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October 6, 2015

Water Docket
Environmental Protection Agency
Mail Code 2822T
1200 Pennsylvania Ave. N.W.
Washington, DC 20460

Via Electronic Mail

Subject: Docket ID No. EPA–HQ–OW014–0461
"Revised Interpretation of Clean Water Act Tribal Provision"

To whom it may concern:

On behalf of Secretary Stepp and the State of Wisconsin I write to provide the Environmental Protection Agency certain comments on its proposed rule entitled "Revised Interpretation of Clean Water Act Tribal Provision," published on August 7, 2015 at 80 Fed. Reg. 47430 *et seq*. As we have stated before, Wisconsin continues to respect and recognize tribal sovereignty. Wisconsin also shares the tribes' interest in protecting environmental quality but has serious concerns about and objections to the manner in which EPA would implement the Clean Water Act's tribal treatment-in-the-manner-of-a-state (TAS) provision. In the interest of brevity I will not repeat the comments made in our September 12, 2014 letter[1] to the Regional Administrator regarding EPA's initial "Potential Reinterpretation of a Clean Water Act Provision Regarding Tribal Eligibility to Administer Regulatory Programs." Instead, we ask that these comments supplement those previously submitted. In addition to those concerns Wisconsin objects to the recently proposed "interpretive rule" for two reasons. First, the legal authorities EPA cites in the Federal Register announcement provide little, if any, support for the proposed "reinterpretation." And second, Wisconsin believes that EPA's use of an informal "interpretive rule making" processes, rather than formal "notice and comment" legislative type rule making, would be unlawful. I'll elaborate on both points below.

The Case Law EPA Relies Upon Does Not Support the Proposed Reinterpretation.

The Rule EPA would revise by the proposed "reinterpretation" was formally promulgated almost 24 years ago,[2] four years after Congress enacted the Clean Water Act "treatment-in-

[1] Wisconsin notes that the September 12, 2014 letter, but not the enclosure submitted with it, has been included in the EPA docket for this matter as item number EPA-HQ-OW-2014-0461-0012. For the sake of completeness, a copy of that initial enclosure ("State of Wisconsin's Comments Regarding the Forest County Potawatomi Community's Application For Treatment as a State Authority Under Sections 303(c), 401, and 518(e) of the Clean Water Act, 33 U.S.C. §§ 1313, 1341, and 1377") is submitted with these comments.

[2] *See* 56 Fed. Reg. 64895 (December 12, 1991).

the-manner-as-a-state" ("TAS") statute, 33 US.C. § 1377(e). EPA then extensively considered whether, but declined to find that, Congress had delegated water quality regulatory authority to the tribes:

> The Agency does not believe, however, that it would be appropriate to recognize Tribal authority and approve treatment as a State requests in the absence of verifying documentation. In addition, in light of the legislative history of section 518, the question of whether section 518(e) is an explicit delegation of authority over non-Indians is not resolved.

56 Federal Register 64876, 64881 (December 12, 1991). For that reason, the 1991 rule required tribes to demonstrate their "authority to regulate water quality." 40 C.F.R § 131.8(b)(3)(ii). Now, decades later, EPA views the intent of Congress when it enacted the TAS provision in 1987 as supporting the opposite conclusion: "EPA proposes to conclude definitively that section 518 includes an express delegation of authority by Congress," pointing to "further ... judicial guidance" it has received. 80 Fed. Reg. at 47431.

The judicial guidance upon which EPA relies consists primarily of three court decisions:

> Importantly, members of the three courts that have considered the issue [of express delegation] have favorably viewed such an interpretation: The U.S. Supreme Court in *Brendale,* the federal district court in *Montana* v. *EPA,* and the D.C. Circuit in *APS.*

80 Fed. Reg. at 47435-436 (referring to the court decisions in *Brendale* v. *Confederated Tribes and Bands of the Yakima Nation,* 492 U.S. 408, 428 (1989) ("*Brendale*"); *Montana* v. *EPA,* 941 F. Supp. 945 (D. Mont. 1996), *aff'd,* 137 F.3d 1135 (9th Cir.), *cert. denied,* 525 U.S. 921 (1998) ("*Montana TAS*") and *Arizona Public Service Co.* v. *EPA,* 211 F.3d 1280 (D.C. Cir. 2000) *cert. denied,* 532 U.S. 970 (2001) ("*APS*"). Wisconsin contends these cases provide little if any support for EPA's proposed reversal of its 1991 conclusion that Congress had not expressly delegated regulatory authority to the tribes in the Clean Water Act TAS provision.

The United States Supreme Court decision in the *Brendale* case predated the existing TAS rule by several years and was extensively addressed in the course of the 1991 rulemaking.

> EPA agrees with those commenters who stated that Justice White's opinion in Brendale can be read to suggest a contrary conclusion, and to indicate that at least four justices of the Supreme Court would apparently interpret section 518(e) as expressly delegating to Tribes the authority to regulate water quality on reservations, including those affected by activities on non-Indian fee lands. Nonetheless, EPA recognizes that *Justice White's opinion was not a majority opinion of the Court* and *was not necessary to the decision* even of the plurality that joined it, since *the issue was not before the Court in Brendale.* Nor is there any discussion in the opinion about the somewhat confusing legislative history of section 518. *The passing reference in that opinion* does not finally resolve the question of whether section 518(e) is a delegation of authority, and, as discussed above,

> EPA does not believe that it can make an absolute determination that Congress in fact expressed a clear intent on the issue.

56 Fed. Reg. at 64880 (emphasis added). In other words, in 1991 EPA correctly viewed Justice White's comments as "dicta,"[3] a category of judicial pronouncements long regarded as having limited value:

> It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.

Cohens v. Virginia 19 U.S. (6 Wheat.) 264, 399-400 (1821) (footnotes omitted). Wisconsin believes EPA in 1991 correctly assessed the dicta in *Brendale* decision when it concluded that the decision does not demonstrate that "Congress in fact expressed a clear intent on the issue" of delegation.

EPA points to the 1996 *Montana TAS* case as a second "development," but expressly acknowledges that the district court's discussion of whether Congress delegated Clean Water Act authority to the tribes is also dicta. 80 Fed. Reg. at 47434. Moreover, the district court's decision is in turn clearly based on Justice White's dicta in *Brendale*:

> In fact, in the *Brendale* decision, Justice White, writing for the Court, cited this very statute as an example of an explicit delegation of Congressional authority to Indian tribes.

941 F. Supp.at 951. Wisconsin submits that neither dicta nor dicta about another court's dicta constitutes sufficient reason for reversing EPA's 1991 determination that it could not conclude Congress had expressly delegated Clean Water Act authority to the tribes.

EPA points to the 2000 *APS* decision, a Clean Air Act case, as the third source of judicial guidance on the question of Congressional delegation. EPA asserts that the *APS* court:

> ... acknowledged the similarities between the CAA and CWA TAS provisions, as well as EPA's different approach under the CWA. Id. at 1291–92. ... and observed favorably the district court's statements in *Montana v. EPA* that section 518 plainly indicates congressional intent to delegate authority to Indian tribes.

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[3] In the law "dicta" is a "statement[] in a judicial opinion that [is] not necessary to support the decision reached by the court .... usually contrasted with a holding, a term used to refer to a rule or principle that decides the case." *Dicta and Article III*, 142 U. Pa. L. Rev. 1997, June, 1994, Michael C. Dorf.

80 Fed. Reg. at 47435. Any discussion of substantive Clean Water Act issues in a Clean Air Act case like *APS*, however, is inherently dicta, and the fact that the *APS* court may have "favorably observed" the dicta of other courts does not elevate its observation to the status of a legal holding which might support the proposed reinterpretation. As to EPA's suggestion that the *APS* court "acknowledged the similarities between the CAA and CWA TAS provisions," Wisconsin would point out that the court also noted differences between the two Acts:

> The situation here is quite different from what EPA found with respect to the Clean Water Act. Although the disputed language in the Clean Air Act and the Clean Water Act is somewhat similar, it is far from identical.

211 F. 3d at 1291-1292 (citing the Clean Air Act's clearer distinction about areas to be regulated by tribes and a legislative history that "plainly" supports Congressional delegation of authority to the tribes, as opposed to the Clean Water Act's "ambiguous and inconclusive" legislative history on that subject).

It is Wisconsin's view that none of the three cases EPA cites as "developments providing judicial guidance" for the proposed reinterpretation provide anything more than the weakest support for EPA's position. All three court decisions involve only dicta on the subject of Clean Water Act delegation, and *Brendale* - which provides the foundation for the dicta in the other two cases - predates the EPA's 1991 rulemaking in which EPA extensively analyzed it and the entire legislative history of the TAS provision and found insufficient evidence of express congressional intent to delegate authority to the Tribes. To date, no court has ruled on the question of whether Congress intended to delegate authority to the tribes when it enacted the Clean Water Act TAs provision and despite the passage of almost 30 years since its enactment and decades of experience in its administration it appears no one has sought and obtained clarification on the issue from Congress. In Wisconsin's view EPA's construct of judicial guidance leans upon a reed too slender to support the proposed action.

On the other hand, certain rulings the United States Supreme Court *has* issued since the TAS statute was enacted in 1987 suggest Congress was unlikely to have divested states of their sovereignty and regulatory authority over waters within their borders without very expressly saying so. Consider, for example, the Supreme Court's recent description of its prior holdings on this subject in *Tarrant Regional Water Dist. v. Herrmann*, 133 S.Ct. 2120, 2132 (2013) , citing authorities dating back nearly two hundred years:

> We have long understood that as sovereign entities in our federal system, the States possess an "absolute right to all their navigable waters and the soils under them for their own common use." *Martin v. Lessee of Waddell,* 16 Pet. 367, 410, 10 L.Ed. 997 (1842). Drawing on this principle, we have held that ownership of submerged lands, and the accompanying power to control navigation, fishing, and other public uses of water, "is an essential attribute of sovereignty," *United States v. Alaska,* 521 U.S. 1, 5, 117 S.Ct. 1888, 138 L.Ed.2d 231 (1997).

In recent decades the Supreme Court has repeatedly made clear in its holdings that tribes have very limited authority to regulate activities on reservation lands owned by non-members. *See, e.g., Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316, 329 (2008).

> Moreover, when the tribe or tribal members convey a parcel of fee land "*to non-Indians,* [the tribe] loses any former right of absolute and exclusive use and occupation of the conveyed lands." *South Dakota v. Bourland,* 508 U.S. 679, 689, 113 S.Ct. 2309, 124 L.Ed.2d 606 (1993) (emphasis added). This necessarily entails "the loss of regulatory jurisdiction over the use of the land by others." *Ibid.* As a general rule, then, "the tribe has no authority itself, by way of tribal ordinance or actions in the tribal courts, to regulate the use of fee land." *Brendale v. Confederated Tribes and Bands of Yakima Nation,* 492 U.S. 408, 430, 109 S.Ct. 2994, 106 L.Ed.2d 343 (1989) (opinion of White, J.).

As two federal courts have held, when Wisconsin attained statehood in 1848 it obtained title to the navigable waters in this state and their beds through operation of the equal footing doctrine, including waters and underlying beds within the boundaries of Indian reservations.[4] In *U.S. v Bouchard*, 464 F.Supp. 1316, 1338-1340 (W.D.Wis. 1978), rev'd. on other grounds, 700 F.2d 341(7th Cir. 1983), regarding waters in the Bad River reservation, the district court held that "the bed and waters of the Kagagon Slough were not reserved exclusively for the Chippewa by the 1842 treaty, and title to the bed of that navigable waterway passed to Wisconsin upon admission as a state in 1848." Similarly, regarding waters within the Lac Courte Oreilles reservation, the 7th Circuit Court of Appeals has held that, in light of Wisconsin's admission into the union on an equal footing with the original states, "we are loath to adopt an interpretation of the 1854 treaty that would divest the State of th[e] power" to "regulate to regulate fishing and hunting in navigable lakes" within a reservation. *State of Wis. v. Baker*, 698 F.2d 1323, 1334 (7th Cir.), cert. denied, 463 U.S. 1207 (1983). *See also Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 283 (1997). Along with that title flowed the sovereign right to control their use. Ownership of the beds of navigable waters is "tied in a unique way to sovereignty," *ibid.*, at 286 (1997), a point reinforced in other Supreme Court decisions. *See United States v. State of Oregon*, 295 U.S. 1, 14 (1935); *Borax Consolidated v. City of Los Angeles*, 296 U.S. 10, 22 (1935); *Withers v. Buckley, et al.*, 61 U.S. (20 How.) 84, 92-93 (1858); *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 224 (1844). That Wisconsin owns the beds of navigable waters adjacent to or within the exterior borders of its post-statehood Indian reservations has never been questioned by the courts. *See, e.g., Wisconsin v. E.P.A.*, 266 F.3d 741, 747 (7th Cir. 2001), cert. denied 535 U.S. 1121 (2002) ("We will assume for the purposes of this appeal that, pursuant to the Equal Footing Doctrine, the state does indeed have title to the lake beds within the reservation."). There is no apparent reason to believe Congress was unaware of such holdings either before or after the enactment of the Clean Water Act TAS provision. Wisconsin submits that if Congress had

[4] The state's enabling act, Act of August 6, 1846, 9 Stat. 56, authorized admission "into the Union on an equal footing with the original States in all respects whatsoever," and, consistent with the Northwest Ordinance of 1787, provided that all waters within the new state would be "forever free, as well to the inhabitants of the said State as to the citizens of the United States." *Ibid.* § 3, 9 Stat. 57.

intended to divest states of their regulatory authority over waters within their borders it would have made that intent plain, but it didn't.[5]

EPA Cannot Lawfully Use Informal "Interpretive Rulemaking" To Amend 40 C.F.R. 131.8(b)(3)

The regulation EPA proposes to "reinterpret," 40 C.F.R. 131.8(b)(3), was adopted under an express mandate of Congress:

> Not later than 18 months after February 4, 1987, the Administrator shall, in consultation with Indian tribes, promulgate final regulations which specify how Indian tribes shall be treated as States for purposes of this chapter.

33 U.S.C. § 1377(e). For that reason, and because it was adopted using formal notice and comment rulemaking, 40 C.F.R. 131.8(b)(3) is a "legislative" rule, not an "interpretive" rule. *See, e.g., American Federation of Government Employees, AFL-CIO v. United States*, 622 F.Supp. 1109, 116 (N.D. Ga. 1984) ("Agency rules may be either legislative or interpretative. The former are rules promulgated under express congressional authority, which fill gaps in a complicated regulatory scheme."). See also *Berlex Laboratories, Inc. v. Food and Drug Admin.*, 942 F.Supp. 19, 26 (D. D.C. 1996):

> In this circuit, a rule is legislative, rather than interpretive, if any one of the following four questions is answered in the affirmative:
>
> > (1) whether in the absence of the rule there would not be an adequate legislative basis for ... agency action to confer benefits or ensure the performance of duties,
> > (2) whether the agency has published the rule in the Code of Federal Regulations,
> > (3) whether the agency has explicitly invoked its general legislative authority, or
> > (4) whether the rule effectively amends a prior legislative rule.

Because it was promulgated under express Congressional authority, because EPA invoked its legislative authority and published the rule in the Federal Register, and because the rule established the bases for tribal entitlement to TAS status under the Clean Water Act, 40 C.F.R. 131.8(b)(3) is a legislative rule.

As to the procedures applicable to the two types of rulemaking, the Supreme Court very recently held that:

> ... the [court below] correctly read §1 of the APA to mandate that agencies use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance. See *FCC* v. *Fox Television Stations, Inc.*, 556 U. S. 502, 515 (2009) (the APA

[5] For that matter, if Congress had really intended to divest states like Wisconsin of their regulatory authority over such waters by the adoption of the TAS provision it would not have left 33 U.S.C. § 1370 in effect: "Except as expressly provided in this chapter, nothing in this chapter shall . . . be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters . . . of such States."

> "make[s] no distinction . . . between initial agency action and subsequent agency action undoing or revising that action"). Where the court went wrong was in failing to apply that accurate understanding of §1 to the exemption for interpretive rules contained in §4: Because an agency is not required to use notice-and-comment procedures to issue an initial interpretive rule, it is also not required to use those procedures when it amends or repeals that interpretive rule.

Perez v. Mortgage Bankers Assn., Case No. 13–1041 (U.S. March 9, 2015), Slip Op. at 8, *available at* http://www.supremecourt.gov/opinions/14pdf/13-1041_0861.pdf. As this decision and the fourth *Berlex* factor cited above make clear, the amendment or repeal of a *legislative* rule like 40 C.F.R. 131.8(b)(3) can be accomplished lawfully only by the use of formal notice-and-comment "legislative" type rule making.

Unlike the *Perez* case, what the EPA proposes to do here is not the amendment of a prior *interpretation* of a rule, it is effectively the amendment or repeal of a formally adopted legislative regulation. As presently worded, 40 C.F.R. 131.8(b)(3)(ii) requires tribes applying for TAS status to provide EPA with:

> **(3)** A descriptive statement of the Indian Tribe's authority to regulate water quality. The statement should include: …
>
> > **(ii)** A statement by the Tribe's legal counsel (or equivalent official) which describes the basis for the Tribes assertion of authority and which may include a copy of documents such as Tribal constitutions, by-laws, charters, executive orders, codes, ordinances, and/or resolutions which support the Tribe's assertion of authority; and

The rule also provides states the opportunity, under 40 C.F.R. 131.8(c)(3), to submit comments to the EPA "limited to the Tribe's assertion of authority." But under the proposed reinterpretation, the requirement for tribes to make the 40 C.F.R. 131.8(b)(3)(ii) statement will be eliminated[6] and the opportunity for states to object under 40 C.F.R. 131.8(c)(3) to such assertions of tribal authority effectively will be rendered moot – there will be no tribal assertion of "authority to regulate water quality" and anything the state may say on that subject would become immaterial in EPA's assessment of TAS applications.

Wisconsin believes EPA was correct in 1991 when it concluded:

> … if Congress had intended to make a change as important as an expansion of Indian authority to regulate nonmembers, it probably would have done so through statutory language and discussed the change in the committee reports. Given that the legislative history ultimately is ambiguous and inconclusive, EPA believes that it should not find that the statute expands or limits the scope of Tribal authority beyond that inherent in the Tribe absent an express indication of Congressional intent to do so.

[6] EPA states: "The effect of this proposal would be to relieve tribes of the need to demonstrate their inherent authority when they apply for TAS to administer CWA regulatory programs." 80 Fed. Reg. at 47347

56 FR 64876-01 at 64880. Wisconsin urges EPA to continue to require TAS applicants to demonstrate authority to regulate water quality.[7] If EPA decides to repeal that requirement, however, it should do so either through notice-and-comment legislative rule making or obtain clarification on the matter from Congress.

I thank you for your consideration of these comments.

Sincerely,

Tim Andryk

Timothy Andryk
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Wisconsin Department of Natural Resources

Enclosures

[7] Wisconsin continues to subscribe to its longstanding position that the "Montana Second Exception" – a rule developed by the Supreme Court to determine tribal regulatory authority over nonmembers on fee lands rather than tribal authority over navigable waters within reservations – and which EPA applies in its interpretation of 40 C.F.R. 131.8(b)(3), is neither correct nor appropriate for that purpose. *See, e.g.*, Wisconsin's petition for certiorari review from the decision of the 7th Circuit court of Appeals in *Wisconsin v. EPA*, at pages 19-22, critiquing EPA's current interpretive rule. A copy of that petition is submitted with these comments for ease of reference.