



August 3, 2023

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

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

Dear Administrator Regan,

The Nevada Division of Environmental Protection (NDEP) appreciates the opportunity to comment on the proposed rule Federal Baseline Water Quality Standards for Indian Reservations. This proposed rule would promulgate federal baseline water quality standards (WQS) for waters on over 250 Indian reservations that do not have WQS in effect under the Clean Water Act (CWA). On behalf of NDEP, I offer these comments to the United States Environmental Protection Agency (USEPA) on this proposed rule.

NDEP strongly believes in the importance of WQS to restore and maintain the chemical, physical, and biological integrity of the State's and Nation's waters. However, **NDEP recommends that the proposed rule should not be adopted at this time.** The proposed rule appears to be a framework that leaves many critical questions unanswered and lacks the detail necessary to thoroughly evaluate potential impacts and consequences of its adoption to State water programs, stakeholders, and the public. In fact, many of the most impactful decisions won't be made until after the rule is already in place, resulting in reduced predictability and increased uncertainty related to rule implementation.

The specific points below further support why the proposed rule should not be adopted at this time.

Waters Affected by the Proposed Rule

No list of waters affected by this proposed rule has been provided. Without knowing which waters will be subject to the rule in advance, it is impossible for states to assess and fully understand the potential impacts to their water quality programs and stakeholders. Prior to consideration of rule promulgation, a definitive list of all waterbodies and waterbody reaches to which the baseline WQS would apply should be developed and made accessible to the public. At a minimum, an interactive web map depicting Tribal boundaries and affected waters should be developed, however availability of a Geographic Information System (GIS) coverage/layer would be extremely valuable.

Designated Uses

The proposed rule does not consider attainability of proposed baseline designated uses. For example, many state and/or Tribal waterbodies that would be affected by the proposed rule do not have

sufficient flow to support baseline designated uses such as primary contact recreation or consumption of specific aquatic organisms.

The proposed rule specifically states that USEPA is soliciting comment on whether a public water supply use should be designated for all Indian reservation fresh waters covered by the scope of this rule. As pointed out in the proposed rule, designating a public water supply use for all Indian reservation waters without accounting for local considerations could result in a designation of a waterbody where such a use is not appropriate. NDEP therefore believes USEPA should **not** designate a blanket public water supply use for all Indian reservation fresh waters covered by the scope of this rule and that this issue is best addressed by allowing affected Tribes to request a public water supply use on a case-by-case basis after the rule is final. This will ensure the designation is appropriate for the waterbody.

The USEPA proposes to promulgate an explicit cultural and traditional designated use to ensure full protection of such uses. However, these cultural and traditional uses and the water quality criteria to protect these beneficial uses have not been defined within the proposed rule. Without knowing what these uses and criteria are in advance, it is impossible for states to ascertain the potential impacts of designating such uses and associated criteria. This also appears to be an impossible task, as the cultural and traditional uses of water are expected to vary from Tribe to Tribe, or at least regionally, and certainly are not the same across the country. Therefore, cultural and traditional uses and the associated water quality criteria to protect these beneficial uses should be identified prior to rule promulgation. Moreover, to reduce uncertainty and improve predictability surrounding rule implementation, it would be beneficial to explicitly detail the process by which the water quality criteria to protect proclaimed cultural and traditional uses would be developed.

Narrative Criteria

The proposed rule puts forth narrative criteria with no acknowledgement that, oftentimes, WQS are unachievable due to natural background conditions. A provision should be included that excludes nonattainment of baseline designated uses due to natural background conditions.

Related to Narrative Criterion #2, a portion of this criteria is an overreach into States' sole and exclusive authority to address water rights; it appears to contradict CWA sections 101(g) and 518(a) which state that WQS shall not be construed to supersede or abrogate rights to quantities of water. Criterion states, "2. All waters shall be free from adverse impacts to the chemical, physical or **hydrologic**, or biological integrity caused by pollutants or pollution that prevent the attainment of applicable designated uses" (emphasis added). The term "hydrologic integrity" may lead to conflicts with Nevada regulations and statutes if it can be interpreted as lack of environmental flow due to agricultural or other water diversions. [NAC 445A.122 Standards applicable to beneficial uses](#) states that "The following standards are intended to protect both existing and designated beneficial uses and must not be used to prohibit the use of the water as authorized under title 48 of NRS." [Nevada Revised Statutes TITLE 48—WATER](#) includes [Chapter 533](#) – ADJUDICATION OF VESTED WATER RIGHTS; APPROPRIATION OF PUBLIC WATERS.

State WQS Different from CWA Section 304(a) Criteria

The proposed Tribal baseline WQS will be based on the [national recommended water quality criteria](#) (CWA section 304(a)). Some of Nevada WQS are deliberately, and legally, different from the 304(a)

criteria. For example, the table below shows Nevada’s statewide selenium criteria, which is based on the absence of sturgeon in State waters:

Selenium Criterion	Chronic Exposures					Short-Term
	Fish Tissue (mg/kg dw*)			Water Column (ug/L*)		Water Column (ug/L)
	Egg-Ovary	Muscle	Whole Body	Water (Lakes)	Water (Streams)	Water
EPA 2016	15.1	11.3	8.5	1.5	3.1	Intermittent Exposure Equation
Nevada “sturgeon-free” waters	19.0	13.1	9.5	1.9	3.9	Intermittent Exposure Equation

*mg/kg dw = milligrams per kilogram dry weight, ug/L = micrograms per liter.

Implementation of the proposed rule has the potential to cause issues when a stream or river flows through a federally recognized Indian reservation. Since Nevada’s selenium criteria is higher, it will inherently conflict with and may not be considered protective of downstream uses if a Tribal baseline WQS in Nevada is based on blanket 304(a) criteria for waters with sturgeon. In general, it is unclear in the proposed rule how such conflicts between State WQS and blanket Tribal WQS under the proposed rule would be resolved, which undoubtedly has the potential to create confusion, unclear implementation, and drain already thinly stretched State and Federal resources.

Feedback on Implementation and Revisions

To ensure protection of the baseline designated uses, the rule proposes to promulgate narrative criteria with binding procedures for the USEPA to translate the narrative criteria into numeric values as needed for implementation. The procedures would:

- Reflect the latest science (e.g., latest published CWA section 304(a) water quality criteria recommendations).
- Provide for limited location-specific tailoring to better protect Tribal waters (e.g., fish consumption rates).
- Provide the option to rely upon adjacent state or Tribal CWA-effective WQS.

The presentation slides from the public hearings on June 27th and July 12th, 2023, state that “EPA anticipates that this rule would facilitate a process of mutual consideration and discussion between EPA, Tribes, and states, and provide an opportunity for EPA to work closely with Tribes and states when implementing applicable baseline WQS.” NDEP believes that this process of mutual consideration and discussion must be formalized and explicit in the rule, not just anticipated.

NDEP recommends including a process in the proposed rule for consulting with states on where/when it is appropriate to rely upon adjacent states or Tribal CWA-effective WQS. The proposed rule must include a detailed process to address any future inconsistencies between existing state water quality standards and those promulgated under this proposed rule.

Furthermore, the proposed rule should be revised to facilitate the ease by which the public, Tribes, and states can review the baseline WQS as they are implemented and revised, and the ability to provide feedback to the USEPA. The review process and feedback mechanisms should be explicit in the rule.

Outstanding National Resource Waters

NDEP is also concerned about the designation process of certain waters on Indian reservations as Outstanding National Resource Waters (ONRWs). During the public hearings, the USEPA indicated that a potential benefit of the rule is enabling Tribes to utilize antidegradation implementation methods to protect culturally significant waters by nominating them as ONRWs. Because designating a Tribal water being designated as an ONRW could have major implications to upstream users/dischargers/permittees, NDEP recommends the rule be revised to include a delineated process for consulting with states on the designation of ONRWs.

The proposed rule does not detail the nomination process for an ONRW. The text states that “any person or entity may nominate a specific water for such protection by providing written documentation of the qualifications of the reservation water to the Regional Administrator and the Tribe.” The process for establishing ONRWs must be explicit, standardized, and transparent, with minimum requirements for nominating a water as an ONRW as well as the criteria for determining which waters deserve protection as an ONRW specified in the proposed rule. Prior to this specification, the minimum nomination requirements and establishment criteria should be vetted through a public hearing/workshop process. Finally, USEPA should not take a lead role in identifying waters on Tribal lands for nomination as ONRWs.

Thank you for the opportunity to comment. Establishment of WQS to protect waterbodies within Indian reservations without treatment in similar manner as states authority is an honorable effort. However, it is clear the proposed rule requires much improvement prior to adoption being considered. NDEP looks forward to engaging in future conversations to revise the proposed rule in a manner that will increase predictability with respect to its implementation while minimizing potential impacts and consequences to State water programs and stakeholders.

Sincerely,



Jason Kuchnicki

Chief, Bureau of Water Quality Planning
Nevada Division of Environmental Protection