



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

Listening session for Tribal Governments
Monday, August 23, 2021, 3 – 5 pm EDT

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



EPA Speakers

JoAnn Chase

Director, American Indian Environmental Office, Office of International and Tribal Affairs

Chase.JoAnn@epa.gov

Deborah G. Nagle

Director, Office of Science and Technology

U.S. Environmental Protection Agency, Headquarters

Nagle.Deborah@epa.gov

Jennifer Brundage

Staff lead

U.S. Environmental Protection Agency, Headquarters

Brundage.jennifer@epa.gov



Opening Remarks

JoAnn Chase

Director, American Indian Environmental Office,
Office of International and Tribal Affairs
U.S. Environmental Protection Agency



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Deborah G. Nagle
Director, Office of Science and Technology
Office of Water
U.S. Environmental Protection Agency



Purpose of Today's Listening Session

- The purpose of today's listening session is to provide an opportunity for tribes and tribal leaders to:
 - learn more about the potential revisions and how to provide input
 - ask questions, and
 - share their views.
- Listening sessions do not constitute individual tribal-EPA government-to-government consultation. EPA hopes that this session will provide further information to tribes to make an informed decision about whether to request an individual consultation.



Agenda for Today's Listening Session

- Presentation by EPA (20 min)
 - Overview
 - Background
 - Potential Regulatory Revisions
 - Potential benefits
 - How to provide comments and request government-to-government consultation
 - Next steps
- Open discussion (1 hr 40 min)



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.
- 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 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 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.



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 is also beginning outreach to states.

Individual Tribal Government Consultation Meetings

- Tribal governments interested in requesting government-to-government consultation with EPA can submit a request to the following contacts:
 - Jennifer Brundage: Brundage.jennifer@Epa.gov or (202) 566-1265
 - Karen Gude: Gude.Karen@epa.gov or (202) 564-0831



Next Steps

Input from Tribal Governments

- Tribal consultation and coordination period concludes September 13, 2021
- EPA encourages tribal governments 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. EPA plans to provide additional opportunities to solicit comments from tribes once the rule is proposed.



How to Provide Comments after the Listening Session

- Please send comments by **September 13, 2021** via e-mail to Jennifer Brundage Brundage.jennifer@epa.gov.
- EPA will continue to consider comments received after the close of the consultation period to the extent possible as EPA moves forward with decision-making.
- EPA plans to provide additional opportunities to solicit comments from tribes once the rule is proposed.



How to Request Government-to-Government Consultation

Jennifer Brundage at Brundage.Jennifer@epa.gov/
(202) 566-1265

or

Karen Gude at Gude.Karen@epa.gov/(202) 564-0831.

- Consultations will likely be conducted virtually.
- Tribes may request that consultation occur simultaneously for this potential rulemaking and the tribal baseline rulemaking.



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>