WESTERN URBAN WATER COALITION

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Michael S. Regan, Administrator
United States Environmental Protection Agency
EPA Docket Center
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1200 Pennsylvania Ave. NW
Washington, D.C. 20460

RE: Comments on Proposed Rule, "Federal Baseline Water Quality Standards for Indian Reservations," RIN 2040–AF62; 88 Fed. Reg. 29496 (May 5, 2023)

The Western Urban Water Coalition (WUWC) appreciates this opportunity to provide comments on the U.S. Environmental Protection Agency's (EPA) proposed rule to establish Federal water quality standards (WQS) for Indian reservation waters that currently do not have WQS in effect under the Clean Water Act (CWA).[1]

Introduction

WUWC was established in 1992 to address the West's unique water supply and water quality challenges that threaten the economic sustainability and growth of the western population centers. WUWC consists of the largest urban water utilities in the West, which together serve more than 40 million urban water consumers in 20 major metropolitan areas across seven states.[2] Some of these utilities also operate wastewater, stormwater, natural gas, and electric and hydroelectric facilities for their customers. Our mission is to ensure the continued availability of

[1] 88 Fed. Reg. 29496 (May 5, 2023).

[2] WUWC consists of the following members: ***Arizona*** (Central Arizona Project, City of Phoenix and Salt River Project); ***California*** (Eastern Municipal Water District, East Bay Municipal Utility District, City of Los Angeles Department of Water and Power, The Metropolitan Water District of Southern California, San Diego County Water Authority, Santa Clara Valley Water District, and City and County of San Francisco Public Utilities Commission); ***Colorado*** (Aurora Water, Colorado Springs Utilities, and Denver Water); ***Nevada*** (Las Vegas Valley Water District, Southern Nevada Water Authority, and Truckee Meadows Water Authority); ***New Mexico*** (Albuquerque Bernalillo County Water Utility Authority); ***Utah*** (Salt Lake City Public Utilities and Washington County Water Conservancy District); and ***Washington*** (Seattle Public Utilities).

high quality and reliable water supplies for present and future generations while balancing conservation and environmental requirements and goals.

WUWC strongly supports the goals of the CWA. As suppliers of reliable, high-quality urban water to millions of users, our members are keenly interested in improving water quality for municipal water supplies and in the regulatory processes protecting water quality. Our members take pride in serving the health, environmental, and economic needs of their communities around the clock, every day of the year. To support our members' activities, WUWC advocates for progressive water policies that are sensitive to the environment's water needs, encourage improved conservation technologies, and promote the effective and efficient application of federal laws. With the Western region's arid climate areas, growing fluctuations in annual precipitation, extreme weather events, wildfires, and other challenges, protecting and maintaining high-quality water supplies is more important than ever.

At the same time, as closely regulated entities serving millions of users, our members also need federal and state regulation that is predictable, clear, and consistent. The regulatory processes for modifying the standards that govern our members' operations must be well-defined and transparent, and they must take into account the potential impact on our members' ability to ensure a cost-effective and reliable water supply and other essential services to over 40 million users. Predictability, clarity, and consistency in the regulatory standards governing our operations are critical to reducing unnecessary costs and delays in the permitting process.

WUWC members are concerned that the proposed rule for Federal Baseline Water Quality Standards for Indian Reservations will result in regulatory uncertainty, inefficiency, and conflict. WUWC appreciates the need to protect Indian country waters. Such protections are essential for the health and welfare of tribal communities, as well as the integrity of waters outside of Indian country. But WUWC believes that establishing appropriate and protective water quality standards is best left to those most familiar with the unique factors that must be considered when developing appropriate WQS—states and authorized tribes. That is, in fact, what Congress intended when it announced its policy in 1948 "to recognize, preserve, and protect the primary responsibilities and rights of States" to regulate water pollution[3] and authorized "treatment as states" for qualifying tribes in 1987.[4] By assigning states and authorized tribes primary CWA responsibility, states and authorized tribes are able to leverage their local knowledge of local conditions to decide how best to protect waters for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes through appropriate and scientifically informed WQS.

Because EPA lacks critical local knowledge, the proposed rule will disrupt the framework states and authorized tribes have worked decades to establish. EPA's proposed changes will have far-reaching effects, affecting multiple programs, including National Pollutant Discharge Elimination System (NPDES) permits under section 402 (33 U.S.C. § 1342), section 401 certifications for federal licenses and permits (33 U.S.C. § 1341), and section 404 permits for

[3] Water Pollution Control Act of 1948, Pub. L. 80-845, 62 Stat. 1155, title I, § 101 (June 30, 1948); *see* 33 U.S.C. § 1251(b).

[4] Water Quality Act of 1987, Pub. L. No. 100–4, title V, § 506, Feb. 4, 1987; *see* 33 U.S.C. § 1377(e).

dredged or fill material (33 U.S.C. § 1344). If promulgated as proposed, EPA's baseline WQS will result in confusion, increased regulatory complexity and unnecessary conflict.

Respectfully, WUWC believes that there are better solutions to the perceived problem the proposed rule is intended to address that adequately protects Indian country waters and is in line with the more limited authority Congress granted EPA in the CWA. WUWC recommends that EPA use the WQS states have spent decades developing that already account for a specific water's "use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes."[5] As a practical matter, EPA already does this in implementing CWA programs in Indian country, and EPA has not explained why the state WQS *EPA approved* are not sufficient for this purpose. Applying state WQS is not only consistent with the plain language of section 303(c), it allows tribes to decide whether they want to establish their own WQS under section 518(e) on their own schedules. In addition, rather than imposing EPA's WQS throughout Indian country by default, EPA should allow tribes to opt in rather than requiring them to justify their opting out.

WUWC members, which operate in states with many Indian reservations (Arizona, California, Colorado, Nevada, New Mexico, Utah, and Washington), believe that these recommended changes will help to avoid conflict and costly disruptions.[6]

General Comments

1. Baseline tribal WQS are not needed under Section 303(c)(4)(B)(2).

In 2001, the Administrator determined that nationwide tribal WQS are necessary under section 303(c)(4)(B)(2).[7] In support of her 2001 "necessity" determination, the Administrator explained that "EPA is concerned that there is currently a gap in water quality standards coverage in Indian country under the Clean Water Act," because states "generally lack the authority to regulate in

[5] 33 U.S.C. § 1313(c).

[6] Section 303(c)(2) requires WQS "to protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter." 33 U.S.C. § 1313(c)(2)(A). The standards that must be considered in establishing WQS are the water's "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." *Id.*

[7] 88 Fed. Reg. at 29499 ("On January 18, 2001, EPA Administrator Carol Browner determined, pursuant to CWA section 303(c)(4)(B), that new or revised WQS were necessary for certain Indian country waters lacking CWA effective WQS."); *see also Federal Water Quality Standards for Indian Country and Other Provisions Regarding Federal Water Quality Standards*, Proposed Rule (Jan. 18, 2001), available at https://19january2017snapshot.epa.gov/sites/production/files/2016-08/documents/federal_wqs_for_indian_country_proposal_signed_1-18-01.pdf. Section 303(c)(4)(B) requires the Administrator to "promptly prepare and publish proposed regulations setting forth a revised or new water quality standard for the navigable waters involved in any case where the Administrator determines that a revised or new standard or new standard is necessary to meet the requirements of this chapter." 33 U.S.C. § 1313(c)(4)(B).

Indian country."[8] The proposed rule expressly relies on the Administrator's 2001 determination without change.[9] Reiterating its understanding that WQS "generally do not apply in Indian country," EPA explains that "76,000 miles of rivers and streams and 1.9 million acres of lakes, reservoirs, and other open surface waters within Indian reservations currently lack CWA-effective WQS."[10]

Respectfully, WUWC members do not read the CWA to omit Indian country waters from coverage. The CWA is a comprehensive nationwide environmental regulatory structure that expressly requires states to establish WQS "applicable to intrastate waters."[11] The term "intrastate waters" is inclusive. In fact, one of the key purposes of the 1972 amendments to the Federal Water Pollution Control Act (FWPCA) was to make the Act comprehensive in its coverage of navigable waters.[12] Prior to 1972, the FWPCA only covered "interstate waters."[13] By amending the Act in 1972 to require states to establish WQS "applicable to intrastate waters" as well, Congress intended section 303 WQS to apply to all navigable waters—interstate and intrastate alike. The Supreme Court reads section 303 in the same manner: "Section 303 of the Act also requires each State, subject to federal approval, to institute comprehensive water quality standards establishing water quality goals *for all intrastate waters*."[14]

EPA's error appears to be based on its view that Indian reservations are not part of the state in which they are located. For example, EPA repeatedly refers to states in the preamble as "adjacent" states.[15] Likewise, it references the entities affected by the proposed rules as including

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[8] *See* EPA Proposed Rule, *Federal Water Quality Standards for Indian Country and Other Provisions Regarding Federal Water Quality Standards* at 11, https://19january2017snapshot.epa.gov/sites/production/files/2016-08/documents/federal_wqs_for_indian_country_proposal_signed_1-18-01.pdf (citing *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 and n.18 (1987)).

[9] 88 Fed. Reg. at 29500 ("EPA is not proposing to amend the Administrator's Determination.").

[10] *Id.* at 29499.

[11] 33 U.S.C. § 1313(a), (c).

[12] *See* A Legislative History of the Water Pollution Control Act Amendments of 1972, 93d Cong., 1st Sess. 1420 (1973).

[13] S. Rep. No. 92-414, at 2 (1971).

[14] *PUD No. 1 of Jefferson Co. v. Washington Dep't of Ecology*, 511 U.S. 700, 704 (1994) (emphasis added); *see also Nat'l Wildlife Fed'n v. Browner*, 127 F.3d 1126, 1127 (D.C. Cir. 1997) (explaining that the CWA requires state WQS for "every body of water" within a state). To the extent that some states have omitted Indian reservation waters from WQS application, that too violates section 303's mandate.

[15] *See, e.g.*, 88 Fed. Reg. at 29507 ("Specifically, the Regional Administrator could utilize this option when WQS adopted by the Tribe are not yet CWA effective, or CWA-effective WQS applicable in an adjacent or other relevant state(s) or Tribe(s), . . ."); *id*. at 29515 ("EPA would follow applicable requirements to ensure public participation and would coordinate, as appropriate, with adjacent states and Tribes, and other interested parties when implementing the standards."); *id*. at 29516 (same); *id*. at 29523 (section 131.XX(d)(2)(iii), "translate the narrative criteria in paragraph (d)(1) of this section using water quality standards adopted by the Tribe, or CWA-effective water quality standards applicable in *an adjacent or other relevant state*(s) or Tribe(s)" (emphasis added)).

"states and authorized Tribes near or bordering such reservations."[16] But it has long been understood that Indian reservations and Indian country are part of state territory.[17] Just last year, the Supreme Court expressly held that "Indian country is part of the State, not separate from the State" in *Oklahoma v. Castro-Huerta* .[18] Properly read, the term "intrastate waters" must include waters located on Indian reservations.[19]

EPA has also maintained that state WQS generally do not apply in Indian country because "[s]tate authority to regulate activities on Indian lands is generally preempted absent an explicit Congressional statute to the contrary."[20] While that may be (partially) true, section 303 *is* an explicit congressional statute to the contrary. Obviously, the CWA is a congressional statute, and section 303(c) requires states to establish WQS applicable to all intrastate waters. "A general [federal] statute in terms applying to all persons includes Indians and their property interests."[21] It was not necessary for Congress to reference Indian country to make clear that state WQS apply to all intrastate waters. As the Supreme Court recently clarified in the context of a federal statute abrogating tribal sovereign immunity, "the clear-statement rule is not a magic-words requirement."[22] Because state WQS already apply to all intrastate waters (excluding TAS reservations), there is no need for the proposed rule under section 303(c)(4)(B)(2).

As a practical matter, the gap EPA's interpretation of 303(c) creates is not as large as the proposed rule suggests. Congress structured the CWA to protect downstream sources by requiring states and authorized tribes to consider and ensure the attainment and maintenance of downstream WQS during the establishment of designated uses and water quality criteria in upstream waters. State WQS "serve as the basis for several CWA programs," including section 402 NPDES discharge permits, section 303(d) water body assessments, section 401 certifications, and section 404 dredge and fill permits.[23] Under section 402, for example, all construction sites on an acre or greater of land and all municipal, industrial and commercial facilities discharging wastewater or stormwater directly from a point source into a surface water

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[16] *Id.* at 29497.

[17] *Surplus Trading Co. v. Cook*, 281 U.S. 647, 651 (1930) ("[R]eservations are part of the State within which they lie and her laws, civil and criminal, have the same force therein as elsewhere within her limits, save that they can have only restricted application to the Indian wards.").

[18] *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2493 (2022).

[19] Reading "intrastate waters" inclusively is also consistent with the express purpose of the CWA: "to restore and maintain the chemical, physical, and biological integrity of the *Nation's waters*." 33 U.S.C. § 1251(a) (emphasis added); *see also Water Quality Standards; Establishment of Numeric Criteria for Priority Toxic Pollutants; States' Compliance; Final Rule*, 57 Fed. Reg. 60848, 60851 (Dec. 22, 1992). The Nation's waters cannot be restored or maintained if pollution protections do not apply in Indian country.

[20] *See, e.g., Water Quality Standards for the Colville Indian Reservation in the State of Washington*, 54 Fed. Reg. 28622, 28623 (July 6, 1989). EPA relies on *Wash. Dep't of Ecology v. EPA*, 752 F.2d 1465 (9th Cir. 1985) in promulgating WQS for the Colville Reservation in 1989 and in this proposed rule.

[21] *Fed. Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960).

[22] *Lac du Flambeau Band of Lake Superior v. Coughlin*, 143 S. Ct. 1689, 1699 (2023).

[23] 88 Fed. Reg. at 29,497.

must obtain an NPDES permit.[24] Section 402 requires the permitting authority to consider downstream waters, and NPDES permits are written to ensure that the receiving waters will achieve specified WQS.[25] Because upstream dischargers must comply with state WQS, state WQS protect waters entering reservations. EPA implements the CWA in Indian country.[26] When EPA issues an NPDES permit for a discharge in Indian country, it must ensure that the Indian country discharge does not result in WQS violations in downstream waters. In short, state WQS protect waters entering and leaving Indian country.

Section 401 certification works in a similar way. Under section 401, any person applying for a federal permit or license that may result in a discharge of pollutants into waters of the United States—including dredge and fill permits under section 404—must obtain a state water quality certification that the activity complies with all applicable WQS, limitations, and restrictions.[27] Section 401 certification requires notice to downstream states and authorized tribes and includes procedures for addressing discharges that may affect downstream water quality.[28] The federal agency cannot issue the federal permit or license, unless the downstream state or authorized tribe signs off or the permit or license can be conditioned to ensure compliance with the downstream WQS.[29]

This is, in fact, what EPA requires in the NPDES permits it issues for Indian country discharges.[30] EPA also looks to state designated uses to identify existing and potential uses of specific waterways.[31] And where there is an on-reservation discharge and no off-reservation

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[24] 33 U.S.C. § 1342.

[25] *Id.* § 1342(b)(3).

[26] U.S. EPA, Env't Protection in Indian Country Clean Water in Indian Country, https://www.epa.gov/tribal/clean-water-indian-country (last visited Aug. 2, 2023).

[27] 33 U.S.C. § 1341(a)(1).

[28] *Id.* § 1341(a)(2).

[29] *Id.*

[30] *See, e.g.*, U.S. EPA, *Fact Sheet, Proposed Issuance of a NPDES Permit to Discharge Pollutants Pursuant to the Provisions of the Clean Water Act (CWA)* (2012), https://www.epa.gov/sites/default/files/2017-01/documents/r10-npdes-swinomish-north-end-wa0025062-fact-sheet-2012.pdf (applying Washington WQS to Swinomish Indian Tribal Community NPDES permit); U.S. EPA, NPDES Permit Fact Sheet (2020), https://www.epa.gov/sites/default/files/2020-05/documents/ca0050008-santa_ynez_npdes_permit_factsheet-2020-05-12.pdf (applying California WQS to Santa Ynez Band of Chumash Indians); *U.S. EPA, NPDES Fact Sheet* 3 (2019), https://www.epa.gov/sites/default/files/2019-05/documents/az0024601-cyprus-tohono-npdes-permit-fact-sheet-2019.pdf ("Arizona WQS for the Santa Rosa Wash and its tributaries are applicable to the discharge at the point where the discharge enters the State waters.").

[31] *See, e.g.,* U.S. EPA, *Statement of Basis* 4 (2018), https://www.epa.gov/sites/default/files/2018-08/documents/nd0031160-mha-interpretive-center-final-sob.pdf ("Although the State of North Dakota water quality standards do not apply where the discharge occurs, the river and lake classification give a good indication of existing and/or potential uses of this segment of the Missouri River. This permit is written to protect the aquatic life and primary contact recreation uses to meet CWA requirements."); U.S. EPA, *NPDES Statement of Basis* 4 (2017), https://www.epa.gov/sites/default/files/2018-06/documents/nd0030813-dakota-magic-casino-final-sob.pdf ("While state water standards do not apply

receiving waters, EPA identifies beneficial uses and does its own analysis.[32] EPA acknowledges this, explaining that "[i]n the absence of CWA-effective WQS for these waters, EPA permit writers have utilized various tools to write protective NPDES permits, such as relying on downstream state WQS to inform relevant permit limits."[33] EPA does not clearly explain why state WQS are insufficient, except to say that "these mechanisms are limited in their ability to protect Tribal waters reflecting Tribal priorities."[34] But the proposed rule does not reflect tribal priorities either. All tribes are different, and all have unique priorities. In the context of water pollution, they can reflect their priorities in several ways, including: (1) seeking TAS status for section 303 purposes, as Congress provided—or not; (2) passing tribal laws to protect tribal waters, which EPA, other federal agencies, and state agencies consider in evaluating permit or license applications; (3) working with states during triennial reviews of state WQS to ensure reservation waters are protected; or (4) relying entirely on state WQS. In fact, some states have already developed WQS that account for the "tribal priorities" EPA identifies. In California, for example, the State Water Board established new designated uses for the protection of uses of water by California tribes—the Tribal Tradition and Culture beneficial use and the Tribal Subsistence Fishing beneficial use.[35]

Given section 303's plain language and EPA's use of state WQS in the permits it issues for Indian country, there does not appear to be any necessity for the proposed rule under section 303(c)(4)(B)(2). State WQS—which EPA has approved as meeting section 303 requirements—should apply in Indian country under the Act's plain language and are applied or referred to in most EPA-issued permits in Indian country. In the absence of real "necessity," EPA does not have authority to promulgate the proposed rule.[36]

WUWC members are also concerned that EPA may not fully appreciated the economic impacts of the proposed rule. Although EPA states that the "baseline WQS proposed in this rule would not themselves impose costs on any entity," it prepared an economic analysis "of the potential

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on the Lake Traverse Reservation, they were considered during permit development to assist in determining downstream uses.").

[32] *See, e.g.*, U.S. EPA, *Statement of Basis For The Rosebud Hotel And Casino NPDES Permit Sd-0034584*, 8 (2017), https://www.epa.gov/sites/default/files/2017-09/documents/sd0034584-rosebud-casino-sob-9-2017.pdf (identifying beneficial uses that it will consider "in the absence of water quality standards on the reservation").

[33] 88 Fed. Reg. at 29499.

[34] *Id*.

[35] *See* California, State Water Board Resolution No. 2017-0027 (May 2, 2017), https://www.waterboards.ca.gov/board_decisions/adopted_orders/resolutions/2017/rs2017_0027.pdf (establishing Part 2 of the Water Quality Control Plan for Inland Surface Waters, Enclosed Bays, and Estuaries of California—Tribal and Subsistence Fishing Beneficial Uses and Mercury Provisions); *see* Cal. Code Regs., tit. 23, § 3010 (summarizing the statewide WQS action).

[36] Administrative agencies are creatures of statute" and "accordingly possess only the authority" that Congress has lawfully provided. *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occ'l Safety & Health Admin*., 142 S. Ct. 661, 665 (2022). EPA cannot expand its power beyond that accorded it by statute. *See Nat. Res. Def. Council, Inc. v. EPA*, 822 F.2d 104, 131 (D.C. Cir. 1987) ("[EPA]'s rulemaking power is limited to adopting regulations to carry into effect the will of Congress as expressed in the statute.").

control actions and costs that point source facilities discharging into or upstream from waters covered by this rule may incur as a result of implementing the baseline WQS."[37] EPA, however, only considers 57 "major" facilities in its analysis, seven of which that directly discharge into Indian reservation waters and 50 upstream facilities.[38]

The analysis does not quantify the proposed rule's impact on minor or undesignated facilities, of which it identified 963. It excluded minor facilities because "[m]inor dischargers typically do not have monitoring requirements for toxic pollutants so data to evaluate reasonable potential for these facilities is often limited."[39] EPA suggests that "these dischargers may not contribute significantly to instream loads even if such pollutants were present in the effluent from these facilities," but without attempting to gather any information, it cannot know if that is true.[40] Its conclusion that "the potential for minor facilities to incur costs as a result of the criteria translations is low," therefore, is purely speculative.[41]

Of much greater concern to WUWC members is EPA's geographic limitations in identifying facilities to consider. EPA explains in its economic analysis that it conducted "an upstream state discharger analysis as an informative aspect of this economic analysis which is intended to be illustrative and representative of potential costs."[42] But EPA limited that analysis to major facilities located on or within a five-mile radius of Indian reservation waters.[43] A five-mile radius is far too small an area to be "representative of potential costs."[44] EPA has applied downstream WQS to facilities over 100 miles away. The proposed NorthMet copper-nickel project in northern Minnesota is an example. In 2019, the U.S. Army Corps of Engineers issued a section 404 permit for the project after the Minnesota Pollution Control Agency (MPCA) certified that it would not violate state WQS. Relying on an environmental impact statement it had jointly prepared, the Corps determined that the section 404 permit would not violate the Fond du Lac Band's WQS.[45] In the course of litigation, however, the Corps suspended the permit, and EPA subsequently advised the Corps not to reinstate the section 404 permit because it was "unaware of any CWA Section 404 permit conditions that would ensure compliance with

[37] 88 Fed. Reg. at 29518 (citing *Economic Analysis for Potential Federal Baseline Water Quality Standards for Indian Reservation Waters*, U.S. Environmental Protection Agency, Office of Water (Apr. 5, 2023), Docket ID EPA-HQ-OW-2016-0405-0208 (hereinafter, "*Economic Analysis*").

[38] *Economic Analysis* at 6.

[39] *Id.* at 6 n.8.

[40] *Id.*

[41] *Id.*

[42] *Id.* at 6 n.7.

[43] *Id*. at 6.

[44] *See id*. at 67.

[45] The EIS for the project actually indicated that the project would lower the amount of pollutants in the St. Louis River by capturing and treating the tailings basin seepage from historic mining operations.

the Band's water quality requirements for reservation waters."[46] The NorthMet project site is located over 116 river miles upstream from the Fond du Lac Reservation.

While WUWC members may not know exactly how many of their facilities are likely to be impacted by the proposed rule, they believe that EPA's analysis understates the economic impacts of its action. When a proposed rule has the potential to have far-reaching economic impacts, as this rule does, it is critical that the agency's authority be very clear.[47] For the reasons explained above, WUWC members do not believe that to be the case.

2. The baseline tribal WQS are likely to create jurisdictional confusion and intergovernmental disputes.

WUWC members are concerned that the proposed rule will substantially increase compliance complexity and intergovernmental disputes. The states in which WUWC members are located have spent decades establishing science-based water quality standards that recognize each state's unique topography, hydrology, geology, and climate. State WQS protect designated uses and are "based on sound scientific rationale."[48] The states have considered "the water quality standards of downstream waters and [ensured] that its water quality standards provide for the attainment and maintenance of the water quality standards of downstream waters," as the CWA required.[49] And they have employed EPA's section 304(a) recommendations, modified to reflect site-specific conditions, or other scientifically defensible methods to establish WQS.[50]

Every three years, states must review their quality criteria, water uses and requirements for antidegradation.[51] These proceedings are time-consuming, involved, and iterative. In California, for example, reviews are handled by basin and involve evaluating new scientific and technical information; addressing new legal requirements; responding to EPA's recommendations and guidelines; ensuring compliance with State Water Board policy requirements; and addressing stakeholder concerns. Arizona has adopted a "local control approach" to ensure protection of the state's important water resources through a public hearing process. When it determines that a revision of a surface WQS is needed, Arizona conducts a rulemaking for the proposed revisions. Each state follows its own process, but all carefully consider a variety of factors, including the

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[46] *See Clean Water Act Section 401(a)(2) Evaluation and Recommendations with respect to the Fond du Lac Band's Objection to the Proposed Clean Water Act Section 404 Permit for the NorthMet Mine Project*, U.S. EPA Region 5 (Apr. 29, 2022), https://www.epa.gov/system/files/documents/2022-05/EPA%20CWA%20401a2%20Evaluation%20and%20Recommendations%20to%20the%20Corps%20on%20NorthMet%204-29-22.pdf.

[47] *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022) (citing *Utility Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014).

[48] 40 C.F.R. §131.11(a).

[49] 40 C.F.R. §131.10(b).

[50] *See* 40 C.F.R. §§ 131.11(b), 131.6, 131.5(a). If EPA determines that the standards are consistent with federal requirements, it must approve the standards within 60 days of the date of submission. 33 U.S.C. § 1313(c)(3); 40 C.F.R. § 131.5(b). If the state fails to adopt the changes within 90 days of notification, EPA must promulgate a water quality standard for the state. *Id.*

[51] 33 U.S.C. § 1313(c)(3)–(4).

aquatic communities, hydrology, geologic formations, and anthropogenic influences affecting intrastate waters, and all conduct research into new technologies, weigh alternatives, and involve the public.

EPA cannot account for local factors in promulgating federal baseline WQS for Indian country and offer the robust public proceedings needed to ensure that the WQS established are appropriate, considering section 303(c)'s enumerated uses. EPA maintains that "as both the promulgating entity and the primary implementing authority," it will allow "a degree of site-specific tailoring" that will "be accomplished by use of the narrative criteria and binding translation procedures identified in the rule."[52] That only underscores why establishing baseline WQS for all of Indian country is inappropriate. EPA's proposed use of narrative criteria, translated into numeric criteria using one of five options at EPA's discretion, will likely make it very difficult for regulated entities to plan.

The legal and jurisdictional complexity throughout Indian country is, in fact, one of WUWC's major concerns. EPA intends for the proposed rule to apply throughout "Indian county," except with respect to: (1) reservations where tribes have been granted TAS status; (2) reservations where EPA has "explicitly found that a state has jurisdiction to adopt water quality standards"; (3) off-reservation allotments and off-reservation dependent Indian communities; and (4) reservations where the Regional Administrator approves an exclusion.[53] WUWC believes that EPA's proposed scope is overbroad and will lead to uncertainty and conflict.

First, Indian land tenure is variable and often highly fractured. Due to federal allotment policies, many reservations are a hodgepodge of tribal trust land, allotted lands, and fee lands. It is well-established that states have jurisdiction over fee lands located within Indian country.[54] As such, state WQS standards already apply to all intrastate waters on fee lands. The proposed rule cannot consequently apply to fee lands located within an Indian reservation because there is no "necessity" under section 303(c)(4)(B)(2). EPA does not have authority to supplant state WQS with its own baseline standards.

The legal authorities governing reservations differ from reservation to reservation. In Colorado, for example, the Southern Ute Reservation has a checkerboard ownership pattern with many non-Indians living within the reservation's historic boundaries, which has precipitated long and contentious jurisdictional disputes. Congress sought to resolve those disputes in 1984 with Public Law No. 98-290 (PL 290), which draws reservation boundaries and delineates the respective jurisdictional authority of the tribe, the state and the county. Despite PL 290, the state and the tribe do not agree as to territorial and regulatory jurisdiction concerning the administration of Clean Air Act programs relative to non-Indian air pollution sources on fee land within the reservation. Congress also passed tribe-specific allotment acts that can affect the allocation of jurisdiction, as well as various termination and restoration acts. In order to determine which

[52] 88 Fed. Reg. at 29499.

[53] *Id*. at 29522 (§ 131.XX(a)).

[54] *Nevada v. Hicks*, 533 U. S. 353, 361 (2001) ("State sovereignty does not end at a reservation's border."); *County of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U. S. 251, 257–258 (1992).

WQS applies, states and tribes will have to resolve jurisdictional uncertainties each of these unique authorities, which will likely generate intergovernmental disputes that would otherwise have been avoided.

The number of very small reservations and off-reservation trust parcels will also create administrative headaches.[55] Many tribes have acquired trust lands outside of reservation boundaries for a variety of reasons—including to support economic development important for tribal self-determination. But non-contiguous trust lands—of which there are many—only increase the jurisdictional complexity and make planning difficult for regulated entities. These problems will only increase. The Bureau of Indian Affairs (BIA) recently announced that it has an affirmative policy favoring trust acquisition.[56] It "has processed thousands of applications placing over a million acres of land into trust for tribes and individual Indians since the passage of the IRA in 1934."[57] BIA has proposed changes to its fee-to-trust regulations that would allow it to "process applications more quickly and with less expense to applicants."[58] Among the proposed changes is a presumption that the Secretary of the Interior will acquire land in trust and the elimination from BIA's consideration of "jurisdictional problems or conflicts of land use which may arise."[59] The combination of EPA's and BIA's proposed rules are likely to have far-reaching consequences to water pollution management.

For WUWC members, having a checkerboard application of variable WQS can make its compliance efforts very challenging. Administration complexity will be exacerbated by EPA's proposed use of narrative criteria, which EPA will numerically translate using one of five options. With over 100 recognized tribes in California, 29 in Washington, 23 in New Mexico, 22 in Arizona, 20 in Nevada, eight in Utah, and two in Colorado, our members' concerns are well-founded. In WUWC's view, the far more sensible approach—and the one most consistent with current practice and the plain language of the Act—is to apply state WQS until such time as a tribe—in an exercise of its sovereign judgment—decides to seek TAS status under section 518.

Specific Comments

1. § 131XX(a) Scope.

The proposed rule will apply to "all waters of the United States in Indian country," except for: reservations where EPA has already promulgated WQS (i.e., the Confederated Tribes of the Colville Reservation); states where EPA has "explicitly found that a state has jurisdiction" or where a tribe is authorized TAS; off-reservation allotments and dependent Indian communities; and reservations were a Regional Administrator approves an exclusion.[60] Exclusions are

[55] EPA intends for the proposed rule to apply all trust lands, not just formal reservations. 88 Fed. Reg. at 29522 (§ 131.XX(a)).

[56] *Land Acquisitions*, 87 Fed. Reg. 74334, 74335 (Dec. 5, 2022).

[57] *Id*. ("[I]t will now be clear Departmental policy to support land into trust.").

[58] *Id.*

[59] *See id.* at 74337, 74338.

[60] 88 Fed. Reg. at 29522.

permitted for tribes "that have a plan in place for establishing WQS for EPA approval or are working on a plan and do not yet have EPA-approved WQS for EPA in effect."[61]

For the reasons explained above, WUWC recommends that EPA limit the scope of the rule. First, EPA should clarify that the rule does not apply to fee lands located within Indian country. Second, EPA should consider limiting application of the rule to the definition of "Indian reservation" Congress enacted in section 518—"all land within the limits of any Indian reservation under the jurisdiction of the United States Government . . ."[62]

WUWC also suggests that EPA not apply the rule to informal reservations to reduce the potential for conflicts and the cost of compliance. In addition, EPA should consider applying the proposed rule in phases, based on reservation size. The surface waters on small reservations and trust lands are far more likely to adequately protected by existing state WQS. To the extent that EPA believes that there are serious gaps that it needs to address in Indian country, it should focus its efforts on those locations. Doing so would also enable it to more accurately understand how the rule is affecting upstream states and dischargers.

Finally, WUWC recommends that, rather than requiring tribes to seek an exclusion from the application of the rule, the rule offer an "opt in" process. Doing so would enable EPA to determine whether the proposed rule reflects and protects tribal priorities, rather than EPA's, by empowering tribes to opt into its application. Many tribes may not have invested significant resources into evaluating EPA's proposed rule for various reasons. Some may believe that state WQS adequately protect reservation waters. Others may wish to avoid the jurisdictional disputes the rule is likely to generate. EPA received comment letters from only ten tribes during tribal consultation. The low level of response, coupled with the concerns tribes voiced regarding jurisdictional disputes, the need for regionally-specific standards, and the application in checkerboard reservations, suggests that an opt-in approach would better reflect tribal priorities and respect tribal sovereignty.

2. § 131.XX(b) Consultation with Tribes.

Proposed § 131.XX(b) provides that in taking actions under this section, the Regional Administrator will initiate Tribal consultation with the tribe(s) whose interests may be affected, consistent with applicable EPA Tribal consultation policies.

WUWC supports EPA's consultation efforts and believes that such consultation is critical to understanding the local complexities that must be considered in establishing appropriate WQS. But EPA's consultation should not be limited to tribes. The baseline WQS will directly impact the states in which the trust lands are located, most dramatically where Indian land tenure is complex and fractured. Because the proposed rule purports to regulate all waters within Indian country (subject to certain exceptions), EPA will assume regulatory control over entities operating under state permits that apply state WQS. In addition, the upstream state and discharges will also be directly impacted. Consulting only with tribes regarding EPA's WQS will

[61] *Id.* at 29501.

[62] 33 U.S.C. § 1377(g)(1).

result in EPA not having sufficient information in translating its narrative criteria into numeric standards.

In addition, many tribes do not have staff or extensive experience in water pollution management. That may be because of lack of resources or tribes may have elected to rely on state WQS, focusing their efforts on other tribal priorities. In any case, states have entire agencies devoted to water pollution management and over a half-century of experience in implementing section 303. EPA, which has little local knowledge, should involve the states in establishing appropriate WQS. WUWC also recommends that EPA consult with non-tribal entities that will be directly affected by the proposed rule.

3. § 131.XX(c) Federal Baseline Designated Uses

EPA proposes to establish three baseline designated uses for most of Indian country: (1) the protection and propagation of aquatic life, which includes protection of human health of consumers of aquatic life; (2) primary contact recreation; and (3) cultural and traditional uses of reservation waters.[63] Respectfully, WUWC members are concerned that EPA has not and cannot meet basic section 303 requirements in implementing the rule.

Pursuant to the regulations EPA promulgated to implement its WQS program, states and authorized tribes are required to specify "*appropriate* water uses to be achieved and protected."[64] In doing so, they must "take into consideration the water quality standards of downstream waters and [to] ensure that its water quality standards provide for the attainment and maintenance of the water quality standards of downstream waters."[65] The proposed rule does not and cannot do either of those things, which is likely to lead to significant implementation problems in the states WUWC members operate. The western United States is arid; there are many waters that do not support fish or primary contact recreation due to insufficient flows or other naturally occurring features. Attainment of EPA's surface water quality criteria is not possible in all waters. It will be necessary to use site-specific criteria and/or attainability analyses—which require considerable technical expertise to develop—to prevent overly stringent effluent limits, unnecessary 303(d) listings, and unattainable TMDL endpoints.

As EPA admits, its blanket approach to designated uses "may not be attainable in all Indian reservation waters because of Tribe-specific or site-specific factors."[66] To address this problem, EPA proposes a regulatory process to revise designated uses as "data and information may become available after the baseline WQS rule becomes final."[67] But this just underscores the problems with EPA's "one size fits all" approach to WQS. WQS need to be tailed to site-specific conditions because aquatic communities, hydrology, geologic formations, and anthropogenic influences substantially vary. These resources should be evaluated by individual reservations,

[63] 88 Fed. Reg. at 29522 (131.XX(c)).

[64] 40 C.F.R. § 131.10(a).

[65] *Id.* § 131.10(b).

[66] 88 Fed. Reg. at 29512.

[67] *Id*. at 29512; 29526 (131.XX(i)).

individual waters, and available resources for implementation before designated uses are identified.

The proposed regulation provides that the Regional Administrator "may"—upon request of the tribe or upon the Regional Administrator's identification—revise one or more designated uses to "more appropriately reflect the Tribe-specific use and value of waters."[68] But this approach turns the process on its head. Rather than designating appropriate uses at the outset, EPA's blanket designations will have to be revised on a case-by-case basis, and the interim, regulated parties will face unattainable requirements. Moreover, because the rule does not allow states or regulated parties to request revision, the rule could leave states and regulated entities without recourse. Tribes that do not have expertise or are not otherwise concerned about off-reservation activities may be unmotivated to revise uses that were inappropriate from the start. States and upstream dischargers, however, will be directly and indirectly impacted by EPA's designated uses.

With respect to EPA's proposed designation of *cultural and traditional uses*, it does not appear that EPA has authority to designate this use. Under section 303(c)(4), the Administrator can establish WQS only if he "determines that a revised or new standard is necessary to meet *the requirements of this chapter*."[69] As EPA's regulations establish, the minimum requirements of the chapter are the use designations consistent with sections 101(a)(2) and 303(c)(2).[70] Section 101(a)(2) uses include "the protection and propagation of fish, shellfish, and wildlife" and "recreation in and on the water."[71] Section 303(c)(2) provides that WQS are to 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."[72] EPA reiterates in 40 C.F.R. § 131.10 that "[t]he classification of the waters of the State must take into consideration the use and value of water for public water supplies, protection and propagation of fish, shellfish and wildlife, recreation in and on the water, agricultural, industrial, and other purposes including navigation." While states and authorized tribes can adopt non-101(a)(2) uses, but they must justify those uses before EPA will approve them.[73]

EPA maintains that cultural and traditional uses serve "to protect the health and welfare of Tribal members exercising such uses and are thus within the purposes enumerated in the Act."[74] There is nothing in the CWA to support EPA's interpretation, as its own regulations establish. In 40

[68] *Id*. at 29526 (131.XX(i)).

[69] 33 U.S.C. § 1313(c)(4)(B) (emphasis added).

[70] 40 C.F.R. § 131.6(a).

[71] 33 U.S.C. § 1251(a)(2).

[72] *Id*. § 1313(c)(2)(A).

[73] 40 C.F.R. § 131.10(a) ("If adopting new or revised designated uses other than the uses specified in section 101(a)(2) of the Act, or removing designated uses, States must submit documentation justifying how their consideration of the use and value of water for those uses listed in this paragraph appropriately supports the State's action.").

[74] 88 Fed. Reg. at 29503.

C.F.R. § 131.2, EPA interprets "'Serve the purposes of the Act' (as defined in sections 101(a)(2) and 303(c) of the Act)" to require WQS that "wherever attainable, provide water quality for the protection and propagation of fish, shellfish and wildlife and for recreation in and on the water and take into consideration their use and value of public water supplies, propagation of fish, shellfish, and wildlife, recreation in and on the water, and agricultural, industrial, and other purposes including navigation." Cultural and traditional uses are not part of the Act's purposes and, thus, are not "necessary to meet the requirements of this chapter" under section 303(c)(4).

WUWC is not taking the position that tribes cannot independently designate cultural and traditional uses in establishing their own WQS.[75] But it does not believe that EPA has the authority to do so under section 303(c)(4).[76]

4. § 131.XX(d) Federal Baseline Water Quality Criteria

EPA proposes to use narrative criteria only. Under the proposed rule, EPA can chose among five options to numerically translate the narrative criteria:

1. EPA's national recommended water quality criteria published under section 304;
2. EPA's national recommended water quality criteria published under section 304, modified to reflect site-specific conditions and aquatic communities that incorporate (where relevant):
    a. Fish consumption rates protective of tribal fish consumers;
    b. Site-specific water chemistry;
    c. Protective default chemistry inputs; or
    d. Other scientifically defensible assessments, such as endangered species guidance and indigenous knowledge;
3. WQS adopted by the tribe or CWA-effective WQS applicable in "adjacent or other relevant state(s) or Tribe(s)," taking into account indigenous knowledge;
4. The Water Quality Guidance for the Great Lakes System; or
5. Existing CWA provisions in 40 C.F.R. part 131.

WUWC members are concerned that this approach provides dischargers, permit writers, and other regulators with virtually no information regarding the standards they will have to satisfy.

[75] *Id*.

[76] WUWC is also concerned that EPA is "not proposing to define cultural and traditional uses in more detail in this rule because they can include a variety of uses specific to the ceremonies and traditions of each Tribe, and each use may require different levels of protection." 88 Fed. Reg at 29503. Without identifying the uses or the levels of protection required or where these protections may apply, WUWC members cannot evaluate the potential impacts of the proposed rule on their facilities.

For regulated entities like WUWC members, the use of narrative criteria makes planning and compliance more difficult, while expanding EPA's discretion.[77]

Under option 2, EPA can modify its national recommended water quality criteria published under section 304, by adopting fish consumption rates largely as it sees fit. Thus, EPA can use its general fish consumption rate of 22 g/day or its national default subsistence value of 142 g/day, the latter of which would require most states to substantially reduce their WQS for downstream compliance purposes. Under this approach, Regional Administrators will have wide discretion to select the numeric criteria they prefer, without "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," as section 303(c) requires.[78] And it appears that stricter standards are EPA's goal, as the preamble explains that "a fish consumption rate should be selected that reflects consumption that is not suppressed by fish availability or concerns about the safety of fish for human consumption."[79] "[A] suppression effect is when the fish consumption rate for a given Tribe reflects a current level of consumption that is artificially diminished relative to the Tribe's heritage fish consumption rate."[80] A tribe's current level of fish consumption may differ from its "heritage fish consumption rate" for a wide variety of reasons, not the least of which is the wide-spread availability of non-local food sources through supermarkets and other sources.

It is also concerning that EPA's justification for this option goes well beyond the purposes of the CWA. EPA explains that "[t]he negative impacts of suppression extend well beyond Tribal health, leading to consequences for Tribal economies and cultures as well."[81] "Given that aquatic resources often support a Tribe's cultural self-determination and can be pivotal to the economic wellbeing of the community, impacts to these resources can affect the very foundation of Tribal social and political organization." The CWA, however, was not designed to address effects extending "well beyond Tribal health." As Congress expressly provided, the purpose of the CWA "is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[82] While WUWC members strongly support WQS that are protective of fish consumers, nothing in the CWA authorizes or provides legal support for EPA to require the use of "unsuppressed" fish consumption rates.[83]

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[77] *See e.g.*, *Upper Blackstone Water Pollution Abatement Dist. v. EPA*, 690 F.3d 9, 32 (1st Cir. 2012) (reviewing EPA's translation of Massachusetts' narrative criteria to significant limit phosphorus discharges under a "zone of reasonableness" standard); *Am. Paper Inst. v. EPA,* 996 F.2d 346, 350 (D.C. Cir. 1993) (deferring to EPA's translation of narrative criteria).

[78] 88 Fed. Reg. at 29503 n.22.

[79] 88 Fed. Reg. at 29507.

[80] *Id.*at 29521.

[81] *Id.*

[82] 33 U.S.C. § 1251(a).

[83] EPA takes the position that tribal treaty rights require the application of unsuppressed fish consumption rates and has proposed a rule that would require states to protect treaty rights in state WQS. *See, e.g., Water Quality Standards Regulatory Revisions to Protect Tribal Reserved Rights,* 88 Fed. Reg. 74361

WUWC members are unsure regarding how Regional Administrators will use indigenous knowledge to modify national recommended water quality criteria. EPA explains that Regional Administrators may "modify the CWA section 304(a) recommended criteria to protect site-specific conditions based on a sound scientific rationale, including EPA published methodologies, if available, and, as appropriate, Indigenous Knowledge (IK), often referred to as Traditional Ecological Knowledge (TEK), where consistent with EPA's regulations and CWA statutory requirements."[84] WUWC members have deep respect for indigenous communities and the traditional ecological knowledge such communities acquired over millennia. But EPA developed its national recommended water quality criteria "to accurately reflect the latest scientific knowledge on the impacts of pollutants on human health and the environment."[85] Its water quality criteria "are based solely on data and scientific judgments on the relationship between pollutant concentrations and environmental and human health effects."[86] It is not apparent how EPA would use IK to modify its data-based, scientific judgments on the relationship between pollutant concentrations and environmental and human health effects or why it would be prudent to do so.

In any event, the Regional Administrator will translate the baseline criteria after the proposed rule is in effect using one of the five options, at its discretion.[87] It "could," but is not required to, provide a specific public process on EPA's translation in advance of the public process associated with the implementation program.[88] And if conflicts arise between upstream state WQS and baseline WQS, EPA will apply 40 C.F.R. § 131.7. Under that section, the Regional Administrator—who created the conflict in the first place—is responsible for attempting to resolve the dispute they created. The Regional Administrator also has the power to appoint a mediator or arbitrator, as applicable, and if the state refuses mediation or arbitration, the Regional Administrator may appoint an official to prepare a written recommendation to resolve the dispute. Whether an NPDES permittee, citizen, citizen group, or other affected entity may participate is also left to the discretion of the Regional Administrator.

The Regional Administrator cannot possibly serve as a neutral arbiter in this situation. This approach is inconsistent with the CWA's policy of ensuring that states (an authorized tribes) have the primary responsibility for preventing, reducing, and eliminating pollution.

(Dec. 5, 2022). Under that rule states and authorized tribes would have to: (a) designate uses of waterbodies that expressly incorporate protections for tribal reserved rights; (b) establish water quality criteria to protect those rights; and (c) adopt antidegradation requirements to protect water quality to the level deemed necessary to protect tribal reserved rights. EPA has not identified any treaty language to support its position.

[84] EPA refers to indigenous knowledge as traditional ecological knowledge. 88 Fed. Reg. at 29507.

[85] U.S. EPA, *Water Quality Criteria*, https://www.epa.gov/wqc (last visited August 2, 2023).

[86] *See e.g.*, U.S. EPA, *Nat'l Recommend Water Quality Criteria 2002* 1 (2002), https://www.epa.gov/sites/default/files/2018-12/documents/national-recommended-hh-criteria-2002.pdf.

[87] 88 Fed. Reg. at 29508.

[88] *Id.*

5. 131.XX(e) Federal baseline antidegradation policy.

WUWC members support antidegradation goals. However, WUWC members are concerned that EPA's broad discretion in translating its water quality criteria into numeric standards discussed above will create significant compliance issues. While the Regional Administrator has the power to allow lowering of high water quality, the proposed rule requires written agreement from the tribe that "is necessary to accommodate important economic or social development in the area in which the waters are located."[89] This approach is likely to result in conflicts. If EPA imposes standards stricter than state WQS that dischargers cannot meet, tribes will be in a position to withhold the written agreement that the regulations require for a lowering of highwater quality. In fact, it may be necessary to obtain multiple permissions, depending on waterbody and the number of reservations and trust lands involved.

6. 131.XX(f)(4)(i) Outstanding national resource water protection consistent with paragraph (e)(3) of this section.

This subsection would allow the Regional Administrator to determine, with written agreement from the tribe, whether a reservation water qualifies as an Outstanding National Resource Water (ONRW). An ONRW, under the proposed rule, could include "such as waters of national and Tribal parks and wildlife refuges and waters of exceptional recreational, ecological, or cultural significance."[90] The proposed language differs from the current language found in 40 C.F.R. § 131.12(a)(3), which does not include "cultural significance."[91] The proposed rule does not require notice to affected upstream states or seek their input prior to the Regional Administrator making the determination.

EPA interprets 40 C.F.R. § 131.12(a)(3) "to mean no new or increased discharges to ONRWs and no new or increased discharge to tributaries to ONRWs that would result in lower water quality in the ONRWs."[92] In other words, designating waters as an ONRW imposes a nearly absolute ban on new or expanded point source discharges. Only "short-term, temporary water quality degradation" can be permitted, and "only if the short-term, temporary degradation is limited to the shortest possible time, does not impact existing uses, and does not alter the essential or special characteristics" that make it an ONRW.[93] EPA interprets "short-term" to mean "weeks and months, not years."[94]

Given the very significant impact ONRW designation can have, WUWC members are concerned that the proposed rule allows the Regional Administrator too much discretion. The affected state and the public should be notified prior to the Regional Administrator making a determination,

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[89] *Id*. at 29523.

[90] 88 Fed. Reg. at 29523 (§131.XX(e)(3)).

[91] *Id*.

[92] U.S. EPA, Water Quality Standards Handbook, Ch. 4, 12 (2012), https://www.epa.gov/sites/default/files/2014-10/documents/handbook-chapter4.pdf.

[93] 88 Fed. Reg. at 29523 (§131.XX(e)(5)).

[94] Water Quality Standards Handbook, Ch. 4, 12.

and there should be meaningful standards for making such a determination. In addition, EPA should take into account the extent of the waters within and outside of Indian country and the economic effects of such designation. While WUWC members support anti-degradation rules, there should be clear standards and a more detailed process.

Conclusion

This rulemaking is an opportunity for EPA to address our comments and those of others who support CWA protections and ensuring that all intrastate waters nationwide are protected. Our members are experienced, on-the-ground partners with EPA and states in the implementation of the CWA. Based on this experience, WUWC is prepared to assist EPA other federal and state regulatory agencies, and members of Congress in addressing this important issue. WUWC looks forward to continued dialogue and collaboration as EPA completes its rulemaking.

Thank you for the opportunity to provide these comments. For more information, please contact me at (951) 203-2804 or Walshj@emwd.org, or WUWC's national counsel, Ted Boling, at (202) 661-5872 or TedBoling@perkinscoie.com, or Jena MacLean at (202 434-1648) or JMacLean@perkinscoie.com.

Very truly yours,

s/ Jolene Walsh

Jolene Walsh
Vice Chair, WUWC

cc: Marshall Brown, WUWC Chair
Ted Boling
Jena MacLean