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VIA ELECTRONIC MAIL

Jennifer Brundage
U.S. EPA Headquarters
Office of Water/Standards and Health Protection Division
William Jefferson Clinton Building
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Re: Reserved Rights Regulations under the Clean Water Act

Dear Ms. Brundage:

Earlier this summer, the Environmental Protection Agency (EPA) announced that it was considering a modification to its regulations under the Clean Water Act (CWA) to protect the rights of Native Nations to use aquatic or aquatic-dependent resources reserved under treaties or otherwise provided by law ("reserved rights"). Essentially, reserved rights would be treated as designated uses of affected water bodies and established water quality standards would have to support these uses. The Onondaga Nation strongly supports this significant step towards honoring the United States' treaty obligations and legally-defined promises to Native Nations and providing greater protection for and helping to restore the waters to their natural state of purity, which is of great importance to the Nation.

Under the CWA, state governments typically develop water management programs, which are reviewed and approved by EPA. States must establish "designated uses" for the waterbodies within the state. States can set designated uses that reflect the actual uses and water conditions or that reflect the desired uses of a water body and improved conditions. Water quality standards are then adopted to support the designated uses and set maximum pollution levels intended to allow designated uses to occur safely. Discharge permits and other water pollution controls must comply with the water quality standards applicable to each water body.

As described by EPA, the reserved rights regulations would require state governments to establish water quality standards that recognize and protect water-based activities or resources guaranteed to Native Nations under treaties, statutes, or executive actions. The regulations might mandate that states add these legally-protected activities to the "designated uses" for affected water bodies or might incorporate the uses directly into the methodology for establishing water quality standards regardless of state-defined designated uses. In either case, the goal would be to ensure that Native Nations can safely exercise their rights to fish, gather plants, perform traditional ceremonies, or undertake other legally protected activities in lakes, rivers, and streams throughout the nation.

The Onondaga Nation applauds EPA's decision to begin this conversation and strongly supports regulatory changes to ensure that Native Nations can safely engage in traditional and legally-protected water-dependent activities. In particular, the Nation supports protection of subsistence fishing rights within its traditional territory and around the country. As EPA develops draft rules, we hope that the agency will address a number of critical issues.

I. Scope of Reserved Rights

EPA should clarify that the proposed reserved right protections apply to both on-reservation uses presumed to be retained by Native Nations via their ownership of the

land and off-reservation uses recognized by treaty or established by statute or executive action. In addition, the proposed regulations should protect the intended or traditional uses of a water body, not a Native Nation's current uses of that water body.

Native Nations certainly have the right to engage in traditional practices, such as subsistence fishing or performing traditional ceremonies, in all of the waters within their currently recognized territories. At minimum, state water programs should treat these protected activities as designated uses within Native Nation territories and ensure that upstream water quality standards do not interfere with them. EPA should clarify that protections for subsistence fishing, traditional gathering, and other cultural uses apply whether or not a Native Nation has articulated specific water quality standards applicable to its current territory or has been authorized to implement its own CWA program.

Many Native Nations also retain treaty-protected rights to fish, hunt, gather plants, and engage in other traditional activities throughout their indigenous territories. As exemplified by EPA's actions in Washington State and Maine, these treaty-protected rights should also be understood as legally designated uses of affected water bodies. Accordingly, where treaties or other legal protections apply, water quality within traditional territories off-reservation must be protective of subsistence fishing, plant gathering, and other reserved rights.

In addition to clarifying the geographic reach, EPA should ensure that protected uses are not constrained by current practice but are defined to include the traditional practices that would be undertaken if conditions allowed. Many Native Nation, including the Onondaga Nation, are not able to fully exercise their treaty-protected rights to waters and water-based resources. Current consumption rates of wild-caught fish within the Nation would not reflect the true subsistence rate protected by treaty, but a suppressed rate driven by fish contamination and Nation citizens' awareness of that contamination; water pollution generally; reduced or altered fish populations in accessible water bodies; improper application of fishing restrictions to Nation fishers; and access issues. Such

limitations should not define the designated uses protected under reserved rights regulations.

The Nation is encouraged by EPA's earlier decisions in Washington State and Maine, where water quality standards proposed to protect subsistence fish consumption levels were set at 175 grams per person per day and 286 grams per person per day respectively. These rates certainly reflect much higher consumption than typical for recreational fishers and are an improvement over the default EPA standard of 22 grams per person per day. *See* EPA, Human Health Ambient Water Quality Criteria: 2015 Update, available on-line at https://www.epa.gov/sites/default/files/2015-10/documents/human-health-2015-update-factsheet.pdf. However, the lower consumption rate for Washington State seems to reflect surveys of current consumption among Native Nations in the area rather than traditional consumption rates. See Department of Ecology/Washington State, *Fish Consumption Rates: Technical Support Document*, Version 2.0, Jan. 2013, available on-line at https://apps.ecology.wa.gov/publications/documents/1209058.pdf. While some Nation citizens may be approaching historic fish consumption rates in Washington State, this is likely to be a suppressed consumption rate and should not be used as a baseline.

Research on traditional, unsuppressed subsistence fish consumption rate within the Confederated Tribes of Umatilla Indian Reservation (CTUIR), located in the adjacent state of Oregon, estimated subsistence consumption rates between 540 and 650 grams/day. *See* Confederated Tribes of the Umatilla Indian Reservation/Department of Science and Engineering, *Exposure Scenario for CTUIR Traditional Subsistence Lifeways,* Sept. 15: 2004, App. 3: Fish Consumption Rate. The higher subsistence fish consumption rate adopted by EPA for waters used by Native Nations in Maine (286 grams/day) was similarly based on assessment of unsuppressed fish consumption under traditional lifeways. *See* Barbara Harper and Darren Ranco (July 2009), *Wabanaki Traditional Cultural Lifeways Exposure Scenario*, available on-line at https://www.epa.gov/sites/default/files/2015-08/documents/ditca.pdf.

The proposed Reserved Rights regulations should adopt the approach taken in Maine and advocated by the CTUIR. Specifically, subsistence fishing and related fish consumption levels should be defined by treaty-defined or legally established use rights and traditional lifeways, not the suppressed uses currently seen within Native Nations.

II. Source of Reserved Rights

The reserved rights to be protected through this regulatory revision are not being created for or given to Native Nations by states when they adopt designated uses that reflect these activities. Rather, these rights are derived from the Nations' sovereign status and were preserved, not created, by the underlying treaties. EPA should clarify this point in framing the proposed regulations.

Instead of insisting that states "adopt" designated uses that reflect treaty-protected use rights or rights created by federal law or executive action, EPA should require states to recognize these rights as pre-existing designated uses. While this distinction may not seem significant and should not change the scope of protection or the related water quality standards to be adopted, the framing is important.

In addition to being more respectful of Nation sovereignty, the proposed formulation acknowledges that these particular designated uses are created outside the CWA. If states find that certain water bodies cannot reach water quality levels, the CWA allows state and federal regulatory agencies to downgrade the designated used or create long-term variances to standards established under the law. Reserved rights-based designated uses were created outside the CWA and are supported by treaties, federal law, or executive actions – all of which trump administrative decisions. Neither EPA nor state environmental agencies should be able rely on their regulatory authority under the CWA to remove or downgrade these uses or the water quality standards adopted to support them. Instead, EPA should require states to develop long-term plans to bring affected water bodies into (or closer to) compliance. Further, EPA should require that these long-

term water quality improvement plans should be developed in collaboration or in close consultation with affected Native Nations.

III. Technical Support and Consultation Requirements

Finally, the Nation notes that the process of defining the geographic scope of reserved rights and translating the related designated uses into water quality standards is not simple. States are unlikely to have the expertise or information necessary to fully identify reserved rights or the traditional uses encompassed within those rights or to translate those uses into water quality standards.

To undertake this task, states will have to identify and properly interpret treaties and other historic documents to define the geographic scope and substance of reserved rights held by Native Nations. They will have to determine the exposures created when Native Nations exercise these rights, which will require recreating and assessing exposures under traditional lifeways rather than simply measuring current exposures. All of this information will then have to be reflected in the water quality standards adopted. Much of this information is held by Native Nations themselves. Without Nation participation, this process is unlikely to be successful.

Accordingly, the proposed regulations should require and provide support for Native Nation participation in the development of reserved rights-based designated uses and related water quality standards. At minimum, the regulations should require close consultation by state agencies with affected Native Nations. In addition, EPA should be prepared to provide detailed guidance to the states on identifying and protecting the reserved rights of Native Nations to waterways and water-dependent resources.

Thank you for your attention to our concerns and advice. We look forward to continuing to work with EPA on this proposed set of regulations and to reviewing draft regulations when they become available.

Sincerely,

Alma L. Lowry, Of Counsel

cc: Council of Chiefs
Argie Cirillo, EPA/Region 2
Grant Jonathan, EPA/Region 2