



August 1, 2023

Mr. James Ray  
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U.S. Environmental Protection Agency  
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*Submitted via email to: [ray.james@epa.gov](mailto:ray.james@epa.gov) and [www.regulations.gov](http://www.regulations.gov)*

**RE: National Tribal Water Council's Comments on EPA's Proposed Rule on Federal Baseline Water Quality Standards for Indian Reservations, Docket ID No. EPA-HQ-OW-2016-0405**

Dear Mr. Ray:

On behalf of the National Tribal Water Council (NTWC), I am pleased to submit the following comments on the U.S. Environmental Protection Agency's (EPA's) proposed rule regarding Federal Baseline Water Quality Standards (WQS) for Indian Reservations, as identified above.

### **Introduction**

Tribes nationwide have waited over two decades for EPA to promulgate WQS for waterbodies on Indian reservations that do not have Clean Water Act (CWA) standards. In 2001, Administrator Carol Browner determined that federal WQS are necessary for such waters in order to protect the health and well-being of tribal members and the environment. The proposed rule, signed by Administrator Michael Regan on April 27, 2023, 88 Fed. Reg. 29496 ("Proposed Rule"), takes the agency one-step closer to fulfilling its duty.

NTWC recognizes the importance of ensuring CWA protections for all tribal waters and fully supports federal baseline WQS for Indian reservations without such protections as the most effective way to do so and to ensure nationwide water quality protection at the same time. Without federal baseline WQS, the protection and improvement of water quality in Indian country is limited. NTWC believes that the Proposed Rule is consistent with EPA's 1984 Indian Policy, which sets forth EPA's direct implementation practice. The proposed federal baseline WQS rule is separate from but

complementary to the Tribal Reserved Rights rule, which protects tribal treaty and other reserved rights.

Please accept the following comments on the Proposed Rule.

## **I. General Information**

EPA explains: “Because EPA-approved state WQS generally do not apply in Indian country, in the absence of Federal WQS or EPA-approved Tribes’ WQS, no CWA-effective WQS apply in the many Indian country waters where Tribes have not yet obtained TAS [treatment in a similar manner as a state] and established EPA-approved WQS.” 88 Fed. Reg. at 29498. More than 300 federally recognized tribes have formal or informal reservations but only 50 of these tribes have EPA-approved WQS. *See id.* This leaves some 76,000 miles of rivers and streams and 1.9M acres of lakes, reservoirs, and other surface waters within Indian country without CWA-effective WQS, *id.* at 29499, or, in the case of tribes that have water quality standards that have not yet been approved, without protection from upstream discharges.

NTWC agrees with EPA’s assessment that obtaining TAS authority and adopting WQS is a time- and resource-intensive process. Therefore, NTWC supports federal baseline WQS as a temporary gap-filler to ensure reservation waters are federally protected until such time as tribes obtain TAS status and adopt CWA-approved WQS for their respective waters. NTWC believes that the proposed federal baseline WQS would benefit tribal governments in a variety of ways beyond straight protection of water quality. These include promoting tribal participation in EPA’s administration of the federal baseline WQS, protecting aquatic and aquatic-dependent resources, and providing a basis for determining water quality impairments.

## **II. Applicability of the Proposed Federal Baseline WQS**

The federal baseline WQS would apply to all waters of the United States in Indian country except Indian reservation waters for which EPA has promulgated other federal WQS, has determined that a state has jurisdiction, or has authorized a tribe with TAS to adopt WQS, and EPA has approved the state’s or tribe’s WQS. 88 Fed. Reg. at 29500. As proposed, however, federal baseline WQS would not apply to Indian country waters in off-reservation allotments or dependent Indian communities due to the claimed difficulty of identifying and locating these areas. *Id.* at 29500-01. NTWC’s position is that the federal baseline WQS should apply in these areas also because they meet the statutory definition of Indian country, 18 U.S.C. § 1151, and therefore state standards are unlikely to apply and so these waters would be unprotected. When Indian country status is unclear, it can be addressed on a case-by-case basis. It is counterproductive to limit the applicability of the Proposed Rule from the beginning; indeed, this is the very reason why the Proposed Rule is structured on an opt-out rather than an opt-in basis.

Administrator Browner’s 2001 determination excluded waters where the tribe or EPA “has or intends to develop a plan” for establishing CWA-approvable WQS within a reasonable time. 88 Fed. Reg. at 29501. Going one step further, the Proposed Rule offers tribes an option to seek exclusion from coverage without committing to a plan. *Id.* NTWC supports this change: we believe that fewer tribes will oppose promulgation of the federal baseline WQS if they have the opportunity to opt-out by

request to their Regional Administrator and, second, that EPA will be able to focus its efforts on reservation waters where tribes are positioned to work with the agency to implement the baseline WQS.

The Proposed Rule describes an approach and a timeframe for a tribe seeking to opt out of the federal baseline WQS: “[A] tribe should communicate with the Regional Administrator, explaining the basis of the Tribes’ request to be excluded from coverage at this time and providing any supporting information, including, where applicable, plans for developing WQS and the associated timeline for doing so.” *Id.* at 29501-02. NTWC recommends that a tribe’s opt-out request to the Regional Administrator also should be granted when it is based on fundamental statements for which detailed supporting information is not required, including a statement that the tribe views application of the federal baseline WQS as counter to its sovereign authority or as not aligned with its current priorities. EPA also should provide guidance in the final rule as to the types of statements that will qualify so that there is consistency among Regional Administrators in making exclusion determinations. If one Regional Administrator accepts a tribe’s explanation for its opt-out request, all Regional Administrators should accept this or similar explanations. The NTWC suggests that Regional Administrators discuss exclusion determinations during their quarterly coordination meetings in order to ensure consistent determinations across the regions.

EPA proposes a limited timeframe for a tribe to request an exclusion from coverage under the federal baseline WQS: between publication of the Proposed Rule in the Federal Register (May 5, 2023) and 90 days after publication of the final rule. *Id.* at 29502. This timeframe is too short for a tribe to decide on, develop its request, and consult with the Regional Administrator, especially as tribes are unlikely to consider their position until the final rule is published and the provisions of the rule are certain. NTWC requests that EPA extend this timeframe to 180 days after publication of the final rule to give tribal decision makers time to engage with their professional and legal staff to understand their options for exclusion and to assemble the information needed by the Regional Administrator. The effective date of the final rule could still occur 90 days after publication, but a tribe could opt out for up to 90 days after the effective date and have the federal baseline WQS lifted at that point. This would be the only instance when a tribe could opt out after the rule becomes effective. As for tribes that have opted out and subsequently acquire additional lands after the opt-out deadline has passed, those lands should automatically be excluded from application of the federal WQS unless the tribe requests or binding documents provide otherwise.

### **III. Components of the Proposed Federal Baseline WQS**

#### *A. Proposed Baseline Designated Uses*

NTWC supports EPA’s proposed promulgation of a designated use for primary contact recreation to protect recreational users of surface waters. *See* 88 Fed. Reg. at 29503. NTWC also supports EPA’s proposal to promulgate a cultural and traditional designated use, based on its interpretation of CWA § 101(a)(2). The proposed cultural and traditional designated use explicitly protects the cultural and traditional uses of Indian reservation waters. NTWC supports the addition of this designated use because there are certain time-honored traditions and tribal cultural practices – such as the use of sacred plants for food, art, or utility – that may not be covered by the aquatic life or the primary contact recreation designated uses. As EPA itself recognizes: “Tribal treaty or other reserved

rights to fish, hunt, and/or gather on Indian reservations could generally be protected by such cultural and traditional designated uses, to the extent they are not protected by an aquatic life use or primary contact recreation use.” *Id.* EPA does not provide more detail about these uses because “they can include a variety of uses specific to the ceremonies and traditions of each Tribe, and each use may require different levels of protection.” 88 Fed. Reg. at 29503. NTWC agrees with this approach.

EPA also requests input on whether to promulgate uses protected under CWA § 303(c)(2) but not under § 101(a)(2), including a public water supply use for all fresh waters covered by the Proposed Rule, or whether an individual tribe should be allowed to request this designation for a specific water body or water bodies on its reservation. *See id.* at 29502-03. Although NTWC recognizes that not all reservation waters are able to support public water supply uses, promulgating a public water supply designated use for all reservation fresh waters is nevertheless a high priority of tribes and is critical to protect their drinking water sources. EPA asks similar questions regarding agricultural and industrial designated uses. NTWC supports the inclusion of all these designated uses, especially because the proposal would allow a tribe to request that any of these designations be removed from specific waters for which it is not appropriate, due to tribe-specific or site-specific factors. NTWC believes this provision affords sufficient flexibility to allow inclusion of a broad range of designated uses. Last, NTWC supports EPA’s proposal to develop a process to revise or add baseline designated uses or establish WQS variances for specific waterbodies. *See id.* at 29504.

#### *B. Proposed Baseline Water Quality Criteria*

To protect the baseline designated uses, EPA proposes to promulgate narrative criteria with binding procedures to translate the narrative criteria into numeric values. This approach will provide for limited tailoring to account as best as possible for site-specific conditions and water attributes of importance to individual tribes, such as fish consumption rates. *See id.* NTWC supports the proposed narrative water quality criteria, *see* 88 Fed. Reg. at 29505. Because tribes are disproportionately vulnerable to the impacts of climate change, EPA must develop adaptation strategies in partnership with tribes and with consideration of Indigenous Knowledge (also referred to as traditional ecological knowledge, or TEK). NTWC strongly believes that TEK can assist in supporting a regulatory basis for addressing the resiliency of tribal waters in the face of climate change and should be incorporated into EPA’s translation of narrative into numeric criteria.

The Proposed Rule provides five options for a Regional Administrator to translate narrative criteria, including those incorporating TEK, into the numeric values that will serve as the basis of CWA section 402 and 404 permits, section 303(d) lists and total maximum daily loads, and section 401 certifications. *Id.* at 29506–08. These translation procedures, if promulgated, will allow the Regional Administrator to utilize TEK when tribal information and data more accurately reflect site-specific conditions than the national criteria and are consistent with statutory and regulatory requirements, such as a fish consumption rate protective of subsistence fishing rights. *Id.* at 29507. These procedures also are a crucial place for implementation of the 2022 *Guidance for Federal Departments and Agencies on Indigenous Knowledge* issued by the White House Office on Science and Technology Policy and the Council on Environmental Quality. NTWC approves of EPA’s use in this context of information regarding tribal treaty or other reserved rights to aquatic or aquatic-dependent resources.

The EPA regional office would rely on the binding translation procedures to incorporate the federal baseline WQS into the Section 402 National Pollutant Discharge Elimination System (NPDES) permit conditions for discharges both outside and inside reservation boundaries to determine if they may cause or contribute to an exceedance of WQS. Where there are significant differences between upstream state WQS and federal baseline WQS in the context of a shared waterbody, EPA proposes to use the procedural steps in 40 CFR § 131.7 even though this regulation does not specifically apply to disputes between state and federal WQS. *See* 88 Fed. Reg. at 29507. According to the Proposed Rule: “EPA could utilize procedural steps similar to those laid out in that section where appropriate to work with the relevant parties in a neutral fashion in an effort to resolve the issues involved.” *Id.* at 29508. NTWC has no issues with extending the § 131.7 dispute resolution process to this situation but recommends that EPA include specific language that provides for affected tribes’ involvement in the dispute resolution process.

### *C. Proposed Baseline Antidegradation Policy and Implementation*

NTWC supports EPA’s proposed antidegradation policy for Indian reservation waters consistent with the antidegradation regulation at 40 CFR § 131.12(a). This proposal would establish three levels of protection: protection for existing uses, protection for high quality waters, and protection for outstanding national resource waters (ONRWs), known as Tier 3 protection. *Id.* at 29508-10. With regard to the Tier 3 level of protection, NTWC agrees with EPA’s proposal to include the term “cultural significance” as part of the new regulations, since it is not included within 40 CFR § 131.12(a)(3). In this way, tribes will be able to identify and protect highly valued waterbodies on their reservations based on the cultural significance they ascribe to these waters. NTWC also finds it important that the affected tribe agree to a designation of ONRW, as EPA proposes.

### *D. Mixing Zones*

Under the proposal, the Regional Administrator can consider establishing mixing zones in permitting actions on a case-by-case basis. The NTWC recommends that EPA follow its mixing zones guidance, which emphasizes a holistic approach to mixing zone regulation that considers location, size, shape, outfall design, and zone quality as part of a permit action. *See* 88 Fed. Reg. at 29510. The NTWC agrees that mixing zones for toxic pollutants should be prohibited because of their potential to persist and bioaccumulate within the aquatic environment. The NTWC also recommends limiting the size of mixing zones and prohibiting them from extending across the entire water body, which would enable aquatic organisms, such as migrating salmon, to avoid contact with the pollutant dilution zone. Finally, the NTWC recommends that EPA deny a request by a permittee to authorize a mixing zone in a tribal water unless the tribe agrees to such action. EPA must first provide the affected tribal government with necessary information and resources to understand the issuance of a mixing zone as part of the permit action.

## **IV. Proposed Procedures to Revise or Add a Designated Use or Establish a WQS Variance**

NTWC supports EPA’s proposed administrative procedure for revising the federal baseline WQS for specific Indian reservation waters, where appropriate, without launching a new rulemaking. *See* 88 Fed. Reg. at 29512-14. NTWC agrees that information and data may become available after the

Proposed Rule becomes final that could make EPA or a tribe want to revise or add a designated use for specific tribal waters or adopt a variance from the baseline WQS. NTWC understands that, in these circumstances, the Regional Administrator would follow the public participation steps consistent with EPA regulations, including a public hearing, accessible documentation, and opportunity for public comment.

## **V. Implementation of Baseline WQS in CWA Programs**

### *A. CWA Section 402 NPDES Program*

EPA is generally the authority for issuing NPDES permits in Indian country unless and until EPA authorizes a tribe to administer the NPDES program. (Currently, no tribes are authorized to do so.) Thus, NTWC supports “public participation when EPA issues NPDES permits for discharges to Indian reservation waters” and stresses the importance for EPA to “consult with the appropriate Tribe when developing and issuing NPDES permits for discharges to Indian reservation waters to ensure that Tribal concerns and issues are considered.” 88 Fed. Reg. at 29514. Moreover, when EPA is not the permit writer, NTWC agrees that EPA should “coordinate with Tribes to ensure that Tribal concerns and issues are considered when EPA is reviewing NPDES permits issued by authorized states that may affect Indian reservation waters covered by the baseline WQS.” *Id.* at 29515. Here too, tribal participation is crucial to successful implementation of the federal baseline WQS.

### *B. CWA Section 404 Permits for Discharges of Dredge or Fill Material*

CWA section 404 permits for dredge or fill activities must include permit conditions to ensure discharges from those activities meet certain criteria, including applicable WQS. In the current rulemaking, EPA proposes to clarify that these permits need to ensure compliance with the federal baseline WQS for Indian reservation waters as well as with any state WQS. *Id.* at 29515. This proposal would apply to section 404 permits that are issued by the Corps of Engineers or that are issued by states. *See id.* NTWC supports EPA’s intent to work closely with the appropriate tribe, along with adjacent states and tribes, in situations where a discharge could cause or contribute to a violation of the federal baseline WQS.

### *C. Section 401 Certifications*

Under CWA section 401(a)(2), the Administrator provides notice to states and authorized tribes if the Administrator determines that a discharge originating in another jurisdiction may affect their water quality. The federal baseline WQS, when finalized, will feed into this determination. *Id.* at 29516. NTWC seeks clarification regarding EPA’s responsibility to provide notice to authorized tribes of such discharges, upon which notification they may object to the issuance of the license or permit. We recommend that the agency refer to its Policy on Consultation and Coordination with Indian Tribes (pp. 5-6), that explains notification can occur in several ways depending on the activity and the number of tribes potentially affected as well as tribal preferences regarding the specific mode of contact. Above all, notification should include sufficient information for tribal officials to make an informed decision and occur early enough in the process to allow for meaningful input by the tribe(s).

## Conclusion

On behalf of NTWC, I thank you for the opportunity to comment on the Proposed Rule establishing federal baseline WQS for Indian reservation waters that lack CWA protections.

Ultimately, the Proposed Rule, if finalized, will go a long way toward meeting the goals of the CWA in protecting all waters of the United States while at the same time protecting unique tribal practices and resources and implementing the federal trust responsibility to tribes. Most importantly, the federal baseline WQS must be complied with. EPA must ensure compliance as part of permit issuance for a potential pollutant discharge regardless of origination, especially when the discharge could have serious effects on the health and welfare of a downstream reservation.

We believe that our comments and recommendations will assist EPA in making better-informed decisions when finalizing this rule.

Should you or your staff have questions or comments regarding our letter, please contact me at [Kenpnorton@gmail.com](mailto:Kenpnorton@gmail.com) or Elaine Wilson, NTWC Project Manager, at [Elaine.Wilson@nau.edu](mailto:Elaine.Wilson@nau.edu).

Sincerely,



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National Tribal Water Council

Cc: Karen Gude, US EPA Office of Water



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