



National Association of Wetland Managers

“Dedicated to the Protection and Restoration of the Nation’s Wetlands”

August 2, 2023

Executive Director

Marla J. Stelk
500 Washington Avenue, Suite 201
Portland, ME 04103
(207) 892-3399

Chair

Mark Biddle
DE Dept. of Natural Resources
and Environmental Control
285 Beiser Boulevard, Suite 102
Dover, DE 19904
(302) 739-9939

Vice Chair

Samantha Vogeler
KY Division of Water
300 Sower Boulevard, 3rd Floor
Frankfort, KY 40601
(502) 782-6995

Secretary

Amy Lounds
MI Dept. of Environment,
Great Lakes, and Energy
525 W. Allegan Street
Lansing, MI 48933
(517) 331-7966

Treasurer

Lauren Driscoll
WA State Dept. of Ecology
PO Box 47600
Olympia, WA 98504
(360) 407-7045

Past Chair

Collis Adams
Adams Environmental Consulting, LLC
110 Pattee Hill Road
Goffstown, NH 03045
(603) 660-9797

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Denise Clearwater
MD Dept. of the Environment

Andrew Robertson
Saint Mary's Univ. of Minnesota

Bill Ryan
OR Dept. of State Lands

Mary Ann Tilton
NH Dept. of Environmental Services

Mr. James Ray

Office of Science and Technology

Mail Code 4305-T

U.S. Environmental Protection Agency

100 Pennsylvania Avenue, NW

Washington, D.C. 20460

Re: Federal Baseline Water Quality Standards for Indian Reservations
(Docket #EPA-HQ-OW-2016-0405)

Via www.regulations.gov

The National Association of Wetland Managers (NAWM) submits the following comments in response to the proposed rule, “Federal Baseline Water Quality Standards for Indian Reservations,” EPA-HQ-OW-2016-0405. NAWM supports the rulemaking by the Environmental Protection Agency (EPA) on baseline tribal standards and has some suggestions regarding potential improvements.

NAWM is a national 501(c)(3) professional organization that supports the use of sound science, law, and policy in development and implementation of state and tribal wetland and aquatic resource protection programs. Since 1983, our organization and our member states and tribes have had longstanding positive and effective working relationships with federal agencies. As an association representing states and tribes as co-regulators tasked with implementation of regulations implementing the Clean Water Act (CWA), NAWM understands the complexity of the CWA, the implementation challenges the Act poses, and the central role water quality standards play in CWA programs. We have worked for many years together with federal, state, and tribal agencies in the implementation of regulatory and non-regulatory programs designed to protect waters of the United States. Our collaboration has involved programs such as the CWA §404 permit program for dredged or fill material, state and tribal water quality standards for wetlands, and CWA §401 water quality certification of federal licenses and permits.

This letter first discusses background issues, such as the need for water quality standards in Indian country and the importance of tribal participation as EPA develops and revises baseline tribal water quality standards. The letter then focuses on the proposed water quality standards, including beneficial uses, criteria, and anti-degradation

policies. The letter concludes with a discussion of issues associated with baseline tribal water quality standards implementation.

A. Background Issues.

1. The Need for Baseline Tribal Water Quality Standards.

Water quality standards developed under Clean Water Act (CWA) §303 are the foundation from which CWA programs achieve the primary goal of the Act, restoring and maintaining the chemical, physical, and biological integrity of the nation's waters.¹ Standards describe the desired water quality for particular waterbodies that is consistent with a water's designated use.

CWA §303 has required states to develop water quality standards since the 1970s. In 1987 Congress amended the CWA to allow tribes to obtain "treatment in a manner similar to states," or TAS, under which tribes can manage water resources on their reservations.² Of the approximately 300 tribes with Indian reservations that are eligible for TAS, 84 Tribes have applied and been approved to administer a water quality standards program, and of those only 47 Tribes to date have adopted standards and submitted them to EPA for review and approval under the CWA.³ EPA estimates that about 76,000 miles of rivers and streams, and 2.9 million acres of lakes, wetlands, and other surface waters on tribal lands lack CWA-effective water quality standards.⁴ "As a result, 50 years after enactment of the CWA, the majority of Indian reservations do not have this foundational protection laid out by Congress in the CWA for their waters."⁵

CWA programs are difficult to apply to tribal waters that lack water quality standards. For example, §402 National Pollutant Discharge Elimination System (NPDES) permits are required to include discharge limits sufficient to achieve compliance with applicable CWA water quality standards.⁶ Section 404 permits addressing discharge of dredged or fill material similarly must include requirements that ensure, among other things, that discharges will not cause or contribute to a violation of any applicable water quality standard.⁷ Water quality certification under §401 is intended to ensure that a federally issued license or permit would be consistent with attaining applicable water quality standards and other enumerated CWA program provisions.⁸ Without applicable water quality standards, implementation of these and other CWA programs lack a direct tie to the general goal of the Act established in §101(a): to restore and maintain the chemical, physical, and biological integrity of the nation's waters.

¹ CWA §101(a).

² CWA §518.

³ 88 Fed.Reg. 29496, 29499 (May 5, 2023).

⁴ *Id.*

⁵ *Id.*

⁶ CWA §402(a)(1); 88 Fed.Reg. 29496, 29514-29515 (May 5, 2023).

⁷ CWA §404; 40 CF.R. §230.10(b)(1).

⁸ CWA §401(a)(1); *see also* 88 Fed.Reg. 29496, 29516 (May 5, 2023).

The baseline tribal water quality standards would fill this regulatory gap in CWA protection of reservation waters until a Tribe receives TAS authority and develops water quality standards. The proposal preamble suggests that baseline tribal standards are intended as a starting point, an important first step protecting aquatic life and human consumers of that life, providing for safe recreation in and on the water, and protecting cultural and traditional uses.⁹ These proposed baseline standards are somewhat general and when finalized are likely to be useful models for tribes that eventually develop their own water quality standards more tailored to specific circumstances. Such standards allow EPA and Tribes to address during the TAS and water quality standards approval processes reservation-specific natural conditions, cultural or traditional practices, and other unique circumstances.

As EPA finalizes baseline tribal water quality standards, NAWM believes it will be important to allow and ideally encourage Tribes to develop specific standards for wetlands, including criteria that define the physical, chemical, and biological conditions desired in tribal waters. Tribes may seek TAS authority and develop standards approved by EPA for any water of the United States, including wetlands. During this process, authorized Tribes have flexibility to adopt sub-categories of uses and associated criteria to allow for differentiation between types of wetlands and their expected uses, functions, and conditions. As EPA emphasized in its recent publication, “Protecting Waters and Wetlands in Indian Country: A Guide for Developing Tribal Wetland Management Programs,” wetland-specific water quality standards can be an important component of a comprehensive tribal plan to manage wetlands, particularly those that play an important role in ecological functions and cultural uses for Tribes.¹⁰

Recommendation: NAWM supports EPA’s development of baseline tribal water quality standards and believes finalizing those standards is essential for adequately protecting Indian reservation waters. NAWM strongly encourages EPA to reflect the important and unique attributes of wetlands in those baseline standards.

2. EPA authority to develop baseline tribal water quality standards.

The CWA provides EPA with authority to develop new or revised water quality standards where the “Administrator determines that a revised or new standard is necessary to meet the requirements” of the Act.¹¹ In 2001, then-Administrator Carol Browner determined that “... water quality standards are necessary to meet the requirements of the Clean Water Act for all Indian country waters where EPA has not either (1) promulgated other Federal water quality standards or (2) explicitly found State or Tribal Jurisdiction to adopt water quality standards (and Tribal or State Standards are in effect) under the Clean Water Act.”¹² Between 2001 and the present, EPA several times renewed rulemaking efforts to provide water quality protections in Indian country, focusing on Indian reservation waters that did not have CWA-effective water

⁹ See 88 Fed.Reg. 29496, 29503 (May 5, 2023).

¹⁰ Environmental Protection Agency, “Protecting Waters and Wetlands in Indian Country: A Guide for Developing Tribal Wetland Management Programs” (EPA 840B21005, December 2022).

¹¹ CWA §303(c)(4)(b).

¹² Quoted in 88 Fed.Reg. 29496, 29500 (May 5, 2023).

quality standards in place. The baseline tribal standards proposed on May 5, 2021, stem directly from the 2001 determination by Administrator Browner.¹³

During EPA's 2016 efforts to develop baseline tribal standards, some challenged the Agency's authority to develop such standards. However, the statutory authority seems clear where water quality standards are necessary to meet the requirements of the CWA. As discussed in section 1 above, water quality standards directly link implementation of many CWA programs to the statutory goal of "restore and maintain the ... integrity of the nation's waters," and waters that lack standards might not receive water quality protections of those programs. It is a tiny step to conclude that federal interim standards for tribal waters are necessary to meet the requirements of the Act.

Recommendation: NAWM supports EPA's conclusion that the CWA authorizes EPA-developed water quality standards because they are necessary to meet the requirements of the Act.

3. Working Collaboratively with Tribes to Develop Baseline Tribal Standards.

The CWA uses a cooperative federalism approach to achieve its goal of restoring and maintaining the chemical, physical, and biological integrity of the nation's waters. For example, the statute establishes a role for tribes with TAS in implementing several programs central to achieving the Act's objective, such as administering the water quality standards program and impaired waters and total maximum daily loads program under section 303.¹⁴ The CWA also authorizes tribes with TAS to implement the section 402 and 404 permitting programs. Section 401 provides authorized tribes authority to review proposed federal licenses and permits that may result in a discharge to waters of the United States, and to decide whether to grant water quality certification, develop mandatory conditions necessary to ensure water quality goals would be met, or to deny certification at which time the federal permit or license could not be issued. As a result, under the CWA tribes along with states can have a co-regulator relationship with the federal agencies and therefore a very strong interest in how water quality standards are developed and implemented.

Input from Tribes is critical to ensuring baseline tribal standards effectively protect reservation waters and cultural values associated with those waters. Tribes intimately understand the relationship between their cultural values and waters, desirable uses for those waters, and existing relationships among the multiple water quality protection authorities. As a result, input from Tribes is critical to ensure the baseline tribal standards achieve the CWA goal of restoring and protecting the chemical, physical, and biological integrity of tribal waters.

NAWM appreciates EPA's consultation and outreach to Tribes since the Agency began in 1998 to develop water quality standards to protect waters on reservation lands. The proposed rule preamble discusses efforts to date to ensure rulemaking reflected tribal input and perspectives.¹⁵

¹³ "EPA is not proposing to amend the Administrator's Determination. This remains the source of authority for EPA's proposal of WQS for Indian country waters that lack such standards." *Id.*

¹⁴ CWA §518.

¹⁵ *Id.*

Recommendation: NAWM encourages EPA to continue working closely with Tribes to ensure the resulting final baseline tribal standards are workable and appropriately protect reservation waters.

B. Baseline Tribal Water Quality Standards.

1. The Scope of Waters Covered by Proposed Baseline Tribal Standards.

The proposal would apply baseline tribal water quality standards to all waters of the United States in Indian country, with three automatic exclusions in the following circumstances: (1) waters for which EPA has promulgated other federal water quality standards; (2) waters where EPA has explicitly found that a state has jurisdiction to adopt standards or authorized a Tribe with TAS to adopt standards subsequently approved by EPA; and (3) waters in off-reservation allotments or Dependent Indian Communities (DICs).¹⁶ In addition to these three automatic exclusions, the proposal also provides processes under which a Tribe may request the EPA Regional Administrator to approve an exclusion (discussed in section C-2 below).

NAWM has heard from its state members in recent years that uncertainty sometimes exists regarding the legal boundaries of tribal lands in the West. Unclear boundaries could raise questions whether a state or tribal water quality standard applies to a given water. Boundary uncertainties appear to be greatest when involving allotments, DICs, and so-called “checkerboard” areas where land alternates between tribal and non-tribal status. The proposal preamble acknowledges such uncertainty and indicates it is why EPA “has chosen to focus this initial effort on waters where the agency is best positioned to implement the baseline WQS in collaboration with Tribal partners.”¹⁷

The proposal preamble notes the Bureau of Indian Affairs and Bureau of Land Management are in the process of identifying and locating off-reservation allotments around the country. As a result, clarity regarding allotment borders should increase over time. Potentially, in the future agencies might undertake a similar project for DICs. EPA should consider extending the scope of waters covered by baseline tribal standards to cover allotments and DICs as their borders become clear. Additionally, or alternatively, EPA could establish a process under which Tribes may petition the EPA Regional Administrator to apply baseline tribal standards to specific allotments or DICs on a case-by-case basis where borders are precisely understood and described in the petition. Either approach would be consistent with broad coverage of waters by water quality standards, and with desirable implementation clarity.

Some states have expressed uncertainty regarding whether state or tribal standards apply to reservation waters with non-tribal owners, to rights-of-ways running through reservations, to

¹⁶ 88 Fed.Reg. 29496, 29500-29501 (May 5, 2023).

¹⁷ 88 Fed.Reg. 29496, 29501 (May 5, 2023).

private landowners engaged in agricultural production on tribal lands, and similar situations.¹⁸ EPA’s proposed baseline tribal standards are described as applying to “all waters of the United States in Indian country,” unless excluded.¹⁹ That description suggests baseline tribal standards (and, for that matter, standards developed by a Tribe with TAS and approved by EPA) apply to reservation waters with non-tribal owners, to rights-of-way on reservations, and to agricultural production on tribal lands regardless of ownership. Comments in 2016 on baseline tribal standards from states and other parties highlighted confusion about whether and how tribal standards applied to situations such as these when occurring on reservation lands. To reduce continued uncertainty and confusion, it would be helpful if the final baseline tribal standards rule explicitly clarified applicability situations such as these involving non-tribal ownership or activities.

Recommendation: NAWM supports the scope of waters to which baseline tribal standards would initially apply. NAWM suggests, however, that EPA anticipate expanding applicability to allotments and Dependent Indian Communities as their boundaries become more precise. In addition, EPA might consider establishing a process whereby Tribes could petition the EPA Regional Administrator to apply baseline tribal standards to certain allotments or DICs with known boundaries. Also, clarifying applicability of baseline standards to non-tribal ownership or activities on reservation lands would be helpful.

2. Proposed Baseline Tribal Water Quality Standards

The CWA specifies that water quality standards shall, wherever attainable, provide for protection of fish, shellfish, and wildlife, for recreation in and on the water, and must consider use and value of waters for those uses and for public water supplies, industrial purposes, and navigation.²⁰ A water quality standard typically includes three components: designated uses, criteria consistent with those designated uses, and an antidegradation policy. The proposed baseline tribal standards follow this pattern.

a. Proposed Designated Uses

Designated uses establish and communicate to the public the water management and water quality objectives for a state or Tribe’s waters. The designated uses proposed for baseline tribal standards include (1) protection and propagation of fish, shellfish, and wildlife, including protection of the health of human consumers of aquatic life, (2) protection of recreation in and on the water, and (3) protection of cultural and traditional uses of reservation waters.²¹

¹⁸ See, e.g., letter from Tony Willardson, Executive Director of the Western States Water Council on “EPA proposed rulemaking on baseline water quality standards on Indian Reservations, EPA-HQ-2016-0405,” posted on <https://regulations.gov> on January 2, 2017; letter from Barry N. Burrell, Water Quality Division Administrator, Idaho Department of Water Quality on “EPA proposed rulemaking on baseline water quality standards on Indian Reservations, EPA-HQ-2016-0405,” posted on <https://regulations.gov> on January 4, 2017.

¹⁹ 88 Fed.Reg. 29496, 29500 (May 5, 2023).

²⁰ 88 Fed.Reg. 29496, 29502-29503 (May 5, 2023); CWA §101(a)(2).

²¹ 88 Fed.Reg. 29496, 29503 (May 5, 2023).

NAWM's conversations over the years with our tribal members indicate a very strong support for cultural and traditional uses being a designated use in baseline tribal water quality standards. In the proposal preamble, EPA notes that "[c]ultural 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."²² The proposal does not define in any detail what constitutes cultural and traditional uses, which seems appropriate given that those uses vary from Tribe to Tribe. As noted in the proposal preamble, cultural and traditional uses can be specific to the ceremonies and traditions of each tribe, and each use may require different levels of protection.²³ A general designated use for cultural and traditional uses seems very important, however. Some cultural and traditional uses might be protected by an aquatic life use such as fishing, or by a primary contact recreation use where traditional fishing involves immersion. Others, such as protection of materials used for basketry and other traditional crafts, might not be adequately addressed by an aquatic life use or its protective criteria. In such circumstances, a designated use of cultural and traditional uses becomes necessary.

The proposal asks for comment on whether the baseline tribal standards should designate public water supply use for all Indian reservation fresh waters. The proposal does not designate water supply as a designated use, noting that such a designation could cover waterbodies with local characteristics such as inadequate flow that make a water supply use unavailable or inappropriate. The proposal notes a Tribe could petition the EPA Regional Administrator to designate a public water supply use if available information indicates it is appropriate. In other words, the proposal defaults to no water supply designated use unless a Tribe requests it.

Based on conversations NAWM has had over the years with our tribal members, and a review of comments received during earlier EPA efforts to develop tribal standards, NAWM believes that the final rule should default to including a designated use of water supply while allowing a Tribe to petition the EPA Regional Administrator to remove the designated use if it seems unattainable or inappropriate. Under NAWM's recommendation, the default would be flipped towards automatically protecting public water supply unless the Tribe opts out. Given the critical importance of water supply on many reservation lands, a default that leans towards protection seems desirable.

Recommendation: NAWM strongly supports inclusion of a designated use of cultural and traditional uses to ensure those uses are adequately protected in Indian country. Additionally, NAWM supports inclusion of public water supply as a designated use for reservation waters with an opt-out provision available for those waters inappropriate to use for water supply.

b. Proposed criteria

EPA's water quality standards regulation requires a standard to incorporate water quality criteria that protect designated uses.²⁴ Criteria must be based on sound scientific rationale, contain

²² 88 Fed.Reg. 29496, 29503 (May 5, 2023).

²³ *Id.*

²⁴ 40 C.F.R. §131.11.

sufficient parameters to protect the designated use, support the most sensitive use where multiple designated uses apply, and may be either narrative or numeric.²⁵ A goal for EPA-developed criteria is to protect the applicable designated uses, and enable an appropriate degree of customization to best account for site-specific conditions and water attributes of importance to individual Tribes.²⁶

When the criteria are narrative, they might need to be translated into numeric values that can be used in federally enforceable permits such as those under CWA §402 or §404, or for §303(d) lists of impaired waters, or for §401 water quality certifications. The proposal identifies EPA as the authority responsible for translating the baseline narrative criteria to numeric values when necessary. The proposed rule provides five options that an EPA Regional Administrator can consider when translating narrative criteria to numeric values.²⁷ The proposed translation guidelines allow the EPA Regional Administrator to consider inclusion of Indigenous Knowledge when information is available that more accurately reflects site-specific conditions and are consistent with EPA's regulations and CWA requirements. The proposal preamble provides examples where incorporating Indigenous Knowledge could be appropriate, such as when defining a fish consumption rate protective of tribal fish consumers.²⁸

NAWM believes that the procedures for EPA to translate narrative criteria to numeric values should be appropriate and applicable to wetlands, in addition to other types of surface waters. As with water quality criteria for other surface waters, criteria for wetlands can be narrative or numeric. While developing narrative standards may be relatively easy, developing specific numeric criteria for wetlands has, for several reasons, been more challenging than developing criteria for other types of waters. For example, the sheer number of wetlands in a jurisdiction compared to streams and lakes can make developing numeric standards for individual wetlands challenging. Criteria for a healthy wetland might be quite different than that for a healthy stream or lake, particularly for parameters such as dissolved oxygen, hydrology, vegetation types, flow regimes, conductivity, alkalinity, soils, and pH.²⁹

Recommendation: NAWM supports consideration of Indigenous Knowledge whenever possible when translating narrative criteria to numeric values, and when determining site-specific tailoring is necessary to meet local needs and circumstances. NAWM also urges EPA to ensure translation procedures are appropriate for use in wetlands as well as other types of waters of the United States.

²⁵ 88 Fed.Reg. 29496, 29504 (May 5, 2023).

²⁶ *Id.*

²⁷ 88 Fed.Reg. 29496, 29506-29507 (May 5, 2023).

²⁸ 88 Fed.Reg. 29496, 29507 (May 5, 2023).

²⁹ For a discussion of opportunities and challenges in protecting waters and wetlands in Indian Country, *see*: Environmental Protection Agency, "Protecting Waters and Wetlands in Indian Country: A Guide for Developing Tribal Wetland Management Programs (EPA 840B21005, December 2022).

c. Proposed antidegradation policies

Antidegradation requirements are an important component of water quality standards. Antidegradation provides a framework for maintaining and protecting water quality that has already been achieved, and provide for maintaining and protecting existing uses, high quality waters, and the water quality of outstanding natural resource waters.³⁰ Maintaining water quality is critical to supporting public health, economic and community growth, and high functioning natural systems.

Proposed baseline tribal standards incorporate an antidegradation policy, while explicitly calling for tribal input in its implementation. “Tier 1” waters establish a level of protection sufficient to support existing uses for all Indian reservation waters. The antidegradation policy of protecting high quality waters (“Tier 2 waters”) requires that high quality to be maintained unless “the State” finds that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located. Under the proposed baseline tribal standards, it would be the EPA Regional Administrator who would make such a finding, since the EPA Regional Administrator is the entity implementing the antidegradation policy. As proposed, the EPA Regional Administrator could not make such a finding and allow lowering of water quality unless the relevant Tribe agrees in writing that such a lowering is necessary to accommodate important economic or social development.³¹ NAWM believes the proposed approach is appropriate because it requires written tribal agreement before the EPA Regional Administrator can decide lowering the quality of Tier 2 waters is necessary.

EPA is proposing to modify the baseline tribal standard’s antidegradation policy for Outstanding Natural Resource Waters (ONRWs or “Tier 3 Waters”) to better reflect tribal concerns. To be considered an ONRW and qualify for the high level of protection accorded ONRWs, antidegradation policies require that the water be of exceptional recreational or ecological significance. EPA is proposing to add “cultural significance” as a third criteria for when a water could qualify as an ONRW, to clarify that Tribes are able to identify highly valued waters on their reservations based on their cultural significance.³²

Recommendation: NAWM supports the proposed antidegradation policies and the provisions they include for tribal input, including a requirement that a Tribe agree in writing before EPA’s Regional Administrator decides to allow lowering of water quality in Tier 2 waters. NAWM also supports including cultural significance as a criterion for designating a water as an ONRW.

³⁰ 40 C.F.R. Part 131.

³¹ 88 Fed.Reg. 29496, 29509 (May 5, 2023).

³² *Id.*

C. Implementation of Baseline Tribal Water Quality Standards

1. Education and Outreach Regarding the Final Rule.

As EPA finalizes a baseline tribal water quality standards rule, the Agency will need to ensure that the new baseline standards are well-understood by Tribes, neighboring states, and the general public. Some states expressed concern during the 2016 baseline tribal standards effort about effects on neighboring states, such as the potential need to consider tribal baseline standards in effect on a neighboring reservation when making permitting decisions, and potential effects of baseline standards on non-tribal owners and activities on reservation lands.³³ Some of these concerns may not be specific to baseline tribal standards but inherent in the broader water quality standards program. Other concerns may arise from uncertainty how baseline standards will be applied. Training and outreach about the rule will be important for minimizing potential disruption of existing tribal and state water quality protection programs, and for increasing support for water quality standards as an important policy tool for achieving CWA goals.

Recommendation: NAWM strongly encourages a robust education and outreach effort to Tribes, states, and the general public to explain the baseline tribal standards rule when it is finalized.

2. Process for “Opting Out” of Baseline Tribal Water Quality Standards.

The proposal recognizes that Tribes’ individual circumstances may vary and have differing interest in coverage by baseline tribal water quality standards. Some Tribes may need additional time to gather information about baseline tribal standards and decide how they choose to protect their waters, while others may be intending to develop a plan for establishing water quality standards within a reasonable time. Some Tribes may be concerned about the sovereignty implications of federally developed water quality standard.³⁴

The proposal provides an opportunity for an individual Tribe to “opt out” from the EPA-developed baseline tribal water quality standards by seeking an exclusion from the EPA Regional Administrator. The proposal does not limit a Tribe’s rationale for seeking an exclusion from coverage by the baseline tribal standards, but does indicate a Tribe should demonstrate to the Regional Administrator that baseline tribal standards are not consistent with tribal priorities at this time.³⁵ Upon receipt of an exclusion request, the EPA Regional Administrator would “consider the impacts of that exclusion ... on reservation water quality, including potential

³³ See, e.g., letter from Tony Willardson, Executive Director of the Western States Water Council on “EPA proposed rulemaking on baseline water quality standards on Indian Reservations, EPA-HQ-2016-0405,” posted on <https://regulations.gov> on January 2, 2017; letter from Barry N. Burrell, Water Quality Division Administrator, Idaho Department of Water Quality on “EPA proposed rulemaking on baseline water quality standards on Indian Reservations, EPA-HQ-2016-0405,” posted on <https://regulations.gov> on January 4, 2017.

³⁴ The proposal notes that, during the 2016 Advance Notice of Proposed Rulemaking process, some Tribes expressed concerns about efforts to develop baseline tribal standards, “perceiving it as an infringement on Tribal sovereignty, and requested that EPA not promulgate baseline WQS for Tribes who did not want to be covered...” 88 Fed.Reg. 29496, 29500 (May 5, 2023).

³⁵ *Id.*

impacts to overburdened communities.”³⁶ An “opt out” provision should reduce tribal opposition to promulgation of federal water quality standards, and allow EPA to focus its efforts on reservation waters where Tribes are best positioned and interesting in working together with EPA to implement baseline standards.

Some of NAWM’s tribal members have expressed concern that the exclusion process could be cumbersome, requiring extensive data and associated extensive effort. They suggest that a request for an exclusion from baseline tribal standards should be able to be broad, simple statements such as baseline tribal water quality standards do not align with tribal priorities at this time.

Another concern we have heard from our tribal members and others is that the timeframe for seeking an exclusion is too short. The proposed rule indicates the timeframe for seeking an exclusion begins on May 5, 2023 (publication of the proposed rule) and ends “no later than 90 days after the final rule is published in the Federal Register.”³⁷ It seems likely that a final baseline tribal water quality standards rule will differ from the proposal in some respects, responsive to public comments and other analyses. A Tribe will need adequate time to evaluate and understand the final rule, decide if it wishes to be covered by the final baseline standards, and if not, develop an exclusion request and consult with the EPA Regional Administrator. Tribes often have limited professional and legal staff, and their leadership often does not meet frequently for consultation and approval. NAWM has heard a tribal endorsement of 180 days from final rule publication as an appropriate time.

Recommendation: NAWM supports the proposal’s “opt out” process and encourages EPA to keep the process for requesting an exclusion relatively simple. NAWM also believes EPA should discuss with Tribes what would be an adequate timeframe in which to request an exclusion and select a timeframe that allows Tribes adequate time for analysis and decision-making.

3. Processes after the Rule is Finalized for Revising Baseline Tribal Standards or for Adding a Variance from Baseline Tribal Standards.

The baseline tribal water quality standards address the CWA’s minimum fishable and swimmable goals and reflect the rule’s three proposed beneficial uses of aquatic life uses, recreational uses, and cultural and traditional uses. Circumstances may arise after the baseline tribal standards rule is final where a Tribe wishes to add or revise a designated use and associated criteria, or to establish a variance for certain reservation waters from the baseline tribal standards. For example, new data about existing uses might arise, or a Tribe may wish to more precisely describe in a water quality standard the cultural and traditional uses protected by the standard. The proposal provides a process overseen by the EPA Regional Administrator for revising a reservation’s applicable water quality standards that follows public document access and public participation requirements of 40 C.F.R. Part 131 without requiring full rulemaking.

³⁶ 88 Fed.Reg. 29496, 29502 (May 5, 2023).

³⁷ 88 Fed.Reg. 29496, 29502 (May 5, 2023).

Recommendation: NAWM supports inclusion of a process allowing for updates and revisions to applicable water quality standards that is less time-consuming and burdensome than full rulemaking, provided the process continues to incorporate a robust opportunity for public input.

In closing, I would like to thank you for the opportunity for NAWM to submit comments on the Agencies' proposed rule to establish federal baseline water quality standards for Indian reservations. We strongly support the Agencies' efforts to develop tribal baseline standards, which NAWM believes are very important for effective implementation of CWA programs in Indian country. Although these comments have been prepared by NAWM with input from the NAWM Board of Directors, they do not necessarily represent the individual views of all states and tribes. We encourage your full consideration of the comments of individual Tribes and states, and other state and tribal associations.

Sincerely,

A handwritten signature in black ink, appearing to read "Marla J. Stelk". The signature is fluid and cursive, with a long horizontal stroke at the end.

Marla J. Stelk, Executive Director

Cc: NAWM Board of Directors