Energy, Inc. v. U.S. E.P.A.*, 692 F. Supp. 2d 1297 (D. Wyo. 2009);

C. Federal policies – Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 9, 2000); EPA Policy on Consultation and Coordination with Indian Tribes (May 4, 2011), available at https://www.epa.gov/tribal/epa-policy-consultation-and-coordination-indian-tribes ("EPA Tribal Consultation Policy");

D. Federal regulatory actions – EPA, WQS Regulatory Revisions: Final Rule, 80 Fed. Reg. 51,020 (Aug. 21, 2015); Letter from Daniel D. Opalski, Director, Office of Watersheds and Water, Region 10, EPA, to Hon. Chairman Marchand, Colville Business Council, Confederated Tribes of Colville Reservation (May 2, 2018) (concerning TAS approval for CWA Sections 303(c) and 401) ("EPA Colville WQS Letter"), available at https://www.epa.gov/wqs-tech/water-quality-standards-regulations-confederated-tribes-colville-reservation; Spokane Tribe of Indians, Surface WQS (eff. Dec. 19, 2013) (Dec. 8, 2017) ("Spokane Tribe WQS"), available at https://www.epa.gov/sites/production/files/2014-12/documents/spokane-tribe-wqs.pdf, including without limitation Letter from Daniel D. Opalski, Director, Office of Water and Watersheds, Region 10, EPA, to Hon. Rudy Peone, Chairman, Spokane Tribe (Dec. 19, 2013) ("EPA Spokane Letter") and Region 10, EPA, Technical Support Document for Action on the Revised Surface WQS of the Spokane Tribe of Indians Submitted April 2010 (Dec. 11, 2013) ("EPA Spokane TSD"); and

E. State law and regulatory actions – WAC 173-201A-240 (certified Jan. 23, 2020), available at https://apps.leg.wa.gov/wac/default.aspx?cite=173-201a; Washington State Department of Ecology rulemaking to adopt WQS variances for the Spokane River for (i) Liberty Lake Sewer and Water District Water Reclamation Facility, (ii) Kaiser Aluminum Washington LLC, (iii) Inland Empire Paper Company, (iv) Spokane County Regional Water Reclamation Facility, and (v) the City of Spokane Riverside Park Water Reclamation Facility, all available at https://ecology.wa.gov/Regulations-Permits/Laws-rules-rulemaking/Rulemaking/WAC173-201A-variances.

III. BACKGROUND

A. CWA WQS

The CWA establishes the basic structure for regulating discharges of pollutants into the waters of the United States and regulating quality standards for surface waters. *See generally* 33 U.S.C. § 1251 *et seq*. Under the CWA, it is unlawful to discharge any pollutant into navigable waters from a point source or the functional equivalent of a direct discharge from a point source, except as authorized by the CWA. CWA § 301(a), 33 U.S.C. § 1311(a); *County of Maui, Hawaii v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1468 (2020). Under the CWA, the National Pollutant Discharge Elimination System ("NPDES") permit program controls discharges. *See generally* CWA §§ 301(e), 302(a), 402(a), 33 U.S.C. §§ 1311(e), 1312(a), 1342(a); 84 Fed. Reg. 3324, 3324-38 (June 12, 2019). Point sources are "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged" but not "agricultural stormwater discharges and

return flows from irrigated agriculture." CWA § 502(14), 33 U.S.C. § 1362(14) (definition).

In addition, Section 303(c) of the CWA and its implementing regulations provide that States and authorized Tribes can assume primary responsibility for establishing, administering, and revising WQS. *See* 33 U.S.C. § 1313(c); 40 C.F.R. Part 131. States are "required to set WQS for *all* waters within their boundaries regardless of the sources of the pollution entering the waters." *Pronsolino*, 291 F.3d at 1127 (emphasis in original). WQS consist of three elements:

> first, each water body must be given a "designated use," such as recreation or the protection of aquatic life; second, the standards must specify for each body of water the amounts of various pollutants or pollutant parameters that may be present without impairing the designated use; and finally, each state must adopt an antidegradation review policy which will allow the state to assess activities that may lower the water quality of the water body. 33 U.S.C. § 1313(c)(2)(A) and 40 C.F.R. §§ 130.3, 130.10(d)(4), 131.6, 131.10, and 131.11. Further, each state is required to identify all of the waters within its borders not meeting water quality standards and establish "total maximum daily loads" ("TMDL") for those waters. 33 U.S.C. § 1313(d). A TMDL defines the specified maximum amount of a pollutant which can be discharged into a body of water from all sources combined. *Dioxin/Organochlorine Ctr. v. Clarke*, 57 F.3d 1517, 1520 (9th Cir.1995).

American Wildlands, 260 F.3d at 1194.

These use designations in WQS are important. Namely,

> Section 101(a) of the CWA provides that the ultimate objective of the Act is to restore and to maintain the chemical, physical, and biological integrity of the Nation's waters. The national goal in CWA section 101(a)(2) is water quality that provides for the protection and propagation of fish, shellfish, and wildlife and for recreation in and on the water "wherever attainable." EPA's WQS regulation at 40 CFR part 131, specifically §§ 131.10(j) and (k), interprets and implements these provisions through requirements that WQS protect the uses specified in CWA section 101(a)(2) unless states and authorized tribes show those uses are unattainable through a use attainability analysis (UAA) consistent with EPA's regulation, effectively creating a rebuttable presumption of attainability.

80 Fed. Reg. at 51,024. This rebuttable presumption under the CWA has been upheld against a court challenge. *Id.* at n.12 (citing *Idaho Mining Ass'n v. Browner*, 90 F. Supp. 2d 1078, 1097-98 (D. Idaho 2000)). Furthermore, based on the CWA Section 303(c)(2)(A) requirement that WQS must protect public health, EPA since 1992 has recognized "that the consumption of aquatic life is a use specified in section 101(a)(2) of the Act" so that "not only can fish and shellfish thrive in a water body, but when caught, they can also be safely eaten by humans." *Id.* at 51,027.

Next, the specific water quality criteria in WQS must be "sufficient to protect the designated uses." 40 C.F.R. § 131.6(c); *see id.* § 131.11(a). For this, relevant here, CWA Section 303(c)(2)(B) requires that States and authorized Tribes adopt "specific numerical" water quality criteria for toxic pollutants listed pursuant to Section 307(a)(1) for which EPA has published

criteria under Section 304(a) where the discharge or presence of those toxics could reasonably be expected to interfere with the designated uses adopted by the State or authorized Tribe. 33 U.S.C. § 1313(c)(2)(B). Furthermore, States or authorized Tribes can establish narrative criteria where numeric criteria cannot be determined or to supplement numeric criteria. *See id*; 40 C.F.R. § 131.11(b)(2). Section 303(c) also authorizes States and authorized Tribes to submit new or revised WQS to EPA for review. 33 U.S.C. § 1313(c)(2)(A). EPA is required to review these changes to ensure revisions to WQS are consistent with the CWA. *Id.* § 1313(c)(3).

Finally, the antidegradation policies adopted in state WQS must be consistent with the federal anti-degradation policy. 40 C.F.R. § 131.6(c), 131.12. Under that federal policy, state WQS policies must, at a minimum, ensure that "[e]xisting instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected." 40 C.F.R. § 131.12(a)(1). Additional antidegradation policy requirement apply to waters that exceed the quality necessary to support aquatic life and recreation. *See id.* § 131.12(a)(2)-(3); *American Wildlands*, 260 F.3d at 1194 (discussing the Tier I, Tier II, and Tier III protections).

B. EPA Review of WQS

Once a State or an authorized Tribe adopts WQS that satisfy the above requirements, the WQS must be submitted to and review by EPA for approval. *See* CWA § 303(c)(2)-(3), 33 U.S.C. § 1313(c)(2)-(3); 40 C.F.R. § 131.5(a). EPA must determine whether those WQS are consistent with the CWA, *American Wildlands*, 260 F.3d at 1197, and stringent enough to comply with EPA's standards and criteria, *Albuquerque*, 97 F.3d at 426. *See* 40 C.F.R. § 131.6 (outlining minimum requirements for WQS submissions). Among other federal WQS standards, "[i]n designating uses of a water body and the appropriate criteria for those uses, the State [or authorized Tribe] shall take into consideration the water quality standards of downstream waters and shall ensure that its water quality standards provide for the attainment and maintenance of the water quality standards of downstream waters." 40 C.F.R. § 131.10(b). Accordingly, EPA may disapprove initial or revised WQS to ensure that downstream WQS are maintained. *El Dorado*, 763 F.3d at 958-59.

In addition, all comments submitted to a State or authorized Tribe regarding the adoption or revision of WQS become part of the federal administrative record and are reviewed by EPA in determining whether to approve the proposed standards. *Albuquerque*, 97 F.3d at 425. EPA therefore has an enforceable obligation to fully consider the entire administrative record including objectively review all comments. *Pennaco Energy*, 692 F. Supp. 2d at 1309-10. EPA also must explain its analysis and reasoning, including whether appropriate technical and scientific data and analysis support the specific numeric criteria adopted by a State or an authorized Tribe *Id.* at 1310-12 & n.7. That also requires providing "'a rational connection between the facts found'" and the agency's conclusion. *Id.* at 1314 (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)); *Northwest Envtl. Advocates*, 855 F. Supp. 2d at 1204, 1215 (citing *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1193 (9th Cir. 2008)). Finally, EPA must review any WQS provisions that affect how, whether, and when those WQS apply or may supplant, delay implementation of, or undermine application of WQS. *Northwest Envtl. Advocates*, 855 F. Supp. 2d at 1212 (concerning nonpoint sources).

C. WQS Variances

In situations where incremental improvements are needed to meet established WQS, EPA has provided for WQS variances to allow swift progress toward attaining a designated use that is not attainable immediately. *Upper Missouri Waterkeeper*, 377 F. Supp. 3d at 1165-66 (citing 80 Fed. Reg. at 51,039). For this, a State or an authorized Tribe may adopt WQS variances subject to public participation and EPA review and approval or disapproval 40 C.F.R. § 131.20(b), 131.14 para. 1. A WQS variance is a temporary modification to a designated use and associated water quality criteria that would otherwise apply for limited purposes, such as NPDES permits and certifications under CWA Section 401, while "[a]ll other applicable standards not specifically addressed by the WQS variance remain applicable." *See generally id.* § 131.3(o) (definition), .14(a) (applicability). WQS variances "help states and authorized tribes focus on making incremental progress in improving water quality, rather than pursuing a downgrade of the underlying water quality goals through a designated use change, when the current designated use is difficult to attain." 80 Fed. Reg. at 51,022. Moreover, WQS variances must be used appropriately to "facilitate progress toward attaining designated uses." *Id.* at 51,035. Thus, EPA has authority to determine whether any WQS variances adopted by a State or an authorized Tribe are consistent with Section 131.14. 40 C.F.R. § 131.5(a)(4); 80 Fed. Reg. at 51,036.

Under Section 131.14, WQS variances are based on a use attainability demonstration and target achievement of "the highest attainable condition of the water body or waterbody segment" during the variance period. *See* 40 C.F.R. §§ 131.3(o), 131.14(b)(1)(ii). Also, a WQS variance may address a specific permittee or water body or waterbody segments and will only apply to the specified permittees or water body or waterbody segments. *Id*. § 131.14(a)(1). Accordingly, all other applicable WQS, designated uses, and criteria not specifically addressed by a WQS variance remain applicable. *Id*. § 131.14(a)(2). A typical WQS variance modifies the use for discharge of a single pollutant from a single source for a period "only . . . as long as necessary to achieve the highest attainable condition" and may be for greater than five years only with reevaluations no less frequently than every five years. *Id*. § 131.14(b)(1)(iv)-(v). Under these standards, a variance must set forth a timeline that ends with the ultimate attainment of the current, approved WQS rather than simply improving water quality to the level of relaxed criteria in the variance. *Upper Missouri Waterkeeper*, 377 F. Supp. 3d at 1171.

Once approved by EPA, a WQS variance serves as the applicable WQS for relevant NPDES permits for the term of the variance. *Id*. § 131.14(a)(3), 131.14(c). Also, any limits and requirements necessary to implement the WQS variance are included as enforceable conditions of the NPDES permit for the permittee(s) subject to the WQS variance. *Id.* Finally, States and other certifying entities may use approved WQS variances for certifications under CWA Section 401. *Id.* § 131.14(a)(3).

D. CWA TAS and Dispute Resolution

Once authorized by EPA, Indian tribes can be treated as states, with primary responsibility for reviewing, establishing, and revising WQS within their jurisdictions. *See* 33 U.S.C. § 1377(e); 40 C.F.R. § 131.3(j), 131.4(a), 131.8. Relevant here, the CWA requires that EPA

> provide a mechanism for the resolution of any unreasonable consequences that may arise as a result of differing water quality standards that may be set by States and Indian tribes located on common bodies of water. Such mechanism shall provide for explicit consideration of relevant factors including, but not limited to, the effects of differing water quality permit requirements on upstream and downstream dischargers, economic impacts, and present and historical uses and quality of the waters subject to such standards. Such mechanism should provide for the avoidance of such unreasonable consequences in a manner consistent with the objective of this chapter.

33 U.S.C. § 1377(e).

That dispute resolution mechanism established by EPA applies in the following situation:

> The [EPA] Regional Administrator shall attempt to resolve such disputes where:
> (1) The difference in water quality standards results in unreasonable consequences;
> (2) The dispute is between a State (as defined in §131.3(j) but exclusive of all Indian Tribes) and a Tribe which EPA has determined is eligible to the same extent as a State for purposes of water quality standards;
> (3) A reasonable effort to resolve the dispute without EPA involvement has been made;
> (4) The requested relief is consistent with the provisions of the Clean Water Act and other relevant law;
> (5) The differing State and Tribal water quality standards have been adopted pursuant to State and Tribal law and approved by EPA; and
> (6) A valid written request has been submitted by either the Tribe or the State.

40 C.F.R. § 131.7(b).

Either a State or a Tribe may request in writing, subject to certain criteria, for EPA to resolve any dispute which satisfies the above criteria. *Id.* § 131.7(c). If the Regional Administrator determines that EPA involvement is appropriate based on the above-quoted factors, the Regional Administrator shall, within 30 days, notify the relevant State and Tribe that the Regional Administrator is initiating an EPA dispute resolution action and solicit their written responses. *Id*. § 131.7(d). The Regional Administrator shall also make reasonable efforts to ensure that other interested individuals or groups have notice of that action. *Id.* These disputes can then be procedurally addressed via mediation or arbitration, or in accordance with an applicable dispute-resolution agreement entered into by the relevant State and Tribe. *See id*. § 131.7(e), (f)(1)-(2). Alternatively, if one or more parties refuse to participate in mediation or arbitration, the Regional Administrator may appoint a single official or panel to review available information concerning the dispute and issue a written recommendation for resolving the dispute. *Id*. § 131.7(f)(3).

E. Spokane River WQS and Variance Applications

The Spokane Tribe of Indians ("Spokane Tribe") reside on the Spokane Indian Reservation, which is located on the Spokane River downstream from the City of Spokane. In 2013, EPA

approved the Spokane Tribe's new and revised surface WQS. *See* EPA Spokane Letter. The most significant aspect of the Tribe's revised WQS are those related to human health criteria, which include a new fish consumption rate of 865 grams per day and drinking water intake rate of 4 liters per day. *Id*. at 3; EPA Spokane TSD at 7-8. Those provisions reflect the Tribe's goal of protecting fish consumption and drinking water rates characteristic of traditional Spokane Tribe subsistence practices, which are fundamentally a question of tribal policy and within the Tribe's authority under the CWA. EPA Spokane Letter at 3-4. Because the fish consumption rate and drinking water intake rates do not operate as independent WQS in isolation from human health criteria, but were just used to determine WQS, EPA did not take action to approve or disapprove those. *Id.* at 3.

Instead, EPA approved the majority of the Spokane Tribe's revised human health criteria because the methodology used by the Tribe to develop the fish consumption rate and other variables used in developing the criteria were scientifically sound and sufficient to protect the designated uses, which are designed to protect fish consumption and drinking water rates characteristic of the traditional Spokane subsistence lifestyle. EPA Spokane Letter at 3-4 (quoting 40 C.F.R. § 131.11(a)); EPA Spokane TSD at 16-17, 20 (same), 21. Among other things, the Spokane Tribe's revised standards for total PCBs are 1.30E-06 micrograms per liter (µg/L) (i.e., parts per billion or ppb) for water and organisms as well as organisms only. As a result of these revisions, the Spokane Tribe's human health toxics criteria are generally more stringent than the default values recommended by the EPA in national guidance, EPA Spokane Letter at 3, which is allowable under the CWA, EPA Spokane TSD at 20-21.

Additionally, downstream from and adjacent to the Spokane Reservation are the Confederated Tribes of the Colville Reservation ("CTCR"). The Colville Reservation's southern boundary is the Columbia River, which is also called Lake Roosevelt above the Grand Coulee Dam, into which the Spokane River flows directly near the most southeasterly point of the Colville Reservation. That confluence is also the most southwesterly point of the Spokane Tribe's Reservation, along the Spokane River. The Colville Tribes have been granted TAS status but have not established their own WQS. *See* EPA Colville WQS Letter (concerning approval of CTCR for TAS for CWA Sections 303(c) and 401). Instead, EPA pursuant to its authority under CWA Section 303(c)(4)(B) in 1989 promulgated WQS for the Colville Reservation as necessary to meet the requirements of the CWA. *See* 40 C.F.R. §§ 131.22, 131.35; 80 Fed. Reg. at 51,023 & n.11 (noting same). In particular, the EPA-promulgated Colville WQS designate Lake Roosevelt as Class I, 40 C.F.R. § 131.35(h)(1), and specify that that class of water should protect salmon harvesting, *id.* § 131.35(f)(1)(i)(C), including that "[t]oxic, radioactive, nonconventional, or deleterious material concentrations shall be less than those of public health significance, or which may cause acute or chronic toxic conditions to the aquatic biota, or which may adversely affect designated water uses[,]" *id.* § 131.35(f)(1)(ii)(G).

In contrast to the above, the Washington State WQS for total PCBs is 0.00017 µg/L or ppb, based on a fish consumption rate of 175 grams per day. WAC 173-201A-240(5), (5)(b), Table 240, & footnote E. However, those WQS for toxic substances regarding human health protection begin with the following additional narrative limit, consistent with 40 C.F.R. § 131.10(b): "All waters shall maintain a level of water quality when entering downstream waters that provides for the attainment and maintenance of the water quality standards of those downstream waters, including the waters of another state." *Id.* § 173-201A-240(5)(b). Notwithstanding that regulation and that provision, the five variance applications that have been submitted to Washington State by

dischargers to request WQS variances for their discharges to the Spokane River upstream of the Spokane and Colville Reservations do not squarely address attainment of the WQS for either the Spokane or Colville Reservations. *See supra* § II.E.

IV. ANALYSIS: Downstream WQS Limit Upstream Variance Authority In Five Ways

A. EPA may require upstream dischargers to comply with downstream WQS and must address how WQS variances affect stricter downstream tribal WQS following timely and meaningful tribal consultation.

CWA Section 402 authorizes EPA to require an upstream discharger subject to the NPDES regime to comply with downstream state WQS. *Arkansas,* 503 U.S. at 102, 107 (citing 33 U.S.C. § 1342(b)(3), (5)). "Although these provisions do not authorize the downstream State to veto the issuance of a permit for a new point source in another State, the [EPA] Administrator retains authority to block the issuance of any state-issued permit that is outside the guidelines and requirements of the Act." *Id.* at 102 (quoting 33 U.S.C. § 1342(d)(2)). In turn, CWA Section 401 prohibits the issuance of any federal license or permit over the objection of an affected State unless compliance with the affected State's WQS can be ensured when EPA itself is the permit issuing regulatory authority. *Id.* at 103 (citing 33 U.S.C. § 1341(a)(2)).

Consistent with those aspects of the CWA, since CWA Section 518 regarding Indian tribes incorporates CWA Sections 401 and 402, the CWA also authorizes EPA to block NPDES permits for upstream point source dischargers that do not comply with downstream EPA-approved tribal WQS. *See Albuquerque,* 97 F.3d at 423-24 & n.13 (concerning 33 U.S.C. §§ 1341, 1342, 1377). The same necessarily also applies to EPA-promulgated WQS for a downstream tribe. *See* 40 C.F.R. § 131.10(b), 131.22(c); *cf.* 80 Fed. Reg. at 51,021 ("[I]f the Administrator makes a determination under CWA section 303(c)(4)(B) that a new or revised WQS is necessary, EPA must propose and promulgate federal standards for a state or authorized tribe, unless the state or authorized tribe develops and EPA approves its own WQS first."). Also, the CWA authorizes EPA to require upstream NPDES dischargers to comply with downstream Tribal WQS. *See Albuquerque*, 97 F.3d at 423-24. In accordance with all those federal constraints, Washington State's own WQS for toxic substances regarding human health protection expressly acknowledge that "[a]ll waters shall maintain a legal of water quality when entering downstream waters that provides for the attainment and maintenance of the water quality standards of those downstream waters, including the waters of another state." WAC 173-201A-240(5)(b). Thus, because downstream Tribal and State WQS constitute applicable standards that constrain upstream WQS, those downstream WQS also necessarily constrain upstream WQS variances. *See* 40 C.F.R. § 131.10(b), 131.14; *see also id.* § 131.7.

Under all these authorities, EPA may condition approval of WQS variances based on attainment of downstream federal or tribally issued tribal WQS. Alternatively,

> [i]n deciding whether to issue a permit for discharge within a state that may violate the water quality standards of a downstream tribe, the EPA may ask the parties to engage in mediation or arbitration, in which the decision-maker and the EPA administrator, who has the final authority over the issuance of the permit, will consider such factors as "the effects of differing water quality permit requirements

> on upstream and downstream dischargers, economic impacts, and present and historical uses and quality of the waters subject to such standards." The EPA may then ask the tribe to issue a temporary variance from its standards for the particular discharge or may ask the state to provide additional water pollution controls.

Wisconsin, 266 F.3d at 749 (quoting 33 U.S.C. § 1377(e)).

Here, EPA is certainly aware of the stricter relevant WQS of the Spokane Tribe and those that EPA itself promulgated for the Colville Reservation. *See* 40 C.F.R. § 131.35; EPA Spokane Letter at 3-4. Given those federally approved and issued downstream tribal WQS, EPA must consult in a timely and meaningful manner with the Spokane and Colville Tribes before and regarding any approval actions regarding upstream WQS variances that have substantial direct effects on those tribal WQS and waters. *See* Exec. Order No. 13,175, § 5(a), 65 Fed. Reg. at 67,250; EPA Tribal Consultation Policy. That includes a four-step process of identification, notification, input, and follow up. EPA Tribal Consultation Policy at § V.A.1-4.

In particular, "[c]onsultation should occur early enough to allow tribes the opportunity to provide meaningful input that can be considered prior to EPA deciding whether, how, or when to act on the matter under consideration. A[nd a]s proposals and options are developed, consultation and coordination should be continued, to ensure that the overall range of options and decisions is shared and deliberated by all concerned parties, including additions or amendments that occur later in the process." *Id.* § V.C. In addition, EPA must "provide[] feedback to the tribes(s) involved in the consultation to explain how their input was considered in the final action. This feedback should be a formal, written communication from a senior EPA official involved to the most senior tribal official involved in the consultation." *Id.* § V.A.4. All this means that EPA must address the downstream Spokane and Colville WQS before and in any approval decision regarding the proposed upstream WQS variances regarding discharges to the Spokane River.

B. EPA must disapprove WQS variances if the designated use and criteria addressed by the variances can be achieved by implementing technology-based effluent limits required under CWA Sections 301(b) and 306.

The federal regulation governing applicability for WQS variances provides that "[a] State may not adopt WQS variances if the designated use and criterion addressed by the WQS variance can be achieved by implementing technology-based effluent limits required under sections 301(b) and 306 of the Act." 40 C.F.R. § 131.14(a)(4). Accordingly, if the applicable WQS can be achieved by such implementation, EPA must deny the WQS variances. And because downstream WQS are implicated by WQS variances, as explained above, this requirement also encompasses achievement of downstream WQS and corresponding designated uses and criteria. Given this, Washington State may not approve the proposed five discharger-specific WQS variances for the Spokane River if the relevant downstream tribal WQS can be achieved by implementing technology-based effluent limits required under CWA Sections 301(b) and 306. And if Washington State approves these WQS variances in those situations, contrary to the governing federal regulation, EPA must disapprove the variances.

C. EPA also must disapprove WQS variances that affect fish consumption use if attaining the designated use is feasible.

The federal regulation that prescribes requirements for WQS variances provides that, "[f]or a WQS variance to a use specified in section 101(a)(2) of the Act or a sub-category of such a use, the State must demonstrate that attaining the designated use and criterion is not feasible throughout the term of the WQS variance[.]" 40 C.F.R. § 131.14(b)(2)(i)(A). Thus, if a State cannot demonstrate this, EPA must disapprove the WQS variance. As noted above, EPA has recognized since 1992 "that the consumption of aquatic life is a use specified in section 101(a)(2) of the Act" so that "not only can fish and shellfish thrive in a water body, but when caught, they can also be safely eaten by humans." 80 Fed. Reg. at 51,027. Given that, if a State desires to adopt a variance from a fish consumption use, it must demonstrate that attaining the designated use and criterion is not feasible throughout the term of the proposed WQS variance. Accordingly, here, EPA must disapprove the proposed WQS variances for the Spokane River that affect fish consumption use if attaining the designated use is feasible at any time during the term of the proposed variances.

D. EPA also must disapprove WQS variances if their requirements either do not represent the highest attainable condition of the water body or water body segment applicable throughout the term of the variance or would result in any lowering of the currently attained ambient water quality.

The federal regulation that prescribes requirements for WQS variances also provides that a WQS variance must include "the requirements that apply throughout the term of the WQS variance." 40 C.F.R. § 131.14(b)(1)(ii). In particular, "the requirements shall represent the highest attainable condition of the water body or waterbody segment applicable throughout the term of the WQS variance" and "shall not result in any lowering of the currently attained ambient water quality[.]" *Id*. (except for lake, wetland, or stream restoration under 40 C.F.R. § 131.14(b)(2)(i)(A)(2)). Moreover, a state "must specify the highest attainable condition of the water body or water body segment as a quantifiable expression" reflecting the "highest attainable interim criterion" or "the interim effluent condition that reflects the greatest pollutant reduction achievable" or "that reflects the greatest pollutant reduction achievable with pollutant control technologies installed at the time the State adopts the WQS variance, and the adoption and implementation of a Pollutant Minimization Program." *Id*. The latter is a structured set of activities to improve processes and pollutant controls that will prevent and reduce pollutant loadings. *See* 40 C.F.R. § 131.3 (definitions). Based on all this, EPA must disapprove WQS variances if their requirements either do not represent the highest attainable condition of the water body or water body segment applicable throughout the term of the variance or would result in any lowering of the currently attained ambient water quality. This standard must be met for federal approval of any WQS variances that Washington State adopts for the Spokane River.

E. Downstream States and authorized Tribes may invoke dispute resolution to make upstream WQS variances comply with their WQS.

Like States, Tribes authorized with TAS status have unquestionable power and authority to regulate waters within their regulatory authority. *Supra* § III.B. Additionally, TAS status provides tribes with "the power to require upstream off-reservation dischargers . . . to make sure that their activities do not result in contamination of the downstream on-reservation waters (assuming . . . that the reservation standards are more stringent than those the state is imposing on

the upstream entity)." *Wisconsin*, 266 F.3d at 748. "Such compliance may impose higher compliance costs on the upstream company, or in the extreme case it might have the effect of prohibiting the discharge or the activities altogether." *Id.*

As also explained above, *supra* § III.B, CWA Section 518(e)(3) and 40 C.F.R. § 131.7 provide for resolving potentially conflicting interests between States and authorized Tribes that may have conflicting WQS. That provides a procedural mechanism to address insufficiently protective upstream WQS variances if EPA fails to do so itself in approving or disapproving them. As explained above, that allows for mediation, arbitration, or alternative resolution. Also, regardless of which approach is used, a participating Tribe can rely on the underlying categorical substantive standards under the CWA to "facilitate progress toward attaining designated uses[,]" including safe fish consumption. 80 Fed. Reg. at 51,027, 51,035. Thus, the Spokane or Colville Tribes could invoke that mechanism if EPA approves conflicting upstream WQS variances.

V. OPINIONS

Based on the foregoing and subject to the qualifications and limitations stated in this letter, we are of the opinion that:

A. EPA has authority to require that upstream dischargers and WQS variances comply with downstream tribal WQS and must address downstream tribal WQS in WQS variance approvals following timely and meaningful tribal consultation;

B. EPA must disapprove WQS variances if the designated uses and criteria addressed by them can be achieved by implementing technology-based effluent limits required under CWA Sections 301(b) and 306;

C. EPA must disapprove WQS variances that affect fish consumption use if attaining the designated use is feasible;

D. EPA must disapprove WQS variances if their requirements either do not represent the highest attainable condition of the water body or water body segment applicable throughout the term of the variances or would result in any lowering of the currently attained ambient water quality; and

E. authorized Tribes (i.e., with TAS) can invoke the dispute resolution mechanisms in 40 C.F.R. § 131.7 to object to EPA approval of upstream WQS variances that violate their own WQS.

VI. LIMITATIONS

In rendering the opinions in this letter, we have assumed without inquiry or investigation and qualified and limited our opinions as follows:

A. legal issues and relevant facts as presented us in rendering this opinion are truthful, accurate, and can be relied on by us in rendering these opinions and we have no obligations to make any independent inquiry or investigation thereof;

B. the opinions provided here apply only to the matters described above and are subject to changes in applicable statutes, regulations, case law, and facts, and judicial interpretation thereof, as well as the discretion of the court before which a proceeding may be brought;

C. no opinions expressed in this letter include any implied opinions and we specifically disclaim any responsibility to provide advice regarding any changes (or the need for changes) in this opinion letter resulting from changes in relevant facts or governing law occurring, learned, or communicated after the date of this letter;

D. this opinion letter only addresses the above legal requirements and does not address or evaluate any scientific or technical compliance with any WQS or designated uses; and

E. this opinion letter is rendered solely at the request and for the benefit of the addressee for this letter, and this opinion letter does not establish any attorney-client relationship between this law firm and any third-party.

Thank you for allowing us this opportunity to provide these opinions. Please let us know if you have any questions or comments regarding these matters or wish to discuss them further.

Sincerely,

Rey-Bear McLaughlin, LLP

Daniel I.S.J. Rey-Bear

Timothy H. McLaughlin