



EPA Baseline Water Quality Standards: An Enhancement of Tribal Sovereignty

The U.S. Environmental Protection Agency (EPA) is proposing to promulgate rules to establish baseline water quality standards (WQS) under the Clean Water Act for waters in Indian Country that currently do not have EPA-approved WQS in place. This proposed rulemaking will allow Tribes currently without Treatment as a State (TAS) or federally approved WQS the opportunity to consult with EPA in permitting decisions that affect individual Tribal water resources. Consultation enables affected tribes to provide data and/or tribal knowledge about their resources to EPA at critical decision points in the regulatory process. This effort will not only provide an essential level of protection on waters that currently do not have such protection, but will also enhance Tribal sovereignty by providing a mechanism for affected Tribes to engage in review of actions that may affect Tribal waters.

Tribes use natural resources with respect and reverence. Tribes know best what measures are required to preserve their traditions and to maintain the environment in order to practice these traditions and rights. The Tribe may be able to protect the resources within Indian country, but the Tribe has little control over off-reservation polluters. Environmental pollution is migratory irrespective of political boundaries. Thus, where there is use of a common body of water by both a Tribe and another jurisdiction, the quality for all users needs to be protected. The Clean Water Act [CWA] is a comprehensive statute designed to “*restore and maintain the chemical, physical, and biological integrity of the Nation's waters' through the reduction and eventual elimination of pollutant discharge into those waters*”¹. The Clean Water Act does not authorize states to implement or enforce their water quality management programs on Indian lands. Therefore, in the absence of a treaty or federal statute granting such State authority over a particular tribal land, it is appropriate for the EPA to proceed under section 303(c)(4)(B) to promulgate federal water quality standards, where justified,

Water Prayer

From the North: *For Native people, caring for the water is not a matter of practicality. We lived as human beings on this earth for thousands of years without relying on oil. We can live without gold. But we cannot live without water.*

¹ Clean Water Act § 101(a), 33 U.S.C. § 1251(a) (1994)

for waters on Indian lands². Proposed baseline WQS will provide the nationwide basic level of CWA protection for all Tribal waters until the Tribes can establish site-specific (tribe-specific) standards to protect water resources for their uses. Baseline WQS will provide the Tribes a stronger voice in preserving the water resources in Indian country.

The promulgation of baseline WQS is an initial, fundamental step for protecting waters in Indian Country. These WQS can act as a placeholder for Tribes that may one day determine the need to develop their own WQS and submit their application for TAS to EPA. In the meantime, these baseline WQS could serve as a “safety net/umbrella” to stem the assault on water resources in Indian country. For example, Indian Tribes in Michigan have seen waters of their reservations considered as “mixing zones” when the state issues a National Pollution Discharge Elimination System permit (NPDES) for upstream dischargers, as currently there are no applicable WQS for their reservation waters.

The Baseline WQS will protect and enhance Tribal sovereignty through:

- Providing a safety net/umbrella for Tribes without WQS.
- Narrative WQS that are enforceable provide a level of protection currently not realized for Tribes without approved standards in place.
- Strong antidegradation provisions will be instrumental in protecting high quality Tribal water resources.
- Tribes without approved WQS are subject to neighboring state WQS during EPA-led NPDES and other types of permitting decisions requiring 401 water quality certification permitting determinations.
- The Baseline WQS may also be used by Tribes to determine if a Tribal waterbody has “Impaired Waters”.
- Baseline WQS allows Tribes without approved WQS a voice in NPDES, Section 404 Dredge and Fill, and other types of federal permits through consultation with EPA in permitting decisions that affect individual Tribal water resources. This also gives the Tribe the opportunity to bring federal environmental protection standards under local Tribal control through conditioning a 401 certification with specific stipulations requiring protection and preservation of sacred or ceremonial sites. This may also include denial of a 401 water quality certification outright.

Water Prayer

From the East: We give thanks to all the waters of the world for quenching our thirst and providing us with strength. Water is life. We know its power in many forms – waterfalls and rain, mists and streams, rivers and oceans. With one mind, we send greeting and thanks to the spirit of Water. Now our minds are one.

² 53 Fed. Reg. 26,968, 26,968 (1988) (to be codified at 40 C.F.R. § 131).

- The Baseline WQS will neither undermine nor supersede any Tribe’s historic agreement with the United States that precede statehood, or which guarantee that neither party will harm the waters, fish, or other resources of the other party.
- This is a fulfillment of the Trust Responsibility inherent to all Federal Agencies to Tribes.
- States are provided the authority to regulate water quality and to set effluent standards as long as the state program meets or exceeds the standards set by the CWA. Tribes are currently encouraged to establish their own WQS that assert the power of sovereign government. WQS might be considered as a primary Tribal responsibility and privilege to fulfill the right of a sovereign nation.

Baseline WQS that are narrative are enforceable. Standard narrative language states that “Waters shall be fishable, swimmable, and meet ceremonial/religious uses”. Narrative standards are often implemented through ‘translators’, or other parameters that are relevant to the desired condition. For example, “fishable” is defined as having a viable fish population, which in turn requires the proper dissolved oxygen level of 5.0 ppm or greater, proper pH which is not too acidic nor too alkaline, no toxic algae blooms, and an optimal temperature range. “Swimmable” is defined as the local population to be able to swim and not get sick. This can be interpreted as a safe level of *E. coli* bacteria, and with no other toxic pollutants such as PCBs. Ceremonial/religious uses can be defined to include water clarity and purity.

In summary, Baseline WQS offer a fundamental level of protection to Tribal Waters in Indian Country which currently have *no* protection under the CWA. It will not preclude any Treaty Right or other Historic Right that a Tribe may currently enjoy. It allows a Tribe to have case by case discussions with EPA on permitting decisions which will affect Tribal Waters, and provides an additional avenue for Tribes to protect their unique Tribal Water uses through the Section 401 Certification process for permits. Tribes will not be prohibited from developing their own WQS. Indeed, they will be encouraged to do so by using the Baseline WQS as a starting point for their own WQS. As a result, Tribal Sovereignty is enhanced through this proposed Baseline WQS promulgation.

Water Prayer

From the South: *The water is ha’nyi gash ja (grandfather water). Prayers are said when one partakes of this life giving liquid. The springs (ha’ pak) are considered holy waters. The holy water is bathed in for healing of the body and soul. Babies are taken to the sacred springs near their place of birth and washed. Doing this makes the child part of the spring, and the child can return to the spring for blessing and guidance. That child is related to the water. The Hualapai live through the water and the water lives through the Hualapai.*

From the West: *Water is the Life of All of Us – Felix Aripa, Coeur ’Alene Tribal Elder*