

# FEDERAL BASELINE WATER QUALITY STANDARDS & TRIBAL RESERVED RIGHTS FINAL RULES

Internal deliberative pre-decisional - FOR USE BY 2024 PRESIDENT-ELECT TRANSITION TEAM MEMBERS ONLY

## ISSUE SUMMARY:

Water quality standards (WQS) for surface waters under the Clean Water Act (CWA) Section 303 are intended to protect aquatic life and aquatic-dependent wildlife, and human health. Additionally, WQS are the foundation for developing, implementing, and enforcing the CWA's water pollution control programs. All fifty states have EPA-approved WQS in effect under the CWA, but these WQS generally do not apply to waters in Indian country. The EPA has developed two rules strengthening protection of (1) Tribal health and resources for Indian reservation waters that currently do not have applicable CWA WQS (the Federal Baseline WQS rule) and (2) Tribal reserved (e.g., treaty) rights in waters where states establish WQS (the Tribal Reserved Rights rule). These rules provide comprehensive and sustainable water quality protection for Indian reservation waters, as well as waters where Tribes have rights reflected in federal law to CWA-protected resources. Together, these rules increase regulatory certainty and provide a more durable foundation to appropriately protect the waters upon which Tribes rely.

## KEY POINTS:

### Federal Baseline Water Quality Standards Rule

The EPA anticipates publishing a final rule in the fall of 2024 promulgating federal "baseline" WQS for Indian reservations that do not have CWA-effective WQS in place, with limited exceptions. This rule extends the same framework of water quality protection to Tribal waters that currently exists for most other waters of the United States. Although it is the EPA's preference for Tribes to obtain authority to administer their own WQS program and develop their own WQS tailored to individual reservations, the EPA's promulgation of baseline WQS serves to safeguard water quality until Tribes, with continued assistance from the EPA, obtain authority to administer their own program and adopt CWA WQS.

- WQS are the foundation upon which key human health and environmental protections of the CWA are built; without WQS for Indian reservation waters, those protections are limited.
- Currently, the EPA has approved 84 out of more than 300 Tribes with reservations for "treatment in a similar manner as a state" to administer their own WQS program. Of those 84, 52 have WQS effective under the CWA. As a result, 50 years after enactment of the CWA, over 80% of Indian reservations do not have this foundational protection under the CWA for their waters.
- CWA Section 303(c)(4)(B) provides EPA authority to propose and promulgate WQS where EPA determines that new or revised WQS are necessary to serve the purposes of the Act; EPA is utilizing its 303(c)(4)(B) authority to address the longstanding lack of CWA-effective WQS by promulgating baseline WQS for Indian reservation waters.

- The baseline WQS, if finalized as proposed, would fulfill requirements for WQS under EPA's regulations by establishing:
  - designated uses consistent with the goals of the CWA (protection and propagation of fish, shellfish, and wildlife and recreation in and on the water),
  - narrative water quality criteria with procedures to derive numeric values to protect those uses, and
  - an antidegradation policy and implementation methods to protect high quality waters.
- Baseline WQS provide a more robust and transparent foundation to implement CWA programs in Indian country facilitating future actions, including:
  - establishing water quality-based effluent limits in NPDES permits for Indian reservation waters,
  - performing CWA Section 401 certification of federal licenses and permits,
  - analyzing permits to discharge dredged and fill material under CWA Section 404, and
  - identifying impaired waters under CWA Section 303(d).

### **Tribal Reserved Rights Rule**

On April 26, 2024, the EPA Administrator signed a final rule that revises the federal WQS regulation at 40 CFR part 131 to explicitly address how the EPA and states must consider Tribal reserved rights – defined in this rule 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 – in establishing WQS, where Tribes assert these rights for consideration. Previously, the EPA had addressed Tribal reserved rights in state-specific WQS actions, which had led to uncertainty. This rule establishes a clear and transparent regulatory framework that promotes national consistency in the consideration of tribal treaty rights while also accounting for local considerations to inform the development of WQS to protect applicable Tribal reserved rights.

- Many Tribes hold reserved rights to aquatic or aquatic-dependent resources in waters outside the boundaries of federal Indian reservations where states are responsible for establishing WQS. Such rights are "reserved" by Tribes, because, as the U.S. Supreme Court has explained, treaties are "not a grant of rights to the Indians, but a grant of rights from them, a reservation of those not granted."
- The EPA's authority for this rule derives primarily from CWA Section 303(c), which requires states and authorized Tribes to adopt WQS and submit them to the EPA and assigns EPA an oversight function in approving or disapproving the WQS.
- Where a Tribe asserts Tribal reserved rights in writing to a state and the EPA for consideration in establishment of WQS, the rule requires that the state, to the extent supported by available data and information:
  - Take into consideration Tribal reserved rights when adopting or revising designated uses,
  - Take into consideration the future anticipated exercise of Tribal reserved rights, unsuppressed by water quality,
  - Where the state has adopted designated uses that protect the right, develop water quality criteria to protect right holders' members using at least the same risk level (e.g., cancer risk level, hazard quotient, or illness rate) as the state would otherwise use to develop water quality criteria to protect the state's general population, paired with exposure inputs (e.g., fish consumption rate) representative of right holders' members exercising their reserved rights,
  - Submit to the EPA any information provided by right holders about relevant rights and documentation of how that information was considered, and
  - At each triennial review, evaluate any new information presented on Tribal reserved rights and consider whether WQS must be revised to protect those rights.

- The rule requires that the EPA:
  - Provide assistance with evaluating Tribal reserved rights upon request by states or right holders, to the extent practicable,
  - Review WQS submitted by states and authorized Tribes to determine whether they appropriately considered applicable Tribal reserved rights, and
  - Initiate the Tribal consultation process with the right holders to inform this review.
- This rule does not define geographically where Tribal reserved rights apply, or the level of water quality necessary to protect any specific Tribal reserved rights. Rather, it defines the regulatory expectations against which the EPA will evaluate future state WQS submissions.

## ONGOING/UPCOMING REVIEWS FOR FY2024

### **Federal Baseline Water Quality Standards**

The EPA anticipates completing a final rule in the fall of 2024.

### **Tribal Reserved Rights Rule**

On May 28, 2024, a coalition of eight states filed a complaint against the EPA in the U.S. District Court for the District of North Dakota challenging the EPA's final rule.

On June 14, 2024, four additional states joined as Plaintiffs, and the 12 Plaintiff states filed a motion requesting that the court stay the rule or enjoin the EPA from enforcing the rule against Plaintiff states pending the outcome of the litigation. In their motion, Plaintiffs argue, in pertinent part, that the EPA lacked statutory authority under the CWA to promulgate the final rule, as the CWA does not explicitly require states to consider Tribal reserved rights in establishing WQS. The Plaintiffs' motion is fully briefed, and the parties are awaiting a decision from the court.

Plaintiffs' initial merits brief is due November 4, and the EPA's initial merits brief is due January 3, 2025.

## KEY EXTERNAL STAKEHOLDERS:

- |                                   |  |  |  |                                |  |
|-----------------------------------|--|--|--|--------------------------------|--|
| <input type="checkbox"/> Congress | <input checked="" type="checkbox"/> Industry | <input checked="" type="checkbox"/> States | <input checked="" type="checkbox"/> Tribes | <input type="checkbox"/> Media | <input checked="" type="checkbox"/> Other Federal Agency |
| <input type="checkbox"/> NGO      | <input type="checkbox"/> Local Governments   | <input type="checkbox"/> Public            |  |                                |  |

## MOVING FORWARD:

### **Federal Baseline Water Quality Standards**

Once finalized, the EPA will implement the baseline WQS, in consultation with Tribes, in a manner to address location-specific water quality conditions and Tribal circumstances, as appropriate, and consistent with all relevant public participation requirements to ensure transparency for stakeholders. Tribes covered by the baseline WQS will be listed on EPA's [website](#).

### **Tribal Reserved Rights Rule**

If and when requested, the EPA will assist states and/or right holders with evaluating Tribal reserved rights to the extent practicable. This may include helping to evaluate the nature or extent of the rights in the WQS context, supporting the gathering or development of data and information, or assisting with the development of methodologies to establish

protective WQS. When assisting states with these activities, the EPA will engage with right holders. When the EPA is reviewing WQS and a Tribe has asserted a right for consideration, the EPA will evaluate case-specific information about the Tribal reserved right in question and the levels or types of pollutants that could affect that right, in consultation with the Tribe. The EPA does not expect that applicable Tribal reserved rights exist in every state.