



Summary Report of Tribal Consultation on Revisions to the Federal Water Quality Standards Regulation to Protect Tribal Reserved Rights

U.S. Environmental Protection Agency

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Introduction

This consultation report was prepared to support the EPA’s rule *Water Quality Standards Regulatory Revisions to Protect Tribal Reserved Rights*. The EPA consulted with Tribal officials early in the process of developing this regulation to permit them to have meaningful and timely input into its development.

The EPA initiated a 90-day pre-proposal Tribal consultation and coordination period by sending a “Notification of Consultation and Coordination” letter on June 11, 2021, to all 574 federally recognized Tribes as of that date. The consultation period began on June 15, 2021, and ended on September 13, 2021. The EPA conducted the consultation and coordination process in accordance with the EPA Policy on Consultation and Coordination with Indian Tribes in effect at the time.¹

In addition to two national Tribal listening sessions held in July and August 2021, the EPA presented at 20 meetings of Tribal staff and leadership, held seven staff-level coordination/engagement meetings, and held seven leader-to-leader meetings at the request of Tribes. The EPA continued outreach and engagement with Tribes at national and regional Tribal meetings after the end of the consultation period before publishing the proposed rule. Twenty-one Tribes and Tribal organizations submitted written pre-proposal comments to the EPA. These are included in the docket for the rule. The EPA considered all pre-proposal Tribal input received as it developed the proposed rule.

The EPA initiated a second 90-day Tribal consultation and coordination period after the Administrator signed the proposed rule by sending a “Notification of Consultation and Coordination” letter on November 29, 2022, to all 574 federally recognized Tribes as of that date. The second consultation period began on November 30, 2022, and ended on February 28, 2023. During the second consultation period and throughout the public comment period, the EPA held two additional national listening sessions for Tribal representatives in January 2023, presented at six meetings of Tribal staff and leadership, held six staff-level coordination/engagement meetings, and held seven leader-to-leader meetings with representatives of individual Tribes upon request.

The EPA encouraged Tribal representatives to submit written comments through the docket on the proposed rule. The EPA received written comments representing 47 Tribes and Tribal organizations. These are also included in the docket for the rule and the EPA considered all post-proposal Tribal input received as it developed the final rule.

This report summarizes the consultation and outreach conducted with Tribes prior to development of the proposed and final rules as well as comments provided by participants at Tribal consultation and coordination meetings and the written comments received during both pre- and post-proposal Tribal consultation periods. The summary is intended to provide a description of the wide range of comments received from Tribes and Tribal organizations.

¹ USEPA, 2011. EPA Policy on Consultation and Coordination with Indian Tribes. <https://19january2017snapshot.epa.gov/sites/production/files/2013-08/documents/cons-and-coord-with-indian-tribes-policy.pdf>.

Consultation and Coordination

Pre-Proposal Consultation and Coordination Period

On June 11, 2021, the EPA sent a Tribal Consultation Notification letter inviting Tribal officials to participate in consultation and coordination events and provide comments to the EPA. The letter (Appendix A) was sent to all 574 federally recognized Tribes as of that date. The letter invited Tribal leaders and designated consultation representatives to participate in the Tribal consultation and coordination process.

The EPA consulted with Tribes to gain an understanding of Tribal views on what was, at that time, a potential rulemaking to revise the federal water quality standards (WQS) regulation to explain how Tribal reserved rights to aquatic and aquatic-dependent resources must be protected when states and the EPA are establishing and revising WQS and to solicit their comments on potential provisions of a proposed rule. Due to the ongoing pandemic, the EPA participated in all meetings virtually.

The consultation period ended on September 13, 2021, though the EPA continued outreach with Tribes as well as consultation with individual Tribes after the close of the consultation period. In addition, the EPA continued to accept Tribal consultation comment letters after the close of the consultation period.

Post-Proposal Consultation and Coordination Period

After the EPA Administrator signed the proposed rule on November 28, 2022, the EPA sent a Tribal Consultation Notification letter on November 29, 2022, inviting Tribal officials to participate in consultation and coordination events and provide Tribal views on the EPA's proposed rule. The letter (Appendix B) was sent to all 574 federally recognized Tribes as of that date. The letter invited Tribal leaders and designated consultation representatives to participate in the Tribal consultation and coordination process.

The consultation period ended on February 28, 2023, and the public comment period for the proposed rule ended on March 6, 2023. The EPA encouraged Tribal representatives to submit written comments through the docket on the proposed rule.

Information Sharing and Engagement

Before issuing the proposed rule, the EPA engaged Tribes at 20 meetings of Tribal consortia and regional Tribal operations committees (RTOCs) and held two national listening sessions for Tribal representatives. **Table 1** below lists the title and date of each information sharing meeting in which the EPA participated pre-proposal.

After issuing the proposed rule, the EPA engaged Tribes at six meetings of Tribal consortia and RTOCs and held two national listening sessions for Tribal representatives. **Table 2** below lists the title and date of each information sharing meeting in which the EPA participated post-proposal.

Table 1: Pre-Proposal Information Sharing and Tribal Engagement Meetings

Date	Event
July 12, 2021	Region 2 Tribal Nations Listening Session
July 13, 2021	Region 6 Regional Tribal Operations Committee (RTOC) Meeting
July 13, 2021	Washington Coordinated Tribal Water Quality Program/Northwest Indian Fisheries Commission (NWIFC)
July 14, 2021	Region 5 RTOC Meeting
July 14, 2021	National Tribal Water Council – EPA Monthly Call
July 15, 2021	Region 10 RTOC Meeting
July 19, 2021	First National Listening Session for Tribes
July 21, 2021	Region 7 RTOC Meeting
July 22, 2021	Region 9 RTOC Meeting
August 4, 2021	Region 4 RTOC Meeting
August 4, 2021	EPA National Tribal Caucus
August 11, 2021	Region 1 RTOC Meeting
August 11, 2021	National Tribal Water Council
August 23, 2021	Second National Listening Session for Tribes
August 24, 2021	Follow Up Call with Region 9 Tribal Caucus/RTOC
August 26, 2021	Region 8 RTOC Meeting
September 10, 2021	Great Lakes Indian Fish and Wildlife Commission
September 22, 2021	EPA Tribal Wetlands Workshop
September 27, 2021	National Tribal Caucus-Office of Water 1-on-1
November 17, 2021	Oregon Tribal Environmental Forum

Table 2: Post-Proposal Information Sharing and Tribal Engagement Meetings

Date	Event
December 7, 2022	Region 4 RTOC Meeting
December 14, 2022	National Tribal Water Council
December 14, 2022	Region 1 RTOC Meeting
January 5, 2023	First National Listening Session for Tribes
January 5, 2023	Region 5 EPA-Tribal Monthly Mining Meeting
January 10, 2023	Second National Listening Session for Tribes
February 2, 2023	Great Lakes Indian Fish and Wildlife Commission
February 16, 2023	Region 10 RTOC Monthly Call

The EPA generally provided background information at each meeting via PowerPoint presentation. Representative copies of the presentations are available in the docket for the rule and on the EPA’s website at <https://www.epa.gov/wqs-tech/tribal-consultation-and-coordination-epas-proposal-revise-federal-water-quality-standards>.

Staff from the EPA’s Office of Water, Office of International and Tribal Affairs, and the respective EPA Regional offices participated in these meetings.

Individual Consultation and Coordination Meetings

Tables 3 and 4 below list the staff-level coordination meetings that the EPA held pre-proposal and post-proposal, respectively. Tables 5 and 6 list the leader-to-leader meetings that the EPA held pre-proposal and post-proposal, respectively.

In two instances, the EPA was unable to schedule consultation meetings where the Tribe did not follow up after multiple outreach attempts.

Additionally, two written comments the EPA received on the proposed rule on the last day of the public comment period included requests for formal Tribal consultation meetings prior to finalizing the rule. However, since the EPA received these comments on the last day of the public comment period, the EPA was not able to honor these requests.

Table 3: Pre-Proposal Staff-Level Engagement Meetings

Date	Tribe
August 12, 2021	Swinomish Indian Tribal Community
August 25, 2021	Little Traverse Bay Bands of Odawa Indians
September 1, 2021	Confederated Salish and Kootenai Tribes of the Flathead Nation
September 1, 2021	Leech Lake Band of Ojibwe
September 10, 2021	Listening Session for Tribes Located in EPA Region 5
September 20, 2021	Little River Band of Ottawa Indians
October 25, 2021	Squaxin Island Tribe

Table 4: Post-Proposal Staff-Level Engagement Meetings

Date	Tribe
January 23, 2023	Squaxin Island Tribe
February 7, 2023	Makah Tribe
February 23, 2023	Port Gamble S'Klallam Tribe
February 28, 2023	Seneca Nation
March 3, 2023	Buena Vista Rancheria of Me-Wuk Indians
March 6, 2023	Great Plains Tribal Water Alliance

Table 5: Pre-Proposal Leader-to-Leader Meetings

Date	Tribal Nation
August 10, 2021	Lac du Flambeau Band of Lake Superior Chippewa Indians
September 9, 2021	Houlton Band of Maliseet Indians
September 15, 2021	Makah Tribe
September 16, 2021	Pokagon Band of Potawatomi Indians
September 16, 2021	Summit Lake Paiute Tribe
September 21, 2021	Chickaloon Native Village, including staff from Eklutna Native Village, and Seldovia Village Tribe
September 28, 2021	Nez Perce Tribe

Table 6: Post-Proposal Leader-to-Leader Meetings

Date	Tribal Nation
February 14, 2023	Nez Perce Tribe
February 21, 2023	Confederated Tribes of the Colville Reservation
February 22, 2023	Lower Elwha Klallam Tribe
February 23, 2023	Houlton Band of Maliseet Indians
February 23, 2023	Muscogee Nation
March 3, 2023	Bad River Band of Lake Superior Chippewa
March 6, 2023	Quapaw Nation

The EPA provided the same background information at each meeting via PowerPoint presentation. Representative copies of the presentations are available in the docket for the rule.

Staff from the EPA’s Office of Water, Office of International and Tribal Affairs, and the respective EPA Regional offices participated in these meetings. Staff from the Office of General Counsel also participated in some leader-to-leader meetings.

Following each leader-to-leader meeting, the EPA sent Tribal leadership a follow up letter thanking the Tribe for consulting with the EPA and summarizing the Tribe’s comments during the discussion.

Written Comments

The EPA received pre-proposal letters from the following Tribes and Tribal organizations:

- Choctaw Nation of Oklahoma
- Columbia River Inter-Tribal Fish Commission
- Confederated Salish and Kootenai Tribes of the Flathead Nation
- Confederated Tribes of the Umatilla Indian Reservation
- Fond du Lac Band of Lake Superior Chippewa
- Great Lakes Indian Fish and Wildlife Commission
- Houlton Band of Maliseet Indians
- Lac du Flambeau Band of Lake Superior Chippewa Indians
- Leech Lake Band of Ojibwe
- Little River Band of Ottawa Indians
- Little Traverse Bay Bands of Odawa Indians
- Makah Tribe
- Mille Lacs Band of Ojibwe
- National Tribal Water Council
- Nez Perce Tribe
- Onondaga Nation
- Penobscot Nation
- Red Cliff Band of Lake Superior Chippewa Indians
- Seneca Nation
- Snoqualmie Tribe
- Yakama Nation

The EPA received post-proposal comment letters from the following Tribes and Tribal organizations:

- Bad River Band of Lake Superior Chippewa
- Bay Mills Indian Community
- Buena Vista Rancheria of Me-Wuk Indians
- California Indian Environmental Alliance
- Calista Corporation
- Chickaloon Native Village
- Confederated Salish and Kootenai Tribes of the Flathead Nation
- Confederated Tribes of the Colville Reservation
- Confederated Tribes of the Warm Springs Reservation of Oregon
- Elem Indian Colony
- Fond du Lac Band of Lake Superior Chippewa
- Grand Portage Band of Lake Superior Chippewa
- Great Lakes Indian Fish and Wildlife Commission
- Great Plains Tribal Water Alliance
- Houlton Band of Maliseet Indians
- Keweenaw Bay Indian Community
- Lac du Flambeau Band of Lake Superior Chippewa Indians
- Leech Lake Band of Ojibwe
- Lower Elwha Klallam Tribe
- Mille Lacs Band of Ojibwe
- Muscogee Nation
- National Tribal Water Council
- Nez Perce Tribe
- Northwest Indian Fisheries Commission (NWIFC)
- Oglala Sioux Tribe
- Orutsararmiut Native Council
- Port Gamble S'Klallam Tribe
- Puyallup Tribe of Indians
- Quapaw Nation
- Quinault Indian Nation
- Red Lake Band of Chippewa Indians
- Ridges to Riffles Indigenous Conservation Group
- Seminole Tribe of Florida
- Seneca Nation
- Shingle Springs Band of Miwok Indians
- Skokomish Tribe
- Snoqualmie Tribe
- Sokaogon Chippewa Community
- Squaxin Island Tribe
- Standing Rock Sioux Tribe
- Suquamish Indian Tribe
- Swinomish Indian Tribal Community
- Tribal Caucus of the Region 10 Tribal Operations Committee (RTOC)

- Upper Snake River Tribes Foundation
- White Earth Band of the Minnesota Chippewa Tribe
- Winnemem Wintu Tribe
- Yurok Tribe

All letters submitted are available in the docket for this rulemaking at Docket ID No. EPA-HQ-OW-2021-0971.

Themes Emerging from Consultation Meetings and Comment Letters

This section summarizes the key themes of pre-proposal and post-proposal input received through the Tribal consultation process, including feedback provided by Tribes during information sharing and engagement, staff-level coordination, and leader-to-leader consultation meetings as well as written feedback provided in letters. The EPA considered all Tribal input in developing the final rule.

1. The rule is an overdue recognition of Tribal reserved rights; clean water is necessary to protect Tribal reserved resources and lifeways

Many Tribes and Tribal organizations stated that clean water is essential to Tribal lifeways, including sustenance fishing, commercial fishing, and cultural uses, and stressed the need for clean water to exercise their reserved rights.

- Several commenters stated that the risk to human health from consumption of contaminated fish is a key concern of Tribal governments and Tribal members.
- Some Tribes stated their commitment to protecting water quality for current and future generations.
- Tribes mentioned wild rice, salmon, and other marine and freshwater fish as resources central to their lifeways.
- Some commenters noted that pollution has compromised Tribes' ability to practice their lifeways as understood by their ancestors, including noting that fish consumption advisories signify a violation of Tribal reserved rights.
- Some Tribes emphasized the need to protect waters connected to waters where reserved rights apply.
- Some commenters requested that the EPA consider cumulative impacts of both point and nonpoint sources of pollution to migratory species that move through the territorial waters of different states and countries.
- Some commenters stated that the federal trust responsibility requires the EPA to protect Tribal reserved rights when it promulgates or approves WQS.
- Some commenters noted that nutrient pollution is a key obstacle to exercising their reserved rights.
- Some commenters noted the importance of water quantity, which affects water quality and aquatic resources.

2. States should not have the authority or responsibility for interpreting Tribal reserved rights; interpretations of Tribal reserved rights in the WQS context should be limited to that context

Many Tribes and Tribal organizations raised concerns with the fact that the EPA proposed to require states to identify, and potentially interpret, Tribes' reserved rights.

- Several commenters asserted that states lack the federal government’s trust responsibility to Tribes and do not engage in government-to-government consultation with Tribes.
- Tribes raised concerns that states would be more likely than the federal government to make decisions that would be unfavorable to Tribes and unprotective of their rights.
- Several commenters stated that the proposed rule failed to set up a process to address the numerous likely instances where a state and a Tribe or Tribes disagree regarding the existence or scope of reserved rights.
- Tribes raised concerns about sharing information with states regarding their exercise of reserved rights.
- Several Tribes requested that the EPA revise the proposed rule to provide that states must obtain and rely on information from Tribes and/or the EPA so that states are not in the position of interpreting rights differently than the right holders.
- Several commenters noted the need for early and meaningful consultation with affected Tribal reserved right holders on the scope and definition of their reserved rights.
- Some commenters requested clarification about how the EPA would minimize litigation risk that could impact reserved rights.
- Some commenters asked whether the EPA would consult the Department of the Interior for such determinations.

3. The EPA should broaden the scope and definition of “Tribal reserved rights” and “right holders”

Several Tribes and Tribal organizations requested that the EPA clarify and/or expand the definition of “Tribal reserved rights” to ensure that the rule covers additional rights/species. Some Tribes and Tribal organizations asked the EPA to expand the definition of “right holders” to apply the rule’s protections to additional Tribes.

- Tribes identified additional rights such as: the right to hunt waterfowl, terrestrial species, and mammals; and the right to pray and/or engage in traditional ceremonial uses in which Tribal members come into direct contact with water.
- Some commenters asked how the EPA intends this rule to apply to Tribes without rights under federal law and/or recommended that the EPA provide equivalent protection to resources used by all Tribes regardless of existing legal recognition of those rights. Commenters noted that such protection should be based on Tribes’ inherent sovereignty, recognizing that Tribes have fished, hunted, and gathered in and around waters since time immemorial, and that rights that were never ceded are retained.
- Some commenters recommended that the EPA ensure that activities upstream of waters where Tribal reserved rights apply protect those rights.

4. The EPA should require that WQS reflect unsuppressed exercise of Tribal reserved rights

Several Tribes and Tribal organizations stated that the rule should protect the intended or traditional uses of a water body, including historical or heritage fish consumption rates, which may not be the same as current Tribal uses of that water body due to factors including fish contamination and Tribal citizens’ awareness of that contamination; water pollution generally; reduced or altered fish populations in accessible water bodies; improper application of fishing restrictions to Tribal fishers; and access issues.

- Some commenters recommended that information about heritage rates and Tribal Ecological Knowledge (TEK)/Indigenous Knowledge (IK) be weighed more heavily than contemporary data.
- Some Tribes asked the EPA to include a mandatory fish consumption rate “floor” in its rule to protect subsistence fishing.
- Many commenters requested that the EPA clarify and define the terms it used in its proposed rule, such as “unsuppressed” and “reasonably achievable.”
- Some commenters asked the EPA to clarify how suppression would be considered outside the context of fish consumption, and how to define when restoration efforts are planned or underway.

5. The EPA should further clarify the level of water quality necessary to protect Tribal reserved rights

Many Tribes and Tribal organizations requested clarification about the level of water quality necessary to protect Tribal reserved rights, who will be responsible for determining that level, and what will happen in the event of disagreement between the relevant state(s) and Tribe(s).

- Some commenters requested specific thresholds to protect Tribal reserved resources, including that for the purpose of establishing human health criteria, the cancer risk level be no less than 10^{-6} and Tribes be treated as the target population; that the EPA establish a fish consumption rate floor for subsistence fishers; that state designated uses must protect Tribal reserved rights; and that the EPA should prioritize ensuring protection of existing high quality waters.
- Some commenters requested that the EPA update its 2000 *Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health* to reflect the above recommendations for calculation of human health criteria for waters covered by Tribal reserved fishing rights.
- Some commenters expressed concern that the option to establish designated uses to protect Tribal reserved resources could be implemented with an inadequate standard of protection.
- Some commenters requested that TEK be included as a type of data that states must consider under this regulation.
- One commenter recommended that instead of requiring states to “adopt” designated uses that reflect treaty-protected use rights or rights created by federal law or executive action, the EPA should require states to recognize these rights as pre-existing designated uses which were created outside the CWA.
- Several commenters expressed concern about the burden on Tribes to derive data necessary to support appropriate implementation of the rule and recommended that the EPA provide technical and funding support for any additional studies or data collection needed to determine the WQS necessary to protect Tribal reserved rights.
- Several commenters sought clarification about how the EPA would reconcile likely differences of opinion about the level of water quality necessary to protect reserved rights. These commenters either requested clarification about how the EPA intends to resolve disputes or asserted that the EPA must provide a process for resolving disputes between states, Tribes, and/or the EPA.

6. The EPA should clarify how this rule will impact water rights

Several Tribes with water rights requested clarification about how this rule would impact adjudicated water rights and/or urged the EPA to ensure this change to the WQS regulations would protect flow sufficient to effectuate Tribal reserved rights to aquatic and aquatic-dependent resources.

7. The EPA should clarify how this rule will be implemented

Several Tribes and Tribal organizations requested information about how the new regulation would be implemented in other CWA programs such as National Pollutant Discharge Elimination System (NPDES) permits and CWA Section 401 certifications, as well as how it would lead to cleaning up existing pollution problems.

- Some commenters requested that the EPA revise its interpretation of the CWA Section 401 certification regulations to allow Tribes to object to or condition permits that would impair their reserved rights in both reservation waters and ceded territories, even when those rights were not protected by existing WQS.
- Some Tribes recommended that the EPA should consult with the potentially affected Tribe(s) as to any impact a permitted activity might have on the Tribe's reserved rights.
- Some Tribes requested that the EPA address states' failure to implement existing WQS in other CWA programs.
- Several commenters recommended that the EPA allow for Tribal co-management of water resources on federal lands where Tribes hold reserved rights.

8. The EPA should clarify how this rule applies in certain geographic areas

Several Tribes requested clarification about how this rule would apply to their specific situation.

- Several Tribes asserted in written comments that they have reserved rights to aquatic and aquatic-dependent resources in areas where states establish WQS, including in portions of the Great Lakes, Maine, Idaho, New York, Minnesota, Michigan, Wisconsin, Montana, Oklahoma, Oregon, Idaho, Washington, Wyoming, and Alaska.

9. Comments related to the process for developing the rule

The EPA received several comments related to the process for developing the proposed and final rules.

- Some participants suggested that the EPA co-draft the rule with Tribes, noting the value that Tribes can provide in such a process. Several commenters and meeting participants wanted to review rule language as it was being developed or requested discussion of possible regulatory text.
- Some commenters expressed a lack of trust in the EPA and the U.S. government generally to have their best interests at heart or fully understand their needs.
- Some commenters expressed frustration with the number of initiatives on which the EPA is simultaneously requesting their input.
- Some commenters requested that the EPA provide an opportunity for further government-to-government consultation prior to publication of a final rule.

Appendix A:

Notification of Consultation and Coordination Letter Sent to Tribes on June 11, 2021



UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF WATER

Re: Notification of Consultation and Coordination on Potential Revisions to the Federal Water Quality Standards Regulations to Protect Tribal Reserved Rights

Dear Honorable Leader,

The U.S. Environmental Protection Agency (EPA) is initiating consultation and coordination with federally recognized Indian tribes to inform potential revisions to the federal Clean Water Act (CWA) water quality standard (WQS) regulations. Many tribes, through treaties and equivalent agreements with the U.S. government, hold reserved rights to aquatic or aquatic-dependent resources in waters outside the boundaries of federal Indian reservations, or in areas otherwise subject to state and federal jurisdiction. EPA's Office of Water is considering pursuing a change to the federal WQS regulations at 40 CFR Part 131 to explicitly and sustainably protect tribal reserved rights in state waters, consistent with existing legal obligations.

This action is separate from and complementary to EPA's concurrent action to establish baseline WQS under the CWA for waters on Indian reservations that currently do not have EPA-approved WQS in place. EPA is initiating a concurrent 90-day tribal consultation period for that complementary action.

This consultation and coordination process will be conducted in accordance with the *EPA Policy on Consultation and Coordination with Indian Tribes* (<https://www.epa.gov/tribal/epa-policy-consultation-and-coordination-indian-tribes>). EPA invites you and/or your designated consultation representative(s) to participate in this process. **The 90-day consultation period begins on June 15, 2021 and ends on September 13, 2021.** 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. Pending the input that EPA receives during the tribal consultation period, EPA anticipates proposing this rule in early 2022. This will provide an additional opportunity for tribes to comment during the public comment period on the proposal.

EPA will hold a listening session via webinar for tribal leaders and staff on July 19, 2021 from 3:00-5:00 pm (EDT). You can register for the webinar [here](#). While listening sessions do not constitute individual tribal-EPA government-to-government consultation, it is hoped the sessions will provide further information to tribes to make an informed decision about whether to request an individual consultation.

EPA plans to hold a second listening session via webinar towards the end of the consultation period. EPA

plans to announce the date and time of the second webinar in early August and anticipates scheduling the webinar to occur in late August or early September. **Updates on the second webinar will be posted to:** <https://www.epa.gov/wqs-tech/protecting-tribal-reserved-rights-in-WQS>.

EPA invites interested tribal governments to request individual government-to-government consultation with EPA by contacting:

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

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

In order to provide time to schedule consultations prior to the close of the consultation period, please provide such requests by August 23, 2021. Given that this is a national consultation including all tribes and the United States is recovering from the pandemic, we anticipate that most if not all consultations will need to be conducted virtually.

Enclosed is a consultation and coordination plan that provides additional background and detail about the proposal that EPA is considering and the process that EPA intends to follow, including information on how you can provide input on this potential action. *This information is also available in EPA's Tribal Consultation Opportunities Tracking System (TCOTS) at* <https://tcots.epa.gov>.

Please contact our official EPA representative for this consultation and coordination process, Jennifer Brundage (Brundage.Jennifer@epa.gov) at (202) 566-1265, if you have any questions or would like to request alternate arrangements to the process outlined in the consultation and coordination plan. We look forward to hearing from you.

Sincerely,

DEBORAH NAGLE Digitally signed by DEBORAH NAGLE
Date: 2021.06.11 09:41:58 -04'00'

Deborah G. Nagle, Director
Office of Science and Technology

cc: Tribal Environmental Directors and Natural Resource Directors
EPA Regional Indian Coordinators

Enclosure

Consultation and Coordination Plan for Potential Revisions to the Federal Water Quality Standards Regulations to Protect Tribal Reserved Rights

Overview

EPA is examining how it could revise the federal water quality standards (WQS) regulations to explain how applicable tribal reserved rights are to be considered when states or EPA are establishing and revising WQS.

The proposed regulatory revisions would be relevant to situations where tribes have reserved rights to aquatic or aquatic-dependent resources in waters where states have jurisdiction to establish WQS. This is separate from and complementary to EPA's concurrent action to establish baseline WQS under the Clean Water Act (CWA) for waters on Indian reservations that currently do not have EPA-approved WQS in place. EPA is initiating a concurrent 90-day tribal consultation period for that complementary action.

Background information on the initiative

In 2016, after consultation and coordination with tribes, EPA concluded that WQS must comply with both the CWA and any applicable tribal reserved rights. For example, in Washington and Maine, EPA concluded that the states' human health criteria must be set at levels that would make fish safe to eat in subsistence/sustenance quantities in waters where reserved rights to fish for subsistence/sustenance exist. In both Washington and Maine, EPA disapproved the state's WQS and promulgated federal WQS that reflected the Agency's conclusion regarding protection of tribal reserved rights.

EPA's actions in Maine and Washington were both state-specific actions where EPA's reserved rights rationale was set forth in preamble language, rather than in regulation. The agency took a different position on this issue in subsequent years, which has resulted in uncertainty with respect to how states and EPA must reconcile existing legal obligations.

In his January 26, 2021 memorandum, *Tribal Consultation and Strengthening Nation-to-Nation Relationships*, President Biden committed to fulfilling federal trust and treaty responsibilities to tribal nations. Building from that commitment, EPA is renewing its emphasis on protecting tribal reserved rights to water resources and is interested in restoring the 2016 paradigm of harmonizing WQS with tribal reserved rights in a transparent and sustainable way. In that spirit, EPA is now considering amending the nationally-applicable federal WQS regulations to explain how WQS actions must be harmonized with applicable tribal reserved rights where those rights to a particular resource exist and are implicated.

EPA is considering proposing the following concepts in its amendments to the WQS regulations at 40 CFR Part 131:

- The requirement that states and EPA must not impair tribal reserved rights when establishing, revising, and evaluating WQS.
- The requirement that if reserved rights exist in the geographic area where a given set of WQS will apply, and the rights are related to a certain level of CWA protection that can be defined by available data, upholding those rights requires providing that level of CWA protection.
- Requirements outlining that the scope/definition of these reserved rights and their protection must be informed by consultation with the affected tribe(s).
- Providing options for regulatory approaches that states and EPA can use to ensure tribal reserved rights are protected:
 - Designated uses that explicitly incorporate protection of resources covered by tribal reserved rights.

- 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.

EPA is interested in your feedback on these specific concepts to ensure that we take all relevant considerations into account in this effort. EPA also anticipates soliciting pre-proposal feedback from states, since the rule will have implications for how states establish and revise WQS.

Potential benefits of this rulemaking

The goals of revising the federal WQS regulation are:

- Provide sustainable protection of tribal reserved rights.
- Provide clarity and transparency about how states and EPA must protect tribal reserved rights when establishing and revising WQS.

Opportunities for tribes to participate

The consultation period on this proposal will remain open for 90 days and will include two listening sessions via webinar.

EPA will hold a listening session via webinar for tribal leaders and staff on July 19, 2021 from 3:00-5:00 pm (EDT). You can register for the first webinar [here](#). EPA plans to hold a second listening session via webinar towards the end of the consultation period. **EPA plans to announce the date and time of the second webinar in early August and anticipates scheduling the webinar to occur in late August or early September.** The final date and time along with registration information will be 1) posted on [EPA's website for this rulemaking](#), and 2) shared with those who register for the first webinar on July 19.

The webinars will provide tribes and tribal leaders an opportunity to ask questions, learn more about this consultation opportunity and the potential revisions, and share their views.

Tribes may submit written comments to Jennifer Brundage at Brundage.jennifer@epa.gov.

Tribes may access this letter and related consultation information in EPA's Tribal Consultation Opportunities Tracking System (TCOTS) located at <https://tcots.epa.gov>.

EPA's goal is to provide sufficient information for tribal leaders and their designated consultation representative(s) to make an informed decision about the desire to continue with government-to-government consultation and to understand how to provide informed input. At any point during the consultation period EPA invites tribal nations to request government-to-government consultation with EPA. Tribes may request consultation for this potential rulemaking as well as the concurrent tribal baseline rulemaking at the same time. EPA looks forward to working with federally recognized tribes to better understand their needs and answer questions related to the potential revisions to the federal WQS regulation.

The information that you provide during the consultation period will help inform our forthcoming rule proposal. Whether or not you participate in this consultation and coordination process, you will still have the opportunity to provide input on the forthcoming proposed rule, which we anticipate will be available for public comment in early 2022. The proposed rule will be published in the Federal Register, accessible at

regulations.gov, and available on EPA's website [here](#).

Tribal Consultation and Coordination Process and Timeline

Date/Time	Event	Contact Information
June 15, 2021	Initiation of the 90-day tribal consultation period. Consultation notification letters are emailed to tribal leaders.	EPA Contact: Jennifer Brundage (202) 566-1265 (Brundage.Jennifer@epa.gov)
July 19, 2021 3:00-5:00 PM (EDT)	Webinar #1 for Tribal Leaders and Staff: Proposed Water Quality Standards Regulatory Revisions to Protect Tribal Reserved Rights	EPA Contact: Jennifer Brundage (202) 566-1265 (Brundage.Jennifer@epa.gov) To register, please visit EPA's website for this rulemaking (https://www.epa.gov/wqs-tech/protecting-tribal-reserved-rights-in-WQS).
Date and Time TBD Anticipated late August or early September	Webinar #2 for Tribal Leaders and Staff (same content as Webinar #1): Proposed Water Quality Standards Regulatory Revisions to Protect Tribal Reserved Rights	EPA Contact: Jennifer Brundage (202) 566-1265 (Brundage.Jennifer@epa.gov) Final date and time along with registration information will be 1) posted on EPA's website for this rulemaking at https://www.epa.gov/wqs-tech/protecting-tribal-reserved-rights-in-WQS , and 2) shared with those who register for the first webinar on July 19.
September 13, 2021	Close of formal tribal consultation and coordination period.	Any written comments must be received by this date. Please send comments via e-mail to Jennifer Brundage Brundage.jennifer@epa.gov .

Appendix B:

Notification of Consultation and Coordination Letter Sent to Tribes on November 29, 2022



UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF WATER

Re: Notification of Consultation and Coordination on Proposed Revisions to the Federal Water Quality Standards Regulation to Protect Tribal Reserved Rights

Dear Honorable Leader,

The U.S. Environmental Protection Agency (EPA) is continuing consultation and coordination with federally recognized Indian tribes to inform proposed revisions to the federal Clean Water Act (CWA) water quality standards (WQS) regulation at 40 CFR part 131 that would clarify and prescribe how WQS must protect aquatic and aquatic-dependent resources reserved to tribes in waters subject to state WQS.

EPA conducted tribal engagement and consultation on the concepts reflected in this proposed rule between June and September 2021, prior to drafting the proposed rule. We are resuming consultation because EPA has just signed the proposed rule and will soon be initiating public comment. This proposed rule reflects input received during the pre-proposal consultation period. This second invitation for consultation and coordination provides tribes an opportunity to share input and comments with EPA on the proposed rule now that it has been released for public review. The proposed rule was signed by the EPA Administrator on November 28, 2022 and will soon be published in the Federal Register for a 90-day public comment period.

To download a copy of the pre-publication version of the proposed rule, please visit the following website: <https://www.epa.gov/wqs-tech/protecting-tribal-reserved-rights-in-WQS>.

This consultation and coordination process will be conducted in accordance with the *EPA Policy on Consultation and Coordination with Indian Tribes* (<https://www.epa.gov/tribal/epa-policy-consultation-and-coordination-indian-tribes>). EPA invites you and/or your designated consultation representative(s) to participate in this process. **The 90-day consultation period begins on November 30, 2022 and ends on February 28, 2023.** The 90-day public comment period on the proposed rule will begin a few days after the beginning of the tribal consultation period; instructions on submitting written comments on the rule to the public comment docket are included in the attached consultation and coordination plan.

The enclosed consultation and coordination plan provides additional background and detail about the proposal and the process that EPA intends to follow, including information on how you can

provide input on this action. *This information is also available in EPA's Tribal Consultation Opportunities Tracking System (TCOTS) at <https://tcots.epa.gov>.*

Thank you for your consideration of this invitation for consultation and coordination. Please contact our official EPA representative for this consultation and coordination process, Jennifer Brundage, at Brundage.Jennifer@epa.gov or (202) 566-1265 if you have any questions. We look forward to hearing from you.

Sincerely,

DEBORAH
NAGLE

Digitally signed by
DEBORAH NAGLE
Date: 2022.11.29
08:31:53 -05'00'

Deborah G. Nagle,
Director
Office of Science and Technology

cc: Tribal Environmental Directors and Natural Resource Directors
EPA Regional Indian Coordinators

Enclosure

Consultation and Coordination Plan for Proposed Revisions to the Federal Water Quality Standards Regulation to Protect Tribal Reserved Rights

Overview

Many tribes, through treaties and other sources of federal law, hold reserved rights to aquatic or aquatic-dependent resources in waters subject to state WQS. EPA's Office of Water is proposing a change to the federal WQS regulation at 40 CFR part 131 to clarify and prescribe how WQS for waters subject to state WQS must protect aquatic and aquatic-dependent resources reserved to tribes.

Background information on the initiative

In 2016, after consultation and coordination with affected tribes, EPA concluded that WQS must protect tribal reserved rights to aquatic and aquatic-dependent resources in waters where those rights apply. For example, in Washington and Maine, EPA concluded that the states' human health criteria must be set at levels that would make fish safe to eat in subsistence/sustenance quantities in waters where reserved rights to fish for subsistence/sustenance exist. In both Washington and Maine, EPA disapproved the state's WQS and promulgated federal WQS that reflected the Agency's conclusion regarding protection of tribal reserved rights.

EPA's actions in Washington and Maine were both state-specific actions where EPA's reserved rights rationale was set forth in preamble language, rather than in regulation. The Agency took a different position on this issue in subsequent years, which has resulted in uncertainty with respect to how WQS established by states and EPA must protect tribal reserved rights.

In his January 26, 2021 memorandum, *Tribal Consultation and Strengthening Nation-to-Nation Relationships*, President Biden committed to fulfilling federal trust and treaty responsibilities to tribal nations. Building from that commitment, EPA is renewing its emphasis on protecting tribal reserved rights to aquatic resources and is proposing to restore the 2016 paradigm to ensure that WQS protect tribal reserved rights in a transparent and sustainable way. In that spirit, EPA is now proposing to amend the nationally applicable federal WQS regulation to establish a framework outlining how WQS actions must protect applicable tribal reserved rights.

EPA is proposing to amend the WQS regulation at 40 CFR part 131 to incorporate the following requirements:

- The requirement that WQS must protect tribal reserved rights applicable to the waters subject to such standards.
- The requirement that 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.
- The requirement that EPA will initiate tribal consultation with the right holders, consistent with applicable EPA tribal consultation policies, in determining whether state WQS protect applicable reserved rights.
- The requirement that states must ensure that rights are protected using a variety of approaches,

including:

- (1) Designating uses that either expressly incorporate protection of the tribal reserved rights or encompass such rights; and
- (2) Establishing water quality criteria to protect tribal reserved rights; and/or
- (3) Using applicable antidegradation requirements to maintain and protect water quality that protects tribal reserved rights.

The proposed rule will be published in the Federal Register, accessible at <http://www.regulations.gov>, and available on EPA's website [here](#).

EPA welcomes your input on any aspects of the proposed rule.

Potential benefits of this rulemaking

The goal of revising the federal WQS regulation is to codify a framework that provides clarity and transparency about how states and EPA must protect tribal reserved rights when establishing and revising WQS.

Opportunities for tribes to participate

The table below outlines the approach and timeline for consultation and coordination. EPA is also looking for additional opportunities to engage with tribes during the consultation period.

At any time during the consultation and coordination process, tribes may submit written comments directly to the public docket at <http://www.regulations.gov>, Docket ID No. EPA-HQ-OW-2021-0791. In order to be considered in development of the final rule, all comments must be received by the end of the 90-day public comment period deadline, which EPA expects to be shortly after the **February 28, 2023** end of the tribal consultation and coordination period. All written comments submitted to the docket at [regulations.gov](http://www.regulations.gov) will be addressed in EPA's Response to Comment document for the rule.

Written comments on the rule that the tribe does not submit as public comments (see above) will be addressed in the tribal consultation summary accompanying the final rule instead of in EPA's Response to Comment document. Verbal comments provided during webinars, consultation and coordination meetings will be summarized and addressed in the tribal consultation summary accompanying the final rule. The tribal consultation summary, any written comments provided during consultation, and the Response to Comment document will be included in the docket for the final rule.

Pending the input that EPA receives through tribal consultation and public comments, EPA anticipates finalizing this rule in late 2023.

EPA also will hold identical listening sessions via webinar for tribal leaders and staff on January 5, 2023 from 2:00-4:00 pm (ET) and January 10, 2023 from 3:00-5:00 pm (ET). You can find links to register for the listening sessions on EPA's website for this rulemaking, at the link provided in the table below.

The listening sessions will provide tribes and tribal leaders an opportunity to learn more about this consultation opportunity and the proposed rule and share their views. While listening sessions do not

constitute individual tribal-EPA government-to-government consultation, it is hoped the sessions will provide further information to tribes to make an informed decision about whether to request an individual consultation.

Additionally, EPA invites interested tribal governments to request individual government-to-government consultation with EPA by contacting:

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

In order to provide time to schedule consultations prior to the close of the consultation period, please provide such requests by February 1, 2023. EPA will work with your staff to schedule the consultation meetings with your tribal government as requests are received. In order to fully consider input from tribal governments prior to finalizing the federal rule, EPA must conclude the consultation meetings by the end of the 90-day public comment period deadline. EPA expects the public comment period to end shortly after February 28, 2023 (the closing date of the formal tribal consultation and coordination period).

Given that this is a national consultation invitation to all federally recognized tribes in the U.S. and the nation is currently recovering from the pandemic, we anticipate that most, if not all, consultations will be conducted virtually.

EPA's goal is to provide sufficient information for tribal leaders and their designated consultation representative(s) to make an informed decision about whether to pursue government-to-government consultation and to understand how to provide informed input. EPA looks forward to working with federally recognized tribes to better understand their needs and answer questions related to the proposed revisions to the federal WQS regulation. The information that you provide during the consultation and coordination period will help inform our final rule.

Tribes may access this letter and related consultation information in EPA's Tribal Consultation Opportunities Tracking System (TCOTS) located at <https://tcots.epa.gov>.

Tribal consultation and coordination process and timeline

Date/Time	Event	Contact Information
Wednesday, November 30, 2022	Initiation of the 90-day tribal consultation period. Consultation notification letters are emailed to tribal leaders.	EPA Contact: Jennifer Brundage (202) 566-1265 (Brundage.Jennifer@epa.gov)

Date/Time	Event	Contact Information
Thursday, January 5, 2023 2:00-4:00 PM (ET)	Listening Session via Webinar #1 for Tribal Leaders and Staff: Proposed Water Quality Standards Regulatory Revisions to Protect Tribal Reserved Rights	EPA Contact: Jennifer Brundage (202) 566-1265 (Brundage.Jennifer@epa.gov) To register, please visit EPA's website for this rulemaking (https://www.epa.gov/wqs-tech/tribal-consultation-and-coordination-protecting-tribal-reserved-rights-in-WQS).
Tuesday, January 10, 2023 3:00-5:00 PM (ET)	Listening Session via Webinar #2 for Tribal Leaders and Staff (same content as Webinar #1): Proposed Water Quality Standards Regulatory Revisions to Protect Tribal Reserved Rights	EPA Contact: Jennifer Brundage (202) 566-1265 (Brundage.Jennifer@epa.gov) To register, please visit EPA's website for this rulemaking (https://www.epa.gov/wqs-tech/tribal-consultation-and-coordination-protecting-tribal-reserved-rights-in-WQS).
Wednesday, February 1, 2023	Deadline for requesting government-to-government consultation meetings	EPA Contact: Jennifer Brundage (202) 566-1265 (Brundage.Jennifer@epa.gov)
Tuesday, February 28, 2023	Close of formal tribal consultation and coordination period. All consultation meetings must take place and comments must be received by the end of the 90-day public comment period, which EPA anticipates will be shortly after the close of the consultation and coordination period, in order to be considered in development of the final rule.	EPA Contact: Jennifer Brundage (202) 566-1265 (Brundage.Jennifer@epa.gov)

EPA also encourages tribal representatives to attend the public hearings for this proposed rule, as they provide additional opportunities for tribes to gather information and share their views. The public hearings will occur on January 24, 2023 from 4:00-6:00 PM (ET) and January 31, 2023 from 2:00-4:00 PM (ET). Information on how to register is available on EPA's website at <https://www.epa.gov/wqs-tech/protecting-tribal-reserved-rights-in-WQS>.