IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ASSOCIATION OF WASHINGTON BUSINESS, et al., Plaintiffs, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al., Defendants.	Civil Action No. 23-cv-3605

BRIEF *AMICUS CURIAE* OF THE AMERICAN EXPLORATION & MINING ASSOCIATION, AMERICAN FARM BUREAU FEDERATION, FERTILIZER INSTITUTE, NATIONAL ASSOCIATION OF HOME BUILDERS, NATIONAL ASSOCIATION OF MANUFACTURERS, AND NATIONAL MINING ASSOCIATION IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Amici are a coalition of trade associations representing virtually all aspects of the American economy and work force—those in the agricultural, manufacturing, construction, mining, and energy sectors. They respectfully submit this brief to share their practical perspective on the harmful and plainly unlawful final rule (the Rule) issued by the Environmental Protection Agency setting water quality standards (WQS) for the state of Washington under the Clean Water Act (CWA). Not only will the new federal water quality standards do great damage in their own right—causing business closures, job losses, and reducing economic development—but they signal an alarming new expansion in the agency's assertion of lawmaking powers.

Amici urge the Court to vacate the EPA's Rule for two principal reasons.

First, EPA is imposing new water quality standards on Washington that are simply infeasible as a compliance matter. This is no mere bellyaching over new costs of regulatory burdens. EPA's new standards, which are based on the agency's indefensibly conservative cancer risk assumptions—and its unlawful decision to treat subsistence fish consumption rates as reflective of the general population—are so low that they cannot even be measured with existing technologies. Indeed, they are so low that they require nearly all of Washington's waters to be classified as "impaired" immediately and indefinitely, mandating impossible cleanup plans that burden day-to-day activities of all kinds. In fact, in some cases, the new federal water quality standards are below the naturally occurring background levels of the substances being regulated. Consequently, the standards are impossible to meet and make no sense from an exposure perspective.

Equally important are the grave consequences to *amici*'s members and their ability to operate in Washington if businesses cannot obtain the necessary permits or are subject to

nonpoint source enforcement mechanisms. The practical effects of the Rule will reach all corners of the economy, including point source entities as well as "nonpoint source" entities that are not typically required to seek CWA permits and are not otherwise regulated under the CWA. State-wide implementation measures are mandatory and cannot balance pollutant controls against the massive costs that will result. Thus, EPA's bottom-line position in this case—that Congress authorized it to set impossible water quality standards that cannot be measured or achieved—will choke off economic activity in Washington, to devastating effect. Fundamentally, EPA's actions are also contrary to law. After all, "Congress is presumed not to have intended absurd (impossible) results" with the CWA. *Hughey v. JMS Development Corp.*, 78 F.3d 1523, 1529 (11th Cir. 1996).

Second, EPA's assertion of authority to interpret and apply tribal rights embodied in federal treaties, if approved by this Court, would be a troubling enlargement of the agency's rulemaking power under the CWA. EPA's novel method of reinterpreting its authority to achieve these impossible new standards dramatically realigns the interests that Congress intended the agency to balance under the statutory scheme. If the Court allows EPA to assert that authority, it would also authorize the agency to consult all manner of legal authorities in search of new sources of rulemaking power. If treaties with Indian Tribes are fair game, then EPA could just as easily interpret its CWA authority to invoke other federal statutes that EPA believes have some bearing on the interests of certain subpopulations that it decides, by administrative fiat, to prioritize over others.

The underlying principle—that EPA may define the "target general population" in any way it pleases based on authorities it has no power to implement—is limitless. "Were courts to presume a delegation of power" like this, simply because there is no "express withholding of such power, agencies would enjoy virtually limitless hegemony," in violation of

separation-of-powers principles. *National Mining Association v. Department of Interior*, 105 F.3d 691, 695 (D.C. Cir. 1997).

Nor is there any room in EPA's congressionally delegated authority for this new form of regulatory innovation in any event. The CWA has been on the books for nearly 50 years. In all that time, EPA has never before purported to expand its rulemaking authority based on its own agency-specific interpretation of extra-statutory authorities like the United States' treaties with sovereign Indian Tribes. The Court should treat with great "skepticism" EPA's claim to have "discover[ed] in a long-extant statute an unheralded power to regulate a significant portion of the American economy'" in this new way. *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014). To hold otherwise would green-light a sweeping new form of regulatory overreach that will not only squelch American industry and place extraordinary burdens on local communities, but also trammel the principles of federalism that underlie the CWA. Judicial approval of the Rule would embolden EPA to proliferate this approach in other States and other ways. For these reasons, and for those stated in the plaintiffs' principal brief, the Court should vacate the Rule.

INTERESTS OF THE *AMICI CURIAE*

The **American Exploration and Mining Association** (AEMA) is a 129-year-old, 1,800-member national association representing the minerals industry with members residing in 46 states, seven Canadian provinces or territories, and ten other countries. AEMA is the recognized national voice for exploration and represents the entire mineral mining life cycle, from exploration to reclamation and closure. AEMA's members routinely evaluate the applicability of established water quality standards to their projects and assess implications of those standards in the context of permit compliance. Though its members strive to minimize effects on waters and wetlands, the fixed locations of orebodies and often large

scale of operations frequently make complete avoidance impossible. AEMA members are, therefore, keenly aware of the effects of EPA's rulemaking here and its potentially profound implications for the mining industry. As described in AEMA's comments on the rulemaking submitted on May 31, 2022, EPA's approach to water quality standards in Washington has far-reaching implications for AEMA's members in the state of Washington and throughout the United States and their ability to responsibly develop the critical and strategic minerals that America needs.

The **American Farm Bureau Federation** (AFBF) was formed in 1919 and is the largest nonprofit general farm organization in the United States. AFBF represents about six million member families in all 50 States and Puerto Rico who grow and raise crops, livestock, and every other agricultural commodity produced in the United States. AFBF's mission is to protect, promote, and represent the business, economic, social, and educational interests of American farmers and ranchers. To that end, AFBF regularly participates in litigation, including as an amicus in this and other courts.

AFBF's members are often subject to enforcement mechanisms designed to satisfy water quality standards. Those of its members that operate concentrated animal feeding operations (CAFO) are subject to point source permitting requirements under the National Pollutant Discharge Elimination System (NPDES). Other members are subject to restrictions on nonpoint sources due to implementations of total maximum daily loads (TMDL) for impaired waters. AFBF has a strong interest in ensuring that water quality standards are based on sound science and good law, and that they reflect reasonable goals.

The **Fertilizer Institute** (TFI) represents companies engaged in all aspects of the United States' fertilizer supply chain. The industry is essential to ensuring farmers receive the nutrients needed to enrich soil and grow the crops that feed our nation and the world.

Fertilizer is critical to feeding a growing global population, which is expected to surpass 9.5 billion people by 2050. Half of all grown food around the world today is made possible through the use of fertilizer production in the United States and foreign markets. The U.S. fertilizer sector includes producers, importers, wholesalers, and retailers. The industry supports 487,000 American jobs with annual wages in excess of $34 billion. TFI has a strong interest in ensuring the water quality standards are reasonable and attainable.

The **National Association of Home Builders** (NAHB) is a Washington, D.C.-based trade association whose mission is to enhance the climate for housing construction and the building industry as a whole. Founded in 1942, NAHB is a federation of more than 700 state and local associations. About one-third of NAHB's more than 140,000 members are home builders or remodelers, who construct 80 percent of all new homes in the United States. NAHB is a vigilant advocate in the nation's courts. It frequently participates as a party litigant and amicus curiae to safeguard the constitutional and statutory rights and business interests of its members and those similarly situated.

The **National Association of Manufacturers** (NAM) is the largest manufacturing association in the United States, representing small and large manufacturers in all 50 states and in every industrial sector. Manufacturing employs nearly 13 million men and women across the country, contributes $2.89 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for over half of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The **National Mining Association** (NMA) is a national trade association whose 280-plus members include most of the producers of the Nation's coal, metals, agricultural, and

industrial minerals; the manufacturers of mining equipment; and other firms serving the mining industry. NMA's members produce a range of commodities, all of which are essential to U.S. economic and national security, supply chain, and energy and infrastructure priorities. The NMA is the primary national trade association that serves as the voice of the entire U.S. mining industry and the thousands of American workers it employs before Congress, the federal agencies, and the judiciary. As described in comments the NMA filed on this rulemaking in both 2015 and 2022, the NMA has a direct interest in this matter. The NMA's member companies operate in Washington State and elsewhere across the country where this rule's approach to water quality standards could have precedential impact and affect our members' ability to obtain and achieve compliance with necessary permits.

BACKGROUND

1. The CWA regulates pollution levels in the waters of the United States through a cooperative scheme of regulation involving both the EPA and the States. *See Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992). The Act assigns to States the "primary responsibilities and rights" for setting water quality standards, subject to EPA approval. 33 U.S.C. § 1251(b). Setting water quality standards requires first designating the uses of a waterbody, and then determining appropriate "water quality criteria . . . based upon such uses." *Id.* § 1313(c)(2)(A). A water quality standard thus places "limits on the levels of pollutants necessary to protect those designated uses," such as recreation, fishing, or irrigation. *National Wildlife Federation v. Browner*, 127 F.3d 1126, 1127 (D.C. Cir. 1997); *see also* 40 C.F.R. §§ 131.10–131.12.

The typical water quality standard will set "numerical limits on the allowable concentration of particular pollutants in ambient water," such as "no more mercury than 5 parts per billion." *Edison Electric Institute v. EPA*, 391 F.3d 1267, 1268 (D.C. Cir. 2004). If

EPA finds that a State's standards "do not meet the requirements of the Act," it will "promulgate[] the water quality standards for the state." *Friends of Earth v. EPA*, 333 F.3d 184, 186 (D.C. Cir. 2003).

Water quality standards are enforced principally through two mechanisms. First, EPA and the States may issue permits through the National Pollutant Discharge Elimination System (NPDES) program.[1] "Under the NPDES, it is unlawful for any person to discharge a pollutant [from a point source] without obtaining a permit and complying with its terms." *EPA v. California*, 426 U.S. 200, 205 (1976). NPDES permits limit discharges from "point sources," which are "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). A point source could be a "pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft," among other things. *Id.* But point sources expressly exclude "agricultural stormwater discharges and return flows from irrigated agriculture." *Id.*

EPA has primary responsibility for administering the NPDES program, but any State may seek EPA approval "to administer its own permit program for discharges into navigable waters within its jurisdiction." 33 U.S.C. § 1342(a)(1), (b). Most States, including Washington, have done so. *See* Wash. Admin. Code 173-220-010, *et seq*.

The second enforcement mechanism for water quality standards involves establishing a "total maximum daily load," or TMDL, for an "impaired" body of water—that is, a waterbody that is not achieving its designated effluent levels. States are required to establish a

[1] The NPDES program is established by Section 402 of the CWA. Section 404 establishes a parallel permitting program for dredge and fill material, which regulates activities that fill waters for construction, water resource infrastructure projects (like dams and levees), infrastructure development (such as bridges and highways), and mining projects.

TMDL if existing effluent limitations set by NPDES permits are "not stringent enough" to attain the applicable water quality standards. *Friends of Earth*, 333 F.3d at 186 (quoting 33 U.S.C. § 1313(d)(1)(A)). As the Supreme Court has explained, "if standard permit conditions fail to achieve the water quality goals for a given water body, the State must determine the total pollutant load that the water body can sustain and then allocate that load" among those who discharge to the body of water. *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95, 107 (2004) (quoting 33 U.S.C. § 1313(d)); *see also Friends of Earth*, 333 F.3d at 186 ("[A] TMDL represents the maximum amount of pollutant 'loadings' that a waterbody may take in without violating applicable water quality standards.").

TMDLs account for point sources as well as nonpoint sources. As the label implies, nonpoint sources are origins of effluent that are not emitted from a point source. They may include, for example, unchanneled rainwater runoff from roads, bridges, parking lots, roof-tops, and other impermeable surfaces. *See Cordiano v. Metacon Gun Club*, 575 F.3d 199, 221 (2d Cir. 2009). TMDLs are calculated by summing (1) that portion of the water's loading capacity attributable to *point* sources; (2) that portion of the water's loading capacity attributable to *nonpoint* sources; and (3) a margin of safety to account for uncertainties. 33 U.S.C. § 1313(d)(1)(C), (d)(1)(D); 40 C.F.R. § 130.2(g)-(i); *Food & Water Watch v. EPA*, 5 F. Supp. 3d 62, 69 (D.D.C. 2013).

"[T]he implementation of the TMDL rests largely with the [S]tate." *NRDC v. EPA*, 301 F. Supp. 3d 133, 137-138 (D.D.C. 2018) (citing 33 U.S.C. § 1313(e)(3)(C)). The "maximum levels and allocations of pollutants in a TMDL are incorporated into the State's water quality management plan," in theory leading to coordination "among agencies, local authorities, and nongovernmental organizations to further reduce both point and non-point source pollution." *Anacostia Riverkeeper, Inc. v. Jackson*, 798 F. Supp. 2d 210, 217 (D.D.C. 2011).

States must establish each TMDL "at a level necessary to implement the applicable water quality standards," subject to regulatory constraints. 33 U.S.C. § 1313(d)(1)(C).

ARGUMENT

Amici object to the Rule for two principal reasons. First, it sets criteria that are unattainable and will lead to an unnecessary cascade of burdens on regulated entities. Second, EPA's resort to using tribal treaties is a troubling and unlawful expansion of rulemaking power.

I. EPA'S UNATTAINABLE WATER QUALITY STANDARDS WILL DO GREAT HARM TO INDUSTRY.

The infirmities with the Rule are many. These infirmities are laid out persuasively in plaintiffs' principal brief, and we do not repeat them here. *Amici* write, instead, to emphasize the alarming pileup of permitting restrictions and regulatory enforcement—and the economic impact that will follow—if the Court upholds EPA's infeasible standards. Most directly, the wrong assumptions underlying EPA's standards will drive the majority of Washington's waters into indefinite states of deemed impairment. In turn, that will result in more stringent permitting restrictions for point sources, the cessation of new permit issuances, and TMDLs that will unlock an array of extraordinarily burdensome state-level enforcement measures against nonpoint sources.

A. EPA's water quality standards are so low that nearly all state waters will be impaired indefinitely.

Central to EPA's new water quality standards is concern for cancer risk. In EPA's 2000 "Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health" ("2000 Methodology"), the agency acknowledged that a "10^{-5} risk level" for PCBs was "generally acceptable" with respect to the general population, so long as more exposed subpopulations were protected at a 10^{-4} risk level. *See* EPA, Human Health Water

Quality Criteria and Methods for Toxics (Oct. 2, 2023), https://perma.cc/URU7-DW89; EPA, Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health (Oct. 2000), https://perma.cc/35WZ-QTTR. This 10^{-5} figure means that effluent levels should be set so as to avoid the risk that more than one additional cancer case per 100,000 people will occur. *See* 2000 Methodology at 1-3 n.1 (defining "risk-level" as the "upper-bound estimate of excess lifetime cancer risk"). And because conservative assumptions are factored into the calculation of risk level, satisfying the risk level would mean that the actual risk is far lower than one in one hundred thousand.

When combined with the "default fish consumption value" for the general population (17.5 grams per day), that risk level produces a standard familiar to and generally workable for *amici*'s members. While that standard does result in costs and regulatory burdens, those costs and burdens can be managed, and compliance can more likely be achieved. And rightly so, in the name of public health. *Amici*'s members understand that as industrial actors, they must pay close attention to how their activities and discharges could affect the environment and nearby populations. Through constructive dialogue and collaboration with the EPA, states like Washington, and other stakeholders, *amici* and their members routinely work towards reasonable and flexible solutions that balance environmental protection and economic development.

But the Rule undermines this collaboration and upsets this balance. Instead of determining acceptable levels of pollutants, such as PCBs, by reference to the fish consumption rate of the majority of the general population (for which the default is 17.5 grams per day), EPA fixed the value *ten times higher*—175 grams per day—to instead reflect the "95th percentile consumption rate of surveyed tribal members." 80 Fed. Reg. 55,063, 55,067 (Sept. 14, 2015); 87 Fed. Reg. 19,046, 19,054 (Apr. 1, 2022) (adopting the same rationale

EPA used in its 2016 rule). The agency then set a cancer risk level for all chemicals, including PCBs, of 10^{-6}, which is *ten times* more stringent than past practice. Compounding these enormous adjustments, the agency then applied the 10^{-6} risk level to a small and discrete subpopulation—tribal subsistence fishers. The net effect was to reduce the acceptable risk level for the general population of the entire state by *one thousand-fold*, to 10^{-8}. That means that pollutant levels are unacceptable if they cause a probability of more than one additional cancer case per 100,000,000 people—a rate so close to zero that there is effectively no difference. EPA-HQ-OW-2015-0174-1089 at 14 (Northwest Pulp & Paper Comment Letter May 31, 2022) ("Pulp & Paper Letter"). *Amici* are not aware of any other case where EPA has applied a 10^{-8} level of risk protection for water quality standards setting purposes, let alone a case where that level is applied to general populations that consume significantly less fish than the tribal subpopulations the standard focused on.

As the NMA explained in its comment letter, EPA's rule results in "unattainable criteria." EPA-HQ-OW-2015-0174-1094, at 2 (May 31, 2022). Not only does the risk level set an irrational rate, but even EPA acknowledged that with current technology, "[n]early half of pollutant parameters addressed in this rule have analytical quantitation limits that are above" the levels set. 87 Fed. Reg. 69,183, 69,195 (Nov. 18, 2022). Indeed, EPA's criterion of seven parts per quadrillion "is so small that modern technology cannot even reliably detect or measure the pollutant at that concentration." Plaintiffs' Br. 34.

Because EPA has set the water quality standard for PCBs and other chemicals so low, "large portions of state waters would be considered impaired" indefinitely. 2022 Pulp & Paper Letter 65; *see also id.* at 62 (EPA's methylmercury criteria would similarly cause "widespread and pervasive water quality impairment"); 33 U.S.C. § 1313(d)(1) (requiring states to identify impaired waters not meeting water quality standards).

B. EPA's new water quality standards will unleash intrusive regulatory enforcement mechanisms that will cause severe harm to industry.

The indefinite impairment of Washington's waters will have drastic consequences for the State's economy, by way of regulation for both point sources and nonpoint sources.

1. Impact on point source regulation. Under Ninth Circuit law, which is binding in Washington, "no permit may be issued to a new discharger" under the NPDES permit scheme "if the discharge will contribute to the violation of water quality standards," unless the permit applicant demonstrates that existing discharges are "subject to compliance schedules designed to bring the segment into compliance with applicable water quality standards." *Friends of Pinto Creek v. EPA*, 504 F.3d 1007, 1012-1013 (9th Cir. 2007). In other words, "[i]f point sources, other than the permitted point source, are necessary to be scheduled in order to achieve the water quality standard, then the EPA [and States] must locate any such point sources and establish compliance schedules to meet the water quality standard before issuing a permit." *Id.* at 1014. And "[i]f there are not adequate point sources to do so, then *a permit cannot be issued unless the state or [the permit-seeker] agrees to establish a schedule to limit pollution from a nonpoint source or sources sufficient to achieve water quality standards*." *Id.* (emphasis added).

Additionally, a coalition of trade associations, including some of *amici*, has warned in a related rulemaking that under EPA's approach, new NPDES discharge permits must "include extremely conservative effluent limitations to ensure that dischargers did not cause or contribute to impairments." FRL-8599-01-OW at 12 (March 6, 2023) (Trade Association Coalition Letter to EPA Assistant Administrator).

The concrete harms that will follow for NPDES and Section 404 permitholders and permit-seekers are numerous. The new regime will result in increased costs for industries and

municipalities to comply with stricter permit requirements. In some cases, upgrading facilities to meet the new effluent limits through advanced technological measures will inflict uneconomical costs on facilities. In other cases, permitholders will be required to reduce or alter existing operations significantly to comply with mass-based or concentration-based limits, leading to reductions in productivity and thus job losses. Or they will have to pay for water quality trading credits to avoid operational disruptions. *See* EPA, Water Quality Trading, https://perma.cc/4VMG-RJSN. In addition, the process of obtaining or renewing permits will become lengthier due to additional scrutiny and TMDL requirements, potentially delaying development.

The effects land directly on *amici*'s members. In the resource-extraction sector, the new water quality standards will tighten permits for active mining operations, which typically constitute point sources. In the agricultural sector, CAFO operators will be subject to the strict NPDES permitting requirements triggered by the final rule, limiting their ability to operate. Likewise in the manufacturing sector, where factories will be subjected to new conditions that are likely to make continued operation at current levels infeasible.

Industries unable to afford the costs of compliance may have to reduce their work-forces or cease operations altogether, leading to locally catastrophic job losses. This is particularly true for smaller businesses that are far less likely to have the financial resilience to adapt to heightened effluent limits. Further, many of *amici*'s members in mining, manufacturing, agriculture, and other sectors that are heavily reliant on usage of water itself will be categorically unable to adapt to the new limits. When they arise so pervasively throughout a State's economy, such harms can contribute to economic downturns, increased tax burdens, and higher consumer costs as surviving businesses are forced to raise prices and

those who lose their jobs leave their communities. All this will compound over time because enforcement measures will be in place indefinitely.

2. Impact on nonpoint source regulation. While the sudden mass impairment of Washington's waters is effectively freezing issuances of new NPDES and 404 permits and placing additional constraints on existing permits—a present reality for *amici*'s members since the final Rule took effect—it also triggers the TMDL regime, which will impose severe new restrictions on nonpoint sources, too. Because nonpoint source regulation is left to the States, and because identifying causes of nonpoint source pollution is more challenging than point source pollution, these nonpoint restrictions tend to be extremely intrusive.

Such intrusive measures of nonpoint pollution enforcement can be sector specific or reach across multiple sectors. For example, States may restrict forestry practices, such as by setting timber harvesting plans, imposing licensing requirements, or even by "directing forest operators to implement specific practices." Environmental Law Institute, *Enforceable State Mechanisms for the Control of Nonpoint Source Water Pollution* at 35 (1997), https://perma.cc/3UVL-D6H3. In the agricultural context, states may prohibit discharge of sediment into waters except in accordance with an approved soil and water conservation plan. *Id.*; *see also, e.g.*, Md. Code, Environment § 4-413. Farmers' failure to timely comply with agricultural water quality plans can lead to debilitating civil penalties. *E.g.*, Ky. Rev. Stat. Ann. § 224.71-130. States have also enacted enforceable "nutrient regulations" and laws regulating the use of fertilizers. More broadly, states often impose sediment and erosion laws that regulate conduct across different sectors, from urban to agriculture.

For its part, Washington has identified "enforceable mechanisms that address [non-point source] pollution," including state laws regulating "forest practices, dairies, and on-site-sewage systems." Washington Department of Ecology, *Washington's Water Quality*

Management Plan to Control Nonpoint Sources of Pollution, at 7 (July 2015), https://-perma.cc/EZ5N-346Z; *see, e.g.*, Wash. Admin. Code 173-201A-010, *et seq.* These measures ordinarily can help reduce the runoff of pollutants into Washington's waters and prevent further degradation of water quality. But when the applicable water quality standard is incapable of being measured and effectively unattainable, this process will work as an open-ended invitation for state and federal environmental regulators to insert themselves indefinitely into the day-to-day operations of *amici*'s members.

In the mining industry, for example, virtually every aspect of operations is regulated in detail. *See* National Ocean Service, *Forestry and Mining Operations*, https://perma.cc/-3R8W-7GUR; 40 C.F.R. § 122.26(a)(1)(ii), (b)(14). In agriculture, farmers will face state-imposed limits on nonpoint source operations, as runoff in rural areas can sometimes carry fertilizer or trace pesticides into nearby waters. Nonpoint source regulations thus open the door to day-to-day regulatory intrusion on farms across the State. Similarly, Washington targets construction sites and manufacturers as part of its measures to control urban and stormwater runoff. *See Stormwater & Runoff*, Washington Department of Ecology, https://perma.cc/8N2F-4XTT.

Making matters worse, once a TMDL has been established, it is notoriously difficult to revise. Before any change may be made to a TMDL, applicants typically must persuade the State to seek EPA approval. When they succeed on that score, more delay awaits: EPA must then engage in laborious notice-and-comment rulemaking, which opens the door to obstructive litigation by nongovernmental groups whose aim is to prevent change by any means. Even successful changes to TMDLs—those that make it through the gauntlet of notice-and-comment rulemaking and judicial review—often suffer years of additional delay

due simply to bureaucratic inaction. Practically speaking, any restrictive TMDLs established under the Rule will be as good as written in stone once adopted.

That is especially problematic here because the Rule's replacement of the existing water quality standard with an unattainable one—based on EPA's statutorily required finding that the change was "necessary" (33 U.S.C. § 1313(c)(4)(B))—requires the State to regulate all industry. EPA's aggressive, *sua sponte* intervention into Washington's environmental policy forces more stringent TMDLs on the State, reducing regulators' options for promoting economic development. On the flipside, the flexible structure of TMDL enforcement allows regulators to be as creative (and capricious) as they want when they wish to *hinder* economic development. Indeed, when Washington proposed a water quality management plan to control nonpoint sources of pollution in 2015, regulators expressed support for the extraordinary notion that "it has been illegal to cause nonpoint source pollution [in Washington] since at least 1899." Washington Department of Ecology, *Washington's Water Quality Management Plan to Control Nonpoint Sources of Pollution* at 19 (citing 33 U.S.C. § 407). EPA has also recently announced a new TMDL for PCBs in the Spokane River, adding further difficulty to the compliance burdens that the 2022 Rule thrusts on regulated entities. EPA, Spokane and Little Spokane Rivers Polychlorinated Biphenyls: Total Maximum Daily Loads (May 15, 2024), https://perma.cc/S79N-U6QZ.

Unbridled regulatory discretion inevitably is problematic. EPA's rule risks permanently licensing both federal and state regulators to impose arbitrary, costly, and overly protective restrictions on any economic activity they deem, for any reason, to be undesirable. The harms that would follow speak for themselves, as all economic actors face increasingly micromanagerial CWA regulation. That is not what Congress intended under the CWA.

Government is supposed to foster a fair and predictable regulatory scheme that protects the public health and natural environment *while also* encouraging businesses to operate and innovate without fear of capricious government interference. EPA's impractical, unachievable water quality standards for Washington, and all the downstream regulatory intrusion they invite, are at odds with that basic truism. And that error will result in state-wide and local implementation that seriously harms *amici*'s member businesses, for the sake of comparatively minimal health benefit.

II. EPA'S RELIANCE ON SOURCES OF LAW BEYOND THE CWA IS CONTRARY TO LAW AND PORTENDS GREAT HARM TO AMERICAN INDUSTRY.

There is yet more that is wrong with EPA's rulemaking here. The agency's reliance on treaties with Indian Tribes to interpret its authority under the CWA also is unlawful. Neither the CWA nor any other statute empowers EPA to arbitrate and enforce tribal rights. Were this Court to hold otherwise, it would invite federal agencies to assert almost limitless rule-making powers based on sources of law with no direct relation to their organic statutes. This, too, would have far-reaching, adverse practical consequences for *amici*'s members.

A. EPA's reliance on Tribal treaties exceeds its statutory authority.

With respect to EPA's assertion of authority to implement treaties with sovereign Indian Tribes, the starting point is familiar: "[A]n administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *Pharmaceutical Research & Manufacturers of America v. DHHS*, 43 F. Supp. 3d 28, 35 (D.D.C. 2014). Indeed, "an agency literally has no power to act . . . unless and until Congress confers power upon it." *California Independent Systems Operator Corp. v. FERC*, 372 F.3d 395, 398 (D.C. Cir. 2004). Here, EPA's use of tribal treaties to establish human health criteria is not authorized by the CWA. Congress could not have intended this sort of power grab.

In the "2000 Methodology," EPA drew a distinction between "the general population" and "more highly exposed subgroups." 2000 Methodology, at 1-12. "[S]ubsistence fishers" were characterized as examples of the latter. *Id.* But in EPA's initial 2016 rulemaking—which the agency withdrew in 2020 (*see* 85 Fed. Reg. 28,494 (May 13, 2020)) but then relied upon in the 2022 final rule—"EPA proposed to consider the tribal populations exercising their legal right to harvest and consume fish and shellfish *as the general population* for purposes of deriving protective" health-risk standards. 87 Fed. Reg. at 69,187 (emphasis added). The agency did not (obviously could not) determine that tribal subsistence fishers comprised a majority of the population in Washington. Rather, it deemed tribal populations "the general population" to "reflect consideration of tribal treaty-reserved rights." *Id.* Accordingly, EPA did not survey a representative sample of Washingtonians when it chose to deviate tenfold from the default fish consumption rate of 17.5 grams per day. Instead, it relied upon "fish consumption surveys of tribal members" to set the amount to 175 grams per day (*id.*), in the view that it effectively could bootstrap separate and unrelated executive policies concerning Indian Tribes to its implementation of the CWA.

EPA attempted to justify this bootstrapping by pointing to Congress' direction that the CWA "[s]hall not be construed as . . . affecting or impairing the provisions of any treaty of the United States." 81 Fed. Reg. 85,417, 85,422 & n.31 (Nov. 28, 2016) (citing 33 U.S.C. § 1371). The agency concluded that it was therefore "necessary and appropriate to consider tribal treaties to ensure that EPA's actions under the CWA are in harmony with such treaties." *Id.* at 85,423. Then it cited eight treaties "relevant to the State of Washington" that reserved to 24 Tribes the "right of taking fish at usual and accustomed places, in common with all citizens of the Territory." *Id.* The agency found that the treaties at issue emphasized the importance of subsistence fishing. *Id.*

In the final Rule, EPA explained that this approach was "protective of tribal members exercising their legal right to harvest and consume fish and shellfish at subsistence levels." 87 Fed. Reg. at 69,189. In other words, it adopted the "same rationale" as the 2016 rule. *Id.* The agency elaborated on its approach to tribal rights in a further rule finalized on May 2, 2024. *See Water Quality Standards Regulatory Revisions to Protect Tribal Reserved Rights*, 89 Fed. Reg. 35,717 (May 2, 2024). There, EPA asserted sweeping authority to consider under its CWA rulemaking powers any and all "rights reserved by treaty, statute, or executive order to aquatic and/or aquatic-dependent resources that also fall within the ambit of resources protected under the CWA." *Id.* at 35,718.

That is a stunning regulatory overreach. It is a "fundamental principle[] deriving from the Constitution's separation of powers" that the Executive Branch cannot in this way arrogate to itself power not conferred by Congress. *Chamber of Commerce v. U.S. Department of Labor*, 885 F.3d 360, 387 (5th Cir. 2018). Agencies may not invoke unrelated treaties and statutes, let alone executive orders issued without congressional involvement of any kind, to expand their own authority. An "agency may not confer power on itself." *Mozilla Corp. v. FCC*, 940 F.3d 1, 75 (D.C. Cir. 2019).

The D.C. Circuit has not hesitated to enforce this basic rule. For example, in *NRDC v. EPA*, 859 F.2d 156 (D.C. Cir. 1988), EPA argued that under the NPDES program, it was "empowered to impose permit conditions unrelated to effluents" based on its authority under the National Environmental Policy Act (NEPA). *Id.* at 169. But "[a]ny action taken by a federal agency must fall within the agency's appropriate province under its organic statute(s)." *Id.* The D.C. Circuit thus held that "EPA may not . . . under the guise of carrying out its responsibilities under NEPA transmogrify its obligation to regulate discharges into a mandate to regulate the plants or facilities themselves" because "[t]o do so would unjusti-

fiably expand the agency's authority beyond its proper perimeters." *Id.* at 170.

EPA's expansion of its authority here is even more egregious. Whereas in *NRDC*, there was at least an "interaction of the CWA and NEPA" (*id.* at 168), the same cannot be said of the CWA and the treaties that EPA relied on. The cited treaties do not reference the CWA, and the only provision in the CWA invoked here, 33 U.S.C. § 1371, merely states that nothing in the Act shall affect or impair separate treaty rights. EPA's implicit position—that setting practical, attainable water quality standards for the state of Washington would impair tribal treaty rights—is implausible and legally invalid. Section 1371 simply means that Congress did not intend to abrogate or diminish existing treaties when it enacted the CWA. Certainly, § 1371 cannot be read on its own as authorizing EPA to treat, counterfactually, a subset of the population as the general population of the entire state for purposes of evaluating the health effects of contaminants. And no other provision of the CWA grants EPA authority to interpret treaties between sovereigns.

B. EPA's novel assertion of authority to interpret and implement treaties through the CWA will have vast implications across the American West.

EPA's reliance on tribal treaties in setting water quality standards has far-reaching implications for the restriction of *amici*'s members' activities. EPA's novel approach to its CWA rulemaking authority would allow it to override state-established CWA standards whenever it deems them inconsistent with its own, EPA-specific interpretation of tribal treaty rights, regardless of the scientific basis of its decision. This would undermine the "cooperative federalism" framework of the CWA and intrude on the states' primary role in protecting their waters. *See New York v. United States*, 505 U.S. 144, 167 (1992).

This is no mere conjecture. In the May 2024 rule, EPA noted a few occasions during a brief period between 2015 and 2017 where the agency asserted authority to override states'

water quality standards because of its interpretation of tribal rights. In 2015, it rejected water quality standards proposed by Maine because they "did not adequately account for Tribal members' rights to fish for sustenance." 89 Fed. Reg. at 35,721. And in 2016, it urged Idaho of the "need to consider treaty-reserved fishing rights" when determining criteria under the CWA. 89 Fed. Reg. at 35,721. With the promulgation of the Washington water quality standard in 2022, and more recently in the May 2024 rule, EPA has announced that this aberrational practice now will become the new norm.

The practical impact of this new approach cannot be overstated. Especially in the American West, treaties reserving tribal fishing rights are common. *See, e.g.*, *Midwater Trawlers Cooperative v. U.S. Department of Commerce*, 393 F.3d 994, 998 (9th Cir. 2004); *National Wildlife Federation v. National Marine Fisheries Service*, 481 F.3d 1224, 1229 (9th Cir. 2007). The 2024 rule explicitly identifies many such treaties. "[I]n certain states in the Great Lakes region," EPA noted in the preamble to that rule, "[t]ribal reserved rights include hunting, fishing, and gathering rights both within Tribes' reservations and outside these reservations in specific areas." 89 Fed. Reg. at 35,721.

For specific examples, the agency cited the Treaty with the Chippewas, under which Tribes retain "[t]he privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded." *Id.* at n. 28 (citing *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999)). And "[i]n the Pacific Northwest," EPA has explained, "treaties explicitly reserved to many Tribes rights 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 their traditional territories." *Id.* at 35,721 & n.29 (citing Treaty with the Nez Perces; Treaty with the Nisquallys, etc.). The references to hunting and harvesting indicate that EPA is prepared to expand its authority yet further.

The final Rule setting water quality standards for Washington is the trial run for this new regime. EPA cited the views of "[T]ribes in Washington" to explain how EPA's selected fish consumption rate and cancer risk level was "protective" of the legal rights of "tribal members."[2] 87 Fed. Reg. at 69,189 & n.66.

The final Rule invoked "treaty-reserved rights," but EPA's approach is not limited to treaties. The May 2024 rule provides that "[i]n addition" to rights reserved through treaties, "other Tribes have statutorily reserved rights." 89 Fed. Reg. at 35,721. As an example, the agency cites a Maine law protecting the authority of the Passamaquoddy Tribe and the Penobscot Nation to regulate "[h]unting, trapping or other taking of wildlife," as well as fishing. Me. Rev. Stat. tit. 30, § 6207. That rationale belies EPA's asserted basis for incorporating Tribal rights to begin with: the CWA's lone mention of "any treaty of the United States." 33 U.S.C. § 1371(a).

And there is no reason to suppose EPA's approach is limited to tribal rights, whether reserved by treaty or statute. In fact, every indication suggests that EPA will attempt to extend its power further, for example, to any policy stated in an executive order. The preamble to the May 2024 rule is clear about this. In the same breath that the agency baldly claims that tribal treaty rights are "CWA-protected" and are incorporated "pursuant to [EPA]'s CWA authority, for consideration in the WQS context," the agency stresses that "[t]his also does *not dictate or limit* how treaty, statutory or Executive order-based reserved rights may be considered." 89 Fed. Reg. at 35,725 (emphasis added).

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[2] Although EPA claimed that the selected cancer risk level was "appropriate independent of treaty rights," it is plain that EPA's goal to protect treaty rights animated the Rule in its entirety. *See* 87 Fed. Reg. at 69,189.

This is precisely the kind of agency self-aggrandizement that the D.C. Circuit has warned against. Courts must not "presume a delegation of power" simply because there is no "express withholding of such power," or else "agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with . . . the Constitution." *National Mining Association*, 105 F.3d at 695; *see also American Petroleum Institute v. EPA*, 52 F.3d 1113, 1120 (D.C. Cir. 1995) ("[W]e will not presume a delegation of power based solely on the fact that there is not an express withholding of such power.").

If EPA could invoke tribal treaties to alter water quality standards and eliminate States' discretion under the CWA, it equally could invoke *any* federal law where governmental functions remotely implicate water quality. *Cf.* 33 U.S.C. § 1371(a) (the CWA shall not be construed as "limiting the authority or functions of any officer or agency of the United States under any other law or regulation not inconsistent with this chapter"). Indeed, by EPA's reasoning, it would be free to go beyond the charge of the CWA by twisting terms like "general population," then justifying such illegitimate moves through vague references to any federal right on the books. This practice would inflate its power to enact unprecedented state-wide water quality standards under the guise of specially serving *any* "distinct, identifiable class of individuals holding legal rights under Federal law" (89 Fed. Reg. at 35,735), such as classes based on gender, national-origin, or race (under the Civil Rights Act of 1964); or disability (under the Americans with Disabilities Act); or age (under the Age Discrimination in Employment Act of 1967). The agency could simply point to a loose connection between water resources and any such federally protected group, in turn using that connection to grant itself license to radically reinterpret its own congressional authority and historical purview. For example, it could consider the effects of certain water contaminants on the elderly, homing in on large retirement communities in Florida as a way to justify

banning the use of certain chemicals that the administration disfavors. EPA would become an agency driven by policies that are detached from its environmental responsibilities.

At the most basic level, EPA's use of treaty-reserved fishing rights exceeds the authority conferred by Congress. It imposes unreasonable and disproportionate burdens on *amici*'s members, and it does so without statutory authority. These burdens not only harm the economic welfare of *amici*'s members and the local communities whom they serve and support and who serve and support them, but also undermine the legitimate and lawful objectives of the CWA, which are to restore and maintain the chemical integrity of the Nation's waters, while protecting the primary responsibilities of the States to set their own risk-management policies in eliminating pollution. "The regulation clearly exceeds EPA's statutory grant of authority and must be invalidated." *Automotive Parts Rebuilders Association v. EPA*, 720 F.2d 142, 158 (D.C. Cir. 1983). *Amici* urge this Court to vacate EPA's 2022 final rule.

CONCLUSION

The Court should grant Plaintiffs' motion for summary judgment.

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Respectfully submitted,

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