

EPA’s Proposed Water Quality Standards Regulatory Revisions to Protect Tribal Reserved Rights
Public Hearing #1 Transcript
January 24, 2023 – 4:00 p.m. to 6:00 p.m. EST

(Slide 1) Kary Phillips: Hello and welcome to today’s online public hearing for EPA’s proposed revisions to the Federal Water Quality Standards Regulation to Protect Tribal Reserved Rights. This session is sponsored by the United States Environmental Protection Agency’s Office of Water. The purpose of today’s public hearing is to provide background on the proposed rulemaking and then for interested parties to provide oral comments on the proposed rule.

I am Kary Phillips of Tetra Tech, a contractor to EPA, and I will be moderating today’s hearing with support from my colleagues. Thank you for joining us.

We’ll start by going over a few housekeeping items. You should be connected to this session through your computer or mobile device. At this time, you should see a slide titled “Logistics: Options for Audio.”

You can listen to the presentation through your computer (or mobile device) speakers but will need a microphone if you would like to make oral testimony. If you do not have speakers or a microphone on your device, you may use a phone to call in. We will provide detailed instructions on how to provide oral testimony after the presentation.

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Please note that all lines have been muted upon entry to avoid any echo and sound issues. If you have unmuted your device or phone to test your audio, please mute yourself on the screen, or by pressing *6. Today’s public hearing will be transcribed, and all oral comments will be considered part of the official record for this rule. As such, when developing the official response to public comments and finalizing the rule, the oral comments provided today will become part of the official record along with the written public comments submitted via the docket for this rulemaking. If you provide an oral comment during today’s online hearing, you do not have to submit the same comment in writing in order for it to be included in the official record. If you are interested in making a written comment, directions will be provided during this hearing. Please note that EPA will not respond to comments today; however, EPA will respond to the oral comments received at this hearing—along with all comments it receives during the comment period—in EPA’s response-to-comments document that will accompany the final rulemaking. Also, EPA will not be answering questions today. Today’s presentation for the online public hearing has been reviewed by EPA staff for technical accuracy. However, the views of those making an

oral comment and their organizations are their own and do not necessarily reflect the views of EPA. Mention of commercial enterprises, products, or publications does not mean that EPA endorses them.

(Slide 2) Now that we have completed the discussion of housekeeping items, let's start today's online public hearing! We will now begin the presentation by EPA. Jennifer Brundage from EPA will be our presenter today. Jennifer is the rule manager for this proposed rule. She is a Regional Liaison with the Office of Science and Technology, Standards and Health Protection Division in EPA's Office of Water. I will now turn it over to Jennifer to provide an overview of the proposed rule.

(Slide 3) Jennifer Brundage: Thanks so much, Kary. And thanks again to everyone joining us today. I'll start off the presentation by providing a brief overview of the proposed revisions, then one slide on scope, a couple of slides on the basic background about water quality standards, and then I'd like to spend the majority of my presentation providing details of the proposed regulatory revisions and their implications. Then I'll touch on potential benefits and move on to logistics about how to provide comments and next steps. Next slide, please.

(Slide 4) EPA is proposing revisions to the Federal Water Quality Standards Regulation at 40 CFR part 131. CFR stands for "Code of Federal Regulations." The proposal describes how water quality standards must protect aquatic and aquatic-dependent resources, such as fish and wild rice, that are reserved to tribes through treaties, statutes, executive orders, or other sources of federal law, in waters of the United States. We're using this term "reserved rights" to encompass that variety of legal instruments through which such rights can be held or reserved in different situations, and just like all water quality standards, these revisions would only apply to waters that are defined as waters of the United States or are included in the definition of waters of the United States. Once final, this proposal would create a regulatory framework that would be applied case-specifically to ensure that water quality standards protect resources reserved to tribes. Next slide, please.

(Slide 5) The waters that this proposed rule is relevant to are typically waters outside of Indian Country, in areas commonly referred to, for example, as ceded territory, or in the Pacific Northwest a more common term might be "usual and accustomed areas." In the diagram of a hypothetical state on this slide, the waters to which this rule would be relevant are represented as an amorphous, peach-colored blob with a river running through it. You may have heard about our concurrent work to propose baseline water quality standards for waters in Indian reservations that currently do not have Clean Water Act-effective water quality standards in place. EPA hopes to propose baseline water quality standards via a separate rule this year. That separate rule would cover waters in Indian Country, specifically Indian reservation waters that do not have Clean Water Act-effective water quality standards in place, represented in the diagram on this slide by the green rectangle containing the lake. The baseline rule is not the focus of today's session, but I wanted to provide this clarification in the hopes of reducing confusion about these two separate actions. Next slide, please.

(Slide 6) Ok, so what are water quality standards? Water quality standards are the core of water quality standards-based water management programs under the Clean Water Act. They define water quality goals for a waterbody and have three key components. Designated uses, which are narrative goals for a waterbody, such as recreation and protection of aquatic life. Designated uses express the desired condition of the water, and do not need to be currently attained to be designated. Criteria are those numeric or narrative pollutant levels that protect the designated uses, and antidegradation policy protects existing uses, which are those uses attained in the water body on or after November 28, 1975,

whether or not they are included in the water quality standards. The reason that water quality standards are the core, the foundation, of water quality-based water management programs under the Clean Water Act is because they are the basis for a variety of other Clean Water Act implementing programs, including listing waters as impaired for elevated pollutant levels under section 303(d) of the Clean Water Act; Total Maximum Daily Load targets for remediating waters with elevated pollutant levels; water-quality based effluent limits under state/tribal NPDES for point sources; and certification under Section 401 of the Clean Water Act, which is 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. Next slide please.

(Slide 7) Water quality standards are adopted into state or authorized tribal law, and here, by authorized tribe, I'm referring to a tribe that's authorized for treatment in a manner similar to a state, abbreviated "TAS" under the Clean Water Act, for the purpose of establishing water quality standards. So, after a state or authorized tribe adopts new or revised water quality standards, the Clean Water Act requires a state or authorized tribe to submit them to EPA for approval or disapproval. EPA reviews the state and authorized tribal submissions for compliance with the Federal Water Quality Standards Regulation 40 CFR 131, which is the one we're proposing to amend, and in addition we also review part 132 for states and tribes located within the Great Lakes region. In addition, whenever the EPA Administrator determines that new or revised water quality standards are necessary for a state or tribe, the Clean Water Act authorizes EPA to promulgate federal water quality standards on behalf of that state or tribe. Next slide, please.

(Slide 8) So now I'll walk through the heart of the proposed regulatory revisions, and then, on the next few slides, I'll explain each one in a little bit more depth, and then after that I'll walk through the other new provisions that we're proposing that complement this core one. So, the cornerstone of the proposal is on this slide, proposed new 40 CFR 131.9(a). "(a)" is that water quality standards must protect water quality standards applicable to the waters, subject to such standards. So, what this means is that, for a given waterbody, if any tribes hold reserved rights to aquatic- or aquatic-dependent resources in or associated with that waterbody, then water quality standards for that waterbody must protect those rights. There are two components to this inquiry to determine whether the provision is met. First would be determining whether tribal reserved rights apply to the waterbody in question, and if yes, then the second question is determining the level of water quality that protects those rights. So in order to determine that level of water quality to protect those rights, the proposal provides the two additional proposal requirements in (1) and (2) on this side, that water quality standards 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. Next slide please.

(Slide 9) So, going back to that first question of whether tribal reserved rights apply to the waters for which you're establishing water quality standards, whether reserved rights apply to waters subject to a specific new or revised standard is usually 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, and we're available to facilitate discussion between tribes and states. We're requesting comment on several specific questions in the preamble to the proposed rule. I'm going to highlight some of them

throughout this presentation, but I encourage anyone who is interested in commenting to please review the Federal Register Notice for the full suite of questions on which we're specifically requesting comments and the full context of each one. So, the first one related to this slide is whether there are any 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. Next slide, please.

(Slide 10) The second question, once we've established that tribal reserved rights apply, is determining the level of water quality to protect the reserve resources. So again, states, EPA, and tribes should work together to evaluate available data. EPA recommends that states request information from right holders; for example during triennial water quality standards reviews, 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 water quality standards. EPA also encourages right holders to proactively share any such information with states and EPA. I want to highlight the caveat in proposed 40 CFR 131.9(a) that this is subject to available data and information. Where data and information are not currently available to support establishing numeric levels of water quality, or where data are inconclusive, states may adopt narrative water quality standards consistent with the existing water quality standards regulation. This is similar to the process EPA follows currently to determine the level of water quality that protects, for example, new designated uses, or to determine criteria for pollutants where there is uncertainty in the science, for example, from emerging contaminants. And again, I just want to emphasize that EPA is available to assist states in gathering more information in coordination with the right holders for future use. Next slide, please.

(Slide 11) So, diving more now into the proposed 40 CFR 131.9(a)(1), which is the requirement to protect "the exercise of the tribal reserved rights unsuppressed by water quality or availability of the aquatic or aquatic-dependent resource." This 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 assure that new and revised standards don't merely reinforce that existing suppressed use. EPA is not proposing that water quality standards must always protect the water body condition that existed at the time the reserved right was established. The goal is to balance heritage use of a resource with what is achievable for a particular water body. For example, EPA approved the Spokane tribe's human health criteria based on a fish consumption rate of 865 grams per day. This fish consumption rate maintains the caloric intake characteristic of a traditional subsistence lifestyle while accounting for the lesser quantity and diversity of fish currently available to the tribe as a result of the construction of the Grand Coulee Dam. In addition, this proposal, if finalized, would not establish any nationally applicable thresholds for unsuppressed levels or use of a resource. Next slide, please.

(Slide 12) 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 establish the acceptable risk. What we had in mind with this is the cancer risk level used to develop criteria to protect human health, but we wrote this language more broadly to allow for it to encompass other types of risk that we may not have thought of. So, again it is intended to establish acceptable risk for tribal members whose exercise of reserved rights may put them at greater risk than the general population, for example, due to higher fish consumption rates. This would specify that tribal members exercising applicable reserved rights should be exposed to no greater than a one in 100,000 cancer risk per EPA's current guidelines for the general population, and, from the previous slide, specify that the appropriate cancer risk level must be paired

with an appropriate fish consumption rate in order to ensure that the resulting human health criteria are protective overall. Next slide, please.

(Slide 13) The preamble to the proposed rule describes EPA's assessment of circumstances where the proposed regulation may necessitate new water quality standards as compared to circumstances where compliance with the existing federal water quality standards regulation may already protect tribal reserved rights. So, in accordance with the interim goals specified by Clean Water Act Section 101(a)(2), of "water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water," the existing Federal water quality standards regulation requires that state water quality standards protect fish, shellfish and wildlife, and recreation in and on the water, wherever attainable. As a result, states typically designate most of their waters for those uses. In addition, the existing water quality standards regulation at 40 CFR 131.11 requires that states adopt water quality criteria that protect their designated uses. As a result, where a tribe has the right to hunt an aquatic-dependent species, for example, the species may already be protected in accordance with this proposed rulemaking by a state's "wildlife" designated use and associated criteria, such that this rulemaking would not require any additional protection of that species beyond what is already required under the Clean Water Act and EPA's existing water quality standards regulation. EPA also provides guidance for deriving criteria that generally protect aquatic organisms, including commercially or recreationally important species. EPA does not anticipate that more stringent criteria to protect aquatic or aquatic-dependent resources themselves would be necessary in most cases to comply with this proposed rulemaking than already required by the existing federal water quality standards regulations. Additionally, if use of an aquatic or aquatic-dependent resource pursuant to a tribal reserved right is a use that is presently being attained, EPA's existing regulation at 40 CFR 131.10(i) requires states to revise their water quality standards to reflect the presently attained use. EPA anticipates that the circumstances where water quality standards may need to be adjusted to protect tribal reserved rights would fall primarily into two categories. First, human health criteria to protect tribal fish consumers. Again, this is where tribes with reserved fishing rights, who consume more fish and are therefore exposed to greater levels of contaminants in fish, they would have a differential health risk between the right holders and the general population of the state because right holders are more highly exposed to the resource. The second scenario is where a reserved right is not already accounted for as a designated or presently attained use for a water body, but that water body could be reasonably expected to support that right in the future. For example, if restoration efforts are underway. EPA requests comment on whether there are other instances where water quality standards may need to be adjusted to protect tribal reserved rights consistent with this proposed rulemaking. This request for comment includes, but is not limited to, whether there are tribal reserved rights to aquatic or aquatic-dependent resources that may require more stringent criteria than otherwise required to protect applicable designated uses in order to comply with this proposed rulemaking and whether there are differential health risks for right holders associated with activities other than fish consumption such that new or revised criteria may be necessary to comply with this proposed rule. Next slide, please.

(Slide 14) A few other things we are specifically requesting comment on, and again, in this presentation we're highlighting and condensing the key specific requests for comment, for brevity. In the federal register notice you'll see all the specific requests for comments in context, including a few additional requests that I'm not highlighting in this presentation, just for brevity. So, 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 reserved rights; and 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. Next slide, please.

(Slide 15) Okay so now I'll run through a few additional provisions that we're proposing to round out the proposal. So, proposed 131.9(b), if finalized, would require EPA to initiate consultation with right holders, consistent with applicable EPA tribal consultation policies, in determining whether state water quality standards 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, though it would not require tribes to consult with EPA if they did not wish to. Next slide, please.

(Slide 16) Proposed 131.9(c) is the "how". So, how to incorporate protection of tribal reserved rights into water quality standards. This proposal would provide states some flexibility in using the three core components of water quality standards that I laid out in the background slide to protect tribal reserved rights. So, designated uses that either explicitly incorporate protection of tribal reserved rights or encompass such rights, paired with water quality criteria to protect tribal reserved rights, and/or using applicable antidegradation requirements to maintain and protect water quality that protects tribal reserved rights. States could also choose to combine these methods. EPA is also specifically requesting comment on ways that states could use their antidegradation policies and implementation methods to protect tribal reserved rights. Next slide, please.

(Slide 17) In addition, EPA is proposing revisions to the existing water quality standards regulation 131.6(g). So, as mentioned on slide 15 under the Clean Water Act, new and revised water quality standards must be submitted to EPA for review and approval or disapproval. So, this proposal would add one additional piece of supporting information to include in that submission which would be information about the scope, nature, and current and past use of the tribal reserved rights, as informed by the right holders, and data and methods used to define the water quality standards. EPA is also proposing conforming revisions to 40 CFR 131.5, which is the part that lays out the different factors that EPA looks at when it is reviewing water quality standards submissions to determine whether to approve or disapprove them. Next slide, please.

(Slide 18) And then finally, EPA is proposing revisions to the existing regulation at 131.20, which lays out the requirements for triennial water quality standards reviews, to add the requirement to evaluate 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. Next slide, please.

(Slide 19) So, that's the overview of the proposed revisions. Our goal is to provide clarity and detail on what is largely an existing legal obligation, which we hope will lead to more focus on this issue and, in turn, greater protection of tribal reserved resources and ideally improve protection of resources reserved to tribes and the health of tribal members exercising their reserved rights. The proposed regulatory framework would also provide transparency and predictability for tribes, states, regulated industries and municipalities, and the public. This proposal does not address many common problems raised by tribes during pre-proposal consultation, such as lack of Clean Water Act tools to control

nonpoint source pollution, non-compliance with existing water quality regulations, and scientific uncertainty about the level of protection necessary to protect certain aquatic resources. EPA hopes this rule will foster additional collaboration between different tribes, EPA, and states to negotiate solutions to many of these complex issues. Next slide, please.

(Slide 20) As far as next steps, EPA will accept verbal comments at a second public hearing next Tuesday, January 31st from 2 to 4 pm Eastern Time, and then the public comment period closes on March 6th, and then pending review of comments, EPA anticipates finalizing this rule later this year. Thank you all very much, and I'll now turn it back over to Kary to explain how to submit a written comment and then open the line for oral comments.

(Slide 21) Kary Phillips: Thank you, Jennifer. In a moment, we will provide instructions for making an oral comment today, but first we will provide instructions for submitting written comments in one of the following ways. Again, if you provide oral comments during today's online hearing, you do not have to submit the same comment in writing. However, if you plan to submit a written comment, you may do so through the website at [regulations.gov](https://www.regulations.gov), our preferred method, mail your comment, or submit a written comment via hand delivery. The instructions for submitting a written comment through these mechanisms are explained in more detail on this slide. Remember, when submitting a written comment, please make sure to reference the Docket ID number EPA-HQ-OW-2021-0791. I will pause here for a few moments to allow time to record this information.

We will now open the hearing for interested parties to make an oral comment. If you would like to make a comment, please raise your hand. Depending on the device you are using, there are different ways to raise your hand. If you are on a computer or internet-based mobile device: click on the reactions button in the menu on the bottom of your Zoom window. If you do not see a Reactions button on your computer, hover towards the bottom of your Zoom window, and a menu bar should appear. Over the reactions button, select raise hand. If you called in using your phone, please press *9 on your phone to raise your hand. When it is your turn to speak, the host will call on you by name or by the phone number you dialed with. At that time, you can unmute yourself by pressing the unmute button on your screen, or dialing *6 on your phone. Please feel free to turn on your video while you are speaking. If you have technical issues, please start a chat with Technical Support. Remember, EPA will not respond to comments today; however, EPA will respond to oral comments received at this hearing—along with all comments received during the comment period—in EPA's response-to-comments document accompanying EPA's final rule. Also, EPA will not be answering any questions during the hearing today.

Each commenter will be announced before providing an oral comment. Each commenter will have a maximum of three minutes to make an oral comment. A timer will appear on the screen indicating approximately how much time each caller has left. Commenters are responsible for watching their own time. Each commenter will be given a 10-second warning using the timer appearing on the screen. At the three-minute mark, the slide will read "Time is up" and commenters will be muted. If you provided your oral comment and were stopped after three minutes, you can resume making your comment after all commenters have had the opportunity to provide their comments. Please raise your hand at that time and wait for your name to be called. When it is your time to make an oral comment, your name will be announced, and you will be able to unmute yourself. If you called in using your phone, your phone number will be announced, and you will be able to unmute yourself. Please state and slowly spell your name for the official record and if applicable, provide the name of your organization. After the self-

introduction, your three-minute time will start. We will now begin the public comment process. There may be a short pause before the first commenter is introduced. Rachel, do we have any commenters in the queue?

Rachel Buzzeo: Yes, it looks like we have one commenter who raised their hand. Dr. Kirschner, it is now your time to speak. Please unmute yourself and you can begin making your comment.

Commenter #1 - Dr. Kirschner: Hello, everybody! Can you hear me?

Rachel Buzzeo: Yes, we can hear you.

Commenter #1 - Dr. Kirschner: Okay. Thank you. Thank you for the opportunity to comment. I am Dr. Kirschner. I've worked in Superfund since I was 20 years old. First as an EPA Lockheed employee, then through the University of Idaho, then with the U.S. Bureau of Mines, and finally through more than 10 tribes. Today I'm 62 years old. That's 42 years in superfund. Many of the tribal participants know me and my partner, Dr. Harper, who was recently deceased, by our work on over 10 mega sites within the Superfund in the Manhattan Project Complex. These include the Bunker Hill Mine, which was the first Superfund site with tribal government involvement, the Midnight Uranium mine, the Upper Columbia River, Leviathan, Washoe, and a condemned Sulfur Bank Mercury Mine, Los Alamos, Tar Creek, Leech Lake, FMC, on Dagger Lake, and Hanford. Specifically, we have developed human health risk scenarios for tribal populations living in major physiographic or ecologic regions of the U.S. These scenarios are being used by tribes, and actually to evaluate risk and develop environmental laws, such as tribal surface water quality standards, or hazardous substance control acts to protect their members from the chemical releases. In summary, in all my years, I've not seen a superfund site on tribal lands that did not involve environmental justice issues. I am personally the drafter of the Spokane Tribe's surface water quality standards that is cited in the notice, as well as six other tribes across the U.S. and have provided extensive comments on the file, on all the documents noted in the notice, footnotes like numbers 51, 54, 55, 56, and so on. The fact is designated uses for tribally-used waters must be for unrestricted uses. This means that these waters must meet tribal surface water quality standards and support all unrestricted uses and, you know, recreational use is a restricted use. So, comments by providing some written ones, which I will be in the future, must include pre-contact, meaning pre-European contact, hazard substance levels, which by the way are minimal in EPA's long-held, incorrect view that small amounts of contamination are not detrimental to human health. The notice correctly points out that the Court has described tribal reserved rights to fish and access to fishing locations as not less necessary to the existence of the Indians than the atmosphere they breathe. The connotation is that the quality of the fish has to be safe to eat. The warnings are, be aware of those in the industry that argue tribal surface water quality standards are only aspirational in nature and can never be attained. In fact, since none of the main water bodies in the United States meet even federal water quality standards, all water quality standards are aspirational in nature. This problem demonstrates that the cat is already out of the bag, and these proposed changes are already dated. The point is that the commenters also need to be aware that the EPA is proposing a risk level of 10^{-5} excess cancer risk. So typically, it's 10^{-6} or one in a million and not one in a 100,000, and by the way the tribes themselves can set their own acceptable risk levels, as the Spokane tribe has done, and they use a one in a 1 million and not one in 10,000. Well, thank you for your time, that's all I had to say, and I will be providing written comments as well.

Kary Phillips: Great, thank you for providing your comment. Rachel, do we have any other commenters in the queue?

Rachel Buzzeo: At the moment we do not have any other commenters in the queue. As a reminder you can raise your hand and we will let you provide your comments.

Kary Phillips: Okay we will pause here to wait for more commenters.

We have currently exhausted all oral comments at this time. We will stay on the line in case there are additional commenters. If there are no additional commenters, and 15 minutes pass with no comments, the hearing will end early. You are welcome to stay with us or depart the meeting. If you have a comment at this time, please use the hand raise function.

At this time, I'd like to conclude today's public hearing. Thank you to everyone who joined us and provided an oral comment.