



Rule Updates:

U.S. EPA's Proposal to Promulgate Federal Baseline Water Quality Standards for Indian Reservations & Revisions to the Federal Water Quality Standards Regulation to Protect Tribal Reserved Rights

Southwest Tribal Clean Water Act Training
March 4, 2024

U.S. Environmental Protection Agency
Office of Water, Water Quality Standards Program



Proposal to Promulgate Federal Baseline Water Quality Standards for Indian Reservations

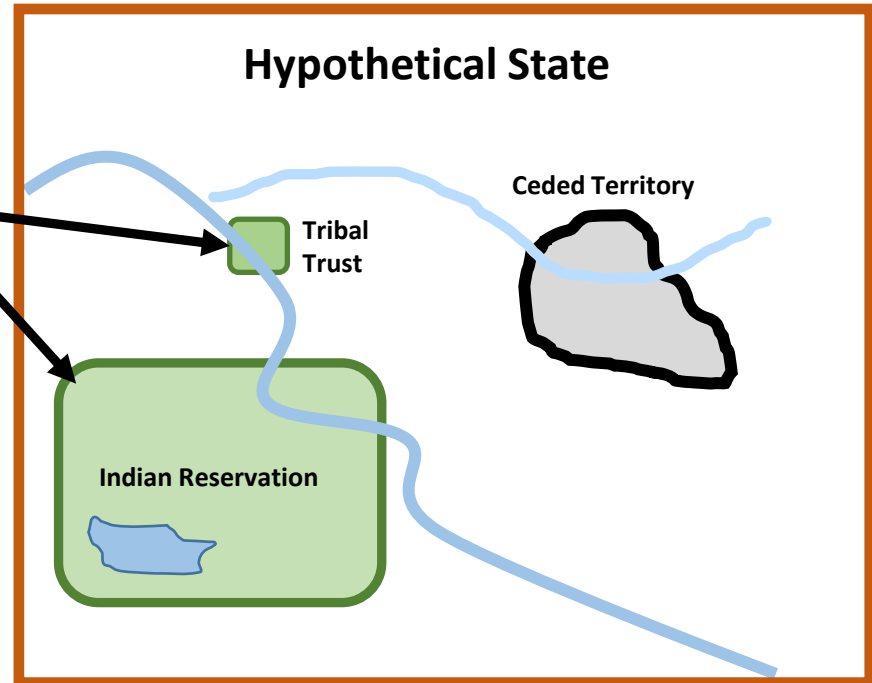


Scope of Baseline WQS Rule

Baseline WQS Rule
For Indian reservation waters that currently do not have Clean Water Act effective WQS in place

separate from
and
complementary to

Tribal Reserved Rights Rule
To protect rights in ceded territories where states establish and maintain WQS under the Act





Status Update

- April 27, 2023: EPA Administrator signed the proposed rule to establish federal “baseline” WQS for Indian reservation waters that currently do not have WQS in effect under the Clean Water Act (CWA).
- 90-Day Tribal Consultation with EPA HQ: May 3 – August 1
 - Included two national tribal listening sessions (6/21, 7/6)
- 90-Day Public Comment Period: May 5 – August 3
 - Included two virtual public hearings (6/27, 7/12)
- Administrator Signs Final Rule: ~Spring 2024



Overview

- Over 80% of Indian reservations do not have CWA-effective water quality standards (WQS).
- EPA’s promulgation of **baseline WQS** would
 - establish CWA-effective WQS for waters on over 250 Indian reservations,
 - safeguard water quality,
 - apply until tribes obtain “treatment in a similar manner as a state” (TAS) and EPA-approved WQS.
- The baseline WQS would be the legal foundation for:
 - water quality-based effluent limits (WQBELs) in NPDES permits,
 - 401 certifications of federal licenses and permits,
 - analyzing permits for dredged and fill material under section 404, and
 - identifying impaired waters.



Overview of Proposed Baseline WQS

Water quality standards consist of three main components

The proposed baseline WQS include:

- 1) Aquatic life (including fish consumption), recreation and traditional/cultural **designated uses**;
- 2) Narrative water quality **criteria** to protect the uses above; **Translation procedures** for EPA to derive numeric values from the narrative criteria; and
- 3) Provisions for **antidegradation, mixing zones, compliance schedules**, and an administrative **procedure to revise designated uses and establish WQS variances**.



Proposed Baseline Narrative Water Quality Criteria

All waters shall be free from:

- Toxic, radioactive, deleterious, conventional, non-conventional, or other pollutants in amounts that will prevent attainment of...designated uses; or
- Adverse impacts to the chemical, physical, or biological integrity caused by pollutants or pollution that prevent the attainment of...designated uses; or
- Substances attributable to...discharges that settle to form objectionable deposits; float as debris, scum, oil, or other matter to form nuisances; produce objectionable color, odor, taste, or turbidity; or produce undesirable or nuisance aquatic life; or
- Conditions that could cause jeopardy to the continued existence of any threatened or endangered species under the Endangered Species Act....

All waters shall maintain a level of water quality... that provides for the attainment and maintenance of the WQS of downstream waters....



Proposed Baseline Narrative Criteria Translation Procedures

<i>Option One</i>	
For parameters for which EPA has section 304(a) criteria recommendations	Translate the baseline narrative criteria using the section 304(a) criteria recommendations .
<i>Option Two</i>	
For parameters for which EPA has section 304(a) criteria recommendations, and data are available that more accurately reflect site-specific conditions	Translate the baseline narrative criteria using the section 304(a) criteria recommendations modified to reflect site-specific conditions (e.g., tribal fish consumption rate, ambient monitoring data).
<i>Option Three</i>	
Where tribal or state numeric criteria are available that are more appropriate, and for parameters for which EPA does not have CWA section 304(a) criteria recommendations.	Translate the baseline narrative criteria using numeric criteria available in: <ul style="list-style-type: none"> • Tribal WQS not yet CWA effective, or • Adjacent state or adjacent tribal CWA-effective WQS
<i>Option Four</i>	
For waters of the Great Lakes System	Translate the baseline narrative criteria using required criteria methodologies for the Great Lakes Basin .
<i>Option Five</i>	
If none of the above options apply or are available	EPA may rely on existing CWA implementation provisions to translate applicable narrative criteria, as necessary.



Where Would Baseline WQS Apply?

As proposed, all Indian reservation waters except...

- **Automatic exceptions:**

1. Where tribes have adopted EPA-approved WQS under the CWA (47 tribes)

2. Where EPA has promulgated other federal WQS (1 tribe)

3. Where states have authority from Congress to administer WQS over Indian country:

- All Indian country: Maine (4 tribes), South Carolina (1 tribe)

- Partial areas of Indian country: Oklahoma, Washington (1 tribe)

- **Case-by-case exceptions:**

4. Where a tribe chooses to be excluded from baseline WQS coverage and communicates to the Regional Administrator.

The rule would not apply in non-reservation areas of Indian country, such as allotments and dependent Indian communities located off-reservation.



Summary of Public Comment and Consultation Periods

Public Comment Period

- Verbal comments
 - None
- Written comments
 - Tribes – 10 comment letters
 - Tribal associations – 3
 - States – 21
 - State associations – 3
 - Industries and industry associations – 8
 - NGOs and academia – 3
 - Individual persons – 11
 - Mass mailers – 3,254
 - Total – 3,314 comment letters
(59 unique comments)

Tribal Consultation Period

- Government-to-government consultation meetings
 - Total – 4
- National and regional tribal meetings
 - Total – 7
- Listening sessions
 - Total – 2



How EPA Will Consider Tribal Input

- All written comments are posted to the public docket for the rule at www.regulations.gov/docket/EPA-HQ-OW-2016-0405), and will be considered and addressed in EPA's Response to Comment document accompanying the final rule.
- The Tribal Consultation Summary and the Response to Comment document will be posted in the docket for the final rule.



Revisions to the Federal Water Quality Standards Regulation to Protect Tribal Reserved Rights

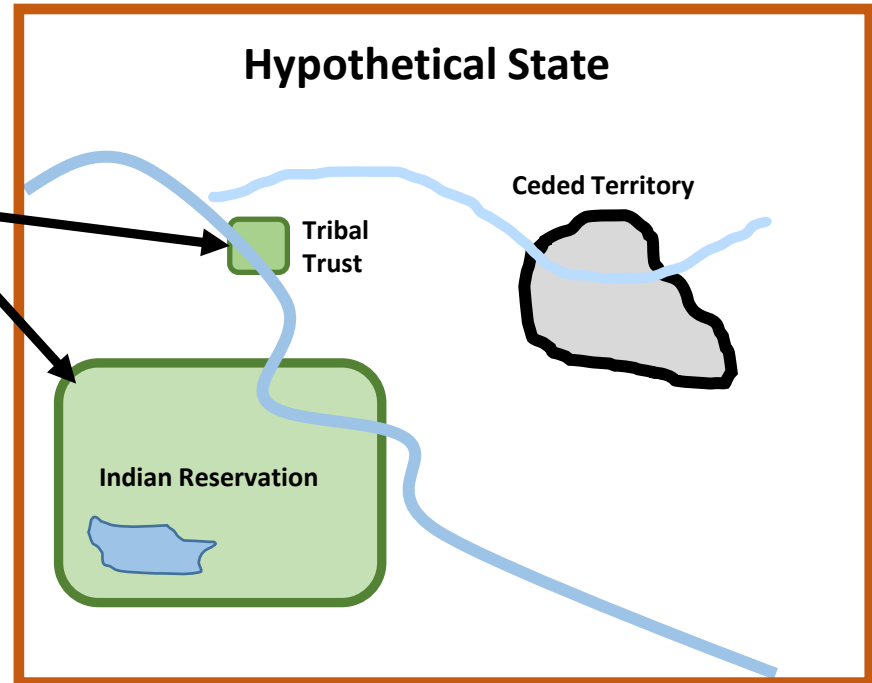


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Overview

- On December 5, 2022, EPA proposed revisions to the federal water quality standards (WQS) regulation at 40 CFR Part 131.
- The proposed revisions would create a regulatory framework that would be applied case-specifically to protect aquatic and aquatic-dependent resources – such as fish – reserved to tribes through treaties, statutes, and executive orders, in waters of the United States.
- The rule aims to improve
 - protection of resources reserved to tribes and the health of tribal members exercising their reserved rights,
 - transparency and predictability for tribes, states, regulated community, and the public.



Background: How Are Water Quality Standards Established?

- Adopted into state or authorized tribal law
- After a state or authorized tribe adopts new or revised WQS, the CWA requires the state or authorized tribe to submit them to EPA for approval or disapproval
- EPA reviews state and authorized tribal submissions for compliance with the federal WQS regulation at 40 CFR part 131 (and 132 for the Great Lakes Basin)
- Where the EPA Administrator determines new or revised WQS are necessary for a state or tribe, the CWA authorizes EPA to promulgate federal WQS



What Did EPA Propose?

- Where tribal reserved rights exist, states must account for those rights in revising their WQS.
- WQS must account for unsuppressed use of reserved resources, based on available data.
 - Determined by considering past, present and potential future use of the resource.
- WQS must protect the health of the tribal members exercising reserved rights to at least the same risk level at which the general population of the state would otherwise be protected.
 - EPA anticipates the primary application of this provision to be in determining the appropriate cancer risk level when deriving criteria to protect human health.



What Did EPA Propose? con't

- State WQS submissions must include supporting information about any applicable tribal reserved rights and the technical basis for WQS that protect the right.
- States must re-evaluate whether WQS need to be revised to protect applicable tribal reserved rights at each triennial WQS review.
- EPA will initiate tribal consultation with the right holders when reviewing WQS submissions to determine whether state WQS protect applicable reserved rights.



Tribal Consultation & Engagement

- EPA held a 90-day pre-proposal tribal consultation period from June 11 to September 13, 2021 to gain an understanding of tribal views on a potential rulemaking.
- EPA held a second 90-day tribal consultation period concurrent with a 90-day public comment period on the proposed rule. The public comment period closed on March 6, 2023.



Comments Received and Next Steps

- EPA received 162 unique written comments from
 - 47 tribes and tribal organizations
 - 13 individual states + 2 organizations representing states
 - 30 environmental advocacy groups
 - 21 industry groups and dischargers
- All written comments are posted to the public, online docket for the proposed rule at <https://www.regulations.gov/docket/EPA-HQ-OW-2021-0791>.
- As part of the rulemaking process EPA will develop a tribal consultation summary and a response to comments document that responds to all of the comments received.
- EPA is currently targeting early 2024 to publish a final rule.



For Additional Information

Proposal to Promulgate Federal Baseline Water Quality Standards for Indian Reservations

- James Ray, ray.james@epa.gov
- EPA's website for this rulemaking: <https://www.epa.gov/wqs-tech/promulgation-tribal-baseline-water-quality-standards-under-clean-water-act>

Revisions to the Federal Water Quality Standards Regulation to Protect Tribal Reserved Rights

- Erica Fleisig, Fleisig.Erica@epa.gov
- EPA's website for this rulemaking: <https://www.epa.gov/wqs-tech/protecting-tribal-reserved-rights-in-WQS>