



Federal Baseline Water Quality Standards for Indian Reservations

Proposed Federal Promulgation

Listening session for Tribal Governments

Thursday, July 8, 2021

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



Presenters

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Opening Remarks

Deborah Nagle
Director, Office of Science and Technology
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Purpose of Today's Listening Session

To obtain input from tribal governments prior to publishing a proposed rulemaking in early 2022 on potential Tribal Baseline Water Quality Standards (WQS).

EPA will:

- Present current thinking on the proposed rulemaking for potential Baseline WQS
- Answer questions
- Invite feedback – Are we on the right track? Are we missing anything important?



Outline of Today's Listening Session

- Presentation by EPA (20 min)
 - Background - Why Baseline WQS?
 - Input from tribal governments to date
 - Potential Baseline WQS – EPA's current thinking and options
 - Potential impacts
 - Questions related to the potential rulemaking
 - Next steps
- Open discussion (1 hr 40 min)



Background

- Only 46 tribes out of over 300 with reservations currently have EPA-approved WQS effective under the Clean Water Act.
- Previous Baseline WQS Efforts
 - Between 1999 and 2003, EPA developed but did not complete a rulemaking to establish federal “core standards” for Indian country waters.
 - EPA published an Advance Notice of Proposed Rulemaking (ANPRM) in 2016 to solicit comments on promulgating “baseline” WQS.
 - EPA engaged extensively with tribal governments during both efforts



Potential benefits of this rulemaking

- Establishing water quality goals for reservation waters
- Facilitating tribal participation in managing water quality
- Providing basis for enforceable NPDES and other discharge permits
- Protecting reservation waters from upstream discharges
- Providing basis for determining watershed impairments



Input from Tribal Governments to Date

Input from consultation and coordination 2015-2016:

- Tribes were cautiously optimistic and generally supportive.
 - Discussed WQS protections from a cultural perspective.
 - Need for regional WQS tailoring (esp. fish consumption rates).
 - Antidegradation is important.
 - Concern for EPA capacity and resources.
- National Tribal Water Council (NTWC) members were strongly supportive:
 - “Full promulgation” – to advance tribal sovereignty and EPA trust responsibility, no opt in or out.
 - How EPA communicates with tribes is key: Should empower tribes to consult with EPA during implementation (e.g., EPA issuance of permits).

Written comments on 2016 ANPRM (12 tribal governments and associations):

- The majority of comments from tribal governments expressed support for promulgation of baseline WQS. The NTWC, in its 2016 comments, was a vocal supporter. A few tribes expressed concerns with this effort and requested options to not be included in a promulgation.

Support conveyed in 2021:

- NTWC reiterated its support via a 2020/2021 Transition Brief to EPA.
- The National Tribal Caucus included baseline WQS in their budget priority guidance for FY 2023.



Input from Tribes to Date: Tribal Stories

Pueblo of Jemez:

- The Pueblo's EPA-Tribal Environmental Plan (ETEP) includes development of water quality standards as a long-term priority.
- Environmental staff at the Pueblo implement a surface water monitoring program. They also provide information about water quality standards to Tribal Leaders and the Tribal Administration.
- Federal baseline water quality standards would be used to protect the Pueblo's surface waters, until the Tribe adopts its own standards that are approved by EPA.

Nez Perce Tribe of Idaho

- In Feb 2014, the Tribe requested that EPA promulgate federal water quality standards.
- In Aug-Nov 2015 pre-consultation, NPT letter to EPA:
"The consequences of EPA not taking action to protect water quality on Indian reservations would pose a significant concern for the Tribe and Tribes throughout the country."



Where would Potential Baseline Standards Apply? Current Thinking:

- Baseline WQS would apply to Indian reservation waters where EPA has not:
 - promulgated other federal WQS or
 - approved tribal or state WQS
- Baseline WQS would not apply to:
 - off-reservation allotments and
 - tribes that elect to “**opt-out**” in circumstances where the tribe and/or EPA has or intends to develop a plan for establishing WQS under the CWA within a reasonable amount of time.



Baseline WQS and TAS for Tribes

- EPA continues to encourage and support interested tribes to seek TAS to administer the WQS program
- The BWQS are not meant to discourage tribes from seeking TAS
- EPA would intend to remove the BWQS for any tribes that subsequently get TAS and EPA-approved WQS.



Potential Baseline Standards

Water quality standards consist of three elements:

1. Designated uses – narrative goals for a waterbody, such as recreation and protection of aquatic life
2. Water quality criteria – numeric or narrative pollutant levels to protect designated uses
3. Antidegradation provisions – protect existing uses and high quality waters



Potential Baseline Standards

1. Designated uses

- Considering for all waters: a suite of designated uses that provide for protection of uses such as recreation, fish propagation, and fish consumption.
- Suggested by many tribes in 2016 consultation: Protection of cultural and traditional uses of water and aquatic resources.
- Considering public drinking water supply use for all fresh waters.



Potential Baseline Standards

2. Water quality criteria

Exploring use of narrative criteria and numeric criteria

- EPA could describe waters as being “free from” certain adverse conditions and substances in order to ensure protection of applicable designated uses relying on binding translation procedures
- Provide for limited location-specific tailoring to better protect tribal waters (e.g., fish consumption rates)
- Include downstream protection narrative
- Include wetlands narrative criteria



Potential Baseline Standards

3. Antidegradation requirements

Antidegradation: requirements complement designated uses and water quality criteria by providing a framework for maintaining and protecting water quality that has already been achieved, providing three tiers of maintenance and protection.

Tier 1. Existing in-stream uses for all waters of the United States.

Applies a minimum level of protection to all waters even when another tier is also assigned.

Tier 2. High quality waters (where water quality is better than the levels necessary to support the CWA section 101(a)(2) uses).

Provides a public review process prior to deciding to allow a lowering of water quality.

Tier 3. Outstanding National Resource Waters (ONRW)

Generally prohibits any lowering of water quality.



Potential Baseline Standards

Implementation

- Standards could include **implementation** flexibilities (*e.g.*, mixing zones, WQS variances, compliance schedule provisions).
- Tribal engagement opportunity in EPA's implementation actions such as establishing appropriate water quality-based effluent limits in NPDES permits.
- EPA would also engage in public participation with states and the regulated community in accordance with existing regulations.

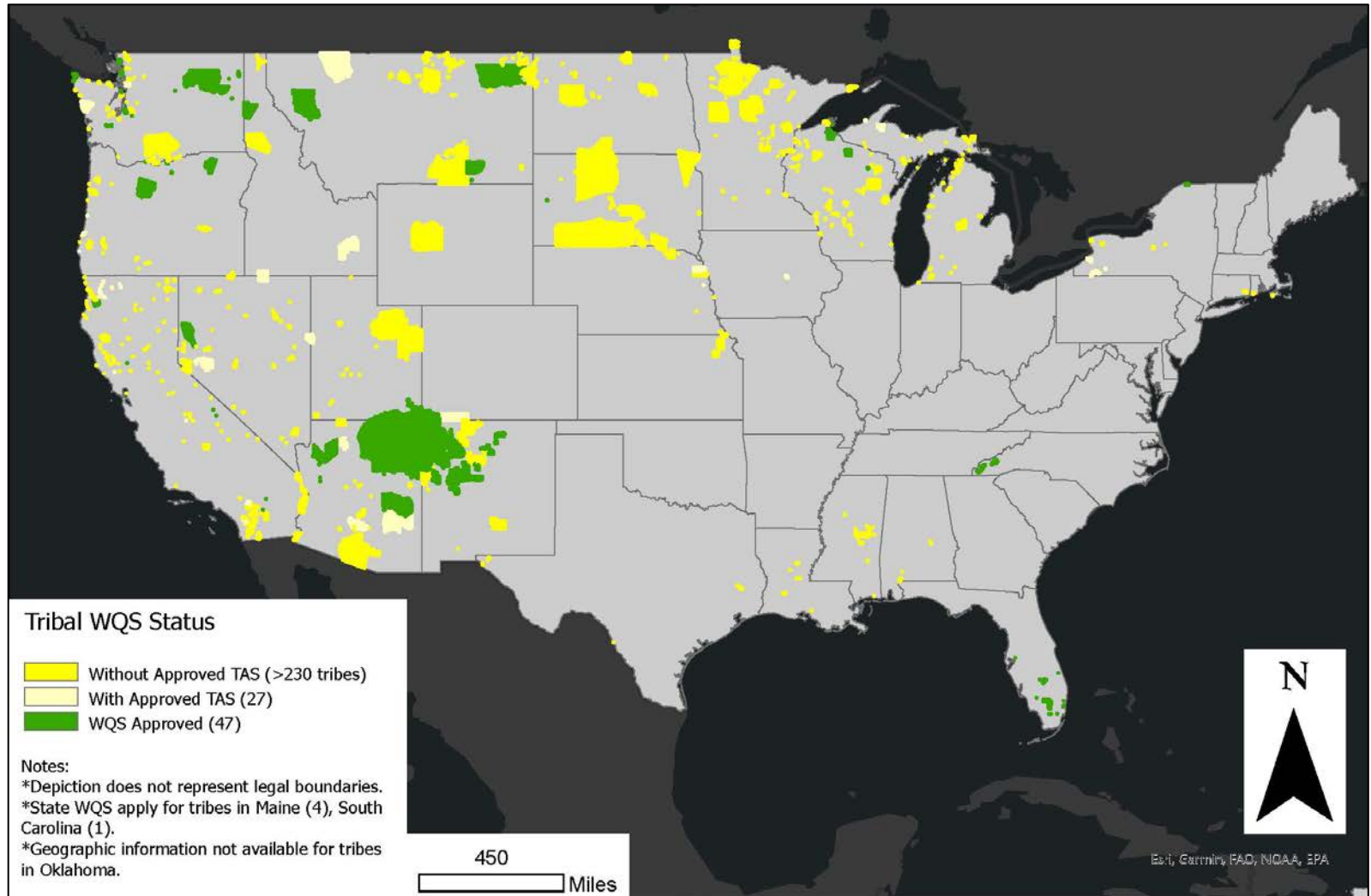


Potential Opt-Out Provision

- EPA is interested in obtaining input regarding a potential opt-out provision to enable a tribe to elect not to be included in a final tribal baseline WQS promulgation if it has a plan or intends to have a plan to seek treatment in a similar manner as a state to administer a CWA WQS program and to develop CWA WQS, in agreement with the respective EPA Region.
- EPA is also interested in receiving input regarding the timing for a tribe to elect to opt out of a tribal baseline WQS promulgation:
 - (1) during the public comment period associated with a proposed rulemaking;
 - (2) by a specified deadline after the tribal baseline promulgation has become effective for CWA purposes but prior to a pre-established “applicability” date;
 - or both (1) and (2).



Location of Potential Baseline WQS





Potential Impacts on Dischargers

- Approximately 164 NPDES individual discharger permits (including 7 major dischargers) are located within Indian country.
- Approximately 280 (57 majors) located within 5 miles upstream from Indian country.
- Nationally there are over 50,000 individual NPDES permits.
- Further analysis is underway to evaluate the potential costs and benefits of the Tribal Baseline WQS rule.



Questions Relating to Tribes' Interests in Protecting Water Quality

- What would an effective federal rulemaking look like to you and your tribe?
- What water quality protection issues (or issues specifically related to WQS) are you and your tribe facing that should be considered in this potential rulemaking?
 - Concerns for reservation water quality and degradation of water quality?
 - Concerns for upstream sources of water pollution?
 - Concerns for neighboring state WQS?
 - Concerns for water uses relating to equity, safety, drinking water, treaty rights, traditional/cultural uses or economic interests?
- Do tribes have examples of current water quality issues they are facing that could help inform, or that should be addressed, by this potential rulemaking?



Questions Relating to EPA's CWA Implementation Responsibilities

- What approaches in a potential rulemaking should EPA consider to implement CWA WQS on reservations and be most effective for you and your tribe?
- Do you have any concerns about this action? Are there any sensitivities or unintended consequences that EPA should consider before moving forward on this action?
- If EPA provided baseline WQS, would this change your tribe's interest in pursuing TAS?
 - Would your tribe be more likely to pursue TAS? If yes, would your tribe be interested in using baseline standards as a starting point to develop more specific standards for reservation waters?
 - Would your tribe be more likely **not** to pursue TAS?
 - No effect?



Next Steps

Consultation, Coordination, and Outreach

- EPA will continue tribal coordination through regional meetings (e.g., Regional Tribal Operations Committee meetings and dedicated coordination meetings).
- EPA plans to begin outreach to states and stakeholders prior to the close of the tribal consultation and coordination period.
- Pending outcome of tribal consultation and coordination, EPA anticipates proposing this rule by early 2022. This will provide an additional opportunity for tribal governments to comment during the public comment period on the proposal.

Input from Tribal Governments

- Tribal consultation and coordination period concludes September 13, 2021
- EPA encourages tribal governments to submit written comments to Mary Lou Soscia by e-mail at soscia.marylou@epa.gov by September 13, 2021

Individual Tribal Government Consultation Meetings

- Tribal governments interested in requesting government-to-government consultation with EPA can submit a request to the following contacts by August 23, 2021
 - Mary Lou Soscia: soscia.marylou@epa.gov or (503) 381-3840



How to Provide Comments after the Listening Session

Please send comments by **September 13, 2021** via e-mail to Mary Lou Soscia at soscia.marylou@epa.gov/(503) 381-3840

- 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.
- Tribes will have an additional opportunity to provide input on the forthcoming proposed rule, which we anticipate will be available for public comment in spring 2022.



How to Request Government-to-Government Consultation

Mary Lou Soscia at

soscia.marylou@epa.gov/(503) 381-3840

- Please provide such requests by August 23, 2021.
- Consultations will likely be conducted virtually.
- Tribes may request that consultation occur simultaneously for this potential rulemaking and the tribal reserved rights rulemaking.



Second Listening Session

- EPA plans to hold a second listening session via webinar in late August or early September.
- EPA plans to announce the date and time of the second listening session in early August.
- The final date and time along with information about how to register will be
 - 1) Posted on EPA's website for this rulemaking, and
 - 2) Shared with those who registered for today's listening session



For More Information

- Mary Lou Soscia, soscia.marylou@epa.gov
- James Ray, ray.james@epa.gov
- EPA's website for this rulemaking: <https://www.epa.gov/wqs-tech/tribal-baseline-WQS>
- EPA Policy on Consultation and Coordination with Indian Tribes: <http://www.epa.gov/tribal/epa-policy-consultation-and-coordination-indian-tribes>
- Environmental protection in Indian Country: <https://www.epa.gov/tribal>
- Clean Water Act and Water Quality Standards: <https://www.epa.gov/standards-water-body-health>