



Protecting Tribal Reserved Rights in Water Quality Standards Potential Revisions to the Federal Regulations

Tribal Wetlands Workshop

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U.S. Environmental Protection Agency
Office of Water



Overview

- Many tribes hold rights reserved through treaties, statutes, or Executive Orders (herein “reserved rights”) to aquatic or aquatic-dependent resources in waters where states have Clean Water Act jurisdiction to establish water quality standards (WQS).
- EPA is considering revising the federal WQS regulations at 40 CFR Part 131 to explain how tribal reserved rights must be protected when states or EPA are establishing and revising WQS.
- This is separate from and complementary to EPA’s concurrent action to establish baseline WQS for waters on Indian reservations that currently do not have EPA-approved WQS in place.



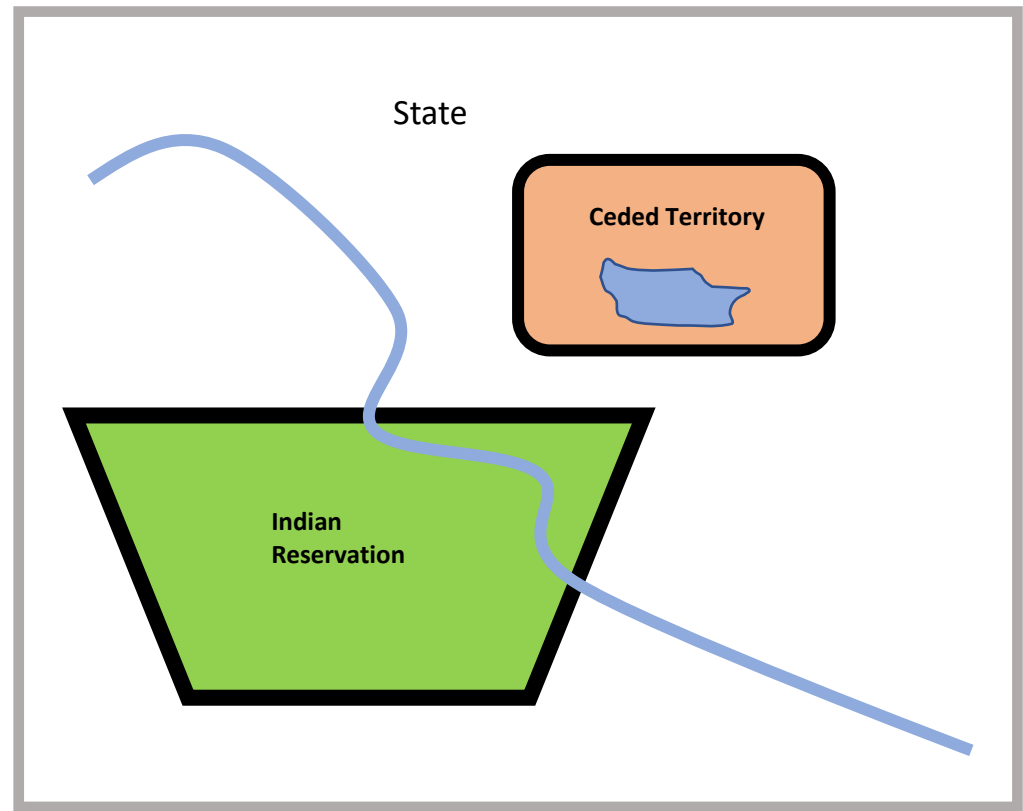
Scope of Tribal Reserved Rights vs. Baseline Rules

Federal Baseline WQS Rule:

EPA is proposing to promulgate baseline WQS on Indian reservations that currently do not have Clean Water Act-effective WQS in place.

Tribal Reserved Rights Rule:

EPA is proposing to promulgate revisions to its WQS regulations to require that state WQS protect resources reserved to tribes in waters under state jurisdiction (e.g., in ceded territory) through treaties and equivalent legal agreements.





Background: What Are Water Quality Standards?

- Core of water management programs
- Define the water quality goals for a waterbody
- 3 components of WQS:
 - Designated Uses – narrative goals for a waterbody, such as recreation and protection of aquatic life
 - Criteria – numeric or narrative pollutant levels to protect the uses
 - Antidegradation policy – protects existing uses and high quality waters
- Basis for
 - [Listing waters as impaired](#) for elevated pollutant levels under section 303(d) of the CWA
 - [Total maximum daily loads \(TMDL\)](#) targets for remediating waters with elevated pollutant levels
 - [Water quality-based effluent limits](#) under the state, tribal or National Pollutant Discharge Elimination System (NPDES)
 - [Certification under section 401 of the CWA](#)



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 regulations at 40 CFR Part 131 (and 132 for the Great Lakes)
- Where the EPA Administrator determines new or revised WQS are necessary for a state or tribe, the CWA authorizes EPA to promulgate federal WQS on behalf of a state or tribe



Background: How Are Tribal Reserved Rights Considered in the WQS Process?

- In 2016, after several years of consultation and coordination with tribes about reserved rights to fish for subsistence in Maine and in the Pacific Northwest, EPA took actions in Maine and Washington to harmonize WQS with tribal reserved rights.
- Specifically, EPA required that human health criteria established for waters under state jurisdiction where tribes reserved the rights to fish for subsistence/sustenance be set at more stringent levels to protect tribal fish consumers in those waters.
- EPA took a different position on this issue in 2019, concluding that tribal reserved rights do not require any special consideration in the WQS context.
- EPA has concluded that its 2016 position was consistent with the intent of the CWA.



Potential National Regulatory Framework

EPA is considering incorporating the following concepts into the WQS regulations at 40 CFR Part 131:

- States and EPA must not impair tribal reserved rights when establishing, revising, and approving WQS.
- As informed through consultation with applicable tribes, if tribal reserved rights exist in waters where the WQS will apply,

and

The level of water quality necessary to protect those rights is known,

then

Upholding those rights requires protecting that water quality.



Potential National Regulatory Framework, continued

EPA is considering providing the following options for states to ensure protection of applicable reserved rights in their development of WQS:

- Establishing designated uses that explicitly incorporate protection of tribal reserved resources.
- Establishing water quality criteria that protect tribal reserved rights in waters where those rights apply.
- Assignment of Tier 3 antidegradation protection (i.e., requirement to maintain and protect current and future improved water quality) in waters where tribal reserved rights apply and where current water quality is sufficient to protect those rights.



Potential Benefits of This Change to the Federal WQS Regulations

- Provide sustainable and transparent regulatory framework to require protection of tribal reserved rights in future WQS actions.
- Provide a framework for national discussion on how to harmonize the Clean Water Act with tribal reserved rights.



Next Steps

- EPA anticipates proposing this rule in spring 2022. EPA plans to provide additional opportunities to solicit comments from tribes once the rule is proposed.



For More Information

- EPA held two national listening sessions for tribal leaders and staff, on July 19 and August 23, 2021. Slides and a recording of the EPA presentation portion of both listening sessions are available online at EPA's website for this potential rule: <https://www.epa.gov/wqs-tech/protecting-tribal-reserved-rights-in-WQS>.
- Jennifer Brundage, Brundage.jennifer@epa.gov
- Clean Water Act and Water Quality Standards: <https://www.epa.gov/standards-water-body-health>