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RE: Federal Baseline Water Quality Standards for Indian Reservations Proposed Rule
Comment period ends 8/3/23
Federal Rulemaking Portal: https://www.regulations.gov
Docket ID No. EPA–HQ–OW–2016–0405

To: Docket ID No. EPA–HQ–OW–2016–0405

The South Dakota Department of Agriculture and Natural Resources (DANR) appreciates the opportunity to comment on the Environmental Protection Agency (EPA) proposed Federal Baseline Water Quality Standards for Indian Reservations. DANR has reviewed the proposed rule, engaged in listening sessions, and attended webinars regarding the proposed rule. DANR provides the following comments.

South Dakota DANR urges EPA to withdraw the proposed rule or make meaningful revisions to the proposed rules. If the rule is not withdrawn, DANR urges EPA to carefully consider the comments:

1) This proposed rule does not provide transparency or clear guidance to states and TAS tribes and will likely result in confusion and contested permits.

Water Quality Standards consist of three components: designated uses, water quality criterion, and antidegradation. The proposed rule does not clearly specify the numeric translations (based on the narrative criterion) that would be associated with those designated uses. Instead, EPA has proposed five different guidelines the agency could use to translate the narratives into binding numeric criteria. To further complicate this process, EPA states it would not be "a good use of their resources" to translate the criteria for all waters covered by the rule. If the location of the designated use or the associated numeric criteria is not known, how will downstream uses be proactively protected? Additionally, this proposed rule would allow EPA to pick their preferred option during the public review process after the effort to develop a permit or TMDL is complete.

EPA has repeatedly stated permit writers routinely develop permits to protect downstream uses and this proposed rule is the same process. It is not. Permit writers routinely know the location of the downstream protected waters and the associated numeric criteria prior to permit development. For example, South Dakota permit writers know the location of the Nebraska state boundary and have easy access to Nebraska's published state and EPA-approved water quality criterion.

2) DANR strongly opposes EPA assigning blanket designations of drinking water supply and primary recreation and aquatic life designations to all waters.

DANR strongly urges EPA to ONLY assign designated uses that are existing and attainable uses. Assigning non-existent and unattainable uses will have detrimental implications to both tribes and states. If a drinking water supply or recreation use is designated for a water body that is not physically capable of achieving those uses due to low flow or other factors, placing stringent criterion on that stream does not protecting a use if that use does not exist. States should not have any expectation EPA will perform UAAs on streams to remove nonexistent uses or to classify a sub-use if the original assigned use is not appropriate. Many streams in South Dakota are ephemeral or intermittent in flow, so DANR strongly urges EPA to carefully assess waters on a case-by-case basis to determine if the proposed uses are existing and attainable and NOT simply place a blanket designation across the entire country.

3) DANR opposes EPA adding the language "cultural significance" to 40 CFR 131.12(a)(3) under protection for Outstanding National Resource Waters (ONRW) (Tier 3), because it is unnecessary. The purpose of the ONRW designation is to maintain high quality waters and not allow degradation. Additionally, EPA's *Economic Analysis for Proposed Federal Baseline Water Quality Standards for Indian Reservations, April 5, 2023,* did not consider the impacts of including the language "cultural significance" and the potential consequences to existing upstream facilities if a water would suddenly change to a ONRW. By assigning *Cultural and Traditional uses* as a designated use, the proposed rule already provides protection of waters.

4) DANR opposes this proposed rule because it by-passes laws enacted by Congress and creates a different and unequal process for EPA.

Congress has provided a clear process for states and tribes to develop water quality standards, and EPA has created an exhaustive list of guidance material to implement those Clean Water Act requirements. Additionally, per 40 CFR 131.22(c), "In promulgating water quality standards, the Administrator is subject to the same policies, procedures, analyses, and public participation requirements established for States in these regulations." Yet, EPA is proposing a different rule for themselves that does not follow the same set of requirements set forth by Congress in the Clean Water Act. In fact, Option Three would allow EPA to use tribal water quality standards that are NOT Clean Water Act EPA-approved. Would EPA approve state water quality standards that did not identify the physical location of the beneficial use? Would they approve a package that ONLY contained narrative criteria without explicitly identifying numeric translations (the actual numbers)? Would EPA allow a state to never do a triennial review? Yet this is the rule they are writing for themselves. EPA is proposing a two-tiered system of environmental quality-one tier passed by Congress for states and tribes where EPA makes decisions and determines approval and the second tier where EPA creates a less stringent set of rules for their use.

5) The proposed rule could prove counterproductive to President Biden administration's efforts on environmental justice.

Executive Order 14096 states "We must advance environmental justice for all by implementing and enforcing the Nation's environmental and civils rights laws, preventing pollution, addressing climate changes and its effects, and working to clean up legacy pollution that is harming human health and the environment." On the surface, environmental justice appears to be at the core of the proposed rule. However, upon further examination, the proposed rule lacks a commitment to conduct triennial reviews of water quality standards, waterbody assessments and listing, and TMDL development and restoration. Water quality standards are the first steps to protecting tribal water quality, and the environment, and culture. However, to fully achieve environmental justice,

EPA must also commit to the Clean Water Act cornerstones of reviews, assessment and listing, and TMDL development and waterbody restoration. Without the complete approach to waterbody protection, environmental justice is not served, and tribal communities will continue to be underserved by the federal government and EPA.

Congress has already provided a clear process in the Clean Water Act for which environmental justice may be served and tribal waters be protected. The preamble identifies that in 2016 the Treatment as States (TAS) application process was streamlined and tribes could achieve TAS within 10 years. DANR recommends EPA commit to provide greater assistance for tribes to obtain TAS instead of diverging with the proposed rule. Working with tribes to gain TAS would address most of the deficiencies in this rule while protecting tribal waters on a basis that is equal to the protections provided to non-tribal waters. This proposed rule is not necessary. The TAS process already exists.

6) The Economic Analysis fails to address key issues.

In the economic analysis, EPA used a five-mile radius to identify potentially impacted upstream dischargers and chose to omit the financial impacts of nutrient standards and PCBs to those facilities. Five miles is the absolute minimum distance that EPA requires the states to examine impacts. It is not uncommon for EPA Regions to require impact assessments to waters up to 30 or more miles downstream during permit and TMDL development. The economic analysis has grossly underestimated the number of communities that will be impacted.

The validity of the economic analysis is also question by the rule's suggestion variances might be issued to alleviate the costs for facilities upstream of Indian country. The state is unaware of any legal avenue through with a facility may be issued a water quality variance for another jurisdiction's water quality standards.

Lastly, the economic analysis is unacceptably deficient due to the omission of analyzing facility impacts to meet nutrient standards in tribal waters. EPA has been pushing states and tribes to adopt numeric nutrient criteria and better regulate nutrients in the environment for decades. In an April 5, 2022, Memorandum "Accelerating Nutrient Pollution Reductions in the Nation's Waters" EPA Assistant Administrator Radhika Fox, states "Nutrients are the most widespread stressor impacting rivers and streams.... In the coming years, a key area of focus for the Office of Water is to accelerate progress in controlling excess nutrients entering our nation's waters...We will use the Clean Water Act framework to make progress and to provide an incentive and backstop for collaborative approaches. We are committed to taking bold action to tackle the nutrient pollution challenge."

The intentional decision to exclude nutrient criteria in the economic analyses results in a flawed conclusion and vastly underestimates the economic impact of the rule. EPA has been clear in their intention to "tackle the nutrient pollution challenge" and will certainly use 304(a) nutrient criteria when translating the proposed narrative criteria. Using a conservative estimate of 5 miles, there will be <u>at least</u> 70 facilities in South Dakota required to address nutrients. The smallest facilities can expect costs to exceed a million dollars with estimates for others each exceeding five to ten million dollars. DANR urges EPA to reevaluate the economic analysis to include EPA's 304(a) nutrient criteria for the entire country. A proposed rule of this magnitude deserves an accurate economic analysis.

7) The proposed rule does not clearly indicate where the rule would apply.

The proposed rule states in section (a) that the standards "apply to all waters of the United States in Indian country ...." The rule then sets forth exceptions one of which in subsection (3) is for "Indian country waters on off-reservation allotments and off-reservation dependent Indian communities."

In footnote 3 of the proposed rule's Supplementary Information, reference is made to 18 U.S.C. § 1151 which defines "Indian country" as:

> (a) 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, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

88 FR at 29498.

EPA posits the term "reservation" in 1151(a) "includes both formal reservations and informal reservations such as trust land that has been validly set apart for use by a Tribe even if such trust land is located outside of the exterior boundaries of a formally designated reservation." 88 FR at 29498.

DANR has long opposed EPA's position that all tribal trust lands outside of a formal reservation constitute Indian country. A parcel of land held in trust by the United States for an Indian tribe does not mean it meets one of the three definitions of Indian country set forth above. As the Eighth Circuit Court of Appeals has noted, "tribal trust land beyond the boundaries of a reservation is ordinarily not Indian country." *United States v. Stands*, 105 F.3d 1565, 1572 (8th Cir. 1997), *cert. den.*, 522 U.S. 841. In *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994, 1012-1013 (8th Cir. 2010), the court appeared to depart in some degree from *Stands* to find that lands within the 1858 extinguished boundaries of the Yankton Reservation which were taken into trust, constituted current "reservation." It also created questions with regard to certain former allotted lands. However, while the extent to which these findings are applicable outside the Yankton "extinguished" boundary and within other "extinguished" reservation boundaries is debatable, the findings surely do not apply to lands which lie outside an "extinguished" boundary. As a result, DANR contends that EPA has exceeded the statutory definition of Indian country in past practice and continues to exceed its authority in this proposed rule.

Even if tribal trust land outside of a formal reservation is considered to be an "informal reservation," there is no accepted precedent or any definition in the proposed rule to describe what constitutes an "informal reservation." Thus, it is unclear as to what, besides tribal trust lands, EPA considers to be an "informal reservation."

It is not clear whether off-reservation allotments, which are excluded from the rule, include off-reservation individual Indian trust lands. Under the Indian Reorganization Act ("IRA"), 25 U.S.C. § 5101, *et seq.*, an individual Indian can purchase fee land and apply to the Secretary of the Interior to have the land taken into trust by the federal government for the benefit of the Indian. *See* 25 C.F.R. Part 151. Section 151.3(b) limits such individual Indian applications to land "located within the exterior boundaries of an Indian reservation, or adjacent thereto ...." So, at first glance, one would expect few or none of such parcels of land to be "off-reservation." But Section 151.2(f) defines "Indian reservation" for IRA trust acquisitions and provides that, "where there has been a

final judicial determination that a reservation has been disestablished or diminished, *Indian reservation* means that area of land constituting the former reservation of the tribe ...." In South Dakota, the Pine Ridge, Rosebud, and Yankton Reservations have been judicially diminished and the Lake Traverse Reservation has been judicially disestablished. Consequently, it is quite common for individual Indians to have land taken into trust that is considered to be "on-reservation" under the IRA but which is "off-reservation" under the proposed rule.

"Allotments" that are Indian country under § 1151(c) are "allotments, the Indian titles to which have not been extinguished ...." It would appear that "allotment" does not include individual Indian fee land taken into trust under the IRA. An allotment must have an uninterrupted chain of title throughout, which is held in trust by the federal government for the benefit of Indian owner or owners. Fee land taken into trust under the IRA had its trust status interrupted when it became fee land.

The primary concern with whether an allotment includes land taken into trust under the IRA is the difficulty in obtaining information regarding the ownership, location, or description of individual parcels held in trust. Although the Bureau of Indian Affairs has this information, it will not provide it, citing 25 U.S.C. § 2216(e) and 25 C.F.R. §150.303. If "allotment" is interpreted or defined to include land taken into trust under the IRA, then effectively all individual Indian trust land outside of a reservation would be excluded from the proposed rule.

EPA has not provided any indication of how EPA, states, tribes, or others can easily differentiate where the proposed baseline water quality standards apply regarding off-reservation tribal trust lands and off-reservation allotments. Available mapping layers do not differentiate between off-reservation tribal trust lands, which would be included in the proposed rule, and off-reservation allotments, which would not be included in the proposed rule. DANR does not support this proposed rule because it does not provide clear boundaries of where the rule would apply. DANR highly recommends that EPA work with federal partners to provide a process so states can easily identify where the proposed baseline standards would apply and where they would not.

Thank you for the opportunity to comment. DANR would ask that EPA carefully consider these comments and withdraw rulemaking efforts or make meaningful revisions to the proposed rule.

Sincerely,

Hunter Roberts
Secretary