IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

STATE OF IDAHO, et al., Plaintiffs, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al., Defendants.	Case No. 1:24-cv-100

BRIEF *AMICUS CURIAE* OF THE AMERICAN FARM BUREAU FEDERATION, AMERICAN FOREST & PAPER ASSOCIATION, THE 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

The American Farm Bureau Federation, American Forest & Paper Association, The Fertilizer Institute, National Association of Home Builders, National Association of Manufacturers, and National Mining Association are a coalition of trade associations representing a broad swath of the American economy and work force—including 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 requiring States to protect broadly defined "tribal reserved rights" in setting water quality standards under the Clean Water Act (CWA). Not only will the new water quality standards policy do great damage in its own right—causing business closures, job losses, and reducing economic development—it also represents an alarming new expansion of the agency's regulatory powers.

Amici urge the Court to vacate the EPA's Rule for two principal reasons. First, the Rule's burdensome requirements will lead to widespread impairment designations for bodies of water across the country, triggering heightened permitting restrictions and impossible cleanup plans that will burden day-to-day activities of all kinds. These classifications of state waters as "impaired" will in many cases be indefinite, as EPA's decision to treat tribal subsistence fishing populations as though they were the general population of a State results in skewed assumptions about cancer risk and perpetually unattainable water quality standards.

The practical effects of the Rule will reach all corners of the economy. Entities that discharge through point sources, as well as those classified as "nonpoint source" entities, which are not typically required to seek CWA permits and are not otherwise regulated under the CWA, will be impacted. State-wide implementation measures are mandatory and cannot

balance pollutant controls against the massive costs that will result. Thus, EPA's bottom-line position—that Congress authorized it to require States to establish impossible water quality standards that cannot be measured or achieved—will choke off economic activity to devastating effect in locations across the country where EPA and the states identify relevant tribal rights. Already, in the State of Washington, EPA's implementation of this approach (through a separate rule that applied EPA's tribal rights theory) has caused significant disruptions to industry.

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 unprecedented expansion of its authority to impose these new standards would revise dramatically the range of interests that Congress intended the agency to balance under the statutory scheme. Indeed, the agency's view of its own authority is effectively limitless; it would authorize EPA to consult all manner of legal authorities in search of new sources of rulemaking power. If treaties with Indian Tribes are fair game, 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. But courts do not presume a delegation of power simply because Congress did not expressly withhold it. *See Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 2267-68 (2024).

There is no room in EPA's congressionally delegated authority for this new form of regulatory innovation. The CWA has been on the books for over 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 not only would squelch American industry and place extraordinary burdens on local communities, but also would trammel the principles of cooperative federalism that underlie the CWA. The Court should vacate the Rule.

INTERESTS OF THE *AMICI CURIAE*

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 **American Forest & Paper Association** (AF&PA) serves to advance U.S. paper and wood products manufacturing through fact-based public policy and marketplace advocacy. The forest products industry is circular by nature. AF&PA member companies make essential

products from renewable and recyclable resources, generate renewable bioenergy, and are committed to continuous improvement through the industry's sustainability initiative—Better Practices, Better Planet 2030: Sustainable Products for a Sustainable Future. The forest products industry accounts for approximately five percent of the total U.S. manufacturing GDP, manufactures about $350 billion in products annually, and employs about 925,000 people. The industry meets a payroll of about $65 billion annually and is among the top 10 manufacturing sector employers in 43 States.

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 that 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 $2.91 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's** (NMA) 250-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. NMA has a direct interest in this matter. NMA's member companies operate throughout the country, and the Rule's approach to water quality standards could affect their ability to obtain and achieve compliance with necessary permits.

BACKGROUND

The CWA regulates pollution levels in the waters of the United States through a cooperative scheme of regulation involving both 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 pollution to protect designated uses like "water supply, propagation of fish, or recreation." *El Dorado Chem. Co. v. EPA*, 763 F.3d 950, 953 (8th Cir. 2014); *see also* 40 C.F.R. §§ 131.10–131.12.

Congress prescribed the "consideration[s]" that States must account for when setting water quality standards: "their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and . . . navigation." 33 U.S.C. § 1313(c)(2)(A). 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). It will also include "a descriptive, 'narrative' criterion regarding the entire effluent (*e.g.,* 'no toxic pollutants in toxic amounts')." *Id.*

If a State's water quality standard "meets the requirements" of the statute, then it "shall" be approved by EPA. 33 U.S.C. § 1313(c)(3). EPA may reject a water quality standard only if it is "not consistent" with the CWA's "applicable requirements." *Id.* In that case, EPA may "promulgate revised or new standards 'when necessary to meet the requirements of the [CWA].'" *El Dorado*, 763 F.3d at 953 (quoting 33 U.S.C. § 1313(c)(3)-(4)).

Water quality standards are implemented 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."

[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.

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 initial 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 Idaho and North Dakota, have done so. *See* Amend. Compl. ¶ 29.

The second implementation 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 the water quality standard's designated effluent levels. *See Thomas v. Jackson*, 581 F.3d 658, 662 (8th Cir. 2009). States are required to establish a TMDL if existing effluent limitations set by NPDES permits are "not stringent enough" to attain the applicable water quality standards. *Id.* at 666 (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 City of Kennett, Missouri v. EPA*, 887 F.3d 424, 428 (8th Cir. 2018) ("The TMDL calculates the impaired water's 'loading

capacity'—the greatest amount of a pollutant that can be introduced without violating water quality standards.").

TMDLs account for point sources as well as nonpoint sources. *Thomas*, 581 F.3d at 662. As the label implies, nonpoint sources are origins of effluent that are not emitted from a point source. *Id.* at 661 n.4. They may include, for example, unchanneled rainwater runoff from roads, bridges, parking lots, rooftops, 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); *Thomas*, 581 F.3d at 662.

States may "use a variety of regulatory techniques to implement the TMDL standards." *Missouri Soybean Ass'n v. EPA*, 289 F.3d 509, 511 (8th Cir. 2002); *see* 33 U.S.C. § 1313(e)(3)(C)). State water quality management plans incorporate a TMDL's maximum pollutant levels and allocations, and in theory allow for coordination with agencies, local authorities, and nongovernmental organizations to reduce both point and nonpoint source pollution. *See, e.g.*, *Center for Native Ecosystems v. Cables*, 509 F.3d 1310, 1332 (10th Cir. 2007); *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

The Rule will cause widespread impairment designations, leading to an unnecessary cascade of burdens on regulated entities. More, EPA's direction to consider treaty-recognized rights is an unlawful expansion of rulemaking power. The Rule must be vacated.

I. THE RULE WILL LEAD TO OVERLY STRINGENT WATER QUALITY STANDARDS, RESULTING IN WIDESPREAD IMPAIRMENT DESIGNATIONS AND EXTENSIVE ENFORCEMENT ACTIONS

The Rule's legal infirmities are many. They 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 new, extra-statutory requirements. Most directly, the requirement to calculate water quality criteria by combining the "exposure inputs" of a *Tribe* (such as its fish consumption rate) with the "same risk level" used for the "State's *general* population" (such as the maximum acceptable risk of cancer) will drive the majority of covered waters into indefinite states of deemed impairment. *See* 40 C.F.R. § 131.9(a)(3) (emphasis added). 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 broad requirements for protecting tribal rights will increase the stringency of water quality standards for covered waters throughout the Nation

Under the Rule, tribal rights constrain a State's discretion to determine the acceptable health risk associated with a body of water. Normally, States decide maximum acceptable risk levels (such as cancer risk level or illness rate) by reference to a "general population" comprised of "individuals with 'average' or 'typical' exposure." 89 Fed. Reg. 35,717, 35,734 (May 2, 2024). 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^{-6} or 10^{-5} risk level" for cancer risk 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. The 10^{-5} figure means that human exposure to a chemical present in a water body at the concentration allowed by the water quality criterion would be projected to present a risk of no more than one additional cancer case per 100,000 people. *See* 2000 Methodology at 1-3 n.1 (defining "risk-level" as the "upper-bound estimate of excess lifetime cancer risk"). Because conservative assumptions are factored into the calculation of risk level, satisfying a 10^{-5} risk level would mean that the actual risk is far lower than one in one hundred thousand.

When combined with a fish consumption rate of 17.5 grams per day, the 10^{-5} risk level produces a standard familiar to and generally workable for *amici*'s members. That fish consumption rate, as EPA has recognized, "represent[ed] an estimate of the 90th percentile consumption rate for the U.S. adult population," and is therefore "protective of the majority of the general population." 2000 Methodology at 1-12. EPA's 2000 Methodology accordingly made 17.5 grams per day of fish consumption the "default" (*id.*), although EPA has since updated it to 22 grams per day (89 Fed. Reg. at 35,746).

Tribal subsistence fishing populations are thought to consume fish at a rate an order of magnitude higher. According to EPA, the mean fish consumption rate for some tribal populations reached 233 grams per day, and the 90th percentile rate reached 528 grams per day. 89 Fed. Reg. 35,746. These populations thus have significantly greater exposure to water impurities, including regulated contaminants. A water quality standard corresponding to a 10^{-6} or 10^{-5} risk level for the *general* population will necessarily produce a greater risk level for a *tribal* population, that consumes more fish. *See* 2000 Methodology at 2-7 ("[C]hanging the exposure parameters also changes the risk."). Acknowledging this

difference, the 2000 Methodology found that highly exposed subpopulations were "adequately protect[ed]" if their relative risk level did not exceed 10^{-4}. *Id.* at 2-6.

While these standards do result in costs and regulatory burdens, those costs and burdens ordinarily can be managed, and compliance more likely can 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 EPA, States, and other stakeholders, *amici* and their members routinely work towards reasonable and flexible solutions that balance environmental protection and economic development.

The Rule undermines this collaboration and upsets this balance. For water bodies that implicitly "encompass" a tribal right (40 C.F.R. § 131.9(a)(3)), instead of determining acceptable pollutant levels by reference to the fish consumption rate of the majority of the general population, States must use a rate at least *ten times higher* because of EPA's counterfactual assumption that "a Tribal member utilizing [treaty-reserved] rights is more appropriately viewed as an individual with 'average' or 'typical' exposure" (89 Fed. Reg. at 35,735). They must establish water quality criteria that protect those highly exposed subpopulations with "at least the same risk level" as the State "would otherwise use . . . to protect the State's general population." 40 C.F.R. § 131.9(a)(3).

As a coalition of trade and business associations (including some *amici*) explained in its comment letter, the Rule "result[s] in water quality standards that are orders of magnitude more stringent" than were previously required and that common sense suggests is actually necessary. EPA-HQ-OW-2021-0791-0171; FRL-8599-01-OW, at 11 (March 6, 2023) ("Coalition Letter"). These new standards are not "based on scientific, technical, or public health considerations," but on the status of tribal "right holders." *Id.*

"At a minimum," the Rule will lead to excessively stringent water quality standards that will result "in the vast majority of covered waters being deemed impaired," requiring NPDES permits to include "extremely conservative effluent limitations," and triggering TMDLs for "hundreds of newly impaired waters." Coalition Letter at 11-12; *see* 33 U.S.C. § 1313(d)(1) (requiring States to identify impaired waters not meeting water quality standards).

B. EPA's new requirements for water quality standards will force new discharge restrictions that will cause severe harm to industry

The indefinite designation of the majority of covered waters as "impaired" will have drastic repercussions for the economy, impacting industries through regulation of both point sources and nonpoint sources.

1. Impact on point source regulation. The NPDES is a "permitting program through which the EPA and the several States implement various regulatory limits upon the discharge of pollutants into navigable waters." *Gen. Motors Corp. v. EPA*, 168 F.3d 1377, 1378 (D.C. Cir. 1999). The program authorizes EPA to issue permits (33 U.S.C. § 1342(a)), or alternatively, a state may assume that authority "for discharges into navigable waters within its jurisdiction." 33 U.S.C. § 1342(b). NPDES permits contain "numerical discharge limits" and must be submitted to EPA for approval. *Id.*; 33 U.S.C. § 1342(d)-(e).

"[A] point source cannot discharge a pollutant unless the discharge is authorized by an NPDES permit." *El Dorado*, 763 F.3d at 953. And "[n]o permit may be issued" if the permit does not comply with "the applicable requirements of CWA, or regulations promulgated under CWA." 40 C.F.R. § 122.4(a); *see also* 33 U.S.C. § 1342(d)(2); *Friends of Pinto Creek v. EPA*, 504 F.3d 1007, 1012-1013 (9th Cir. 2007) (permit applicant must demonstrate that existing discharges are "subject to compliance schedules designed to bring the segment into

compliance with applicable water quality standards."). In some jurisdictions, "[i]f there are not adequate point sources" to control to be able to achieve the water quality standard, then the State or permit seeker must "agree[] to establish a schedule to limit pollution from a *nonpoint* source or sources sufficient to achieve water quality standards" before a new NPDES permit may issue. *Id.* at 1014 (emphasis added).

AF&PA has explained that the "overly stringent risk levels" required by the Rule will lead to "unachievable permit limits for many industries and municipalities." EPA-HQ-OW-2021-0791-0307 at 12-13 (March 6, 2023) ("AF&PA Comment Letter"). The criteria established to protect highly exposed subpopulations as if they were the general population will in many cases be lower "than current detection limits or natural background levels." *Id.* at 6. This means that even a discharge with concentrations of a pollutant less than occur naturally in the receiving water could be prohibited. Additionally, EPA's new requirements will prevent discharges in the name of extremely stringent water quality standards even where "no cost-feasible technologies are available for effective treatment." *Id.* EPA's astonishing incorporation of tribal rights into the CWA will thus "severely restrict or effectively prohibit large swaths of economic activity in a state." *Id.* at 5.

The concrete harms that will follow for NPDES and Section 404 permitees and permit-seekers (*see* 33 U.S.C. § 1344) are numerous. The new regime will result in increased costs for industries and municipalities to comply with stricter permit requirements. *See* Plaintiffs' Br. 21-22. In some cases, upgrading facilities to meet these overly stringent effluent limits through advanced technological measures will inflict uneconomical costs on facilities. In other cases, permitees 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* (accessed May 20, 2024), https://perma.cc/4VMG-RJSN. In addition, the process of obtaining or renewing permits will lengthen due to additional scrutiny and TMDL requirements, potentially delaying development. *See City of Kennett*, 887 F.3d at 428.

The effects land directly on *amici*'s members, which typically involve point source discharges. In the resource-extraction sector, new water quality standards could impose more stringent permit limits that effectively prohibit discharges from mining activities, hindering their ability to continue operating. The stringent new standards will also have severe implications for mines currently in development, necessitating extensive modifications to planned discharge systems and environmental safeguards. The resulting increases in developmental delays and investment costs are worsened by uncertainty—mining (and other) businesses won't know what tribal rights will be asserted and factored into future water quality standards. In the agricultural sector, concentrated animal feeding operation (CAFO) operators will be subject to the strict NPDES permitting requirements triggered by the final rule. *See AFBF v. EPA*, 836 F.3d 963, 965 (8th Cir. 2016) ("A CAFO may not discharge pollutants into the waters of the United States unless it obtains a [NPDES] permit."). Likewise, in the manufacturing sector, factories and pulp and paper mills will be subjected to new conditions that are likely to make continued operation at current levels infeasible. Finally, for the construction industry, developers will be forced to create and comply with stormwater pollution prevention plans that abide by newly developed TMDLs.

The uncertainty surrounding the applicability and scope of treaty-reserved tribal rights exacerbates the difficulties faced by *amici*'s members. States submit water quality standards for EPA approval at least every three years. *See Iowa League of Cities v. EPA*, 711 F.3d 844, 857 (8th Cir. 2013); 33 U.S.C. § 1313(c)(1). However, amici's members often plan five to ten

years in advance, if not longer. Without clear and predictable information about which tribal rights will be asserted and how states will implement them, it becomes nearly impossible for industry actors to formulate effective long-term strategies. Yet EPA demands that States implement all tribal rights "encompass[ed]" by a designated use (40 C.F.R. § 131.9(a)(3)), whether those rights are "express or implied" (89 Fed. Reg. at 35,721). The Rule gestures at a variety of cognizable rights categories, ranging from "fishing," "hunting," and "gathering," to amorphous "ceremonial practices." 89 Fed. Reg. at 35,730. This uncertainty is particularly problematic because most of these treaties predate the CWA and were not designed with its regulatory framework in mind. The utter lack of predictability concerning tribal rights and their integration into state water quality standards will disrupt operational planning and investment.

Industries unable to afford the costs of compliance—or, indeed, unable to comply at all due to unattainable new standards[2]—may have to reduce their workforces 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 tenfold-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. As these industries use large quantities of water for their operations, they inevitably discharge substantial volumes of water back into the environment. Where the quality of discharged water must meet exceptionally high

[2] This has already occurred in Washington. The EPA imposed new water quality standards on that State because of tribal fishing rights, ratcheting up the water quality criteria by multiple orders of magnitude. For certain pollutants, the new standards were "so low that modern technology literally cannot detect or measure [them] at EPA's selected concentration." Complaint, *Ass'n of Washington Businesses v. EPA*, No. 1:23-cv-3605, ECF No. 1 ¶ 12 (D.D.C. Dec. 4, 2023) (summary judgment motion pending).

standards—even requiring businesses to leave it cleaner than they found it—businesses will need to invest in advanced water treatment technologies that may not be cost-feasible or available. Such pervasive harms throughout a State's economy ultimately contribute to economic downturns, job losses crucial to local communities, increased tax burdens, and higher consumer costs. And compounding these harms, EPA's ability to impose enforcement measures on industry, including prohibiting discharges, ordering site restoration, daily civil penalties, and/or judicial enforcement actions, will remain in place indefinitely. 33 U.S.C. § 1319; *see also* EPA, *Enforcement under CWA Section 404* (updated Mar. 26, 2024), https://www.epa.gov/cwa-404/enforcement-under-cwa-section-404.

2. Impact on nonpoint source regulation. While the sudden impairment designations of the nation's waters will effectively freeze issuances of new NPDES and section 404 permits and place additional constraints on existing permits, it also will trigger TMDL regimes, which will impose severe new restrictions on nonpoint sources. 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 nonpoint restrictions can be sector-specific or reach across multiple sectors. For example, States may restrict forestry practices 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. 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. More broadly, States often impose sediment and erosion laws that regulate conduct across different sectors, from urban to agriculture. Nonpoint source regulations thus open the door to day-to-day regulatory intrusion on farms across the States.

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. *See City of Kennett*, 887 F.3d at 431 ("Once approved by the EPA, [a] TMDL's wasteload allocations are binding on future permits unless the EPA approves a replacement TMDL."). 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.

That is especially problematic here because the Rule's requirement that States replace existing water quality standards with unattainable ones will require them to regulate all industry. *See* Plaintiffs' Br. 25-26. By forcing more stringent TMDLs on States, EPA will reduce regulators' options for promoting economic development. On the flipside, the "variety of regulatory techniques" available for TMDL enforcement gives regulators free range to *hinder* development. *See Missouri Soybean*, 289 F.3d at 511. For example, 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 (July 2015), https://perma.cc/5WW7-MVDR (citing 33 U.S.C. § 407). EPA's Rule will result in largely unchecked local regulatory discretion, driving up costs for States and businesses, while permanently licensing both federal and state regulators to impose arbitrary, costly, and overly protective restrictions on economic activity.

That is not what Congress intended under the CWA. EPA has not shown any clear statutory authority for its assertion of this novel and vast regulatory authority, and it is of great political and economic significance. Not only is EPA's statutory interpretation a bad reading of the CWA, but its flip-flopping from longstanding positions means that its approach here is not even entitled to "due respect." *Loper Bright*, 144 S. Ct. at 2259, 2262, 2267.

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 requirements for establishing water quality standards, and all the downstream regulatory intrusions they invite, are at odds with that basic truism. And that error will result in state and local implementation that seriously harms *amici*'s member businesses, for the sake of comparatively minimal health benefit.

C. EPA's new approach has already proved unworkable and costly

The Rule notes that EPA "has previously addressed reserved rights held by Tribes in state-specific [water quality standards] actions" between 2015 and 2017. 89 Fed. Reg. at 35,721. Purporting to "harmoniz[e]" the CWA with other statutes and treaties, EPA found

that the water quality standards in Maine, Idaho, and Washington "were not sufficiently protective of the applicable reserved rights." *Id.* As here, EPA required those States "to protect Tribal members to the same risk level as the states' general populations" with reference to the tribal fish consumption rates. *Id.* at 35,722.

These efforts predictably were disastrous for industry. In Washington, for example, EPA replaced a workable water quality standard that was based on the general population's fish consumption rate of 17.5 grams per day, with an unattainable standard based on a fish consumption rate of 175 grams per day. It did so to 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 from the September 2015 rule). The agency then set a cancer risk level for all chemicals of 10^{-6}—aimed at protecting that discrete subpopulation. 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. Northwest Pulp & Paper Comment Letter, EPA-HQ-OW-2015-0174-1089 at 14 (May 31, 2022).

That risk level is unheard of, and for some pollutants, the criterion is so small that modern technology cannot reliably detect or measure it at the acceptable concentration. Even EPA acknowledged that with current technology, "[n]early half of pollutant parameters [the Washington rule] addressed have analytical quantitation limits that are above" the levels set. 87 Fed. Reg. 69,183, 69,195 (Nov. 18, 2022). EPA's state-specific actions thus led to "unattainable criteria." NMA Comment Letter, EPA-HQ-OW-2015-0174-1094, at 2 (May 31, 2022). Now, the harm is nationwide.

II. EPA'S UNAUTHORIZED EXPANSION OF ITS AUTHORITY THREATENS GREAT HARM TO THE ECONOMY

There is yet another major flaw with EPA's Rule. The agency unlawfully interprets the CWA as requiring States to tighten water quality criteria to "protect right holders" whose undefined rights are not established by the CWA. 40 C.F.R. § 131.9(a)(3). Neither the CWA nor any other statute empowers EPA to arbitrate and enforce tribal rights. Were the 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. The CWA does not prohibit otherwise acceptable water quality criteria based on treaty-reserved rights

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." *Union Pac. R.R. Co. v. Surface Transportation Bd.*, 863 F.3d 816, 823 (8th Cir. 2017). Indeed, "an agency literally has no power to act … unless and until Congress confers power upon it." *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 357 (1986). Here, the 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.* Now, EPA requires that *some* of those subgroups—those with "reserved rights" to harvest and consume fish—be treated *as the general population* for purposes of setting risk standards. But those rights are not conferred

by the CWA. Thus, the Rule is bootstrapping separate and unrelated executive policies concerning Indian Tribes to EPA's implementation of the CWA.

EPA previously 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). EPA now disavows that rationale (likely because it does not extend to statutes and executive orders) and further states that its "authority . . . does not derive from harmonizing a specific treaty, statute, or Executive order with the CWA." 89 Fed. Reg. 35,722-723; *see also* Plaintiffs' Br. 27-32 (explaining EPA's "abrupt change of course"). Instead, EPA claims that "the substantive authority to promulgate this rule derives from CWA section 303(c)," specifically the provision requiring water quality standards to "protect the public health or welfare." 89 Fed. Reg. 35,723; 33 U.S.C. § 1313(c)(2)(A). From those general few words, EPA asserts the authority to enforce rights to "aquatic and/or aquatic-dependent resources reserved by right holders, either expressly or implicitly, through Federal treaties, statutes, or executive orders." 89 Fed. Reg. 35,719 n.3.

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 previously rejected an attempt by EPA to expand its authority under one statute by citing another. 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 court 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 this "would unjustifiably expand the agency's authority." *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 now requires States to account for in developing water quality standards. The treaties and statutes that previously served as excuses for EPA's heightened state-specific water quality standards in Washington do not reference the CWA. And the CWA does not encompass this power by itself. Broadly worded phrases like "public health or welfare" in § 1313(c)(2)(A) must "take meaning from the purposes of the regulatory legislation," not from other federal sources. *NAACP v. Federal Power Commission*, 425 U.S. 662, 669-670 (1976); *see id.* at 670 ("The use of the words 'public interest' in the Gas and Power Acts is not a directive to the Commission to seek to eradicate discrimination.").

B. EPA's novel interpretation of the CWA as requiring the implementation of treaties will have vast implications across the country

EPA's direction to States to rely 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 allows 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. Indeed, EPA's approach is necessarily devoid of scientific principle because it rejects water quality standards that would otherwise be found sufficiently protective of highly exposed subpopulations in the absence of tribal-reserved rights. In other words, EPA would approve a water quality standard if tribal rights are not asserted, but it could reject that same standard when tribal rights *are* asserted, despite nothing changing about the relevant populations and the actual, scientifically measured health risk. As plaintiffs have shown (at 35-37), the Rule undermines the "cooperative federalism" framework of the CWA and intrudes on the States' primary role in protecting their waters. *See New York v. United States*, 505 U.S. 144, 167 (1992).

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.*, *Mille Lacs Band of Chippewa Indians v. State of Minn.*, 124 F.3d 904, 910 (8th Cir. 1997), *aff'd*, 526 U.S. 172 (1999); *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 Rule explicitly identifies many such treaties: "In certain States in the Great Lakes region, Tribal reserved rights include hunting, fishing, and gathering rights both within Tribes' reservations and outside these reservations in specific areas that the Tribes ceded to the Federal Government." 89 Fed. Reg. at 35,721. For specific examples, the agency cited the Treaty with the Chippewas, under which Tribes retained "[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.).

There is no reason to suppose EPA's approach is limited to tribal rights, whether reserved by treaty, statute, or executive order. 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 Rule's preamble is clear about this. In the same breath that the agency claims that tribal treaty rights are "CWA-protected" and are incorporated "pursuant to [EPA]'s CWA authority, for consideration in the [water quality standards] 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 in other contexts." *Id.* at 35,725 (emphasis added).

This is precisely the kind of agency self-aggrandizement that courts have warned against. "Were courts to *presume* a delegation of power absent an express *withholding* of such power, agencies would enjoy virtually limitless hegemony." *First Premier Bank v. U.S. Consumer Fin. Prot. Bureau*, 819 F. Supp. 2d 906, 919 (D.S.D. 2011) (quoting *Oil, Chem. & Atomic Workers Int'l Union, AFL-CIO v. NLRB*, 46 F.3d 82, 90 (D.C. Cir. 1995)). That was true even before the Court forbade "presuming that statutory ambiguities are implicit delegations to agencies." *Loper Bright*, 144 S. Ct. at 2247.

If EPA can determine that tribal treaties eliminate States' discretion under the CWA and require unreasonably more stringent water quality standards, 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 concepts 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 detached from its environmental responsibilities.

At the most basic level, EPA's use of treaty-reserved rights exceeds the authority conferred by Congress. It distorts the CWA's policy of cooperative federalism while imposing 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 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 "rule clearly exceeds the EPA's statutory authority" under the CWA. *Iowa League of Cities*, 711 F.3d at 877, *enforced* 2021 WL 6102534 (8th Cir. Dec. 22, 2021). *Amici* urge this Court to vacate it in its entirety.

CONCLUSION

The Court should grant Plaintiffs' motion for summary judgment.

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Respectfully submitted,

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