

**FINAL**  
**Response to Significant Comments**

Cherokee Trout Farm (NC0054992)  
Eastern Band of Cherokee Indians Trout Hatchery (NC0052451)

**May 21, 2024**



**U.S. Environmental Protection Agency**  
**Region 4**  
Water Division  
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## Introduction

The Cherokee Trout Farm and the Eastern Band of Cherokee Indians (EBCI) Trout Hatchery are existing source concentrated aquatic animal production (CAAP) facilities located within the EBCI Tribal boundary. The current administratively continued National Pollutant Discharge Elimination System (NPDES) permits for the two facilities were issued June 9, 2017, and expired on June 9, 2022. The EPA received a complete application from each facility at least 180 days prior to the expiration date and the permits became administratively continued upon expiration.

On May 25, 2022, the EPA released for public notice and comment the two draft NPDES permits. In accordance with 40 CFR § 124.10, the public notices were published on EPA's website and in the Cherokee One Feather. The first public comment period lasted for 30-days and ended on June 24, 2022. The EPA received written comments on the draft permits and addressed those comments in the second drafts of the supporting documents for the permits.

The permits were then public noticed a second time, beginning on October 27, 2022, and ending on November 26, 2022. The EPA received written comments during the second public notice, has addressed those comments in the supporting documents for the final permits, and is responding to those comments in the sections of this document below.

### Response to Comments Summary

In accordance with 40 Code of Federal Regulations (CFR) § 124.17, EPA must issue a Response to Comments (RTC) document at the time of the final permit decision. The RTC is required to have certain information: 1) specify any provisions of the draft permit that have been changed in the final permit and the reason for the change; and 2) briefly describe and respond to all significant comments on the draft permit and supporting documents raised during the public comment period.

The EPA received comments from one individual during both public comment periods. During the first public comment period, the comments addressed the pending completion of the Antidegradation Review, Clean Water Act (CWA) § 401 Certification, National Historic Preservation Act (NHPA) consultation, Endangered Species Act (ESA) consultation, and Fish and Wildlife Coordination Act (FWCA) consultation for both permits. During the second public comment period, the comments included questions about the Antidegradation Analysis Report completed by EBCI and the 401 Certification.

### Changes to the Statements of Basis and Supporting Documents Following First Public Notice (May 25, 2022 – June 24, 2022)

In accordance with 40 CFR § 124.17(a)(1), EPA is required to specify any revised provisions in the draft permit record. No revisions were made to the draft permits based on the comments received during the first public notice period. However, there were revisions made in the draft Statements of Basis and below is a summary of changes following the first public notice:

- EPA documented the completion of the Antidegradation Review, CWA § 401 Certification, and NHPA consultation through coordination between the EPA and the EBCI.
- EPA documented the completion of the ESA consultation and FWCA consultation through coordination with the U.S. Fish and Wildlife Service.

**Changes to the Statements of Basis and Supporting Documents Following Second Public Notice (October 27, 2022 – November 26, 2022)**

No revisions were made to the draft permits based on the comments received during the second public notice period. Below is a summary of changes made to the draft Statement of Basis for the EBCI Trout Hatchery following the second public notice:

- The Antidegradation Analysis Report was re-public noticed by the EBCI to include the determination that some pollutant parameters will be increased based on a proposed increased feed rate at the facility. The EBCI determined that the increased pollutant load will use additional assimilative capacity and increase nutrient concentrations within Straight Fork. The usage of additional assimilative capacity in the receiving streams was found to be in the Tribe's interest and no alternatives were found.

### Summary of the comments received during the first public comment period (May 25, 2022 – June 24, 2022)

1. **Comment:** Commenter expressed concerns about the draft permit not containing complete information regarding antidegradation, CWA 401 certifications, and consultations required under ESA Section 7 and the FWCA.

**Response:** During the first comment period, the draft Statements of Basis stated that the Antidegradation Review, CWA § 401 Certification, NHPA consultation, ESA consultation, and FWCA consultation were pending completion. Following the first public notice, the EPA completed all the above-mentioned processes and revised the Statements of Basis for both permits. The permits underwent a second public notice with the full draft permit record made available to the public.

2. **Comment:** Commenter expressed concern about the lack of limits for nitrogen, ammonia, solids, and phosphorus.

**Response:** EPA conducted a reasonable potential analysis (RPA) for each facility to determine if the discharge will cause or contribute to an exceedance of a water quality standard pursuant to 40 CFR § 122.44(d). Due to the lack of EBCI numeric nutrient criteria, EPA ecoregional criteria was used to conduct the RPA for nutrients.

For the Cherokee Trout Farm (NC0054992), the EBCI determined that the no additional assimilative capacity would be used for the pollutants of concern. Regarding the Antidegradation Analysis Report for the EBCI Trout Hatchery, it was determined that the increase in feed rate will use additional assimilative capacity and increase nutrient concentrations within the receiving waterbody. However, no significant adverse effect to water quality will occur and the designated uses will be maintained and protected in accordance with the antidegradation procedures.

The permits contain effluent limits for total suspended solids and monitoring for nitrogen, phosphorus, turbidity, and total ammonia nitrogen. In addition, the monitoring information for these parameters can be used to determine if effluent limits are necessary during the permit term or when the permits are reissued.

3. **Comment:** Commenter expressed general concern about the draft permit not dealing with climate change issues, such as warming of waters, nutrients, and lower river flows from droughts.

**Response:** To assess the stream health and the potential impacts of the facilities' discharge to the receiving streams, including river flow conditions and temperature, the permits require in-stream biomonitoring to occur annually throughout the full permit term (5 years). See response to comment 2 regarding nutrients.

4. **Comment:** Commenter expressed general concern for environmental justice issues.

**Response:** There were no comments received that addressed a specific concern for an environmental justice issue. The EPA did not identify any environmental justice issues related to the issuance of the NPDES permits. The EPA collaborated with the EBCI throughout the issuance process to ensure awareness of any changes from the previous permits. Through the 401 Certification process, the EBCI

certified that the permits do not allow violations of the EBCI water quality standards and required the inclusion of a special condition for flow measurements and annual biomonitoring. Pursuant to the EBCI Water Quality Standards Administrative Rules (effective March 28, 2019),<sup>1</sup> the EBCI has determined that these permit issuances are in the tribe's best interest.

5. **Comment:** Commenter requested a public hearing pursuant to 40 CFR § 124.11.

**Response:** EPA has discretion to hold a public hearing on draft NPDES permits. EPA elected to not hold a public hearing due in part to the draft permit record being revised and a second public comment period conducted.

6. **Comment:** Commenter requested an extended public comment period pursuant to 40 CFR § 124.13.

**Response:** EPA has discretion on whether to extend the public comment period. While EPA did not extend the comment period, EPA did public notice the draft permit and supporting documents during a second public notice that allowed for an additional 30-day comment period.

7. **Comment:** Commenter requested EPA to reopen the comment period after a revised draft permit and statement of basis were completed.

**Response:** EPA has discretion to reopen the public comment period. EPA did not reopen the comment period for the first draft permit; however, EPA did public notice the draft permit and supporting documents during a second public notice and comment period.

### **Summary of the comments received during the second public comment period (October 27, 2022 – November 26, 2022)**

1. **Comment:** Commenter claimed that the EBCI must create a final antidegradation report and include a response to comments in the final report.

**Response:** The EPA published a second public notice and received public comments on antidegradation issues during the second public comment period. The EBCI public noticed the revised Antidegradation Analysis Report for the EBCI Trout Hatchery and posted the report in the Cherokee One Feather for a 30-day public comment period in November 2023. The EBCI addressed all comments from the previous public notice within the revised Antidegradation Analysis Report. The EBCI received no comments during the second public comment period on the revised Antidegradation Analysis Report. The November 2023 Antidegradation Analysis Report is the final version.

2. **Comment:** Commenter claimed that the stream tier designation is wrong, and that Tribal resource waters are considered tier 2.5, not tier 2.

**Response:** All Cherokee waters are classified into the appropriate protection tier, as determined by the Division of Agriculture and Natural Resources (DANR) with appropriate public involvement, pursuant to the EBCI Water Quality Standards Administrative Rules. The EBCI confirmed that the stream tier

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<sup>1</sup> Eastern Band of Cherokee Indians. 2018. Eastern Band of Cherokee Indians (EBCI) Administrative Regulations Title 15, Subchapter B: Surface Water Quality Standards. < [www.epa.gov/sites/default/files/2019-04/documents/ebci\\_wqs\\_0001\\_081518.pdf](http://www.epa.gov/sites/default/files/2019-04/documents/ebci_wqs_0001_081518.pdf) >

designation for Straight Fork is Tier 2.

- Comment:** Commenter claimed the tribe's statement in the antidegradation report is false and that there is additional load from either farm or that no assimilative capacity would be used.

**Response:** From the EPA's second public comment period of the draft permits and revised supporting documents, issues were identified in the Antidegradation Review for the EBCI Trout Hatchery. The EPA coordinated with the EBCI to address those antidegradation issues identified. EBCI public noticed another Antidegradation Review in November 2023, pursuant to the Antidegradation Policy and Implementation Plan described in the EBCI Water Quality Standards Administrative Rules.

The Antidegradation Analysis Report for the EBCI Trout Hatchery includes the determination that some chemical parameters will be increased based on a proposed increased feed rate at the facility. It was determined that this increase will use additional assimilative capacity and increase nutrient concentrations within Straight Fork. The increase was found to be in the Tribe's interest and no alternatives were found; however, no significant adverse effect to water quality will occur.

The Antidegradation Analysis Report for the Cherokee Trout Farm was not revised. The original determination made by EBCI that the expansion of the Cherokee Trout Farm will not use additional assimilative capacity remains final.

- Comment:** Commenter requests the tribe analyze more alternatives.

**Response:** The EBCI is the responsible party for conducting an antidegradation analysis pursuant to the Antidegradation Policy and Implementation Plan described in the EBCI Water Quality Standards Administrative Rules. The EBCI examined additional possible alternatives within the revised Antidegradation Analysis Report.

- Comment:** Regarding the 401 Certification, the commenter asks whether there will be a violation of water quality standards since there will be an increase in flow. The commenter also claims that the 401 Certifications rely on wrong and unsupported antidegradation reports.

**Response:** As part of the 401 Certifications, the EBCI has requested the permits contain a provision for annual instream biomonitoring to ensure that flow is not being altered in a way that affects aquatic life in Straight Fork between the intake and the discharge. Additionally, the EPA can modify the permit during the permit term if it is found that water quality standards are not being met pursuant to 40 CFR § 122.62(a).

The Antidegradation Analysis Report for the Cherokee Trout Farm was accurate and final following the first public notice. The EPA coordinated with the EBCI to revise the EBCI Trout Hatchery Antidegradation Analysis Report and ensure that the information is accurate. The 401 Certifications and the Antidegradation Analysis Reports are accurate and considered final.

- Comment:** The commenter claims that the 401 Certifications require two years of in-stream monitoring and asks whether the EPA is requiring monitoring for the full permit term.

**Response:** The permits require in-stream biomonitoring to occur annually throughout the full permit term (5 years).

7. **Comment:** The commenter asks why the monitoring is needed since questions about maintaining water quality standards should be answered prior to permit issuance.

**Response:** In the Statements of Basis, the EPA describes why the in-stream biological monitoring is included, which is to address the tribe's flow criteria, which states, "Natural daily, seasonal, annual, and inter-annual fluctuations of flow shall be maintained to support the naturally balanced indigenous biological community including those species most sensitive to alterations in flow, including trout and all life stages of trout." The annual biomonitoring will be assessed by the EPA to ensure that the flow criteria is being met.