

**EPA's Proposal to Promulgate Federal Baseline Water Quality Standards for Indian Reservations**  
**Public Hearing #2 Transcript**  
**July 12, 2023 – 2:00 p.m. to 4:00 p.m. ET**

**(Slide 1) Kary Phillips:** Hello and welcome to today's online public hearing for EPA's proposal to promulgate federal baseline water quality standards for Indian reservations. This session is sponsored by the United States Environmental Protection Agency's Office of Water. The purpose of today's public hearing is to provide background on the proposed rulemaking and then for interested parties to provide oral comments on the proposed rule. I am Kary Phillips of Tetra Tech, a contractor to EPA, and I will be moderating today's hearing with support from my colleagues. Thank you for joining us.

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

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

Instructions for calling in are available in the menu on your screen to the right of the Unmute button. Select the arrow to the right, then "Switch to Phone Audio" and follow screen prompts. Following the on-screen instructions for calling in will link your phone line to your computer and allow you to use controls on your screen (for example to mute or unmute yourself, or raise your hand to speak).

Alternatively, you may also call in directly to (301) 715-8592. The Meeting ID is 868 0939 5229. Once you are connected to the audio, if you hear an echo, please turn off your computer speakers. If you have any technical difficulties, please chat with Tech Support. If you would like to download a copy of the slides for today's presentation, a PDF of the slides has been posted to the Chat window for all participants. If you do not see the PDF, please chat with Tech Support. A copy of the slides will also be posted to EPA's website after today's presentation.

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

**(Slide 2)** Now that we have completed the discussion of housekeeping items, let's start today's online public hearing. We will now begin the presentation by EPA. I'll turn it over to James Ray of EPA to provide a detailed overview of the proposed rule.

**(Slide 3) James Ray:** Great, thanks so much, Kary. Greetings everyone. I'll start off today by providing a few slides on the scope of the baseline water quality standards rule and then we'll go into an overview of the rule and some background information including, where the baseline water quality standards would potentially apply. Then, I'd like to spend most of my presentation providing details about the proposed baseline water quality standards and how to provide public comment. My name is James Ray, and I am the baseline water quality standards rule manager.

**(Slide 4)** We are here to discuss the federal baseline water quality standards proposed rule, which is represented in green here on the slide, and it applies to Indian reservation waters, which includes tribal trust lands that are located off the reservation and are considered informal reservations as described in the proposal. The purpose of this rule is to protect the water quality of waters on Indian reservations that do not have Clean Water Act effective water quality standards in place, with some limited exceptions. The geographic scope of the proposed federal baseline water quality standards rule is represented in the diagram here on the slide in the green rectangle. Here, the baseline water quality standards rule would apply to the lake and river segment flowing through the green rectangle representing the Indian reservation, and then apply to the small green rectangle representing the tribal trust land off reservation.

You may have also heard of EPA's concurrent proposed Tribal Reserved Rights Rule. That rule proposes to revise EPA's water quality standards regulations to protect tribal reserved rights in waters where states are responsible for establishing and maintaining water quality standards under the Clean Water Act. That rule is relevant to waters typically outside of Indian country. So, an area that is commonly referred to as a ceded territory is shown in this diagram in grey. This is all in a larger orange box which represents a hypothetical state. The baseline water quality standards rule is the focus of this session, but I wanted to mention the Reserved Rights Rule to clarify that these are two separate rules, that complement each other in their geographic scope.

**(Slide 5)** To begin our overview, EPA is proposing to establish federally-based water quality standards for Indian reservation waters that currently do not have water quality standards in effect under the Clean Water Act. I will go over some exceptions in a later slide, but with this rulemaking EPA is recognizing the importance of tribal waters and the need to better protect the water resources that tribes rely on. Fifty years after the enactment of the Clean Water Act, most Indian reservations do not have the foundational protection of water quality standards in place for their waters. Specifically, only forty-seven tribes of over 300 with reservations currently have EPA approved water quality standards effective under the Clean Water Act.

**(Slide 6)** If the baseline water quality standards are finalized, they will provide a more robust and transparent foundation for several Clean Water Act control programs in Indian country. These water quality standards serve as the basis for establishing water quality based effluent limits in NPDES permits and discharges to reservation waters. They serve as the basis for Clean Water Act section 401 certifications of federal licenses and permits for discharges to reservation waters. They are also used when analyzing permits to discharge dredged and fill material under Clean Water Act section 404, and are also used in identifying impaired waters that need further attention. Although EPA prefers for

eligible tribes to obtain authority to administer their own water quality standards program and develop their own water quality standards, EPA's promulgation of baseline water quality standards would serve to safeguard water quality until tribes with continued assistance from EPA obtain that authority to adopt and administer Clean Water Act water quality standards.

**(Slide 7)** To provide some background, EPA's actions in 2001 really set the stage for EPA's proposal of the baseline water quality standards. In 2001, EPA Administrator Carol Browner reviewed the status of tribal water quality standards at the time and made an Administrator Determination that water quality standards are necessary to fulfill the Clean Water Act requirements for tribal waters that lacked water quality standards. This led to a duty under the Clean Water Act for EPA to propose the standards, which Administrator Carol Browner did when she signed the proposed core standards. However, with the change of administrations, this rulemaking was never published.

In 2016, EPA published an advance notice of proposed rulemaking, and this time EPA obtained public comments on promulgating federal water quality standards in Indian reservation waters. EPA changed the terminology to baseline water quality standards to signal a new commitment to protect tribal water resources. EPA has an existing legal duty to promulgate federal water quality standards for Indian reservation waters without Clean Water Act effective water quality standards in place based on the 2001 Administrator Determination. From the public comments received from the 2016 action, EPA was able to gather additional ideas and support for establishing baseline water quality standards.

**(Slide 8)** As mentioned earlier, the baseline water quality standards would apply to all Indian reservation waters that do not have Clean Water Act water quality standards, with some exceptions. The two types of exceptions are noted on this slide. These exceptions are automatic exceptions and case-by-case exceptions. The automatic exceptions are for waters that have Clean Water Act water quality standards—that's (1) where tribes have authority to administer the water quality standards program and have adopted EPA approved water quality standards under the Clean Water Act, and that is currently 47 tribes; (2) where EPA has promulgated other federal water quality standards, which has happened only once so far, at the request of the Colville Tribe in 1989 and; (3) for a small number of specific places in Indian country where Congress has given Clean Water Act regulatory responsibilities to states. These include all of Indian country belonging to the four tribes in Maine and to the only tribe in South Carolina. It also includes parts of Indian country for **nine**\* [sic] of the 38 federally recognized tribes in Oklahoma and one of the 29 tribes in Washington. The case-by-case exception is also known as the "Opt-out" option. EPA included this in its proposal in response to feedback we obtained from tribes during pre-proposal consultation in 2021. We will go over this option in greater detail later in this presentation.

\*To be consistent with this slide, EPA's remarks during the public hearing should have also referenced six tribes. We note that as courts in Oklahoma continue to address the reservations of additional tribes, this number will evolve over time. As described in the proposal, to the extent additional reservations are found to remain intact, the relevant partial areas of those reservations would be automatically excluded from coverage of the rule.

**(Slide 9)** Here is a map depicting how the potential rule would expand the coverage of water quality standards for tribal waters—from the forty-eight tribes shown in green that already have Clean Water Act water quality standards to all 250 or more tribes in yellow, where the baseline water quality

standards would potentially apply from locations in fourteen states to a new combined total of 32 states.

So, if the baseline water quality standards rule is finalized, water quality standards under the Clean Water Act would potentially be in place for over 300 reservations—areas that are in both green and yellow on the map of the United States on this slide, but with two caveats. First, the map does not account for any tribes that might choose to be excluded from the baseline water quality standards. Second, the map for the State of Oklahoma is blank because we do not have sufficient federally sourced data available at this time to depict Indian reservations in Oklahoma.

**(Slide 10)** Under the Clean Water Act, water quality standards have three main components.

- (1) Designated uses, which describe the water quality goals or desired condition for a specific water body;
- (2) Water quality criteria, which are water quality levels that will protect the designated use and those can be numeric or narrative criteria; and
- (3) Antidegradation, which is a provision that establishes requirements for maintaining and protecting water quality that has already been achieved.

A few examples for the water quality criteria piece:

- For numeric criteria, an example would be for cadmium, which would equal 2 micrograms per liter.
- For narrative criteria, an example would be that those waters shall be free from adverse effects from toxic pollutants.

**(Slide 11)** For designated uses, EPA proposes to promulgate two uses that EPA's water quality standards regulation requires for all waters, wherever they are attainable. These are: (1) protection and propagation of fish, shellfish, and wildlife use, which includes the protection of the health of human consumers of fish, shellfish, and other aquatic life, and (2) the primary contact recreation use providing for recreation in and on the water. These two uses are consistent with the national goal of the Clean Water Act as expressed in section 101(a)(2) of the Act. All state, tribal, and EPA water quality standards to date include some form of these two uses, except where EPA has approved exceptions that were justified based on strict requirements in the water quality standards regulation.

As a third use, the baseline water quality standards propose to promulgate an explicit cultural and traditional use, specified as "protection of cultural and traditional uses of reservation waters," which can include a variety of uses specific to ceremonies and traditions of each tribe. Including this use is in response to input from many tribes and is consistent with section 303(c) of the Clean Water Act, which provides that water quality standards are to protect public health and welfare.

EPA is considering whether to promulgate any other uses, such as a public water supply use, agricultural use, or industrial use, which the Clean Water Act allows. The rule specifically invites public comment on whether EPA should designate a public water supply use for all Indian reservation fresh waters covered by the scope of this rule or whether this use is best addressed by allowing tribes to request such a designation case-by-case.

**(Slide 12)** We are also codifying in the rule, as part of the applicable water quality criteria, five binding procedures to translate narrative criteria into numeric values, as needed for implementation. Together, the narrative and binding translation procedures constitute the applicable baseline water quality criteria. We envision that the procedures would enable the resultant values to reflect the latest science and allow for limited location-specific tailoring to better protect tribal waters. They also provide the option to rely on adjacent state or tribal Clean Water Act effective water quality standards.

**(Slide 13)** EPA would be the authority responsible for translating the applicable baseline narrative criteria for use in Clean Water Act regulatory actions because the baseline water quality standards would be federally promulgated, and the proposed regulatory text directs EPA to undertake this translation step. EPA would use these procedures to translate the narrative criteria into numeric values on a case-by-case basis, as needed to support control actions. The translation process would enable EPA to reflect the latest science in its actions and to provide limited site-specific tailoring to better protect tribal waters. We expect numeric translations would be needed for NPDES permits.

**(Slide 14)** For these next two slides, I'll provide more details about the proposed baseline water quality criteria. The baseline narrative criteria are based on EPA's longstanding recommendations for states to adopt such as "waters shall be free from toxic pollutants and amounts that prevent attainment of designated uses" and "free from substances that produce undesirable or nuisance aquatic life." They also include narrative criteria regarding protection of endangered and threatened species, and regarding protection of downstream waters.

**(Slide 15)** The Baseline Criteria Translation Procedures would be codified as an integral part of the baseline water quality standards. They would govern EPA's actions to translate baseline narrative criteria for Clean Water Act implementation purposes after the final baseline water quality standards Rule is in effect. The resulting numeric values would be used for developing Clean Water Act section 402 and 404 permits, section 401 certifications, and section 303(d) lists and TMDLs, where applicable. In each case, EPA would identify and explain the derived numeric values by choosing one of the binding options. These five binding options include:

- Option one, which is reliant on Clean Water Act section 304(a) criteria recommendations;
- Option two, which is reliant on modified Clean Water Act section of 304(a) criteria , modified based on site-specific conditions;
- Option three, which is a translation of that baseline narrative criteria using numeric criteria available in tribal water quality standards or adjacent state or tribal Clean Water Act effective water quality standards;
- Option 4, which is reliant on the Great Lakes Basin methodologies; and
- Option 5, which is reliant on existing Clean Water Act implementation provisions.

EPA would rely on the public participation requirements associated with the respective Clean Water Act implementation programs to provide the numeric values for public review before they are finalized. After the numeric values are finalized, EPA would make them available at a website that will be provided in the final rule.

**(Slide 16)** The antidegradation component of water quality standards play a critical role in allowing states and tribes to maintain and protect the valuable public resource of clean water and ensure that decisions to allow lowering of high-water quality are made in a public manner and serve the public good.

EPA's regulations require states and authorized tribes to have both an antidegradation policy with three tiers of protection and antidegradation implementation methods. The baseline water quality standards therefore include both a policy and implementation methods as well. The three tiers of the baseline antidegradation policy include Tier 1, which protects existing in stream uses for all waters; Tier 2, which protects high quality waters and provides a public review process prior to a decision to allow a lowering of water quality; and Tier 3, which generally prohibits any lowering of water quality in waters designated as outstanding national resource waters.

The antidegradation implementation methods are a set of provisions that describe how the antidegradation policy will be implemented in the proposed baseline water quality standards to protect Indian reservation waters covered by the rule. For example, these methods will apply whenever EPA considers a request by a permit to authorize new or expanded regulated activities on an Indian reservation covered by the rule. The methods specify EPA's procedures for evaluating such requests, and they include a few steps where a tribe will need to provide written agreement before EPA can take certain actions, such as agreeing to a lowering of water quality under Tier 2 or assigning a water body to Tier 3 protection.

**(Slide 17)** EPA's proposed mixing zone policy in this proposed rule draws upon the mixing zone policy included in EPA's Model Water Quality Standards Template for Waters on Indian Reservations. The policy builds upon mixing zone guidance produced by EPA over the years and upon state mixing zone policies that EPA has approved. In applying the baseline mixing zone policy in federally issued NPDES permits, EPA would follow its regulations regarding public notice and opportunity for public comment. EPA also proposes to include a provision in the baseline water quality standards to authorize compliance schedules. Under this provision, EPA could issue a compliance schedule as part of an NPDES permit that would require the discharger to comply as soon as possible with any water quality-based limitation in a permit reissued or modified on or after the effective date of the final rule.

**(Slide 18)** EPA anticipates that data and information may become available after the baseline water quality standards become final that could lead EPA to identify a need, or a Tribe to request that EPA revise or add designated uses and associated criteria or establish a water quality standards variance for Indian reservation waters covered by this rule. While EPA retains the discretion to issue a subsequent federal rulemaking to take such actions, EPA is proposing to include a federal administrative procedure that could result in revisions to the applicable baseline water quality standards, where appropriate, for specified water bodies covered by this water quality standards rule and consistent with EPA's regulations. EPA will follow the public participation requirements under the Clean Water Act and EPA's regulations for any action taken under this procedure. Under this procedure, EPA would prepare and make available to the public supporting documentation consistent with what EPA regulations require of states and authorized Tribes, and would provide an opportunity for public comment on the proposed designated use revisions, additions, or establishment of a water quality standards variance.

**(Slide 19)** This slide provides a few key points about how EPA will implement the baseline water quality standards and how tribes can assist with implementation. As background, EPA will generally be the implementing agency for the baseline water quality standards if the rule is finalized and will, for example, be deciding on permit limits to comply with the baseline water quality standards in the NPDES permits it issues for water covered by the baseline water quality standards. Other examples include



section 404 dredge and fill permits, section 401 certifications, and in section 303(d) programs. The four points to know here are the following:

1. The proposed rule requires the Regional Administrator to initiate tribal consultation when taking actions under this rule that might affect tribal interests;
2. This consultation would help EPA address tribal-specific circumstances, as appropriate;
3. A reminder that under the Clean Water Act EPA must also give the public an opportunity to participate and comment on EPA's actions, which ensures transparency for states, stakeholders, and the regulated community; and
4. EPA anticipates that this rule would facilitate mutual consideration and discussion between EPA, tribes, and states, and provide opportunities for EPA to collaborate closely with tribes and states when implementing the baseline water quality standards.

**(Slide 20)** EPA recognizes after recent consultations that baseline water quality standards may not be appropriate for some tribes that are presently working actively toward obtaining authority to administer a water quality standards program, or adopting water quality standards for submittal to EPA, or for other reasons that tribes may discuss with their Regional EPA contacts. EPA also recognizes that some tribes may simply need additional time to gather more information about baseline water quality standards and prepare for the partnership opportunities the baseline water quality standards would afford. To accommodate such case-by-case considerations, the proposal allows EPA Regional Administrators to exclude waters from coverage of the baseline water quality standards. To seek exclusion, a tribe should communicate with the EPA Regional Administrator to explain its request to be excluded from coverage at this time and provide any supporting information. The timeframe to do so began on May 5—the date the proposal was published in the Federal Register—and will end 90 days after the final rule is published in the Federal Register. So, this is roughly over a year for a tribe to decide if they want to be excluded from coverage of the rule given EPA is intending to finalize the rule in Spring 2024 and the deadline would be 3 months after that. In this way, any exclusion decisions will occur before the final rule becomes effective 120 days after the final rule is published.

If the rule is finalized, EPA will maintain information on its website identifying which tribes have waters covered by the baseline water quality standards, which tribes have waters that are excluded from coverage, and which tribes already have Clean Water Act effective water quality standards in place.

**(Slide 21)** The purpose of this slide is to emphasize that the baseline water quality standards rule would not replace a tribe's ability to have its own water quality standards under the Clean Water Act. Shown in a descending list on this slide: if a tribe follows all the steps shown here of obtaining TAS or the authority to administer the water quality standards program, then adopts tribal water quality standards, submits those water quality standards to EPA, and gets EPA approval of the water quality standards—the baseline water quality standards would no longer apply to those waters covered by the EPA water quality standards approval. Instead, from that point forward, the tribe's own water quality standards would apply to those waters and be used for all purposes of the Clean Water Act.

**(Slide 22)** To touch on a few benefits of this rule. First, establishing water quality goals for Indian reservation waters is important. This rule would help to facilitate participation in managing water quality, and would provide a basis for enforceable NPDES and other permits. This rule also helps to establish water quality standards on Indian reservation waters to inform upstream dischargers, and would rely on the baseline water quality standards for Clean Water Act section 401 by tribes with

authority to administer Clean Water Act section 401 or EPA as the certifying authority. Other benefits are enabling tribes to utilize antidegradation implementation methods to protect culturally significant waters and providing a basis for determining water quality impairments.

**(Slide 23)** Although water quality standards in themselves do not establish requirements directly applicable to regulated entities, EPA conducted an economic analysis estimating the potential costs to facilities that might be affected by permits and other regulatory actions based on the proposed baseline water quality standards. We estimated approximately 164 NPDES individual discharger permits that are located within reservations potentially covered by the rule. Approximately 270 are located within 5 miles upstream from those reservations. EPA estimated that total annualized cost to facilities discharging into or upstream from waters covered by the rule would be within the range of 15 to 30 million dollars per year, using a 3 percent discount rate for capital and O&M cost for additional wastewater treatment over 20 years. EPA also estimated an additional one-time cost within the range of one 1.2 million to 6.1 million dollars for up-front pollution prevention steps, and in the case of the low annual estimates, the up-front costs of obtaining water quality standards variances in lieu of a portion of the annual treatment costs are the reason for those resultant values.

**(Slide 24)** This slide describes a conforming amendment, not forging any new ground. To ensure consistency, the proposal includes some conforming changes to the 404 regulations, as shown here on this slide. The proposal would insert new references to “federally promulgated standards.” For section 404 permits, the baseline rule would provide applicable water quality standards under the Act upon which to base permits affecting most tribal waters.

**(Slide 25)** In terms of next steps, if folks would like more information on the proposal we have a link here in the first bullet (<https://www.epa.gov/wqs-tech/promulgation-tribal-baseline-water-quality-standards-under-clean-water-act>). The public comment period closes Thursday, August 3, so be sure to submit your comments by then. Pending review of those comments, EPA is anticipating finalizing this rule in spring 2024.

**(Slide 26) Kary Phillips:** Thank you, James. In a moment, we will provide instructions for making an oral comment today, but first we will provide instructions for submitting written comments in one of the following ways. Again, if you provide oral comments during today’s online hearing, you do not have to submit the same comment in writing. However, if you plan to submit a written comment, you may do so through the website at regulations.gov (our preferred method), mail your comment, or submit a written comment via hand delivery. The instructions for submitting a written comment through these mechanisms are explained in more detail on this slide. Remember, when submitting a written comment, please make sure to reference the Docket ID number EPA-HQ-OW-2016-0405. I will pause here for a few moments to allow time to record this information. Instructions for submitting a written comment through these mechanisms are explained in more detail on this slide.

We are opening the comment period now for interested parties to make an oral comment. If you would like to make a comment, please raise your hand. Depending on the device you are using, there are different ways to raise your hand. If you are on a computer or internet-based mobile device: click on the reactions button in the menu on the bottom of your Zoom window. If you do not see a reactions button on your computer, hover towards the bottom of your Zoom window, and a menu bar should appear. Over the reactions button, select raise hand. If you called in using your phone, please press \*9 on your phone to raise your hand. When it is your turn to speak, the host will call on you by name or by the



phone number you dialed with. At that time, you can unmute yourself by pressing the unmute button on your screen, or dialing \*6 on your phone. Please feel free to turn on your video while you are speaking. If you have technical issues, please start a chat with Technical Support. Remember, EPA will not respond to comments today; however, EPA will respond to oral comments received at this hearing—along with all comments received during the comment period—in EPA’s response-to-comments document accompanying EPA’s final rule. Also, EPA will not be answering any questions during the hearing today.

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

**Rachel Buzzeo:** Not at this time. There are no commenters with their hands raised.

**Kary Phillips:** Again, EPA will not be responding to comments or answering questions during this public hearing. And you can see the instructions there on the screen regarding how to make an oral comment. We will hold and if we have 15 minutes or more silence we will end early. If you do have an oral comment to make, now is the time. I believe we have posted the slides from today as a PDF in the chat box.

*(Silence for 15 minutes)*

We will end this public hearing early. I would encourage that if you’d like to make an oral comment, now is the time. We may have someone join us a little late, so we are going to give it about another five or six minutes to see if anyone would like to make an oral comment today. Rachel, I just wanted to confirm with you that there are no hands raised.

**Rachel Buzzeo:** Correct. There are no commenters in the queue.

**Kary Phillips:** I am not seeing any hands raised. So, at this time I’d like to conclude today’s public hearing. Thank you to everyone who joined us today. Remember if you would like to provide a comment, you can submit a written comment to the docket. Do not forget to put the docket number on your comment. That ends our hearing for today. Thanks again for joining us and have a good day.