



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

EPA Region 9 Regional Tribal Operations Committee
Meeting

July 22, 2021

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



EPA Staff

Jennifer Brundage

Staff lead

U.S. Environmental Protection Agency, Headquarters

Brundage.jennifer@epa.gov



Purpose of Today's Discussion

- The purpose of today's discussion is to provide an opportunity for tribes and tribal leaders to:
 - learn more about the potential regulatory revisions and how to provide input
 - ask questions, and
 - share their views.



Agenda for Today's Discussion

- Presentation by EPA
 - Overview
 - Background
 - Potential Regulatory Revisions
 - Potential benefits
 - How to provide comments and request government-to-government consultation
 - Next steps
- Open discussion



Overview

- Many tribes hold rights reserved through treaties, statutes, or equivalent legal agreements (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.
- The 90-day tribal consultation period ends on September 13, 2021.
- 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.



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?

- Prior to 2016, states and EPA had not regularly considered tribal reserved rights when establishing and revising WQS.
- 2016 was a turning point in EPA's approach to tribal reserved rights, where EPA made protecting those rights an element of its WQS analysis.
- 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 Regulatory Revisions

EPA is interested in your feedback on incorporating the following in 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 Regulatory Revisions, 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.



National Listening Sessions

- EPA held a national listening session for tribal leaders and staff on July 19, 2021.
- EPA plans to hold a second listening session for tribal leaders and staff in late August or early September.
- EPA plans to announce the date and time of the second listening session in early August.
- The final date and time along with information about how to register will be posted at: <https://www.epa.gov/wqs-tech/protecting-tribal-reserved-rights-in-WQS>.



Next Steps

Consultation, Coordination and Outreach

- EPA will continue outreach to tribes through regional meetings (e.g., Regional Tribal Operations Committee meetings and dedicated coordination meetings).
- EPA plans to begin outreach to states and stakeholders prior to the close of the tribal consultation period.

Individual Tribal Consultation Meetings

- Tribes interested in requesting government-to-government consultation with EPA can submit a request to the following contacts by August 23, 2021
 - Jennifer Brundage: Brundage.jennifer@epa.gov or (202) 566-1265
 - Karen Gude: Gude.Karen@epa.gov or (202) 564-0831



Next Steps

Input from Tribes

- Tribal consultation and coordination period concludes September 13, 2021
- EPA encourages tribes to submit written comments to Jennifer Brundage by e-mail at Brundage.jennifer@epa.gov by September 13, 2021
- Pending outcome of tribal consultation, EPA anticipates proposing this rule in spring 2022. This will provide an additional opportunity for tribes to comment during the public comment period on the proposal.



For More Information

- Jennifer Brundage, Brundage.jennifer@epa.gov
- EPA's website for this rulemaking:
<https://www.epa.gov/wqs-tech/protecting-tribal-reserved-rights-in-WQS>
- Tribes may access EPA's consultation letter for this effort and related consultation information in EPA's Tribal Consultation Opportunities Tracking System (TCOTS) located at <https://tcots.epa.gov>.
- Clean Water Act and Water Quality Standards:
<https://www.epa.gov/standards-water-body-health>