Mark Gordon, Governor

Department of Environmental Quality

To protect, conserve and enhance the quality of Wyoming's environment for the benefit of current and future generations.

Todd Parfitt, Director

August 3, 2023

United States Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460

Submitted online via https://www.regulations.gov

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

To Whom It May Concern,

The Wyoming Department of Environmental Quality (WDEQ) appreciates the opportunity to provide comments on the Environmental Protection Agency's (EPA) proposed revisions to the Clean Water Act (CWA) water quality standards (WQS) regulation at 40 CFR Part § 131. The revisions propose to establish "baseline" WQS for a subset of waters of the United States (WOTUS) under tribal authority that do not have CWA-effective WQS. The WDEQ fully supports the proposed rule's intent to ensure that CWA protections are in place for WOTUS under tribal authority that currently do not have such protections. However, the proposed rule has significant adverse implications for WDEQ and CWA implementation in the State of Wyoming. Because EPA has not fully considered the proposed rule's implications, the WDEQ recommends that EPA withdraw the proposed rule until the concerns identified in this letter, and letters from other states, can be addressed through meaningful consultation with both states and tribes.

Pursuant to both the Wyoming Environmental Quality Act (Wyoming Statutes Title 35, Chapter 11) and the CWA, WDEQ is responsible for the development and implementation of surface water quality standards (WQS) within the State of Wyoming, excluding those surface waters that fall under the authority of the Northern Arapaho and Eastern Shoshone Tribes, who jointly occupy the Wind River Indian Reservation in central Wyoming. In the late 2000's the Northern Arapaho and Eastern Shoshone developed WQS; however, neither tribe has received treatment as a state (TAS) under Section 518 of the CWA, 33 USC § 1377. Thus, there are no CWA-effective WQS for WOTUS under their authority. Should the tribes choose, the baseline WQS may apply to WOTUS on the Wind River Indian Reservation, including segments of the Wind River, Little Wind River, Pogo River, Fivemile Creek, and Muddy Creeks, which flow on and off the reservation, alternating between tribal and state authority. The proposed WQS will also likely affect WOTUS that originate in Wyoming and flow into areas under tribal jurisdiction without CWA-effective WQS, including WOTUS within the Crow Reservation in Montana. There are approximately 140 WDEQ-issued discharge permits upstream of the Wind River and Crow Reservations that could potentially be impacted by the proposed WQS.

The proposed baseline WQS establish designated uses (primary contact recreation, aquatic life, and cultural and traditional uses); narrative water quality criteria; antidegradation provisions; and implementation procedures. The rule also proposes to allow the EPA Regional Administrator, outside of the federal regulation

revision process, to designate Outstanding National Resource Waters (ONRWs), modify designated uses and water quality criteria, and establish variances. The proposed rule describes procedures the Regional Administrator can use to translate narrative criteria into numeric thresholds during CWA implementation, including discharge permitting under Sections 402 or 404; 401 certifications; water quality assessments under Section 305(b); and identification of impaired waters and total maximum daily load (TMDL) development under Section 303(d). These methods include (1) 304(a) criteria; (2) 304(a) criteria modified to reflect site-specific conditions; (3) water quality standards adopted by a Tribe or CWA-effective water quality standards applicable in adjacent or other relevant states or tribes; (4) 40 CFR 132 (Water Quality Guidance for the Great Lakes System); or (5) if 1-4 are not applicable, other CWA implementation provisions. EPA proposes to provide these "translations" on a publicly accessible website.

It has been more than 35 years since Congress amended[1] the CWA to provide two main pathways for WOTUS under tribal authority to receive CWA protections. The first, Section 518(d) of the CWA, 33 USC § 1377(d), provides for Indian tribes and States to enter into cooperative agreements to jointly administer the CWA. The second, Section 518(e) of the CWA, 33 USC § 1377(e), allows Indian tribes TAS for CWA implementation provided they meet certain requirements. Despite Congress's clear direction, EPA has chosen to spend the last several decades[2] 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 has concerns with the proposed rule and its implementation, most notably that Congress did not give EPA explicit authority to promulgate WQS and broadly administer the CWA in Indian Country. The proposed WQS and revision process are not consistent with requirements states and tribes with TAS must meet—EPA's proposed rule seemingly will not be subject to the triennial review, public notice and participation, and toxic pollutant criteria requirements established in the CWA and federal regulations. Further, the specific applicable surface waters have not been identified, and EPA does not have authority to determine the applicable surface waters outside of the TAS process. This ambiguity in application will leave states, tribes, and the federal government to work through jurisdictional issues after federal promulgation and during CWA implementation, opening the door to potential litigation, and leaving would-be permittees and other stakeholders to await resolution. Based on our experience with CWA implementation, we question whether the rule will provide tribes with sufficient time to contemplate coverage under the federal baseline WQS and hold associated public comment opportunities. Further, EPA's reliance on narrative water quality criteria without binding translation procedures is insufficient to ensure effective and consistent implementation to meet CWA requirements and will create a burdensome process for stakeholder review and evaluation.

While EPA has provided opportunities to discuss the proposed rule with states during the public comment period, these engagement sessions should have been held prior to EPA's drafting the rule, as they have (1) highlighted the significant hurdles EPA, states, and tribes face to implement the rule as proposed and (2) illuminated EPA's deficient rule development process, which lacked meaningful collaborative input from states and tribes. Given this lack of engagement with stakeholders, EPA's approach to address the gap in CWA protections is not implementable, will not sufficiently protect water quality in areas under tribal authority, and is inconsistent with the goals and objectives of the CWA.

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[1] 1987 amendments to the CWA, Public Law 100-4

[2] Preamble at 29498.

WDEQ recommends EPA withdraw the proposed rule to address the concerns outlined in detail below and to conduct meaningful engagement with states, tribes, and other stakeholders. Establishment of WQS on a case-by-case basis through collaboration between tribes, states, and the Federal government would be a more productive course of action. Empowering tribes to obtain TAS status and have authority for CWA implementation on waters under their jurisdiction also supports local decision-making for environmental protection, better comports with the intent of Section 101(b) of the CWA, and will facilitate a tribe's ability to pursue regulations to protect non-WOTUS waters. The WDEQ strongly encourages EPA to not lose sight of this goal.

1. EPA Lacks Congressional Authority to Promulgate WQS For Tribes That Do Not Have TAS. The legal framework established by the CWA for tribes does not grant EPA authority to promulgate and implement WQS for all Indian Country. Absent clear congressional authority, an agency cannot act.[3]

Congress provided two mechanisms to extend CWA protections and authorities, including promulgation of WQS, to WOTUS under tribal authority. First, Section 518(d), 33 USC § 1377(d), provides that "an Indian tribe and the State or States in which the lands of such tribe are located may enter into a cooperative agreement, subject to the review and approval of the Administrator, to jointly plan and administer the requirements of this Act." Second, Section 518(e), 33 USC § 1377(e), describes "the Administrator is authorized to treat an Indian tribe as a State for purposes of title II and Sections 104, 106, 303, 305, 308, 309, 314, 319, 401, 402, and 404" of the CWA if the tribe has a governing body; the tribe oversees management and protection of water resources; and the tribe is reasonably capable of carrying out these functions. Section 518(e) allows the Administrator authority to authorize tribes to be treated as a "state" for specific purposes of the CWA, but neither 518(d) nor 518(e) granted EPA authority to broadly promulgate WQS in Indian Country.

The CWA also does not contemplate EPA's use of its promulgation authority to supplant the role of tribes in administering the CWA. EPA is relying on Section 303(c)(4)(B), 33 USC § 1313(c)(4)(B), of the CWA as authority to promulgate WQS for Tribes not authorized under Section 518 (see the preamble at 29498). Section 303(c)(4)(B) provides rulemaking authority when the "Administrator determines that a revised or new standard is necessary to meet the requirements of this chapter." However, when read in its entirety, subsection (c) pertains to the failure of "States" [or **authorized** tribes] to promulgate adequate WQS and provides "States" [or **authorized** tribes] an opportunity to adopt revised or new standards in the 90-day period after the Administrator publishes proposed standards:

> The Administrator shall promptly prepare and publish proposed regulations setting forth [. . .] new water quality standards for navigable waters involved [. . .] in any case where the Administrator determines that a revised or new standard is necessary to meet the requirements of this chapter. The Administrator shall promulgate any revised or new standard under the paragraph not later than ninety days after he publishes such proposed standards, unless prior to such promulgation, **such State** has adopted a revised or new water quality standard which the Administrator determines to be in accordance with this chapter. (Emphasis added).

[3] *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208,109 S.Ct. 468 (1988).

Non-authorized tribes are not considered "States" under the CWA, but are a "municipality[4]" pursuant to Section 502(4), 33 USC § 1362(4), of the CWA since they have not gone through the TAS process. Further, the timing requirement for EPA to act on State [or **authorized** tribes] WQS should clearly not be confused as an additional grant of authority to commence an entirely new process with respect to tribes aside from the explicitly directed processes outlined in Section 518.

If Congress had intended for EPA to fully administer the CWA in Indian Country, as EPA outlines in the proposed rule[5], it would have also revised other portions of the CWA, including Sections 303(c), 33 USC § 1313(c)[6]; 303(d), 33 USC § 1313(d);[7] 305(b), 33 USC § 1315(b);[8] to explicitly provide EPA with authority to develop WQS, identify impaired waters, and assess waters in Indian Country. In contrast, Congress did exactly that when it granted EPA explicit authority in the Clean Air Act.[9] Congress could have included similar language in the CWA but chose not to. Since Congress did not grant EPA these explicit authorities, EPA lacks authority to promulgate and implement WQS in Indian Country.

EPA must rely on the means identified by Congress in the CWA to establish WQS and address CWA-implementation in Indian Country. Recent successes suggest that significant progress can be made. As described in the preamble at 29499[10], 27 of the 84 tribes with TAS were approved after 2016 when EPA revised its interpretation of CWA Section 518, 33 USC § 1377, to streamline aspects of a tribe's TAS application. EPA should devote its efforts and additional resources to support tribes in the TAS process for WQS and other CWA implementation programs.

2. EPA Must Follow the Same Process that States and Authorized Tribes are Required to Follow in Promulgating WQS. The only authority in the CWA that authorizes promulgation of WQS, by any entity, is Section 303. As such, in promulgating baseline WQS, EPA is bound by Section 303 and its implementing regulations in 40 CFR § 131.22. However, the proposed rule is not consistent with 40 CFR § 131.22(c), which holds EPA, when promulgating WQS, to the same policies, procedures, analyses, and public participation requirements established for states. EPA does cite explicit congressional authority to use a different process to promulgate baseline WQS and has not provided authority or justification for why it

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[4] CWA 502(4), 33 USC § 1362(4): "The term ''municipality'' means a city, town, borough, county, parish, district, association, or other public body created by or pursuant to State law and having jurisdiction over disposal of sewage, industrial wastes, or other wastes, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 1288 of this title."

[5] Preamble at 29506: "Specifically, the binding numeric translation procedures in proposed 40 CFR 131.XX(d)(2) would require the Regional Administrator to use the procedures as necessary to derive numeric translations for specific water bodies as needed for *all purposes* [emphasis added] under the CWA."

[6] CWA Section 303(c)(1), 33 USC § 1312(c)(1): "The Governor of a *State* [emphasis added] or the *State* [emphasis added] water pollution control agency of such state shall.."

[7] CWA Section 303(d)(1)(A), 33 USC § 1312(d)(1)(A): "Each *State* [emphasis added] shall identify those waters within its boundaries for which the effluent limitations required by section 1311(b)(1)(A) and section 1311(b)(1)(B) of this title are not stringent..."

CWA 303(d)(1)(C), 33 USC § 1312(d)(1)(C): "Each *State* [emphasis added] shall establish for the waters identified in paragraph (1)(A) of this subsection, in accordance with the priority ranking, the total maximum daily load."

[8] CWA Section 305(b), 33 USC § 1315(b) "Each State [emphasis added] shall prepare and submit...a report which shall include..."

[9] 42 USC §§ 7601(d) and 7661(a).

[10] Preamble at 29499: "Tribal interest in obtaining TAS and adopting their own WQS has increased in recent years, especially after EPA's action in 2016 to revise its interpretation of CWA section 518, which streamlined aspects of a Tribe's TAS application. A total of 27 of the 84 Tribes with TAS for the WQS program have been approved in the six years since then. Nonetheless, acquiring TAS authorities and adopting WQS is a time and resource-intensive process. At the current pace, it could take more than a decade for CWA-effective WQS to be put in place for all Indian reservations.

should not be bound by 40 CFR § 131.22. Therefore, EPA's use of a different, special, process for the baseline WQS, while still relying on Section 303 for authority, would arbitrary and capricious.

EPA's proposed rule deviates from the requirements in 40 CFR § 131.22(c) in the following areas:

A. *EPA Has Not Committed to A Triennial Review Process.* Under the proposed rule, WQS revisions (e.g., site-specific translations of narrative criteria, changes to designated uses, variances, ONRW designations) will be housed on a "publicly available website," but will be made without corresponding changes to the federal regulations. EPA also proposes to make modifications to the translations and baseline WQS on an ongoing basis (see preamble at 29504[11] and 29514[12], which speak to the translation of narrative criteria on a case-by-case basis and the Regional Administrator's ability to enact designated use changes and variances without rulemaking revisions, respectively). Despite EPA's intent to revise aspects of the WQS on an ongoing basis, nowhere does the preamble describe EPA's intent to conduct triennial reviews as required by 40 CFR § 131.20(a).[13] To be consistent with 40 CFR § 131.20(a) and 40 CFR § 131.22(c), EPA must provide for triennial reviews with public hearings where all applicable WQS are evaluated and revised as necessary.

B. *EPA's Public Notice Requirements for ONRWs Are Not Consistent with 40 CFR § 131.20(b).* EPA's proposed WQS describe "The Regional Administrator shall issue a public notice, utilizing EPA's own procedures and existing Tribal public notice procedures, regarding the decision to assign a water as an Outstanding National Resource Water" (ONRW). The proposed process is not consistent with 40 CFR § 131.20(b), which requires States to hold one or more public hearings for the purpose of reviewing or revising water quality standards. Establishment of ONRWs is a WQS since the designation dictates how antidegradation provisions are applied. Therefore, in order to be consistent with 40 CFR § 131.20(b) and 40 CFR § 131.22(c), EPA must hold hearings for designating an ONRW.

C. *EPA's Use of Narrative Criteria for Toxic Pollutants Is Not Consistent with the CWA or 40 CFR § 131.11.* EPA's proposed WQS include only narrative water quality criteria to protect designated uses, including for toxic pollutants. EPA's proposed WQS also specify, without additional guidance or implementation methods, the five broad options the Regional Administrator can use to translate the narrative criteria into numeric thresholds during CWA implementation. EPA has articulated that it plans to translate narrative criteria and make modifications on an as-needed basis rather than make modifications to the federal regulations. Given these details, EPA's proposed rule is not consistent with Section 303(c)(2)(B), 33 USC § 1313(c)(2)(B)[14], of the CWA, which outlines that states shall adopt *numeric* criteria for toxic pollutants. Neither is the rule consistent with 40 CFR § 131.11,[15] which outlines that if a state chooses to use narrative criteria for

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[11] Preamble at 29504: "EPA would use these procedures to translate the narrative criteria into numeric values on a case-by-case basis to best reflect site-specific conditions and consideration of new and/or available information representing the latest sound science."

[12] Preamble at 29514: For designated use changes and variances, "Pursuant to the proposed Federal administrative procedure, a decision by a Regional Administrator would be final and effective upon signature without necessitating a subsequent Federal rulemaking revising the baseline WQS rule...."

[13] 40 CFR § 131.20(a): "States shall from time to time, but at least once every 3 years, hold public hearings for the purpose of reviewing applicable water quality standards."

[14] Section 1313(c)(2)(B) of the CWA: "states shall adopt criteria for all toxic pollutants listed pursuant to section 1317(a)(1) of this title for which criteria have been published under section 1314(a) of this title...Such criteria shall be specific numerical criteria for such toxic pollutants."

[15] 40 CFR § 131.11: "Where a State adopts narrative criteria for toxic pollutants to protect designated uses, the State must provide information identifying the method by which the State intends to regulate point source discharges of toxic pollutants on water quality

toxic pollutants, the state must provide the methods by which it intends to regulate point source discharges of toxic pollutants. EPA's proposed use of five different methods to derive numeric translations without additional guidance is not sufficiently detailed to be consistent with the CWA and the implementing regulations.

D. *EPA's Designation of All WOTUS for Traditional and Cultural Uses Is Not Consistent with 40 CFR § 131.6(b).* EPA proposes to designate all applicable WOTUS for "cultural and traditional uses" under Section 303(c)(2)(A) of the CWA[16], 33 USC § 1313(c)(2)(A). EPA has not provided a definition of cultural and traditional uses, nor has EPA described the process and information that EPA will use to support the identification and application of these uses. In the preamble at 29503, EPA describes "During the Tribal consultation process, many Tribes stressed the value and importance of protecting water quality at levels appropriate for use in various cultural and traditional activities of individual Tribes." EPA does not provide any further rationale or site-specific information to support its designation of all WOTUS for traditional and cultural uses. 40 CFR § 131.6(b) requires States to submit methods used and analyses conducted to support water quality standards. Therefore, to be consistent with 40 CFR § 131.6(b) and 40 CFR § 131.22(c), EPA must provide information supporting its decision to designate specific waters for cultural and traditional uses.

3. EPA Must Clearly Identify the Applicable Waters, Provide Opportunity to Comment on Specific Waters. The proposed rule narratively describes[17] that the WQS will apply to WOTUS in "Indian Country" by identifying where the WQS will not apply, including "off-reservation allotments," "off-reservation dependent Indian communities," and other "Indian reservation waters." Given the lack of specificity in the proposed rule, EPA apparently plans to determine jurisdiction as-applied to specific lands and waters during CWA implementation (e.g., permits under Sections 404 or 402, Section 401 certification, Section 305(b) assessment, Section 303(d) impairment identification, or total maximum daily load development). Making ad-hoc jurisdictional decisions during the permitting process, however, creates both legal and practical concerns.

First, EPA does not have general authority under the CWA to, on a permit-by-permit or CWA implementation action-by-implementation action basis, determine where the federally promulgated baseline WQS apply. While an administrative agency may have discretion in whether it determines jurisdiction based on rulemaking or an adjudicative procedure, that discretion exists only if Congress has not spoken.[18] Congress has directed EPA to make jurisdictional determinations for application of the CWA to areas under tribal authority under Section 518 when a tribe seeks TAS. EPA has interpreted this

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limited segments based on such narrative criteria. Such information may be included as part of the standards or may be included in documents generated by the State in response to the Water Quality Planning and Management Regulations (40 CFR part 130)."

[16] CWA section 303(c)(2)(A), 33 USC § 1313: Such standards shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation.

[17] 40 CFR § 131.XX: [A]ll waters of the United States in Indian country except: (1) Indian reservation waters for which EPA has promulgated other Federal water quality standards; 2) Indian reservation waters where EPA has explicitly found that a state has jurisdiction to adopt water quality standards or authorized a Tribe to adopt WQS pursuant to 40 CFR § 131.8, and where EPA has approved the applicable state or Tribal water quality standards; 3) Indian country waters on off-reservation allotments and off-reservation dependent Indian communities; and 4) Indian reservation waters of Tribes for which the Regional Administrator approves an exclusion from application of the standards in this section, informed by consultation with the Tribe. EPA will maintain a publicly available list of Indian reservation waters that are ***excluded*** [emphasis added] from coverage of the baseline water quality standards in this section at [EPA website to be inserted in final rule].

[18] *Michigan v. EPA*, 268 F.3d 1075, 1087 (2001).

congressional direction to make jurisdictional determinations through its promulgation of 40 CFR §§ 130.16 and 131.8.

EPA's reliance on Section 303(c)(4) as authority for this proposed rule, and the fact that Section 303(c)(4) only applies to "States" [and **authorized** tribes], binds EPA to the same procedural requirements tribes must meet to determine tribal jurisdiction during the TAS process in Section 518(e). Using a process for making jurisdictional determinations different from the process outlined by Congress is arbitrary and capricious as being contrary to law.[19]

Further, by not following the same procedural requirements EPA requires of the tribes for jurisdictional determinations, EPA sets itself up for arbitrary decision-making. EPA must "engage in reasoned decision-making" or its actions will be set aside if found to be "arbitrary or capricious."[20] Both 40 CFR §§ 130.16 and 131.8 require tribes to submit "a map or legal description of the area over which the tribe asserts authority to regulate surface water" and a statement that "describes the basis for the Tribes assertion of authority." EPA has not outlined a rationale or justification for why it does not have to determine jurisdiction through the same process or use the same information it uses in every other jurisdictional determination it makes under the CWA. To determine jurisdiction in a manner different from what EPA has prescribed for tribes themselves and without the information EPA has previously deemed necessary sets the agency up for arbitrary decision-making.

Second, Section 303(c)(4)[21], which EPA cites for its authority to promulgate baseline WQS, requires EPA to identify the specific "navigable waters involved" (see 40 CFR 131 Subpart D for examples of federally promulgated WQS and lists of specific waters). Identification of the "navigable waters involved" is essential for states and tribes to effectively evaluate the proposed rule to determine whether EPA's interpretation of jurisdiction is consistent with state and tribal understanding of jurisdiction. EPA and the Tribes only have authority where the State of Wyoming does not, and vice versa.[22] Assuming EPA has authority to promulgate the baseline WQS, EPA does not have authority to promulgate WQS on lands where the State has jurisdiction without making the requisite determinations under Section 303(c). Even on lands or waterbodies with questionable jurisdiction, EPA would be prohibited from taking action.[23]

Further, not only is the proposed rule not in compliance with Section 303 of the CWA, but by not identifying the "navigable waters involved" and jurisdictional boundaries, it is also unconstitutionally vague[24]. Identification of specific waters, along with a rationale, alleviates ambiguity and potential inconsistencies among terms used in the authorizing statute, implementing regulations, and how those terms have been interpreted by the courts. With jurisdictional issues and the involvement of state sovereignty and property rights, any proposed law affecting those rights must be clear enough to put the affected party on notice[25]. This proposed rule fails to provide that notice, and lacks the requisite precision

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[19] *See Michigan v. EPA,* 268 F.3d 1075, 1088 (2001).
[20] *Dep't of Homeland Security v. Regents of the Univ. Of Cal.*, 140 S. Ct. 1891, 1905 (2020).
[21] Section 303(c)(4) of the CWA, 33 USC § 1313(c)(4): "The Administrator shall promptly prepare and publish proposed regulations setting forth a revised or new water quality standard for the navigable waters involved"
[22] *Michigan v. EPA*, 268 F.3d 1075, 1085 (D.C.Cir. 2001).
[23] *See Michigan v. EPA*, 268 F.3d 1075, 1087 (D.C. Cir. 2001)
[24] *See F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012).
[25] *Id.*

to avoid EPA enforcing the rule in an arbitrary manner when implementing the rule through the permitting process.

Finally, EPA's proposed rule fails to outline any sort of notice and comment opportunity for as-applied jurisdictional decisions. It is assumed that such determinations will be made ad-hoc for each CWA decision being made under the proposed rule. By skipping a jurisdictional determination at the beginning, EPA is disallowing any appeal of its WQS jurisdiction until it is implemented. Certainly, CWA implementation is not the appropriate venue to determine applicability of WQS and jurisdictional authority. Without clarity, states, EPA, and authorized tribes may all assert authority and issue permits for the same activities, creating confusion for permittees and other stakeholders as to which WQS and permit limits or conditions apply.

EPA should recognize both the importance and difficulty of identifying the applicable waters given EPA's recent history of incorrectly defining Indian Reservation boundaries (see *State of Wyoming v. USEPA*, 849 F.3d 861 (10th Cir. 2017), which vacated a determination EPA made under the Clean Air Act regarding the Wind River Reservation boundary in Wyoming. In the years following the decision, WDEQ and EPA Region 8 have been using Wyoming's official Wind River Reservation boundary map for purposes of determining EPA versus Wyoming jurisdiction with respect to CWA Section 404 and 402 permitting and for CWA Section 401 certifications. However, EPA's assertion of jurisdiction over all "trust lands" and "land owned in fee simple by non-Indians," whether on the reservation or not, as articulated in the proposed rule, could upset the current process that has taken several years of deliberations to achieve. This is especially true considering the more fluid fee-to-trust land acquisitions that would keep the jurisdictional boundaries for purposes of the proposed rule in perpetual flux, creating additional uncertainty.

4. EPA's Proposed Timeframe of 90-Days for Tribes to Opt-Out of Coverage May Be Too Short, Stakeholders Should Be Provided an Opportunity to Comment on a Tribes' Decision to Opt-Out of Coverage Under the Baseline WQS, Tribes Should Have the Option to Withdraw from Coverage Under the Federal Baseline WQS. The proposed rule outlines that tribes will have 90 days after the final rule is published in the Federal Register to opt out of coverage and that the federally promulgated WQS will become effective 120 days after the final rule is published in the Federal Register. After this initial 90-day period has ended, tribes are not provided a mechanism to either "opt-in" or "opt-out" of coverage. EPA states in the preamble at 29517-29518 that, "after the final rule goes into effect for CWA purposes, the Regional Administrator generally would no longer exclude additional Indian reservation waters from coverage by the baseline WQS," suggesting that even if new areas come under tribal authority, the baseline WQS would apply. The proposed rule also does not require tribes or EPA to provide the public with an opportunity to comment on a tribe's decision to "opt-in" or "opt-out" of coverage.

Given the significance of federal promulgation of WQS, 90-days does not seem to be a sufficient timeframe for a tribe to evaluate the baseline WQS, determine implications, and decide whether they would like to opt-in or opt-out of coverage. It would certainly be challenging for a state to meet this timeline and have the necessary consultations with the appropriate decision makers and affected parties. While the WDEQ cannot speak for tribal procedures, we encourage the EPA to ensure it has adequately consulted with tribes on feasible timelines. Further, not providing a mechanism for tribes to opt-in or opt-out of coverage once this initial 90-day period closes does not seem consistent with tribal sovereignty, and we encourage EPA to consult with tribes on this subject. Finally, an opportunity for the public to comment on a tribe's decision to either opt-in or opt-out of coverage should be provided to ensure that all relevant information has been considered.

5. EPA's Use of Narrative Criteria and Broad Translation Options Are Not Sufficient to Ensure Compliance with the CWA. EPA's proposed WQS include only narrative water quality criteria to protect designated uses (e.g., primary contact recreation, aquatic life, and cultural and traditional uses). The rule specifies five options that the Regional Administrator can use to translate the narrative criteria into numeric thresholds during CWA implementation. Beyond the five options, EPA has neither included any specifics for how numeric translators will be derived nor identified any guidance that will be followed to ensure that the translations are made in a consistent and reproducible way. EPA has not described who will be deriving the translators (e.g., permitting staff, water quality standards staff, 401 program, etc.) and how it will ensure consistent translations between CWA programs. EPA has not described the spatial extent to which the translations will apply or whether the translations will be broadly applicable or specific to each CWA activity.

Despite the lack of specificity on narrative criteria implementation, EPA describes in the preamble at 29515 that EPA will use its oversight authority to ensure compliance with WQS[26]. Presumably, EPA would also use its "neighboring jurisdiction" review process under 40 CFR § 121.13[27] to evaluate individual CWA 401 certifications issued by states to determine compliance with the federally promulgated baseline WQS.

EPA's threat to use its oversight authority to ensure that state and authorized tribes' NPDES permits comply with the federally promulgated 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.

EPA must identify an alternative approach to establishing water quality criteria so that the criteria are binding, transparent, and can be consistently implemented.

6. EPA Must Use Established Procedures to Promulgate WQS. EPA Must Streamline Access to the Baseline WQS and Public Notice Processes for Revisions and Translations. EPA is proposing to promulgate WQS for a subset of WOTUS under tribal authority. However, entities interested in understanding what WQS are applicable to specific waters will not be able to rely on the proposed rule, neither will they be able to use the public notice procedures associated with changes to the federal regulations to comment on translations of, or revisions to, the baseline WQS. As proposed, interested persons may need to review numerous webpages and documents to identify the applicable WQS,

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[26] Preamble at 29515: "NPDES permits must ensure compliance with the applicable WQS of all affected waters. See CWA sections 301(b)(1)(C) and 402(b)(1)(A); 40 CFR 122.4(a), (d) introductory text, and (d)(1). The proposed rule would allow EPA to ensure that NPDES permits issued by authorized states, Tribes, or territories for discharges to waters upstream from Indian reservation waters comply with the final baseline WQS. If a permitting authority failed to meet this requirement, EPA could use its oversight authority of approved programs, which includes the authority to review permits."

[27] 40 CFR § 121.13: "The Regional Administrator shall review the application, certification, and any supplementation information provided in accordance with §§ 121.11 and 121.12 and if the Regional Administrator determines there is reason to believe that a discharge may affect the quality of the waters of any State or States other than the State in which the discharge originates, the Regional Administrator shall, no later than 30 days of the date of receipt of the application and certification from the licensing or permitting agency as provided in §§ 121.11, so notify each affected State, the licensing or permitting agency, and the applicant.

translations, and modifications, because EPA plans to provide all of the following on publicly available websites: (1) areas that are not part of the federal promulgation; (2) areas where tribes have chosen to opt-out of coverage; (3) variances established by the Regional Administrator; (4) changes to the designated uses made by the Regional Administrator; (5) ONRWs designated by the Regional Administrator; and (6) the Regional Administrator's "translations" of narrative water quality criteria that have been made during CWA implementation, including but not limited to 402 permit development, 404 permit development, 401 certifications, water quality assessments, identification of impaired waters, and TMDLs.

Reviewing and providing comment on the baseline WQS, translations of narrative criteria, modifications to the baseline WQS, and designation of ONRWs is even more cumbersome under the proposed rule. An interested party would need to track, receive notices, review, and potentially provide comments via (1) the Federal Register public process; (2) public notice and hearings provided by the Regional Administrator regarding proposed revisions to designated uses and/or water quality criteria; (3) public notices associated with Section 402[28] and 404 permits, 401 certifications, water quality assessments, 303(d) Listings, and/or TMDLs that include translations of narrative criteria made by the Regional Administrator; and (4) public notices associated with designations of ONRWs made by the Regional Administrator.

By comparison, states and authorized tribes typically use a standardized rule revision and public review process when considering any modifications to their water quality standards. And although states and authorized tribes use narrative standards, their use is on a much more limited basis. In addition, when states and authorized tribes translate narrative criteria for use during CWA implementation, they often develop detailed and publicly vetted implementation procedures.

If EPA has authority to promulgate baseline WQS, EPA should use the established Federal Register[29] process and use the associated public notice procedures plus public hearings to take comment on the proposal as well as any future modifications. Using this process would be more consistent with past precedent and the procedures used by states and authorized tribes and would ensure EPA is fulfilling all public participation requirements. Alternatively, at a minimum, EPA must consolidate all the WQS information for particular areas under tribal jurisdiction so that it is clear what WQS and translations have been made for particular waterbodies and waterbody segments. In addition, EPA must provide a consistent public process for interested persons to provide feedback on revisions and translations associated with the baseline WQS.

7. EPA Must Identify the Evaluation Process for ONRWs, Evaluate Implications of Designating an ONRW, and Revise the Public Notice Requirements for ONRWs. EPA's proposed baseline WQS at 40 CFR § 131.XX(f)(4)(i) describes "any person or entity may nominate," in writing, why "a specific Indian reservation water with applicable baseline water quality standards should be assigned as an Outstanding National Resource Water (ONRW)." ONRW waters are described at proposed 40 CFR § 131.XX(e)(3) as "waters of national and Tribal parks and wildlife refuges and waters of exceptional recreational, ecological, or cultural significance, that water quality shall be maintained and protected." 40 CFR § 131.XX(f)(4)(ii) describes "The Regional Administrator shall determine with written agreement from the Tribe whether the nominated water qualifies as an Outstanding National Resource Water as described in paragraph (f)(4) of this section." The rule does not further elaborate on the criteria that the Regional Administrator will use to determine whether a waterbody should be designated as an ONRW, the process

[28] Preamble at 29508: "For federally issued NPDES permits, for example, EPA would describe in the permit fact sheet or statement of basis how it used the numeric values translated from the applicable baseline narrative criteria to derive WQBELs."
[29] 40 CFR § 131.31, Federally Promulgated Water Quality Standards

for tribal consideration and concurrence, nor the type of analysis that would be conducted to determine the potential implications of designating the ONRW.

Assigning and maintaining tier 3 antidegradation protections for waters such as ONRWs is a significant WQS action with wide-ranging implications. The designations and associated protections may preclude new or expanded discharges upstream of the ONRW and may require action on the part of nonpoint sources[30]. Further, identifying current water quality of ONRWs and evaluating whether degradation may have occurred requires significant resources.

Wyoming has a number of "ONRW-equivalent" waters. WDEQ and stakeholders have invested considerable resources into ensuring that the quality of these waters is maintained. Some of Wyoming's "ONRW-equivalent" waters are located upstream and downstream of areas where the federally promulgated baseline WQS could apply. For at least one downstream water, WDEQ has worked cooperatively with EPA to ensure the Wyoming's WQS antidegradation protections are met via WDEQ- and EPA-issued NPDES permits. Even after many years and significant investment in resources, WDEQ and EPA are still working collaboratively to obtain the information needed to inform development of permit effluent limits. Should additional ONRW waters be designated, the level of complexity and effort to ensure protections would undoubtedly compound. Based on WDEQ's experience conducting these activities, it is unlikely that EPA regions are equipped to add these new expanded roles and responsibilities with current resources and workloads.

As such, it is essential that before designating a new ONRW, a thorough evaluation of the potential implications is conducted such that states, tribes, EPA, and other stakeholders can fully grasp the consequences and impacts. If the proposed rule is finalized, EPA must include the evaluation process within the WQS.

8. Proposed Narrative Criteria Regarding Adverse Impacts to Hydrologic Conditions May Create Confusion Regarding Scope of CWA. Among EPA's proposed narrative water quality criteria is a hydrologic integrity narrative[31]. 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, 33 USC § 1251, makes it clear that Congress did not intend for the CWA to interfere with state authorities to allocate quantities of water[32]. 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

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[30] Proposed 40 CFR 131.XX(f)(4), "For Indian reservation waters assigned as Outstanding Aquatic Resource Waters, the Regional Administrator shall ensure, through the application of appropriate controls on point and Tribal-regulated nonpoint pollutant sources, that water quality is maintained and protected. No new or expanded regulated discharges will be allowed to Outstanding National Resource Waters or tributaries to such waters that would result in lower water quality unless it is on a short term and temporary basis, consistent with paragraph (f)(4)(v) of this section."

[31] Proposed 40 CFR 131.XX(d)(1)(ii): "All waters shall be free from adverse impacts to the chemical, physical or *hydrologic* [emphasis added], or biological integrity caused by pollutants or pollution that prevent attainment of applicable designated uses."

[32] Section 101(g) of the CWA, 33 USC § 1251: "It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter. It is the further policy of Congress that nothing in this chapter shall be constructed to supersede or abrogate rights to quantities of water which have been established by any State."

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.

9. EPA's Proposed Rule Creates Confusion Regarding Requirements to Address Nonpoint Sources of Pollution. Proposed 40 CFR § 131.XX(e) describes that in administering the federal baseline antidegradation policy for High Quality Waters, "the Regional Administrator shall assure that there shall be achieved the highest statutory and regulatory requirements for all new and existing point sources and all Tribal-regulated cost effective and reasonable best management practices for nonpoint source control." Although this language mimics the language in 40 CFR § 131.12(a)(2)[33], the proposed rule does not define "tribal-regulated nonpoint sources," elaborate on what statutory authority and regulated requirements might be applicable, or describe that there may be no statutory and regulatory requirements for nonpoint sources. 40 CFR § 131.XX(f) adds to the confusion by describing that "Before allowing any degradation of high water quality, the Regional Administrator shall identify point sources and Tribal-regulated nonpoint sources that discharge to, or otherwise impact, the receiving water." This provision suggests that EPA will identify nonpoint sources, regardless of whether a tribe has authority to regulate nonpoint sources.

Although EPA cites the 1994 Davies memorandum that outlines "[a]lthough there are no Federally enforceable requirements for control of nonpoint sources in the Clean Water Act" and "Section 131.12(a)(2) does not REQUIRE a State to establish BMPs for nonpoint sources where such BMP requirements do not exist," the proposed rule will undoubtedly cause confusion. Therefore, if EPA finalizes the federal baseline WQS, EPA should either remove these provisions or both define "tribal-regulated nonpoint sources" and clarify that nonpoint source controls only need to be addressed if the tribe has authority over nonpoint sources. The WDEQ encourages EPA to ensure that it has adequately consulted with tribes on this subject to ensure the rule does not pre-empt a tribe's determination of how it may wish to address nonpoint sources on tribal lands.

10. EPA Did Not Conduct Sufficient Local Consultation, as Required in Executive Order 13132[34]. In the Federal Register notice, EPA concludes that Executive Order 13132 does not apply to this action. Executive Order 13132 outlines that the Agency cannot promulgate rules with federalism implications,[35] including those that pre-empt state and local laws, unless the agency provides all affected State and local officials notice and an opportunity for appropriate participation in the proceedings. EPA's proposed rules potentially promulgate WQS for areas where tribal, state, and local officials may not agree about authority. Moreover, the WQS will likely have implications for point sources (e.g., municipal discharges, industries) as well as nonpoint sources upstream of tribal waters subject to the baseline WQS. As such, the proposed revisions have the potential to conflict with state and local laws and authorities.

EPA described in the preamble that on September 15, 2021, they provided an overview of the draft regulations for the Association of Clean Water Administrators (ACWA) Monitoring, Standards and

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[33] 40 CFR § 131.12(a)(2): that in allowing lowering of water quality, the "state shall assure that there shall be achieved the highest statutory and regulatory requirements for all new and existing point sources and all cost-effective and reasonable best management practices for nonpoint sources,"

[34] Executive Order 13132, Federalism: https://www.govinfo.gov/content/pkg/FR-1999-08-10/pdf/99-20729.pdf

[35] Federalism implications are defined as having substantial direct effects on states or local governments (individually or collectively), on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

Assessment Subcommittee. EPA did not describe any additional consultation with elected state and local officials, nor is WDEQ aware of any efforts made by EPA to engage beyond water quality management agencies. Due to the potential implications of the proposed revisions to local and state laws, EPA is required under Executive Order 13132 to consult with state and local officials as part of the regulation revision process.

11. EPA's State Consultation Process Was Insufficient. EPA has been contemplating promulgation of federal baseline WQS for more than 20 years. The preamble states that EPA released the 2016 Advanced Notice of Proposed Rulemaking (ANPRM) and that 11 states commented on the ANPRM. On September 15, 2021, EPA provided an overview of the draft regulations for the ACWA Monitoring, Standards and Assessment Subcommittee. One ANPRM that garnered comments from 11 states and one listening session via ACWA cannot be considered substantive engagement on a rule with such significant implications. In addition, while ACWA is an important national organization that represents states, engagement with ACWA should be used in addition to, not instead of, engagement with individual states.

Further, EPA has not addressed the concerns identified by states that provided feedback on the ANPRM, including Wyoming. In response to the 2016 ANPRM, WDEQ raised concerns about differences between the baseline WQS and Wyoming's WQS, the inability of baseline WQS to sufficiently reflect site-specific conditions, a lack of resources to implement and modify the baseline WQS, potential impacts of the baseline WQS on EPA resources in Region 8, and a lack of sufficient public input into the baseline WQS. Other states raised concerns about EPA's authority and resources to promulgate and effectively implement baseline WQS; differences between the baseline standards and neighboring states' standards; impacts to upstream dischargers; jurisdictional issues; criteria for establishing ONRWs; triennial review requirements; and dispute mechanisms for waters with shared jurisdiction. However, none of these comments were addressed in EPA's proposed rule, and WDEQ finds itself repeating the comments it submitted in 2016. It is clear that EPA gave little credence to the feedback Wyoming and other states provided in an attempt to help EPA craft a more effective and implementable rule.

Cooperative federalism, whereby states, tribes, and EPA work together, is essential to successful development and implementation of WQS under the CWA. Cooperative federalism requires EPA to more thoroughly integrate states and tribes into the regulation development and revision process. A meaningful cooperative federalism and nation-to-nation consultation process with states and tribes is critical to develop an implementable rule.

12. EPA Should Formalize/Codify Tribal Participation in Baseline WQS Implementation. The proposed rule authorizes the Regional Administrator to make many decisions regarding interpretation and implementation of the baseline WQS without a binding tribal consultation process (e.g., translations of narrative criteria, water quality assessments, TMDL development). While WDEQ recognizes that EPA has policies regarding tribal consultation, these policies are not legally binding and are therefore subject to deviation. From a state co-regulator perspective, WDEQ would be concerned with this approach, and we recommend EPA ensure that adequate consultation with tribes on this subject has been conducted.

13. EPA Must Provide an Alternative Dispute Process to 40 CFR § 131.7. 40 CFR § 131.7, Dispute resolution mechanism, was added to the federal regulations in 1991 to provide a process for the Regional Administrator to resolve disputes between states and authorized tribes where there were differences in WQS on common bodies of water. In the case of the baseline WQS, the process is no longer appropriate

because the Regional Administrator is responsible for translating and revising the baseline WQS. EPA describes this lack of applicability in the preamble at 29509[36]. Given the scale of the federally promulgated baseline WQS, as well as the lack of site-specific information that was used to inform the WQS, if EPA finalizes the proposed rule, a dispute resolution process must be included to ensure differences in WQS between states and EPA can be addressed objectively, fairly, and consistently. Allowing the Regional Administrator to both promulgate WQS and be the arbiter of disputes is neither objective, fair, nor consistent.

14. EPA's Economic Analysis Was Incomplete. EPA's economic analysis (EA) was based on potential impacts to NPDES discharges within a 5-mile radius, which identified 57 major NPDES discharges. EPA specifically identified only 10 of these facilities in the EA. EPA described on page 6 of the EA that minor discharges were not included because they "typically do not have monitoring requirements for toxic pollutants, that these dischargers do not contribute significant loads, and that the potential for these facilities to incur costs is low." Point source discharges receive effluent limits and incur costs based on the WQS of the downstream receiving waters, regardless of the size of the discharge. WDEQ estimates that 21 and 122 facilities are permitted through Wyoming's delegated CWA Section 402 program upstream of the Wind River Indian Reservation in Wyoming and the Crow Reservation in Montana, respectively. All of these facilities, including the minor discharges, may be impacted by the proposed rule and should be considered in the economic analysis. In addition, despite stating that "attainment of the baseline WQS would likely depend on additional actions such as nonpoint sources controls," and the rule "may lead to nonpoint sources incurring costs as an indirect result of the proposed baseline WQS," EPA did not include any costs associated with nonpoint source controls. EPA should consider and include estimates associated with nonpoint sources. Finally, the economic impacts of designating ONRWs must be included, as must costs associated with 404 permits and 401 certifications.

15. EPA Must Work with the US Army Corps to Determine Jurisdiction Before Implementation. EPA, before initiating or authorizing any CWA activities in areas with federally promulgated WQS, must work with the United States Army Corps of Engineers (USACE), the primary federal agency responsible for identifying WOTUS, to determine whether a water is a WOTUS. This is important to ensure WOTUS are identified consistently, particularly given the Supreme Court's recent *Sackett* decision. This step is also critical to ensure that EPA's actions are consistent with the scope of the CWA.

16. The Proposed Rule Does Specifically Address Wetlands. EPA's proposed WQS apply to all WOTUS in Indian Country. Since the proposed rules are silent on the subject of wetlands, WDEQ presumes EPA intends for the assigned designated uses of primary contact recreation, aquatic life, and cultural and traditional uses to be applicable to all WOTUS, including wetlands. WDEQ/WQD recommends EPA clarify the applicability of the proposed rule to wetlands and ensure the proposed WQS are appropriate for wetlands.

WDEQ appreciates the opportunity to provide comments on the proposed revisions. Given WDEQ's extensive concerns, WDEQ recommends EPA withdraw the proposed rule and conduct meaningful engagement with states and tribes. To this end, WDEQ is ready to engage further with EPA and tribes on this important issue. Please contact Lindsay Patterson, Surface Water Quality Standards Supervisor, at 307-777-7079 or Lindsay.Patterson@wyo.gov, should you have any questions regarding these comments.

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[36] Preamble at 29509: "Although 40 CFR § 131.7 does not apply to situations with different Federal and state WQS on a shared water body, EPA could utilize procedural steps similar to those laid out in that section where appropriate to work with the relevant parties in a neutral fashion in an effort to resolve the issues involved."

Sincerely,

Todd Parfitt, Director

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