



COLORADO

Department of Public
Health & Environment

Dedicated to protecting and improving the health and environment of the people of Colorado

December 14, 2016

Water Docket
Environmental Protection Agency
Attention: Docket ID No. EPA-HQ-OW-2016-0405

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

Dear EPA:

The State of Colorado offers the following comments on the Environmental Protection Agency's Advance notice of proposed rulemaking regarding Baseline Water Quality Standards for Indian Reservations. While Colorado firmly believes in the importance of water quality standards in order to protect, restore, and maintain waters of the United States, Colorado does not believe that EPA should proceed with baseline water quality standards for the Southern Ute Indian Reservation because it would result in greater confusion, potential conflict, and likely less protective water quality standards being implemented.

Applicability in Colorado

There are two Indian Reservations within Colorado: the Ute Mountain Ute Indian Reservation, and the Southern Ute Indian Reservation. The Ute Mountain Ute Tribe obtained treatment in a manner similar to states (TAS) status for the purpose of setting water quality standards in 2005, and EPA approved water quality standards for waters on the Ute Mountain Ute Reservation in 2011. Therefore, the only situation for which baseline water quality standards are of concern in Colorado is on the Southern Ute Reservation.

The Southern Ute Tribe applied for TAS status for purposes of setting water quality standards on March 2, 2015. Colorado has no objection to the Southern Ute's application. That application is still pending action by EPA. The Southern Ute's 2015 application did not request TAS for all of the waters within the external boundaries of the reservation. Rather, as stated in the 2015 application, the Southern Ute Tribe requested TAS only for "surface water resources located on the Reservation lands that are held in trust by the United States for the benefit of the Tribe and individual Indians, to the extent those surface water resources constitute 'navigable waters' under the Clean Water Act section 502(7). For practical reasons and to avoid a jurisdictional dispute, the Tribe is limiting its assertion of authority for purposes of this application to such Reservation surface waters located on trust land."

Land within the Southern Ute reservation has a checkerboard ownership pattern. Certain portions of the reservation are comprised of Indian trust and federally owned land, while other portions are owned in fee by Colorado citizens within the traditional boundaries of the reservation. In 1984, the Southern Ute Tribe, the State of Colorado, and La Plata County jointly petitioned the U.S. Congress to approve Public Law 98-290 ("PL 290"), an agreement drawing reservation boundaries and delineating jurisdictional authority between the State and the Southern Ute Tribe. The Tribe, the State, and the County all saw this



boundary drawing and jurisdictional delineation as necessary to end long and costly battles between the State and the Tribe. PL 290 was signed into federal law on May 21, 1984.

The State of Colorado respects the Southern Ute's sovereignty and interest in protecting the water quality within its reservation boundaries, and yet Colorado believes that PL 290 precludes the Southern Ute Tribe from obtaining TAS status with respect to privately-owned fee lands within the external boundaries of the reservation. Accordingly, Colorado has adopted water quality standards for these waters, to the extent that Colorado has jurisdiction over these waters. These standards reflect criteria developed to be protective in light of site-specific characteristics of waters in this area, and these standards are used for implementation into permits issued by the state as well as permits issued by EPA. Additionally, the State and the Southern Ute Tribe are working collaboratively to develop consistent standards, without conceding or resolving the jurisdictional disagreement. Specifically, in anticipation of EPA taking positive action on its TAS application, the Southern Ute Tribe is currently developing its own set of water quality standards to be submitted to EPA for approval. At the same time, the State is working on revisions to its own water quality standards for waters on privately-owned fee lands on the reservation, to the extent that the State has jurisdiction over these waters. The Tribe and the State recognized that these similar efforts created a timely opportunity to begin sharing information with the goal of streamlining the adoption and implementation of compatible water quality standards, wherever possible. The parties are in the midst of collaborating to do just that and are hopeful that these efforts will help facilitate a longstanding partnership for protecting the water resources on, upstream, and downstream of the reservation.

EPA has indicated that the motivation for baseline water quality standards is to adopt water quality standards on waters where there is a gap and no protective measures are in place. Moreover, EPA acknowledges that "CWA-effective WQS should be tailored to the individual circumstances of the authorized tribe and its waters, likely through the development of additional or refined criteria and uses." If EPA were to adopt baseline water quality standards for the waters on fee lands within the Southern Ute Reservation, the result would be a more confusing situation with different water quality standards applying for state purposes and federal purposes, and the federal standards would be nationally generalized while the state standards would be tailored to the individual circumstances of the area with additional and refined criteria and uses. In other words, adoption of baseline water quality standards in this case would create a situation that is the opposite of EPA's stated goal, because the baseline water quality standards would likely be inconsistent with and also less stringent than the water quality standards the state adopted, and likely inconsistent with standards adopted by the Southern Ute Tribe. Accordingly, Colorado believes that EPA should not adopt baseline water quality standards at all, or at the very least should not adopt them on the Southern Ute Indian Reservation. Whether or not EPA adopts baseline water quality standards on privately owned fee lands within the Southern Ute Indian Reservation, it remains Colorado's position that Colorado has jurisdiction to adopt standards on those waters.

Downstream Waters

In the event EPA does adopt baseline water quality standards, and those baseline water quality standards are also adopted on the Southern Ute Indian Reservation, Colorado supports standards that are identical to Colorado's standards, in order to minimize confusion and conflict. There are numerous waters in the area which cross back and forth from outside the external boundaries of the reservation, into the external boundaries, on fee land and trust land, and back outside the external boundaries, etc. In other words, the jurisdiction



over these waters may change several times and so having consistent standards for these waters would be beneficial for all regulatory entities as well as regulated entities.

Therefore, in regards to EPA's request for input on a narrative criterion for protection of downstream waters, Colorado requests that EPA adopt the same provision as Colorado, which is a variation on one of EPA's customizable templates. It reads: "In assigning classifications and standards, the Commission shall take into consideration the water quality classifications and standards of downstream waters and shall ensure that as implemented through its policies, the water quality classifications and standards of downstream waters will be attained and maintained."

Temperature

Colorado recently underwent a rulemaking effort to revise its temperature standards. In particular, Colorado was attempting to address challenges with respect to the fact that temperature varies greatly within the state based on elevation changes as well as seasonal changes. Colorado is interested in establishing standards that are protective during seasonal shoulder seasons (spring and fall) when temperatures fluctuate due to natural conditions. During this process, Colorado considered establishing a narrative temperature standard for shoulder seasons. During discussions on this approach, EPA expressed strenuous concern with this approach due to the uncertainty with respect to how it would be implemented in permits, assessment, and TMDLs.

Therefore, Colorado now finds it confusing that in the ANPRM EPA has specifically solicited comment on "using a narrative temperature criterion to account for significant variability in temperature requirements of aquatic species in different regions...." Consistent with the state's position in Colorado's recent discussions in stakeholder meetings leading up to a temperature rulemaking hearing, Colorado would support the use of narrative temperature criterion. As Colorado expressed during those discussions, a narrative temperature criterion would allow the flexibility needed to adapt to the unique characteristics of any specific surface water to provide the needed protections. It appears that EPA now believes that a narrative approach for temperature standards in the shoulder season can be appropriate, recognizing that the narrative standard would need to be translated during implementation. Colorado would support that, and would request that EPA provide consistent support for a similar approach in Colorado.

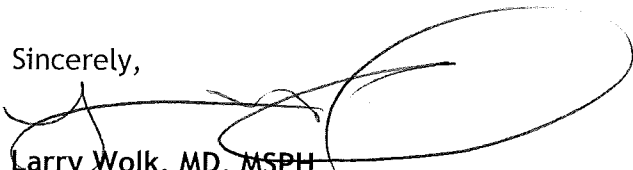
Outstanding Natural Resource Waters

EPA's initial thinking is to outline a "nomination process to identify Indian reservation waters that warrant protection as an Outstanding National Resource Water." While Colorado supports antidegradation rules and believes outstanding waters should receive protection as such, if EPA is going to identify waters as ONRW, in addition to establishing a process EPA should have criteria in place for determining which waters deserve protection as an ONRW.

Thank you for the opportunity to provide Colorado's comments.



Sincerely,



Larry Wolk, MD, MSPH

Executive Director and Chief Medical Officer
Colorado Department of Public Health and Environment

Cc: Annette Quill, Colorado Attorney General's Office

