



July 26, 2023

United States Environmental Protection Agency
Attn: Administrator Michael S. Regan
1200 Pennsylvania Avenue NW
Washington, DC 20004

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

Dear Administrator Regan:

Thank you for the opportunity to comment on the proposed Federal Baseline Water Quality Standards for Indian reservations. The Nebraska Department of Environment and Energy (NDEE) acknowledges that all Waters of the United States (WOTUS) within Indian reservations under EPA jurisdiction should have water quality standards under the Clean Water Act (CWA). NDEE has concerns about the ambiguity of the proposed rule, how the rule will be implemented, the apparent lack of an avenue for impartial dispute resolution, underestimation of the fiscal impact to permittees, as well as the lack of opportunity for ongoing public participation.

Ambiguity of Translating Criteria

The Proposed Rule states that "the binding numeric translation procedures in proposed 40 CFR 131.XX(d)(2) would require the Regional Administrator to use the procedures necessary to derive translations for specific water bodies as needed for all purposes under the Clean Water Act. As such, these translations would occur during CWA implementation of applicable CWA implementation programs. EPA has included the words "as necessary" to recognize not only that numeric values may be needed for different parameters in different circumstances, in accordance with EPA regulations, but also to reflect variations in the way criteria are applied in different CWA implementation programs."

Nebraska has several concerns about translating the proposed narrative criteria into numeric limits only "as necessary." This method is ambiguous and is not in line with current CWA requirements for states. This approach would allow for multiple implementation programs to choose different translation options resulting in multiple numeric limits for the same waterbody. For example, it appears that an EPA NPDES permit writer / Regional Administrator could choose Option 5 to develop limits for an NPDES permit discharging to a waterbody on an Indian reservation, while a 404 individual permit may contain conditions with numeric limits that were determined using translation Option 1. This could result in having two distinct limits for the same parameter on the same waterbody. This will be confusing and make it difficult for upstream authorities to know which numeric limits apply to downstream beneficial uses.

Inconsistency in Translation

Nebraska is concerned about the potential for inconsistent application of translation options among regions and between implementation programs in the same region. The proposed rule is not prescriptive and does not provide a transparent methodology for Regional Administrators and implementation programs to apply translation options.

Furthermore, EPA fails to address how EPA will handle dispute resolution between upstream activities and downstream beneficial use protections/criteria promulgated by EPA where EPA is the one setting the standards in dispute. States would be at a disadvantage if EPA is the decision maker under those circumstances.

Nebraska's water quality standards (WQS) are largely based on EPA recommended criteria pursuant to Section 304(a) of the CWA. The criteria within Nebraska's WQS apply to the designated uses of each designated waterbody and those specific criteria for each designated use are used for implementation purposes. Nebraska has similar narrative criteria as are proposed in this rule. The state has implementation procedures that clearly explain how narrative criteria are applied to waters of the state in the Nebraska's Continuing Planning Process Document. Nebraska suggests that EPA take a similar approach through applying numeric criteria to all designated WOTUS within Indian reservations, especially for 101(a) designated uses with 304(a) recommended criteria. This would ensure consistency with Nebraska state water quality standards and would facilitate the protection of downstream beneficial uses of waters within Nebraska as well as within Indian reservations.

EPA's Economic Analysis Understates Impacts in Nebraska

Nebraska is concerned that the economic analysis considered only major dischargers within Indian reservations and only within 5 miles upstream of Tribal lands. EPA has indicated that other dischargers may be impacted, including minor dischargers and those further than 5 miles upstream. See the attached map showing impacts to NPDES permitted dischargers in Nebraska.

This analysis underestimates the true financial impact because it did not consider many of the facilities that may be impacted by required upgrades to protect downstream beneficial uses on Indian reservations. In Nebraska, as in many other states, minor facilities may be disproportionately affected by financial impacts. Many small systems in Nebraska have aging populations and may be experiencing population declines making it more difficult to facilitate system upgrades. It is also not clear how financial impacts were determined when numeric limits and subsequent facility upgrades are largely unknown at this time. We suggest that the economic analysis include all facilities that may be impacted to fully understand the true cost of compliance with the proposed baseline water quality standards.

EPA Should Be Held to the Same Process as States in Setting Water Quality Standards

Section 131.20 (b) of the CWA requires that states hold a public hearing for the purposes of reviewing water quality standards, in accordance with State law, EPA's water quality management regulation (40 CFR 130.3(b)(6)) and public participation regulation (40 CFR part 25). The proposed water quality

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standards revision and supporting analyses shall be made publicly available to the public prior to the hearing.

The proposed rule states that public participation opportunities to provide input on numeric limits will happen only through normal CWA implementation program procedures. The Clean Water Act requires that states provide public participation opportunities and accept comments when they are reviewing water quality standards, when they are revising water quality standards, and again when taking an action through a CWA implementation program. EPA should be required to follow the same requirements that states have when it comes to the revision of water quality standards and criteria and should also be required to provide public participation opportunities separate from public participation for limits developed through implementing CWA programs.

NDEE requests that all data and documentation used by regional administrators and CWA implementation programs used to choose translation options and for the development of numeric limits and waterbody assessments be publicly available.

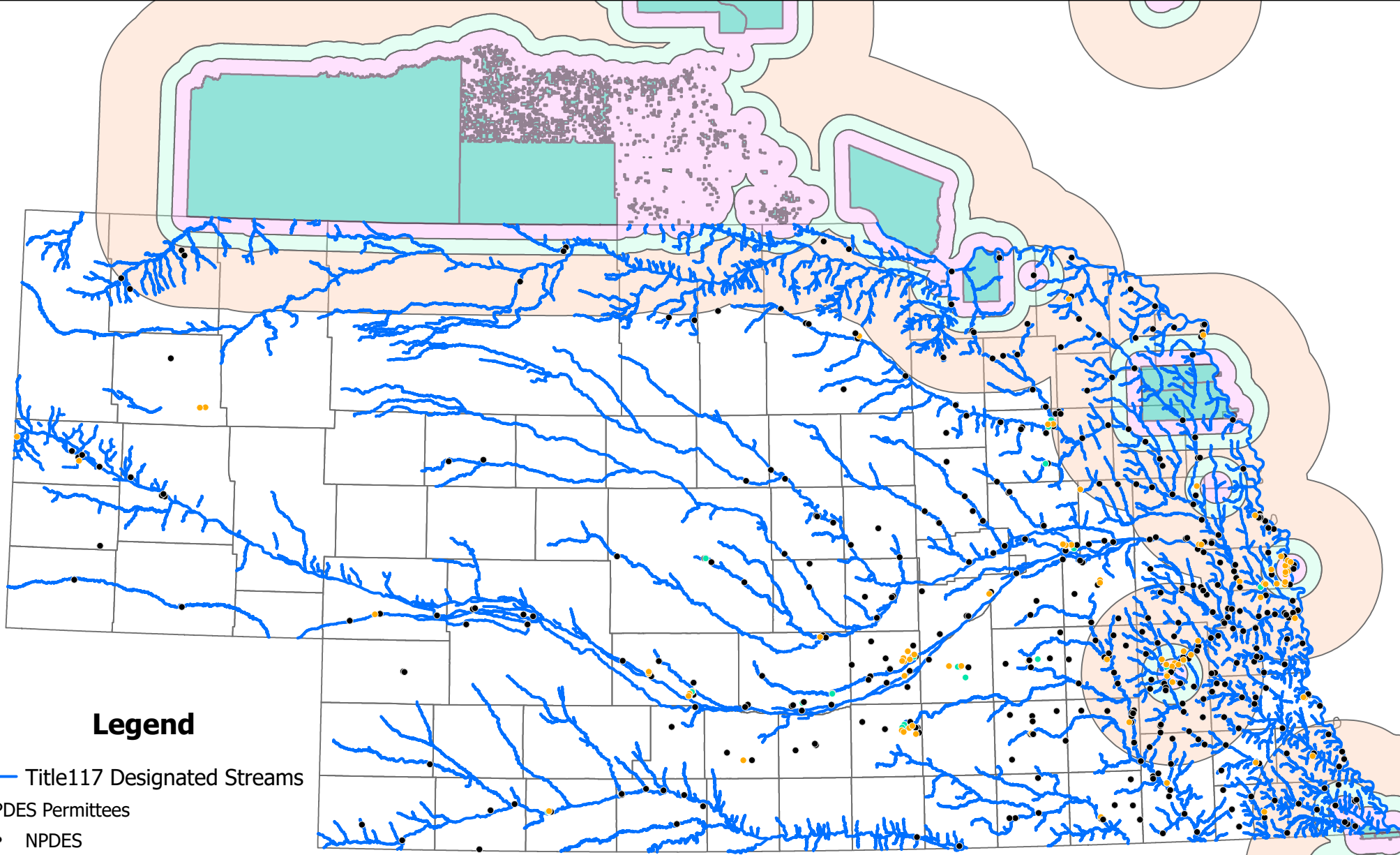
Thank you for the opportunity to provide Nebraska's comments.

Sincerely,



Jim Macy
Director

Attachment



Legend

— Title 117 Designated Streams

NPDES Permittees

- NPDES
- NPDES/NPP
- NPP

Indian Reservations With Buffer

- 5 mile
- 10 mile
- 30 mile
- Indian Reservations

NEBRASKA

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