

Final Water Quality Standards Regulatory Revisions to Protect Tribal Reserved Rights

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The U.S. Environmental Protection Agency is finalizing a rule to help protect water quality where Tribes hold and assert rights to aquatic and aquatic-dependent resources. Specifically, the agency is revising the federal water quality standards (WQS) regulation to describe how EPA and states must consider applicable Tribal reserved rights when establishing WQS. For the first time, this action establishes a clear and consistent national framework for EPA and states to follow. When implemented, this final rule will better protect waters that Tribes depend on for various uses, including fishing, gathering wild rice, and cultural practices.

How does this action support Tribes?

Clean water is essential to Tribes, but diminished water quality prevents many Tribes from maintaining traditional ways of life. By clearly describing how EPA will review state-set WQS that impact water and water-dependent resources reserved to Tribes, this rule will enhance protection of those resources. The final regulatory framework will also provide transparency and predictability for Tribes, states, regulated industries, municipalities, and the public.

What are water quality standards?

WQS define the goals for a water body by designating its uses (such as fishing), setting criteria (pollutant levels or conditions) that support those uses, and establishing policies to protect existing water quality from degradation. Section 303(c) of the Clean Water Act (CWA) directs states¹ to establish WQS for rivers, lakes, estuaries, and other waters of the U. S. within their jurisdictions. States must review their WQS at least every three years and, if appropriate, revise or establish new standards. Any new or revised WQS must be submitted to EPA for review. EPA's regulation that implements CWA section 303(c) specifies requirements for states to develop WQS that are consistent with the Act.

What are Tribal reserved rights?

This rule defines Tribal reserved rights, for purposes of the federal WQS regulation at Title 40, Part 131 of the Code of Federal Regulations, as "any rights to CWA-protected aquatic and/or aquatic-dependent resources reserved by right holders, either expressly or implicitly, through Federal treaties, statutes, or Executive orders." The U.S. Constitution defines treaties as the supreme law of the land. Many Tribes hold rights to resources in waters where states establish WQS. In implementing CWA section 303(c), EPA has an obligation to ensure that its WQS approvals and disapprovals are consistent with federal laws reflecting Tribal reserved rights.

¹ Pursuant to 40 CFR 131.3(j), "states" include the 50 states, the District of Columbia, Guam, the Commonwealth of Puerto Rico, Virgin Islands, American Samoa, the Commonwealth of the Northern Mariana Islands, and Indian tribes that the EPA determines to be eligible for purposes of the WQS program.

What does the final rule require?

The rule requires that if a Tribe asserts a Tribal reserved right in writing to a state and EPA for consideration in establishment of WQS, the state must, to the extent supported by available data and information:

- 1) Take into consideration the use and value of its waters for protecting the Tribal reserved right in adopting or revising designated uses.
- 2) Take into consideration the anticipated future exercise of the Tribal reserved right unsuppressed by water quality in establishing relevant WQS.
- 3) Establish water quality criteria to protect the Tribal reserved right where the state has adopted designated uses that either expressly incorporate protection of the Tribal reserved right or encompass the right. This latter requirement includes developing criteria to protect right holders using at least the same risk level as the state would otherwise use to develop criteria to protect the state's general population (i.e., non-right holders).

The rule requires that EPA:

- 1) Provide assistance with evaluating Tribal reserved rights upon request by states or right holders, to the extent practicable.
- 2) Review WQS adopted by states and authorized Tribes to determine whether they appropriately considered applicable Tribal reserved rights.
- 3) Initiate the Tribal consultation process with the right holders to inform this review.

Where can I find more information?

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