

Proposed Water Quality Standards Regulatory Revisions to Protect Tribal Reserved Rights

EPA is proposing revisions to the federal water quality standards (WQS) regulation that carries out part of the Clean Water Act (CWA). The revisions describe how state and federal WQS must protect water and water-dependent resources reserved to tribes through treaties, statutes, executive orders, or other sources of federal law, in waters of the United States. Once final, this proposal would create a regulatory framework to be applied case-specifically to ensure that WQS protect resources reserved to tribes, such as fish and wild rice.

How does this action support tribes?

Clean water is essential to maintaining traditional tribal ways of life. However, due to diminished water quality, many tribes are unable to do so. By clearly describing how EPA will review state-set WQS that impact water resources reserved to tribes, this proposed rule will enhance protection of those resources. The proposed regulatory framework would also provide transparency and predictability for tribes, states, regulated industries, municipalities, and the public.

What are water quality standards?

WQS define the goals for a water body by designating its uses (such as fishing), setting criteria (safe pollutant levels or conditions) to protect those uses, and establishing policies to protect existing water quality from degradation. CWA section 303(c) directs states¹ to establish WQS for rivers, lakes, estuaries, and other waters of the United States within their jurisdictions. States must review their WQS at least every three years and, if appropriate, revise or establish new standards. Any new or revised WQS must be submitted to EPA for review. EPA's regulation that implements CWA section 303(c) specifies requirements for states to develop WQS that are consistent with the Act.

What are tribal reserved rights?

Many tribes hold reserved rights, through treaties, statutes, executive orders, or other sources of federal law, to resources in waters where states establish WQS. The U.S. Constitution defines treaties as the supreme law of the land. In implementing CWA section 303(c), EPA has an obligation to ensure that its WQS approvals and disapprovals are consistent with treaties, statutes, executive orders, and other sources of federal law reflecting tribal reserved rights.

What is EPA proposing?

EPA's proposed regulation clarifies that where tribal reserved rights exist, states must account for those rights in revising their designated uses, criteria, and/or antidegradation provisions.

¹ Pursuant to 40 CFR 131.3(j), "states" include the 50 states, the District of Columbia, Guam, the Commonwealth of Puerto Rico, Virgin Islands, American Samoa, the Commonwealth of the Northern Mariana Islands, and Indian tribes that EPA determines to be eligible for purposes of the WQS program.

The proposal further specifies that WQS must protect unsuppressed use of any reserved resources. Determining the unsuppressed level requires considering past, present, and future use of the resource, along with what is currently reasonably to achieve for the waterbody.

The proposal would also require that WQS protect the health of the tribal members exercising reserved rights to at least the same risk level at which the general population of the state would otherwise be protected. EPA anticipates the primary application of this provision to be in determining the appropriate cancer risk level when deriving criteria to protect human health.

EPA is proposing that state WQS submissions must include documentation of the state's efforts to obtain information about the existence of any applicable tribal reserved rights, their current and past use, scope, and nature, as well as the level of water quality that protects those rights. Additionally, the rule would require states to re-evaluate whether WQS need to be revised to protect any applicable tribal reserved rights at each triennial WQS review.

Finally, the proposed rule would require EPA to initiate tribal consultation with the right holders when reviewing WQS submissions to determine whether state WQS protect applicable reserved rights.

How can I comment on the proposed rule?

In addition to accepting written comments from the public, EPA is offering two online public hearings so that interested parties may provide oral comments. For more details on the online public hearings and to register to attend, please visit: <https://www.epa.gov/wqs-tech/protecting-tribal-reserved-rights-in-WQS>.

Where can I find more information?

To access the Federal Register notice and supporting documents in the docket (EPA-HQ-OW-2021-0791), visit EPA's Water Quality Standards website at: <https://www.epa.gov/wqs-tech/protecting-tribal-reserved-rights-in-WQS>.