



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10**

1200 Sixth Avenue, Suite 155
Seattle, WA 98101

WATER
DIVISION

June 13, 2023

Dr. Ryan Erhart
Environmental Division Manager
Makah Indian Tribe
181 Resort Drive
Neah Bay, Washington 98357

Re: EPA's Clean Water Act Action on the April 28, 2023, Submittal of the Makah Tribe's Revised Recreational Bacteria Criteria

Dear Dr. Erhart:

The U.S. Environmental Protection Agency has completed review of the new and revised water quality standards (WQS) adopted by the Makah Tribe and submitted to EPA on April 28, 2023. Pursuant to section 303(c) of the Clean Water Act (CWA), 33 U.S.C. § 1313(c), states and authorized tribes must submit new or revised WQS to EPA for review and action, and EPA must ensure that those WQS are consistent with the CWA and EPA's implementing regulations. The details of EPA's action are outlined below and are further described in the enclosed Technical Support Document.

EPA's action applies to waters within the boundaries of the Makah Reservation and Tribal trust lands. Today's action does not apply to waters outside of the Makah Reservation boundaries which are under Washington State's jurisdiction. CWA section 518(e), 33 U.S.C. § 1377(e), authorizes EPA to treat an Indian tribe in a similar manner as a state to manage and protect water resources "within the borders of an Indian reservation," provided certain requirements are satisfied. The Tribe received approval for treatment in a similar manner as a state for the purpose of developing and administering WQS and water quality certification programs, CWA sections 303(c) and 401, 33 U.S.C. § 1313(c) and 1341, respectively, in December 2003.

I. Summary of EPA's Action

The Makah Tribe amended the Makah Water Quality Standards (MWQS) by adopting revised criteria for enterococci in fresh waters, marine waters and lakes. These revised criteria were adopted consistent with EPA's 2012 CWA section 304(a), 33 U.S.C. § 1314(a), recommendations for recreational water quality criteria.

Pursuant to EPA's authority under CWA section 303(c) and the implementing regulations at 40 C.F.R. Part 131, EPA is approving the following revised WQS shown in bold:

Revised Recreational Water Quality for Fresh Water: Part II – Designated Uses and Criteria, Section 4 Freshwater Designated Uses and Criteria, (2) water quality criteria, (g) recreation uses, Table 5 Water Contact Recreation Bacteria in Fresh Water.

Revised Recreational Water Quality for Marine Water: Part II – Designated Uses and Criteria, Section 5 Marine Waters Designated Uses and Criteria, (2) water quality criteria, (i) recreation, **Table 11 Water Contact Recreation Bacteria in Marine Water.**

Revised Recreational Water Quality for Lakes: Part II – Designated Uses and Criteria, Section 7 Lake Designated Uses and Criteria, (3) water quality criteria, (a) recreation uses, **Table 13 Water Contact Recreation Bacteria in Lakes.**

II. Provisions EPA is Taking No Action On

EPA is taking no action on the following provisions (shown in bold) adopted and submitted by the Tribe because EPA has determined they are not new or revised WQS that EPA has the authority to review and approve or disapprove pursuant to CWA section 303(c), 33 U.S.C. § 1313(c)(3).

Revised Recreational Water Quality for Fresh Water: Part II – Designated Uses and Criteria, Section 4 Freshwater Designated Uses and Criteria, (2) water quality criteria, (g) recreation uses, **(ii), (iii), and (iv) regarding averaging and sampling.**

Revised Recreational Water Quality for Marine Water: Part II – Designated Uses and Criteria, Section 5 Marine Waters Designated Uses and Criteria, (2) water quality criteria, (i) recreation, **(ii), (iii), and (iv) regarding averaging and sampling.**

Revised Recreational Water Quality for Lakes: Part II – Designated Uses and Criteria, Section 7 Lake Designated Uses and Criteria, (3) water quality criteria, (a) recreation uses, **(ii), (iii), and (iv) regarding averaging and sampling.**

EPA appreciates the efforts your staff have dedicated throughout the years to providing new protections for waters under the Tribe’s jurisdiction and we look forward to continuing our close collaborations with the Makah Tribe. If you have any questions, please contact me at (206) 553-0171 or Andrea Ramirez, EPA staff lead, at (206) 553-1058 or ramirezpuentes.andrea@epa.gov.

Sincerely,

HANH
SHAW

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SHAW
Date: 2023.06.13
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Hanh Shaw, Branch Chief
Standards, Assessment, and Watershed
Management Branch

Enclosure: Technical Support Document

Technical Support Document

EPA's Clean Water Act Action on the Makah Tribe's Revised Recreational Bacteria Criteria

Submitted April 28, 2023

June 13, 2023

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Technical Support Document

EPA’s Clean Water Act Action on the Makah Tribe’s Revised Recreational Bacteria Criteria

Submitted April 28, 2023

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I. Introduction

This Technical Support Document provides the basis for the U.S. Environmental Protection Agency’s (EPA) approval action under section 303(c) of the Clean Water Act (CWA), 33 U.S.C. § 1313(c), and the federal water quality standards (WQS) regulations at 40 C.F.R. Part 131, on the revised recreational bacteria criteria, submitted to EPA by the Makah Tribe (“Tribe”). These revisions to the Makah Tribe Water Quality Standards (MWQS) were duly adopted pursuant to Tribal Law.¹ The Tribe’s revised recreational use definition and criteria were adopted on May 29, 2020 (Resolution No. 59-20).²

The Tribe received approval for “treatment in a similar manner as a state” for administering a WQS program on December 23, 2003, and EPA approved the MWQS on September 29, 2006.

This document is organized as follows:

- Part II – Provides background information about CWA requirements and the Tribe’s recreational bacteria water quality standards submittal. It also includes the scope of EPA’s action.
- Part III – Describes EPA’s action and the basis for the action under CWA section 303(c) and the implementing regulations at 40 C.F.R. Part 131.
- Part IV – Summarizes the rule provisions that EPA is taking no action on.

II. Background

A. Clean Water Act Requirements for Water Quality Standards

The objective of the CWA is to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters with an interim goal, where attainable, to achieve water quality that provides for the protection and propagation of fish, shellfish, and wildlife and recreation in and on the water. Under section 303(c) of the CWA, and federal implementing regulations at 40 C.F.R. § 131.4, states and authorized tribes³ have the primary responsibility for reviewing, establishing, and revising WQS. These standards include the designated uses of a waterbody or waterbody segment, the water quality criteria necessary to protect those designated uses, and an antidegradation policy. This statutory and regulatory framework allows states and authorized tribes to work with local communities to adopt appropriate designated uses (as required at 40 C.F.R. §131.10(a)) and to adopt criteria to protect those designated uses (as required at 40 C.F.R. §131.11(a)).

States and authorized tribes are required to hold public hearings for the purpose of reviewing applicable WQS periodically, but at least once every three years, and, as appropriate, modifying these standards (40 C.F.R. §131.20). Each tribe must follow applicable legal procedures for revising or adopting such standards (40 C.F.R. § 131.5(a)(6)) and is required to submit a certification by the appropriate legal tribal authority or tribal attorney that the WQS were duly adopted pursuant to state law (40 C.F.R. §

¹ As stated in the *Attorney Certification for Updated Recreational Water Quality Criteria in the Makah Tribes’ Water Quality Standards*, dated April 17, 2023.

² Resolution No. 59-20 of the Makah Tribal Council, *Revised Tribal Water Quality Standards*, dated May 29, 2020.

³ The term “authorized tribe” means a tribe eligible under CWA section 518(e) and 40 CFR 131.8 for treatment in a similar manner as a state (TAS) for the purpose of administering a water quality standards program.

131.6(e)). EPA's review authority and the minimum requirements for states and authorized tribes WQS submittals are described at 40 C.F.R. §§ 131.5 and 131.6, respectively.

Section 303(c) of the CWA requires states and authorized tribes to submit new or revised WQS to EPA for review and action. EPA reviews these changes and approves the WQS if they meet the requirements of the CWA and EPA's implementing regulations.

EPA considers four questions (listed below) when evaluating whether a particular provision is a new or revised WQS. If the answer to all four questions is "yes," then the provision would likely constitute a new or revised WQS that EPA has the authority and duty to approve or disapprove under CWA section 303(c)(3).⁴

1. Is it a legally binding provision adopted or established pursuant to state or tribal law?
2. Does the provision address designated uses, water quality criteria (narrative or numeric) to protect designated uses, and/or antidegradation requirements for waters of the United States?
3. Does the provision express or establish the desired condition (e.g., uses, criteria) or instream level of protection (e.g., antidegradation requirements) for waters of the United States immediately or mandate how it will be expressed or established for such waters in the future?
4. Does the provision establish a new WQS or revise an existing WQS?

If EPA approves a tribe's WQS submission, such standard(s) shall thereafter be the applicable standard for CWA purposes. 33 U.S.C. § 1313(c)(3). When EPA disapproves a Tribe's WQS, EPA shall notify the Tribe and specify why the WQS is not in compliance with the requirements of the CWA and federal WQS regulations, and specify any changes that are needed to meet such requirements. *Id.*; 40 C.F.R. § 131.21.

Finally, EPA considers non-substantive edits to existing WQS to constitute new or revised standards that EPA has the authority to approve or disapprove under CWA section 303(c)(3). While such edits and changes do not substantively change the meaning or intent of the existing WQS, EPA believes it is reasonable to treat such edits and changes in this manner to ensure public transparency as to which provisions are applicable for CWA purposes. EPA notes that the scope of its review and action on non-substantive edits or editorial changes extend only to the non-substantive edits or changes themselves. EPA does not re-open or reconsider the underlying WQS that are the subject of the non-substantive edits or editorial changes.

B. Regulatory Requirements for Recreational Criteria

As a recipient of grant funding under the Beaches Environmental Assessment and Coastal Health (BEACH) Act, the Makah Tribe must meet specific requirements regarding recreational water quality criteria. Section 303(i)(1)(B) of the CWA, 33 U.S.C. § 1313(i)(1)(B), (as amended by the BEACH Act of 2000) directs states and authorized tribes having coastal recreation waters to adopt and submit to EPA new or revised WQS for those waters for all pathogens and pathogen indicators to which the new or

⁴ See *What is a New or Revised Water Quality Standard under 303(c)(3) Frequently Asked Questions*, U.S. Environmental Protection Agency, EPA Pub. No. 820F12017 (Oct. 2012). Hereafter referred to as 303(c) FAQs. Available at <https://www.epa.gov/sites/production/files/2014-11/documents/cwa303faq.pdf>

revised water quality criteria are applicable.⁵

C. Overview of the Tribe's submittal

The Tribe's April 28, 2023 submittal to EPA included the adoption of revised recreational water quality criteria at MWQS, Part II. The adoption amends the MWQS by revising criteria for enterococci in fresh waters, marine waters and lakes to protect the primary contact recreation designated use. These revisions were incorporated to be consistent with EPA's 2012 section 304(a) recommendations for recreational water quality criteria.⁶

The Tribe began the process of revising the MWQS in early 2020. The Tribe initiated the public comment process on February 18, 2020, and scheduled a public hearing for April 2, 2020 at the Makah Tribal Center. The public participation process was scheduled to close on April 13, 2020, but due to the COVID-19 pandemic, the Tribe was unable to complete the public comment process and finalize the revisions at that time. The public participation process was reinitiated with a new public comment period from December 6, 2022 to January 20, 2023. Aside from EPA's comments, the Tribe did not receive comments from the public. The Tribe's environmental staff held a virtual public hearing on March 29, 2023; no members of the public attended.⁷ No changes were made to the 2020 adopted MWQS as a result of the public participation process.

The Makah Tribal Council adopted the revised MWQS during the general Council meeting held on May 29, 2020, pursuant to Resolution 59-20. The Tribe's submission included a certification by the Tribal Attorney that the revisions were duly adopted pursuant to Tribal Law. 40 C.F.R. § 131.6(e).

The Tribe's April 28, 2023, submittal package includes:

- 1) Attorney's Certification directed to Dan Opalski, EPA Region 10 Water Division, certifying that the rule was duly adopted pursuant to tribal law, describing the revision of the MWQS, its justification, and a description of the public participation process, dated April 17, 2023.
- 2) Makah Tribe's Water Quality Standards for Surface Waters, dated March 2019.
- 3) Resolution 59-20 of the Makah Tribal Council stating the adoption of the revised MWQS, enacted on May 29, 2020.
- 4) Comprehensive tracked changes version of the Makah Tribe's Water Quality Standards for Surface Waters and cover letter.
- 5) Evidence of public comment period, which was open from December 6, 2022 to January 20, 2023.
- 6) Evidence of public hearing announcement, which was held virtually on March 29, 2023.
- 7) Public hearing summary memo from Lizz Miller, Water Quality Specialist, to Ryan Erhart, Makah Environmental Division Manager, dated April 24, 2023.
- 8) EPA's comment letter to the Makah Tribe's Proposed Revisions to Recreational Water Quality

⁵ Beaches Environmental Assessment and Coastal Health (BEACH) Act of 2000. Available at <https://www.congress.gov/106/plaws/publ284/PLAW-106publ284.pdf>

⁶ Recreational Water Quality Criteria. 2012. USEPA Office of Water 820-F-12-058, pp. 63. Available at: <https://www.epa.gov/sites/production/files/2015-10/documents/rwqc2012.pdf>. (2012 RWQC)

⁷ Memo dated April 24, 2023 from Lizz Miller, Makah Water Quality Specialist, to Ryan Erhart, Makah Environmental Division Manager. Re: Makah Water Quality Standards Revision – Public Hearing Summary.

Criteria, dated March 19, 2020 and retransmitted on January 11, 2023.

D. Overview of EPA Criteria Recommendations

EPA issued its current ambient water quality criteria recommendations for recreational waters in 2012. The criteria are designed to protect the public from exposure to harmful levels of pathogens while participating in water-contact activities in all water bodies designated for such recreational uses.

EPA issued these recommendations consistent with the CWA. Amendments to the CWA by the BEACH Act of 2000 directed EPA to conduct studies associated with pathogens and human health, and to publish new or revised criteria recommendations for pathogens and pathogen indicators based on those studies. Prior to 2012, EPA had last issued recreational water quality criteria recommendations in 1986. Relative to the 1986 ambient water quality criteria recommendations, the 2012 recreational water quality criteria recommendations are identical for marine and fresh waters because they are based on the same illness rate estimate. EPA's 2012 recreational water quality criteria recommendations also include the addition of a statistical threshold value (STV), which is intended to be a value that should not be exceeded by more than 10 percent of the samples taken.

The 2012 Recreational Water Quality Criteria recommendations relied on the latest research and science, including studies that show a link between illness and fecal contamination in recreational waters. The criteria are based on the use of two bacterial indicators of fecal contamination, *E. coli* and Enterococci. The revised criteria are designed to protect primary contact recreation, including swimming, bathing, surfing, water skiing, tubing, water play by children, and similar water contact activities where a high degree of bodily contact with the water, immersion and ingestion are likely.

EPA's water quality criteria recommendations provide guidance for states and authorized tribes in establishing new or revised water quality standards. As discussed below in the section titled "EPA's Action on New and Revised Water Quality Standards," the Tribe's revisions at MWQS, Part II addressing the bacteria criteria to protect recreation in fresh waters, marine waters and lakes are consistent with EPA's 2012 Recreational Water Quality Criteria recommendations.

E. Scope of EPA's Action

The Tribe's submission to EPA for CWA section 303(c) review and action revises the bacteria criteria at MWQS, Part II, Sections 4, 5, and 7 to protect fresh waters, marine waters and lakes designated for recreational use.

EPA is only acting on the revised WQS adopted into regulation by the Tribe and identified in the Tribe's April 28, 2023 submittal. EPA is taking no action on the already existing sections of the MWQS in the Tribe's April 28, 2023 submittal because these sections are not new or revised WQS that EPA has the authority to review and act on.

In addition, the Tribe's April 28, 2023, submission included the adoption of certain provisions that are not WQS that EPA has the authority to review and act on under CWA section 303(c) and 40 C.F.R. Part 131. These non-WQS provisions are discussed in the section titled "Provisions that EPA is Taking No

Action On.”

Today’s action applies only to waters under the jurisdiction of the Makah Tribe, as defined in 18 U.S.C. § 1151. Nothing in this decision document shall constitute an approval or disapproval of a WQS that applies to waters under the jurisdiction of the state of Washington.

III. EPA’s Action on New and Revised Water Quality Standards

The following section summarizes EPA’s action and rationale for each provision. Please refer to the MWQS for the complete text of the new and revised WQS. The bold portions of the text indicate the revised language and the strikethrough portions indicate the deleted or reformatted language that are the subject of EPA’s action.

A. Action on Revised Bacteria Criteria

EPA Action

In accordance with its CWA authority, 33 U.S.C. § 1313(c)(3) and 40 C.F.R. Part 131, EPA approves the revised WQS at MWQS, Part II, as shown in bold.

SECTION 4. Freshwater Designated Uses and Criteria

(2) Water quality criteria.

(g) Recreation uses.

Table 5. Water Contact Recreation Bacteria Criteria in Fresh Water

Category	Bacteria Indicator
Primary contact recreation	Enterococci organism levels must not exceed a geometric mean value of 33/100 mL, with no single sample value exceeding 62/100 mL.
Secondary contact recreation	Enterococci organism levels must not exceed a geometric mean value of 165/100 mL.

Category	Criteria Element Indicator	Magnitude	
		GM (organisms/100 mL)	STV (organisms/100 mL)
Primary contact recreation	Enterococci	30	110
Secondary contact recreation	Enterococci	165	
Duration and Frequency: The water body GM should not be greater than the selected GM magnitude in any 90-day interval. There should not be greater than a ten percent excursion frequency of the selected STV magnitude in the same 90-day interval.			
GM: geometric mean; STV: statistical threshold value			

SECTION 5. Marine Water Designated Uses and Criteria

(2) Water quality criteria.

(i) Recreation.

Table 11. Water Contact Recreation Bacteria Criteria in Marine Water

Category	Bacteria Indicator
Primary contact recreation	Enterococci organism levels must not exceed a geometric mean value of 32/100 mL, with no single sample value exceeding 104/100 mL.
Secondary contact recreation	Enterococci organism levels must not exceed a geometric mean value of 160/100 mL.

Category	Criteria Element Indicator	Magnitude	
		GM (organisms/100 mL)	STV (organisms/100 mL)
Primary contact recreation	Enterococci	30	110
Secondary contact recreation	Enterococci	160	
Duration and Frequency: The water body GM should not be greater than the selected GM magnitude in any 90-day interval. There should not be greater than a ten percent excursion frequency of the selected STV magnitude in the same 90-day interval.			
GM: geometric mean; STV: statistical threshold value			

SECTION 7. Lake Designated Uses and Criteria

(3) Water quality criteria.

(a) Recreation Uses.

Table 13. Water Contact Recreation Bacteria Criteria in Lakes

Category	Bacteria Indicator
Primary contact recreation	Enterococci organism levels must not exceed a geometric mean value of 33/100 mL, with no single sample value exceeding 62/100 mL.
Secondary contact recreation	Enterococci organism levels must not exceed a geometric mean value of 165/100 mL.

Category	Criteria Element Indicator	Magnitude	
		GM (organisms/100 mL)	STV (organisms/100 mL)
Primary contact recreation	Enterococci	30	110

Secondary contact recreation	Enterococci	165	
Duration and Frequency: The water body GM should not be greater than the selected GM magnitude in any 90-day interval. There should not be greater than a ten percent excursion frequency of the selected STV magnitude in the same 90-day interval.			
GM: geometric mean; STV: statistical threshold value			

B. EPA Rationale

Based on EPA’s review, the revisions to the Tribe’s recreational water quality criteria are based on a sound scientific rationale, as explained in EPA’s 2012 Recreational Water Quality Criteria recommendations.⁸ As part of the revisions, the Tribe reformatted Tables 5, 11 and 13, however, the MWQS revisions do not include secondary contact recreation. A comparison of the Tribe’s recreational water quality criteria for primary contact recreation and EPA’s recommendations is presented below.

Table 1: Comparison of the Tribe’s Primary Contact Recreation Revised Criteria with EPA’s 2012 Recreational Water Quality Criteria Recommendations

Criteria Component	EPA’s 2012 Recommendations	Makah Tribe’s Revisions
Indicator	Enterococci (marine & fresh) or <i>E. coli</i> (fresh)	Enterococci (marine & fresh)
Magnitude (CFU or MPN/100 mL)	<u>Recommendation 1</u> – Illness Rate of 36/1,000 Enterococci: GM = 35; STV = 130 <i>E. coli</i> : GM = 126; STV = 410	Adopted EPA’s Recommendation 2 for Enterococci: Illness Rate of 32/1,000 Enterococci: GM = 30; STV = 110
	<u>Recommendation 2</u> – Illness Rate of 32/1,000 Enterococci: GM = 30; STV = 110 <i>E. coli</i> : GM = 100; STV = 320	
Duration and Frequency – GM	Not to be exceeded in any 30-day interval	The Tribe uses a 90-day interval which is consistent with the 2015 EPA Policy Memo. ⁹
Duration and	Not to be exceeded more than 10%	Not to be exceeded more than 10% of the

⁸ 2012 RWQC

⁹ Communication from EPA’s Standards and Health Protection Division to the Water Quality Standards Coordinators: *Narrative Justification for Longer Duration Period for Recreational Water Quality Criteria*. Oct. 30, 2015. Although EPA’s criteria recommendations state that 30 days is considered to be an optimal duration period to capture both short-term and long-term variability of exposure conditions to protect recreational uses, EPA has since concluded that a geometric mean not to exceed 90 days, in combination with the protective criteria magnitudes, is protective of a primary contact recreation use and consistent with EPA’s criteria recommendations and data analysis.

Criteria Component	EPA’s 2012 Recommendations	Makah Tribe’s Revisions
Frequency – STV	of the time in the same 30-day interval assessed for the GM	time in the same 90-day interval, which is consistent with the 2015 EPA Policy Memo. ⁹

GM = Geometric Mean; STV = Statistical Threshold Value;
 CFU = Colony Forming Units; MPN = Most Probable Number

1. Indicator

The Tribe adopted Enterococci as an indicator of bacterial contamination in fresh water, marine waters and lakes, which is consistent with EPA’s 2012 Recreational Water Quality Criteria recommendations regarding use of Enterococci as indicator of bacterial contamination in marine and fresh waters.¹⁰

EPA approves the use of Enterococci as an indicator of bacterial contamination in fresh water, marine waters and lakes because it is protective of designated uses and based on a sound scientific rationale, as explained in EPA’s 2012 Recreational Water Quality Criteria recommendations.

2. Magnitude

The Tribe adopted a GM of 30 organisms/100 mL and a STV of 110 organisms/100 mL for all waters designated for primary contact recreation use, which are the same as EPA’s recommended magnitudes for enterococci at an illness rate of 32/1,000 primary contact recreators.

EPA approves the magnitude portion of these criteria in fresh water, marine waters and lakes because they protect designated uses and are based on a sound scientific rationale, as explained in EPA’s 2012 Recreational Water Quality Criteria recommendations.

3. Duration and Frequency

The Tribe specified that for enterococci, the GM should not be exceeded over a 90-day interval and the STV must not be exceeded more than 10% of the time within the same 90-day period.

As stated in EPA’s 2012 Recreational Water Quality Criteria recommendations, 30 days is considered to be an optimal duration period to capture both short-term and long-term variability of exposure conditions to protect recreational uses. However, EPA has since concluded that a geometric mean not to exceed 90 days, in combination with the protective criteria magnitude, is also protective of a primary contact recreation use and consistent with EPA’s criteria recommendations and data analysis.¹¹ In addition, analysis of data from waters that experience short-term variability, or “transient fluctuations,” from periodic high concentration releases exhibit very similar criteria attainment assessment outcomes using a 30-day or 90-day

¹⁰ 2012 RWQC

¹¹ 2015 EPA Policy Memo

assessment period, when both the GM and STV criteria components are evaluated as part of the same distribution of water quality data.

Therefore, EPA approves the 90-day interval since it is scientifically defensible and protective of the Tribe's recreation uses.

4. Summary

As shown in Table 1 and discussed above, EPA has determined that each component of the Tribe's revised bacteria criteria (indicator organism, magnitude, duration, and frequency) is based on a sound scientific rationale, as explained in EPA's 2012 Recreational Water Quality Criteria recommendations and the 2015 EPA Policy Memo (*Narrative Justification for Longer Duration Period for Recreational Water Quality Criteria paper from EPA's Standards and Health Protection Division, October 2015*). Therefore, the Tribe's revised bacteria criteria are protective of primary contact recreation in fresh waters, marine waters and lakes for the reasons discussed in EPA's criteria development document.¹² EPA addresses the remaining rule revisions in the section below titled, "Provisions that EPA is Not Taking Action On."

IV. Provisions that EPA is Not Taking Action On

EPA has reviewed revisions to certain provisions that were adopted by the Tribe at (ii), (iii) and (iv), after Tables 5, 11 and 13, and included in the April 28, 2023 submittal. These revisions are shown with strikeouts and in bold:

- (ii) It is preferable to average by season and include five or more data collection events within ~~each a period of 90 days period.~~
- (iii) When averaging bacteria sample data for comparison to the geometric mean criteria, the period of averaging should not exceed ~~12 months~~ **90 days**, and should have sample collection dates well distributed throughout the ~~reporting~~ **averaging** period.
- (iv) **Beach average:** When determining compliance with the geometric mean and single sample bacteria criteria in or around small sensitive areas, such as popular swimming beaches, it is recommended that ~~multiple~~ **at least 3** samples are taken throughout the area during each visit. Such multiple samples should be arithmetically averaged together (to reduce concerns with low bias when the data is later used in calculating a geometric mean) to reduce sample variability and to create a single representative data point.

EPA has determined that the revisions are not WQS. Specifically, the revision to subsection (ii) expresses a preference for averaging and is not a legally binding provision and therefore not a WQS. The revision to subsection (iii) relates to data sufficiency for assessing compliance with the criteria and does not express or establish a desired condition or instream level of protection for waters and therefore is not a WQS. The revision to subsection (iv) both expresses a preference for the number of samples that is not legally binding and relates to data sufficiency and is therefore not a WQS. EPA is taking no action

¹² 2012 RWQC

on these revisions because they are not new or revised WQS that EPA has the authority to review and approve or disapprove pursuant to CWA Section 303(c), 33 U.S.C. §1313(c)(3).¹³

¹³ What Is a New or Revised WQS Under CWA 303(c)(3)? FAQs, October 2012. Available at <https://www.epa.gov/sites/default/files/2014-11/documents/cwa303faq.pdf>