



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

AUG 11 2015

OFFICE OF WATER

Dear Honorable Leader:

The U.S. Environmental Protection Agency is initiating consultation and coordination with federally recognized Indian tribes to consider a potential rulemaking that would establish baseline water quality standards under the Clean Water Act for waters on Indian reservations that currently do not have EPA-approved WQS in place to protect water quality. The EPA's goal is to address the existing gaps in CWA protection of reservation waters where there are no existing EPA-approved WQS. Standards would establish baseline human health and environmental goals as the basis for the CWA protection. This potential rulemaking effort adds to a growing list of initiatives the EPA is undertaking that recognize the importance of tribal waters, tribal sovereignty, and the need to better protect the water resources that tribes rely on.

The potential benefits to tribes and the environment of establishing baseline WQS through a federal rulemaking are significant. WQS define the goals for the quality of reservation waters and serve as the foundation of the water quality-based pollution control program mandated by the CWA to protect human health, recreation, wildlife, aquatic life, and other uses. WQS are the cornerstone to prevent future degradation of waters, and improve water quality in impaired waters, by providing a basis to assess the health of water bodies and impose limits in permits to control pollution discharges, including upstream discharges.

The EPA strongly supports and will continue to encourage eligible tribes to obtain Treatment in a Similar Manner as a State under the CWA in order for tribes to establish their own WQS for approval by the EPA and to administer their own WQS program. The EPA recognizes, however, that not all tribes may seek TAS and some tribes may continue to experience challenges to establishing their own WQS. Out of over 300 tribes with Indian reservations, only 40 have EPA-approved tribal WQS in place. This means those tribal waters without WQS may not have the full suite of protections afforded under the CWA.

Establishing baseline WQS for Indian reservations through a federal rulemaking could ensure a baseline level of protection for tribal waters and a step in supporting tribal interests in protecting their water quality and use of reservation waters. In addition, baseline WQS could provide more protections now than currently exist to address concerns about waters flowing into the reservation from adjacent jurisdictions, until such time that the tribe establishes its own customized WQS and obtains the EPA's approval to make them effective under the CWA.

Working as government-to-government partners with tribes, the EPA seeks to explore this potential effort to establish baseline WQS for Indian reservations, and solicits feedback from tribes on factors to consider to ensure the EPA crafts an effective federal rulemaking that reflects tribes' interests in protecting reservation waters under the CWA. This effort is consistent with the EPA's responsibilities under the CWA and the goals of the EPA's 1984 Indian Policy. Some tribal leaders may recall that between 1999 and 2003, the EPA developed a draft rulemaking of federal WQS for those waters in Indian country that did not have EPA-approved WQS. The EPA is interested in building on elements of that earlier effort to ensure a baseline level of protection exists for reservation waters.

Enclosed is a consultation and coordination plan that includes a description of the action under consultation and the process the EPA intends to follow, including a timeline for the consultation and coordination period, and information on how you can provide input on this action. The EPA's consultation information is also available on EPA's Tribal Portal (<http://www.epa.gov/tribal/consultation>).

This consultation and coordination process will be conducted in accordance with the *EPA Policy on Consultation and Coordination with Indian Tribes* (<http://www.epa.gov/tribal/consultation>). The EPA invites you and your designated representative(s) to participate in this process. The EPA's anticipated timeline for the consultation and coordination period is expected to extend from the date of this letter to November 6, 2015.

If you have any questions, please contact Danielle Anderson (anderson.danielle@epa.gov) of my staff. We look forward to hearing from you on this important matter.

Sincerely,

A handwritten signature in blue ink that reads "Kenneth J. Kopocis". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

Kenneth J. Kopocis
Deputy Assistant Administrator

Enclosure

Consultation Plan For Considering a Baseline Water Quality Standards Proposed Rule

August 2015

Background Information

The EPA is exploring a federal rulemaking to establish baseline Water Quality Standards (WQS) for waters on Indian reservations that do not have Clean Water Act (CWA) WQS in place. This adds to a growing list of initiatives that the EPA is undertaking to better protect tribal water quality and uses. For example, the EPA proposed an action to streamline the TAS process for tribes on August 7 (see <http://water.epa.gov/scitech/swguidance/standards/wqslibrary/tribal.cfm>), and is planning to propose a process later this year for tribes to apply for the section 303(d) program for listing impaired waters and developing total maximum daily loads (TMDLs) (see <http://water.epa.gov/lawsregs/lawsguidance/cwa/tmdl/policy.cfm>).

This baseline WQS action is focused on establishing baseline federal WQS for Indian reservations that are not currently covered by EPA-approved WQS. Such WQS could be used in water quality permitting decisions that impact reservation waters, including permits directly upstream from reservation waters. At any time, tribes, with assistance from the EPA, could still seek to obtain TAS authority (under CWA section 518) to adopt and administer their own tribal-specific WQS for EPA approval. Tribe-adopted, EPA-approved WQS would supersede any baseline WQS established by this potential rulemaking.

The EPA is considering including a combination of CWA 101(a)(2) designated uses, numeric criteria, narrative “free from” criteria, and general WQS provisions in the baseline WQS. The EPA may also consider providing some very limited regional adjustments for consistency with other federal actions. However, the EPA recognizes that fully customized standards are best achieved by a tribe with TAS that develops its own WQS for approval by the EPA. Tribe-adopted, EPA-approved WQS best reflect tribal-specific circumstances and uses that are not feasible for national baseline WQS. Nonetheless, baseline WQS could be developed to be fully protective of water quality, and may be critical for those tribes that may never seek TAS or adopt their own WQS. This rulemaking could impact the EPA's direct implementation of the CWA on Indian reservations including facilitating the use of approved WQS in EPA-issued permits, providing water quality certifications, and other protective actions.

Tribal leaders may recall that in 1999-2003, the EPA initiated the process of promulgating federal WQS for Indian reservations that did not have EPA-approved WQS. The EPA is interested in your feedback on how we might build on elements of that earlier effort to better ensure Indian reservations have EPA-approved WQS and the full slate of protections under the CWA.

Potential Benefits for Tribes

The potential benefits of establishing baseline WQS through a federal rulemaking are significant given that WQS define the goals for a waterbody and serve as the foundation of the water quality-based pollution control program mandated by the CWA to protect human health, recreation, wildlife, aquatic life, and other uses.

In this potential rulemaking, the EPA would be providing a set of WQS that the EPA, states, and tribes would use on a consistent basis for water quality management decisions where there are currently no

EPA-approved WQS in place. The benefits of having federal WQS in place for reservation waters where no EPA-approved WQS exist include:

- Facilitating tribal participation with states and the federal government to inform water quality management decisions impacting those waters on the reservation;
- Establishing goals for the quality of reservation waters that are recognized under the CWA;
- Providing a basis for enforceable National Pollutant Discharge Elimination System (NPDES) permits to require controls beyond basic technology-based controls. (Water discharges allowed by NPDES permits must meet WQS set under the CWA for those receiving waters);
- Providing a mechanism to control discharges through other federal licenses and permits (CWA section 401 certification); and
- Protecting reservation water quality from upstream discharges flowing into reservation waters from other jurisdictions.

Areas for Consultation and Coordination

Consistent with the EPA's Policy on Consultation and Coordination with Tribes, the EPA seeks to consult and coordinate with federally recognized tribes to solicit feedback on all aspects of this potential rulemaking, including input on how best to structure and develop baseline WQS for Indian reservations which currently do not have EPA-approved WQS. The EPA is particularly interested in hearing from tribes on the following questions:

Questions relating to tribes' interests in protecting water quality:

- (1) What would an effective federal rulemaking look like to you and your tribe?
- (2) What water quality protection issues (or issues specifically related to WQS) are you and your tribe facing that should be considered in this potential rulemaking?
 - a. Concerns for reservation water quality and degradation of water quality?
 - b. Concerns for upstream sources of water pollution?
 - c. Concerns for neighboring state WQS?
 - d. Concerns for water uses relating to equity, safety, drinking water treaty rights, or economic interests?
- (3) Do tribes have examples of situations they are facing regarding water quality that could help inform, or that should be addressed, by this potential rulemaking?

Questions relating to the EPA's CWA implementation responsibilities:

- (4) What approaches in a potential rulemaking should the EPA consider to implement CWA WQS on reservations and be most effective for you and your tribe?

- (5) Do you have any concerns about this action? Are there any sensitivities or unintended consequences that the EPA should consider before moving forward on this action?
- (6) If the EPA provided baseline standards, would this change your tribe's interest in pursuing TAS?
- a. Would your tribe be more likely to pursue TAS? If yes, would your tribe be interested in using baseline standards as a starting point to develop more specific standards for reservation waters?
 - b. Would your tribe be more likely **not** to pursue TAS?
 - c. No effect?

Tribes may submit written consultation comments by email or mail to:

Danielle Anderson, anderson.danielle@epa.gov
USEPA Headquarters
William Jefferson Clinton Building
1200 Pennsylvania Avenue, N.W.
Mail Code: 4305T
Washington, DC 20460

Tribal Consultation and Coordination Process and Time Frame

Consultation and coordination with tribes on a proposed rulemaking will occur according to the table below. If the EPA decides to move forward with a proposed rulemaking, tribes will have the opportunity to further consult with the EPA once the rule is proposed. In addition, tribes may provide input as part of the public comment period that immediately follows the publication of a proposed rule.

The table on the next page describes the process and timeline for consultation and coordination on this action. Tribes may access this letter through the Tribal Consultation Opportunities Tracking System (TCOTS), located at: <http://tcots.epa.gov/oita/TConsultation.nsf/TC?OpenView>.

Tribal Consultation and Coordination Process and Timeline	
Date	Event
Date of this letter through November 6, 2015.	Consultation and coordination period
August 17-20, 2015	Information presentation and discussion at the Tribal Lands and Environment Forum. Minneapolis. MN EPA's Office of Water will participate in this conference, and is available for consultation discussions during the conference. For more information, see http://www7.nau.edu/itep/main/Conferences/conference/ . Session: USEPA Major Initiatives Discussion with Senior USEPA Staff, Tuesday, August 18, 10:30 a.m. to 12:00 p.m.
September 9-11, 2015	Information presentation and discussion at the Region 10 Region Tribal Operations Committee meeting. EPA's Office of Water will participate in this conference by telephone. Details will be announced via TCOTS and email, "Time-Sensitive U.S. EPA Office of Water Information and Tribal Participation Opportunities"
September 23, 2015 Time: 2:00 -4:00 p.m. EDT	Tribes-only information, coordination and consultation webinar* Details will be announced via TCOTS and email, "Time-Sensitive U.S. EPA Office of Water Information and Tribal Participation Opportunities"
October 18, 2015 Time: Afternoon	72 nd Annual Meeting, National Congress of American Indians, San Diego. CA. Session details to be determined. EPA officials will participate in this conference, and will be available for consultation discussions during the conference. For more information, see http://www.ncai.org/events/2015/10/18/72nd-annual-convention-and-marketplace .
October 26, 2015	Information presentation and discussion at the Region 9 Region Tribal Operations Committee meeting in Reno. NV. EPA's Office of Water will participate in the accompanying Annual Tribal/EPA conference, and is available for consultation discussions during the conference. Details will be announced via TCOTS and email, "Time-Sensitive U.S. EPA Office of Water Information and Tribal Participation Opportunities"

*The webinar will include two segments: The first segment will be used to coordinate and share information, and provide an opportunity for input and questions on the proposal. The second segment will provide an opportunity for consultation comments from tribal consultation officials.

Contact information for all events:

Danielle Anderson, anderson.danielle@epa.gov
EPA Office of Water
(202) 564-1631

For additional information regarding the prior federal core WQS rulemaking effort for Indian Country, please visit:

<http://water.epa.gov/scitech/swguidance/standards/wqsregs.cfm>

EPA has additional resources available that explain the Clean Water Act and Water Quality Standards, please visit:

<http://www2.epa.gov/laws-regulations/summary-clean-water-act>

<http://water.epa.gov/scitech/swguidance/standards>