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DIRECTOR

December 28, 2016

Water Docket
Environmental Protection Agency
ow-docket@epa.gov

Dear Administrator McCarthy:

SUBJECT: Advance Notice of Proposed Rulemaking Concerning
Federal Baseline Tribal Water Quality Standards
Docket ID No. EPA-HQ-OW-2016-0405

I am writing on behalf of the Michigan Department of Environmental Quality (MDEQ) in response to the United States Environmental Protection Agency's (USEPA) advance notice of proposed rulemaking concerning federal baseline tribal water quality standards (Tribal WQS) under the federal Water Pollution Control Act (Clean Water Act or CWA), 33 U.S.C. § 1251 *et seq.* The USEPA has not yet proposed draft WQS and the MDEQ may have comments concerning those standards. However, the MDEQ generally supports adopting standards that protect water quality.

In light of the USEPA's goal to fill the "gap in water quality protection under the CWA for waters on Indian reservations," the MDEQ respectfully suggests that the USEPA should approach this Tribal WQS rulemaking effort by:

1. Focusing on a single set of baseline standards, including the minimum standards already in place for the Great Lakes System, without engaging in tailoring.
2. Applying the Tribal WQS to waters within reservations subject to the listed exclusions, but without resolving jurisdictional disputes and with administrative accommodations for trust lands.
3. Exercising care when adopting designated uses and narrative standards for Tribal WQS.
4. Avoiding conflicts and actively coordinating with states with WQS that may apply inside Indian country.

By taking these steps, the MDEQ believes that the USEPA could make progress toward protecting the nation's waters inside of Indian reservations.

Baseline Standards, Tailoring, and the Great Lakes

The USEPA has asked whether it should adopt "one set of WQS that apply universally to the reservation waters covered by any final federal baseline" or standards that "offer limited tailoring opportunities by establishing cultural and traditional designated uses[.]" 81 Fed. Reg. 66903.

Throughout the advanced notice of proposed rulemaking, the USEPA also mentions numerous other options for a Tribal WQS program. Those options are part of a larger question concerning how best to set standards for waters in vastly differing parts of the country.

The MDEQ recommends that the USEPA focus on developing a single set of baseline Tribal WQS that address:

- Designated uses in section 101(a)(2) of the CWA, 33 U.S.C. § 1251(a)(2);
- Criteria for pollutants established under section 304(a)(1) of the CWA, 33 U.S.C. § 1314(a)(1); and
- Minimum standards for the Great Lakes System under 40 C.F.R. 132.

Baseline standards are, by definition, a starting point. Setting Tribal WQS developed “for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water” are an important first step toward more sophisticated and tailored standards in the future. Baseline standards are also likely to be useful models for tribes that eventually seek to develop their own WQS.

Without baseline standards, it is difficult to determine which standards should be tailored and whether tailoring should occur regionally, by state, or by other criteria. Those standards intended to apply narrowly to specific tribes or reservations are not good candidates for the USEPA’s Tribal WQS. Instead, those specific standards should be incorporated in an individual tribe’s WQS when the USEPA approves the tribe for treatment as a state under section 518 of the CWA, 33 U.S.C. § 1377. The treatment as a state process is better-suited to addressing widely varying natural conditions, cultural or traditional practices, and other unique circumstances. Alternatively, narrowly-applied standards should be adopted in tribe- or reservation-specific WQS that the USEPA administers.

First gaining experience with uniform baseline standards is also likely to help distinguish between Tribal WQS that are broadly effective inside Indian country from those that require tailoring or other modifications. That experience will assist the USEPA in establishing priorities for future rulemaking if needed. If the USEPA is concerned that adopting uniform baseline standards might not be fully attainable on a national basis, the MDEQ supports requiring use attainability analyses that meet the requirements with 40 C.F.R 131.10.

Incorporating tailoring into national Tribal WQS could also significantly delay the USEPA’s ability to engage in formal rulemaking. Pursuing even a small number of the tailoring options is likely to make developing a rulemaking package more complex and, therefore, more time-consuming. The potential for a more comprehensive and tailored set of Tribal WQS at some point in the future should not impede current progress toward establishing the baseline standards.

The MDEQ proposes that these baseline standards address the existing regulations that establish the minimum standards for the Great Lakes System in 40 C.F.R. 132. The Great Lakes are unique national and international fresh water resources that require a coordinated approach to protection that includes Indian country. The waters in the Great Lakes drainage basin are of central importance to fishing as an industry, sustenance fishing, recreation, and other uses that are critical both to Indian and non-Indian populations that use these water resources.

Unlike an effort at tailoring, the regulations for the Great Lakes are implemented across a large geographic area spanning eight states and three USEPA regions. These regulations expressly apply to tribes that have USEPA-approved WQS or National Pollutant Discharge Elimination

System programs. See 40 C.F.R. 132.2 (defining Great Lakes states and tribes); 40 C.F.R. 132.6 (applying Part 132 regulations to states and tribes). Thus, if the Great Lakes states and tribes are already subject to these regulations, the USEPA will fill the remaining gap for the Great Lakes by ensuring that the Tribal WQS it administers meet these minimum standards.

Incorporating the minimum standards for the Great Lakes into the Tribal WQS will also provide additional tools to protect water quality. For instance, the regulations already include an antidegradation policy and implementation procedures. See 40 C.F.R. 132, Appendix E. Additionally, the regulations permit site-specific modifications of WQS. See 40 C.F.R. 132, Appendix F. Site-specific modifications to WQS are the appropriate method to address the variations in fish consumption levels between different tribes to avoid adopting a single level that may be overly-restrictive or under-protective for some populations. Consequently, the MDEQ proposes that the USEPA pursue a single set of baseline Tribal WQS that incorporate the minimum requirements for the Great Lakes states and tribes in 40 C.F.R. 132.

Waters Where Tribal WQS Apply

The USEPA has proposed to apply the Tribal WQS to reservations and trust lands, but to exclude: waters on reservations where the USEPA has promulgated reservation-specific WQS; waters where a tribe has adopted USEPA-approved WQS under the CWA; waters where a state has adopted USEPA-approved WQS under the CWA. 81 Fed. Reg. 66904.

The MDEQ proposes that the USEPA also categorically exclude waters inside disputed reservations. In those cases, the courts have the jurisdiction to resolve whether the lands in question are a reservation. Until the courts make that determination, the USEPA's efforts to impose the Tribal WQS could have the unintended effect of interfering with the state programs under the CWA in an area *outside* Indian country where the USEPA has authorized states to assume the federal CWA programs.

Additionally, the MDEQ understands that federal law may treat both reservation and trust lands as Indian country in a variety of circumstances. In states like Michigan, with substantial and varied water resources and widely dispersed trust lands, it is difficult to draw a bright line between waters inside and outside of Indian country. Waters traverse Indian country, affecting federal, tribal, and state interests.

The complications that arise from imposing the baseline Tribal WQS to all trust lands are more acute when trust parcels are very small, sometimes simply the location of an access point or serving a discrete purpose. The MDEQ believes that the USEPA can and should create a category that makes administrative accommodations for the Tribal WQS to avoid conflicts with state programs for small parcels of trust lands or where water quality outside of the trust parcel will be affected by imposing the Tribal WQS. There are a variety of options to address these situations, including having the USEPA apply the state WQS that will apply to the downstream waters.

Designated Uses and Narrative Standards

The USEPA has indicated that it does not intend, at least at this time, to adopt designated uses that address tribal cultural and traditional practices because they vary widely and may be adequately addressed by other designated uses. 81 Fed. Reg. 66905. However, the USEPA also indicates that it may be considering adopting a combination of narrative and numeric criteria to address certain tribal cultural and traditional practices not adequately covered in existing designated uses. *Id.* Full-body emersion for ceremonial washing and the protection of certain aquatic plants for basket weaving are some examples the USEPA provides. *Id.*

The MDEQ supports incorporating designated uses in the Tribal WQS that reflect the designated uses in section 101(a)(2) of the CWA, 33 U.S.C. § 1251(a)(2). The MDEQ does not view other designated uses as consistent with an intent to adopt baseline WQS that would apply nationally. Further, the MDEQ suggests that the USEPA adopt designated uses that will be consistent with those adopted by states in accordance with 40 C.F.R 131.10(b). Those designated uses would serve as a good minimum standard for protecting waters, especially where downstream waters leave Indian country and are clearly subject to state regulation.

The MDEQ also views determining whether existing designated uses protect cultural and traditional uses as an approach consistent with the CWA's objective to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). This objective requires the USEPA to adopt a scientific method to protecting waters, even when looking at cultural and traditional uses.

Understandably, there may be some challenges when translating cultural and traditional practices into scientific approaches to water quality. However, the MDEQ would be concerned about any general effort to use narrative standards where numeric criteria could be developed because the narrative criteria give dischargers, permit writers, and other regulators less useful information and could lead to inconsistent levels of protection. To the extent that the USEPA does incorporate narrative criteria in this rulemaking, the MDEQ proposes that the USEPA adopt narrative criteria providing that waters be "free from" specific substances or pollutants that would prevent attainment of designated uses in general and attributable to discharges.

Conflicts with State Programs

A public notice is not the place to brief all of the legal complexities of regulatory jurisdiction in and affecting Indian country. But the USEPA's advanced notice of proposed rulemaking provides an incomplete picture concerning state regulatory authority involving Indian country that has the potential to create unnecessary conflicts between baseline Tribal WQS and the CWA programs the USEPA has approved for states.

Contrary to the USEPA's suggestion, states are not simply "near" or "border" Indian country. "Ordinarily, it is now clear, an Indian reservation is considered part of the territory of the State." *Nevada v Hicks*, 533 U.S. 353, 361–362 (2001) (internal citations and quote marks omitted). More importantly, the Supreme Court has developed a framework for determining when states may regulate activities inside Indian country. See, e.g., *White Mountain Apache Tribe v Bracker*, 448 U.S. 136, 144–145 (1980). As a result, even where the USEPA asserts that it has not authorized a state to assume a CWA program inside Indian country, it remains entirely possible that the state may continue to regulate certain activities inside Indian country under state law.

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State WQS may be more comprehensive and tailored to local conditions than the baseline standards the USEPA is currently contemplating. For instance, Michigan's designated uses for surface water already include partial body contact all year, and full body contact between May 1 and October 31 when there is more recreation in surface water. See Michigan Administrative Code, R. 323.1100(1)(f) and (2). Those designated uses are protective of cultural or traditional practices that require contact with surface water, such as ceremonial washing.

The USEPA should be careful not to adopt baseline Tribal WQS that conflict with state standards that already protect cultural and traditional uses, even if they do so indirectly. The adoption of conflicting standards would miss an opportunity to leverage existing protections for water quality inside Indian country and could cause unintended impacts to the way these standards are administered and applied by states outside of Indian country.

More than just avoiding conflicts, the USEPA should affirmatively coordinate its baseline Tribal WQS with the state programs it has approved under the CWA. The CWA, including 33 U.S.C. § 1252(a), requires the Administrator to cooperate with a broad coalition of interested parties, including other governments to develop comprehensive programs for controlling water pollution. Many states adopt WQS designed to serve the dual purpose of satisfying state law *and* the CWA. The CWA strongly supports the USEPA cooperating with states in that context.

Consider, for example, that the USEPA and a state may each have to develop effluent limits in their respective permits for a single discharge to surface water by a non-Indian business with a facility in Indian country. The USEPA and the state environmental agency should have a coordinated approach so that the permittee can obtain permits within a reasonable amount of time and can comply with both sets of substantive requirements. This coordination will also be critical so that both agencies can enforce their permits and respond to critical incidents.

Conclusion

The MDEQ views the USEPA and tribes as its partners in protecting the environment, especially water resources that are plentiful in Michigan both inside and outside Indian country. If carefully crafted, the USEPA's proposed rulemaking on baseline Tribal WQS would provide a significant opportunity to advance water quality protection while avoiding administrative and jurisdictional concerns or problems.

Thank you for considering these comments. If you have any questions, please contact me at 517-284-5470 or seidelt@michigan.gov.

Sincerely,



For Teresa Seidel, Chief
Water Resources Division

cc: Mr. Peter Manning, Michigan Department of Attorney General
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