



August 3, 2023

EPA Docket Center  
Sara Hisel-McCoy  
Director, Standards and Health Protection Division  
Office of Water, U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue NW, Washington, DC 20460

Subject: Comments Docket ID No. EPA-HQ-OW-2016-0405, Federal Baseline Water Quality Standards for Indian Reservations

Dear Director Hisel-McCoy:

Thank you for the opportunity to review and provide comments to the proposed rule for Federal Baseline Water Quality Standards for Indian Reservations, dated May 5, 2023. This proposed rule is very comprehensive and will have an enormous economic impact on the citizens of Idaho and the Idaho Department of Environmental Quality (IDEQ). Although IDEQ agrees with the intent of the rule and that waters in our beautiful state lacking water quality standards pose a risk to all immediate and downstream waters users, however this proposed rule is flawed in its implementation and IDEQ does not feel that EPA adequately engaged with IDEQ or our stakeholders during the development. IDEQ does not support the establishment of federal baseline water quality standards for Indian reservation waters. Below we highlight a few of our main concerns.

I. EPA's definition of reservation waters.

Under the proposed rule, baseline water quality standards would apply to waters "within the borders of an Indian reservation" but goes on to state that "in accordance with judicial precedent, the term "reservation" includes both formal reservation and informal reservation such as trust land that has been validly set apart for use by the tribe even if such trust land is located outside the exterior boundaries of a formally designated reservation"<sup>1</sup>. In the state of Idaho, we have five Tribes in which several have trust lands outside of reservations.

In the Association of Clean Water Administrators (ACWA)/EPA listening session IDEQ participated in, EPA clearly admits that they are unclear as to the boundaries or lands that will be covered under this rule and each situation will be unique and will need to be "sorted out" on a permit-by-permit basis. This lack of certainty adds to the time and expense of moving forward with regulatory decisions. Highlighting the lack of clarity on trust lands, EPA went on to say that it does not determine reservation boundaries, and that "the responsibility lies elsewhere in the government." However, it appears that even between agencies and states, data is inconsistent and has yet to be centralized. For example, data provided by

---

<sup>1</sup> [56 FR 64876](#), [64881](#), December 12, 1991

the Bureau of Indian Affairs in response to a 2018 Freedom of Information Request submitted by the Native Lands Advocacy Project, shows that Idaho has 1,057,430 acres of trust land,<sup>2</sup> not including fee or restricted lands. It took BIA nearly two years to fulfill this request for data, and there were hundreds of thousands of discrepancies between the area of land reported by BIA, and that recorded by the States.<sup>3</sup>

In the preamble of the proposed rule, it states that EPA has the authority to treat an Indian tribe as a state (TAS) pertaining to water resources within the borders of an Indian reservation. Clean Water Act (CWA) section 518<sup>4</sup> defines TAS 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. EPA states that, under this language, tribes can only obtain TAS status over waters within the borders of their reservations, and conversely, tribes cannot obtain TAS under the CWA for water resources pertaining to any non-reservation Indian country. However, in this proposed rule, EPA then states that Indian reservation includes trust lands validly set aside for Indian tribes even if such lands have not formally been designated as an Indian reservation. These two statements appear to be, at least in part, inconsistent. On the one hand, EPA states that TAS status will only apply to waters within the borders of a reservation, but on the other hand, appears to state that waters on trust lands, even if outside reservation borders may be included within the definition of water resources of an Indian reservation.

IDEQ questions whether EPA is correct in its assertion that the revised interpretation will have no effect on existing state CWA programs and requests clarification on whether States will be preempted from applying State water quality law. Under EPA's current interpretation, there is no express delegation of authority to tribes. Thus, prior to EPA approving TAS status for a tribe, tribal authority is limited to the tribes' inherent authority to regulate non-tribal members. With certain exceptions, tribes cannot regulate non-tribal members on non-tribal land within an Indian reservation. States, on the other hand, generally have the authority to regulate non-tribal members on such land. In addition, even when a tribe has the inherent authority to regulate non-tribal members on non-tribal land, States may have concurrent jurisdiction to apply state water quality law.

Under EPA's revised interpretation, section 518(e)<sup>5</sup> provides an express delegation to Indian tribes to regulate all water resources within the borders of a reservation, even those waters on non-tribal member lands. Under EPA's revised interpretation, IDEQ will be preempted from applying state water quality law to non-members on non-tribal land, even prior to the approval of TAS status for a tribe. If this is true, then EPA's revised interpretation will certainly have an impact on existing state CWA programs. IDEQ requests EPA clarify whether under the revised interpretation, States will be preempted from applying state water quality law to non-tribal members on non-tribal land within the borders of a reservation and if there is a preemption, whether the state is preempted prior to EPA approval of TAS status.

---

<sup>2</sup> <https://data.nativeland.info/dataset/2019-tribal-land-ownership-by-state>

<sup>3</sup> Brewer, J. P., Carroll, S. R., Bartecchi, D., Chesnais, A. K., & Johnson, M. K. (2023). Life and times of data access: Regarding Native Lands. *Environment and Planning F*, 2(1–2), 305–315.  
<https://doi.org/10.1177/26349825231164616>

<sup>4</sup> <https://www.govinfo.gov/content/pkg/FR-2016-05-16/pdf/2016-11511.pdf>

<sup>5</sup> <https://www.federalregister.gov/d/2016-11511/p-114>

## II. EPA's role and responsibilities and implementation considerations.

This section provides DEQ's comments on EPA's proposed rule implementation and lack of concrete language on which to provide meaningful comment. EPA did not adequately incorporate stakeholder involvement and input when developing tribal baseline water quality standards. Without allowing for upstream stakeholder engagement early in the process of permit development, the new tribal standards may lead to unnecessary conflict between upstream discharge permits and new standards. Under the CWA, states have been increasingly required to provide more rule development and water quality standards implementation transparency, and public and stakeholder engagement throughout all programs. However, this proposed rule does not require the same transparency from EPA. EPA has not identified how TMDL's, water quality assessments and listings, or other CWA programs will be developed on reservation waters and implemented or how the tribes and state will be part of the process.

The intent of the "binding translation procedures" is unclear. EPA "is relying on its role as both the promulgating entity and the primary implementation authority to allow a degree of site-specific tailoring with the regulatory construct of the water quality standards during subsequent implementation of the proposed rule." In other words, EPA will only develop the water quality criteria component of standards when implementing a TMDL, NPDES permit, or water quality certification. A situation which would never be approved in a state's WQS package.

Narrative criteria will be accompanied by a binding translation procedure for determining case-specific numeric values to protect the applicable designated use. Again, the translation procedures are vague, and it is unclear how the process will be implemented for the development of NPDES permits limits, water quality assessment, or water quality certification development. States are unable to provide adequate feedback for implementation if there isn't a clear process or procedure provided to comment on. During the ACWA/EPA listing session, EPA clarified that the first time a state would be able to review the binding translation and the resulting criteria would be when the NPDES permit is out for review, which is very late in the development process.

Furthermore, EPA states it would maintain a website containing a publicly available list of all tribes with Indian reservations for purposes of this proposed rule. It would also indicate which of those tribes are covered by baseline WQS, which are excluded from coverage, and which tribes already have CWA-effective WQS in place. Updates and changes to permits will also be housed on this site. This is a large amount of information requiring frequent updates. This is not an effective way to inform states or stakeholders and would be difficult to maintain.

During this same listening session, EPA clarified that they will not be reviewing the narrative standards or the translated criteria under a triennial review. The CWA requires states and authorized tribes to periodically review and, as appropriate, adopt new or revised WQS to meet the requirements of the CWA<sup>6</sup>. This appears to hold states to a higher regulatory burden than EPA is willing or able to implement.

EPA "is not proposing to define cultural and traditional uses in more detail in this rule...". This is another example of ambiguity that is nearly impossible for a state or stakeholder to provide meaningful feedback on. It is unclear how, by whom, or where the cultural and traditional use will be defined and implemented. The proposed rule,<sup>7</sup> recognizes tribal reserved rights to use and access natural and

---

<sup>6</sup> Water Quality Standards Handbook, Chapter 6: Procedures for Review and Revision of Water Quality Standards.

<sup>7</sup> EPA docket# EPA-HQ-OW-2021-079

cultural resources but does not identify how it will identify and protect those *tribal cultural and traditional uses and tribal reserved rights*.

IDEQ understands that EPA was deliberately vague as to how to designate and implement the protection of Outstanding Natural Resource Waters (ONRW). IDEQ has a clear and transparent process as to how an ONRW is nominated and designated. Since the ONRW would only apply within reservation boundaries for this rule, it is imperative that the process is clearly laid out so IDEQ can have a more predictive process as an upstream state.

### III. Economic Impact

Idaho has many permitted dischargers upstream from reservation and trust lands. The economic analysis that EPA conducted only included facilities within a five-mile radius of reservation lands. This is dramatically underestimated. Much depends on the regulated constituent, and Idaho has many naturally occurring metals persistent in the watershed because of regional geology. Consequently, these will be detectable further than five miles. For example, EPA is currently writing a TMDL for the Spokane River that crosses from Idaho to Washington state. The Spokane reservation is 58 river miles from the Idaho border. Idaho will likely have to meet a much more restrictive PCB criteria than our own state's approved standard and more stringent than even Washington state's PCB criteria. EPA contends that for Washington State to meet the criteria at the border of the reservation, then too shall Idaho have to meet a more stringent criteria than state standards. This will cause substantial expense both internally to IDEQ with updated permit development and review, and the permittees to adjust their treatment to accommodate stricter limits. In addition, when stricter limits are required on an upstream permit, often there are not sufficiently sensitive test methods in place for monitoring some pollutants, again creating opportunities for compliance legal issues.

In closing, during the meeting on July 13, 2023, hosted by ACWA, EPA stated that there will not be any additional funding for implementation of this rule. This proposed rule will have a tremendous amount of additional work for EPA staff, who are already often behind schedule for current CWA program response. IDEQ has concerns that the additional work this rule will entail, EPA staff will not have the ability to respond in a timely manner, negatively affecting Idaho citizens and stakeholders.

Sincerely,



Mary Anne Nelson  
Surface & Wastewater Division Administrator

c: Beth Spelsberg, IDEQ