



U.S. EPA's Proposal to Promulgate Federal Baseline Water Quality Standards for Indian Reservations

Public Hearing #2

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



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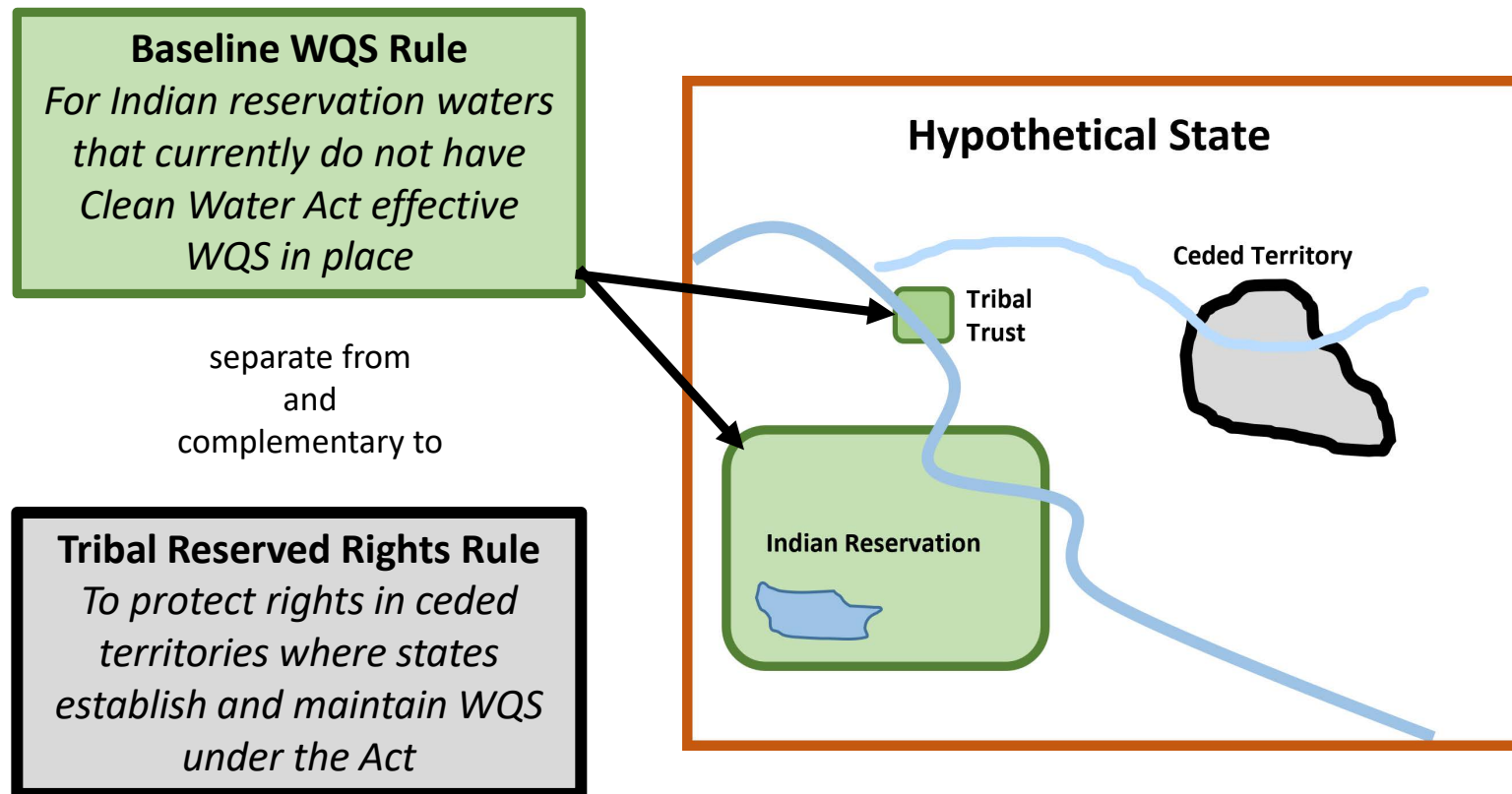


Agenda

- Scope
- Overview
- Background
- Proposed baseline water quality standards (WQS)
- Potential benefits and impacts
- Next steps
- How to provide comments



Scope of Baseline WQS Rule





Overview

- On April 27, the EPA Administrator signed a proposed rule to establish federal “baseline” WQS for Indian reservation waters that currently do not have WQS in effect under the Clean Water Act (CWA), with limited exceptions.
- This proposed rulemaking recognizes the importance of tribal waters and the need to better protect the water resources tribes rely on.
- Fifty years after enactment of the CWA, the vast majority of Indian reservations do not have this foundational protection in place for their waters.
 - Only 47 tribes out of over 300 with reservations currently have EPA-approved WQS effective under the CWA.



Overview

- Baseline WQS will provide a more robust and transparent foundation for EPA to implement CWA programs in Indian country including:
 - establishing water quality-based effluent limits (WQBELs) in NPDES permits for reservation waters
 - performing CWA section 401 certification of federal licenses and permits
 - analyzing permits to discharge dredged and fill material under CWA section 404
 - identifying impaired waters
- Although EPA prefers for tribes to obtain authority to administer their WQS program and develop their own WQS, EPA's promulgation of baseline WQS would serve to better safeguard water quality until tribes, with continued assistance from EPA, obtain that authority, and adopt and administer CWA WQS themselves.



Background

- In 2001, EPA Administrator Carol Browner made an Administrator Determination that federal WQS are necessary to fulfill the CWA requirements for tribal waters that lacked WQS, triggering the duty for EPA to propose such standards, and signed the never-published proposed “core” standards.
- In 2016, EPA took public comment on an Advance Notice of Proposed Rulemaking (ANPRM), changing the terminology to “baseline” WQS to signal a new commitment to protect tribal water resources.
- EPA has an existing legal duty to promulgate WQS for those Indian reservation waters that do not have CWA-effective WQS in place, based on the 2001 Administrator Determination.



Where Would Baseline WQS Apply?

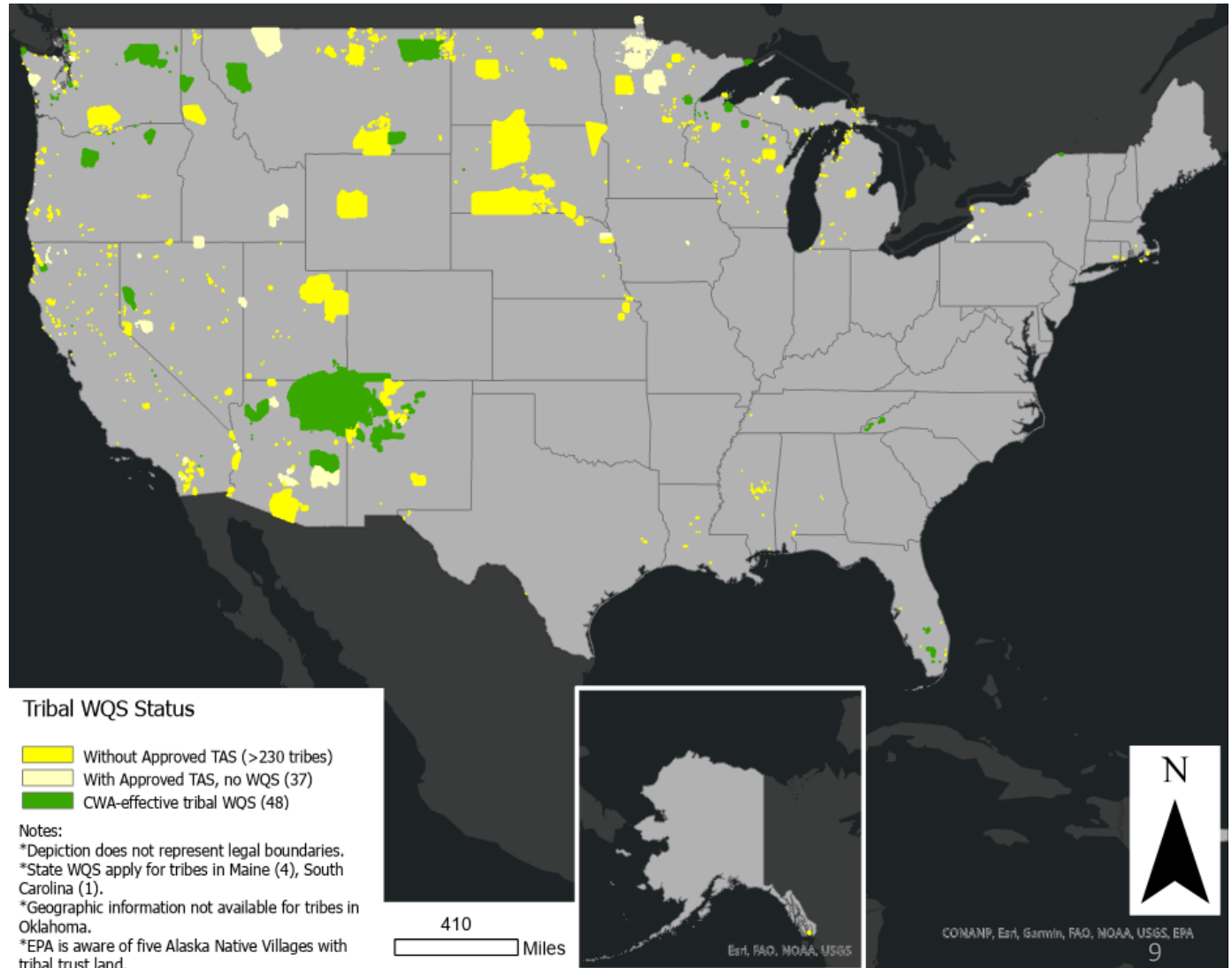
- EPA is proposing to promulgate baseline WQS for all Indian reservation waters **with the following exceptions:**
- Automatic exceptions:
 - Where tribes have adopted EPA-approved WQS under the CWA (47 tribes)
 - Where EPA has promulgated other federal WQS (1 tribe)
 - Where states have authority from Congress to administer WQS over Indian country:
 - All Indian country: Maine (4 tribes), South Carolina (1 tribe)
 - Partial areas of Indian country: Oklahoma (6 tribes), Washington (1 tribe)
- Case-by-case exceptions:
 - Where a tribe chooses to be excluded from baseline WQS coverage and EPA approves.

The rule would not apply in non-reservation areas of Indian country, such as allotments and dependent Indian communities located off-reservation.



Where Would Baseline WQS Apply?

- Tribes in yellow are candidates for baseline WQS
- Tribes in green have EPA-approved or promulgated WQS





Components of WQS

Water quality standards consist of three main components

Designated uses – Describes the water quality goals or desired condition for a specific water body (e.g., protection of aquatic life, primary contact recreation).

Water quality criteria – Water quality levels that will protect the designated use. Can be numeric criteria or narrative criteria.

Antidegradation – A provision that establishes requirements for maintaining and protecting water quality that has already been achieved. This includes maintaining and protecting the water quality that supports existing uses, high quality waters, and outstanding National resource waters.



Proposed Baseline WQS

1. Designated Uses

EPA proposes to promulgate the following designated uses consistent with CWA section 101(a)(2):

- (1) **Aquatic Life.** Protection and propagation of fish, shellfish, and wildlife, which includes protection of the health of human consumers of fish, shellfish, and other aquatic life.
- (2) **Primary Contact Recreation.** Provides for recreation in and on the water.

EPA proposes to promulgate an explicit cultural and traditional designated use to ensure full protection of such uses:

- (3) **Cultural and traditional uses.** Protection of cultural and traditional uses of reservation waters.

EPA is inviting 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 designated use case-by-case after the rule is final.



Proposed Baseline WQS

2. Water Quality Criteria

To ensure protection of the baseline designated uses, EPA is proposing to promulgate narrative criteria with binding procedures for EPA to translate the narrative criteria into numeric values as needed for implementation. The procedures would:

- Reflect the latest science (e.g., latest published CWA section 304(a) ambient water quality criteria recommendations).
- Provide for limited location-specific tailoring to better protect tribal waters (e.g., fish consumption rates).
- Provide the option to rely upon adjacent state or tribal CWA-effective WQS.



Proposed Baseline WQS

- 2. Water Quality Criteria: Narrative criteria with binding procedures for EPA to translate to numeric values as needed (1/3)**

Baseline Narrative
Criteria



Baseline Binding
Translation Procedures



Proposed Baseline WQS

2. Water Quality Criteria: Narrative criteria with binding procedures for EPA to translate to numeric values as needed (2/3)

Baseline Narrative Criteria

All waters shall be free from:

- Toxic, radioactive, deleterious, conventional, non-conventional, or other pollutants in amounts that will prevent attainment of...designated uses; or
- Adverse impacts to the chemical, physical, or biological integrity caused by pollutants or pollution that prevent the attainment of...designated uses; or
- Substances attributable to...discharges that settle to form objectionable deposits; float as debris, scum, oil, or other matter to form nuisances; produce objectionable color, odor, taste, or turbidity; or produce undesirable or nuisance aquatic life; or
- Conditions that could cause jeopardy to the continued existence of any threatened or endangered species under the Endangered Species Act....

All waters shall maintain a level of water quality... that provides for the attainment and maintenance of the WQS of downstream waters....



Proposed Baseline WQS

2. Water Quality Criteria: Narrative criteria with binding procedures for EPA to translate to numeric values as needed (3/3)

Baseline Binding Translation Procedures

| <i>Option One</i> | |
|---|---|
| For parameters for which EPA has section 304(a) criteria recommendations | Translate the baseline narrative criteria using the section 304(a) criteria recommendations . |
| <i>Option Two</i> | |
| For parameters for which EPA has section 304(a) criteria recommendations, and data are available that more accurately reflect site-specific conditions | Translate the baseline narrative criteria using the section 304(a) criteria recommendations modified to reflect site-specific conditions (e.g., tribal fish consumption rate, ambient monitoring data). |
| <i>Option Three</i> | |
| Where tribal or state numeric criteria are available that are more appropriate, and for parameters for which EPA does not have CWA section 304(a) criteria recommendations. | Translate the baseline narrative criteria using numeric criteria available in: <ul style="list-style-type: none">• Tribal WQS not yet CWA effective, or• Adjacent state or adjacent tribal CWA-effective WQS |
| <i>Option Four</i> | |
| For waters of the Great Lakes System | Translate the baseline narrative criteria using required criteria methodologies for the Great Lakes Basin . |
| <i>Option Five</i> | |
| If none of the above options apply or are available | EPA may rely on existing CWA implementation provisions to translate applicable narrative criteria, as necessary. |



Proposed Baseline WQS

3. Antidegradation Policy and Implementation Methods

Antidegradation Policy: provides 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.

Implementation Methods: address how to implement EPA's proposed antidegradation policy



Proposed Baseline WQS

4. Mixing Zone Policy and Compliance Schedule Authorizing Provision

In the baseline WQS, EPA is proposing to promulgate:

- A detailed mixing zone policy that would allow EPA to establish mixing zones on a case-by-case basis when issuing NPDES permits.
- A compliance schedule authorizing provision.



Proposed Baseline WQS

5. Federal Administrative Procedure to Revise Baseline Designated Uses and Establish WQS Variances

- The proposed rule would promulgate an administrative procedure for EPA to:
 - revise baseline designated uses,
 - add designated uses and associated criteria, or
 - establish WQS variances to the baseline WQS for specific waterbodies, where appropriate, consistent with EPA's regulations.
- The procedure includes public participation steps consistent with EPA regulations, including a public hearing, accessible documentation, and opportunity for public comment.
- EPA would maintain a public website containing:
 - Updated list of the applicable designated uses and associated criteria,
 - Updated list of WQS variances,
 - Accompanying explanations of the statutory and regulatory basis for the decisions.



Implementation of Baseline WQS

- EPA is proposing to require the Regional Administrator for each respective Region to initiate tribal consultation with a tribe(s) when taking actions under this rule that may affect tribal interests.
- EPA would implement the baseline WQS, in consultation with Tribes, in a manner that would address location-specific water quality conditions and tribal circumstances, as appropriate.
- EPA would be consistent with all relevant public participation requirements to ensure transparency for states, stakeholders, and the regulated community.
- EPA anticipates that this rule would facilitate a process of mutual consideration and discussion between EPA, Tribes, and states, and provide an opportunity for EPA to work closely with Tribes and states when implementing applicable baseline WQS.



Option to be Excluded from Baseline WQS Coverage

- Case-by-case exceptions, for example:
 - tribes are presently working toward seeking TAS for WQS and/or adopting WQS for submittal to EPA
 - tribes may need additional time to gather more information about baseline WQS and prepare for partnership opportunities with EPA
 - Baseline WQS are not consistent with tribal priorities at this time
- To seek exclusion from the rule, a tribe should communicate with the EPA Regional Administrator, explaining the basis of the tribes' request to be excluded from coverage at this time and providing any supporting information.
- Tribes may seek to be excluded at any time between now and 90 days after the final rule is published in the Federal Register (estimated Spring 2024).
- EPA is proposing that the final rule and baseline WQS would be effective under the CWA 120 days after publication in the Federal Register.
- Under this proposed rule, EPA would maintain a publicly available list, on a dedicated website, indicating which of tribes are covered by baseline WQS, which are excluded from coverage at this time, and which tribes already have CWA-effective WQS in place.



Conditions Under Which Baseline WQS Would No Longer Apply

For tribal waters that are covered by a final baseline WQS rule, the baseline WQS would cease to apply to those waters after EPA approves the tribe's own CWA WQS:



Upon that EPA approval, the tribe's waters covered by the EPA approval would no longer fall within the scope of the final rule and the baseline WQS would no longer apply to those waters.



Potential Benefits of the Rule

- Establishing water quality goals for Indian reservation waters
- Facilitating tribal participation in managing water quality
- Providing basis for enforceable NPDES and other discharge permits
- Establishing WQS on Indian reservation waters to inform upstream discharges
- Relying on baseline WQS for CWA section 401 certifications by tribes with authority to administer CWA section 401 or EPA as the certifying authority
- Enabling tribes to utilize antidegradation implementation methods to protect culturally significant waters by nominating them as outstanding national resource waters
- Providing basis for determining water quality impairments



Anticipated Economic Impacts of the Rule

- Baseline WQS would not themselves impose costs on any entity.
- However, to best inform the public, EPA has analyzed potential control costs that point sources discharging into or upstream from waters covered by this rule may incur as a result of implementing the baseline WQS.
 - Approximately 164 NPDES individual discharger permits are located within reservations potentially covered by baseline WQS.
 - Approximately 270 are located within 5 miles upstream from those reservations
- Estimated total costs: from \$15.5M to \$30.5M annually (20 years, 3% discount rate), plus one-time costs of \$6.1M and \$1.2M respectively.



Proposed Amendment to CWA section 404(b)(1) Regulations

EPA's baseline WQS proposed rule includes a proposed conforming amendment to [40 CFR part 230*](#) to clarify that section 404 permits need to comply with federally promulgated WQS (such as the baseline WQS), as well as with state WQS as currently provided.

[*EPA's Guidelines required by CWA section 404\(b\)\(1\).](#)



Next Steps

- For more information on the proposal, please visit EPA's website: <https://www.epa.gov/wqs-tech/promulgation-tribal-baseline-water-quality-standards-under-clean-water-act>
- The public comment period closes on Thursday, August 3.
- Pending review of comments, EPA anticipates finalizing this rule in Spring 2024.



To Make a Written Comment

- You may send comments, identified by Docket ID No. EPA-HQ-OW-2016-0405, by any of the following methods:
- Online: www.regulations.gov (our preferred method). Follow the online instructions for submitting comments.
- Mail: U.S. Environmental Protection Agency, EPA Docket Center, Standards and Health Protection Division Docket, Mail Code 28221T, 1200 Pennsylvania Avenue NW, Washington, DC 20460
- Hand Delivery: EPA Docket Center, WJC West Building, Room 3334, 1301 Constitution Avenue, NW, Washington, DC 20004, Attention Docket ID No. EPA-HQ-OW-2016-0405.
 - Hand deliveries and couriers may be received by scheduled appointment only.

All submissions received must include the Docket ID No. EPA-HQ-OW-2016-0405 for this rulemaking. Comments received may be posted without change to www.regulations.gov, including any personal information provided. Once submitted, comments cannot be edited or removed from the docket.