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# Tribal Baseline Water Quality Standards: Developing an Advance Notice of Proposed Rulemaking (ANPRM)

Region 9 RTOC – August 11, 2016

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# Purpose of Today's Presentation

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To obtain input from tribes prior to publishing an Advance Notice of Proposed Rulemaking (ANPRM) later in 2016 on potential Tribal Baseline Water Quality Standards (WQS).

EPA will:

- Present current thinking on the ANPRM for potential Baseline standards
- Answer questions
- Invite feedback – Are we on the right track? Are we missing anything important?



# Outline of Today's Presentation

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- Background - Why Baseline standards?
- Input from tribes to date
- Why an ANPRM?
- Schedule
- Potential Baseline WQS – EPA's current thinking and options
  - Designated uses
  - Water quality criteria
  - Antidegradation requirements
  - Implementation provisions
- Potential coverage
- Next steps



# Background

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## Recent EPA actions regarding tribes

- Enabling participation in more regulatory programs
  - Proposed rule, *Treatment of Indian Tribes in a Similar Manner as States for Purposes of Section 303(d) of the Clean Water Act*, 81 FR 2791 (Jan. 19, 2016)
- Considering tribal rights
  - EPA Policy on Consultation and Coordination with Indian Tribes: Guidance for Discussing Tribal Treaty Rights (Feb. 19, 2016)
  - Recent water quality standards decisions protecting tribal fish consumption in Maine and Washington
- Streamlining TAS\* applications
  - Final interpretive rule, *Revised Interpretation of Clean Water Act Tribal Provision* (81 FR 30183, May 16, 2016)



# Why Baseline Standards?

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To round out these efforts, EPA is exploring a rulemaking to establish federally-promulgated baseline WQS for Indian reservations that do not have Clean Water Act (CWA) effective WQS.

- Recognizes the importance of reservation waters, tribal sovereignty, and the need to better protect the water resources that tribes rely on.
- Aimed at closing the gap in WQS for Indian reservation waters.
  - Providing for a few exceptions, only 42 out of over 300 tribes with Indian reservations have adopted WQS effective under the CWA.
  - Individually promulgating standards “one tribe at a time” would take many years and strain resources.
  - All tribes may not seek TAS; and even with streamlined TAS applications, many tribes may continue to experience obstacles to establishing their own CWA-effective WQS.



# Why Baseline Standards? (continued)

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- Reservation waters without such WQS may not have the full suite of protections afforded under the CWA.
- Provides a basis for engaging with tribes, such as during tribal consultation and coordination, when deciding EPA's actions to implement the standards.

Examples of such implementation actions include:

- Calculating NPDES permit limits
- 401 water quality certifications and for 404 permit decisions for tribal waters
- Listing impaired tribal waters



# Baseline WQS would...

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- Establish applicable WQS for all reservation waters that do not currently have such standards.
- Recognize the relationship EPA has with federally recognized tribes, consistent with the federal trust responsibility.
- Provide opportunity for 401 WQS certification for important federal permits/licenses.
- Allow tribes to engage with EPA and states in consultation process on permits and other water quality decisions.



# Baseline WQS would NOT...

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- Change existing NPDES permit development and responsibilities; EPA generally issues NPDES permits now on reservation waters and will continue to issue them.
- Affect the scope of existing EPA-approved state programs.
- Affect the more than 40 tribes that currently have EPA-approved WQS.
- Diminish a tribe's ability to apply for TAS and establish their own WQS.
- Impose any additional obligation or responsibility on tribes.





# Input from Tribal Governments to Date

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EPA conducted extensive coordination, information sharing and consultation in August-November, 2015.

- Tribes are cautiously optimistic and generally supportive.
  - Discussed WQS protections from a cultural perspective.
  - Need for regional WQS tailoring (esp. fish consumption rates).
  - Antidegradation is important.
  - Concern for EPA capacity and resources.
- **National Tribal Water Council** members are strongly supportive:
  - Pursue “full promulgation” to cover all reservation waters currently without WQS.
  - Will advance tribal sovereignty and EPA trust responsibility, no opt in or out.
  - Empower tribes to consult with EPA in implementation (*e.g.*, EPA issuance of permits).
  - Council would assist EPA in reaching out to tribal leaders.

EPA has also been reaching out to Regional Tribal Operations Committees and the National Tribal Caucus.

EPA is conducting outreach with states in Summer 2016.



# Input from Tribes to Date: Story of Two Tribes

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**Confederated Tribes of Colville Indian Reservation** – only EPA federal WQS promulgation for an Indian reservation – 1989

- EPA/Tribe/State permitting process has gone well.
- Tribe has increased their technical capacity and expertise by developing permits in coordination with the EPA.
- Tribe is now anxious to receive TAS, submitted TAS application in 2014.

**Nez Perce Tribe of Idaho** – in February 2014, the Tribe requested that EPA promulgate federal water quality standards.

- In August-November 2015 pre-consultation, NPT letter to EPA:  
*“The consequences of EPA not taking action to protect water quality on Indian reservations would pose a significant concern for the Tribe and Tribes throughout the country.”*



# Why an ANPRM?

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- In April 2016, EPA decided to issue an ANPRM this year that provides details of a potential proposed rule and invites input from tribes and the public.
- ANPRM provides tribes more time and opportunity for consultation and coordination with EPA (building on early input), as well as opportunity for public comments.
- The ANPRM will continue momentum to move forward on a potential rulemaking.



# Schedule

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- Tribal/EPA Government to Government consultation and coordination – from June 29 through August 31
  - Ø Tribal Consultation Webinars – July 20 and August 10
  - Ø Face to Face Consultation – Tribal Lands and Environment Forum – August 17
  - Ø Regional RTOCs and other information discussions with Tribal Governments
- Publish the ANPRM in the Federal Register by the end of the calendar year



# What Might Be Included in Potential Baseline Standards?

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EPA would seek input in the ANPRM on:

- **Which components of water quality standards should be included to ensure CWA water quality protection of all waters on Indian reservations?**
  - Includes designated uses, narrative and numeric water quality criteria, antidegradation requirements, and general provisions such as authorizing provisions for mixing zones, compliance schedules, and WQS variances.
- **Should EPA establish “one set of WQS that apply universally”? And:**
  - Allow limited tailoring by establishing cultural and traditional designated use to account for unique practices?
  - Provide limited range of fish consumption rates used in HHC?
  - Ensure greater protection for high quality and outstanding natural resource waters of particular importance to tribe through antidegradation?



# For What Waters Would Potential Baseline Standards Apply?

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- Could apply to all reservation waters except those having CWA-applicable WQS.
- Reservation waters include: waters in formal reservations and waters in lands not located within formal reservations that are held in trust for tribal governments.



# Potential Baseline Standards

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Water quality standards generally consist of the following elements:

1. Designated uses
2. Water quality criteria
3. Antidegradation requirements
4. Implementation provisions



# Potential Baseline Standards

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## 1. Designated uses – 101(a)(2)

- EPA would designate the CWA section 101(a)(2) uses of protection and propagation of fish, shellfish, and wildlife and recreation in and on the waters (“fishable, swimmable”) for all waters.
- In the first round of consultation, tribes expressed a clear interest in using WQS to help protect their *cultural and traditional* uses of water and aquatic resources.
- EPA would seek comment on two options:
  - **Option A:** Include “cultural and traditional uses of the water by a tribe” *explicitly* in the Baseline Water Quality Standards designated uses.
  - **Option B:** Cover cultural and traditional uses *implicitly* in the BWQS under sections 101(a)(2) and 303(c) of the CWA, and/or through criteria adjustments.
- EPA would also seek comment on designation of a public water supply use for all waters.





# Potential Baseline Standards

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## 1. Designated uses – 101(a)(2)

Example Option A language from NTWC comment letter

*(For informational purposes—Not a statement of EPA policy)*

"Wherever attainable, water quality must provide for protection and propagation of fish, shellfish, and wildlife, and for recreation in and on the water, *and for cultural and traditional uses...*"



# Potential Baseline Standards

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## 2. Water quality criteria

Water quality criteria can be expressed as narrative or numeric:

- **Narrative** (*qualitative*): used to express the protective condition of a water body when pollutants are unknown, unstudied or cannot be precisely measured.
- **Numeric** (*quantitative*): specify precise, measurable levels of particular chemicals or conditions allowable in a water body.

EPA would seek comment on combination of narrative and numeric.



# Potential Baseline Standards

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## 2. Water quality criteria – Narrative

The baseline WQS water quality criteria could include:

- Requirement for waters to be “free from” certain adverse conditions and types of substances.
- Narrative to protect cultural and traditional uses.
- Narrative for downstream protection.
- Narrative wetlands WQS currently being developed.

Example narrative criteria language from NTWC comment letter

*(For informational purposes—Not a statement of EPA policy)*

“All waters shall be free from toxic, radioactive, conventional, non-conventional, deleterious or other polluting substances in amounts that will prevent attainment of the “fishable /swimmable” designated uses”.



# Potential Baseline Standards

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## 2. Water quality criteria – Numeric

- Include most aquatic life and human health numeric 304(a) recommended criteria.
- Options for default fish consumption rates (FCR) may include:
  - 175 g/day for Northwest tribes
  - 160 g/day half of the USDA recommended daily protein intake
  - 142 g/day EPA default “subsistence” rate
  - 22 g/day national human health criteria default

### Example numeric criteria

*(For informational purposes—Not a statement of EPA policy)*

To protect the Aquatic Life Use, dissolved Zinc shall not exceed 90 micrograms per liter as a one hour average more than once every three years.



# Potential Baseline Standards

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## 3. Antidegradation requirements

**Antidegradation:** requirements complement designated uses and water quality criteria by providing a framework for maintaining and protecting water quality that has already been achieved.

### 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 process (Tier 2 review) to allow measured consideration prior to allowing a lowering of water quality.

### Tier 3. Outstanding National Resource Waters (ONRW)

- Includes a prohibition of any lowering of water quality.

EPA would seek comment on including both an **antidegradation policy** consistent with all three tiers of maintenance and protection and detailed **antidegradation implementation methods** in the text of any resulting Baseline rule.



# Potential Baseline Standards

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## 4. Implementation

- Standards could include **implementation** flexibilities (*e.g.*, authorizing provisions for mixing zones, compliance schedules, and WQS variances).
- Tribal engagement opportunity in EPA's implementation actions such as establishing appropriate water quality-based effluent limits in NPDES permits.
- EPA would also engage in public participation with states and the regulated community in accordance with existing regulations.



# Potential Coverage

## Location of Dischargers

- Approximately 231 NPDES individual discharger permits (including 22 major dischargers) are located within potentially affected Indian reservations.
- Approximately 256 (48 majors) located within 5 miles upstream from such reservations.
- Nationally there are over 45,000 facilities with individual NPDES permits.

## Potential New Coverage

- The Tribal Baseline WQS effort would expand the footprint of tribes with WQS from 13 states currently to 31 states. The 18 “new” states generally have not had direct experience dealing with reservation WQS under the CWA.

	<u>Located within the states of</u> NY, FL, MN, WI, NM, CO, MT, AZ, CA, NV, ID, OR, WA (13 states)	<u>Located within the states of</u> CT, MA, RI, AL, MS, NC, MI, LA, OK, TX, IA, KS, NE, ND, SD, UT, WY, AK (18 states)
Tribes that have adopted EPA-approved WQS under TAS	42 tribes	
Tribes with EPA-promulgated WQS tailored to local waters	1 tribe (Colville, WA, 1989)	
Tribes potentially covered by EPA-promulgated Baseline WQS	Up to 198 tribes*	Up to 93 tribes*

\*An unknown number of these tribes lack reservation waters and would not be covered by Baseline WQS.



# For More Information

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- Felicia Wright, [wright.felicia@epa.gov](mailto:wright.felicia@epa.gov)
- Environmental protection in Indian Country:  
<https://www.epa.gov/tribal>
- Clean Water Act and Water Quality Standards:  
<https://www.epa.gov/standards-water-body-health>
- Aquatic and Human Health Criteria:  
<https://www.epa.gov/wqc/national-recommended-water-quality-criteria>





# How to Provide Comments

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Please email any comments after the presentation to the following address:

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