

Fact Sheet: Proposed Federal Promulgation: Federal Baseline Water Quality Standards for Indian Reservations

Prepared by EPA for the July 22, 2021, Meeting with Region 9 Regional Tribal Operations Committee

Overview: EPA is proposing a federal promulgation to establish federal baseline water quality standards (WQS) under the Clean Water Act (CWA) for waters on Indian reservations that currently do not have EPA-approved, CWA WQS in place to protect water quality. Out of over 300 tribes with Indian reservations, only 46 currently have EPA-approved CWA WQS. Thus, the majority of tribal waters may not have the full suite of CWA protections. EPA recognizes that not all tribes may seek TAS and some tribes may continue to experience challenges in establishing their own CWA-effective WQS. This rule aims to close the gap in CWA WQS for tribal waters and is part of EPA's agency-wide efforts to recognize the importance of tribal waters, tribal sovereignty, and the need to better protect the water resources that tribes rely on. The June 2021 - September 2021 Tribal Government consultation and coordination will provide an opportunity for EPA to receive input from tribal governments to help shape a proposed rulemaking.

This rule builds upon previous EPA work efforts:

- Between 1999 and 2003, EPA developed but did not complete a rulemaking to establish federal "core standards" for Indian country waters.
- EPA published an Advance Notice of Proposed Rulemaking (ANPRM) in 2016 to solicit comments on promulgating "baseline" WQS but did not promulgate a final rule.
- EPA engaged extensively with tribal governments during both efforts.

Potential Benefits for Tribes

The potential benefits of baseline federal WQS would be significant, and include:

- 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);
- Facilitating tribal participation with states and the federal government to inform CWA based water quality management decisions impacting those waters on the reservation; and
- Protecting reservation water quality from upstream discharges flowing into reservation waters from other jurisdictions.

Why We Need Baseline Standards – Story of Two Tribes:

Pueblo of Jemez

- The Pueblo’s EPA-Tribal Environmental Plan (ETEP) includes development of water quality standards as a long-term priority.
- Environmental staff at the Pueblo implement a surface water monitoring program. They also provide information about water quality standards to Tribal Leaders and the Tribal Administration.
- Federal baseline water quality standards would be used to protect the Pueblo’s surface waters, until the Tribe adopts its own standards that are approved by EPA.

Nez Perce Tribe of Idaho

- In Feb 2014, the Tribe requested in a letter to EPA that EPA promulgate federal water quality standards. The Tribe is not hopeful that they will ever achieve TAS.
- In Aug-Nov 2015 pre-consultation, Nez Perce Tribe letter to EPA: *“The consequences of EPA not taking action to protect water quality on Indian reservations would pose a significant concern for the Tribe and Tribes throughout the country.”*

Where would Potential Baseline Standards Apply? Current Thinking:

- Baseline WQS would apply to Indian reservation waters where EPA has not:
 - promulgated other federal WQS or
 - approved tribal or state WQS
- Baseline WQS would not apply to:
 - off-reservation allotments and
 - tribal nations that elect to **“opt-out”** in certain circumstances.
- Baseline WQS would include designated uses, water quality criteria to protect those uses, antidegradation requirements, and other general provisions (such as allowances for mixing zones and WQS variances).

Input from 2015 – 2016 Tribal Government consultation and coordination:

- Tribes were cautiously optimistic and generally supportive.
 - Discussed WQS protections from a cultural perspective.
 - Need for regional WQS tailoring (esp. fish consumption rates).
 - Antidegradation is important.
 - Concern for EPA capacity and resources.
- National Tribal Water Council (NTWC) members were strongly supportive:
 - Promulgation would advance tribal sovereignty and EPA trust responsibility.
 - How EPA communicates with tribes is key: Should empower tribes to consult with EPA during implementation (e.g., EPA issuance of permits).

Input from 2015 – 2016 Tribal Government consultation and coordination

Written comments on 2016 ANPRM (12 tribal governments and associations):

- The NTWC and a majority of comments from tribal governments expressed support for promulgation of baseline WQS. A few tribes/nations expressed concern.

Support conveyed in 2021:

- NTWC reiterated its support via a 2020/2021 Transition Brief to EPA.
- The EPA National Tribal Caucus included baseline WQS in their budget priority guidance for FY 2023.

Proposed Rulemaking Schedule

- June 15 – September 13 – Opportunity for Tribal Government Consultation and Coordination
- July 8th – Tribal Government Listening Session
- August 23rd – Tribal Governments deadline to notify EPA on consultation request
- Second Listening Session – TBD in August
- Outreach to States – Fall 2021
- Draft rule development – Fall 2021 - early 2022
- EPA Administrator to sign proposed rulemaking – Spring 2022

Components of Potential Federal Tribal Baseline WQS Promulgation:

Water quality standards consist of three elements:

- 1. Designated uses – narrative goals for a waterbody, such as recreation and protection of aquatic life**
 - Considering for all waters: a suite of designated uses that provide for protection of uses such as recreation, fish propagation, and fish consumption.
 - Suggested by many tribes in 2016 consultation: Protection of cultural and traditional uses of water and aquatic resources.
 - Considering public drinking water supply use for all fresh waters.

- 2. Water quality criteria – numeric or narrative pollutant levels to protect designated uses**
 - Exploring use of narrative criteria and numeric criteria
 - EPA could describe waters as being “free from” certain adverse conditions and substances in order to ensure protection of applicable designated uses
 - Provide for limited location-specific tailoring to better protect tribal waters (e.g., fish consumption rates)
 - Include downstream protection narrative
 - Include wetlands narrative criteria

- 3. Antidegradation provisions – protect existing uses and high-quality waters**

Antidegradation: requirements complement designated uses and water quality criteria by providing a framework for maintaining and protecting water quality that has already been achieved, providing three tiers of maintenance and protection.

 - Tier 1. Existing in-stream uses for all waters of the United States.
 - Applies a minimum level of protection to all waters even when another tier is also assigned.
 - Tier 2. High quality waters (where water quality is better than the levels necessary to support the CWA section 101(a)(2) uses).
 - Provides a public review process prior to deciding to allow a lowering of water quality.
 - Tier 3. Outstanding National Resource Waters (ONRW)
 - Generally, prohibits any lowering of water quality.

Implementation

- Standards could include **implementation** flexibilities (e.g., mixing zones, WQS variances, compliance schedule provisions).
- Tribal engagement opportunity in EPA’s implementation actions such as establishing appropriate water quality-based effluent limits in NPDES permits.
- EPA would also engage in public participation with states and the regulated community in accordance with existing regulations.

Potential Opt-Out Provision

- EPA is interested in obtaining input regarding a potential opt-out provision to enable a tribal government/nation to elect not to be included in a final tribal baseline WQS promulgation in certain circumstances.
- EPA is also interested in receiving input regarding the timing for a tribal government/nation to elect to opt out of a tribal baseline WQS promulgation:
 - (1) during the public comment period associated with a proposed rulemaking;
 - (2) by a specified deadline after the tribal baseline promulgation has become effective for CWA purposes but prior to a pre-established “applicability” date; or both (1) and (2)

Potential Impacts on Dischargers

- Approximately 164 NPDES individual discharger permits (including 7 major dischargers) are located within reservations potentially covered by Baseline WQS.
- Approximately 280 (57 majors) located within 5 miles upstream from waters potentially covered by Baseline WQS.
- Nationally there are over 50,000 individual NPDES permits.
 - Further analysis is underway to evaluate the potential costs and benefits of the Tribal Baseline WQS rule.

Questions for Tribal Governments on EPA’s CWA Implementation Responsibilities

- What approaches in a potential rulemaking should EPA consider to implement CWA WQS on reservations and be most effective for you and your tribal nation?
- Do you have any concerns about this action? Are there any sensitivities or unintended consequences that EPA should consider before moving forward on this action?
- If EPA provided baseline WQS, would this change your tribal nation’s interest in pursuing TAS?
 - Could baseline standards serve as a starting point for your tribe to develop more specific standards for reservation waters?

For More Information

- Mary Lou Soccia, soccia.marylou@epa.gov
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- EPA’s website for this rulemaking: <https://www.epa.gov/wqs-tech/tribal-baseline-WQS>
- EPA Policy on Consultation and Coordination with Indian Tribes: <http://www.epa.gov/tribal/epa-policy-consultation-and-coordination-indian-tribes>
- Environmental protection in Indian Country: <https://www.epa.gov/tribal>
- Clean Water Act and Water Quality Standards: <https://www.epa.gov/standards-water-body-health>