



Proposed Revisions to the Federal Water Quality Standards Regulation to Protect Tribal Reserved Rights

Public Hearing #1

Tuesday, January 24, 2023, 4 – 6 pm ET

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



EPA Staff

Jennifer Brundage

Rule Manager

U.S. Environmental Protection Agency, Headquarters

Brundage.jennifer@epa.gov



Agenda

- Overview
- Scope
- Background
- Proposed regulatory revisions
- Potential benefits
- How to provide comments and next steps



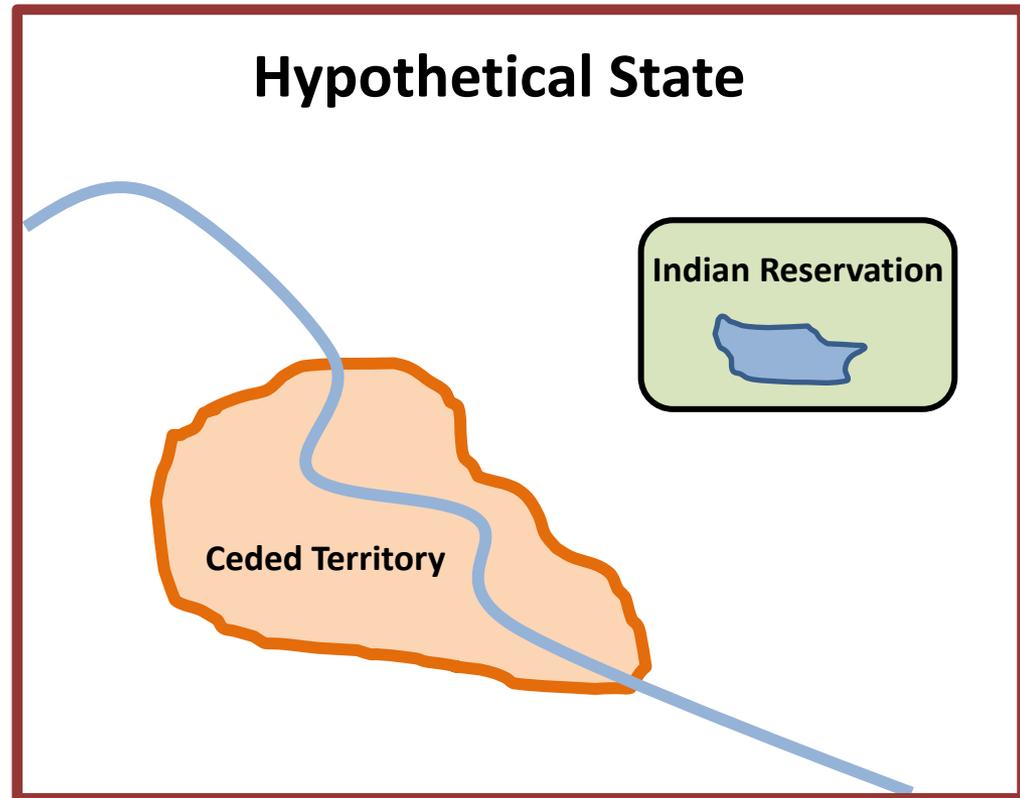
Overview

- EPA is proposing revisions to the federal water quality standards regulation (WQS) at 40 CFR Part 131.
- The proposed revisions describe how WQS must protect aquatic and aquatic-dependent resources – such as fish and wild rice - reserved to tribes through treaties, statutes, executive orders, or other sources of federal law, in waters of the United States.
- Once final, this proposal would create a regulatory framework to be applied case-specifically to ensure that WQS protect resources reserved to tribes.



Scope of Tribal Reserved Rights Rule

- Waters where states establish WQS (e.g., in ceded territory).
- This proposed rule is separate from and complementary to EPA's concurrent work to propose baseline WQS for waters on Indian reservations that currently do not have CWA-effective WQS in place.





Background: What Are Water Quality Standards?

- Core of water quality-based water management programs under the Clean Water Act (CWA)
- Define the water quality goals for a waterbody
- 3 key components:
 - Designated Uses – narrative goals for a waterbody, such as recreation and protection of aquatic life
 - Criteria – numeric or narrative pollutant levels that 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](#) – required before a federal agency may issue a permit or license to conduct any activity that may result in any discharge into waters of the United States.



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 regulation 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



Proposed Regulatory Revisions: New 40 CFR 131.9

“(a) [WQS] must protect tribal reserved rights applicable to the waters subject to such standards.”

“... [WQS] must, to the extent supported by available data and information, be established to protect:

(1) The exercise of the tribal reserved rights unsuppressed by water quality or availability of the aquatic or aquatic-dependent resource; and,

(2) The health of the right holders to at least the same risk level as provided to the general population of the state.”



New 40 CFR 131.9: Determining Whether Tribal Reserved Rights Apply

- Whether reserved rights apply to waters subject to a specific new/revised WQS is a complex inquiry that will be informed by several factors, including:
 - Input from the right holders
 - Language of the treaties, statutes, or executive orders and relevant judicial precedent
- EPA encourages ongoing communication between states and right holders
- EPA can help facilitate discussion between tribes and states
- Specific Request for Comment: Whether there are additional types of tribal reserved rights to aquatic resources that we should consider in addition to rights to fish, gather aquatic plants, and hunt for aquatic-dependent animals.



Implementing New 40 CFR 131.9(a): Determining the Level of Water Quality To Protect the Reserved Resource

- States, EPA and tribes should work together to evaluate available data.
- EPA recommends that states request information from the right holders such as
 - types of pollutants perceived to be impacting their rights,
 - key aquatic species, and/or
 - consumption rates that would be useful in developing protective WQS
- EPA encourages right holders to proactively share any such information with states and EPA.



New 40 CFR 131.9(a)(1): Accounting for Suppression

The requirement to protect “the exercise of the tribal reserved rights unsuppressed by water quality or availability of the aquatic or aquatic-dependent resource” is intended to

- address situations where existing water quality is lower than necessary to allow for right holders to fully exercise their tribal reserved rights; and
- ensure that new/revised WQS do not merely reinforce that existing suppressed use.
- EPA is not proposing that WQS must always protect the waterbody condition that existed at the time a reserved right was established. The goal is to balance heritage use of a resource with what is achievable for a particular waterbody.

This proposal, if finalized, would not establish any nationally applicable thresholds for unsuppressed levels or use of a resource.



New 40 CFR 131.9(a)(2): Protecting the Health of the Right Holder

The requirement to protect “The health of the right holders to at least the same risk level as provided to the general population of the state” is intended to

- a) Establish acceptable risk (e.g., cancer risk level) for tribal members whose exercise of reserved rights may put them at greater risk than the general population, e.g., due to higher rates of fish consumption.
- b) Specify that tribal members exercising applicable reserved rights should be exposed to no greater than a 1 in 100,000 cancer risk, per EPA’s current guidance for the general population.
- c) Specify that the appropriate cancer risk level must be paired with an appropriate fish consumption rate, per previous slide.



Circumstances Where Proposed 40 CFR 131.9 May Necessitate New or Revised WQS

- The existing Federal WQS regulation already requires protection of
 - Many aquatic and aquatic-dependent resources that tribes have rights to fish, hunt or gather
 - Presently attained uses
- EPA anticipates that the circumstances where WQS may need to be adjusted to protect tribal reserved rights would fall primarily into two categories:
 1. Human health criteria to protect tribal fish consumers
 2. Where a reserved right is not already accounted for as a designated or presently attained use for a waterbody, but that waterbody could be reasonably expected to support that right in the future (e.g., if restoration efforts are underway).



New 40 CFR 131.9(a)(1) and (2): Specific Requests for Comment

- Types of historic information that states and EPA should consider in determining the level of water quality necessary to protect any aquatic or aquatic-dependent resource or users of that resource.
- Whether additional language should be included in the final rule specifying the considerations for determining unsuppressed exercise of a reserved right.
- Whether there may be other situations where the requirement to protect the health of the right holders to at least the same risk level as provided to the general population of the state would apply in addition to establishment of cancer risk level for calculating criteria to protect human health.



New 131.9(b): Initiating Consultation

- If finalized, this rule would *require* EPA to initiate consultation with right holders, consistent with applicable EPA tribal consultation policies, in determining whether state WQS protect applicable reserved rights.
- EPA's policy and longstanding practice is to consult on a government-to-government basis with tribes when EPA actions such as WQS approval/disapproval decisions may affect tribal interests.
- The rule would not require tribes to consult with EPA if they did not wish to.



New 131.9(c): How To Incorporate Protection of Tribal Reserved Rights into WQS

“In order to meet the requirements in paragraph (a) of this section, States must:

- 1) Designate uses...that either explicitly incorporate protection of tribal reserved rights or encompass such rights; and
- 2) Establish water quality criteria...to protect tribal reserved rights; and/or
- 3) Use applicable antidegradation requirements to maintain and protect water quality that protects tribal reserved rights.”

States could also choose to combine these methods.

EPA is specifically requesting comment on ways that states could use their antidegradation policies and implementation methods to protect tribal reserved rights.



New §131.6(g): Minimum Requirements for Water Quality Standards Submission

Where tribal reserved rights apply, WQS submissions would need to include:

- “1. Information about the scope, nature, and current and past use of the tribal reserved rights, as informed by the right holders; and
2. Data and methods used to develop the [WQS].”

EPA is also proposing conforming revisions to 40 CFR §131.5 (“EPA Authority”)



Proposed Revision to §131.20 WQS Triennial Review

“The State shall from time to time, but at least once every 3 years, hold public hearings for the purpose of reviewing applicable water quality standards...This review shall include evaluating whether there are tribal reserved rights applicable to State waters and whether water quality standards need to be revised to protect those rights pursuant to §131.9.”



Potential Benefits

- By laying out how EPA would review state WQS that impact aquatic resources reserved to tribes, this proposed rule would improve protection of
 - resources reserved to tribes, and
 - the health of tribal members exercising their reserved rights.
- The proposed regulatory framework is also intended to provide transparency and predictability for tribes, states, regulated industries and municipalities, and the public.



Second Public Hearing & Next Steps

- EPA will accept verbal comments at a second public hearing, on Tuesday, January 31, from 2-4 pm ET.
- Pending review of comments, EPA anticipates finalizing this rule in late 2023.



To Make a Written Comment

You may send comments, identified by Docket ID No. EPA-HQ-OW-2021-0791, by any of the following methods:

Online: www.regulations.gov (our preferred method). Follow the online instructions for submitting comments.

Mail: U.S. Environmental Protection Agency, EPA Docket Center, Standards and Health Protection Division Docket, Mail Code 28221T, 1200 Pennsylvania Avenue NW, Washington, DC 20460

Hand Delivery: EPA Docket Center, WJC West Building, Room 3334, 1301 Constitution Avenue, NW, Washington, DC 20004, Attention Docket ID No. EPA-HQ-OW-2021-0791. The Docket Center's hours of operations are 8:30 a.m. – 4:30 p.m., Monday through Friday (except Federal holidays).

All submissions received must include the Docket ID No. EPA-HQ-OW-2021-0791 for this rulemaking. Comments received may be posted without change to www.regulations.gov, including any personal information provided. Once submitted, comments cannot be edited or removed from the docket.

All comments must be received by the close of the public comment period on Monday, March 6.