

August 3, 2023

James Ray
U.S. EPA, Office of Science and Technology
Standards and Health Protection Division
1200 Pennsylvania Avenue NW (MC 4305T)
Washington, DC 20460

RE: Docket ID No. EPA-HQ-OW-2016-045

Dear Mr. Ray:

The Colorado Department of Public Health and Environment submits the following comments on EPA's May 5, 2023, proposal to establish baseline federal water quality standards (WQS) for waters of the United States (WOTUS) within Indian reservations, as published in the Federal Register at 88 FR 29496. We appreciate the opportunity to explain Colorado's perspective on the unique jurisdictional circumstances concerning waters within the exterior boundaries of the Southern Ute Indian Reservation¹. Additionally, Colorado has comments related to the implementation of the translation procedures.

JURISDICTIONAL ISSUE

EPA is proposing to promulgate baseline WQS for all WOTUS in "Indian country," which is defined in relevant part as "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation". 18 U.S.C. § 1151(a). As explained in its proposal, EPA does not intend for the baseline WQS to apply to WOTUS within Indian country where: (1) EPA has explicitly found that a state has jurisdiction to adopt WQS or authorized a Tribe to adopt WQS pursuant to the TAS² regulation; and (2) where EPA has approved the applicable state or Tribal WQS. EPA has identified only four instances where it recognizes state jurisdiction to administer WQS on reservations or parts of a reservation. These instances do not include non-Indian owned fee lands within the Southern Ute Indian Reservation, and thus Colorado assumes that EPA intends to administer its proposed baseline standards on those lands. *See also* EPA's website at <https://www.epa.gov/wqs-tech/water-quality-standards-regulations-colorado> (stating "Colorado water quality standards apply to all waters within the State of Colorado, with the exception of those waters that are within Indian Country, as defined in 18 U.S.C. § 1151.") These statements indicate EPA's intent to apply its baseline WQS for WOTUS flowing through any lands within the reservation boundaries where the Tribe's approved standards do not apply.

¹The other Indian reservation within Colorado's borders belongs to the Ute Mountain Ute Tribe. The Ute Mountain Ute Tribe has treatment in a similar manner as a state status to administer its own water quality standards program on all lands within its exterior reservation boundaries, and has had a WQS program in place since 2011.

²In the context of the Clean Water Act, "TAS" refers to "Treatment in a similar manner as a state." 33 U.S.C. § 1377(e).

The Southern Ute Indian Reservation consists of a "checkerboard" pattern of tribally-owned lands, federal trust lands, and non-Indian owned fee lands. Colorado has long held the position that pursuant to Public Law 98-290, enacted by Congress in 1984, 98 Stat. 201, the State has civil jurisdiction, including jurisdiction to administer federally-delegated Clean Water Act programs, on non-Indian owned fee lands within the exterior Reservation boundaries. The Tribe, on the other hand, has historically held the position that the State lacks regulatory and EPA-delegated authority over water quality on non-Indian owned fee lands within the Reservation boundaries. Because stream segments cross through this checkerboard of lands, Colorado and the Tribe have collaborated for decades on a consistent approach for managing water quality across the entire Reservation. Colorado appreciates and respects the Southern Ute Tribe's commitment to protect water quality.

Without ceding its jurisdictional position, the Southern Ute Indian Tribe's 2015 application for TAS status to administer a WQS program was limited to trust lands within the Reservation boundaries. As such, EPA's grant of TAS authority to the Tribe in 2018 did not include any non-Indian owned fee lands within the Reservation boundaries. In 2022, EPA approved the WQS promulgated by the Tribe for those trust lands.

Without ceding the state's jurisdictional position, Colorado intends to recognize EPA's baseline standards for WOTUS on non-Indian owned fee lands within the Southern Ute Reservation boundaries in the context of EPA-issued discharge permits. In implementing its baseline standards on WOTUS flowing through those lands, we encourage EPA to honor the longstanding desire for consistency of protective WQS across the entire reservation. We believe EPA's proposed approach provides sufficient flexibility to accomplish this, and we look forward to working with EPA and the Tribe to ensure continued consistency and protectiveness of the Tribe's and State's water resources. At the same time, Colorado intends to continue to use its own standards to establish effluent limits for State-issued discharge permits on such fee lands.

ADDITIONAL COMMENTS

Translation Procedures: The proposed rule identifies numeric translation procedures and derivation of numeric values. These are provided in 40 CFR § 131.XX(d)(2) of the proposed rule. The five options established under the procedures are summarized in Table 1 of the preamble. Based on discussions with both EPA Region 8 staff and headquarters staff at meetings on June 12 and 14, it is our understanding that the five available options are not prioritized and that any option can be utilized when determining the most appropriate way to translate the narrative standard. We request that this is made clear in the rule.

In Colorado, Option 2 may be the most appropriate as both the State and both the Ute Mountain Utes and the Southern Ute Indians tribes have applicable standards that should be considered on a site-specific basis. The most protective standards should be considered to protect downstream uses. For example, Colorado has adopted more protective temperature standards than the temperature standards adopted by the Southern Ute Indian Tribe; the aquatic community should be considered when determining the most appropriate temperature standards to be implemented for any given stream. In addition, streams may pass in and out of tribal lands, and downstream protection should be considered. In some cases where Colorado has adopted a standard for a particular parameter, there may be no 304(a) criteria for that parameter. All three options—EPA 304(a) criteria, Colorado basin-specific standards, and Southern Ute standards—should be carefully considered when implementing these translation procedures on non-Indian owned fee lands within the Reservation's external boundaries.

Downstream Protection: "The fifth proposed element of the baseline narrative criteria under 5. would require that all waters maintain a level of water quality at their pour points to downstream waters that provide for the attainment and maintenance of the water quality of downstream waters of those waters, including the waters of another state or a federally recognized Tribe." We support the protection of downstream uses in this rule.

Reviewing Upstream State-Issued Permits: At 88 FR 29515, the proposed rule states that "EPA will 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." It is essential that EPA also coordinate with the permitting authority when making this review, and therefore this statement should address coordination with both Tribes and the permitting authority.

Sincerely,

/s/ Trisha Oeth, Esq.

Trisha Oeth, Director
Environmental Health and Protection
COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT