



Progress Update: Federal Baseline Water Quality Standards for Indian Reservations

Region 9 RTOC Meeting | 30 May 2024



Final Rule: Water Quality Standards Regulatory Revisions to Protect Tribal Reserved Rights

Region 9 RTOC Meeting | 30 May 2024

Purpose

Provide an overview of the final rule:

Water Quality Standards Regulatory Revisions to Protect Tribal Reserved Rights

Background

- Many Tribes hold “reserved rights” through Federal treaties, statutes, or Executive orders to aquatic or aquatic-dependent resources in waters where states are responsible for establishing Clean Water Act (CWA) water quality standards (WQS). Tribal reserved rights have the same force and effect as other Federal laws.
- Overarching goals of this rulemaking:
 1. Articulate which Tribal reserved rights are relevant in the WQS context, and when and how WQS must account for those rights.
 2. Provide an opportunity for comment on the national framework on which future WQS actions will be based.
 3. Drive improvements toward water quality necessary to effectuate Tribal reserved rights.

What Are “Tribal Reserved Rights”?

This rule defines “Tribal reserved rights” for purposes of the Federal WQS regulation at 40 CFR part 131 as:

Any rights to CWA-protected aquatic and/or aquatic-dependent resources reserved by right holders, either expressly or implicitly, through Federal treaties, statutes, or Executive orders.

What Does the Rule Require of States?

Where a right holder has asserted a Tribal reserved right in writing to the state and EPA for consideration in establishment of WQS, to the extent supported by available data and information, the state must:

1. Take into consideration the use and value of its waters for protecting the Tribal reserved right in adopting or revising designated uses;
2. Take into consideration the anticipated future exercise of the Tribal reserved right unsuppressed by water quality in establishing relevant WQS; and
3. Establish water quality criteria to protect the Tribal reserved rights where the state has adopted designated uses that either expressly incorporate protection of Tribal reserved rights or encompass the right.
 - This requirement includes developing criteria to protect right holders using at least the same risk level (e.g., cancer risk level, hazard quotient, or illness rate) as the state would otherwise use to develop criteria to protect the state's general population, paired with exposure inputs (e.g., fish consumption rate) representative of right holders exercising their reserved right.

What Does the Rule Require of the EPA?

EPA must:

1. Provide assistance with evaluating Tribal reserved rights upon request by states or right holders, to the extent practicable;
2. Review WQS adopted by states to determine whether they appropriately considered applicable Tribal reserved rights; and
3. Initiate the Tribal consultation process with right holders that have asserted their rights for consideration in establishment of WQS to inform this review.

What Are the Roles for Tribes?

Tribes can choose to:

1. Assert their rights for consideration in a WQS context;
2. Provide detail and documentation on the geographic scope and nature of the rights, provide data and information about desired revisions to relevant WQS, and/or otherwise share information and perspectives with the state and the EPA to inform WQS development; and
3. Consult with the EPA to inform the Agency's review of whether WQS adopted by states appropriately consider asserted Tribal reserved rights.

Comments from Tribes & NGOs: General Themes

- States should not have the authority or responsibility for interpreting Tribal reserved rights
- The rule should protect Tribal traditional/historical uses of waters
- The EPA should explain how it will resolve disputes between and among states and Tribes
- The EPA should specify water quality thresholds to protect Tribal reserved rights
- The EPA should broaden the definitions of “Tribal reserved rights” and “right holders”
- This rule is a long overdue recognition of Tribal reserved rights; protective WQS are necessary to address disproportionate impacts of pollution on Tribes

Comments from Tribes & NGOs: Additional Themes in R9

- Need for ongoing Tribal consultation at every step of the WQS establishment and review process and Federal funding to support Tribes' participation
 - Rule should also require that all information provided by Tribes is sent to the EPA to inform review
- Confidential information provided by Tribes should be protected
- The EPA should develop a secondary pathway to protect Tribal uses
 - *e.g.*, by identifying Tribal designated uses on a Federal level, by requiring states to adopt Tribal uses, or by establishing a framework for Tribes to designate uses
- The EPA should ensure that decisions on reserved rights for purposes of establishing WQS do not limit efforts by Tribes to leverage their reserved rights more generally
- The EPA should acknowledge that water quantity is often an essential element of Tribal reserved rights
- Rule should specify how states must account for restoration efforts and for revitalized Tribal uses in determining appropriate WQS

Comments from States & Industry: General Themes

- The EPA/Federal government is responsible for interpreting Tribal reserved rights, not states, and/or the EPA must provide states with Federal interpretations of relevant rights
- The proposal is overly burdensome; scope should be reduced and clarified
- The EPA lacks CWA authority to promulgate these requirements generally
- The EPA lacks CWA authority with respect to specific elements of the rule
 - The CWA provides no basis to require WQS to protect unsuppressed use of a resource or protect Tribal members to the same risk level as the general population of the state
 - The EPA lacks authority to require states to designate uses beyond fishing and rec uses
- The rule is arbitrary and capricious
 - The proposed reg text and preamble language re: suppression is unclear

Comments from States & Industry: Additional Themes in R9

- Rule should protect water uses of all Tribes (not just those that are federally recognized or have a federal land base)
- Rule should require states to protect all Tribal water uses, not just those specified by Federal instruments codifying reserved rights
 - Requiring states to interpret reserved rights in the WQS context creates an unnecessary burden and invites opposition from parties who perceive their interests to be potentially affected
- Economic Analysis for proposed rule significantly underestimates costs to states
- The EPA should clarify that states' designations of Tribal uses that are not based on reserved rights are consistent with this rule
- The CWA and its implementing regulations cannot be used as a basis for increasing the quantity of water reserved for a reservation

Changes from Proposal to Final

The EPA made three key changes in response to public comments:

1. Rule requirements triggered by a Tribe asserting their rights

- Allows Tribes to decide whether and when to raise their rights for consideration in the WQS context
- Limits the burden on states by not requiring them to conduct independent inquiries about potentially applicable rights

2. States must “take into consideration” suppression effects

- Requires that WQS reflect consideration of the unsuppressed exercise of Tribal rights where data and methods exist
- Provides flexibility in a complex and evolving area

3. The EPA will engage early in the process, if requested and feasible

- Helps minimize and facilitate resolution of disputes

Next Steps

- Additional meetings with states and Tribes
- Working collaboratively with states and Tribes on rule implementation

For Additional Information

- EPA's website for this rulemaking:

<https://www.epa.gov/wqs-tech/protecting-tribal-reserved-rights-in-WQS>

- Contacts:

Kelly Gravuer, gravuer.kelly@epa.gov | **Erica Fleisig**, fleisig.eric@epa.gov

Implementation

Example Implementation Scenario



Questions?