



## ENVIRONMENTAL PROGRAMS DIVISION

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### **Responses to Comments from Treatment as a State Application Commenters Following Advance Notice of and Request for Review and Comment on the Tribe's Proposed Water Quality Standards**

August 4, 2021

By an email transmitted on May 3, 2021, the Southern Ute Indian Tribe provided those entities and individuals who commented on the Tribe's 2015 application to the U.S. Environmental Protection Agency seeking treatment in the same manner as a state under Clean Water Act Section 518(e) for the purposes of implementing water quality standards and a Clean Water Act Section 401 certification program, an advance opportunity to review and comment on the Tribe's proposed water quality standards. On May 14<sup>th</sup> and June 1<sup>st</sup>, the Tribe notified these commenters that comments on the proposed water quality standards would be received until June 15, 2021 and a Question & Answer webinar would be held on June 3, 2021. The Tribe received forty-eight comments during this period. The Tribe has carefully considered all of the comments received. This document provides the Tribe's responses to all comments received.

For convenience and clarity, comments or paraphrases of comments are set forth below. Similar comments were received by multiple commenters. To avoid duplicating responses or incorporating responses by reference, the Tribe has grouped comments together by subject matter. The subject matter is set forth in the headings. Comments are italicized to distinguish them from the Tribe's specific responses.

#### **Tribal Authority and Jurisdiction**

##### Comments:

- *Several commenters suggested the Tribe clarify the scope of its authority for setting water quality standards. Specifically, several commenters asked the Tribe to limit its assertion of authority to water bodies located on trust lands. One commenter suggested that "[t]he question of whether the Tribe's water quality standards will apply to fee lands located within the exterior boundaries of the Reservation should be answered before the Tribe's proposed standards go into effect. Otherwise, the owners of fee land within the Reservation's exterior boundaries are put in the impossible position of not knowing where to apply for a permit and who will be conducting 401 certifications."*
- *There is no mention in the draft document of allotted land within the exterior boundaries of the Reservation. It appears as though the Tribe considers allotments in the same manner as Reservation land. It would be useful if the document addressed*

*how water on or flowing through allotments would be regarded, and the authority by which the Tribe asserts any authority over water on allotted lands.*

Tribe's Response:

The Tribe appreciates and understands these comments. The Tribe's standards apply broadly to all water bodies on the Reservation over which the Tribe has authority to set water quality standards, including EPA delegated federal authority, as well as tribal inherent authority. EPA's delegated authority to the Tribe is limited to water bodies on land held in trust by the United States for the benefit of the Tribe. As stated in Section 1.4 (Applicability) of the Tribe's proposed water quality standards, "[t]he Tribe intends that the standards that it is adopting apply to the water bodies in question [i.e., water bodies located on non-Indian owned fee land] only to the extent that the Tribe has jurisdiction and is not attempting to resolve that jurisdictional issue here." The scope of the Tribe's authority may depend on the definition of "waters of the United States" and on certain facts and circumstances.

The Tribe respectfully declines to further clarify the scope of its authority. The Tribe understands the commenters' desire for clarity, but it is not the Tribe's intention in these standards to resolve all jurisdictional questions relative to the applicability of the standards and respectfully disagrees that it is necessary to resolve the jurisdictional issue before it adopts standards.

Comments:

- *What will be the formality for issuing permits to non-tribal members or on fee lands beyond the exterior boundaries of the Reservation?*

Tribe's Response:

For any activity that originates within the exterior boundary of the Reservation, regardless of whether the applicant is a tribal member or not, the EPA and the U.S. Army Corps of Engineers are the permitting authorities. The EPA, the U.S. Army Corps of Engineers, and the State of Colorado are permitting authorities for projects beyond the exterior boundaries of the Reservation.

Comment:

- *This is more of an informative question, but what has triggered the Tribe to develop and implement their own water quality standards? Besides the Animas River catastrophe, were there other events (i.e., severe, or moderate) that altered/impacted the water quality within the exterior boundaries of the Reservation?*

Tribe's Response:

The Tribe has been working towards implementing its own water quality standards on the Reservation for over 20 years, long before the Gold King Mine spill. Obtaining TAS status under section 303(c) and section 401 of the Clean Water Act gives the Tribe a greater role in protecting water bodies on the Reservation and is an expansion of the Tribe's sovereignty.

## CWA 401 Certification

### Comments:

- *Several commenters asked for clarification regarding the scope of the Tribe's Clean Water Act Section 401 certification authority.*

### Tribe's Response:

On March 28, 2018, the Tribe received treatment-as-a-state status to administer the 401 certification program for activities that result in a discharge that originates in a water body located on tribal trust land. For an activity resulting in a discharge that originates in water bodies on fee land, the EPA has 401 certification authority. The EPA and the U.S. Army Corps of Engineers are permitting authorities for projects on both tribal trust and fee land. It is the Tribe's understanding the CDPHE may currently issue discharge permits to certain facilities located on fee land, however, the Tribe asserts that EPA is the appropriate permitting authority of those facilities. The Tribe's 401 procedures would apply when the Tribe is the 401 certification authority, i.e., when an activity originates on tribal trust land.

### Comment:

- *Once the Tribe's Standards have been implemented, if a federal agency is reviewing a permit application for a project on fee land within the Reservation, the Colorado Department of Public Health and Environment (CDPHE) or the EPA would be contacted for 401 Certification. Please clarify what standards would be used to determine compliance under the 401 Certification if the review is completed by the CDPHE or the EPA. Additionally, what role would the Tribe have in the certification process when they are a consulting agency for projects on fee lands?*

### Tribe's Response:

Under EPA's regulations for implementing Clean Water Act Section 401, found at 40 C.F.R. Part 121, in deciding whether to grant, grant with conditions, deny, or waive certification, certifying authorities must determine whether a discharge from a proposed project will comply with "water quality requirements." "Water quality requirements" means "applicable provisions of [Sections] 301, 302, 303, 306, and 307 of the Clean Water Act, and state or tribal regulatory requirements for point source discharges into waters of the United States." 40 C.F.R. 121.1(n). Typically, certifying authorities must, among other things, determine the size of the area potentially affected, and take into account potential downstream impacts. When consulted by another certifying authority, the Tribe would anticipate providing relevant information and assistance regarding the meaning of, content of, application of, and methods to comply with water quality requirements.

### Comment:

- *We propose that the Tribe include language under sections 6.1 and 7.1 to indicate that the narrative water quality criteria are not grounds for denying 401 Certification when the subject discharge is within the authorized limits of a permit issued by a relevant agency. Discharges authorized by the EPA under a National Pollutant Discharge Elimination System (NPDES) permit or fill discharges authorized under an*

*U.S. Army Corps of Engineers (USACE) permit may be contrary to the requirements of the narrative criteria in the Standards. In addition, while the inclusion of a narrative biological criteria is commended and notably consistent with the goals of the CWA Section 101 (a)(2), we suggest adding clarification that the criteria apply to species that are not undesirable or nuisance species as referenced under Section 6.1 (7).*

Tribe's Response:

The goal of the narrative water quality criteria is to be able to assess and protect water quality using parameters that humans and biota can directly perceive and in situations where numeric standards for individual pollutants or parameters may not be sufficient. The narrative criteria may be grounds for denying or adding conditions to a 401 certification.

### Antidegradation Policy

Comment:

- *Have sections of the river been categorized under tiers as identified in the antidegradation policy?*

Tribe's Response:

For the purposes of its antidegradation policy, the Tribe has not yet categorized river segments by tiers. The Tribe anticipates, at least initially, using a waterbody-by-waterbody approach to implementing its antidegradation policy whenever there is a proposed activity requiring antidegradation review. Under this approach, all segments are categorized as at least tier 1. The Tribe will identify water bodies that will be afforded tier 2 or tier 3 protection on a case-by-case basis whenever there is a proposed activity that could impact water quality, taking into account the pollutant, chemistry of the stream, and other specifics of the proposed activity. The Tribe understands that the state of Colorado currently implements its antidegradation policy by assigning tiers to each specific river segment. However, examining the tiers on a case-by-case basis allows for greater flexibility for the Tribe and dischargers depending on the pollutants and characteristics of the stream at a particular location. The Tribe fully intends to work with permittees and the EPA during the antidegradation review process to ensure tribal waters are protected.

Comment:

- *Are there any tier 3 waters?*

Tribe's Response:

The Tribe has not yet identified any tier 3 waters.

Comments:

- *Clarify the antidegradation policy and how it applies to dischargers within the exterior boundary of the Reservation. Provide an example of what it would look like for a discharger to expand their capacity or upgrade a permit.*

- *Would the Tribe insist these standards be applied to any discharge permit renewals or changes to permits?*
- *As a corollary, SWCD requests clarification on if the Tribe's described anti-degradation review process in its standards proposal is different than the State's, would the permitting authority for fee land have to use both the State's process on fee land and the Tribe's process on Tribal Waters? We note that the Tribe's anti-degradation policy and the State's appear very similar, but we are not clear they are identical. Again, we are also discussing this issue with the State.*
- *Similarly, SWCD requests clarification as to who will issue NPDES permits on fee land within the Reservation boundaries and perform anti-degradation reviews.*
- *On fee lands, does the Tribe oversee monitoring or the non-tribal individual? As part of the antidegradation implementation procedures, if a party is non-tribal, would this individual be responsible for providing all required information, monitoring data, etc.? If not, who would assume these responsibilities and costs?*

Tribe's Response:

Currently, the Tribe has not applied for and has received no delegation from EPA for the NPDES discharge permitting program on the Reservation. That authority is held by EPA. If the Tribe's proposed water quality standards are approved, for projects occurring upstream and within the exterior boundaries of the Reservation, permit writers must take into consideration the Tribe's standards.

The antidegradation policy specifies how the Tribe will determine, on a case-by-case basis whether, and to what extent, water quality may be lowered. Section 13 and Appendix A of the Tribe's proposed water quality standards outline specific procedures governing tribal review, applicant and tribal responsibilities, and approval of a proposed regulated activity that may have some effect on surface water quality. Appendix A of the Tribe's proposed water quality standards outlines the role of the applicant for any proposed activity that may lower water quality, this includes but is not limited to monitoring data. The Tribe fully intends to work with permittees and the EPA during the antidegradation review process to ensure tribal waters are protected, as outlined in the implementation procedures.

Regarding antidegradation review, for federal permits on tribal trust lands, the Tribe will conduct the antidegradation review. For federal permits on fee lands, the Tribe in consultation with the EPA, will conduct any antidegradation review the Tribe deems necessary. The EPA will give notice to the Tribe (through a "neighboring jurisdiction" letter) of any upstream proposed discharges for which, in EPA's view, there is a "reasonable potential" to impact downstream waters on trust land.

Comment:

- *Section 13 Antidegradation General Guidelines in Appendix (p. vi): Based on a limited review of the antidegradation requirements, a few key thresholds stood out to us. The Tribe's regulations identify both 5% and 10% as guidelines for defining significant degradation relative to ambient pollutant concentration. This section is*

unclear and also very stringent. The General Guidelines text currently states (with unclear text in yellow):

*As a non-binding rule of thumb, proposed activities that would lower ambient quality of any parameter by more than 5%, reduce the available assimilative capacity by more than 5%, or increase pollutant loadings to a segment by more than 5% will be presumed to pose significant degradation. The intent of this guideline is to establish a de minimis test of significance and to eliminate from further review only those proposed activities that will result in truly minor changes in water quality. Regardless of other considerations, any proposed activity or activities that will cumulatively lower a water quality parameter, lead to a reduction in assimilative capacity, or increase in pollutant loading greater than 10% shall be considered significant degradation.*

*For comparison, Colorado's guideline is a 15% pollutant concentration change threshold and a 10% bioaccumulative toxics threshold. Additionally, if 100:1 dilution is present in Colorado, a no significant impact determination is made. Antidegradation-driven requirements can be extremely costly for small dischargers due to extremely stringent treatment requirements and can have other unintended environmental consequences (e.g., higher energy requirements and greenhouse gas emissions for treatment processes, disposal of concentrated pollutant reject streams from reverse osmosis, technologically enhanced radioactive material [TENORM]).*

#### Tribe's Response:

The intent of the non-binding rule of thumb is to eliminate from further review the activities that will result in minor changes in water quality. It is the Tribe's understanding that a pollutant concentration change threshold as suggested would not be approvable by EPA. The Tribe intends to work with permittees and the EPA during the antidegradation review process to ensure tribal waters are protected.

#### Technical

#### Comments:

- I do think the Tribe's proposed standard of 50 ug/l would affect discharge permits that could be applied to mine drainages near Silverton and may affect the Town of Silverton's discharge permit as well. Silverton's wastewater collection system picks up a lot of metals from infiltration of groundwater under the town. They already have a zinc issue because of it. Durango's wastewater discharge might also exceed 50 ug/l simply because the source water it gets from the Animas has much higher manganese concentrations. Manganese is a particularly difficult and expensive metal to remove from a waste stream. I'd sure like to see the Tribe look at this issue more closely.*
- Secondary Drinking Water Parameters (Manganese, Sulfate, Dissolved Iron): These standards are based on taste and odor issues, rather than human health. These pollutants can occur naturally at concentrations higher than the proposed standards. Colorado's Regulation 31 allows an option for using the existing conditions of these pollutants as of January 1, 2000, as an alternative basis for the standards where*



*naturally occurring concentrations are elevated. (Note: chloride is also a Secondary Drinking Water Standard, but does not receive this allowance.) Dissolved manganese is an impairment listing on Colorado's 2022 303(d) List for the Animas River and some of its tributaries in Colorado, even with allowance of a January 1, 2000 standard option. Has the Tribe considered inclusion of a provision that recognizes naturally occurring elevated conditions for these Secondary Drinking Water parameters?*

- *SWCD requests that the Tribe not adopt water quality standards that are currently not being met because of natural conditions, particularly if it is likely that those standards may need to be revisited at a triennial review in the next few years. Levels of some water quality constituents whose sources are predominately natural currently exceed or may exceed the Tribe's proposed standards. For example, concentrations of manganese in the Animas River on the reservation are 100 to 150 micrograms per liter (ug/l) and most of the manganese originates from naturally mineralized areas upstream in San Juan County. The proposed tribal standard for public water supply is 50 ug/l, far less than existing concentrations in the river. We understand that the La Plata River also has high manganese concentrations, although we haven't yet seen any data. Our concern is that it is much easier and less resource intensive process to apply stricter standards in the future if needed than to loosen standards in the future if they are determined to be too stringent given natural sources. Temperature, manganese, and aluminum are constituents that we have identified so far where there may be concerns. Although we have not seen aluminum data for the Animas River on the Reservation, EPA's relatively new, chronic aquatic life criteria is far exceeded in the Animas River just below the confluence with Cascade Creek. The State has not adopted EPA's aquatic life aluminum criteria and currently has retained its older standard because of concerns that the criteria does not provide the appropriate level of protection.*

#### Tribe's Response:

The Tribe's proposed water quality standards aim to achieve the highest attainable use. Under Section 8.1(4)(d) of these standards, the Tribe may adopt site-specific numeric criteria when "the concentration resulting from natural background exceeds numeric criteria for aquatic life or other uses." The natural background sources versus the anthropogenic or anthropogenic-exacerbated sources would need to be studied and examined prior to any site-specific adoption of any pollutant. If the Tribe should modify a specific-criteria or, if a site- or segment-specific criteria needs to be developed, the Tribe will consider doing so by reviewing data presented during a triennial review. A full scientific defensible study may be provided to the Tribe if a site-specific standard is proposed for any segment.

#### Comment:

- *Are there particular contaminants of concern for the Tribe that may be at or near exceeding the water quality standards proposed?*
- *What pollutants or non-point sources (i.e., chemical, physical, or biological) have been most concerning to and determinantal to the Tribe? Is it an accumulation of nutrient loads being dispersed from upstream sources?*

Tribe's Response:

The Tribe is equally concerned about all potential contaminants and is interested in maintaining the water resources in a manner that protects the health, welfare, and environment of the tribal membership, the broader Reservation community, and the Reservation.

Comment:

- *Is the data used to develop these standards going to be made available?*

Tribe's Response:

The data used by the Tribe is already publicly available. Pursuant to the EPA federal grant guidelines, all water quality data collected currently, and in the past, is regularly uploaded to the EPA water quality database, Water Quality Exchange Portal or WQX, for public access.

Comment:

- *In review of SUIIT's Proposed Water Quality Standards, the [New Mexico Environment] Department notes a few distinctions from State standards, as explained below. One of the variations noted is the difference between SUIIT's proposed acute and chronic temperature criteria and the State's criteria. For example, the acute (maximum) temperature criteria are different for each of the subcategories (e.g., SUIIT's proposed cool water maximum temperature criterion is equivalent to New Mexico's cold water aquatic life use maximum temperature criterion). In addition, for chronic temperature criteria, the Department uses an exposure criterion with either a four or six consecutive hour maximum occurring over a three consecutive day period; SUIIT proposes a more conservative maximum weekly average temperature that is several degrees lower than State criteria.*

Tribe's Response:

The Tribe appreciates the Department noting these temperature designations in the proposed water quality standards.

Comment:

- *Further, the [New Mexico Environment] Department notes that for Pine River (Segment 3 from Dry Creek to the New Mexico State Line), the proposed aquatic life use is warm water with a maximum temperature criterion of 30C and a maximum weekly average temperature of 27C. Pine River (a.k.a. Los Pinos River) in New Mexico has a cold water aquatic life use with a maximum temperature criterion of 24C and a maximum 6-hour, 3-day temperature of 20C. The Department is not concerned about these differences given the information from the SUIIT's evaluation. The Department noted that the State's aquatic life designated use for Los Pinos River may be unattainable and is considering an analysis to determine the appropriate aquatic life use.*



Tribe's Response:

The Tribe appreciates the Department noting these uses in the proposed water quality standards.

Comment:

- *As it pertains to recreational uses, both the State and SUIIT have equivalent criteria for primary contact, and SUIIT's secondary contact criteria is equivalent to the criteria for primary contact. The [New Mexico Environment] Department noted that the La Plata River (Segment 3), as it comes into New Mexico, is designated with a secondary contact recreational use; however, the Tribe's proposed secondary contact criterion is equivalent to New Mexico's primary contact criterion for the same tributary. Therefore, this designation poses no issue for New Mexico.*

Tribe's Response:

The Tribe appreciates the Department noting these criteria in the proposed water quality standards.

Comments:

- *The Standards have established designated uses for ephemeral washes (Section 5.7, Table 14). Since ephemeral washes are exempt from regulation under the NWPR, we are hoping to determine the reasoning for including designated uses for these washes.*
- *Section 5.7, Table 14. Designated Uses for Ephemeral Washes: As defined in the proposed standards, "Ephemeral Waters are water bodies that flow or contain water only in direct response to precipitation in the immediate watershed. The stream channel of such a water body is generally above the adjacent water table." Thus, ephemeral washes are typically dry except in direct response to precipitation events. The proposed designated uses of Public Water Supply, Recreation 2, Agricultural, and Aquatic Warm 2 Uses for all ephemeral washes reservation-wide seem overly stringent and not well supported. We recommend removing some or all of the use designations for ephemeral washes. For example, basic protections could be provided by applying an Agricultural Use designation only.*

Tribe's Response:

Ephemeral washes are an important component of the watershed that require protection. The scientific literature regarding the biological importance of nonperennial waters is robust and shows the diversity and sensitivity of species that occupy these systems. Although EPA may be limited in the extent to which it can approve the Tribe's standards, the Tribe is not limited to asserting its federally delegated authority for setting water quality standards. Without attempting to resolve the precise parameters of its inherent authority, the Tribe is also establishing its water quality standards based on its inherent authority.

Comment:

- *In the definitions of the Standards, increased temperature can be considered a pollutant. This is concerning because agricultural diversion causes the de-watering of streams, which can cause the stream temperatures to rise. Section 2.2 of the*

*Standards states: “Implementation of these water quality standards shall not interfere with the lawful diversion of water pursuant to decreed water rights.” Additionally, the NWPR exempts groundwater from regulation. To fulfill the Section 2.2 implementation mandate and for consistency, we would propose the following definition changes.*

- (1) Nonpoint Source of Pollution means any source of pollutants to surface waters that is not from a single attributable location. Nonpoint source pollution is typically associated with water moving over or through the ground and can originate from many types of diffuse sources (e.g., agricultural, ranch and forest lands, construction sites, development, urban runoff, atmospheric deposition, etc.). **Non-point source discharge from agricultural activities originating off Tribal land is exempt from these standards.***
- (2) Point Source is any discernible, confined and discrete conveyance including, but not limited to, any pipe, ditch **(not including irrigation ditches)**, channel, sewer, tunnel, conduit, well, discrete fissure, container, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. **Point Source does not include irrigation return flows or hydro-electric conveyance structures on agricultural facilities.***
- (3) Pollutant includes, but is not limited to dredged soil, solid waste, incinerator residue, filter backwash, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials (except those regulated under the Atomic Energy Act of 1954 as amended, 42 U.S.C. Section 2011, et seq.), heat **(except to the extent caused by dewatering due to agricultural diversions)**, wrecked or discarded equipment, oil, mine tailings, rock, sand, cellar dirt and industrial, municipal, **and agricultural waste (excluding return flows from irrigation)** discharged into water.*
- (4) Pollution includes such contamination, or other alteration of the physical, chemical, or biological properties of any waters of the Tribe, **except to the extent caused by dewatering due to agricultural diversions**, including change in temperature, taste, color, turbidity, or odor of the waters, or such discharge of any liquid, gaseous, solid, radioactive, or other substance, or any exotic biota into any waters of the Tribe that will or is likely to create a nuisance to or impair any beneficial use of such waters.*

Tribe's Response:

As described in Section 2.2 of the proposed water quality standards, the standards will not interfere with the lawful diversion of water pursuant to decreed water rights. Furthermore, many activities related to agriculture are exempt under the CWA. The Tribe respectfully declines to make the suggested changes.

Comment:

- *Arsenic: The “Water + Organism” standard for arsenic of 0.018 ug/L has numerous temporary modifications to the standard (rounded to 0.02 ug/L) in Colorado as Colorado works through its 10-year Water Quality Roadmap. For segments with Water Supply only, Colorado currently allows use of a hyphenated standard where 0.02 ug/L is retained as the underlying standard, but assessment and permit limits are based on the drinking water standard of 10 ug/L. The 0.018 ug/L standard is below the limit of technology for treatment and below the practical quantitation limit of 1 ug/L for laboratory analysis of samples (in Colorado standards). Adopting the 0.018 ug/L arsenic standard may result in impairment listings without a feasible mechanism to meet the standard. Based on Colorado’s 2022 303(d) List, this is expected to be a likely issue on the Animas River, Florida River, Dolores River, La Plata River, Rio Blanco River, and possibly others. Has the Tribe considered a delay in adoption of this standard with a higher interim value to allow time to further explore this issue, similar to Colorado’s approach in the 10-year Water Quality Roadmap?*

Tribe's Response:

The Tribe’s proposed water quality standards aim to achieve the highest attainable use. Under Section 8.1(4)(d) of these standards, the Tribe may adopt site-specific numeric criteria when “the concentration resulting from natural background exceeds numeric criteria for aquatic life or other uses.” If the Tribe should modify a specific-criteria or, if a site- or segment-specific criteria needs developed, the Tribe will consider doing so by reviewing data presented during a triennial review. The natural background sources versus the anthropogenic or anthropogenic-exacerbated sources would need to be studied and examined prior to any site-specific adoption of any pollutant. A full scientific defensible study may be provided to the Tribe if a site-specific standard is proposed for any segment.

Comment:

- *Selenium: In areas with naturally occurring selenium-bearing formations (e.g., Mancos shale), it may not be possible to meet EPA’s new more stringent selenium criteria. This is also a topic in Colorado’s 10-year Water Quality Roadmap process. Has the Tribe considered adopting Colorado’s current water-column based standard of 4.6 ug/L (chronic) and 18.4 ug/L (acute) that correspond to EPA’s previously recommended selenium values? Colorado agencies are currently conducting selenium-related studies on fish species in Colorado that could support an alternative standard(s) that would be protective and perhaps more reasonably attained. Based on review of Colorado’s 2022 303(d) List, it appears that selenium issues may not be significant on the Tribe’s land; however, selenium impairments have been identified in Colorado on the main stem of the Mancos River.*

Tribe's Response:

The Tribe's proposed water quality standards aim to achieve the highest attainable use. Under Section 8.1(4)(d) of these standards, the Tribe may adopt site-specific numeric criteria when "the concentration resulting from natural background exceeds numeric criteria for aquatic life or other uses." If the Tribe should modify a specific-criteria or, if a site- or segment-specific criteria needs developed, the Tribe will consider so by reviewing data presented during the triennial review. Current water quality data collected by the Tribe do not indicate a concern regarding selenium concentrations. When measured, selenium concentrations are below the proposed standard for all reaches sampled within the last 5 years.

Comment:

- *pH: What is the basis for the 6.6 pH standard? EPA's recommended aquatic life criteria for pH range from 6.5 to 9.0. We wonder if the reference to 6.6 in several locations in the draft standard could be a typographical error.*

Tribe's Response:

Thank you for this comment. The Tribe has reconsidered the pH range and revised the standard to a range of 6.5 to 9.0.

Comment:

- *Specific Conductance: Specific conductance can vary dramatically in streams depending on the dominant source of flows. For example, during low flow conditions where streamflow is dominated by groundwater, conductivity can be quite high in some areas. We suggest deleting this standard. Specific conductance is not included as a stream standard in Colorado; however, Water Quality Policy 24 "Implementing Narrative Standards in Discharge Permits for the Protection of Irrigated Crops" still provides a regulatory mechanism to limit electrical conductivity (EC) and sodium absorption ratio (SAR) in discharge permit limits for the purpose of protecting water used for crop irrigation. It may be advantageous to omit the specific conductance stream standard but rely on permitting policies and limits to manage conductivity levels in discharges (e.g., through EC/SAR limits).*

Tribe's Response:

The wide range of this criteria was developed with the noted variations in mind. In the interest of protecting tribal waters from spills and accidental discharges, and to quantify the extent of those incidences, the specific conductance standard is an important criterion.

Comments:

- *Temperature: We applaud the Tribe's efforts to collect empirical data to support segment-specific temperature standards. However, we have some concerns that it may be premature to adopt these standards based on the limited temperature data available. For example, even though the temperature data were measured over an 8-year period cumulatively, each stream segment has a much more limited data set, with some segments only having one season or one year of monitoring. The Animas*

*and San Juan segments have the longest records at approximately 3 to 3.5 years. Although the work that the Tribe completed to collect segment-specific temperature data is valuable, the data collection period may not reflect the range of temperature conditions naturally occurring on various stream segments.*

*Based on information provided in the Rationale document, it appears that the Pine River Segment 3, Animas River Segments 1 through 3, La Plata River Segment 3, Stollsteimer Creek, and Capote Reservoir do not meet the proposed acute temperature standards. (A comparison of chronic temperature standards is not provided in the rationale.) Based on the comparison of the Colorado, New Mexico and the Tribes' proposed temperature standards for the Animas River, it appears that the Tribe's proposed standards are lower and also not currently attained for the three segments. Although the Animas temperatures are most similar to the Cool category proposed by the Tribe, these segments would nonetheless be considered impaired for temperature using the Tribe's proposed standard. We note, however, that they would meet the New Mexico standard.*

*We also suggest clearly defining how the temperature standards are assessed and what types of excursions are allowed due to warming events and/or air temperature, low flows, winter shoulder season, etc. In terms of assessment, a general statement is provided: "An appropriate assessment procedure shall be used to identify when such excursions are or may be impairing aquatic life." We think it would be beneficial to define allowable excursions at least at a basic level in the regulations. For example, can the maximum daily and weekly average temperatures be exceeded once every three years? (See Colorado Regulation 31 Table 1 footnotes as examples.) Also, the temperature standard in the Tribe's Table 20 appears to have an "o" footnote that is not included in the draft.*

*In summary, based on the available information, it appears that additional segment-specific work is needed to assign appropriate temperature standards for several segments. We are not opposed to the general approach being used by the Tribe, but we recommend additional segment-specific refinement and explicit provision for allowable excursions.*

- *The La Plata Water Conservancy District (LPWCD) has concerns with the proposed temperature designations along the La Plata River. The La Plata River segments on the Southern Ute Indian Reservation have been designated Warm 1 and Warm 2 under the CDPHE. The proposed Standards designate the river as Cool from the northern boundary of the Reservation to the confluence with Cherry Creek and from the confluence with Long Hollow to the New Mexico border. The section of river from Cherry Creek to Long Hollow is designated as Warm. The river often has naturally low flows through a stretch that begins below Breen and above Cherry Creek. It is likely that this part of the river will not meet the Cool temperature requirements. The change downstream from a Warm designation to a Cool designation below Long Hollow is also likely to be a challenging requirement. Despite receiving additional inflows from Long Hollow and return flows from*



*irrigation, the river is lower in elevation and coming from a stretch that is expected to have increased temperatures. The change from winter to summer temperatures in mid-April presents additional concerns as the area typically has increased temperatures earlier in the year. LPWCD requests the Tribe reconsider the temperature designations for these parts of the La Plata River based on the conditions of the La Plata River.*

Tribe's Response:

Thank you for this thoughtful comment. The Tribe used empirical water temperature data to set the temperature standards for each river segment. The most current stream temperature data was used to determine temperature thresholds for the various reaches. The Tribe may decide to modify the temperature designations by reviewing data presented during a triennial review of its standards.

Two footnotes were added to Table 15 of the proposed water quality standards that further define the duration and frequency calculations for the temperature standards.

The footnote for temperature in Table 20 has been deleted.

Comment:

- *Description of Duration and Exceedance Frequency Components of Standards: To fully understand numeric standards, three components need to be clearly described: 1) magnitude, 2) duration over which the standard is assessed, and 3) frequency of allowed exceedances. The Tribe provides the magnitude component of the standard, but does not provide information on the additional components of the standards for most pollutants, with the exception of E. coli. As examples of information that could be added to improve clarity, see the footnotes for Tables 1 through 3 in Colorado's Regulation 31.*

Tribe's Response:

Thank you for the comment. Two footnotes were included below Table 15 to further describe the duration and frequency of the temperature standards. Footnotes were also added to Table 20, numeric criteria for aquatic life, and Table 21, numeric criteria for human health, to describe the duration and frequency criteria of the standards.

Comment:

- *Section 8.1 Establishing Numeric Criteria, #3. To allow the Tribe more flexibility in developing site-specific standards, we suggest deleting the following statement: "Ambient acute criteria shall be based on the default values in this document." Temperature is an example of why this flexibility may be needed. As currently written in the Tribe's Water Quality Standards, acute temperature standards are exceeded on several segments. This sentence significantly constrains the Tribe's ability to develop a more appropriate segment-specific temperature standard.*

Tribe's Response:



The Tribe's proposed water quality standards aim to achieve the highest attainable use. Under Section 8.1(4)(d) of these standards, the Tribe may adopt site-specific numeric criteria when "the concentration resulting from natural background exceeds numeric criteria for aquatic life or other uses." If the Tribe must modify a specific-criteria or, if a site- or segment-specific criteria needs developed, the Tribe will consider doing so during a triennial review. A full scientific defensible study may be provided to the Tribe if a site-specific standard is proposed for any segment. No changes to the standards have been made regarding this comment.

Comment:

- *Section 11 Outstanding Tribal Resource Waters (OTRW): The confidential classification aspect of this designation seems potentially challenging to administer. With a confidential classification it would be difficult to evaluate discharge permit requirements as listed in Table 22 if the relevant segments are unknown.*

Tribe's Response:

The text in the proposed water quality standards states that the Tribe holds the option of keeping OTRW confidential. The Tribe has not yet assigned an OTRW designation to any water body on the Reservation. This section may be examined as part of a triennial review if it poses administrative burdens to implement.

Comment:

- *Colorado's Regulation 31 provides explicit criteria related to upgrading and downgrading standards with provisions that reference naturally occurring conditions (e.g., Section 31.6). We suggest that the Tribe consider incorporating similar provisions.*

Tribe's Response:

The Tribe's proposed water quality standards aim to achieve the highest attainable use. Under Section 8.1(4)(d) of these standards, the Tribe may adopt site-specific numeric criteria when "the concentration resulting from natural background exceeds numeric criteria for aquatic life or other uses." If the Tribe must modify a specific-criteria or, if a site- or segment-specific criteria needs developed, the Tribe will consider doing so during a triennial review. The natural background sources versus the anthropogenic or anthropogenic-exacerbated sources would need to be studied and examined prior to any site-specific adoption of any pollutant. A full scientific defensible study may be provided to the Tribe if a site-specific standard is proposed for any segment.

Comments:

- *An assessment methodology needs to be applied to water quality data to determine if there is a violation of standards. Those assessments are also an integral part of developing impaired waters lists under section 303(d) of CWA. Tribes or states need to certify under section 401 of CWA that activities occurring under a federal license or permit, including under section 404 permits and Federal Energy Regulatory*

*Commission (FERC) licenses, will not violate applicable Tribal and State water quality standards.*

- *SWCD requests that the Tribe develop a document or tables listing what assessment parameters will be used for each of the water quality standards listed in the Tribe's proposal. The Tribe is adopting EPA criteria for a number of water quality constituents. Those criteria typically include assessment parameters for determining if a violation of the criteria has occurred. (For example, for a chronic criterion, the 85th percentile of data collected may not be higher than the criterion over a thirty-day period). This list will directly help the Tribe in assessing possible violations of its standards. In addition, the Tribe did not apply for, and EPA did not delegate authority, under section 303(d) to develop impaired waters lists. As a result, we presume EPA will develop 303(d) lists for Tribal Waters and possibly for other waters within the exterior boundaries of the Reservation. Clearly, having an assessment document or table would be beneficial in developing an impaired waters list. It will also help those upstream of Tribal Waters in understanding what constituents might be treated differently by the Tribe in comparison to the State. This is important because there are constituents where the State has adopted EPA's numeric criteria, but uses different assessment parameters than what EPA suggests.*

**Tribe's Response:**

The Tribe does not have CWA 303(d) authority. Therefore, the development of an impaired waters list and assessment methodologies are not required by EPA. The Tribe's authority is limited to CWA Sections 303(c) (standard setting) and 401 (certification).

## Outreach

**Comment:**

- *Has the Tribe consulted with CDPHE on these standards?*

**Tribe's Response:**

The state of Colorado was provided an advanced comment period which occurred from November 17, 2020 through January 29, 2021. The State's comments, along with the Tribe's responses, can be found in the response to comment document dated April 7, 2021, which are available for a limited time at <https://www.southernuten-sn.gov/justice-and-regulatory/epd/public-comments/>.

**Comment:**

- *Will the Tribe have a public hearing for these standards?*

**Tribe's Response:**

Pursuant to 40 CFR 25.5, the Tribe will engage in a comment period that satisfies all federal requirements set by the EPA, which will include a public hearing.

**Comment:**

- *The Tribe has given parties that commented last year on its Treatment as a State (TAS) application to EPA a thirty-day time period to comment on the Tribe's*

*proposed water quality standards. Thirty days is a short timeframe for SWCD to develop comments, particularly since SWCD's board has regular meetings every two months. Our understanding is that the Tribe will have a general public comment period starting sometime in July. With more time to better understand the implications of the Tribe's proposal, SWCD may provide additional comments during the public comment period.*

Tribe's Response:

The Tribe appreciates this comment and understands that the SWCD may provide additional comments during the public comment period.

Comment:

- *We understand that adopting water quality standards for Tribal Waters is a new and complicated process. As noted above, there are a number of implications that are not addressed in the Tribe's proposal that create uncertainty. SWCD would like to see as many of these issues resolved as possible before the Tribe acts on its draft proposal to reduce uncertainty for those on fee lands and others upstream of Tribal Waters. We look forward to working with the Tribe, the State and EPA to reduce uncertainty associated with the Tribe adoption of its own water quality standards and believe that some discussion on these issues would be beneficial before the public comment period begins.*

Tribe's Response:

Thank you for the comment. The Tribe appreciates the discussions regarding all aspects of its proposed standards. The Tribe intends to discuss and work collaboratively with all interested individuals, organizations, and agencies concerning its proposed water quality standards. The Tribe will be inviting additional comments during the general public comment period.