



August 3rd, 2023

Sara Hisel McCoy
Director, Standards and Health Protection Division
EPA Office of Water

Via electronic mail and Regulations.gov

Re: ACWA Comments in Response to Proposed Federal Baseline WQS for Indian Reservations

Dear Director McCoy,

The Association of Clean Water Administrators (“ACWA”) is the independent, nonpartisan, national organization of state, interstate, and territorial water programs (“states”) that, on a daily basis, implement the water quality programs of the Clean Water Act (“CWA”), including the development and implementation of Water Quality Standards (“WQS”). Under the tenets of cooperative federalism, states, authorized Tribes, and EPA (“the parties”) are co-regulators that jointly implement the CWA. States appreciate the opportunity to comment on the proposed Federal Baseline Water Quality Standards: Tribal Reservations (“the rule”) as well as EPA’s engagement with states during the public comment period, particularly given the rule’s implications to states. In this letter, ACWA first outlines states’¹ general perspectives and concerns, followed by rule text recommendations and implementation guidance recommendations. ACWA urges EPA to closely consider comments from individual states and Tribes. States directly affected by the rule may have further concerns than this letter expresses, while some states where the rule may not apply are interested in affects to their EPA Region’s CWA programs and, by extension, their own CWA programs.

ACWA concurs that WQS are the foundation of pollution controls enabled by the CWA and recognizes that efforts to date in assisting Tribes to obtain treatment as a state (TAS) authority have been insufficient. Waters lacking WQS pose risks to all immediate and downstream users, as well as attainment of downstream state WQS. In lieu of all Tribes receiving TAS authority or finalizing in-process Tribal WQS, the rule intends to provide an interim remedy to establish a baseline of protection (“Baseline WQS”), a concept that states support.

¹ Alaska, Idaho, and Oregon abstain from this comment letter.

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After initial work during 1999's "core WQS" effort and 2001 proposed rule, in 2015/2016, EPA met with 130 Tribes (just under a quarter of federally recognized Tribes), promulgated revisions to the TAS attainment process, and generated an Advanced Notice of Proposed Rulemaking ("ANPRM"). EPA did not finalize a rule but did lean on those consultations with Tribes and states' feedback to develop the 2023 proposed rule. EPA did not work sufficiently or meaningfully with states while developing the current draft of the rule. Some states report that their comments to the 2016 ANPRM remain unaddressed, and ACWA is concerned that the rule lacks a detailed implementation framework necessary to succeed. Some states are especially concerned that EPA is asserting authority over what constitutes Indian reservations² and trust lands inconsistent with the whole of the federal government, and that the rule disincentivizes the pursuit of TAS.

States are highly concerned that EPA Regions, already struggling to meet current CWA obligations, are tasked with implementing the bulk of the rule. It is unclear whether federal and state funding and workforce resources directed at robustly supporting Tribes to pursue TAS would be greater or lesser than implementing the rule. Some states have recommended the rule take a Region-by-Region approach, rather than waterbody-by-waterbody, to better manage implementation. After reviewing the rule and questioning EPA during two listening sessions during this comment period, it is still unclear to ACWA what constitutes applicable trust lands and the rule's exact applicability as well as how EPA will publicly inventory and update that information. The rule does not, as requested by Tribes and ACWA, describe all waters to which Baseline WQS would apply and not apply. States strongly respect confidentiality related to certain Tribal waters and uses, but also wish to discuss among the parties how states can identify applicable waters; where and how downstream Tribes and/or Baseline WQS need to be protected; and if proposed protections are under- or over-protective of uses, consistent with the WQS framework.

EPA's WQS responsibilities under the rule do not mirror states' WQS responsibilities. In regulation, states are required³ to hold public hearings when establishing and reviewing WQS, designating Outstanding Natural Resource Waters (ONRW), or translating narrative criteria. In the rule, EPA holds itself to public notices rather than hearings. In practice, EPA Regions and Headquarters increasingly require significant cross-program transparency and public engagement from states as they establish or consider numeric nutrient criteria, but the rule does not require EPA to meet that bar when developing numeric translators for baseline WQS. 40 CFR 131.22(c) describes that EPA, when promulgating WQS, shall be held to the "same policies, procedures, analyses, and public

² 40 CFR 131.8 describes TAS requirements to administer WQS "within the borders of Indian reservations."

³ Section 303(c)(2)(B) of the CWA requires states to adopt numeric criteria, where available, for all toxic pollutants listed pursuant to CWA section 307(a)(1) for which EPA has published S. 304(a) criteria. EPA proposed narrative criteria with "narrative translations"; 40 CFR 131.11(a)(2) requires, for toxic pollutants, that where a state adopts narrative criteria, the State must provide information identifying the method by which the State intends to regulate point discharges of the pollutants based on such narrative criteria. EPA does not propose a specific method in the rule, but proposes five options for deriving criteria; 40 CFR 131.6(b) requires States to submit methods used and analyses conducted to support WQS revisions. The rule does not provide methods for deriving numeric translators or the use and value demonstration for designating waters for traditional and cultural uses.

participation requirements established for States...” Nor does the rule’s Economic Analysis include costs associated with deriving and implementing numeric nutrient criteria, which ACWA anticipates will require significant work by EPA and timely coordination with the parties.

According to EPA’s summary of Tribal consultation for the rule⁴, “some tribal government representatives requested that EPA ensure there is a process to address any future inconsistencies between state and baseline water quality standards.” ACWA, too, has raised this question, and EPA has suggested a process mirroring how two states, or a state and Tribe, up and downstream of one another address WQS on a cross-jurisdiction waterbody. However, the same scenario under the rule is not analogous given that EPA would be resolving a dispute involving WQS and criteria that EPA derived, a glaring conflict of interest. That scenario involving a Tribe(s) is not analogous given the federal trust responsibility, the sovereign-sovereign relationship between Tribes and EPA, and because 40 CFR § 131.7 includes a dispute procedure that only applies to states and authorized Tribes (those with TAS). States request EPA clarify how it can impartially address disputes if EPA Regional Administrators are enabled to both establish criteria and manage disputes about criteria. Some disputes regarding jurisdictional boundaries are ongoing and likely need to be addressed outside the CWA before the rule can be implemented with necessary boundary clarity.

ACWA is not taking a position on whether EPA should finalize the rule, but urges EPA to work with the parties to craft implementable approaches that meet EPA’s obligations to Tribes, uphold Tribes’ sovereign rights during state and federal WQS actions, avoid unnecessary burdens on state WQS programs seeking to integrate Baseline WQS, and ensure the parties – particularly EPA Regions – can feasibly implement all CWA programs despite their timeline and resource constraints. Regarding the rule text relative to the objectives of the rule and the CWA, ACWA recommends that EPA:

- Consider an additional narrative criteria statement specific to nutrients (for example, “All waters shall be free from nutrients in concentrations that would cause or contribute to impairment of existing or designated uses.”). While the definition of nonconventional pollutants under the NPDES program does include nutrients, this is not clear based on the rule’s narrative criteria statements.
- Publish narrative translators for review prior to publishing draft permits.
- Designate a Public Water Supply (PWS) use where requested, or clearly used by, Tribes. EPA is requesting comment on a proposed PWS use throughout applicable waters. ACWA believes this could yield unnecessarily stringent or inappropriate designations where, for example, groundwater is used for drinking water supply rather than a CWA-applicable surface water.
- Clarify in the rule whether issuing draft permits, rather than finalizing the rule, constitutes a final action subject to Endangered Species Act (ESA) consultation.

⁴ US Environmental Protection Agency. *Summary Report of Tribal Consultation and Coordination for the Proposed Rule: Federal Baseline Water Quality Standards for Indian Reservations*. November, 2021. Accessible at: <https://www.regulations.gov/document/EPA-HQ-OW-2016-0405-0200>

- Clarify why the rule contains an ESA-related criterion when EPA has a duty to ESA consultation on final actions regardless.
- Articulate that EPA will consult the affected parties during numeric translator development, prior to public review.
- Clarify whether a Tribe may receive NPDES TAS without WQS TAS. If scenarios could arise where a Tribe issues NPDES permits to implement Baseline WQS, EPA should specify whether the Agency would publish separate notice of numeric translations before the Tribe publishes the draft NPDES permit.
- Provide the expectation for an EPA Triennial Review of Baseline WQS. 40 CFR 131.20 (a) and (b) requires states and authorized Tribes, “...at least once every 3 years, hold public hearings for the purpose of reviewing applicable WQS” ... “the proposed WQS revisions and supporting analyses shall be made available to the public prior.” The rule does not require EPA to follow suit, instead providing for EPA to review and update numeric translators as applicable NPDES permits are renewed. Assuming a Tribal waterbody has a permitted discharger, renewals occur every five years. This will result in less-frequent updates to Baseline protections for Tribal waters and, by definition, inconsistency with Environmental Justice⁵.

Transparent, detailed implementation procedures will be integral to the rule’s success. EPA’s 2014 *Protection of Downstream Waters in WQS: FAQ* document provides some relevant information but will need updates to address Baseline WQS. Before finalizing the rule, ACWA recommends EPA develop and consult the parties on guidance addressing:

1. Methods EPA will use for translating narrative criteria, by criteria type (e.g., metals vs. nutrients), and clear procedures for EPA prioritizing which of the five narrative translator options it will use and when. States recommend that for locations where EPA-approved state WQS apply to waters upstream or downstream of Tribal waters and support uses, Option 3, existing state WQS (see Table 1 in the rule) be default. This aligns with the fifth element of the rule’s narrative criteria, which requires, “all waters maintain a level of water quality at their pour points to downstream waters.”
2. How Baseline WQS will be implemented in permits (NPDES, 404, 401), TMDLs and 303(d) listing assessments⁶ within and immediately surrounding Tribal land.
3. The factors or criteria EPA will consider during ONRW nominations, including how upstream economic impacts will be considered and at what threshold those impacts will be deemed unreasonable.

⁵ “Environmental justice is the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income, with respect to **the development, implementation, and enforcement of environmental laws, regulations, and policies** [*emphasis added*]. This goal will be achieved **when everyone enjoys (1) the same degree of protection from environmental and health hazards** [*emphasis added*], and (2) equal access to the decision-making process to have a healthy environment in which to live, learn, and work.” Via <https://www.epa.gov/environmentaljustice>

⁶ Neither Section 303(d) or 40 CFR 130.7 confer authority to EPA for assessment and identification of impaired waters.

4. What notice period and public participation process will occur at which stage(s) of implementation, and how states may provide feedback to EPA and Tribes.
5. How traditional and cultural use criteria would be developed.
6. What EPA considers “tribal-regulated nonpoint source controls.” Under the rule, when the Regional Administrator determines whether to allow lowering of water quality, EPA shall achieve the highest statutory and regulatory requirements for all “tribal-regulated, cost-effective, and reasonable best management practices for nonpoint source control.”
7. Visual tools indicating implementation roles and timelines among the parties.
8. A consistent, nationwide communication system among the parties, to ensure EPA can apprise all states and Tribes that applicable NPDES permits and/or Baseline WQS translators are available for review and comment (and use such a system for related CWA actions under the rule, such as designated use revisions, water quality variances, notification of Listed (303(d)) waterbodies, etc.).
9. Clear dispute resolution procedures for the parties to follow under the rule.
10. The level of analysis required to derive numeric criteria and documentation necessary to include in the translation procedure, the spatial extent of the criteria derivation, and persons responsible for conducting the translation. For example, it is not clear if criteria derived for a Section 401 Certifications applies to Section 402 permits or if criteria in permits on applicable waters can be used in nonpoint source management.
11. Mechanisms and guidance for upstream facilities demonstrated to be unable to meet downstream WQS, especially if EPA determines states cannot issue variances for a downstream jurisdiction’s WQS.
12. How, in detail, narrative WQS will be interpreted when there is no point source discharger requiring a permit. The rule does not inform upstream states how to integrate Baseline WQS into their WQS or far upstream permits, or protect applicable waters that do not have a permitted discharger but may in the future.
13. Specific timelines between (a) states requesting downstream numeric translators and (b) EPA providing them, how EPA will determine to object to a state permit if numeric translators have not yet been developed, and how states can protect downstream waters while waiting for a numeric translator. The rule as written, and recent EPA review timelines for state WQS updates, give states cause for concern that the NPDES and WQS backlogs will increase.
14. The universe of applicable discharge permits. EPA’s public presentations on the rule indicate ~270 NPDES permits within a 5-mile radius from potentially applicable waters, as used in the rule’s Economic Analysis, to estimate impacts to 57 major NPDES dischargers. EPA only identified a portion of these facilities. EPA should identify all “majors” and general or individual minor permits. Minor dischargers may experience disproportionate economic impacts from the rule.
15. The statutory authority for the proposed narrative criterion which prohibits adverse impacts to the hydrologic integrity of covered waters, as well as procedures for removing or downgrading uses in the rule and how those would be supported with “use and value” demonstrations. EPA should describe how this criterion would be

translated, and whether EPA envisions regulating instream flows using a translator. The rule does not consider whether designated uses are attainable, and it is not clear how EPA would manage scenarios where Baseline WQS, especially for traditional and cultural uses, conflict with adverse impacts of “hydrologic conditions.” CWA Section 101(g) articulates that the authority of each state to “allocate quantities of water within its jurisdiction shall not be superseded, abrogated, or otherwise impaired by this chapter.” Many state and/or Tribal waterbodies assumed to be affected by the rule do not have sufficient flow to support primary contact recreation and/or organisms that are consumed by people, per CWA Section 101(a)(2) designated uses.

16. Whether and how the parties would be required to work together on a TMDL if an affected waterbody applies downstream.

Thank you for considering ACWA’s comments. We reiterate our request that EPA carefully consider comments submitted by individual states. ACWA looks forward to discussion with the parties about the rule. Please contact me with any questions about the contents of this comment letter.

Sincerely,

A handwritten signature in cursive script that reads "Julia Anastasio".

Julia Anastasio
Executive Director and General Counsel, ACWA

CC: James Ray, Rule Lead, Office of Science and Technology
Deborah Nagle, Director, Office of Science and Technology
Karen Gude, Tribal Program Manager, Office of Water