that complies with the provisions of the Act and applicable Federal regulations. *See* 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. This action merely proposes to approve state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this proposed action:

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

The SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), nor will it impose substantial direct costs on tribal governments or preempt tribal law.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: November 29, 2022.

Daniel Blackman,

Regional Administrator, Region 4.

[FR Doc. 2022–26331 Filed 12–2–22; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 131

[EPA–HQ–OW–2021–0791; FRL–8599–01–OW]

RIN 2040–AG17

Water Quality Standards Regulatory Revisions To Protect Tribal Reserved Rights

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The U.S. Environmental Protection Agency (EPA) is proposing revisions to the Federal Clean Water Act (CWA) water quality standards (WQS) regulation to clarify and prescribe how WQS must protect aquatic and aquatic-dependent resources reserved to tribes through treaties, statutes, executive orders, or other sources of Federal law, where applicable.

DATES: Comments must be received on or before March 6, 2023. Comments on the information collection provisions submitted to the Office of Management and Budget (OMB) under the Paperwork Reduction Act (PRA) are best assured of consideration by OMB if OMB receives a copy of your comments on or before January 4, 2023. *Public Hearing:* EPA will hold two online public hearings during the public comment period. Please refer to the **SUPPLEMENTARY INFORMATION** section for additional information on the public hearings.

ADDRESSES: You may send comments, identified by Docket ID No. EPA–HQ–OW–2021–0791, by any of the following methods:

- *Federal eRulemaking Portal: https://www.regulations.gov/* (our preferred method). Follow the online instructions for submitting comments.
- *Mail:* U.S. Environmental Protection Agency, EPA Docket Center, Office of Water Docket, Mail Code 28221T, 1200 Pennsylvania Avenue NW, Washington, DC 20460.
- *Hand Delivery or Courier:* EPA Docket Center, WJC West Building, Room 3334, 1301 Constitution Avenue NW, Washington, DC 20004. The Docket Center's hours of operations are 8:30 a.m.–4:30 p.m., Monday through Friday (except Federal holidays).

Instructions: All submissions received must include the Docket ID No. for this rulemaking. Comments received may be posted without change to *http://www.regulations.gov,* including any personal information provided. For detailed instructions on sending comments and additional information on the rulemaking process, see the ''Public Participation'' heading of the **SUPPLEMENTARY INFORMATION** section of this document.

EPA is offering two online public hearings on this proposed rulemaking. Refer to the **SUPPLEMENTARY INFORMATION** section below for additional information.

FOR FURTHER INFORMATION CONTACT: Jennifer Brundage, Office of Water, Standards and Health Protection Division (4305T), Environmental Protection Agency, 1200 Pennsylvania Avenue NW, Washington, DC 20460; telephone number: (202) 566–1265; email address: *brundage.jennifer@epa.gov.* Additional information is also available online at *https://www.epa.gov/wqs-tech/protecting-tribal-reserved-rights-in-WQS.*

SUPPLEMENTARY INFORMATION: This proposed rule is organized as follows:

I. Public Participation
  A. Written Comments
  B. Public Hearings
II. General Information
  A. Does this action apply to me?
III. Background
  A. Clean Water Act Requirements
  B. Tribal Reserved Rights
  C. Tribal Reserved Rights and Water Quality Standards
IV. Proposed Revisions to the Federal WQS Regulation
  A. Why is EPA proposing these revisions?
  B. What is EPA proposing?
  C. How would the proposed regulatory revisions be applied?
  D. EPA's Role
  E. How would the proposed regulatory revisions apply to States in the Great Lakes system?
  F. Role of Other WQS Provisions in Protecting Tribal Reserved Rights

V. Economic Analysis
VI. Statutory and Executive Order Reviews
A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563 Improving Regulation and Regulatory Review
B. Paperwork Reduction Act (PRA)
C. Regulatory Flexibility Act (RFA)
D. Unfunded Mandates Reform Act (UMRA)
E. Executive Order 13132: Federalism
F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments
G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks
H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use
I. National Technology Transfer and Advancement Act of 1995
J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

I. Public Participation

A. Written Comments

Submit your comments, identified by Docket ID No. EPA–HQ–OW–2021–0791, at *https://www.regulations.gov* (our preferred method), or the other methods identified in the **ADDRESSES** section. Once submitted, comments cannot be edited or removed from the docket. EPA may publish any comment received to its public docket. Do not submit to EPA's docket at *https://www.regulations.gov* any information you consider to be Confidential Business Information (CBI), Proprietary Business Information (PBI), or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). Please visit *https://www.epa.gov/dockets/commenting-epa-dockets* for additional submission methods; the full EPA public comment policy; information about CBI or multimedia submissions; and general guidance on making effective comments.

B. Public Hearings

EPA is offering two online public hearings so that interested parties may provide oral comments on this proposed rulemaking. For more details on the online public hearings and to register to attend the hearings, please visit *https://www.epa.gov/wqs-tech/protecting-tribal-reserved-rights-in-WQS.*

II. General Information

A. Does this action apply to me?

States [1] responsible for administering or overseeing water quality programs may be affected by this rulemaking, as states may need to consider and implement new provisions, or revise existing provisions, in their WQS. Federally recognized Indian tribes [2] with reserved rights [3] to aquatic and/or aquatic-dependent resources may also be affected by this rulemaking. Entities that are subject to CWA regulatory programs, such as industries, stormwater management districts, or publicly owned treatment works (POTWs) that discharge pollutants to waters of the United States could be indirectly affected by this rulemaking. Dischargers that could potentially be affected include the following:

TABLE 1—DISCHARGERS POTENTIALLY AFFECTED BY THIS RULEMAKING

Category	Examples of potentially affected entities
Industry	Industries discharging pollutants to waters of the United States.
Municipalities	POTWs or other facilities discharging pollutants to waters of the United States.
Stormwater Management Districts	Entities responsible for managing stormwater runoff.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities that could be indirectly affected by this action. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

III. Background

A. Clean Water Act Requirements

The CWA establishes the basic structure for regulating pollutant discharges into waters of the United States. In the CWA, Congress established the national objective to ''restore and maintain the chemical, physical, and biological integrity of the Nation's waters,'' and to achieve ''wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water'' (CWA sections 101(a) and 101(a)(2)).

CWA section 303(c) directs states to adopt WQS for waters of the United States. The core components of WQS are designated uses, water quality criteria, and antidegradation requirements. Designated uses establish the environmental objectives for a water body, such as public drinking water supply, propagation of fish, shellfish and wildlife, and recreation. Water quality criteria define the minimum conditions necessary to achieve those environmental objectives. Antidegradation requirements maintain and protect water quality.

WQS serve as the basis for several CWA programs, including:

- Section 303(d) water body assessments and determinations of total maximum daily loads (TMDLs);
- Section 401 certifications of Federal licenses and permits;
- Water quality-based effluent limits in permits issued through state or National Pollutant Discharge Elimination System (NPDES) Programs under section 402; and
- Section 404 permits for dredged or fill material.

Section 303(c)(2)(A) of the CWA provides that ''[water quality] standards shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter. Such standards shall be established taking into consideration

[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.

[2] *See* Federally Recognized Indian Tribe List Act of 1944, 25 U.S.C. 479a. The current list can be found at 87 FR 4636 through 4641 (January 28, 2022).

[3] EPA proposes to define ''tribal reserved rights'' as ''any rights to aquatic and/or aquatic-dependent resources reserved or held by tribes, either expressly or implicitly, through treaties, statutes, executive orders, or other sources of Federal law.''

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.'' CWA section 303(c)(2)(A) and EPA's implementing regulation at 40 CFR part 131 require, among other things, that a state's WQS specify appropriate designated uses of the waters and water quality criteria to protect those uses. Such criteria must be based on sound scientific rationale, must contain sufficient parameters to protect the designated use, must support the most sensitive use where multiple use designations apply, and may be expressed in either narrative or numeric form.[4] *See* 40 CFR 131.11(a) and (b). In addition, 40 CFR 131.10(b) provides that in designating uses of a water body and establishing criteria to protect those uses, the state shall ''. . . ensure that its water quality standards provide for the attainment and maintenance of the water quality standards of downstream waters.''

Antidegradation requirements provide a framework for maintaining and protecting water quality that has already been achieved (40 CFR 131.12). States can also choose to include general policies in their WQS that affect WQS implementation, such as WQS variance policies and mixing zone policies (40 CFR 131.13).

States are required to review applicable WQS at least once every three years (''triennial review'') and, if appropriate, to revise or adopt new standards (CWA section 303(c)(1)). Any new or revised WQS must be submitted to EPA for review. If EPA disapproves a state's new or revised WQS, the CWA provides the state ninety days to adopt a revised WQS that meets CWA requirements. If a state fails to meet that deadline, EPA is required to promptly propose and promulgate a new standard that meets CWA requirements.

CWA section 303(c)(4)(B) authorizes the Administrator to determine, even in the absence of a state submission, that a new or revised standard is necessary to meet CWA requirements. Once the Administrator makes such a determination, the agency must ''promptly'' propose an appropriate WQS and finalize it within 90 days unless the state adopts an acceptable standard in the interim. CWA section 501(a) authorizes the Administrator to ''prescribe such regulations as are necessary to carry out his functions under this chapter.'' Finally, as further discussed in section III.C. of this preamble, CWA section 511(a)(3) provides that the Act ''shall not be construed as . . . affecting or impairing the provisions of any treaty of the United States.''

B. Tribal Reserved Rights

For the purposes of this proposed rulemaking, ''tribal reserved rights'' means any rights to aquatic and/or aquatic-dependent resources reserved or held by tribes, either expressly or implicitly, through treaties, statutes, executive orders, or other sources of Federal law.[5] Tribal reserved rights as defined in this proposed rulemaking generally do not address the quantification of *Winters* rights.[6] The Court has described tribal reserved rights to fish and access fishing locations as ''not much less necessary to the existence of the Indians than the atmosphere they breathed[.]'' [7] EPA recognizes that tribal reserved rights to use and access natural and cultural resources are an intrinsic part of tribal life and are of deep cultural, economic, and subsistence importance to tribes.[8]

The U.S. Constitution defines treaties as part of the supreme law of the land, with the same legal force as Federal statutes.[9] From 1778 to 1871, the U.S.' relations with tribes were defined and conducted largely through treaty-making. In 1871, Congress stopped making treaties with tribes,[10] and subsequent agreements between tribes and the Federal government were instead generally memorialized through Executive orders, statutes, and other agreements, such as congressionally enacted Indian land claim settlements. Instruments other than treaties may also reserve tribal rights, with equally binding effect.[11] As one court explained, generally ''it makes no difference whether . . . [tribal] rights derive from treaty, statute or executive order, unless Congress has provided otherwise.'' [12] Pursuant to the Constitution's Supremacy Clause, treaties and statutes also bind states.[13]

Courts generally adhere to several guiding principles in interpreting treaties and other Federal legal instruments regarding Indians tribes known as the ''Indian canons of construction.'' In accordance with these canons, ''Indian treaties are to be interpreted liberally in favor of the Indians, and any ambiguities are to be

[4] Special requirements apply to ''priority toxic pollutants.'' CWA Section 303(c)(2)(B) requires states to adopt numeric criteria, where available, for all toxic pollutants listed pursuant to CWA Section 307(a)(1) for which EPA has published 304(a) criteria, as necessary to support the states' designated uses. ''Priority toxic pollutants'' are identified in 40 CFR part 423, Appendix A—126 Priority Pollutants. Consistent with § 131.11(a)(2), where a state or authorized tribe adopts narrative criteria for priority pollutants to protect designated uses, it must also provide information identifying the method by which it intends to regulate point source discharges of priority pollutants in water quality-limited waters based on such narrative criteria.

[5] Treaty rights are ''reserved'' by tribes, because, as the U.S. Supreme Court has explained, treaties are ''not a grant of rights to the Indians, but a grant of rights from them, a reservation of those not granted.'' *United States* v. *Winans,* 198 U.S. 371, 381 (1905).

[6] Under *Winters* v. *United States* and its progeny, the establishment of a Federal reservation (Indian or otherwise) implicitly reserves sufficient water to accomplish the purposes of the reservation. 207 U.S. 564, 576 (1908); *Cappaert* v. *United States,* 426 U.S. 128, 139 (1976); *Arizona* v. *California,* 373 U.S. 546, 597–602 (1963).

[7] *Winans,* 198 U.S. at 381.

[8] *See* 2021 Memorandum of Understanding Regarding Interagency Coordination and Collaboration for the Protection of Tribal Treaty Rights and Reserved Rights. Available online at *https://www.doi.gov/sites/doi.gov/files/interagency-mou-protecting-tribal-treaty-and-reserved-rights-11-15-2021.pdf.*

[9] U.S. Constitution, Art. VI, cl. 2 (''This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding.'')

[10] *See* Act of Mar. 3, 1871, § 1, 16 Stat. 544 (codified as carried forward at 25 U.S.C. 71).

[11] *See* Cohen's Handbook of Federal Indian Law § 18.02 (Nell Jessup Newton et al eds., 2005) (''Statutes and agreements that are ratified by Congress become, like treaties, the supreme law of the land'').

[12] *Parravano* v. *Masten,* 70 F.3d 539, 545 (9th Cir. 1995), cert. denied, *Parravano* v. *Babbitt,* 518 U.S. 1016 (1996); *see also United States* v. *Dion,* 476 U.S. 734, 745, n.8 (''Indian reservations created by statute, agreement, or executive order normally carry with them the same implicit hunting rights as those created by treaty.'').

[13] *Antoine* v. *Washington,* 420 U.S. 194, 205 (1975) (like a treaty, when Congress by statute ratifies an agreement that reserves tribal rights, ''State qualification of the rights is precluded by force of the Supremacy Clause, and neither an express provision precluding state qualification nor the consent of the State [is] required''); *U.S.* v. *Washington,* 853 F.3d 946, 966 (9th Cir. 2017) (Holding that ''in building and maintaining barrier culverts within the Case Area, Washington has violated, and is continuing to violate, its obligation to the Tribes under the Treaties.'') *aff'd,* 138 S.Ct. 1832 (per curiam); *Skokomish Indian Tribe* v. *United States,* 410 F.3d 506, 512 (9th Cir. 2005) (Treaties ''constitute the 'supreme law of the land''' and have ''been found to provide rights of action for equitable relief against non-contracting parties,'' and such equitable relief ''ensures compliance with a treaty; that is, it forces state governmental entities and their officers to conform their conduct to federal law.''); *see also Minnesota* v. *Mille Lacs Band of Chippewa Indians,* 526 U.S. 172, 204 (1999) (noting that ''[a]lthough States have important interests in regulating wildlife and natural resources within their borders, this authority is shared with the Federal Government when the Federal Government exercises one of its enumerated constitutional powers, such as treaty making,'' and accordingly, the treaty in that case gave the Chippewa Tribe ''the right to hunt, fish, and gather in the ceded territory free of . . . state, regulation.'').

resolved in their favor.'' [14] Further, treaties ''are to be construed as the Indians would have understood them'' at the time of signing.[15] Although Congress may abrogate Indian treaty rights, those rights remain absent clear evidence of congressional intent.[16] While these Indian canons of construction originated in the context of treaty interpretation by Federal courts, courts have also applied the canons in other contexts,[17] including determining the scope of tribes' rights under statutes or executive orders setting aside land for tribes.[18] Some tribes have treaty rights that are no longer enforceable because they have been abrogated or otherwise superseded by Congress in later Federal statutes.[19] In addition, some tribes negotiated treaties with the U.S. government that were not ratified.[20]

Tribal reserved rights may apply to waters in Indian country as well as outside of Indian country [21] and may be express or implied.[22] For example, in certain states in the Great Lakes region, tribal reserved rights include hunting, fishing, and gathering rights both within tribes' reservations, as well as rights retained outside these reservations in specific areas that the tribes ceded to the Federal government.[23] In the Pacific Northwest, treaties explicitly reserved to many tribes rights to fish in their ''usual and accustomed'' fishing grounds and stations both within and outside their reservation boundaries and to hunt and gather throughout their traditional territories.[24] In addition to tribes whose rights are reserved through treaties, other tribes have statutorily-reserved rights. For example, tribes in Maine have statutorily-reserved rights to practice traditional sustenance lifeways such as fishing in certain waters.[25]

Courts also have held that tribal reserved rights encompass subsidiary rights that are not explicitly addressed in treaty or statutory language but are necessary to render those rights meaningful.[26] For example, in *United States* v. *Winans,* 198 U.S. 371, 381 (1905), the Supreme Court explained that the right of ''taking fish at all usual and accustomed places,'' necessarily included the right to cross private lands to reach those fishing areas, noting that ''[n]o other conclusion would give effect to the treaty.'' [27]

C. Tribal Reserved Rights and Water Quality Standards

Tribal reserved rights to aquatic resources could be impaired by water quality levels that limit right holders' ability to utilize their rights. Indeed, as described in section III.B of this preamble, courts have recognized that the right to a specific resource necessarily includes attendant protections in order to be rendered meaningful.[28] In exercising its CWA section 303(c) authority, EPA has an obligation to ensure that its actions are consistent with treaties, statutes, executive orders, and other sources of Federal law reflecting tribal reserved rights. While there may be instances where a later-enacted statutory provision intentionally limits reserved rights,[29] that is not the case with section 303(c) of the CWA. First, with respect to

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[14] *Mille Lacs,* 526 U.S. at 200 (internal citations omitted); *see also County of Oneida* v. *Oneida Indian Nation,* 470 U.S. 226, 247 (1985) (''it is well established that treaties should be construed liberally in favor of the Indians with ambiguous provisions interpreted for their benefit'').

[15] *Mille Lacs,* 526 U.S. at 196 (''[W]e interpret Indian treaties to give effect to the terms as the Indians themselves would have understood them.''); *Jones* v. *Meehan,* 175 U.S. 1, 11 (1899) (A ''treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.'').

[16] *Mille Lacs,* 526 U.S. at 202 (''Congress may abrogate Indian treaty rights, but it must clearly express its intent to do so.''); *United States* v. *Dion,* 476 U.S. 734, 739–40 (1986) (noting that in finding congressional intent to abrogate ''[w]hat is essential is clear evidence that Congress actually considered the conflict between its intended action on the one hand and the Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty'').

[17] *See e.g., Hagen* v. *Utah,* 510 U.S. 399, 423–24 (1994) (''For more than 150 years, we have applied this canon in all areas of Indian law to construe congressional ambiguity or silence, in treaties, statutes, executive orders, and agreements, to the Indians' benefit.''); *County of Yakima* v. *Confederated Tribes,* 502 U.S. 251, 268–69 (1992) (quoting *Montana* v. *Blackfeet Tribe,* 471 U. S. 759, 766 (1985)) (''statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit''); *Alaska Pacific Fisheries Co.* v. *U.S.,* 248 U.S. 78, 89 (1918) (''statutes passed for the benefit of dependent Indian tribes or communities are to be liberally construed, doubtful expressions being resolved in favor of the Indians''); *but see Penobscot Nation* v. *Frey,* 3 F.4th 484, 502 (1st Cir. 2021) (holding that the Indian canons of construction were inapplicable to statutes settling Indian land claims in Maine).

[18] *See Winters,* 207 U.S. at 576–77 (applying the canons and holding that the Tribe was entitled to federally reserved rights to the Milk River); *Parravano,* 70 F.3d at 544 (applying the canons to determine the scope of tribes' reserved fishing rights under executive orders and a statute).

[19] U.S. Constitution, Art. II, § 2, cl. 2; *S. Dakota* v. *Bourland,* 508 U.S. 679, 690 (1993) (Statutory language providing that ''the sum paid by the Government to the Tribe for former trust lands taken for the Oahe Dam and Reservoir Project, 'shall be in final and complete settlement of all claims, rights, and demands' of the Tribe or its allottees'' made clear that the Tribe no longer retained its treaty right to regulate hunting and fishing); *Dion,* 476 U.S. at 739 (While Congress has the power to abrogate a treaty, ''the intention to abrogate or modify a treaty is not to be lightly imputed . . . Indian treaty rights are too fundamental to be easily cast aside.''); *U.S.* v. *McAlester,* 604 F.2d 42, 62–63 (10th Cir. 1979) (describing the history of the Choctaw Tribe's treaty-making with the United States, including several treaties in the late 1700s and early 1800s providing rights to lands that were later lost due to the Indian Removal Act of 1830, which ''finally forced the Choctaw Nation to agree . . . to relinquish all its lands east of the Mississippi River and to settle on lands west of the Arkansas Territory'').

[20] *Robinson* v. *Jewell,* 790 F.3d 910, 918 (9th Cir. 2015) (holding that an 1851 Treaty was never ratified by the Senate and thus carries no legal effect.'').

[21] Indian country is defined at 18 U.S.C. 1151 as: (a) All land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation; (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state; and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

[22] *See Menominee Tribe of Indians* v. *U.S.,* 391 U.S. 404, 406, (1968) (Noting that ''nothing was said in the 1854 treaty about hunting and fishing rights,'' but holding that such rights were implied, as the treaty phrase '''to be held as Indian lands are held' includes the right to fish and to hunt.''); *Makah Indian Tribe* v. *Quileute Indian Tribe,* 873 F.3d 1157, 1160 (9th Cir. 2017), *cert. denied* 139 S. Ct. 106 (2018) (Affirming district court finding that, based on historical and linguistic evidence, that use of the term ''fish'' in the Treaty of Olympia encompassed whales and seals).

[23] *See e.g.,* Treaty with the Chippewas, 1837, art. 5, 7 Stat. 536 (tribes retained ''[t]he privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded''); *Minnesota* v. *Mille Lacs Band of Chippewa Indians,* 526 U.S. 172 (1999).

[24] *See, e.g.,* Treaty with the Nez Perces, 1855, art. 3, 12 Stat. 957; Treaty with the Nisquallys, etc., 1854, art. 3, 10 Stat. 1132 (Treaty of Medicine Creek).

[25] *See* Maine Implementing Act, 30 M.R.S 6207(4), (9).

[26] *See, e.g., U.S.* v. *Washington,* 853 F.3d 946, 966 (9th Cir. 2017) (Holding that tribes' treaty-reserved right to fish in their usual and accustomed areas imposed a duty on the State of Washington to replace or modify road culverts to allow the free passage of salmon) *aff'd,* 138 S.Ct. 1832 (per curiam); *Winans,* 198 U.S. at 384 (Holding that a tribe's treaty fishing right also encompassed the right to cross private property to access the tribe's traditional fishing ground); *Grand Traverse Band of Ottawa and Chippewa Indians* v. *Director, Mich. Dept of Nat. Resources,* 141 F.3d 635 (6th Cir. 1989) (Finding that the treaty right to fish commercially in the Great Lakes included a right to temporary mooring of treaty fishing vessels at municipal marinas because without such mooring the Indians could not fish commercially).

[27] *See also Washington,* 853 F.3d at 965 (Explaining that the right of access to ''usual and accustomed fishing places would be worthless without harvestable fish.'')

[28] Consistent with this precedent, the Department of the Interior has affirmed the principle that ''to be rendered meaningful, [tribal reserved] fishing rights by necessity include some subsidiary rights to water quality.'' Letter from Hilary C. Tompkins, Solicitor, DOI, to Avi Garbow, General Counsel, EPA, regarding Maine's WQS and Tribal Fishing Rights of Maine Tribes (January 30, 2015).

[29] *See Dion,* 476 U.S. at 739 (Finding that ''Congressional intent to abrogate Indian treaty rights to hunt bald and golden eagles is certainly strongly suggested on the face of the Eagle Protection Act.'').

treaty-reserved rights, the CWA explicitly provides in section 511(a)(3) that the Act ''shall not be construed as . . . affecting or impairing the provisions of any treaty of the United States.'' Second, more broadly, the statute's structure and objectives for the establishment and oversight of WQS, including the discretion afforded to EPA, provide ample room for the agency to consider and give effect to all applicable reserved rights.

In CWA section 303(c), Congress established broad directives and objectives governing the establishment of WQS. Specifically, the CWA requires that WQS shall consist of designated uses and criteria to protect those uses, and must protect the public health and welfare, enhance the quality of water, and serve the purposes of the Act. *See* CWA section 303(c)(2)(A). In implementing section 303(c), EPA's longstanding position has been, consistent with the objectives of the CWA, to ''use standards as a basis of restoring and maintaining the integrity of the Nation's waters.'' [30] Where tribes have reserved rights to aquatic and/or aquatic-dependent resources, protection of such rights falls within the ambit of these broad statutory directives and objectives and is consistent with EPA's longstanding general approach to implementing CWA section 303(c), including through adoption and revision of its WQS regulation.

CWA section 501 authorizes the agency to prescribe regulations as necessary to implement the Act.[31] Pursuant to that authority, EPA has issued a regulation that provides a framework for implementing CWA section 303(c) and related sections, translating the broad statutory provisions in section 303(c) into specific requirements consistent with the statutory scheme. Accordingly, EPA's implementing regulation at 40 CFR part 131 specifies requirements for states and authorized tribes to develop WQS for EPA review that are consistent with the Act. EPA's existing WQS regulation does not, however, explicitly address how WQS must protect tribal reserved rights.

EPA established the core of the WQS regulation in a final rule issued in 1983. Since that time, the agency has modified 40 CFR part 131 three times.[32] The agency has explained that such updates have been in response to new challenges that ''necessitate a more effective, flexible and practicable approach for the implementation of WQS and protecting water quality,'' and that such updates are informed by the extensive experience with WQS implementation by states, authorized tribes, and EPA.[33] As described further below, EPA has previously addressed tribal reserved rights in exercising its oversight authority in reviewing state-adopted WQS. In this rulemaking, EPA is exercising its discretion in implementing CWA section 303(c) to propose new regulatory requirements to ensure that WQS give effect to rights to aquatic and aquatic-dependent resources reserved in Federal laws. With this update to 40 CFR part 131, the agency is proposing to establish a transparent and consistent process by which states and EPA can set WQS that protect applicable reserved rights.

EPA has previously addressed tribal reserved rights in state-specific WQS actions. In 2015, EPA disapproved certain human health criteria adopted by the State of Maine because they did not adequately protect a sustenance fishing designated use. The sustenance fishing designated use was based in part on tribal reserved rights.[34] In 2016, in promulgating human health criteria for the State of Washington, EPA noted that most waters covered by the State's WQS were subject to Federal treaties that retained and reserved tribal fishing rights. The agency concluded that these rights must be considered when establishing criteria to protect the State's fish harvesting designated use.[35]

These actions followed a December 2014 Memorandum from EPA Administrator Gina McCarthy which explicitly recognized EPA's obligations with respect to tribal treaty rights.[36] This Memorandum was issued to commemorate the 30th anniversary of EPA's 1984 Indian Policy, which addressed many issues related to EPA's relationship with federally recognized tribes and implementation of EPA's statutes in Indian country, but did not expressly address EPA's considerations of tribal treaty and other reserved rights.[37] In pertinent part, the 2014 Memorandum provides that ''EPA has an obligation to honor and respect tribal rights and resources protected by treaties,'' and that ''EPA must ensure that its actions do not conflict with tribal treaty rights.'' [38] In 2016, as part of the agency's efforts to implement the Memorandum, EPA issued an addendum to its tribal consultation policy entitled ''Guidance for Discussing Tribal Treaty Rights'' with the purpose of enhancing EPA consultations where EPA actions may affect tribal treaty rights.[39] The goal of this document was to help ensure that EPA's actions do not conflict with treaty rights, and that EPA is fully informed as it seeks to implement its programs to further protect treaty rights and resources when it has discretion to do so.[40] Even before this Guidance was issued in 2016, EPA routinely undertook extensive consultation with tribes. For example, in the agency's actions in Maine and Washington with regard to WQS, EPA undertook extensive consultation with the federally recognized tribes in Maine and Washington which included, consistent with the objectives of that guidance, gathering information regarding relevant reserved rights.[41]

[30] *Water Quality Standards Regulation,* 48 FR 51400 (November 8, 1983).

[31] *See also E. I. du Pont de Nemours & Co.* v. *Train,* 430 U.S. 112, 132 (1977) (''501(a) . . . gives EPA the power to make 'such regulations as are necessary to carry out' its functions'').

[32] *See Water Quality Standards Regulatory Revisions,* 80 FR 51020, 51021 (August 21, 2015) (Describing the history of EPA's regulation at 40 CFR part 131).

[33] *Id.*

[34] Letter from H. Curtis Spalding, Regional Administrator, EPA Region 1, to Patricia W. Aho, Commissioner, Maine Department of Environmental Protection, ''Re: Review and Decision on Water Quality Standards Revisions'' (February 2, 2015). After subsequent collaboration among the State, EPA, and the tribes, in 2019 the State of Maine adopted a new sustenance fishing designated use subcategory which addresses tribal sustenance fishing. In 2020, after approving this new designated use subcategory, EPA withdrew most aspects of its 2015 decisions. The expectations and steps EPA proposes here reaffirm the general analytical framework the agency applied in the 2015 decisions.

[35] 81 FR 85417, 85422 through 85423 (November 28, 2016).

[36] U.S. EPA, Memorandum, *Commemorating the 30th Anniversary of the EPA Indian Policy* (December 1, 2014), *available https://www.epa.gov/sites/production/files/2015-05/documents/indianpolicytreatyrightsmemo2014.pdf.*

[37] *Id. See also* U.S. EPA, EPA Policy for the Administration of Environmental Programs on Indian Reservations (November 8, 1984), *available https://www.epa.gov/sites/default/files/2015-04/documents/indian-policy-84.pdf.*

[38] *Id.*

[39] U.S. EPA, *EPA Policy on Consultation and Coordination with Indian Tribes: Guidance for Discussing Tribal Treaty Rights* (February 2016), *available https://www.epa.gov/sites/default/files/2016-02/documents/tribal_treaty_rights_guidance_for_discussing_tribal_treaty_rights.pdf.*

[40] U.S. EPA, *Overview: EPA Policy on Consultation and Coordination with Indian Tribes: Guidance for Discussing Tribal Treaty Rights* (February 2016), *available https://www.epa.gov/sites/default/files/2016-02/documents/tribal_treaty_rights_guidance_for_discussing_tribal_treaty_rights.pdf.*

[41] *See* U.S. EPA Region 1, Responses to Public Comments Relating to Maine's January 14, 2013, Submission to EPA for Approval of Certain of the State's New and Revised Water Quality Standards (WQS) That Would Apply in Waters Throughout Maine, Including Within Indian Territories or Lands (January 30, 2015), at 1540 (describing tribal consultation); 81 FR 85417 at 85435 (November 28, 2016).

Although the agency did not rescind the Memorandum and Guidance for Discussing Tribal Treaty Rights, following EPA's 2015 and 2016 WQS actions in Maine and Washington, the agency did make statements in subsequent WQS actions disavowing the approach to protecting tribal reserved rights in the Maine and Washington actions. In response to comments on a 2020 decision reversing aspects of EPA's 2015 Maine WQS disapproval, EPA asserted that it was ''unnecessary'' to ensure protection of applicable statutorily reserved rights because the Indian land claims settlement statutes at issue did not ''themselves . . . address or reference designated uses, water quality criteria, or the desired condition or use goal of the waters covered by the sustenance fishing provisions.'' [42] EPA has reconsidered this assertion. EPA finds that implementing the CWA to give effect to applicable reserved rights to aquatic and/or aquatic-dependent resources does not require that the relevant treaty, statute, executive order, or legal instrument explicitly reference water quality. The agency has similarly reconsidered other statements the agency made indicating that states and EPA can always protect tribal reserved rights by simply applying EPA's existing regulations and guidance, with no additional consideration of such rights.[43] As explained further below, this proposed rulemaking adds regulatory requirements to clarify how EPA and states must ensure protection of reserved rights where they apply.

IV. Proposed Revisions to the Federal WQS Regulation

A. Why is EPA proposing these revisions?

In this proposed rulemaking, the agency is proposing to establish new requirements which build on existing regulations and applicable guidance, to provide a nationally applicable regulatory framework to ensure that WQS protect applicable reserved rights. These revisions to EPA's existing WQS regulation are intended to provide clarity, predictability, and transparency in EPA's review of state WQS and promulgation of Federal WQS in waters where reserved rights to aquatic and/or aquatic-dependent resources apply. Specifically, by amending EPA's WQS regulation, rather than addressing these rights on a case-by-case basis as state WQS are submitted for EPA review under CWA section 303(c), EPA is proposing a uniform approach for establishment of WQS where tribal reserved rights apply and clearly laying out how EPA will review such WQS. These proposed changes are informed by EPA's experience working with states and right holders, and by input they have provided. Because EPA is establishing these requirements in a rulemaking rather than during review of an individual state action, the agency's approach will be informed by public comment and input provided through tribal consultation.

Notably, when EPA promulgated the WQS regulation at 40 CFR part 131 in 1983, the agency considered adding regulatory requirements to ensure that state WQS complied with applicable international treaties. Specifically, in the 1983 final rule establishing the WQS regulation, the agency noted that it had received comments asserting that EPA should ''require States to adopt standards that meet treaty requirements.'' [44] In response, the agency noted that such issues ''have been adequately resolved previously without the need for regulatory language,'' and, accordingly, that ''EPA sees no need to include such language in the Final Rule.'' [45] The agency further reasoned that ''[a]ny specific treaty requirements have the force of law,'' and therefore, ''State water quality standards will have to meet any treaty requirements.'' [46] Here, based on its prior experience evaluating individual state WQS in light of applicable reserved rights, EPA is proposing to add specific requirements to its WQS regulation to guide states establishing WQS in waters where tribes exercise reserved rights. These proposed requirements reflect the agency's considered judgment about how to ensure that WQS protect applicable reserved rights, and will provide clarity, transparency, and predictability.

This proposal is particularly important now, as climate change is exacerbating water quality issues across the United States. Tribes and reserved rights are particularly vulnerable to these impacts due to the integral nature of water resources in their traditional lifeways and culture.[47] Establishing WQS to protect tribal reserved rights is a critical component of reducing the impact of climate change on tribes.

B. What is EPA proposing?

In this rulemaking, EPA is proposing to (1) amend the Federal WQS regulation at 40 CFR part 131 to require that WQS be established to protect tribal reserved rights, and (2) establish attendant regulatory requirements for setting WQS to provide such protection. This section provides a description of these proposed revisions.

Central to these regulatory changes is the proposed addition of 40 CFR 131.9. First, this provision would specify that WQS ''must protect tribal reserved rights applicable to waters subject to such standards.'' For purposes of these regulatory revisions, EPA proposes adding a new definition to 40 CFR 131.3, defining ''tribal reserved rights'' as ''any rights to aquatic and/or aquatic-dependent resources reserved or held by tribes, either expressly or implicitly, through treaties, statutes, executive orders, or other sources of Federal law.'' The proposed definition of ''tribal reserved rights'' in the rule does not apply to unratified treaties or reserved rights that have been abrogated or otherwise superseded. In addition, some tribes entered into legal agreements or compacts with states, which are not Federal law and are therefore similarly not within the scope of this rulemaking.

Second, proposed 40 CFR 131.9(a) would require that, ''to the extent supported by available data and information,'' to protect applicable tribal reserved rights WQS must be established to protect:

1. ''The exercise of tribal reserved rights unsuppressed by water quality or availability of the aquatic or aquatic-dependent resource;'' and

2. ''The health of the right holders to at least the same risk level as provided to the general population of the State.''

For purposes of these regulatory revisions, EPA proposes adding a new definition to 40 CFR 131.3, defining ''right holders'' as ''tribes holding rights to aquatic and/or aquatic-dependent resources pursuant to an applicable treaty, statute, executive order, or other source of Federal law.''

EPA is not proposing to require WQS to be established for every waterbody subject to a reserved right to protect the

[42] U.S. EPA, *Response to Comments on EPA's Proposal to Revise EPA's 2015 Decisions on Sustenance Fishing Designated Use and Human Health Criteria in Maine* (May 27, 2020), p. 20. Attachment B of letter from Dennis Deziel, Administrator, EPA Region 1, to Gerald Reid, Commissioner, Maine Department of Environmental Protection, RE *Withdrawal of Certain of EPA's February 2, 2015 Decisions Concerning Water Quality Standards for Waters in Indian Lands.*

[43] *See* U.S. EPA, Letter and enclosed Technical Support Document from Chris Hladick, Regional Administrator, EPA Region 10, to Maia Bellon, Director, Department of Ecology, Re: EPA's Reversal of the November 15, 2016 Clean Water Act Section 303(c) Partial Disapproval of Washington's Human Health Water Quality Criteria and Decision to Approve Washington's Criteria (May 10, 2019), p. 22–23 (''May 10, 2019 Decision Document'').

[44] 48 FR 51400, 51412 (November 8, 1983).

[45] *Id.*

[46] *Id.* at 51413.

[47] *See https://www.epa.gov/sites/default/files/2016-04/documents/ow-climate-change-adaptation-plan.pdf.*

waterbody condition that existed at the time a reserved right was established. As described more fully below in section C.2.ii of this preamble, the regulation is intended to result in WQS that protect reasonably anticipated future uses, taking into account factors that may have substantially altered a waterbody.

Proposed 40 CFR 131.9(b) specifies that EPA will initiate tribal consultation with the right holders in determining whether State water quality standards protect applicable reserved rights in accordance with 40 CFR 131.9(a)(1) and (2). Finally, proposed 40 CFR 131.9(c) describes the three different ways that WQS can be used where tribal reserved rights apply to ensure protection of those rights.

EPA is also proposing to revise 40 CFR 131.5 (''EPA Authority''). 40 CFR 131.5(a) lists the factors that EPA considers in determining whether state-adopted WQS are consistent with CWA section 303(c). EPA is proposing to add § 131.5(a)(9) specifying that when reviewing new or revised standards, EPA would evaluate whether water quality standards sufficiently protect tribal reserved rights, where applicable, consistent with § 131.9. EPA is proposing conforming revisions to 40 CFR 131.5(b) which would require that this new factor, in addition to the other existing eight factors in 40 CFR 131.5(a), be met for EPA to approve the WQS.

EPA is also proposing to add an element to the list of ''Minimum Requirements for Water Quality Standards Submission'' set forth in 40 CFR 131.6. This proposed addition provides clarity on EPA's expectations regarding how states must document their efforts to ascertain information, in coordination with the right holders, about applicable tribal reserved rights and the level of water quality that fully supports those rights. Specifically, EPA is proposing that where tribal reserved rights apply to WQS being submitted, those submissions would need to include:

1. Information about the scope, nature, and current and past use of the tribal reserved rights, as informed by the right holders; and

2. Data and methods used to develop the WQS.

Finally, EPA is proposing to modify the procedures for state review and revision of WQS at 40 CFR 131.20 to require that the triennial review process include an evaluation of whether there are tribal reserved rights applicable to waters subject to the state's WQS and whether WQS need to be revised to protect those rights.

Pursuant to 40 CFR 131.22(c), EPA would be subject to the same requirements when promulgating Federal WQS. In accordance with CWA section 303(c)(4), there are two scenarios in which EPA would promulgate Federal WQS for the waters of a state. First, CWA section 303(c)(4)(A) establishes that if EPA determines that a state's new or revised WQS is not consistent with the requirements of the Act and the state fails to submit a modified standard within 90 days of that decision, EPA must itself propose and promulgate a revised or new standard for the waters involved (unless prior to promulgation the state has adopted a WQS that EPA determines to be consistent with the Act). Second, CWA section 303(c)(4)(B) grants the EPA Administrator discretion to determine ''that a revised or new standard is necessary to meet the requirements of [the Act].'' Following such a determination, EPA is required to propose and promulgate a revised or new standard except as noted above.

Examples of how these proposed regulatory revisions would be applied and EPA's basis for them are explained in more detail in the next section.

C. How would the proposed regulatory revisions be applied?

The effect of these proposed revisions on the establishment or revision of a state's WQS will be case-specific. EPA anticipates that these proposed revisions would be relevant in states where federally recognized tribes hold reserved rights to aquatic or aquatic-dependent resources in waters where the state, rather than the right holder, establishes applicable WQS.

Whether reserved rights apply to waters subject to a state's new or revised WQS would be informed by several factors, including input from the right holders, other sources of information regarding relevant tribal reserved rights (including information about the geographic scope of those rights), and the available data to inform the level of water quality needed to protect the reserved rights.

1. Determining if Tribal Reserved Rights Apply

Examples of tribal reserved rights as defined in this proposed rulemaking include but are not limited to the rights to fish; gather aquatic plants; and to hunt for aquatic-dependent animals. EPA requests comment on whether there are additional types of tribal reserved rights that it should consider. EPA acknowledges that it may be a complex inquiry to determine if tribal reserved rights apply in waters subject to state WQS, and if so, the nature of those rights and where they apply. For purposes of implementation of this proposed rulemaking, the critical information needed to determine if a reserved right applies to a state's waters includes, but may not be limited to: (1) the nature of the right (*i.e.,* a fishing right, a hunting right, a resource gathering right); (2) where the right applies (*i.e.,* to a specific set of waterbodies or to waters generally within a broad geographic area); and (3) how the right is exercised by the right holders (*e.g.,* for subsistence purposes).[48]

A first step in obtaining this information should be engagement with potential right holders. Accordingly, when WQS are being evaluated or revised, early engagement with federally recognized tribes within the relevant state as well as tribes outside the state that exercise resource rights within that state, can help EPA and states determine if there are reserved rights, the scope of those rights, and whether and how they should be applied in the WQS context. In order to ensure that tribes with reserved rights are engaged in the process of determining whether reserved rights apply, proposed 40 CFR 131.6(g)(1) would require that WQS submissions to EPA include information about tribal reserved rights ''as informed by the right holders,'' where applicable.

In addition to any outreach to or engagement with tribes as part of establishing new or revised WQS, proposed 40 CFR 131.20(a) provides a mechanism for starting the process of such engagement. It would require states to evaluate whether there are applicable tribal reserved rights relevant to waters subject to the state's WQS during the public triennial review process. To help satisfy this requirement, states should explicitly request information regarding the nature and scope of tribal reserved rights in each triennial review, thus providing an opportunity for the right holders to engage and provide information the state can use in its evaluation. Additionally, right holders are encouraged to proactively share information with states and EPA about any tribal reserved rights that may be relevant, including through the triennial review process.

These proposed provisions would provide a role for the right holders in

[48] EPA encourages, to the extent practicable, the consideration and incorporation of any Indigenous Knowledge that is freely provided by right holders. Given the sensitivity of some information about tribal reserved rights, right holders, states and EPA should discuss in advance how the information will be shared and potentially used in the WQS context.

informing both the initial inquiry of whether tribal reserved rights apply and, where reserved rights are applicable, how those reserved rights could be protected through implementation of the requirements of the proposed rulemaking. Specifically, determinations regarding protection of tribal reserved rights should be made through a process of mutual consideration and discussion between right holders, states, and the Federal government.

In addition to seeking input from potential right holders, EPA will also consider other sources of information regarding applicable tribal reserved rights including the language of the treaties, statutes, or Executive orders and relevant judicial precedent.[49]

2. Protecting Applicable Reserved Rights

Proposed 40 CFR 131.9(a) would require states to derive WQS to protect any tribal reserved rights that were determined to be applicable. This would require determining the level of water quality necessary to protect users of the resource and/or the aquatic or aquatic-dependent resource itself, based on available data. This level of water quality is to be determined by applying proposed 40 CFR 131.9(a)(1) and (2), described further below. Once applicable reserved rights to aquatic and/or aquatic-dependent resources have been identified, the proposed regulations provide a mechanism for establishing WQS at a level of water quality that protects those resources and users of those resources, consistent with the CWA.

i. Determining the Level of Water Quality Necessary To Protect the Right

Determining the level of water quality necessary to protect any aquatic or aquatic-dependent resource or users of that resource can be a complex endeavor that involves weighing multiple lines of evidence. However, this endeavor will largely mirror the process states already follow in developing their WQS. Examples of such evidence include fish consumption rate surveys, studies or accounts of heritage fish consumption rates,[50] peer-reviewed articles or reports on the types and levels of pollutants that can adversely affect the resource in question, and monitoring data reflecting historic and/or current water quality. EPA requests comment on the types of historic information that states and EPA should consider.

In some instances, readily available information would be sufficient to identify specific numeric levels of water quality (*e.g.,* numeric criteria) necessary to protect the right. In other instances, such data and information may not be currently available. 40 CFR 131.9(a) acknowledges this by providing that WQS must be consistent with 40 CFR 131.9(a)(1) and (2) ''to the extent supported by available data and information.'' Where data and information are not currently available to support establishing numeric levels of water quality, or where data are inconclusive, states may adopt narrative WQS to protect the right. EPA is available to assist states in gathering more information, in coordination with the right holders, for future use.

In complying with the new regulation, EPA encourages ongoing communication between states and right holders to help states ascertain where reserved rights apply and what data are available to inform the level of water quality necessary to protect those rights. EPA would be available to facilitate dialogue and information-sharing as needed.

Proposed 40 CFR 131.6(g) would require states to submit ''data and methods used'' to develop WQS that protect tribal reserved rights. As with information regarding the tribal reserved rights themselves, information regarding the types and levels of pollutants that may impact those rights should also be informed by engagement with the right holders. EPA recommends that states request information from the right holders such as types of pollutants perceived to be impacting their rights, key aquatic species, and/or consumption rates that would be useful in developing protective WQS, pursuant to proposed 40 CFR 131.20(a). EPA recommends that right holders proactively share any such information with states and EPA. Obtaining these data is another reason that states should work closely with right holders and EPA early in the process of evaluating and revising WQS. As with all WQS actions, states must transparently share information with the public during their process for reviewing and revising WQS (40 CFR 131.20(b)). The data and information gathered and submitted pursuant to proposed 40 CFR 131.6(g) will inform implementation of proposed 40 CFR 131.9.

ii. Accounting for Suppression Effects

Proposed 40 CFR 131.9(a)(1) would require that WQS, to the extent supported by available data and information, be established to protect ''the exercise of the tribal reserved rights unsuppressed by water quality or availability of the aquatic or aquatic-dependent resource.'' This proposed requirement is intended to address situations where existing water quality is lower than necessary to allow for right holders to fully exercise their tribal reserved rights. For example, fish consumption by tribes exercising their treaty-protected right to fish for subsistence may be suppressed due to availability of fish or concerns about the safety of fish for human consumption.[51] Treaty-protected harvesting of wild rice on waterbodies where harvesting historically occurred may likewise be suppressed due to diminished wild rice populations.

This rulemaking does not establish any nationally applicable thresholds for unsuppressed levels or use of a resource. As described in the National Environmental Justice Advisory Committee (NEJAC)'s 2002 report ''Fish Consumption and Environmental Justice,'' the unsuppressed level of a resource for particular right holders will depend on the factors affecting water quality and availability of the resources for that group.[52]

[49] Although, as stated above, legal agreements tribes have entered into solely with states and other non-Federal government entities are not Federal law and therefore not within the scope of this rulemaking, EPA recommends that states use a similar framework to consider tribal rights reserved under state law when developing and revising WQS.

[50] A heritage rate is the amount of fish consumed prior to non-indigenous or modern sources of contamination and interference with the natural lifecycle of fish, in addition to changes in human society. While it is often thought of as a historic rate, it can also be reflective of a current unsuppressed rate. *See:* USEPA. 2016. Guidance for Conducting Fish Consumption Surveys. EPA–823B16002.

[51] As noted by the National Environmental Justice Advisory Council in the 2002 publication *Fish Consumption and Environmental Justice,* ''a suppression effect may arise when fish upon which humans rely are no longer available in historical quantities (and kinds), such that humans are unable to catch and consume as much fish as they had or would. Such depleted fisheries may result from a variety of affronts, including an aquatic environment that is contaminated, altered (due, among other things, to the presence of dams), overdrawn, and/or overfished. Were the fish not depleted, these people would consume fish at more robust baseline levels. . . .In the Pacific Northwest, for example, compromised aquatic ecosystems mean that fish are no longer available for tribal members to take, as they are entitled to do in exercise of their treaty rights.''). National Environmental Justice Advisory Council, *Fish Consumption and Environmental Justice,* p.44, 46 (2002) (NEJAC Fish Consumption Report) available at *https://www.epa.gov/sites/default/files/2015-02/documents/fish-consump-report_1102.pdf.*

[52] *Id,* p.49. Using the term ''baseline'' to refer to the unsuppressed fish consumption rate, the report says the appropriate baseline for determining an unsuppressed level of fish consumption ''will likely differ according to the circumstances surrounding and the group affected by the observed suppression effect . . . . An appropriate baseline [unsuppressed level] might mean examination into what people had consumed as well as aspiration for

The unsuppressed level should balance heritage use of a resource with what is currently reasonably achievable for a particular waterbody. For example, in determining the unsuppressed level of a resource for the purpose of establishing WQS, it may be appropriate to take into consideration both heritage rates of use of that resource and factors that have substantially altered the pollutant burden, hydrology, or availability of the resource, such that use of the resource at heritage rates is not feasible. For example, EPA approved the Spokane Tribe's human health criteria based on a fish consumption rate of 865 g/day. This fish consumption rate maintains the caloric intake characteristic of a traditional subsistence lifestyle while accounting for the lesser quantity and diversity of fish currently available to the Tribe as a result of the construction of the Grand Coulee Dam.[53]

Another example is determining which waters to designate for wild rice protection in the Great Lakes region. To determine the scope of the corresponding designated use, it is appropriate to consider whether waters that do not currently support wild rice uses may do so again in the future. A state might consider historical growing patterns and planned efforts to restore the hydrologic regime and reduce nonpoint sources of pollution, while also accounting for hydrologic changes and legacy contaminants that may not be feasible to remedy at this time.

For the purpose of establishing WQS to fulfill the requirements of this rulemaking, the unsuppressed level or use of a resource should account for situations where restoration efforts are planned or underway (*e.g.,* efforts to improve habitat or reduce contamination), such that it would be reasonable to expect the opportunities for use of the resource to increase in the future. In these situations, where supported by available data and information, EPA is proposing to require that WQS must be set at levels that reflect unsuppressed exercise of the reserved right.

This emphasis on avoiding suppression effects builds on EPA's approach, previously set forth in guidance including EPA's 2000 *Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health*[54] (2000 Methodology), 2016 *Guidance for Conducting Fish Consumption Surveys,*[55] and 1985 *Guidelines for Deriving Numerical National Water Quality Criteria for the Protection of Aquatic Organisms and Their Uses.*[56] Each of these documents contains information and recommendations that should be considered when synthesizing water quality-related data. However, these documents do not all speak to setting WQS to protect tribal reserved rights for CWA purposes. Accordingly, in its discretion in prescribing WQS regulations that give effect to applicable reserved rights, EPA is proposing at 40 CFR 131.9(a)(1) to require that where tribal reserved rights apply, and where supported by available data and information, WQS must be established to protect ''the exercise of the tribal reserved rights unsuppressed by water quality or availability of the aquatic or aquatic-dependent resource.''[57]

This proposed requirement is consistent with the CWA goal to ''restore and maintain the chemical, physical, and biological integrity of the Nation's waters'' (CWA section 101(a)). Indeed, this requirement is necessary to ensure that WQS do not merely reinforce an existing suppressed use that may already limit right holders' ability to exercise their reserved rights, or worse, set in motion a ''downward spiral''[58] of further reduction/suppression. Therefore, where exercise of reserved rights is suppressed, states would need to seek available information about past and present use of the resource, and any information about reasonably anticipated future uses, to help ascertain the level of water quality necessary to fully protect the right.[59] EPA strongly encourages states to coordinate with right holders to gather information about unsuppressed uses and for right holders to proactively share such information with states and EPA. EPA is available to participate in discussions with right holders and states on this issue.

EPA requests comment on whether additional language should be included in the final rule specifying the considerations for determining unsuppressed WQS.

iii. Protecting Right Holders to the Same Risk Level as the General Population

Additionally, proposed 40 CFR 131.9(a)(2) would require that the health of right holders be protected to at least the same risk level as the general population of the state would have been protected, had the general population been the ''target population'' for water quality protections in the waters at issue. EPA anticipates the primary application of this provision to be in using a cancer risk level appropriate for a general population (*i.e.,* at least 10^{-5} along with a fish consumption rate that reflects the reserved right, as discussed above, for the purpose of calculating human health criteria. EPA requests comment on whether there may be other situations where this provision could apply.

Under EPA's 2000 Methodology, a key step in deriving human health criteria is identifying the population subgroup that the criteria should protect. The 2000 Methodology explains that states and authorized tribes could set criteria to protect individuals with ''average'' or ''typical'' exposure, or to protect more highly exposed individuals.[60] EPA's 304(a) criteria use a combination of median values, mean values, and percentile estimates targeted at the high end of the general population (*i.e.,* the target population or the criteria-basis population).[61] The 2000 Methodology also recommends use of conservative exposure parameters to ensure that water quality criteria are protective not

what people would consume were there 'fair access for all to a full range of resources,' or were the conditions fulfilled for full exercise of treaty- and trust-protected rights and purposes.''

[53] U.S. EPA Region 10. *Technical Support Document for Action on the Revised Surface Water Quality Standards of the Spokane Tribe of Indians Submitted April 2010.* December 11, 2013.

[54] USEPA. 2000. Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health. U.S. Environmental Protection Agency, Office of Water, Washington, DC EPA–822–B–00–004. *https://www.epa.gov/wqc/human-health-water-quality-criteria-and-methods-toxics.*

[55] USEPA. 2016. Guidance for Conducting Fish Consumption Surveys. EPA–823B16002.

[56] USEPA. 1985. Guidelines for Deriving Numerical National Water Quality Criteria for the Protection of Aquatic Organisms and Their Uses. U.S. Environmental Protection Agency, Office of Water, Washington, DC PB85–227049.

[57] In its 2019 approval of Idaho's water quality standards, EPA noted that ''[n]othing in the CWA or the EPA's regulations and guidance, including the 2000 Methodology, requires a state to set a FCR based on an estimate of unsuppressed consumption'' and asserted that the concept of requiring a state to use an unsuppressed fish consumption rate should be presented for ''thorough public notice and comment.'' EPA's Approval of Idaho's New and Revised Human Health Water Quality Criteria for Toxics and Other [WQS] Provisions (April 4, 2019), p. 12. In this proposed rule, for the reasons explained herein, EPA is proposing to amend its WQS regulations to require that states use an unsuppressed rate where tribal reserved rights apply and where supported by available data and information. Consistent with its 2019 letter, EPA is requesting public comment on this proposed requirement.

[58] NEJAC Fish Consumption report, at p. 49.

[59] EPA provides guidance on determining unsuppressed fish consumption rates. *See* USEPA. 2016. Guidance for Conducting Fish Consumption Surveys. EPA–823B16002.

[60] USEPA. 2000. Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health. U.S. Environmental Protection Agency, Office of Water, Washington, DC EPA–822–B–00–004. *https://www.epa.gov/wqc/human-health-water-quality-criteria-and-methods-toxics.* p. 2–1.

[61] *Id.*

only of the general population, but also of subpopulations who, because of high exposure, such as high fish intake rates, have an increased risk of receiving a dose that would elicit adverse effects.[62] With respect to carcinogens, the 2000 Methodology states that 10^{-5} and 10^{-6} risk levels may be acceptable for the general population and that highly exposed populations should not exceed a 10^{-4} risk level.[63] [64]

EPA's national guidance has not previously addressed, however, how tribal reserved rights to aquatic and/or aquatic dependent resources should be considered in identifying the target population for deriving water quality criteria. Nor has the agency addressed what constitutes acceptable risk for tribal members whose exercise of reserved rights may put them at greater risk than the general population (*e.g.,* due to higher rates of fish consumption). The agency considered whether it should treat tribal members exercising reserved rights in the same manner as other highly exposed individuals and subpopulations as generally laid out in the 2000 Methodology but has decided protection of tribal members exercising reserved rights warrants a distinct approach. EPA recognizes that treaties, statutes, executive orders, or other sources of law establishing reserved rights vary in many respects and may or may not themselves speak to right holders' exercising their rights relative to a state's general population. Nonetheless, unlike other individuals and subpopulations, tribal members exercising reserved rights are a distinct, identifiable class of individuals holding legal rights to resources, whose reserved rights are unique to them and have a defined geographic scope. In EPA's judgment, their unique status as right holders warrants treating them as the target population for purposes of deriving human health criteria.

The proposed rulemaking does not dictate what cancer risk level must be used in deriving human health water quality criteria for carcinogens where there are applicable reserved rights. Instead, proposed 40 CFR 131.9(a)(2) requires that WQS protect the health of the right holders ''to at least the same risk level as provided to the general population of the state.'' EPA's 2000 Methodology recommends that states and authorized tribes set human health criteria based on a cancer risk level of 10^{-5} or 10^{-6} for the target population which, under the proposed rulemaking, would be tribal members exercising applicable reserved rights. This approach recognizes the special nature of such reserved rights and status of right holders. It also helps ensure protection of tribal members whose exposure (and consequent risk of adverse effects) may vary. For example, if a state or authorized tribe protects the general population at a risk level of 10^{-5}, under the proposed rulemaking they would need to adopt the same risk level for tribes exercising reserved rights. The state or authorized tribe would also select an appropriate fish consumption rate for deriving criteria pursuant to 40 CFR 131.9(a)(1), as discussed above.

In its 2019 decision document reversing its prior disapproval of Washington's human health criteria, EPA made the following assertion: ''[T]he EPA's longstanding view, consistent with the 2000 Methodology, is that a state may consider tribes with reserved fishing rights to be highly exposed populations, rather than the target general population, in order to derive criteria, and that such consideration gives due effect to reserved fishing rights.'' [65] EPA has reconsidered this assertion and is proposing to require that WQS protect the health of right holders to at least the same risk level as a state's general population, rather than treating right holders as a highly exposed population. EPA has determined that it is appropriate, in exercising its discretion in implementing CWA section 303(c), to give effect to reserved rights within the WQS-setting paradigm by requiring that the right holders receive protection to at least the same risk level as recommended for a state's general population and is accordingly proposing the requirement set forth in proposed 40 CFR 131.9(a)(2).

iv. Implementation of These Proposed Requirements

EPA anticipates that the circumstances where WQS may need to be adjusted to protect tribal reserved rights would fall primarily into two categories:

1. Human health criteria to protect fish consumers, where tribes with reserved fishing rights consume more fish and are therefore exposed to greater levels of contaminants in fish. This is because there is a differential health risk between right holders and the general population of the state because right holders are more highly exposed to the resource.

2. Where a reserved right is not already accounted for as a designated or presently attained use for a waterbody, but that waterbody could be reasonably expected to support that right in the future (*e.g.,* if restoration efforts are underway). EPA anticipates that this could arise with uses to protect aquatic life, aquatic-dependent wildlife, and users of those resources, where those uses are not already designated or presently attained.

For many aquatic and aquatic-dependent resources that tribes have rights to fish, hunt or gather, the existing Federal WQS regulations already require states to provide a level of protection consistent with this proposed rulemaking. In accordance with the interim goal specified by CWA section 101(a)(2) of ''water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water,'' the existing Federal WQS regulation requires that state WQS protect fish, shellfish and wildlife, and recreation in and on the water, wherever attainable.[66] As a result, states typically designate most of their waters for those uses. In addition, the existing WQS regulation at 40 CFR 131.11 requires that states adopt water quality criteria that protect their designated uses. As a result, where a tribe has the right to hunt an aquatic-dependent species, for example, the species may already be protected in accordance with this proposed rulemaking by a state's ''wildlife'' designated use and associated criteria, such that this rulemaking would not require any additional protection of that species beyond what is already required under the CWA and EPA's existing WQS regulation.

Additionally, if use of an aquatic or aquatic-dependent resource pursuant to a tribal reserved right is a use that is presently being attained, EPA's existing regulation at 40 CFR 131.10(i) requires states to revise their WQS to reflect the presently attained use. For example, if a tribe has a right to gather an aquatic plant in a state waterbody and that use is presently attained, state WQS should already reflect that as a designated use, per 40 CFR 131.10(i), and thus this resource should be protected in accordance with proposed 40 CFR 131.9(a), discussed further below.

With respect to aquatic life criteria, EPA provides guidance for deriving criteria that generally protect aquatic

[62] *Id.* p.1–11.

[63] *Id.* p.2–6.

[64] Future iterations of this methodology may make different recommendations regarding cancer risk level; the requirement in this proposed rulemaking is not tied to a specific cancer risk level value, but rather requires that states establish WQS that provide the same level of protection between their general populations and right holders.

[65] May 10, 2019 Decision Document. p. 23.

[66] *See* 40 CFR 131.6

organisms,[67] including commercially or recreationally important species. EPA does not anticipate that more stringent criteria to protect aquatic or aquatic-dependent resources themselves would be necessary in most cases to comply with this proposed rulemaking than already required by the existing Federal WQS regulations.

This proposed rulemaking would complement the existing regulatory requirements set forth in EPA's WQS regulation. In certain circumstances, these existing requirements may already be operating to ensure water quality levels are protective of particular tribal reserved rights. By requiring states to seek information regarding applicable reserved rights as they review and revise their WQS, the proposed requirements would equip states with information to determine whether current WQS adequately protect applicable reserved rights.

EPA's identification of two categories of circumstances where compliance with the proposed rulemaking is most likely to necessitate new or revised WQS is consistent with input from tribes during pre-proposal consultation, which focused primarily on protection of fish consumers and protection of wild rice.[68] EPA requests comment on whether there are other instances where WQS may need to be adjusted to protect tribal reserved rights consistent with this proposed rulemaking. This request for comment includes, but is not limited to, whether there are tribal reserved rights to aquatic or aquatic-dependent resources that may require more stringent criteria than otherwise required to protect applicable designated uses in order to comply with this proposed rulemaking and whether there are differential health risks for right holders associated with activities other than fish consumption such that new or revised criteria may be necessary to comply with this proposed rulemaking.

Where information is conflicting, there are gaps in information, and/or a difference of opinion exists between the state and one or more tribes about the level of water quality necessary to protect a reserved right, EPA will take action based on the best available information in the same way that EPA currently makes WQS decisions in these circumstances in other contexts, *e.g.,* determining whether criteria are scientifically defensible in situations where there is conflicting science, there are gaps in the science, and/or there are different conclusions among stakeholders. EPA requests comment on whether there are other factors it should consider when making decisions under these circumstances.

3. Options for Establishing WQS To Protect Tribal Reserved Rights

After determining whether tribal reserved rights apply and the level of water quality necessary to protect those rights, states would be required to revise their WQS if needed to ensure protection of those rights using designated uses, criteria, and/or antidegradation as described at proposed 40 CFR 131.9(c).

The first option is to adopt designated uses that explicitly recognize and identify tribal reserved rights to aquatic and/or aquatic-dependent resources and water quality criteria to protect those uses. For example, a state could adopt a separate designated use of ''customary and traditional fishing'' and apply it to waterbodies where tribes hold reserved rights to fish for subsistence. A state would also determine and adopt protective criteria set at the level of water quality that was determined to protect the customary and traditional fishing designated use. An advantage to establishing designated uses that explicitly recognize specific tribal reserved rights is that it is a transparent way to identify where those rights apply and how they are protected. Designated uses express the desired condition of the water and do not need to be currently attained to be designated.[69] Therefore, it would be appropriate and reasonable to recognize and identify tribal reserved rights as explicit designated uses to define the desired condition for the waters where the rights apply and to then determine and adopt protective criteria to define the minimum conditions necessary to achieve those objectives. As noted above, if use of an aquatic or aquatic-dependent resource pursuant to a tribal reserved right is a use that is presently being attained, EPA's existing regulation at 40 CFR 131.10(i) requires states to revise their WQS to reflect the presently attained use.

As a second option, the state could adopt criteria protective of tribal reserved rights and associate those criteria with a current designated use that already encompasses the tribal reserved rights. For example, a state may have a designated use of ''fishing'' that is intended to capture a broad range of fishing activities. In this case, it may be reasonable for a state to focus on identifying and synthesizing data on fish consumption rates to determine criteria that will protect the ''fishing'' use to an extent consistent with the reserved right, including ensuring that tribes with reserved fishing rights are protected to a level appropriate to protect to the general population as outlined in EPA's 2000 Methodology or EPA's latest guidance for establishing human health criteria.

As a third option, the state could use its antidegradation policy to protect tribal reserved rights. EPA is seeking public comment on whether the following two antidegradation policy options related to Tier 2 and Tier 3 could be used to protect tribal reserved rights in lieu of the options identified in proposed 40 CFR 131.9(c)(1) and (2) and explained earlier in this section. An additional advantage of the antidegradation policy options described in the following paragraph is that in situations where a waterbody's existing water quality exceeds the levels that protect tribal reserved rights, these options would provide a mechanism to maintain high water quality and provide a margin of safety that would afford the water body increased resilience to potential future stressors, including climate change. Protecting such high-quality waters would potentially be more cost-effective and resource-efficient than investing in long-term restoration or remedial actions in the future.

Option 1: States could assign a water body as an Outstanding National Resource Water (ONRW)[70] which would bring it under 40 CFR 131.12(a)(3), which requires the water quality of such ONRWs to be maintained and protected.

Option 2: States could amend their antidegradation policy and/or other legally binding procedures to include a provision that ensures that any lowering of water quality in a high-quality water that is authorized by the state, in accordance with 40 CFR 131.12(a)(2), results in water quality that continues to protect applicable reserved rights.

EPA is requesting comment on these two options for implementing antidegradation requirements to protect tribal reserved rights. EPA is also

[67] USEPA. 1985. *Guidelines for Deriving Numerical National Water Quality Criteria for the Protection of Aquatic Organisms and Their Uses.* U.S. Environmental Protection Agency, Office of Water, Washington, DC PB85–227049.

[68] *See* USEPA 2021. *Summary Report of Tribal Consultation for the Proposed Rule: Water Quality Standards Regulatory Revisions to Protect Tribal Reserved Rights,* available in the docket for this proposed rulemaking.

[69] 40 CFR 131.3(f)

[70] Waters provided the highest level of protection under a state's antidegradation policy. *EPA Water Quality Standards Handbook, Chapter 4: Antidegradation.* p.12. EPA–823–B–12–002. *https://www.epa.gov/sites/default/files/2014-10/documents/handbook-chapter4.pdf.*

requesting comment on alternative ways that states could use their antidegradation policies and implementation methods to protect tribal reserved rights, as defined in proposed 40 CFR 131.9(a).

States could also choose to combine these methods, such as by assigning ONRW status to a waterbody to prevent any additional lowering of water quality, while also establishing a tribal resource designated use goal and criteria that must be met to achieve that goal.

If use of an aquatic or aquatic-dependent resource pursuant to a tribal reserved right is an existing use pursuant to 40 CFR 131.3(e),[71] EPA's current WQS regulation at 40 CFR 131.12(a)(1) requires that the use and the water quality necessary to protect that use be maintained and protected. Thus, implementation of 40 CFR 131.12(a)(1) would protect this resource in accordance with proposed 40 CFR 131.9(a).

EPA recognizes that there may be areas where multiple right holders hold reserved rights to the same aquatic and/or aquatic-dependent resources. In these cases, right holders may have different positions on how to ensure the WQS protect the resources, consistent with proposed 40 CFR 131.9. Additionally, tribal reserved rights to a particular resource may span across multiple states. These situations would likely require significant coordination among all parties to develop WQS to protect all applicable rights. EPA is available to facilitate dialogue between and among states and tribes, where appropriate.

4. Use Attainability Analyses and Tribal Reserved Rights

EPA recognizes that there may be situations where a waterbody may not be able to support a reserved right to an aquatic and/or aquatic-dependent resource because attaining that use in that waterbody is not currently feasible. The CWA and EPA's regulations provide that such uses could be revised if shown to be unattainable based on one of six reasons. However, there may also be situations where it may be critical to maintain the designated uses and continue to strive for attainment of such uses to protect a tribal reserved right consistent with the obligations of treaties and other Federal laws. EPA requests comment on whether and how states can revise designated uses, as provided for by 40 CFR 131.10, while also ensuring the protection of tribal reserved rights per proposed 40 CFR 131.9. EPA is not considering modifying the existing requirements in 40 CFR 131.10 or otherwise reopening those requirements for comment but, rather, is requesting comment only on whether any discrete additions to the current regulatory framework may be necessary to protect tribal reserved rights. For example, should EPA include in 40 CFR 131.9 specifics on whether or how a state can revise designated uses and still protect tribal reserved rights?

D. EPA's Role

1. Engagement With States

EPA makes itself available to engage early and often to provide support when states are adopting and revising WQS. EPA support includes providing triennial review ''kick off'' letters that outline EPA's recommendations for WQS revisions, participating in state public processes, and providing comments to states on their proposed WQS. EPA intends to support states by providing input and information on any tribal reserved rights and the level of water quality to protect those rights. As previously mentioned, EPA is also available to facilitate dialogue between states and tribes.

2. Consultation With Tribes

As mentioned in section III.A. of this preamble, any new or revised WQS must be submitted to EPA for review and approval or disapproval to determine whether it meets CWA and corresponding EPA regulatory requirements (CWA section 303(c)(2)(A) and (c)(3); 40 CFR 131.5; 131.21). EPA's policy [72] is to consult on a government-to-government basis with tribes when EPA actions and decisions such as WQS actions may affect tribal interests. Accordingly, in addition to early engagement with right holders in the development of new or revised WQS, EPA will also consult with right holders as it reviews relevant state WQS submissions. EPA intends to codify in proposed 40 CFR 131.9(b) that EPA would initiate consultation with the right holders on state WQS submissions in determining whether applicable reserved rights are protected. This consultation will inform EPA's determination pursuant to 40 CFR 131.5(a)(9) as to whether WQS protect tribal reserved rights, where applicable.

EPA defines consultation in its 2011 *Policy on Consultation and Coordination with Tribes* [73] as ''a process of meaningful communication and coordination between EPA and tribal officials prior to EPA taking actions or implementing decisions that may affect tribes.'' As a process, consultation includes several methods of interaction that may occur at different levels. The appropriate level of interaction is determined by past and current practices, policy adjustments, the continuing dialogue between EPA and tribal governments, and program and regional office consultation procedures and plans.

Under proposed 40 CFR 131.9(b), EPA would seek information and input regarding applicable tribal reserved rights in accordance with the 2011 EPA *Policy on Consultation and Coordination with Tribes,* the 2016 *EPA Policy on Consultation and Coordination with Indian Tribes: Guidance for Discussing Tribal Treaty Rights,*[74] applicable EPA regional consultation procedures,[75] and any other applicable EPA tribal consultation policies in effect when the proposed rulemaking would be applied. Although proposed 40 CFR 131.9(b) would specifically apply to EPA's review of state WQS submissions, EPA intends per its 2011 *Policy on Consultation and Coordination with Tribes,* the 2016 *EPA Policy on Consultation and Coordination with Indian Tribes: Guidance for Discussing Tribal Treaty Rights,*[76] and applicable EPA regional consultation procedures, to initiate consultation with tribes in the geographic area where any WQS decision under EPA's consideration may affect tribal interests, including reserved rights. EPA would consider all relevant

[71] 40 CFR 131.3(e) Existing uses are those uses actually attained in the water body on or after November 28, 1975, whether or not they are included in the water quality standards.

[72] USEPA 2011. EPA Policy on Consultation and Coordination with Indian Tribes. (see *https://www.epa.gov/sites/default/files/2013-08/documents/cons-and-coord-with-indian-tribes-policy.pdf*)

USEPA 2016. EPA Policy on Consultation and Coordination with Indian Tribes: Guidance for Discussing Tribal Treaty Rights. *https://www.epa.gov/tribal/tribal-treaty-rights;*

Executive Order 13175, Consultation and Coordination with Indian Tribal Governments (see *https://www.federalregister.gov/documents/2000/11/09/00-29003/consultation-and-coordination-with-indian-tribal-governments*);

January 26, 2021 Presidential Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships (see *https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/26/memorandum-on-tribal-consultation-and-strengthening-nation-to-nation-relationships/*).

[73] USEPA 2011. EPA Policy on Consultation and Coordination with Indian Tribes. (see *https://www.epa.gov/sites/default/files/2013-08/documents/cons-and-coord-with-indian-tribes-policy.pdf*)

[74] Available online at *https://www.epa.gov/tribal/epa-policy-consultation-and-coordination-indian-tribes-guidance-discussing-tribal-treaty.*

[75] Available online at *https://www.epa.gov/tribal/forms/consultation-and-coordination-tribes.*

[76] Available online at *https://www.epa.gov/tribal/epa-policy-consultation-and-coordination-indian-tribes-guidance-discussing-tribal-treaty.*

information obtained through consultation to help ensure that the agency is fully informed before taking a WQS action.

EPA would attempt to honor consultation requests from tribal governments considering the nature of the activity, past consultation efforts, available resources, timing considerations, and all other relevant factors. EPA would generally agree to consult when such a request for consultation is made by a tribal government, assuming the proposed action may affect that tribe.

E. How would the proposed regulatory revisions apply to States in the Great Lakes system?

During pre-proposal tribal consultation and coordination, some tribes questioned whether 40 CFR part 132, *Water Quality Guidance for the Great Lakes System,* which identifies minimum WQS for the Great Lakes System to protect human health, aquatic life, and wildlife, may limit the ability of states subject to this regulation, once finalized, to revise their WQS to protect tribal reserved rights. 40 CFR part 132 allows for greater levels of protection than specified in the regulation. For example, 40 CFR 132.4(i) provides that, ''[n]othing in this part shall prohibit the Great Lakes States and Tribes from adopting numeric water quality criteria, narrative criteria, or water quality values that are more stringent than'' the criteria and values derived using the methodologies specified in 40 CFR part 132. Therefore, 40 CFR part 132 does not limit the ability of states subject to its requirements to revise their WQS to be more stringent if necessary to protect tribal reserved rights. In addition, for waters in the Great Lakes basin, states must meet the requirements of both 40 CFR parts 131 and 132. Where regulations in 40 CFR parts 131 and 132 overlap, the more stringent regulation applies.

For these reasons, revisions to 40 CFR part 132 are not necessary to protect tribal reserved rights.

F. Role of Other WQS Provisions in Protecting Tribal Reserved Rights

EPA requests comment on whether EPA should specify in 40 CFR 131.9 how other WQS provisions, such as general policies under 40 CFR 131.13, WQS variances under 40 CFR 131.14, and permit compliance schedules under 40 CFR 131.15, should be used to ensure protection of tribal reserved rights. EPA is not proposing to modify the existing language in these sections and is not reopening them for comment. Rather, EPA is considering whether potential discrete additions to the current regulatory scheme set forth in this rule may be necessary. For example, just as the agency has outlined options for designated use revisions, criteria revisions and use of state antidegradation policies, should EPA include in 40 CFR 131.9 specifics on whether or how a state can adopt a WQS variance and still protect tribal reserved rights?

V. Economic Analysis

Pursuant to Executive Orders 12866 (Regulatory Planning and Review) and 13563 (Improving Regulation and Regulatory Review), EPA has prepared an economic analysis to inform the public of potential costs and benefits of this proposed rulemaking. This analysis is not required by the CWA. EPA's economic analysis is documented in *Economic Analysis for Water Quality Standards Regulatory Revisions to Protect Tribal Reserved Rights (Proposed Rule)* and can be found in the docket for this proposal.

EPA evaluated the potential incremental administrative burdens and costs that may be associated with this proposal, beyond the burden and costs associated with implementation of the current WQS regulation. This proposal would not establish any requirements directly applicable to regulated entities, such as industrial dischargers or municipal wastewater treatment facilities, but could ultimately lead to additional compliance costs to meet permit limits put in place to comply with new WQS adopted by states because of this proposed rulemaking. In general, facilities meet water quality-based limits through pollution prevention programs, product substitution, altered engineering processes, or end-of-pipe treatment. Other aspects of WQS, such as variances which facilitate feasible progress toward a less stringent interim goal, may mitigate compliance costs. However, because of the uncertainty of the specific outcome of application of this proposed rulemaking, both in terms of location and pollutants involved, EPA is unable to provide estimates of costs to those regulated entities. Instead, the focus of EPA's economic analysis is to estimate the potential administrative burden and costs to state governments. EPA does not anticipate this rule would impose any compliance costs on territorial governments because EPA is not aware of any federally recognized tribes with reserved rights in or downstream of any U.S. territory. EPA also does not anticipate costs to authorized tribes [77] because:

- EPA anticipates that few, if any tribes have reserved rights to resources on another tribe's reservation or otherwise under the jurisdiction of another tribe. EPA requests comment on whether any such situations may exist.
- EPA anticipates that if there are tribes with reserved rights to resources under the jurisdiction of a different tribe that is an authorized tribe, their interests may align such that any adopted WQS would reflect protecting such rights in absence of this proposed rulemaking. Should this not be the case, then authorized tribes could be subject to similar administrative costs as presented below for states.

EPA also does not anticipate that this proposed rulemaking would directly impose costs to right holders because it does not impose any requirements on right holders. EPA acknowledges that the proposed requirement to evaluate whether WQS protect relevant tribal reserved rights, as informed by the right holders, may lead to increased information-sharing among states, right-holders, and EPA. However, the proposed rulemaking would not require any additional coordination beyond that which already occurs in connection with WQS public participation processes and EPA's consultations with tribal governments. EPA has, on occasion, provided funding to tribes to develop tribal fish consumption rates that are used to inform the level of water quality necessary to support tribal reserved rights. EPA could support similar projects in the future, as appropriate and as funding allows. While EPA anticipates that states and EPA would bear the majority of the burden for determining the extent of reserved rights and water quality necessary to protect those rights, EPA acknowledges that some tribes may choose to incur costs, such as legal fees or scientific studies to support their position on the scope and nature of their rights and/or water quality necessary to protect them.

EPA assessed the potential incremental burden and costs associated with these proposed regulatory revisions on states by first identifying those elements of the proposed revisions that may impose incremental burdens and costs. Then, EPA estimated the incremental number of labor hours potentially required by states to comply with those elements of the proposed

[77] An ''authorized tribe'' for the purpose of this rulemaking means a tribe authorized for treatment in a manner similar to a state (TAS) under Clean Water Act (CWA) Section 518(e).

regulatory revisions, and then estimated the costs associated with those additional labor hours.

EPA assumed for the purpose of this analysis that all 50 states would each undertake three WQS rulemakings to protect tribal reserved rights. The agency assumed one rulemaking for each of the following purposes:

- To evaluate or revise WQS for protection of human health;
- To evaluate or revise WQS for protection of aquatic life; and
- To account for any other WQS changes needed to protect tribal reserved rights, including addressing the emergence of any information in the future that informs either the applicability of the reserved rights or the necessary level of water quality.

EPA assumed incremental burden and costs for all 50 states, although it is likely that tribal reserved rights to aquatic and/or aquatic-dependent resources do not exist in all 50 states. EPA considered the costs associated with labor from economists, engineers, scientists, and lawyers for development of state regulations. EPA did not include any labor or other costs associated with potential litigation of state regulations as this would not be a direct consequence of this proposed rulemaking and would be highly speculative. Estimates of the incremental administrative burden and costs to state governments associated with this proposal are summarized in the following Table 2:

TABLE 2—SUMMARY OF POTENTIAL ADMINISTRATIVE BURDENS AND COSTS TO STATES ASSOCIATED WITH THE PROPOSED RULE

Rulemaking effort [1]	Burden per State (hours)	Cost per State (2020$) [2]	Number of potentially affected States [3]	Total burden (hours) [4]	Total cost (2020$; one-time) [5]
Rulemaking #1	100–500	$7,465–$37,325	50	5,000–25,000	$373,250–$1,866,250
Rulemaking #2	90–450	6,718–33,592	50	4,500–22,500	335,925–1,679,625
Rulemaking #3	75–375	5,599–27,994	50	3,750–18,750	279,938–1,399,688
Total [7]	265–1,325	19,782–98,911	50	13,250–66,250	989,112–4,945,562

[1] Reflects potential new or increased rulemaking activities to adopt provisions consistent with the proposed rulemaking into WQS.
[2] Hours per state multiplied by average hourly labor rate of $74.65 and rounded to the nearest dollar.
[3] Includes 50 states, but no territories or tribes.
[4] Burden per state multiplied by total number of potentially affected states.
[5] Total burden for all potentially affected states multiplied by average hourly labor rate of $74.65 and rounded to the nearest dollar.

Total one-time costs for this proposal are estimated to range from $989,112 to $4,945,562. EPA chose not to annualize these costs given uncertainty about the period over which that annualization would occur.

In addition to estimating potential burden and costs, EPA also evaluated the potential benefits associated with this proposal. While this rulemaking would not directly lead to improvements in water quality, if finalized, this rulemaking would establish a framework that would encourage future improvements in water quality in geographic areas where tribes hold reserved rights. EPA anticipates that the proposed rulemaking will enhance the ability of states and tribes to protect their water resources by clarifying and prescribing how to protect waters with applicable tribal reserved rights and improving coordination between Federal, state, and tribal governments. Tribal members and the general public may indirectly benefit from this rulemaking through targeted improvements to water quality that are implemented to meet more stringent state WQS adopted in accordance with this rulemaking.

EPA acknowledges that achievement of any benefits associated with cleaner water would involve additional control measures, and thus costs to regulated entities and nonpoint sources, that have not been included in the economic analysis for this proposed rulemaking. EPA has not attempted to quantify either the costs of control measures that might ultimately be required as a result of this rulemaking, or the benefits they would provide. However, better protection of tribal reserved rights has the potential to provide a variety of economic benefits associated with cleaner water.

The primary benefits of the proposed rulemaking for reserved right holders would likely be improved ability to maintain traditions and cultural landscapes and reduced risk to human health. Reducing pollutant levels so that traditional foods such as fish and wild rice are abundant and safe to eat in subsistence quantities allows for unsuppressed levels of tribal subsistence consumption of these resources, which in turn contributes to restoring and maintaining traditional lifeways, preserving indigenous knowledge, and cultural self-determination. The recognition of tribal reserved rights can also lead to direct economic benefits to tribal members. For example, a 1974 court decision allocating 50% of the Columbia River salmon and steelhead catch to the tribes with reserved rights to this resource resulted in a near doubling of revenue for these tribes.[78] This rulemaking seeks to ensure that water quality does not limit right holders' ability to utilize their rights, and therefore achieve the corresponding economic and social benefits.

Other potential benefits include the availability of clean, safe, and affordable drinking water, greater recreational opportunities, water of adequate quality for agricultural and industrial use, and water quality that supports the commercial fishing industry and higher property values. These benefits could accrue to both tribal and nontribal populations.

As mentioned above, this proposal does not establish any requirements directly applicable to regulated point sources or nonpoint sources of pollution, although EPA recognizes that these sources could potentially incur future costs as a result of changes to WQS adopted by states as a result of this rulemaking (states could also adopt new or revised WQS independent of this proposed rulemaking). However, this proposal does not lend itself to identification of readily predictable outcomes regarding changes to state WQS that might result. Likewise, EPA could not predict requirements that could ultimately be imposed on NPDES permittees and nonpoint sources. Thus, EPA has not analyzed potential costs or

[78] Parker, D.P., Rucker, R.R., & Nickerson, P.H. (2016). The Legacy of United States v. Washington: Economic Effects of the Boldt and Rafeedie Decisions. In Unlocking the Wealth of Indian Nations, ed. T.L. Anderson, Rowman and Littlefield Press.

cost savings associated with any consequences of potential revised state WQS.

EPA seeks comment on all aspects of the accompanying economic analysis.

VI. Statutory and Executive Order Reviews

Additional information about these statutes and Executive Orders can be found at *http://www.epa.gov/laws-regulations/laws-and-executive-orders.*

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action is a significant regulatory action that was submitted to the Office of Management and Budget (OMB) for review. Any changes made in response to OMB recommendations have been documented in the docket.

EPA prepared an analysis of the potential costs and benefits associated with this action. This analysis is summarized in section V of the preamble and is available in the docket.

B. Paperwork Reduction Act (PRA)

The information collection requirements in this proposed rule have been submitted for approval to the OMB under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* The Information Collection Request (ICR) document prepared by EPA has been assigned EPA ICR number 2700.01. You can find a copy of the ICR in the docket for this rule, and it is briefly summarized here. The information collection requirements in this proposed rule will be in addition to requirements described in the existing ICR for the Water Quality Standards Regulation and approved by OMB through February 2025.[79] At this time EPA is not proposing to revise the existing ICR to consolidate the requirements of this proposed rule. EPA intends to do so when it requests renewal of the existing ICR in 2025.

EPA would use the information required by this proposed rule to carry out its responsibilities under the CWA to review and approve or disapprove new and revised WQS submitted by states. In reviewing state WQS submissions, EPA considers whether those submissions are consistent with the WQS regulation at 40 CFR part 131. The current regulation requires states to include supporting information to accompany WQS submissions to help EPA determine whether the submitted new and revised WQS are consistent with 40 CFR part 131. This proposed rule would add a new requirement to 40 CFR part 131 to require, where applicable, that state WQS submissions provide additional supporting information about whether the submitted WQS protect tribal reserved rights, including information about the scope, nature, and current and past use of the tribal reserved rights, and data and methods used to develop the WQS. This mandatory information collection would provide EPA with information necessary to review and approve or disapprove standards in accordance with the CWA, 40 CFR part 131, and other Federal laws.

If the information collection activities in this proposed rulemaking are not carried out, states and EPA may not be able to ensure that WQS comply with treaties and other Federal laws. In some cases, this could result in implementation and control steps such as TMDLs and NPDES permits that also do not comply with treaties and other Federal laws.

Respondents/affected entities: states, territories, and tribes authorized for treatment in a manner similar to a state for purposes of establishing WQS under the CWA. While tribal right holders would not be direct respondents, EPA acknowledges that the proposed regulation would require that state submissions be informed by the right holders. EPA believes this would not lead to increased burden on right holders because the proposed rule would not require additional coordination beyond that which already occurs during WQS public participation processes and EPA's consultations with tribal governments. EPA requests comment on this conclusion.

Respondent's obligation to respond: mandatory.

Estimated number of respondents: 50.

Frequency of response: on occasion/as necessary.

Total estimated burden: 13,250–66,250 hours. Burden is defined at 5 CFR 1320.3(b).

Total estimated labor cost: $989,112–$4,945,562 one-time costs (not annualized).

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

Submit your comments on the Agency's need for this information, the accuracy of the provided burden estimates and any suggested methods for minimizing respondent burden to the EPA using the docket identified at the beginning of this rule. You may also send your ICR-related comments to OMB's Office of Information and Regulatory Affairs using the interface at *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under Review— Open for Public Comments'' or by using the search function. OMB must receive comments no later than February 3, 2023. EPA will respond to any ICR-related comments in the final rule.

C. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act. This action will not impose any requirements on small entities. Small entities are not directly regulated by this rule and this action will not impose any requirements on small entities; rather, this action will impose requirements only on states to take into consideration how their WQS must protect aquatic and aquatic-dependent resources reserved to tribes through treaties, statutes, Executive orders, or other sources of Federal law.

D. Unfunded Mandates Reform Act (UMRA)

This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. The action imposes no enforceable duty on any state, local or tribal governments or the private sector.

E. Executive Order 13132: Federalism

EPA has concluded that this action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. This rule would clarify and prescribe how WQS for a state's waters must protect aquatic and aquatic-dependent resources reserved to tribes through treaties, statutes, Executive orders, or other sources of Federal law. States continue to have considerable discretion in adopting and implementing WQS. Thus, Executive Order 13132 does not apply to this action.

In the spirit of Executive Order 13132 and consistent with EPA's policy to promote communications between EPA and state and local governments, EPA provided a conceptual overview of the draft rule for the Association of Clean Water Agencies (ACWA)'s Monitoring, Standards and Assessment

[79] ''Information Collection Request for Water Quality Standards Regulation,'' OMB Control Number 2040–0049, EPA ICR Number 0988.15, expiration date February 28, 2025.

Subcommittee, and during three additional one-on-one meetings with individual states held upon request.[80] In these discussions states requested additional clarification about EPA's expectations for how they should determine where tribal reserved rights apply, what resources and tools will be available, *e.g.,* geospatial data, and how to handle situations where data are not available, the state and tribe disagree, or multiple tribes have overlapping rights and do not agree on the level of protection. EPA took these discussions into account during the drafting of this rule. EPA specifically solicits comments on this proposed action from state and local officials.

After publishing this proposed rulemaking, EPA will conduct additional outreach and engagement with state and local government officials, or their representative national organizations, prior to finalizing a rule. All comment letters and recommendations received by EPA during the comment period from state and local governments will be included in the proposed rulemaking docket (Docket ID No. EPA–HQ–OW–2021–0791).

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This action has tribal implications, however it will neither impose substantial direct compliance costs on federally recognized tribal governments, nor preempt tribal law. This rulemaking may affect tribes with reserved rights to aquatic and/or aquatic-dependent resources in waters subject to state WQS, and it may also affect tribes administering a CWA 303 WQS program. As of November 15, 2022, 80 Indian tribes have been approved for treatment in a manner similar to a state (TAS) for CWA sections 303 and 401.[81] All or some of these authorized tribes could be subject to this proposed rule, depending on the location and nature of any other tribes' downstream rights.

EPA consulted with tribal officials early in the process of developing this regulation to permit them to have meaningful and timely input into its development. EPA held a 90-day tribal consultation and coordination period from June 15 through September 13, 2021 with federally recognized tribes to inform development of the proposed rule. EPA conducted the consultation and coordination process in accordance with the EPA Policy on Consultation and Coordination with Indian Tribes (*https://www.epa.gov/tribal/epa-policy-consultation-and-coordination-indian-tribes*). In addition to two national tribal listening sessions held in July and August 2021, EPA presented at 20 meetings of tribal staff and leadership, as well as held seven staff-level coordination/engagement meetings and held seven leader-to-leader meetings at the request of tribes. EPA continued outreach and engagement with tribes at national and regional tribal meetings after the end of the consultation period. Nearly all commenters were supportive of the potential rule in concept. EPA considered all pre-proposal tribal input received as it developed the proposed rule.

A summary of that consultation (''*Summary of EPA's Pre-Proposal Consultation, Coordination, and Outreach with Federally Recognized Tribes on Potential Revisions to the Federal Water Quality Standards Regulation to Protect Tribal Reserved Rights*'') is available in the docket for this proposal.

G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks

This action is not subject to Executive Order 13045 because it is not economically significant as defined in E.O. 12866, and because it does not concern an environmental health risk or safety risk that may disproportionately affect children.

H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use

This action is not a ''significant energy action'' because it is not likely to have a significant adverse effect on the supply, distribution or use of energy. This action impacts state and tribal water quality standards, which do not regulate the supply, distribution, or use of energy.

I. National Technology Transfer and Advancement Act of 1995

This proposed rulemaking does not involve technical standards.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

For the reasons explained below, EPA concludes that this action does not have disproportionately high and adverse human health or environmental effects on minority populations, low-income populations and/or indigenous peoples, as specified in Executive Order 12898 (59 FR 7629, February 16, 1994). Instead, EPA believes that this rule will address some of the many disproportionate impacts to tribal communities.

EPA defines Environmental Justice (EJ) as the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation and enforcement of environmental laws, regulations and policies.[82] Three Executive Orders (E.O. 12898[83], 13985[84] and 14008[85]) advance EJ by calling on Federal agencies to identify and address disproportionate impacts on historically underserved, marginalized, and economically disadvantaged people. Additionally, EPA has expressed a commitment to conducting EJ analyses for rulemakings as described in the April 30, 2021, revisions to the Cross-State Air Pollution Rule (CSAPR).[86] This rule is

[80] The slides EPA presented at its meeting with ACWA are included in the docket for this rulemaking. These are representative of the slides EPA presented at its one-on-one meetings with states.

[81] For the most current information please refer to *https://www.epa.gov/wqs-tech/epa-actions-tribal-water-quality-standards-and-contacts.*

[82] Fair treatment means that ''no group of people should bear a disproportionate burden of environmental harms and risks, including those resulting from the negative environmental consequences of industrial, governmental and commercial operations or programs and policies.'' Meaningful involvement occurs when ''(1) potentially affected populations have an appropriate opportunity to participate in decisions about a proposed activity [*e.g.,* rulemaking] that will affect their environment and/or health; (2) the public's contribution can influence [the EPA's rulemaking] decision; (3) the concerns of all participants involved will be considered in the decision-making process; and (4) [the EPA will] seek out and facilitate the involvement of those potentially affected.'' A potential EJ concern is defined as ''the actual or potential lack of fair treatment or meaningful involvement of minority populations, low-income populations, tribes, and tribal peoples in the development, implementation and enforcement of environmental laws, regulations and policies.'' See ''Guidance on Considering Environmental Justice During the Development of an Action.'' Environmental Protection Agency, *www.epa.gov/environmentaljustice/guidanceconsidering-environmental-justice-duringdevelopment-action.* See also *https://www.epa.gov/environmentaljustice.*

[83] Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations. Available at *https://www.epa.gov/environmentaljustice/federal-actions-address-environmental-justice-minority-populations-and-low.*

[84] Advancing Racial Equity and Support for Underserved Communities Through the Federal Government. Available at *https://www.federalregister.gov/documents/2021/01/25/2021-01753/advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government.*

[85] Tackling the Climate Crisis at Home and Abroad. Available at *https://www.federalregister.gov/documents/2021/02/01/2021-02177/tackling-the-climate-crisis-at-home-and-abroad.*

[86] 86 FR 23054, 23162 (April 30, 2021) (''Going forward, EPA is committed to conducting environmental justice analysis for rulemakings

consistent with EPA's strategic goal of advancing EJ.[87]

Environmental impacts to tribes may be considered under the category of EJ in recognition that tribes may at times be more susceptible to impacts from environmental degradation. In addition, E.O. 12898 directs Federal agencies, as appropriate and practical, to evaluate and communicate the risks associated with consumption patterns for populations that rely on fish and/or wildlife for subsistence. There is a unique set of EJ considerations for tribes, particularly where tribes are exercising their cultural practices, both on and off their reservations. For EPA, the government-to-government relationship and trust responsibility that the Federal government has with federally recognized tribal governments further sets EJ issues for tribes apart from those in other communities.[88]

EPA and other Federal agencies focus on resolving EJ issues affecting tribes through (1) supporting the tribes' sovereignty and exercise of their own environmental authorities and (2) taking direct action on behalf of the tribes as part of the Federal government's tribal trust responsibility. This proposed rulemaking is relying on a combination of both approaches, as discussed below.

Many tribes rely on aquatic and aquatic-dependent resources for their lifeways. Attaining and sustaining clean water to protect human health is essential to ensuring tribes can continue to practice these traditional lifeways. However, due to water quality issues, many tribes are unable to do so. The contamination of aquatic food resources above levels safe to consume in desired quantities results in what is often described as a suppression effect. An illustration of a suppression effect is when the fish consumption rate for a given tribe reflects a current level of consumption that is artificially diminished relative to the tribe's heritage fish consumption rate.[89] [90] [91]

The negative impacts of suppression extend well beyond tribal health, leading to consequences for tribal economies and cultures as well. Given that aquatic resources often support a tribe's cultural self-determination and can be pivotal to the economic well-being of the community, impacts to these resources can affect the very foundation of tribal social and political organization,[92] as well as impact a tribe's ability to provide for present and future generations and the maintenance of their lifeways.

Tribes have a unique legal and political status, and environmental issues affecting tribes must be viewed in the context of tribal sovereignty. In giving reserved rights an explicit role in CWA regulations, EPA's goal is to support tribal sovereignty. The proposed rulemaking recognizes how critical reserved rights are for many tribes' cultural and economic survival by providing a platform for states and EPA to consider the nature and scope of the very rights that tribes have reserved to themselves and have been enshrined in legal instruments.

Tribes, unlike other communities with EJ concerns, cannot be viewed as subpopulations, differentiated only by exposures and other vulnerabilities. Tribal communities' relationship with their resources is unique and should be understood in terms of both the past and present relationship the particular tribal communities have with these resources and their dependence on those resources. Impacts to tribal communities may be disproportionate by definition because of their unique relationship to the environment.[93] It is often the resource base that provides for their cultural self-determination and can be pivotal to the economic well-being of the community. Indeed, many of the reserved rights expressly include subsistence and economic components.[94] Impacts to their resource base could affect the very foundation of their tribal social and political organization,[95] as well as impact their ability to provide for present and future generations and the maintenance of their lifeways.

This proposed rulemaking's emphasis on treating the applicable tribe or tribes as the target population speaks to this unique status. And the goal of protecting treaty resources that may not be otherwise fully protected under the CWA may indeed have a subsistence and an economic component. Further, the concept of addressing suppression, as described in section IV.C.2.ii. of this preamble, takes on a unique approach where tribal members are concerned by examining not only the current context but may also look at historical and cultural practices to establish the appropriate baseline. Many tribes have continued their traditional practices and/or seek to return to those practices, yet they may have also developed new approaches and relationships to their resource base. Both contexts should be considered in furthering the goal of protecting resources for which tribes have reserved rights.

The role these resources play in tribal communities can be complex. Understanding which resources, how they may be used, and in what quantities, is essential in protecting tribal sovereignty and the cultural and economic survival of tribal communities. And each tribe will likely have a very different set of values and relationships with the resources, which may be different world views from those of the surrounding community, and from state and local governments.[96] Successful implementation of this proposed rulemaking therefore necessitates close coordination with tribes and a greater understanding of the unique approaches that tribes may have toward managing their resources. The foundation of this coordination in this

based on a framework similar to what is outlined here, in addition to investigating ways to further weave environmental justice into the fabric of the rulemaking process including through enhanced meaningful engagement with environmental justice communities.'').

[87] *FY2022–2026 EPA Strategic Plan.* Available online at *https://www.epa.gov/planandbudget/strategicplan.*

[88] EPA recognizes our responsibility to work with both federally recognized tribes and all other indigenous peoples, per the EPA Policy on Environmental Justice for Working with Federally Recognized Tribes and Indigenous Peoples (2014) (available online at *https://www.epa.gov/environmentaljustice/epa-policy-environmental-justice-working-federally-recognized-tribes-and*) to address their EJ concerns. As defined in the policy, Indigenous Peoples ''includes state-recognized tribes; indigenous and tribal community-based organizations; individual members of federally recognized tribes, including those living on a different reservation or living outside Indian country; individual members of state-recognized tribes; Native Hawaiians; Native Pacific Islanders; and individual Native Americans.''

[89] National Environmental Justice Advisory Council (NEJAC). 2002. *Fish Consumption and Environmental Justice. https://www.epa.gov/sites/default/files/2015-02/documents/fish-consump-report_1102.pdf.* p. vii.

[90] EPA. 2016. Idaho Tribal Fish Consumption Survey. *https://www.epa.gov/columbiariver/idaho-tribal-fish-consumption-survey.*

[91] Northwest Indian Fisheries Commission, 2019. Opposition to EPA's 2019 Actions to Roll Back Washington's Human Health Water Quality Criteria, Docket No. EPA–HQ–OW–2015–0174. Available online at *https://www.regulations.gov/comment/EPA-HQ-OW-2015-0174-0970.*

[92] Ranco, D.J., O'Neill, C.A., Donatuto, J., & Harper, B.L. 2011. Environmental Justice, American Indians and the Cultural Dilemma: Developing Environmental Management for Tribal Health and Well-being. *Environmental Justice* 4;4, DOI: 10.1089/env.2010.0036.

[93] Suagee, D.B. (2003). Environmental Justice and Indian Country. *Human Rights,* Vol. 30, No. 4, p.16–17.

[94] *Lac Courte Oreilles Band of Lake Superior Chippewa Indians* v. *Wisconsin,* 758 F. Supp. 1262 (W.D. Wisc. 1991).

[95] Ranco, D.J., O'Neill, C.A., Donatuto, J., & Harper, B.L. (2011). Environmental Justice, American Indians and the Cultural Dilemma: Developing Environmental Management for Tribal Health and Well-being. *Environmental Justice* 4;4, DOI: 10.1089/env.2010.0036.

[96] Ranco, D.J., O'Neill, C.A., Donatuto, J., & Harper, B.L. (2011). Environmental Justice, American Indians and the Cultural Dilemma: Developing Environmental Management for Tribal Health and Well-being. *Environmental Justice* 4;4, DOI: 10.1089/env.2010.0036

WQS context necessarily includes the state, with CWA authority to set standards in the reserved rights areas in question, local governments, who often have even more direct contact with tribal members and their governments, tribes holding those rights, and the Federal government. This proposed rulemaking recognizes the importance of coordination with tribes by establishing an express mechanism for tribal input in the state WQS setting process.

Reaching consensus can pose challenges, particularly given the deep-seated sense of stewardship and responsibility tribes often feel toward these resources even when under the jurisdiction of the state. But it is often when tribal resources are not under the jurisdiction of the tribes themselves that tribes see the biggest environmental justice impacts.[97] It is EPA's goal that the sovereignty and management role of both state and tribal governments will be better understood and aligned through implementation of this rulemaking.

EPA recognizes that tribes without federally reserved rights to aquatic or aquatic-dependent resources will not be directly impacted by this rulemaking. The agency also acknowledges that since this rulemaking only covers locations with reserved rights, other aquatic resources upon which tribes depend may not be covered. It is EPA's expectation that many of the coordination and collaboration processes that will be developed to implement this rule will also lead to better protection of aquatic and aquatic-dependent resources not referenced in treaties and similar instruments because this rulemaking aims to facilitate greater coordination between state and tribal governments. EPA will continue to work with states and tribes to help reach this goal. While this rulemaking does not address all obstacles to the full exercise of these rights, EPA believes it takes a positive step in that direction.

List of Subjects in 40 CFR Part 131

Environmental protection, Indians—lands, Intergovernmental relations, Reporting and recordkeeping requirements, Water pollution control.

Michael S. Regan,

Administrator.

For the reasons set forth in the preamble, EPA proposes to amend 40 CFR part 131 as follows:

[97] *Id*

PART 131—WATER QUALITY STANDARDS

■ 1. The authority citation for part 131 continues to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*

Subpart A—General Provisions

■ 2. Amend § 131.3 by adding paragraphs (r) and (s) to read as follows:

§ 131.3 Definitions.

* * * * *

(r) *Tribal reserved rights* are any rights to aquatic and/or aquatic-dependent resources reserved or held by tribes, either expressly or implicitly, through treaties, statutes, executive orders, or other sources of Federal law.

(s) *Right holders* are tribes holding rights to aquatic and/or aquatic-dependent resources pursuant to an applicable treaty, statute, executive order, or other source of Federal law.

■ 3. Amend § 131.5 by adding paragraph (a)(9) and revising paragraph (b) to read as follows:

§ 131.5 EPA authority.

(a) * * *

(9) Whether any State adopted water quality standards protect tribal reserved rights, where applicable, consistent with § 131.9.

(b) If EPA determines that the State's or Tribe's water quality standards are consistent with the factors listed in paragraphs (a)(1) through (9) of this section, EPA approves the standards. EPA must disapprove the State's or Tribe's water quality standards and promulgate Federal standards under section 303(c)(4), and for Great Lakes States or Great Lakes Tribes under section 118(c)(2)(C) of the Act, if State or Tribal adopted standards are not consistent with the factors listed in paragraphs (a)(1) through (9) of this section. EPA may also promulgate a new or revised standard when necessary to meet the requirements of the Act.

* * * * *

■ 4. Amend § 131.6 by adding paragraph (g) to read as follows:

§ 131.6 Minimum requirements for water quality standards submission.

* * * * *

(g) Where applicable, information which will aid the agency in evaluating whether the submission protects tribal reserved rights consistent with § 131.9, including:

(1) Information about the scope, nature, and current and past use of the tribal reserved rights, as informed by the right holders; and

(2) Data and methods used to develop the water quality standards.

Subpart B—Establishment of Water Quality Standards

■ 5. Add § 131.9 to subpart B to read as follows:

§ 131.9 Protection of tribal reserved rights.

(a) Water quality standards must protect tribal reserved rights applicable to waters subject to such standards. To protect tribal reserved rights, water quality standards must, to the extent supported by available data and information, be established to protect:

(1) The exercise of tribal reserved rights unsuppressed by water quality or availability of the aquatic or aquatic-dependent resource; and

(2) The health of the right holders to at least the same risk level as provided to the general population of the State.

(b) In reviewing State water quality standards submissions under this section, EPA will initiate tribal consultation with the right holders, consistent with applicable EPA tribal consultation policies, in determining whether State water quality standards protect applicable tribal reserved rights in accordance with paragraph (a) of this section.

(c) In order to meet the requirements in paragraph (a) of this section, States must:

(1) Designate uses consistent with § 131.10 that either expressly incorporate protection of the tribal reserved rights or encompass such rights; and

(2) Establish water quality criteria consistent with § 131.11 to protect tribal reserved rights; and/or

(3) Use applicable antidegradation requirements consistent with § 131.12 to maintain and protect water quality that protects tribal reserved rights.

Subpart C—Procedures for Review and Revision of Water Quality Standards

■ 6.Amend § 131.20 by revising paragraph (a) to read as follows:

§ 131.20 State review and revision of water quality standards.

(a) *State review.* The State shall from time to time, but at least once every 3 years, hold public hearings for the purpose of reviewing applicable water quality standards adopted pursuant to §§ 131.10 through 131.15 and Federally promulgated water quality standards and, as appropriate, modifying and adopting standards. This review shall include evaluating whether there are tribal reserved rights applicable to State waters and whether water quality standards need to be revised to protect those rights pursuant to § 131.9. The State shall also re-examine any

waterbody segment with water quality standards that do not include the uses specified in section 101(a)(2) of the Act every 3 years to determine if any new information has become available. If such new information indicates that the uses specified in section 101(a)(2) of the Act are attainable, the State shall revise its standards accordingly. Procedures States establish for identifying and reviewing water bodies for review should be incorporated into their Continuing Planning Process. In addition, if a State does not adopt new or revised criteria for parameters for which EPA has published new or updated CWA section 304(a) criteria recommendations, then the State shall provide an explanation when it submits the results of its triennial review to the Regional Administrator consistent with CWA section 303(c)(1) and the requirements of paragraph (c) of this section.

* * * * *

[FR Doc. 2022–26240 Filed 12–2–22; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 372

[EPA–HQ–TRI–2022–0270; FRL–8741–03–OCSPP]

RIN 2070–AK97

Changes to Reporting Requirements for Per- and Polyfluoroalkyl Substances and to Supplier Notifications for Chemicals of Special Concern; Community Right-to-Know Toxic Chemical Release Reporting

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to add per- and polyfluoroalkyl substances (PFAS) subject to reporting under the Emergency Planning and Community Right-to-Know Act (EPCRA) and the Pollution Prevention Act (PPA) pursuant to the National Defense Authorization Act for Fiscal Year 2020 (NDAA) to the list of Lower Thresholds for Chemicals of Special Concern (chemicals of special concern). These PFAS already have a lower reporting threshold of 100 pounds. The addition of these PFAS to the list of chemicals of special concern will cause such PFAS to be subject to the same reporting requirements as other chemicals of special concern (*i.e.,* it would eliminate the use of the *de minimis* exemption and the option to use Form A and would limit the use of range reporting for PFAS). Removing the availability of these burden-reduction reporting options will result in a more complete picture of the releases and waste management quantities for these PFAS. In addition, EPA is proposing to remove the availability of the *de minimis* exemption for purposes of the Supplier Notification Requirements for all chemicals on the list of chemicals of special concern. This change will help ensure that purchasers of mixtures and trade name products containing such chemicals are informed of their presence in mixtures and products they purchase.

DATES: Comments must be received on or before February 3, 2023.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–TRI–2022–0270, using the Federal eRulemaking Portal at *https://www.regulations.gov.* Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Additional instructions on commenting or visiting the docket, along with more information about dockets generally, is available at *https://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: *For technical information contact:* Daniel R. Ruedy, Data Gathering and Analysis Division (7406M), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; telephone number: (202) 564–7974; email: *ruedy.daniel@epa.gov.*

For general information contact: The Emergency Planning and Community Right-to-Know Hotline; telephone numbers: toll free at (800) 424–9346 (select menu option 3) or (703) 348–5070 in the Washington, DC Area and International; or go to *https://www.epa.gov/home/epa-hotlines.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

You may be potentially affected by this action if you manufacture, process, or otherwise use listed PFAS or any chemicals listed under 40 CFR 372.28. The following list of North American Industry Classification System (NAICS) codes is not intended to be exhaustive, but rather provides a guide to help readers determine whether this action applies to them. Potentially affected entities may include:

- Facilities included in the following NAICS manufacturing codes (corresponding to Standard Industrial Classification (SIC) codes 20 through 39): 311*, 312*, 313*, 314*, 315*, 316, 321, 322, 323*, 324, 325*, 326*, 327, 331, 332, 333, 334*, 335*, 336, 337*, 339*, 111998*, 211130*, 212324*, 212325*, 212393*, 212399*, 488390*, 511110, 511120, 511130, 511140*, 511191, 511199, 512230*, 512250*, 519130*, 541713*, 541715* or 811490*. *Exceptions and/or limitations exist for these NAICS codes.
- Facilities included in the following NAICS codes (corresponding to SIC codes other than SIC codes 20 through 39): 211130 (corresponds to SIC code SIC 1321, Natural Gas Liquids and SIC 2819, Industrial Inorganic Chemicals, Not Elsewhere Classified); or 212111, 212112, 212113 (corresponds to SIC code 12, Coal Mining (except 1241)); or 212221, 212222, 212230, 212299 (corresponds to SIC code 10, Metal Mining (except 1011, 1081, and 1094)); or 221111, 221112, 221113, 221118, 221121, 221122, 221330 (limited to facilities that combust coal and/or oil for the purpose of generating power for distribution in commerce) (corresponds to SIC codes 4911, 4931, and 4939, Electric Utilities); or 424690, 425110, 425120 (limited to facilities previously classified in SIC code 5169, Chemicals and Allied Products, Not Elsewhere Classified); or 424710 (corresponds to SIC code 5171, Petroleum Bulk Terminals and Plants); or 562112 (limited to facilities primarily engaged in solvent recovery services on a contract or fee basis (previously classified under SIC code 7389, Business Services, NEC)); or 562211, 562212, 562213, 562219, 562920 (limited to facilities regulated under the Resource Conservation and Recovery Act, subtitle C, 42 U.S.C. 6921 *et seq.*) (corresponds to SIC code 4953, Refuse Systems).
- Federal facilities.

A more detailed description of the types of facilities covered by the NAICS codes subject to reporting under EPCRA section 313 can be found at: *https://www.epa.gov/toxics-release-inventory-tri-program/tri-covered-industry-sectors.* To determine whether your facility would be affected by this action, you should carefully examine the applicability criteria in part 372, subpart B of title 40 of the Code of Federal Regulations. Federal facilities are required to report under Executive Order 14008 (*https://www.govinfo.gov/content/pkg/FR-2021-02-01/pdf/2021-02177.pdf*), as explained in the Council on Environmental Quality's 2021 memorandum to Chief Sustainability