



## EPN Comments on EPA's Proposed Federal Baseline Water Quality Standards for Indian Reservations

Docket No.: EPA-HQ-OW-2016-0405

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Founded in 2017, the [Environmental Protection Network](https://environmentalprotectionnetwork.org) (EPN) harnesses the expertise of almost 600 former Environmental Protection Agency (EPA) career staff and confirmation-level appointees from Democratic and Republican administrations to provide the unique perspective of former regulators and scientists with decades of historical knowledge and subject matter expertise.

EPN commends EPA for proposing federal baseline water quality standards for Indian Reservations. EPA has spent decades encouraging the more than 300 eligible Tribes to apply for Treatment as a State (TAS), but only 84 Tribes have applied and been approved to administer a water quality standards program. Only 47 tribes with approved TAS applications have approved water quality standards. This incredibly slow pace of tribal-initiated water quality standards has resulted in over 76,000 miles of rivers and streams and 1.9 million acres of lakes and reservoirs to be without water quality standards in 2023, affecting over half a million people. The lack of clear, enforceable human health and environmental standards in these waters is unacceptable in the 21<sup>st</sup> century.

EPN provides comments on the proposed designated uses, narrative criteria, antidegradation policy, mixing zone policy, compliance schedule authorization provision, designated use and variance procedures, CWA section 404 amendments, and the rule's effective date.

### Designated Uses

EPN agrees that EPA should promulgate aquatic life, primary contact recreation, and cultural/traditional uses for all waters in Indian Reservations. We agree that cultural/traditional uses should be left open for each Tribe to define on a site-specific basis, since these uses will be unique for each Tribe and may require different levels of protection from aquatic life and primary contact recreation. EPN urges EPA to add the public water supply use to the designated uses promulgated for all waters in Indian Reservations. We believe it is critical that this rule provides the standards needed to ensure Indian Reservation waters are a source of safe food and drinking water. EPA should promulgate the public water supply use and not delay by requiring Tribes to request this use. Tribes can use this rule's effective procedure for revising any designated use if the public water supply use is unattainable on a site-specific basis.

### Narrative Criteria

EPN commends EPA for proposing narrative criteria instead of numeric criteria for tribal waters. Scientifically defensible water quality criteria require consideration of site-specific water chemistry parameters (e.g., pH, hardness, dissolved organic carbon) that affect the toxicity of metals and other pollutants to aquatic species. Water quality standards for aluminum, ammonia, cadmium, chromium III and VI, copper, lead, nickel, silver, zinc, and pentachlorophenol must be based on these site-specific parameters. In addition, all the human health criteria designed to protect fish consumers must reflect each Tribe's fish consumption rates which may vary significantly from the consumption rates of non-tribal populations.

EPN agrees that EPA's proposal of five types of narrative criteria covers all the types of pollution that can prevent the attainment of designated uses in both tribal waters and downstream state or tribal waters. EPN agrees that EPA's proposed rule has identified the best options for translating these narrative standards into numeric values and requiring robust public review of the resulting numeric standards. We concur that EPA should be responsible for translating the narrative criteria, assuming that is done in consultation and coordination with the Tribe(s) involved. We also concur that EPA should be responsible for resolving differences between upstream states and these tribal water quality standards.

### **Antidegradation Policy**

EPN agrees with the antidegradation policy EPA has proposed for Existing Uses attained on or after November 28, 1975; High Quality Waters exceeding the quality necessary for 101(a)(2) uses; and Outstanding National Resource Waters (ONRWs) with exceptional recreational, ecological, or cultural significance.

For High Quality Waters, EPN agrees that the Regional Administrator should only consider the lowering of water quality if a Tribe agrees in writing to a lowering after public engagement because it is necessary to accommodate important economic and social development in the area where the waters are located. We agree that any lowering must still protect existing uses and that no lowering can be approved unless statutory and regulatory requirements of existing point sources and all tribal-required, cost-effective, and reasonable best management practices for nonpoint source pollution are achieved. EPA asks for comment on whether third parties should be allowed to do a socio-economic analysis to assess the importance of lowering water quality. EPN recommends that EPA prohibit conduct of these analyses by third parties who would gain financially from the lowering of water quality in order to prevent the development of biased analyses.

For ONRWs, EPN agrees that any person or entity should be able to nominate a waterbody for this designation and that any culturally significant waterbody should be eligible in addition to recreationally/ecologically significant waters. EPN further agrees that the antidegradation policy for ONRWs should prohibit any permanent lowering of water quality, allowing only short-term, temporary changes in water quality if necessary.

### **Mixing Zone Policy**

EPN agrees with EPA's proposed policy prohibiting mixing zones for the discharge of bioaccumulative pollutants, pathogens, and pathogen indicators without adequate information that the designated uses will be protected. Clearly, such pollutants can have significant adverse health impacts far beyond a mixing zone and should not be allowed unless farfield impacts are shown to be inconsequential. For other types of pollutants, EPN agrees that the Regional Administrator should have the authority to establish a mixing zone on a case-by-case basis where necessary. EPN agrees that the rule's proposed mixing zone size, shape, and critical low flows all reflect best available science to minimize the impact of such zones. We urge the Regional Administrators to ensure that wherever mixing zones are allowed, the outfall design should maximize initial mixing.

### **Compliance Schedule Authorizing Provision**

EPN agrees with EPA's proposal that the authorizing provision require dischargers to comply as soon as possible with any water quality-based effluent limit (WQBEL) in a permit reissued or modified on or after the effective date of this final rule. It is critical that these tribal water quality standards be reflected in permit limits without delay.

### **Designated Use and Variance Procedures**

EPA requests comment on whether the final rule should include a provision that a Tribe must request in writing any designated use revision less stringent than the baseline use promulgated by EPA. EPN recommends that EPA include in the final rule provisions requiring a Tribe to request in writing a less stringent use designation or a variance from any baseline water quality standard. We believe that these significant revisions to water quality protection require a formal request from a Tribe and that the resulting use attainability analyses, use and value demonstrations, and variance analyses be subject to public review and comment before the Regional Administrator approves a designated use revision or water quality standard variance.

### **CWA Section 404 Amendments**

EPN agrees that EPA should amend 40 CFR § 230.10 (b)(1) to clarify that 404 permits need to ensure compliance with federally promulgated water quality standards, including the baseline standards for Indian reservations, in addition to state water quality standards. EPN also agrees that EPA should amend 40 CFR § 233.51 (b)(3) to clarify that EPA's right to review 404 permit applications may not be waived for permits with a reasonable potential to adversely impact waters of another state or waters subject to federally promulgated water quality standards, including the baseline standards for Indian reservations.

### **Effective Date of Baseline Water Quality Standards**

EPN agrees with EPA's proposal to require that these baseline standards go into effect 120 days after the final rule has been published in the Federal Register. It is critical that publicly transparent water quality standards be established as quickly as possible in tribal waters once the rule has been finalized. EPN further agrees with EPA's proposal to limit Tribes' ability to request exclusion of their waters from these baseline standards to no later than 90 days after the final rule is published in the Federal Register. Tribes have the ability to request exclusion from the moment this rule was proposed until 90 days after final rule publication.

### **Conclusion**

EPN commends EPA for proposing baseline water quality standards that can be customized for each Tribe based on the best available science, local water quality and tribal traditions, and statutory requirements regarding designated uses, protective criteria, and implementation procedures. It has taken far too long for these critically important standards to be established for the thousands of miles of streams and rivers and millions of acres of lakes and reservoirs in Indian reservations throughout the country. EPN urges EPA to finalize these standards as quickly as possible.