



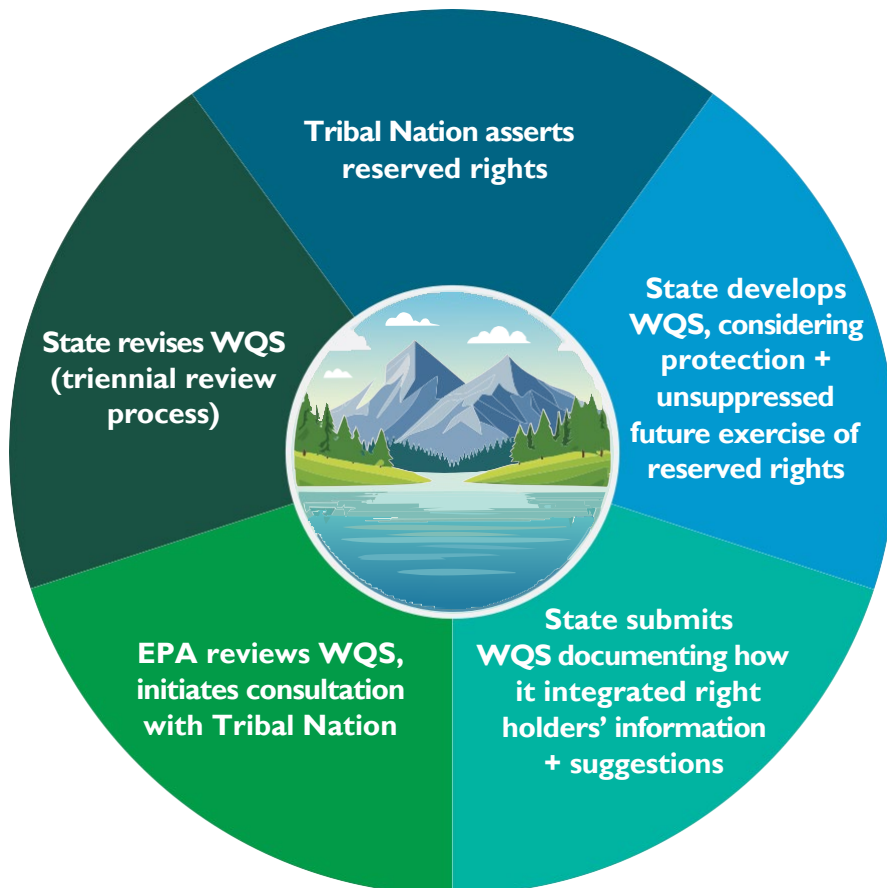
FACT SHEET

EPA’s 2024 Water Quality Standards Regulatory Revisions to Protect Tribal Reserved Rights

On May 2, 2024, the U.S. Environmental Protection Agency (EPA) finalized a new rule updating its Clean Water Act regulations at [40 CFR Part 131](#), requiring states to consider certain Tribal reserved rights when developing or revising their Water Quality Standards (WQS).

The new regulation:

1. Defines Tribal reserved rights (applies only to this set of regulations).
2. Establishes and clarifies the responsibilities of states with regard to Tribal reserved rights in the WQS context.
3. Establishes and clarifies the EPA’s related responsibilities and oversight role.



CLEAN WATER ACT

The **Clean Water Act (CWA)** aims to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” Water Quality Standards developed under CWA § 303 underlie the regulatory programs aimed at achieving this goal.

The three primary components of WQS are:

Designated Uses

The desired goals for a body of water, such as fishing, recreation, public drinking water supply, agriculture, and industry

Water Quality Criteria

Establish parameters for conditions or pollutant concentrations, stated in numeric or narrative terms, sufficient to protect the designated uses

Antidegradation Requirements

Maintain the water quality achieved

Regulatory Definitions

Reserved rights are “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.”

Right holders are “any Federally recognized Tribes holding Tribal reserved rights, regardless of whether the Tribe exercises authority over a Federal Indian reservation.”

This is a subset of what legal scholars call the *reserved rights doctrine*, meaning a Tribal Nation “reserves” any rights not explicitly extinguished in a treaty or federal statute. Some treaties explicitly reserve certain rights, such as to fish, hunt, and/or gather. These rights are binding Federal law.

The regulatory definition applies to reserved rights held by *any* federally recognized tribe, irrespective of a water body’s location or a tribe having jurisdiction over a reservation. It encompasses only resources protected under CWA purposes for WQS, including for protecting fish and shellfish, agriculture, and “other purposes.” It does not affect a state or tribe’s authority to *allocate water quantity*.¹

Consideration of Tribal Reserved Rights

The regulation establishes a procedure to ensure states appropriately consider tribal reserved rights in developing or revising their WQS. States retain considerable discretion, but Tribal Nations do have several opportunities to assert their rights.

Step One. Tribal Nations proactively assert their reserved right *in writing* to a state and the EPA *before* the state finalizes its new or revised WQS. Failure to assert a reserved right is not a waiver of that right, and the tribe may assert that right for the state to consider in future WQS revisions. The written assertion may be as simple as an email to the appropriate state agency. It should provide substantial detail and documentation, including the nature and geographic scope of the right, and level of water quality needed to support the reserved right. Tribal Nations can seek EPA funding for collecting this data.

¹ EPA clarified in its rulemaking that “water quantity would come into play only to the extent that a certain quantity or flow was under consideration in WQS development to protect an aquatic or aquatic-dependent resource.” 89 Fed. Reg. 35717, 35727 (May 2, 2024).

DESIGNATED USES

In establishing WQS, states, territories, and authorized Tribal Nations must consider “their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation.”² They also need to consider and provide for maintaining the WQS of downstream waters—including those established by other jurisdictions, such as authorized tribes.³

EPA obligates adoption of the “highest attainable use” of a water body and requires submission of a *use attainability analysis* (UAA) when attaining a CWA-specified use is infeasible.⁴ The Outstanding National Resource Waters (ONWR) classification permits only minor and temporary decreases in water quality.

² CWA § 303(c)(2). ³ 40 CFR § 131.10(b). ⁴ CWA § 101(a)(2).

Step Two. A state has three obligations, with the third contingent on the other two.

First, the state **takes into consideration** the use and value of its waters for protecting the Tribal reserved right in adopting or revising designated uses. Consideration includes whether: (1) current water quality sufficiently protects the relevant aquatic resource and each right holder’s ability to exercise its related right; and (2) an existing designated use already encompasses that right. States should follow best practices of engaging with Tribal Nations early in the WQS development/revision process and request any additional, helpful information from right holders, including relevant Indigenous Traditional Ecological Knowledge. The state includes any new information about reserved rights as part of its triennial review process.

Second, the state **takes into consideration** the anticipated future exercise of the Tribal reserved right **unsuppressed** by water quality in establishing relevant WQS. “Suppression” means the current water quality prevents right holders from fully exercising their reserved rights. States may review historical use of the aquatic resource as informative data.

Third, the state establishes **water quality criteria** to protect the Tribal reserved right **where the state has adopted designated uses** that either expressly incorporate protection of the Tribal reserved right or encompass the right. Right holders exercising their right will often have greater exposure to pollutants. For example, EPA’s [default recommended fish consumption rate](#) (FCR) is 22 grams per day for the general adult population and [142.4 grams per day for subsistence fishers](#). States developing human health criteria should apply the same risk level to right holders as to the general population.

Step Three. The state submits its new or revised WQS to EPA for review. Submissions should include documentation of how the state integrated information from right holders and which substantive suggestions by right holders the state declined to adopt—along with justification. EPA reviews the proposed WQS against a list of factors, including the state’s compliance with its obligations under the new regulation.

TRIBAL WQS

States, territories, and authorized Tribal Nations adopt and implement their own WQS, subject to EPA approval. Of the 84 Tribal Nations EPA found eligible for “Treatment as a State” (TAS) authority (under CWA § 518(e)) to administer their own WQS program, 49 have approved WQS. Otherwise, EPA has jurisdiction over tribal waters.

The agency in 2023 proposed a rule to develop federal baseline WQS for the over 250 Indian reservations lacking EPA-approved WQS. WQS undergo review and updates at least every three years. This is called the **triennial review process**.



Role of EPA

EPA has three primary obligations under the regulation:

- Follow the same requirements as states when promulgating federal WQS.
- Assist both states and right holders in evaluating Tribal reserved rights, upon request. EPA can assist in negotiating regional solutions when Tribal Nations hold reserved rights across multiple states with WQS revision processes following different timelines.
- Initiate [government-to-government consultation](#) in reviewing a state's WQS submission where a Tribal Nation asserted its reserved rights. EPA stated its intention to initiate consultation with all potentially affected federally recognized Tribal Nations, irrespective of whether any Tribal Nation asserted its reserved rights.

Data Sovereignty and Confidentiality

The regulation's effectiveness hinges in part on states having sufficient information for developing WQS protective of tribal reserved rights. Tribal Nations possess much of the relevant information. However, EPA and most states cannot protect from disclosure, under open records laws, most information Tribal Nations provide. CWA's public participation regulations mandate the provision of relevant information prior to public hearings on proposed WQS revisions. EPA is subject to the Freedom of Information Act (FOIA) disclosure requirements, and states follow their own open records laws. Tribal Nations will need to determine the most relevant information and work with EPA and states on identifying measures available for protecting confidentiality.



The NCAI Institute for Environmental Sovereignty advances Tribal Nations' leadership in natural resource governance and environmental stewardship, the safeguarding of Indigenous Peoples' cultural heritage linked to the landscape and natural environment, and innovative Indigenous-led approaches to environmental protection.

Founded in 1944, the National Congress of American Indians (NCAI) is the oldest, largest, and most representative American Indian and Alaska Native organization serving the broad interests of tribal governments and communities.

DOWNSTREAM EFFECTS

EPA took actions between 2015-2017 to protect tribal subsistence fishing in three states (Idaho, Maine, and Washington) where Tribal Nations asserted reserved fishing rights.

The agency maintained each state's human health criteria needed to protect tribal citizens exercising those rights to the same level as the general population—primarily through adjusting the Fish Consumption Rate (FCR) and/or cancer risk level used in calculating those criteria.

NCAI adopted in 2019 [Resolution No. ABW-19-004](#) stating its opposition to “actions by the Environmental Protection Agency (EPA) that weaken Human Health Criteria water quality standards, fail to protect human health, fail to safeguard tribal health and treaty rights to safely consume fish, and fail to uphold its commitment to environmental justice for tribal communities.”

