

Tribal-State WQS Dispute Resolution Mechanism

Section 518 of the [Clean Water Act \(CWA\)](#) required EPA to establish a "mechanism for the resolution of any unreasonable consequences that may arise as a result of differing water quality standards that may be set by states and Indian tribes located on common bodies of water." EPA established such a mechanism in [40 CFR 131.7](#).

EPA encourages states and authorized tribes to resolve their differences without EPA involvement and to consider jointly establishing a mechanism to resolve disputes when such disputes arise, ideally before either party begins the water quality standards (WQS) adoption process. The §131.7 process is available, however, for a state or authorized tribe to request EPA's involvement in a situation specifically involving differing state and tribal WQS under the CWA on a common body of water.

EPA's role in dispute resolution is to act in a neutral fashion with all parties to the dispute in an effort to reach an agreement that resolves the dispute.

The §131.7 regulation does not include a fixed time frame for resolving disputes. EPA intends to proceed as quickly as possible and encourages parties to the dispute to establish informal time frames and reach resolution expeditiously. However, the variety of potential disputes to be resolved precludes EPA from specifying a single regulatory time limit. EPA prefers to obtain a reasonable agreement or decision rather than to arbitrarily establish a time frame within which an agreement or decision must be made.

The table on the following pages describes the Tribal-State WQS Dispute Resolution Mechanism. The left column provides the regulatory description of the mechanism in [40 CFR 131.7](#). The right column provides an explanation of selected aspects of the mechanism that may be useful to potential users of the mechanism, but that does not replace, qualify, or expand the regulatory description.

Disclaimer

This document is designed to assist tribes and states when confronted with certain issues that may arise between them as a result of differing WQS on common bodies of water. It is completely discretionary for either a state or a tribe to request EPA's involvement as described in 40 CFR 131.7 and this document. This document does not impose legally binding requirements on EPA, tribes, or other entities, nor does it confer legal rights or impose legal obligations or responsibilities upon any entity or member of the public. The Clean Water Act provisions and EPA's regulation, which may be referenced in this document, contain legally binding requirements. This document is not itself a regulation, however, nor does it change or substitute for any Clean Water Act provision or EPA regulation.

Provisions of 40 CFR 131.7 (Dispute resolution mechanism)	Explanation
131.7 (a) Where disputes between States and Indian Tribes arise as a result of differing water quality standards on common bodies of water, the lead EPA Regional Administrator, as determined based upon OMB circular A-105, shall be responsible for acting in accordance with the provisions of this section.	<i>The lead regional administrator (RA) is expected to enlist the aid of any other affected EPA regional offices. If it is not clear which RA should be the lead, EPA headquarters will assign one.</i>
<p>131.7 (b) The Regional Administrator shall attempt to resolve such disputes where:</p> <ul style="list-style-type: none"> (1) The difference in water quality standards results in unreasonable consequences; (2) The dispute is between a State (as defined in §131.3(j) but exclusive of all Indian Tribes) and a Tribe which EPA has determined is eligible to the same extent as a State for purposes of water quality standards; (3) A reasonable effort to resolve the dispute without EPA involvement has been made; (4) The requested relief is consistent with the provisions of the Clean Water Act and other relevant law; (5) The differing State and Tribal water quality standards have been adopted pursuant to State and Tribal law and approved by EPA; and (6) A valid written request has been submitted by either the Tribe or the State 	<p><i>Paragraph (b) establishes six conditions the lead RA must evaluate to initiate the formal §131.7 dispute resolution mechanism. Although the RA may decline to initiate the §131.7 mechanism based on any of the six factors, the Agency is generally willing to discuss specific situations and to mediate disputes informally between states and tribes (or tribes and tribes) consistent with its practice in mediating disputes between states (see 48 FR 51412).</i></p> <p><i>The regulation does not define “unreasonable consequences” because they are dependent on the unique circumstances associated with each dispute. Under (d) below, the RA has discretion to determine when consequences warrant initiating a dispute resolution action.</i></p> <p><i>This formal §131.7 dispute resolution mechanism is limited to disputes between a state and an authorized Indian tribe (e.g., not between two authorized tribes or two states). As mentioned above, informal mediation might be appropriate for these other situations.</i></p> <p><i>EPA encourages states and authorized Indian tribes to resolve their differences beforehand without EPA involvement.</i></p> <p><i>While this regulatory language focuses on situations in which states and authorized tribes have already adopted standards that have been approved by EPA, EPA encourages use of this ADR process to resolve differences prior to the WQS adoption and approval process.</i></p> <p><i>Refer to 131.7 (c) below.</i></p>
131.7 (c) Either a State or a Tribe may request EPA to resolve any dispute which satisfies the criteria of paragraph (b) of this section. Written requests for EPA involvement should be submitted to the lead Regional Administrator and must include:	<i>EPA needs a written request from an authorized tribe or a state with EPA-approved water quality standards to initiate the formal dispute resolution mechanism.</i>

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<ul style="list-style-type: none"> (1) A concise statement of the unreasonable consequences that are alleged to have arisen because of differing water quality standards; (2) A concise description of the actions which have been taken to resolve the dispute without EPA involvement; (3) A concise indication of the water quality standards provision which has resulted in the alleged unreasonable consequences; (4) Factual data to support the alleged unreasonable consequences; and (5) A statement of the relief sought from the alleged unreasonable consequences. 	<p><i>The request need not be lengthy and may be transmitted in any written form, but must come from an appropriate tribal or state official and cover each of the five points at left.</i></p>
<p>131.7 (d) Where, in the Regional Administrator's judgment, EPA involvement is appropriate based on the factors of paragraph (b) of this section, the Regional Administrator shall, within 30 days, notify the parties in writing that he/she is initiating an EPA dispute resolution action and solicit their written response. The Regional Administrator shall also make reasonable efforts to ensure that other interested individuals or groups have notice of this action. Such efforts shall include but not be limited to the following:</p> <ul style="list-style-type: none"> (1) Written notice to responsible Tribal and State Agencies, and other affected Federal agencies, (2) Notice to the specific individual or entity that is alleging that an unreasonable consequence is resulting from differing standards having been adopted on a common body of water, (3) Public notice in local newspapers, radio, and television, as appropriate, (4) Publication in trade journal newsletters, and (5) Other means as appropriate. 	<p><i>The RA can initiate the 131.7 dispute resolution mechanism if he or she determines that EPA involvement is appropriate based on the factors in section (b) above. Note the requirements to notify the parties, other agencies, interested individuals and the public.</i></p>
<p>131.7 (e) If in accordance with applicable State and Tribal law an Indian Tribe and State have entered into an agreement that resolves the dispute or establishes a mechanism for resolving a dispute, EPA shall defer to this agreement where it is consistent with the Clean Water Act and where it has been approved by EPA.</p>	<p><i>When a state and authorized tribe reach resolution, they may choose to incorporate the terms of their agreement in a cooperative agreement to jointly plan and administer CWA requirements, pursuant to Section 518(d) of the CWA. Section 518(d) provides that such agreements are to be approved by the EPA.¹</i></p> <p><i>"Consistent with the CWA" includes consistency with the provisions of 40 CFR part 131.</i></p>

¹ The Agency has delegated approval authority for section 518(d) agreements to the Regional Administrators, subject to concurrence by the General Counsel for agreements regarding programs (including WQS) for which EPA authorization or approval is required.

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<p>131.7 (f) EPA dispute resolution actions shall be consistent with one or a combination of the following options:</p> <ul style="list-style-type: none"> (1) <i>Mediation.</i> The Regional Administrator may appoint a mediator to mediate the dispute. Mediators shall be EPA employees, employees from other Federal agencies, or other individuals with appropriate qualifications. <ul style="list-style-type: none"> (i) Where the State and Tribe agree to participate in the dispute resolution process, mediation with the intent to establish Tribal-State agreements, consistent with Clean Water Act section 518(d), shall normally be pursued as a first effort. (ii) Mediators shall act as neutral facilitators whose function is to encourage communication and negotiation between all parties to the dispute. (iii) Mediators may establish advisory panels, to consist in part of representatives from the affected parties, to study the problem and recommend an appropriate solution. (iv) The procedure and schedule for mediation of individual disputes shall be determined by the mediator in consultation with the parties. (v) If formal public hearings are held in connection with the actions taken under this paragraph, Agency requirements at 40 CFR 25.5 shall be followed. 	<p><i>The §131.7 dispute resolution mechanism provides EPA with alternative courses of action: mediation, arbitration, and a default procedure.</i></p> <p><i>In a mediation, EPA would appoint a mediator to facilitate discussions between the parties and arrive at an agreement or other resolution that is acceptable to the parties. The mediated negotiations may be informal or formal, public or private. The mediator can also establish an advisory group, consisting of representatives from the affected parties, to study the problem and recommend an appropriate resolution.</i></p> <p><i>EPA does not provide for state or tribal approval of mediators because such an approval process provides too great an opportunity to delay the initiation of the mediation process and because the role of the mediator is limited to acting as a neutral facilitator. There is no prohibition against EPA consulting with the parties regarding a mediator; there is just no requirement to do so.</i></p>

- (2) *Arbitration.* Where the parties to the dispute agree to participate in the dispute resolution process, the Regional Administrator may appoint an arbitrator or arbitration panel to arbitrate the dispute. Arbitrators and panel members shall be EPA employees, employees from other Federal agencies, or other individuals with appropriate qualifications. The Regional Administrator shall select as arbitrators and arbitration panel members individuals who are agreeable to all parties, are knowledgeable concerning the requirements of the water quality standards program, have a basic understanding of the political and economic interests of Tribes and States involved, and are expected to fulfill the duties fairly and impartially.
- (i) The arbitrator or arbitration panel shall conduct one or more private or public meetings with the parties and actively solicit information pertaining to the effects of differing water quality permit requirements on upstream and downstream dischargers, comparative risks to public health and the environment, economic impacts, present and historical water uses, the quality of the waters subject to such standards, and other factors relevant to the dispute, such as whether proposed water quality criteria are more stringent than necessary to support designated uses, more stringent than natural background water quality or whether designated uses are reasonable given natural background water quality.
 - (ii) Following consideration of relevant factors as defined in paragraph (f)(2)(i) of this section, the arbitrator or arbitration panel shall have the authority and responsibility to provide all parties and the Regional Administrator with a written recommendation for resolution of the dispute. Arbitration panel recommendations shall, in general, be reached by majority vote. However, where the parties agree to binding arbitration, or where required by the Regional Administrator, recommendations of such arbitration panels may be unanimous decisions. Where binding or non-binding arbitration panels cannot reach a unanimous recommendation after a reasonable period of time, the Regional Administrator may direct the panel to issue a non-binding decision by majority vote.

With an arbitration, the EPA appoints an arbitrator (or arbitration panel) to gather all information pertinent to the dispute considering the factors listed in the [CWA](#) and recommend an appropriate solution. The parties would not be obligated, however, to abide by the arbitrator's decision unless they agree to be bound by the arbitration. The arbitrator is responsible for issuing a written recommendation to all parties. Arbitrators are not allowed to engage in "ex parte" communication pertaining to the dispute – that is, communicating with one party without the knowledge of the other parties.

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<p>(iii) The arbitrator or arbitration panel members may consult with EPA's Office of General Counsel on legal issues, but otherwise shall have no <i>ex parte</i> communications pertaining to the dispute. Federal employees who are arbitrators or arbitration panel members shall be neutral and shall not be predisposed for or against the position of any disputing party based on any Federal Trust responsibilities which their employers may have with respect to the Tribe. In addition, arbitrators or arbitration panel members who are Federal employees shall act independently from the normal hierarchy within their agency.</p> <p>(iv) The parties are not obligated to abide by the arbitrator's or arbitration panel's recommendation unless they voluntarily entered into a binding agreement to do so.</p> <p>(v) If a party to the dispute believes that the arbitrator or arbitration panel has recommended an action contrary to or inconsistent with the Clean Water Act, the party may appeal the arbitrator's recommendation to the Regional Administrator. The request for appeal must be in writing and must include a description of the statutory basis for altering the arbitrator's recommendation.</p> <p>(vi) The procedure and schedule for arbitration of individual disputes shall be determined by the arbitrator or arbitration panel in consultation with parties.</p> <p>(vii) If formal public hearings are held in connection with the actions taken under this paragraph, Agency requirements at 40 CFR 25.5 shall be followed.</p>	<p><i>If one party claims that an arbitrator has recommended a resolution that is not authorized by the CWA, (f)(2)(v) allows the party to appeal the arbitrator's decision. Such requests must be in writing and must include a statement of the statutory basis for altering the arbitrator's recommendation.</i></p>
<p>(3) <i>Dispute resolution default procedure.</i> Where one or more parties (as defined in paragraph (g) of this section) refuse to participate in either the mediation or arbitration dispute resolution processes, the Regional Administrator may appoint a single official or panel to review available information pertaining to the dispute and to issue a written recommendation for resolving the dispute. Review officials shall be EPA employees, employees from other Federal agencies, or other individuals with appropriate qualifications. Review panels shall include appropriate members to be selected by the Regional Administrator in consultation with the participating parties. Recommendations of such review officials or panels shall, to the extent</p>	<p><i>The default procedure is used where one or more parties refuse to participate in mediation or arbitration. The default procedure is used only as a last resort after all other avenues of resolving the dispute have been exhausted. While this dispute resolution technique is similar to arbitration, arbitration generally refers to a process whereby all parties participate voluntarily.</i></p> <p><i>The default procedure simply provides for EPA to review available information and to issue a recommendation for resolving the dispute. EPA's recommendation in this situation would have no enforceable impact but may result in reconsideration by either affected party to</i></p>

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possible given the lack of participation by one or more parties, be reached in a manner identical to that for arbitration of disputes specified in paragraphs (f)(2)(i) through (f)(2)(vii) of this section.	<i>continue resolution negotiations. Any written recommendation resulting from this procedure is provided to all parties involved in the dispute.</i>
<p>131.7(g) <i>Definitions.</i> For the purposes of this section:</p> <p>(1) <i>Dispute Resolution Mechanism</i> means the EPA mechanism established pursuant to the requirements of Clean Water Act section 518(e) for resolving unreasonable consequences that arise as a result of differing water quality standards that may be set by States and Indian Tribes located on common bodies of water.</p> <p>(2) Parties to a State-Tribal dispute include the State and the Tribe and may, at the discretion of the Regional Administrator, include an NPDES permittee, citizen, citizen group, or other affected entity.</p>	<p><i>EPA's role in dispute resolution is to work with all parties to the dispute in an effort to reach an agreement that resolves the dispute.</i></p> <p><i>EPA may include other parties in addition to states and authorized tribes in the dispute resolution process. In some cases, the inclusion of NPDES dischargers or landowners subject to nonpoint source restrictions may be helpful to arrive at a meaningful resolution of the dispute.</i></p>

Mediators and Arbitrators

Mediators and arbitrators may be EPA staff, staff from other federal agencies, or other individuals with appropriate qualifications. Because of resource constraints, the EPA anticipates that mediators and arbitrators will generally be EPA staff rather than consultants. Staff members from other federal agencies are selected, where appropriate, subject to their availability. EPA intends for mediators and arbitrators to conduct the dispute resolution mechanism in a fair and impartial manner and selects individuals who have not been involved with the particular dispute. Members of arbitration panels are selected by EPA in consultation with the parties. In some cases, such panels may consist of one representative from each party to the dispute plus one neutral panel member. Although not specifically mentioned in 40 CFR 131.7, any party to the mediation or arbitration may request to remove the mediator or arbitrator for reasonable cause, which could include showing bias or unfairness or taking illegal or unethical actions.

Arbitrators and arbitration panel members are selected to include only individuals who are agreeable to all affected parties, are knowledgeable concerning the WQS program requirements, have a basic understanding of the political and economic interests of Indian tribes and states involved, and will fulfill the duties fairly and impartially. These requirements are not applicable to mediators.

Resolution of Disputes

EPA envisions developing a number of possible outcomes that, individually or in combination, would likely resolve most of the disputes that would arise. These actions may include, but are not limited to, the following:

- A state or authorized tribe agrees to revise the WQS or NPDES permit limits to ensure that downstream WQS are met.
- A state or authorized tribe agrees to remove a use (consistent with 40 CFR 131.10(g)) or revise a water quality criterion (consistent with 40 CFR 131.11).
- A state or authorized tribe issues a variance from WQS (consistent with 40 CFR 131.14) for a particular discharge subject to EPA approval.
- A NPDES discharger or landowner agrees to provide additional water pollution control.
- EPA assumes NPDES permit-issuing authority for a state or authorized tribe and issues a permit to ensure that downstream WQS are met.
- EPA promulgates new or revised federal WQS where state or tribal WQS do not meet the requirements of the CWA.

EPA Actions

In addition to giving EPA a potential role in resolving certain state-tribal disputes described in this paper, the Clean Water Act also gives EPA responsibilities for overseeing a variety of state and authorized tribal actions under the Act that could arise in these situations. For a description of EPA's role in overseeing state and tribal WQS, see the chapter entitled "Procedures for Review and Revision of Water Quality Standards" of the [Water Quality Standards Handbook](#).