



Western States Water

Addressing Water Needs and Strategies for a Sustainable Future

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ADMINISTRATION/WATER QUALITY **EPA/Tribal Water Quality Standards**

On May 5, the Environmental Protection Agency (EPA) published a proposed rule, Federal Baseline Water Quality Standards (WQS) for Indian Reservations, in the Federal Register (88 FR 29496). The rule would establish federal WQS for waterbodies on Indian reservations that have not established their own WQS under the Clean Water Act (CWA) §518 treatment as states (TAS) authority. Comments are due by August 3.

The proposed rule noted that CWA §518 authorized eligible tribes to administer CWA programs over their entire reservations, including over nonmember activities on fee lands within the reservation. "The Federal Government has recognized 574 Tribes. More than 300 of these Tribes have formal and/or informal reservations: e.g., named formal reservations, Pueblos, Rancherias, and lands held in trust by the United States for Tribal governments that are not designated as formal reservations." In 2016, EPA revised its interpretation of CWA §518 to streamline some aspects of the TAS application. The proposed rule noted that despite increased interest from tribes since 2016, the process of acquiring TAS authority and adopting WQS is still time-consuming and resource-intensive; only 84 of the 300 eligible tribes have applied for TAS authority and been approved, and only 47 of those tribes have adopted WQS and submitted them to EPA for approval. "At the current pace, it could take more than a decade for CWA-effective WQS to be put in place for all Indian reservations."

The proposed rule noted that EPA-approved state WQS generally do not apply in Indian country, with a few exceptions. "EPA estimates that about 76,000 miles of rivers and streams and 1.9 million acres of lakes, reservoirs, and other open surface waters within Indian reservations currently lack CWA-effective WQS; these reservations are home to approximately 550,000 people. As a result, 50 years after enactment of the CWA, the majority of Indian reservations do not have this foundational protection laid out by Congress in the CWA for their waters.... Although it is EPA's preference for Tribes to obtain TAS and develop WQS tailored to the

Tribes' individual environmental goals and reservation waters, EPA's promulgation of baseline WQS would safeguard water quality until Tribes obtain TAS and adopt CWA WQS themselves."

EPA cited 40 CFR 131.22(b) as its authority to establish these federal WQS: "The Administrator may...propose and promulgate a regulation, applicable to one or more navigable waters, setting forth a new...standard upon determining such a standard is necessary to meet the requirements of the Act." Notably, subsection (c) adds: "In promulgating water quality standards, the Administrator is subject to the same policies, procedures, analyses, and public participation requirements established for States in these regulations."

Further, in 2001, EPA Administrator Carol Browner issued a Determination that WQS were needed for certain Indian country waters lacking CWA-effective WQS. The Determination said: "[E]xcept where the Tribe wants to have its Indian country waters excluded from this rule and the Tribe and/or EPA has or intends to develop a plan for establishing water quality standards under the Clean Water Act within a reasonable time, and for off-reservation allotments . . . the EPA Administrator finds under the Clean Water Act sections 303(c)(4)(B) and 501(a) that water quality standards are necessary to meet the requirements of the Clean Water Act for all Indian country waters where EPA has not either (1) promulgated other Federal water quality standards or (2) explicitly found State or Tribal jurisdiction to adopt water quality standards (and Tribal or State standards are in effect) under the Clean Water Act."

The 2023 proposed rule said: "EPA is not proposing to amend the [2001] Administrator's Determination. This remains the source of authority for EPA's proposal of WQS for Indian country waters that lack such standards.... [T]his proposed rule would effectuate a significant portion of that Determination, recognizing that Tribes' individual circumstances may vary and focusing initially on Indian reservation waters where EPA and the relevant Tribes agree that baseline WQS are appropriate at this time. This approach would ensure that the Tribes themselves have a role in determining the application of this rule, so that EPA may appropriately target resources

to those Indian reservation waters where the agency and the Tribes determine the need for baseline WQS is most pressing. EPA will continue to monitor the development of WQS for Indian reservation waters and consider future action to effectuate the remainder of the Determination.”

EPA notes three exclusions where the federal baseline WQS would not apply: (1) Indian reservations with other federal WQS (currently only one tribe); (2) Indian reservations where a TAS tribe is authorized to adopt WQS (47 tribes), or where a state has jurisdiction to adopt WQS for parts or all of a reservation (4 states); and (3) Indian country waters in off-reservation allotments or dependent Indian communities (DICs), which are included in the definition of Indian country under 18 USC 1151. “EPA believes that the third exclusion...is warranted because of the infeasibility of covering these waters at this time.... There are likely many thousands of off-reservation allotments, many of which are scattered throughout the United States. The Department of the Interior’s Bureau of Indian Affairs and Bureau of Land Management are in the process of identifying and locating off-reservation allotments in several geographical areas around the country. Until this information is confirmed, EPA is concerned that it would not be practical to ensure uniform implementation of the baseline WQS and would ensure that persons affected by this proposed rule have a meaningful opportunity to comment and engage in the process.” The proposed rule also provides a mechanism for tribes to seek exclusion where there is an alternative plan to protect water quality consistent with the CWA.

The proposed designated uses include: (1) the protection of aquatic life and the health of human consumers of aquatic life; (2) primary contact recreation; and (3) cultural and traditional uses (which could be used to protect tribal treaty and reserved rights not otherwise protected by the first two designated uses). The proposed rule notes a rebuttable presumption of attainability that requires a state or TAS tribe to demonstrate that these uses are infeasible through a use attainability analysis consistent with 40 CFR 131.10. EPA is soliciting comment on whether the rule should designate a public water supply use for all Indian reservation fresh waters, but notes that this may be best addressed by allowing tribes to request such a designation, particularly as some waters may not have enough flow to support public water supply uses.

EPA is proposing narrative criteria with binding numeric translation procedures designed as the applicable WQS to protect the proposed designated uses for Indian reservation waters: (1) all waters shall be free from toxic, radioactive, conventional, non-conventional, deleterious or other polluting

substances in amounts that will prevent attainment of the applicable baseline designated uses; (2) all waters shall be free from adverse impacts to the chemical, physical or hydrologic, or biological integrity caused by pollutants or pollution that prevent the attainment of applicable designated uses; (3) all waters shall be free from substances attributable to wastewater or other discharges that (a) settle to form objectionable deposits, (b) float as debris, scum, oil, or other matter to form nuisances, (c) produce objectionable color, odor, taste, or turbidity, or (d) produce undesirable or nuisance aquatic life; (4) all waters shall be free from conditions that would likely jeopardize the continued existence of any threatened or endangered species listed under the Federal Endangered Species Act or result in the destruction or adverse modification of such species’ critical habitat; and (5) all waters shall maintain a level of water quality at their pour points to downstream waters that provide for the attainment and maintenance of the water quality standards of those waters, including the waters of another state or a federally recognized tribe.

CONGRESS

Reclamation/Climate and Hydrology

On April 28, Representative Natalie Porter (D-CA) introduced the Reclamation Climate Change and Water Program Reauthorization Act (H.R. 3027), which would extend the program through 2033. Originally authorized in the 2009 Omnibus Public Land Management Act, under the SECURE Water Act §9503(c), the program coordinates the efforts of the Bureau of Reclamation, the U.S. Geological Survey, the Department of Agriculture, the National Oceanic and Atmospheric Administration, and other federal and state agencies to address the risks of climate change to water scarcity in watersheds with Reclamation facilities. The program is used to develop strategies to manage water supply, potential shortages and water delivery to contractors, conflicts, and impacts to water uses and the environment. Reclamation reports to Congress every five years with the West-Wide Climate and Hydrology Assessment, which provides estimates of changes in temperature, precipitation, snowpack, and streamflow across the West.

MEETINGS

Western States Water Council

The WSWC Fall Meetings were previously scheduled to be held in Anchorage, Alaska on September 13-15, 2023. Due to the difficulty of getting flights out of Alaska for some of our members, we have moved our meeting dates up one day to September 12-14. For further information as it becomes available please see <https://westernstateswater.org/events/wswc-2023-fall-meetings/>.

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