On August 4, the public comment period ended for the Environmental Protection Agency's (EPA) proposed rule on Federal Baseline Water Quality Standards (WQS) for Indian Reservations (88 FR 29496). Twelve of our western states submitted comments – AK, AZ, CO, ID, MT, NE, ND, NV, OK, SD, TX, WY – and excerpts of those letters are summarized below. Additionally, eight state attorneys' general submitted a joint comment letter to EPA Administrator Michael Regan from AK, ID, KS, MS, NE, ND, SC, and SD.

Alaska

The Alaska Department of Environmental Conservation (ADEC) detailed the provisions of legislative and judicial law that create a unique Tribal landscape in Alaska. The 1971 Alaska Native Claims Settlement Act (ANCSA) abolished all non-Metlakatla reservations, and the concept of "Indian country" with off-reservation trust lands does not exist in Alaska according to the Department of the Interior's Solicitor's Opinion and the Alaska Supreme Court. ADEC concluded that "EPA must exclude the navigable waters of all Alaska Tribes, including Metlakatla, from coverage under the final rule."

Arizona

The Arizona Department of Environmental Quality (ADEQ) expressed concerns about EPA Region 9's capacity to work with tribes and states in establishing federal baseline WQS, particularly given that it "has yet to issue final action on water quality standards submitted by ADEQ to the agency in November of 2019 due to inadequate staffing…." They noted that effective implementation of the rule would require an extensive collaborative effort between EPA, ADEQ, and the tribes. "Arizona has 22 federally recognized Native American tribes that represent more than 296,000 people. A total of 20 reservations cover more than 30,938 square miles (27%) of the state…. Of the 22 tribes, eight have treatment as state (TAS) status and can develop their own surface water quality standards; and only four have EPA-approved standards." ADEQ noted that the remaining tribal lands cover 11,236 sq. mi., leaving 10% of the state without WQS protections.

ADEQ continued: "In addition to the spatial scale issues above, tribal lands are sometimes commingled with public and private lands in Arizona; such as in the Phoenix metropolitan area and some cities along the Colorado River. Tribal lands are also part of a 'checkerboard' of public, private and tribal land south of Winslow in northern Arizona. While the total number of waters on which federal standards apply depends on the final dispensation of the Supreme Court ruling on *Sackett v. EPA*, there are at least 99 Arizona surface waters that cross reservation boundaries that will likely be affected. Of those waters, there are currently 33 federal Arizona Pollutant Discharge Elimination System (AZPDES) permits. An additional 238 surface waters with 74 more AZPDES permits lie within a five-mile buffer of the tribal reservation boundaries." Finally, ADEQ pointed out the need for a defined resolution process for inconsistencies between state and tribal WQS.

Colorado

The Colorado Department of Public Health and Environment (CDPHE) provided its perspective on (1) "unique jurisdictional circumstances concerning waters within the exterior boundaries of the Southern Ute Indian Reservation," and (2) comments related to the implementation of the numeric translation procedures.

CDPHE said: "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."

CDPHE also noted that in discussions with EPA Region 8 staff, the five options to translate the narrative standard into numeric values under 40 CFR § 131.XX(d)(2) of the proposed rule appear to be non-prioritized, and that any option may be utilized. “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.”

Idaho

The Idaho Department of Environmental Quality (IDEQ) agreed with the intent of the rule to protect waters without WQS, but did not support the establishment of federal baseline WQS for Indian reservation waters. In particular, EPA’s lack of clarity about where reservations and trust lands even exist, and the presently-inconsistent data between states and federal agencies, adds to the time and expense of moving forward with regulatory decisions. “For example, data provided by 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, 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.” Additionally, while “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,” EPA has inconsistently asserted authority to promulgate WQS over trust lands “even if such lands have not formally been designated as an Indian reservation.” IDEQ expressed concerns about the potential preemption of state water quality law jurisdiction over non-tribal members on non-tribal lands within an Indian reservation boundary, even prior to a tribe obtaining TAS authority, questioning EPA’s assertion that the revised interpretation of CWA §518 would have no effect on existing state CWA programs. IDEQ also noted that EPA’s proposed rule “recognizes tribal reserved rights to use and access natural and cultural resources but does not identify how it will identify and protect those *tribal cultural and traditional uses* and *tribal reserved rights*.”

Regarding EPA’s implementation of this rule, IDEQ noted that this rule does not require the same transparency or standards from EPA that the states are required to provide. “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…. EPA will only develop the water quality criteria component of standards when implementing a TMDL, NDPES permit, or water quality certification. A situation which would never be approved in a state’s WQS package…. [The binding 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 listening 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.” IDEQ listed the information EPA has indicated it would make publicly available on a website, including a list of tribes with reservations, which tribes are covered by baseline WQS, which are excluded from coverage, and all updates and changes to permits. “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.” EPA also noted during the ACWA/EPA listening session that it would not be reviewing the narrative standards or the translated criteria under a triennial review, which would hold states to a higher burden than EPA is willing to implement.

They also raised the concern of significant economic impacts on permitted dischargers upstream in a state with many naturally-occurring metals due to the regional geology.

Montana

The Montana Department of Environmental Quality (MDEQ) expressed support for the adoption of WQS that protect beneficial uses of water bodies that are based on sound scientific rationale that is documented, as well as opportunities for public input as WQS are adopted and implemented. MDEQ recommended a means of enabling state, tribal, and interested stakeholder notification of significant implementation actions.

MDEQ acknowledged the efforts of several tribes in Montana that have TAS authority and have adopted their own WQS, and other tribes that are pursuing those actions. MDEQ expressed concern about the lack of clarity about where these new WQS would apply: “States must be able to distinguish where the proposed federal baseline [WQS] apply and where state [WQS] apply. States must also accurately identify the spatial boundaries of lands to which this rule applies to evaluate water

body assessment unit boundaries and evaluate potential for downstream impacts of pollutant discharges. EPA has noted difficulty in acquiring accurate spatial information depicting boundaries of certain categories of tribal lands. [MDEQ] requests that EPA maintain accurate maps that clearly distinguish the spatial boundaries of the formal and informal Indian reservation lands (including applicable trust lands) covered by this rule, as well as those lands that are considered exceptions including off-reservation allotments or dependent Indian communities and make them readily available to states and tribes."

MDEQ requested clarity and guidance on various technical and logistical aspects of the narrative translation procedures, particularly as they impact state programs. "This proposed rule will impact several [MDEQ] programs, including Montana Pollutant Discharge Elimination System (MPDES) permitting, beneficial use support and impairment assessment, Total Maximum Daily Load development, and our 401 and 404 certification programs…. The proposed rule includes narrative criteria and binding translation procedures which EPA would use to determine case-specific numeric values protective of applicable designated uses for use in CWA program implementation. States must know the numeric values that are applicable to downstream waters to ensure adequate downstream protections when issuing permits. States also take upstream water quality conditions and downstream protections into consideration when performing waterbody assessments, reasonable potential analysis, TMDL development, and other CWA program actions."

MDEQ expressed its commitment to continue collaboratively engaging with EPA, tribes, and other state partners to achieve shared goals of water quality protection under the cooperative federalism approach to administering CWA programs. They also noted that the regional offices will need additional resources to meet the increased workload, and requested that EPA notify the states "to what degree the practical implementation of this proposed rule may affect EPA regional offices' capacity and resulting effects to states' state Clean Water Act Programs, including: (1) review and approval of state-issued permits; (2) review and approval of Total Maximum Daily Load documents; and (3) review and approval of 303d/305b water quality reports."

Nebraska

The Nebraska Department of Environment and Energy (NDEE) acknowledged "that all Waters of the United States within Indian reservations under EPA jurisdiction should have [WQS] under the [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."

NDEE said the method of translating proposed narrative criteria into numeric limits "as necessary" is ambiguous and 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." NDEE gave the example of an EPA NPDES permit with limits under option 5 and a §404 individual permit containing conditions under option 1. "This will be confusing and making it difficult for upstream authorities to know which numeric limits apply to downstream beneficial uses." NDEE recommended that EPA take a similar approach to Nebraska's, setting WQS based on §101(a) designated uses with §304(a) recommended criteria. "This would ensure consistency with Nebraska [WQS] and would facilitate the protection of downstream beneficial uses of waters within Nebraska as well as within Indian reservations." Additionally, EPA has not explained how it will handle disputes between its own WQS and state WQS when WPA is the decision maker.

EPA has also underestimated the economic impacts to upstream permitted dischargers. "Many small systems in Nebraska have aging populations and may be experiencing population declines making it more difficult to facilitate system upgrades" to protect downstream beneficial uses on Indian reservations. "It is also not clear how financial impacts were determined when numeric limits and subsequent facility upgrades are largely unknown at this time."

NDEE concluded by asserting that EPA should be held to the same public WQS process as states under CWA §131.20(b) and 40 CFR 130.3(b)(6), with public participation and accepting comments when reviewing and revising WQS and setting numeric limits.

Nevada

The Nevada Division of Environmental Protection (NDEP) acknowledged the importance of WQS to protect the integrity of Nevada's and the nation's waters, but recommended that this rule not be adopted. "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."

NDEP noted that EPA had not provided a list of waters affected, and at a minimum EPA should provide an interactive web map depicting tribal boundaries and affected waters prior to consideration of the rule, and a GIS coverage/layer would be valuable. The rule also does not consider attainability of proposed baseline designated uses, or cultural and traditional designated uses, particularly where the affected waterbodies don't have sufficient flow to support baseline designated uses such as contact recreation or consumption of specific aquatic organisms, or where WQS are unachievable due to natural background

conditions. NDEP recommended that EPA allow affected Tribes to request a public water supply use on a case-by-case basis rather than designate a blanket public water supply use. "This will ensure the designation is appropriate for the waterbody."

NDEP also raised concerns with the potential overreach of Narrative Criterion #2 into the States' sole and exclusive authority to address water rights, in contradiction of CWA §101(g) and §518(a). The criterion states: "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." NDEP said: "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," which includes the adjudication of vested water rights and the appropriation of public waters.

NDEP noted that some of Nevada's WQS are different from the §304(a) criteria and a blanket tribal WQS would cause conflicts. For example, Nevada has sturgeon-free waters and the statewide selenium criteria are higher than EPA's criteria for waters with sturgeon. "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." The process for the public, tribes, and states to review and comment on the implementation and revisions of WQS should also be explicit in the rule. Finally, NDEP recommended that the rule be revised to include a delineated process for consulting with states on the designation of Outstanding Natural Resource Waters (ONRWs), and EPA should not take the lead role in identifying those waters on tribal lands.

North Dakota

The North Dakota Department of Water Resources (NDDWR) expressed concern about EPA's use of hydrologic integrity as a water quality criterion, treating water infrastructure as pollution that influences the water body "including the characteristic pattern of flow magnitude, timing, duration, frequency, and rate of change of a water body." NDDWR said: "[W]ater infrastructure is necessary for the health and safety of all people and is a necessary part of supporting North Dakota's largest industries – agriculture and energy through flood protection and drainage as well as irrigation and industrial uses of water. The EPA's ongoing stance that [WQS] cannot be met if hydrology is altered implies that infrastructure such as flood protection can be achieved in ways that don't affect the environment at all. As a part of NDDWR's and the North Dakota Department of Environmental Quality's (NDDEQ) permitting processes, impacts to waters are properly mitigated and managed at a state level to assure that the state's water resources remain healthy and safe. All projects meet the requirements of the Endangered Species Act, National Environmental Protection Act, and other state and federal regulations."

Oklahoma

The Oklahoma Secretary of Energy and Environment (OSEE) and Oklahoma Department of Environmental Quality (ODEQ) noted the conflict between the proposed rule and EPA's 2020 approval of Oklahoma's request to administer WQS in certain areas of Indian country under the Oklahoma-specific §10211(a) of the Safe, Accountable, Flexible, Efficient Transportation Equity Act of 2005 (SAFETEA). Following the *McGirt v. Oklahoma* decision, EPA recognizes the existence of six tribal reservations in Oklahoma, but the exterior boundaries of these reservations are not clearly identified. In 2021, EPA proposed to withdraw and reconsider the 2020 SAFETEA approval, which Oklahoma's Governor opposed, and EPA has taken no additional action. Oklahoma continues to administer environmental regulatory programs where the SAFETEA statutory elements are met, creating uncertainty about where EPA's baseline WQS would apply and the economic impacts of those new WQS. OSEE and ODEQ recommended that Oklahoma be explicitly excluded from this rulemaking. "If EPA takes future action on the 2020 SAFETEA request approval, then EPA should initiate a separate rulemaking action prior to applying and Federal Baseline Water Quality Standards in Oklahoma in order to allow the State and the impacted tribal nations a meaningful opportunity to comment on the potential consequences of the applicability of such standards."

On the technical side of the rule, OSEE and ODEQ noted that where federal WQS deviate significantly from the state WQS, the checkboard nature of Indian Country in Oklahoma will make implementation difficult. "[M]aking assessment and permitting decisions on small segments of waterbodies for which standards have been established by two sovereign entities becomes difficult, if not practically impossible. Fragmenting the WQS framework within Oklahoma is more likely to result in untenable confusion than it is increased protection of Tribal waters."

South Dakota

The South Dakota Department of Agriculture and Natural Resources (SDDANR) opposed the rule, noting that: (1) it does not provide a transparent process or consistency with state permitting processes; (2) blanket designations of non-existent and unattainable uses to waters on tribal reservations will have detrimental implications for both Tribes and States, particularly where streams are actually intermittent or ephemeral, requiring an assessment on a case-by-case basis; (3) adding "cultural significance" to ONRW designations is unnecessary because their purpose is to maintain high quality and not allow

degradation; (4) this rule bypasses the existing process for states and TAS-tribes to develop WQS and proposes a different, unequal, and less stringent process for EPA outside the requirements established by Congress; (5) the proposed rule lacks commitment to triennial reviews, water body assessments and listing, and TMDL development and restoration, cornerstones of CWA protections, leaving tribal communities to continue to be underserved by EPA; (6) the economic analysis failed to address the financial impacts of nutrient standards and PCBs, and utilized the minimum five-mile radius to identify potentially impacted upstream users when EPA regions commonly require assessments up to 30 miles or more; and (7) EPA has exceeded its authority by including tribal trust lands outside of formal reservations, not all of which meet the definitions of Indian Country, and it is not clear how EPA, states, tribes, or others can differentiate where the proposed WQS will apply on off-reservation tribal trust lands and off-reservation allotments.

Texas

The Texas Commission on Environmental Quality (TCEQ) requested that the rule include publicly available lists of (1) reservation surface waters where the federal WQS apply, together with their known locations and designated uses; and (2) numeric criteria developed by EPA regions. States need this information to ensure they can clearly identify waters under their own jurisdiction and criteria applicable to those waters, and enable states to evaluate potential WQS discrepancies.

TCEQ said: "Clarity is needed regarding EPA's authority to promulgate and implement the proposed rule, to describe the mechanism that will be used to resolve potential conflicts or disputes; and how EPA will meet its existing CWA Section 303(c) responsibilities to act on state-adopted WQS in light of the proposal." TCEQ pointed to the need for extensive resources to implement this rule and EPA's existing backlog of actions, noting that "portions of the 2010, 2014, 2018, and 2022 revisions to 30 Texas Administrative Code Chapter 307, the Texas Surface Water Quality Standards, are awaiting action by EPA."

Technical comments included the need to clearly define: (1) the binding translation procedure, particularly how the procedures will be developed for the same constituent within each CWA program (i.e., WQS, wastewater permitting, total maximum daily load and assessment); (2) Option 5 for implementing the binding translation procedure and how this can be appropriately used for all CWA purposes; and (3) the definition of bioaccumulative to ensure specificity regarding which pollutants EPA considers ineligible for mixing zones.

Wyoming

The Wyoming Department of Environmental Quality (WDEQ) supported the intent of the rule to ensure that CWA protections are in place for WOTUS under tribal authority, but expressed concern that the proposed rule has significant adverse implications for Wyoming, including 140 discharge permits upstream of the Wind River and Crow Reservations.

"It has been more than 35 years since Congress amended the CWA to provide two main pathways [§518 (d) and (e)] for WOTUS under tribal authority to receive CWA protections…. Despite Congress's clear direction, EPA has chosen to spend the last several decades focused on the fundamentally flawed approach of promulgating baseline WQS rather than meaningfully engaging with states and tribes to address barriers to CWA implementation for surface waters under tribal authority. Furthermore, EPA has proposed a rule that will require a significant investment of resources on the part of tribes, states, and EPA without any additional funding to support implementation." WDEQ questioned EPA's authority to sidestep the provisions and objectives of the CWA, to supplant the role of tribes in administering the CWA, and to create a WQS process that is inconsistent with the requirements that states and TAS-tribes must meet.

WDEQ outlined sixteen concerns with the proposed rule: (1) EPA's lack of Congressional authority to promulgate WQS for tribes without TAS, noting that non-authorized tribes are not considered "States" under the CWA, but are a "municipality" under §502(4); (2) EPA must follow the same §303 and 40 CFR §131.22 procedures as States and TAS Tribes, including triennial reviews, public notice and hearings to establish ONRWs, numeric criteria for toxic pollutants or clear methods to regulate narrative criteria, and rationale and site-specific information supporting the designation of specific waters for cultural and traditional uses; (3) EPA must clearly identify applicable waters and provide opportunities to comment on specific waters, noting that "ad-hoc jurisdictional decisions during the permitting process…creates both legal and practical concerns"; (4) EPA needs a mechanism for tribes to opt-in or opt-out of WQS coverage beyond the initial 90-day period, which seems infeasibly short and inconsistent with tribal sovereignty, and a tribe's decision to opt-in or opt-out should be subject to public comment to ensure all relevant information has been considered.

Notable was concern (5), that EPA's use of narrative criteria and five broad translation options are not sufficient to ensure compliance with the CWA, and EPA's threat to use its oversight authority to ensure States' and TAS Tribes' NPDES permits comply with the new federal WQS "is both irrational and alarming. First, unless a specific CWA implementation activity has occurred that prompted EPA to translate the narrative criteria, there would be no translation available that states and authorized tribes could use to ensure compliance with the WQS. Second, even in cases where numeric translations were available, since the translation procedures are not actually 'binding,' states and authorized tribes would not necessarily have to use EPA's translations because they are not WQS. Regardless, the ambiguity associated with EPA's proposed narrative criteria will lead to significant regulatory uncertainty for state and tribal permitting authorities and the regulated community, delaying issuance

of CWA Section 402 and 404 permits as well as CWA Section 401 certifications, because states and EPA may disagree in how to interpret the narrative criteria. In such cases, a long dispute/resolution process is likely."

WDEQ's list continued: (6) EPA should use the established Federal Register process to promulgate WQS to be more consistent with past precedent and procedures used by States and TAS Tribes, and to streamline access to the revisions and translations; (7) EPA must include the criteria and evaluation process for designating ONRWs in the federal WQS. Also notable was concern (8), that EPA's hydrologic integrity narrative may create confusion regarding the scope of the CWA. "Although some states and authorized tribes may have authority over the hydrologic integrity of surface waters through their WQS, Section 101(g) of the CWA…makes it clear that Congress did not intend for the CWA to interfere with state authorities to allocate quantities of water. Given that hydrologic integrity is integrally linked with allocation of water and other hydrologic modifications, WDEQ is concerned the hydrologic conditions narrative will hinder potential water projects or implicate the legal diversion of water for beneficial uses (including diversions from waters under state jurisdiction) as causing or contributing to a designated use impairment. In circumstances where neither EPA nor the tribe has authority over allocation of water, the narrative will only cause confusion regarding the scope of the CWA. Given these concerns, EPA must remove any provisions related to hydrologic integrity since it is outside the scope and authority of the CWA and the EPA."

The final concerns included: (9) EPA needs to clarify requirements regarding non-point sources of pollution within the tribes' control; (10) the rule has federalism consultation implications under E.O. 13132; (11) EPA's consultation with individual states was insufficient, and EPA still has not addressed concerns previously raised in 2016; (12) EPA should formalize or codify tribal participation in baseline WQS implementation to ensure that they are legally binding and not subject deviations; (13) EPA cannot objectively, fairly, and consistently promulgate federal WQS and be the arbiter of disputes between states and EPA under 40 CFR 131.7, and must provide an alternative dispute resolution process; (14) EPA's economic analysis was incomplete, omitting dischargers further than 5-miles away, nonpoint sources, and potential impacts of ONRWs; (15) EPA must work with the Army Corps of Engineers to determine whether a water is WOTUS to ensure consistency after the *Sackett* decision; (16) EPA should clarify the applicability of the proposed rule to wetlands and ensure the WQS are appropriate for wetlands.

Attorneys General

The 20-page joint letter from the eight attorneys general (AGs) said: "In 1987, Congress amended the Clean Water Act to allow Tribes to be treated like States for some provisions of the CWA upon meeting certain requirements. Tribes with treatment-as-States ('TAS') status have authority to establish WQS, administer permits, and manage nonpoint source pollutants. Tribes that have not attained TAS status have no such authority. EPA's role in the world of WQS is twofold: (1) to serve as a 'backstop,' stepping in only when a State or TAS Tribe is failing to meet the requirements of the Clean Water Act; and (2) to 'support' States and TAS Tribes by providing technical services like § 304(a) national recommended water quality criteria for use by States and TAS Tribes when setting WQS." The AGs summarized EPA's reasoning behind the rule as: "EPA believes that: (1) there is a gap in CWA protections over waters on reservations of non-TAS Tribes; (2) this gap exists because Tribes are not attaining TAS Status fast enough; and (3) it is EPA's prerogative to promulgate comprehensive, nationwide water quality criteria to fill this gap."

The AGs noted that the CWA requires EPA to play a supportive role for the states, and for tribes with TAS, as the states and TAS tribes take the lead in protecting their health while juggling multiple other policy considerations. "The Proposed Rule upsets this considered division of responsibility."

The AGs pointed out that the authority invoked under CWA §303(c)(4) requires EPA to make a "necessity determination," and then to follow the same policies, procedures, analyses, and public participation requirements established for the States when promulgating WQS. The AGs noted that since EPA is already writing protective NPDES permits in Indian country by relying on downstream state WQS, the premise that these non-TAS waters are unprotected is false. Additionally, §303(c)(4)(B) power can only be invoked when the states or tribes will not or cannot act. "Far from demonstrating that non-TAS Tribes 'will not, or cannot, act,' EPA acknowledges that Tribes are actively applying for TAS status and that twenty-seven Tribes have been approved in the last six years." Further, under §303(c)(4)(B), "The power to promulgate a particular standard in one case at a time does not encompass the power to promulgate every type of WQS in innumerable cases, nationwide, over an EPA-estimated 76,000 miles of rivers and streams and 1.9 million acres of lakes, reservoirs, and other open surface waters."

The AGs asserted that EPA was disregarding Congressional intent that State WQS apply to all intrastate waters, including Tribal navigable waters, until Tribes attain TAS status and promulgate Tribe-specific WQS. "States have spent more than 50 years establishing science-based water quality standards that recognize each State's unique topography, hydrogeology, geology, climate, and the resulting rivers, streams, and lakes that make up the State's surface waters. Not only is relying on State WQS to protect reservation waters sensible, adherent to cooperative federalism precepts, and consistent with EPA past policy – it is required by the CWA."