

Jon Niermann, *Chairman*
Emily Lindley, *Commissioner*
Bobby Janecka, *Commissioner*
Kelly Keel, *Interim Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

August 3, 2023

James Ray
Attn: EPA-HQ-OW-2016-0405
U.S. Environmental Protection Agency
Office of Science and Technology
Health Protection Division
1200 Pennsylvania Avenue NW
MC 4305T
Washington, DC 20460

Subject: *Federal Register*, vol. 88, No. 87, Pages 29496 - 29526, May 5, 2023, U.S. Environmental Protection Agency; *Federal Baseline Water Quality Standards for Indian Reservations*; *Notice of Proposed Rule*; *Availability of Public Comment*.

Dear Sir or Madame:

The Texas Commission on Environmental Quality (TCEQ) appreciates the opportunity to provide comments on the proposed rule establishing federal water quality standards (WQS) for Indian reservations that currently do not have WQS in effect under the Clean Water Act (CWA). Notice of the proposal and request for public comment was published on May 5, 2023 in the *Federal Register*, vol. 88, No. 87, Pages 29496 - 29526. TCEQ is providing comments on the public availability and opportunities for public comment of: (1) locations to which promulgated baseline standards will apply; and (2) promulgated numeric criteria calculated by EPA in association with the proposed rule. 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. Technical comments include the need to clearly define: (1) the binding translation procedure; (2) Option 5 implementing the binding translation procedure; and (3) the definition of bioaccumulative.

If you have questions concerning the enclosed comments, please contact Cari-Michel La Caille, Director of the Office of Water at (512) 239-6479, or at cari-michel.lacaille@tceq.texas.gov.

Sincerely,

A handwritten signature in black ink that reads "K Keel".

Kelly Keel
Interim Executive Director
Texas Commission on Environmental Quality

Attachment

**Texas Commission on Environmental Quality (TCEQ) Comments on
*Federal Baseline Water Quality Standards for Indian Reservations***

***Federal Register* Vol. 88, No. 87 29496-29526**

Background

In the May 5, 2023, edition of the *Federal Register*, the Environmental Protection Agency (EPA) published the proposed rule establishing federal water quality standards (WQS) for Indian reservations that currently do not have WQS in effect under the federal Clean Water Act (CWA). Public comments on the proposed rule will be accepted by August 3, 2023. EPA published an Advanced Notice of Proposed Rulemaking on September 29, 2016; and on January 18, 2001, administratively determined core WQS for Tribes were needed (Administrator's Determination).

The purpose of the rulemaking is to safeguard water quality for Tribes that have not obtained authority to administer their own WQS programs in a similar manner as states (TAS), or other limited circumstances. Waters in these reservations do not have the protection of WQS afforded by CWA. In these waters, EPA currently uses a variety of tools to ensure protection when implementing CWA programs such as wastewater permitting, including the application of neighboring state WQS or federally recommended water quality criteria. However, the current practice may not reflect uses of Indian reservation waters.

According to the proposed rule, EPA would develop the baseline WQS in consultation with Tribes, in a manner that would address location-specific water quality conditions and Tribal circumstances. EPA's proposed methodology to develop numeric criteria tailored to location-specific conditions and Tribal circumstances is a "binding translation procedure" to implement narrative criteria statements that prescribe water quality be free from objectionable materials and nuisance conditions. The criteria will protect baseline designated uses including aquatic life, primary contact recreation, cultural and traditional uses. The proposed WQS also include an antidegradation policy and implementation methods, and variance procedures; and other policies that address critical conditions, mixing zones, and authorize compliance schedules.

As proposed, EPA Regional Administrators (EPA Regions) will develop, establish, and implement the baseline WQS. These include tasks such as: consultation with Tribes; translating narrative criteria in accordance with the proposed binding translation procedure; maintaining and making publicly available numeric translations of narrative criteria; publishing public notice of baseline WQS rulemakings; and holding hearings according to federal public participation regulations at 40 Code of Federal Regulations (40 CFR) Part 25.

TCEQ offers the following comments as outlined below.

Comments Regarding *Federal Baseline Water Quality Standards for Indian Reservations*

I. General comments on the proposed rule.

- A. **A list of surface waters for which WQS are promulgated in association with the proposed rule should be made publicly available in rule, and states afforded an opportunity to publicly comment.** A list of reservation surface waters, their known locations, and promulgated baseline designated uses with binding criteria should be included in rule, in addition to the dedicated website as indicated on page 29502, in a manner similar to other federally promulgated WQS. Without this information, it will be unclear to states what baseline standards will apply where, or where an allowable exclusion will apply. This information is particularly needed for states with multiple reservations within its boundaries and with neighboring state boundaries, so that applicability and regulatory certainty can be determined. EPA should provide an opportunity for public comment, to ensure states can identify waters under state jurisdiction and evaluate potential WQS discrepancies.
- B. **A list of numeric criteria developed by EPA Regions should be made publicly available in rule, and states afforded an opportunity to publicly comment.** TCEQ supports the proposed publishing of calculated numeric criteria developed by EPA when implementing the “binding narrative translator approach” as indicated on page 29523. However, these criteria and the basis of their development should be published in rule, consistent with other federally-promulgated standards, rather than on a website to be administered by EPA Regions. The public availability of this regulatory information is needed to ensure criteria may be considered by states when implementing their state water quality management programs, and to ensure state programs comply with downstream baseline WQS promulgated by EPA. EPA should provide an opportunity for public comment to ensure states can identify criteria applicable to waters under state jurisdiction and evaluate potential WQS discrepancies.
- C. **Clarity is needed regarding EPA’s authority to promulgate and implement the proposed rule, and to describe the mechanism that will be used to resolve potential conflicts or disputes.** Page 29500 of the preamble indicates that states raised concerns with the authority of EPA to conduct the proposed rulemaking during the advance notice of proposed rulemaking (ANPRM) in 2016, and to resolve potential conflicts that may arise when WQS in neighboring areas differ. Specifically, “States raised concerns about EPA’s CWA authority and resources to promulgate and effectively implement baseline WQS on Indian reservations. States also commented that baseline WQS might differ from neighboring states’ standards and potentially affect upstream dischargers.” The preamble should be revised to clearly indicate how EPA has addressed these state concerns, including a thorough and concise description of EPA’s authority to promulgate and implement the rule as proposed. The mechanism by which

EPA will resolve differences, potential conflicts, or disputes among states, tribes, and the regulated community should also be described.

- D. Clarity is needed to describe how EPA will meet its existing responsibilities in Section 303(c) of the CWA in light of the additional requirements imposed on EPA by the proposed rule.** The proposed rule will require extensive resources by EPA Regional staff and headquarters to implement. Given the existing EPA backlog of actions on state-adopted WQS, how will EPA allocate resources to implement the proposed rule while adequately ensuring EPA's existing responsibilities to state programs are met in accordance with deadlines specified in Section 303(c) of the CWA? For example, 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.

II. Comments concerning technical components of the proposal.

- A. A definition for “binding translation procedure” is needed to provide clarity and regulatory certainty for states.** The preamble generally describes how numeric translators of narrative criteria will be developed using a “binding translation procedure.” The preamble also provides a summary of five proposed options as potential translators. However, it is not clearly defined how “binding” these procedures are in a regulatory context and the degree of flexibility that may be used to apply and implement the translated criteria. For example, clarity is needed to determine how “binding translation procedures” for the same constituent will be developed for each respective CWA program (i.e., WQS, wastewater permitting, total maximum daily load and assessment) or if the binding procedures, resultant criterion, and any other binding requirements will be exactly the same for each implementing program. The preamble indicates on page 29506 that “numeric values may be needed for different parameters in different circumstances, in accordance with EPA regulations, but also reflect variations in the way criteria are applied in different CWA implementation programs.” Accordingly, implementation of the “binding translation procedure” could result in different criteria and targets for different regulatory purposes, contributing to cross-programmatic conflict and regulatory uncertainty.
- B. Option 5 of the proposed binding translation procedures, that allows EPA to rely on existing CWA implementation provisions to translate narrative criteria to numeric criteria, needs additional clarification.** The proposed descriptions provided on pages 29506 and 29508 are vague and unspecific. According to the proposal, the “Administrator would rely on existing CWA implementation provisions to translate the baseline narrative criteria, where necessary. For example, the Regional Administrator could rely on 40 CFR Section 122.44(d)(1)(vi)(A) and (C) for NPDES permitting purposes.” However, not all parameters have clear implementation guidance for all CWA purposes, and available implementation guidance may not address all CWA programs. Additionally, can Option 5 still be used if a technology-based standard is insufficient to protect a use, and a water quality-based standard is needed? More details are needed to describe Option 5 and how this option can be appropriately used for all CWA purposes.

C. Additional clarity and specificity is needed to define “bioaccumulative.” The proposed §131.XX(g)(2)(iv) states “Mixing zones shall not be authorized for pathogens, pathogen indicators, or bioaccumulative pollutants in the discharge, unless the Regional Administrator can demonstrate, after consideration of the effects of the mixing zone (including potential bioaccumulation within specific trophic levels of resident species or other relevant factors), that the designated use of the water body as a whole will be protected. Bioaccumulative pollutant means a pollutant that is taken up and retained by an aquatic organism from any surrounding media (e.g., water, food, sediment).” A more specific definition of what is considered to be bioaccumulative, such as a pollutant with a bioaccumulation factor at or above a specific level, is needed in the proposed rule language to ensure specificity regarding which pollutants EPA considers ineligible for mixing zones.