ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 131, 230, and 233

[EPA–HQ–OW–2016–0405; FRL–5868–03–OW]

RIN 2040–AF62

Federal Baseline Water Quality Standards for Indian Reservations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to establish Federal water quality standards (WQS) for Indian reservation waters that currently do not have WQS in effect under the Clean Water Act (CWA or the Act), with limited exceptions. These WQS (referred to as baseline WQS) would establish human health and environmental objectives as the basis for CWA protections. EPA would implement the baseline WQS, in consultation with Tribes, in a manner that would address location-specific water quality conditions and Tribal circumstances, as appropriate, and consistent with all relevant public participation requirements to ensure transparency for stakeholders. Tribes are encouraged to seek authority to administer their own WQS program under the Act's provision for eligible Tribes to be treated in a similar manner as states (TAS). Baseline WQS would not apply in instances where Tribes with TAS authority have EPA-approved WQS now or in the future. EPA will continue to work closely with, and offer support to, Tribes that wish to develop their own WQS under the CWA.

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

Public Hearings: The first public hearing will be on Tuesday, June 27 from 2 p.m. to 4 p.m. ET. The second public hearing will be on Wednesday, July 12 from 2 p.m. to 4 p.m. ET.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OW–2016–0405, at *https://www.regulations.gov* (our preferred method), or the other methods identified in this **ADDRESSES** section. Once submitted, comments cannot be edited or removed from the docket. EPA will publish all comments received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) 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). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *https://www.epa.gov/dockets/commenting-epa-dockets.*

EPA is offering two online public hearings so that interested parties may provide oral comments on this proposed rule. The first public hearing will be on Tuesday, June 27 from 2 p.m. to 4 p.m. ET. The second public hearing will be on Wednesday, July 12 from 2 p.m. to 4 p.m. ET. EPA plans to make a transcript of the public hearings available to the public in the rulemaking docket. EPA will respond to substantive comments received as part of developing the final rule and will include comment responses in the rulemaking docket. For more details on the public hearings and a link to register, please visit *https://www.epa.gov/wqs-tech/promulgation-tribal-baseline-water-quality-standards-under-clean-water-act.*

FOR FURTHER INFORMATION CONTACT: James Ray, U.S. EPA, Office of Science and Technology, Standards and Health Protection Division, 1200 Pennsylvania Avenue NW (MC 4305T), Washington, DC 20460, (202) 566–1433, *ray.james@epa.gov.* Additional information is also available online at *https://www.epa.gov/wqs-tech/promulgation-tribal-baseline-water-quality-standards-under-clean-water-act.*

SUPPLEMENTARY INFORMATION: This proposed rule is organized as follows:

I. General Information

Does this action apply to me?

Tribes,[1] states, local governments, and citizens concerned with water

[1] ''Tribe'' means an Indian or Alaska Native Tribe, band, nation, pueblo, village, community, or other

quality and how water quality may be defined and protected on Indian reservations may be interested in this rulemaking. Entities discharging pollutants to waters of the United States may be indirectly affected by this rulemaking since water quality standards (WQS) are used to develop National Pollutant Discharge Elimination System (NPDES) permit limits and serve as a basis for Clean Water Act (CWA) section 402 permit decisions. WQS also form the basis for assessing water quality, identifying impaired waters, and developing total maximum daily loads (TMDLs). See CWA sections 305(b) and 303(d). In CWA section 404 permits, WQS are used during the review of permits authorizing the discharge of dredged or fill material. Categories and entities that may be affected include the following:

Category	Examples of potentially affected entities
States, Tribes, and Territories.	Federally recognized Tribes with Indian reservations currently without CWA-effective WQS and states and authorized Tribes near or bordering such reservations.
Federal Agencies	Federal agencies with projects or other activities that may affect surface waters on Indian reservations currently without CWA-effective WQS.
Industry	Industries discharging pollutants that may affect surface waters on Indian reservations currently without CWA-effective WQS.
Municipalities	Publicly owned treatment works and stormwater outfalls discharging pollutants that may affect surface waters on Indian reservations currently without CWA-effective WQS.

This table is not exhaustive, but rather it provides a guide that identifies entities that could be affected by this proposed rule. Other types of entities not listed in the table could also be affected. If you have questions regarding the effect of this action on a particular entity, please consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

II. Background

A. Role of Water Quality Standards Under the Clean Water Act

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. The CWA also sets forth the interim goal of achieving water quality, wherever attainable, that provides for both (i) the protection and propagation of fish, shellfish, and wildlife and (ii) recreation in and on the water (sections 101(a) and 101(a)(2)). 33 U.S.C. 1251(a), (a)(2). To help achieve these goals, the CWA created two complementary structures for regulating discharges in CWA section 402 NPDES permits: first, technology-based effluent limitations (TBELs) that set a floor of performance for categories of dischargers, and second, water quality-based effluent limitations (WQBELs) that are established where TBELs are insufficient to meet applicable WQS or site-specific water quality goals. 33 U.S.C. 1342(a). TBELs in NPDES permits are derived from secondary treatment standards, which are minimum requirements for municipal wastewater treatment plants (CWA sections 301, 33 U.S.C. 1311), effluent limitations guidelines, which are national regulatory standards for industrial wastewater discharged to surface waters and municipal sewage treatment plants (CWA sections 304 and 1314), and new source performance standards, which are standards for water pollution discharges of industrial wastewater to surface waters (CWA section 306, 33 U.S.C. 1316) promulgated by EPA. If TBELs are not sufficient to meet the WQS in the receiving water, the CWA (section 301(b)(1)(c), 33 U.S.C. 1311(b)(1)(c)) and EPA's NPDES regulation, 40 CFR 122.44(d), require that the permit writer develop more stringent, WQBELs.

WQS are the foundation of the water quality-based pollution control programs required by the CWA. Under CWA section 303(c) and EPA's regulation at 40 CFR part 131, WQS consist of designated uses for water bodies, water quality criteria to protect those uses, and an antidegradation policy to maintain water quality. 33 U.S.C. 1313(c). Such standards serve as a description of the desired water quality for particular water bodies. In addition, they serve as the basis for several CWA programs, including:

- WQBELs issued through state or National Pollutant Discharge Elimination System (NPDES) Program under section 402, 33 U.S.C. 1342;
- Section 303(d), 33 U.S.C. 1313(d), water body assessments and determinations of TMDLs;
- Section 401, 33 U.S.C. 1341, certifications of Federal licenses and permits; and
- Section 404, 33 U.S.C., 1344, permits for dredged or fill material.

CWA section 303(c) gives states the primary responsibility to establish, review, and revise WQS applicable to their waters. In 1987, Congress amended the CWA to add section 518, the CWA provision for eligible Indian Tribes to be treated in a similar manner as states, or TAS. 33 U.S.C. 1377. In CWA section 518, Congress expressly delegated authority to Indian Tribes to administer CWA regulatory programs over their entire reservations, including over nonmember activities on fee lands within the reservation of the applicant Tribe, subject to certain eligibility requirements. For a Tribe to be eligible to obtain TAS authority and administer a CWA program, the Tribe must be federally recognized and maintain governmental authority over a reservation, among other requirements.[2]

EPA's use of ''Tribe'' in the context of this proposed rule refers to ''Tribal government authority'' that serves as the ultimate decision-maker for the Tribe.

Pursuant to CWA section 518, Tribes can obtain TAS under the CWA for water resources on their reservation. See 33 U.S.C. 1377(e)(2) (referring to waters ''within the borders of an Indian reservation''); 81 FR 30183, 30191, May 16, 2016. Many named Indian reservations were established through Federal treaties with Tribes, Federal statutes, or Executive orders of the President. Such reservations are often referred to as formal reservations. EPA's longstanding approach under the CWA and other statutes administered by EPA is that, in accordance with judicial precedent, the term ''reservation'' includes both formal reservations and

entity that the Secretary of the Interior acknowledges to exist as an Indian Tribe pursuant to the Federally Recognized Indian Tribe List Act of 1944, 25 U.S.C. 479a.

[2] Under CWA section 518 and EPA's implementing regulation at 40 CFR 131.8(a), four requirements must be satisfied before EPA can approve a Tribe's application for treatment in a similar manner as a state for purposes of administering water quality standards under CWA section 303(c).

informal reservations such as trust land that has been validly set apart for use by a Tribe even if such trust land is located outside of the exterior boundaries of a formally designated reservation. See 56 FR 64876, 64881, December 12, 1991; see also *Oklahoma Tax Commission* v. *Citizen Band Potawatomi Indian Tribe of Oklahoma,* 508 U.S. 114, 123 (1991) (''Congress has defined Indian country broadly to include formal and informal reservations, dependent Indian communities, and Indian allotments, whether restricted or held in trust by the United States''); *HRI v EPA* 198 F.3d 1224 (10th Cir. 2000) (same); *Arizona Public Service Co. v EPA,* 211 F.3d 1280 (D.C. Cir. 2000) (Upholding EPA's interpretation of ''reservation'' in the Clean Air Act as including tribal trust lands and pueblos, and noting that ''[t]his view is consonant with other Federal court holdings that an Indian reservation includes trust lands.''). An Indian Tribe that obtains EPA approval for TAS to administer a WQS program over its reservation is referred to as an ''authorized Tribe.''

CWA section 303(c) also provides for EPA to promulgate Federal WQS in two situations. First, EPA must act if it determines that a state's or authorized Tribe's new or revised WQS is not consistent with the requirements of the Act, and the state or authorized Tribe fails to submit a modified standard within 90 days. In that case, section 303(c)(4)(A) requires EPA to propose and promulgate a revised or new standard for the waters involved, unless prior to promulgation, the state or authorized Tribe adopts a WQS that EPA determines to be consistent with the Act. Second, section 303(c)(4)(B) grants the EPA Administrator discretion to promulgate standards in any case where the Administrator determines that a revised or new standard is necessary to meet the requirements of the Act. A determination pursuant to section 303(c)(4)(B) is referred to as an ''Administrator's Determination.'' See 40 CFR 131.22(b).

B. Clean Water Act-Effective Water Quality Standards Currently Applicable in Indian Country

''Indian country'' is defined by Federal statute at 18 U.S.C. 1151.[3] Pursuant to that definition, Indian country includes all territory within an Indian reservation (including land owned in fee simple by non-Indians). It also includes ''dependent Indian communities'' (DICs) and Indian allotments, the titles to which have not been extinguished, regardless of whether those lands are located within a reservation. EPA generally directly implements Federal environmental programs in Indian country where it has not approved a non-Federal entity to implement the program.[4] See EPA's 1984 Indian Policy (''EPA Policy for the Administration of Environmental Programs on Indian Reservations,'' EPA, November 8, 1984); see *also Phillips Petroleum Co.* v. *EPA,* 803 F.2d 545, 556 (10th Cir. 1986) (holding that EPA had authority to prescribe regulations in Indian country, and noting that the court's conclusion was ''also consistent with the presumption that Congress intends a general statute applying to all persons to include Indians and their property interests.''); 40 CFR 144.2 (Underground Injection Control Program); 40 CFR 123.1(h) (National Pollution Discharge Elimination System Program); 40 CFR 71.4(b) (Clean Air Act Title V Permit Program); 40 CFR 281.12(a)(2) (Underground Storage Tanks Program). Because EPA-approved state WQS generally do not apply in Indian country, in the absence of Federal WQS or EPA-approved Tribes' WQS, no CWA-effective WQS apply in the many Indian country waters where Tribes have not yet obtained TAS and established EPA-approved WQS.[5]

The Federal Government has recognized 574 Tribes.[6] More than 300 of these Tribes have formal and/or informal reservations: *e.g.,* named formal reservations, Pueblos, Rancherias, and lands held in trust by the United States for Tribal governments that are not designated as formal reservations. With few exceptions,[7] any of these Tribes may apply to EPA under CWA section 518 to administer specific environmental programs, including WQS, for water resources within the boundaries of the Tribe's reservation. As explained in section II.A. of this preamble, waters within the boundaries of a Tribe's reservation also refers to waters on Tribal trust lands not formally designated as reservations.

EPA has approved TAS applications for 84 Tribes to administer the CWA section 303(c) program. Tribes with an approved TAS application may adopt WQS under section 303(c) of the CWA and submit them to EPA for review pursuant to CWA section 303(c) and EPA's implementing regulation. To date, 47 of the 84 Tribes have submitted Tribal WQS that EPA has approved in this manner. EPA's website, *EPA Actions on Tribal Water Quality Standards and Contacts*[8] lists these Tribes and the dates their TAS authority and WQS were approved. EPA updates this list continually. EPA also provides technical assistance to Tribes in developing TAS applications and WQS.[9]

[3] 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. Indian reservations are thus a subset of the broader geographic area that comprises Indian country as a whole.

[4] In a few instances, EPA has determined that, due to unique jurisdictional frameworks enacted by Congress, certain states have jurisdiction to administer WQS on Indian reservations under the CWA. These include the reservations, including trust lands, of all four Tribes in Maine (Houlton Band of Maliseet Indians, Mi'kmaq Nation, Passamaquoddy Tribe, and Penobscot Nation), the reservation of the Catawba Indian Nation in South Carolina, non-Indian fee lands of the Puyallup Reservation in Washington, and reservation lands (excluding Tribal trust lands, Indian allotments, and certain Tribal fee lands) in Oklahoma. See, *e.g.,* 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), Attachment A at 2; Letter from Daniel Opalski to Laura Watson, Director, Washington Department of Ecology, Re: Clean Water Act Section 401 Implementation within the Puyallup Tribe of Indians 1873 Survey Area (August 9, 2021) (Noting that the State of Washington is authorized ''to administer all Clean Water Act delegated and authorized programs on non-trust lands, as defined in the 1988 Lands Claims Settlement Agreement,'' pursuant to the Puyallup Tribe of Indians Settlement Act of 1989, 25 U.S.C. 1773); EPA, 87 FR 3673, *Air Plan Approval; South Carolina; Catawba Indian Nation Portion of the Charlotte-Gastonia-Rock Hill Area Limited Maintenance Plan for the 1997 8-Hour Ozone NAAQS* (January 25, 2022) (''Pursuant to the Catawba Indian Claims Settlement Act, S.C. Code Ann. 27–16–120 . . . 'all state and local environmental laws and regulations apply to the [Catawba Indian Nation] and Reservation and are fully enforceable by all relevant state and local agencies and authorities.'''); Letter from Andrew R. Wheeler to The Honorable J. Kevin Stitt, Governor of the State of Oklahoma, Re: Approval of State of Oklahoma Request Under Section 10211(a) of the Safe, Accountable, Flexible, Efficient Transportation Equity Act of 2005 (October 1, 2020). (On December 22, 2021, EPA publicized a ''Notice of Proposed Withdrawal and Reconsideration of October 1, 2020 SAFETEA Decision and Opportunity for Comment.'' EPA's reconsideration is currently ongoing, and Oklahoma's approval to administer WQS in the stated areas of Indian reservations remains in place during that process.)

[5] Some Tribes may have WQS effective under Tribal law. Such standards are not effective for CWA purposes, however, until they are approved by EPA. 40 CFR 131.21.

[6] See *Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs: Notice,* Department of the Interior, 86 FR 7554 (January 29, 2021).

[7] See *supra* note 4.

[8] *https://www.epa.gov/wqs-tech/epa-actions-tribal-water-quality-standards-and-contacts.*

[9] *https://www.epa.gov/wqs-tech/water-quality-standards-tools-tribes.*

In one instance, EPA has promulgated Federal WQS for an Indian reservation. In 1986, the Confederated Tribes of the Colville Reservation (CTCR) in Washington requested EPA to promulgate the CTCR's WQS as Federal standards for waters of the reservation. The CTCR was concerned that their WQS could not otherwise be recognized under the CWA at that time. After EPA received the request from the CTCR, Congress passed the CWA amendments of 1987 to add the TAS provisions of section 518 described in section II.A of this preamble. Despite the pending opportunity to qualify for TAS for purposes of administering a WQS program, the CTCR supported EPA's promulgation of Federal WQS for the reservation. EPA finalized the CTCR promulgation in 1989 at 40 CFR 131.35. In 2018, the CTCR obtained TAS authority to administer a WQS program and is in the process of developing its own Tribe-adopted WQS for CWA purposes.

III. EPA's Rationale for Proposing Baseline Water Quality Standards

A. Status of Water Quality Standards Protection in Indian Country

As mentioned in section II.B of this preamble, while more than 300 Tribes with Indian reservations are eligible to apply for TAS, only 84 Tribes have applied and been approved to administer a WQS program. Of these 84 Tribes, only 47 Tribes to date have adopted WQS and submitted them to EPA for review and approval under the CWA. EPA has generally excluded Indian reservations from state WQS approvals, subject to limited exceptions.[10] EPA estimates that about 76,000 miles of rivers and streams and 1.9 million acres of lakes, reservoirs, and other open surface waters within Indian reservations currently lack CWA-effective WQS; these reservations are home to approximately 550,000 people.[11] As a result, 50 years after enactment of the CWA, the majority of Indian reservations do not have this foundational protection laid out by Congress in the CWA for their waters.

Tribal interest in obtaining TAS and adopting their own WQS has increased in recent years, especially after EPA's action in 2016 to revise its interpretation of CWA section 518, which streamlined aspects of a Tribe's TAS application.[12] A total of 27 of the 84 Tribes with TAS for the WQS program have been approved in the six years since then. Nonetheless, acquiring TAS authorities and adopting WQS is a time and resource-intensive process. At the current pace, it could take more than a decade for CWA-effective WQS to be put in place for all Indian reservations.

The lack of CWA-effective WQS for most Indian reservations means that those waters do not have the human health and environmental objectives in place that form the basis for CWA protections. WQS are central to implementing the water quality framework of the CWA. Although it is EPA's preference for Tribes to obtain TAS and develop WQS tailored to the Tribes' individual environmental goals and reservation waters, EPA's promulgation of baseline WQS would safeguard water quality until Tribes obtain TAS and adopt CWA WQS themselves.

B. Benefits of EPA Promulgating Baseline Water Quality Standards for Indian Reservations Where Clean Water Act-Effective Water Quality Standards Are Not in Place

EPA is proposing a national rule to establish baseline WQS to safeguard water quality for certain Indian reservation waters. The proposed rule will ensure that the core CWA framework to protect water quality is in place for these waters until the Tribe applies for TAS to administer a WQS program and adopts its own Tribal WQS consistent with CWA section 303(c). EPA is proposing to establish the following WQS:

- designated uses consistent with the CWA protection and restoration goals for aquatic life and users of surface water;
- a designated use that protects cultural and traditional uses;
- water quality criteria to protect those uses;
- an antidegradation policy with associated implementation procedures; and
- general WQS polices such as a mixing zone policy and compliance schedule authorizing provision.

EPA recognizes that WQS specific to the site-specific chemical, physical and biological conditions of each reservation might be more desirable than Federal baseline WQS. However, developing WQS tailored to each reservation, and potentially to different categories of waters within each reservation, would further delay needed protections. Instead, EPA is relying on its role as both the promulgating entity and the primary implementing authority to allow a degree of site-specific tailoring within the regulatory construct of the WQS during subsequent implementation of the proposed rule. This tailoring would be accomplished by use of the narrative criteria and binding translation procedures identified in the rule. For example, a particular Tribe's fish consumption rates could be used during the implementation stage as part of the calculation to set the appropriate human health criteria value for its waters.

Because no Tribes have yet applied for TAS to administer the CWA section 402 NPDES permitting program, EPA is typically the NPDES permitting authority in Indian country. In the absence of CWA-effective WQS for these waters, EPA permit writers have utilized various tools to write protective NPDES permits, such as relying on downstream state WQS to inform relevant permit limits. However, these mechanisms are limited in their ability to protect Tribal waters reflecting Tribal priorities.

C. History of EPA's Efforts To Establish Baseline Water Quality Standards

EPA has been working with Tribes on the concept of promulgating baseline WQS for over two decades. Between 1998 and 2003, EPA consulted with Tribes, and sought input from states and the public on the possibility of EPA promulgating certain Federal WQS referred to as ''core water quality standards'' for Indian country waters without CWA-effective WQS. On January 18, 2001, EPA Administrator Carol Browner determined, pursuant to CWA section 303(c)(4)(B), that new or revised WQS were necessary for certain Indian country waters lacking CWA-effective WQS. Pursuant to the Determination, Administrator Browner signed a proposed rule to promulgate the core WQS under CWA section 303(c).[13] Specifically, the Determination provides as follows:

> [E]xcept where the Tribe wants to have its Indian country waters excluded from this rule and the Tribe and/or EPA has or intends to develop a plan for establishing water quality standards under the Clean Water Act within a reasonable time, and for off-reservation allotments . . . the EPA Administrator finds under the Clean Water Act sections 303(c)(4)(B) and 501(a) that

[10] See *supra* note 4.

[11] See EPA's draft analysis, *Analysis of Tribal Reservation Lands without Applicable WQS (Draft),* in the docket for this rulemaking.

[12] See *Revised Interpretation of Clean Water Act Tribal Provision,* final interpretive rule, 81 FR 30183, May 16, 2016.

[13] Federal Water Quality Standards for Indian Country and Other Provisions Regarding Federal Water Quality Standards. 2001: *https://19january2017snapshot.epa.gov/sites/production/files/2016-08/documents/federal_wqs_for_indian_country_proposal_signed_1-18-01.pdf.*

water quality standards are necessary to meet the requirements of the Clean Water Act for all Indian country waters where EPA has not either (1) promulgated other Federal water quality standards or (2) explicitly found State or Tribal jurisdiction to adopt water quality standards (and Tribal or State standards are in effect) under the Clean Water Act.

The proposed rule excepted waters from the Determination where a Tribe demonstrated to the Regional Administrator that it had a plan in place, was working to develop such a plan, or the Tribe and Regional Administrator have agreed on a plan for adopting CWA-effective WQS within a ''reasonable amount of time.'' On January 22, 2001, EPA withdrew that proposal prior to its publication in the **Federal Register** to allow additional review.

In 2015, EPA renewed its efforts to engage in rulemaking to provide WQS protections in Indian country, focusing on Indian reservation waters that did not have CWA-effective WQS in place. In 2016, EPA published an advance notice of proposed rulemaking (ANPRM) to initiate a formal dialogue with Tribes, states, the public, and other stakeholders regarding whether EPA should initiate a rulemaking and, if so, what approach EPA should take regarding key policy issues raised by such a rulemaking. 81 FR 66900, September 29, 2016. EPA engaged in extensive consultation and coordination with Tribes leading up to the publication of the ANPRM in the **Federal Register**. EPA provided a public comment period on the ANPRM and received comments from 12 Tribal governments and associations; 11 state officials, agencies, and associations; 11 private citizens; and the Domestic Energy Producers Alliance. Refer to Docket ID No. EPA–HQ–OW–2016–0405 to view comments submitted to EPA on the ANPRM and EPA's website at *https://www.epa.gov/wqs-tech/advance-notice-proposed-rulemaking-federal-baseline-water-quality-standards-indian.*

As a general summary, most comments associated with the ANPRM from Tribal governments expressed support for promulgation of baseline WQS at the time. However, some Tribes expressed concerns with this effort, perceiving it as an infringement on Tribal sovereignty, and requested that EPA not promulgate baseline WQS for Tribes who did not want to be covered by a WQS baseline rule. Comments raised the need for baseline WQS to accommodate regional tailoring, fish consumption rates reflecting individual Tribes' consumption rates, inclusion of protections for cultural and traditional uses, and reliance on antidegradation policies to ensure protection of high quality waters. States raised concerns about EPA's CWA authority and resources to promulgate and effectively implement baseline WQS on Indian reservations. States also commented that baseline WQS might differ from neighboring states' standards and potentially affect upstream dischargers.

On June 11, 2021, EPA sent a ''Notification of Consultation and Coordination'' letter to all 574 federally recognized Tribes to initiate a 90-day pre-proposal Tribal consultation and coordination period that began on June 15, 2021, and ended on September 13, 2021. In addition to two national Tribal listening sessions, EPA presented at 16 meetings with Tribal staff and leadership, held four staff-level coordination/engagement meetings, and held four government-to-government meetings. EPA continued outreach and engagement with Tribes at national and regional Tribal meetings after the end of the consultation period. For more information on the comments raised during these meetings and the comment letters received, please refer to EPA's *Summary Report of Tribal Consultation and Coordination for the Proposed Rule: Federal Baseline Water Quality Standards for Indian Reservations* available in the docket associated with this rulemaking. In addition, on September 15, 2021, EPA consulted with state representatives from the Association of Clean Water Administrators (ACWA) to hear their initial views on the proposed regulatory changes. Participants raised questions about EPA's implementation of baseline WQS under the CWA, EPA's prioritization of Tribes obtaining TAS to administer their own WQS programs, the ability of baseline WQS to be tailored to reflect regional and location-specific information, and how EPA would reconcile differences between downstream Federal baseline WQS and upstream state WQS.

This proposed rule builds upon the prior initiatives and the comments and feedback provided to date which directly inform the baseline WQS articulated in this proposed rule.

D. EPA's Authority for Establishing Baseline Water Quality Standards

Section 303(c)(4)(B) of the CWA provides that the Administrator shall promptly prepare and publish proposed regulations setting forth a revised or new WQS for the navigable waters in any case where the Administrator determines that a revised or new standard is necessary to meet the requirements of the CWA. As explained in section III.C. of this preamble, in 2001 the EPA Administrator made an Administrator's Determination that new or revised WQS are necessary for certain Indian country waters.

EPA is not proposing to amend the Administrator's Determination. This remains the source of authority for EPA's proposal of WQS for Indian country waters that lack such standards. As explained further below in section IV.B of this preamble, this proposed rule would effectuate a significant portion of that Determination, recognizing that Tribes' individual circumstances may vary and focusing initially on Indian reservation waters where EPA and the relevant Tribes agree that baseline WQS are appropriate at this time. This approach would ensure that the Tribes themselves have a role in determining the application of this rule, so that EPA may appropriately target resources to those Indian reservation waters where the agency and the Tribes determine the need for baseline WQS is most pressing. EPA will continue to monitor the development of WQS for Indian reservation waters and consider future action to effectuate the remainder of the Determination. This is discussed further in section IV.B of this preamble.

IV. Where the Proposed Baseline Water Quality Standards Would Apply

A. Waters to Which the Baseline Water Quality Standards Would Apply and Waters That Would be Automatically Excluded

EPA is proposing to promulgate baseline WQS for all waters of the United States in Indian country, with the following automatic exclusions:

(1) The baseline WQS would not apply to Indian reservation waters for which EPA has promulgated other Federal WQS. Currently, EPA has promulgated WQS for only one Tribe, the Confederated Tribes of the Colville Reservation (see 40 CFR 131.35). If EPA were to promulgate other Federal WQS for other Tribes in the future, consistent with applicable regulations, that rulemaking would result in the new Federal WQS being CWA-effective, rather than the baseline WQS.

(2) The baseline WQS would not apply to Indian reservation waters where EPA has explicitly found that a state has jurisdiction to adopt WQS or authorized a Tribe to adopt WQS pursuant to the TAS regulation and where EPA has approved the applicable state or Tribal WQS. As mentioned previously, 47 Tribes have adopted WQS approved by EPA and there are four instances where EPA found states have jurisdiction to administer WQS under the CWA on reservations or parts of reservations.

(3) The baseline WQS would not apply to Indian country waters in off-reservation allotments or dependent Indian communities (DICs), which are included in the definition of Indian country under 18 U.S.C. 1151.

The first two exclusions flow directly from the Administrator's Determination, excerpted in section III.C of this preamble, where the agency explicitly found that standards are not necessary for Indian country waters where EPA has (1) promulgated other Federal water quality standards, or (2) found that a state or Tribe has jurisdiction to adopt WQS and EPA has approved the applicable state or Tribal WQS.

The third exclusion also flows from the Administrator's Determination, which excepted off-reservation allotments from the scope of the Determination. EPA believes that the third exclusion, which also adds an exception for DICs, is warranted because of the infeasibility of covering these waters at this time. As noted in section II.A of this preamble, Indian country includes ''allotments,'' which are lands held in trust by the Federal Government or under a restriction on alienation for the benefit of individuals. Allotments may be within the boundaries of a Tribe's reservation, and thus subject to this proposed rule along with other Indian reservation waters,[14] or outside of a Tribe's reservation boundaries. There are likely many thousands of off-reservation allotments, many of which are scattered throughout the United States. The Department of the Interior's Bureau of Indian Affairs and Bureau of Land Management are in the process of identifying and locating off-reservation allotments in several geographical areas around the country. Until this information is confirmed, EPA is concerned that it would not be practical to ensure uniform implementation of the baseline WQS and would ensure that persons affected by this proposed rule have a meaningful opportunity to comment and engage in the process. Thus, EPA is not currently considering a new Administrator's Determination regarding off-reservation allotments.[15]

As noted in section II.A. of this preamble, the definition of Indian country also includes ''dependent Indian communities'' (DICs). While the term ''dependent Indian communities'' is not further defined in the statutory definition of Indian country, the Supreme Court has held that the term dependent Indian communities ''refers to a limited category of Indian lands that are neither reservations nor allotments, and that satisfy two requirements—first, they must have been set aside by the Federal Government for the use of the Indians as Indian land; second, they must be under Federal superintendence.'' *Alaska* v. *Native Village of Venetie,* 118 S. Ct. 948 (1998). Given the lack of information regarding the location of dependent Indian communities, the application of baseline standards to these areas at this time raises similar implementation concerns as allotments. As explained further in section IV.B of this preamble, in this proposed rule the agency is acting on a significant portion of a nationwide Administrator's Determination and has chosen to focus this initial effort on waters where the agency is best positioned to implement the baseline WQS in collaboration with Tribal partners. Thus, the agency is not currently proposing new or revised WQS for DICs.

EPA invites comment on the automatic exclusions included in the proposal. EPA specifically invites comment on whether dependent Indian communities should be excluded and whether EPA's concerns, outlined above, are warranted.

B. Additional Option for Case-by-Case Exclusions From Application of the Baseline Water Quality Standards

Section 131.XX(a)(4) of the proposed rule enables the Regional Administrator to exclude additional waters on a case-by-case basis informed by consultation with Tribes. The Administrator's Determination explicitly excluded waters where ''the Tribe and/or EPA has or intends to develop a plan for establishing water quality standards under the Clean Water Act within a reasonable time.'' Thus, in this proposed rule, consistent with the Administrator's Determination, the agency is providing that Tribes may seek exclusion from coverage due to ongoing efforts toward establishing WQS. In addition, EPA is providing an option for Tribes to seek exclusion from coverage in the absence of such a plan to establish WQS at this time, upon approval by the relevant EPA Regional Administrator. As noted above, in this proposed rule the agency has chosen to focus this initial effort on Indian reservation waters where Tribes are best positioned to work with the agency to implement WQS.

Although it is important that WQS be established for all Indian reservation waters currently lacking WQS effective under the CWA, EPA recognizes that Tribes' individual circumstances may vary. After consulting over many years with Tribes, and most recently engaging in coordination and consultation with Tribes to inform this proposal (see EPA's *Summary Report of Tribal Consultation and Coordination for the Proposed Rule: Federal Baseline Water Quality Standards for Indian Reservations* available in the docket associated with this rulemaking), EPA understands that, while some Tribes are presently working toward seeking TAS for WQS and/or the adoption of WQS for submittal to EPA, other Tribes may not be in a position to do so at this time. EPA also recognizes that some Tribes may need additional time to gather more information about baseline WQS and prepare for the partnership opportunities the WQS would afford.

To accommodate these considerations, EPA is proposing to allow Tribes to work with the appropriate Regional Administrator to seek an exclusion from the applicability of baseline WQS under this rule. This approach is consistent with the exception in the Administrator's Determination for Tribes that have a plan in place for establishing WQS for EPA approval or are working on a plan and do not yet have EPA-approved WQS for EPA in effect. Specifically, Tribes with such a plan in place or that are working on a plan are not subject to the Administrator's Determination. Similar to its approach to DICs, the agency is proposing to add an exception for coverage under this proposed rule to allow for potential exclusion from coverage for Tribes that do not yet have EPA-approved WQS but demonstrate to the Regional Administrator that baseline WQS are not consistent with Tribal priorities at this time. This approach would ensure that the Tribes themselves have a role in determining the application of this rule. Allowing Tribes to be excluded from applicability of the baseline WQS at this time will also enable EPA staff to appropriately target current resources toward working with those Tribes that are ready to partner with EPA in implementing baseline WQS in the near term. EPA will continue to work with those Tribes that are excluded from coverage at this time on ensuring that water quality on their Indian reservations is protected consistent with the CWA.

To seek exclusion from the scope of coverage of the baseline WQS rule, a Tribe should communicate with the Regional Administrator, explaining the basis of the Tribes' request to be excluded from coverage at this time and providing any supporting information, including, where applicable, plans for

[14] As explained in section II.A of this preamble, Indian reservation refers to both formal reservations and Tribal trust lands.

[15] The Administrator's Determination, see section III.C of this preamble, explicitly carved out off-reservation allotments due to ''gaps in information regarding such allotments[.]'' [Federal Water Quality Standards for Indian Country and Other Provisions Regarding Federal Water Quality Standards. 2001: *https://19january2017snapshot.epa.gov/sites/production/files/2016-08/documents/federal_wqs_for_indian_country_proposal_signed_1-18-01.pdf*].

developing WQS and the associated timeline for doing so. The timeframe for a Tribe seeking to be excluded to communicate to the Regional Administrator begins upon publication of this proposed rule in the **Federal Register** and ends no later than 90 days after the final rule is published in the **Federal Register**. See the discussion of the effective date of the final rule in section VIII of this preamble.

The Regional Administrator, informed by consultation with the Tribe, would approve or disapprove a Tribe's exclusion from the baseline WQS rule. In making a decision regarding exclusion from the initial coverage of the baseline standards, in the absence of a plan to develop Tribal CWA-effective WQS, the Regional Administrator would consider the impacts that exclusion from the baseline WQS rule would have on reservation water quality, including potential impacts to overburdened communities. The Regional Administrator would document the decision for the record.

Under this proposed rule, EPA would maintain a publicly available list, on a dedicated website, of all Tribes with Indian reservations for purposes of this proposed rule and would indicate which of those Tribes are covered by baseline WQS, which are excluded from coverage at this time, and which Tribes already have CWA-effective WQS in place.

A Tribe whose waters are excluded from baseline WQS coverage under the option described above may at any later time request the Regional Administrator to rescind the exclusion. Rescinding the exclusion will result in baseline WQS becoming applicable for waters of the Tribe. The Regional Administrator would document this decision for the record, and the Tribe would be listed as covered by baseline WQS on the website above.

EPA invites comments on the above proposed approach for EPA to allow exclusions from coverage by the baseline WQS.

V. Proposed Baseline Water Quality Standards

The CWA specifies that WQS shall protect public health or welfare, enhance the quality of water, and serve the purposes of the Act. To ''serve the purposes of the Act'' (as defined in sections 101(a)(2), and 303(c) of the Act), WQS must provide, wherever attainable, water quality for the protection and propagation of fish, shellfish, and wildlife, and recreation in and on the water, and must consider the use and value of the waters for those uses and for public water supplies, industrial purposes, and navigation. (40 CFR 131.2). Per 40 CFR 131.22(c), when EPA promulgates WQS, it is subject to the ''same policies, procedures, analyses, and public participation requirements established for States in these regulations.'' The following sections describe the designated uses, water quality criteria, antidegradation implementation methods, and certain other WQS provisions that EPA proposes to promulgate as the applicable baseline WQS for the Indian reservation waters discussed in section IV of this preamble.

Consistent with the *EPA Policy on Consultation and Coordination with Indian Tribes,*[16] the proposed rule would require the Regional Administrator to initiate Tribal consultation with a Tribe(s) when taking actions under this proposed rule that may affect Tribal interests. See proposed 40 CFR 131.XX(b). That is, the Regional Administrator would notify the Tribe(s) of the opportunity for government-to-government consultation when taking actions under the baseline WQS rule.

EPA defines consultation in its 2011 *EPA Policy on Consultation and Coordination with Indian Tribes* 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. EPA would seek information and input regarding implementation of baseline WQS 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,*[17] applicable EPA regional consultation procedures,[18] or any other applicable EPA Tribal consultation policies in effect at the time the proposed rule would be applied. EPA would consider all relevant information obtained through consultation to help ensure that EPA is fully informed before taking a WQS action for Tribes covered by the final baseline WQS rule.

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 the Tribe.

If a Tribe wishes to consult, EPA would follow the *EPA Policy on Consultation and Coordination with Indian Tribes,* and consultation procedures established by the relevant EPA regional office. If a Tribe declines consultation or prefers coordination without government-to-government consultation, the EPA Region would document this in the file associated with the Regional Administrator's action and consultation efforts would be concluded. If the Tribe does not respond, and reasonable efforts to reach out to the Tribe are unsuccessful, the EPA Region would document this in the file associated with the action and would conclude efforts to initiate consultation. Even if the EPA Region concludes such efforts without government-to-government consultation, EPA will nonetheless consider the potential interests of the Tribe, as well as EPA's responsibilities under the CWA, in its decision-making, pursuant to the general trust relationship and other policies.

A. Proposed Baseline Designated Uses

EPA's WQS regulation at 40 CFR part 131 requires states and authorized Tribes to specify appropriate water uses to be achieved and protected (40 CFR 131.10(a)). These uses are referred to as ''designated uses'' and defined at 40 CFR 131.3(f) as designated uses specified in WQS for each water body or segment whether or not they are being attained. Designated uses establish, and communicate to the public, the environmental management objectives and water quality goals for a

[16] The EPA Policy on Consultation and Coordination with Indian Tribes (*https://www.epa.gov/sites/default/files/2013-08/documents/cons-and-coord-with-indian-tribes-policy.pdf*) applies to agency actions and decisions that ''may affect tribal interests.'' Under Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments) agencies must have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that ''have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Tribes.'' See Section XI.F of this preamble for a discussion of E.O. 13175.

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

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

state or authorized Tribe's waters. Clear and accurate designated uses are essential to meet the ultimate objective of CWA section 101(a) to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.

The CWA distinguishes between two broad categories of uses: uses specified in section 101(a)(2) of the Act and uses specified in section 303(c)(2) of the Act. The national goal in CWA section 101(a)(2) is water quality that provides for the protection and propagation of fish, shellfish, and wildlife and for recreation in and on the water ''wherever attainable.'' CWA section 303(c)(2)(A) also requires states and authorized Tribes to establish WQS ''taking into consideration their use and value'' for a number of purposes, including those addressed in section 101(a)(2) of the Act.

The term ''uses specified in section 101(a)(2) of the CWA'' as used in EPA's WQS regulations, refers to uses, including subcategories of uses, that provide for the protection and propagation of fish (including aquatic invertebrates), shellfish, and wildlife, and recreation in and on the water.[19] In addition, EPA interprets CWA section 101(a)(2) to refer not only to protecting water quality so that fish and shellfish and other aquatic life thrive, but also to protecting aquatic life as a food source.[20] EPA defines ''non 101(a)(2) uses'' as those uses that are not related to the protection or propagation of fish, shellfish, wildlife, or recreation in or on the water (see 40 CFR 131.3(q)). These uses include public water supply, agricultural activity, industrial activity, and navigation which are listed in CWA section 303(c)(2)(A) but not in CWA section 101(a)(2). The CWA requires that states and authorized Tribes take all of the uses listed in CWA section 303(c)(2)(A) into consideration when designating uses, but their uses must include 101(a)(2) uses unless the State or authorized Tribe demonstrates that such uses are unattainable. 40 CFR 131.10(j).

Consistent with CWA section 101(a)(2) and EPA's regulation at 40 CFR 131.10, EPA proposes to promulgate the following designated uses for Indian reservation waters consistent with section 101(a)(2). Water quality must provide for:

- *Aquatic Life:* Protection and propagation of fish, shellfish, and wildlife, which includes protection of the health of human consumers of fish, shellfish, and other aquatic life.
- *Primary Contact Recreation:* Provides for recreation in and on the water.

Since 1983, EPA's WQS regulation at 40 CFR 131.10(j) and (k) has required that WQS protect CWA section 101(a)(2) uses unless states and authorized Tribes demonstrate that those uses are infeasible to attain through a use attainability analysis (UAA) consistent with 40 CFR 131.10, effectively creating a rebuttable presumption of attainability.[21] If a state or authorized Tribe adopts designated uses other than the uses specified in section 101(a)(2) of the Act, it must document how its consideration of the use and value of water for those uses appropriately supports the state's action (§ 131.10(a)).

During the Tribal consultation process, many Tribes stressed the value and importance of protecting water quality at levels appropriate for use in various cultural and traditional activities of individual Tribes. CWA section 303(c)(2)(A) provides that uses are to protect the ''public health or welfare'' and consider a water body's use and value for various enumerated and other purposes.[22] Cultural and traditional uses serve to protect the health and welfare of Tribal members exercising such uses and are thus within the purposes enumerated in the Act. EPA proposes to promulgate an explicit cultural and traditional designated use as part of the baseline WQS to ensure full protection of such uses. Accordingly, the baseline WQS would contain a third designated use in addition to the two described above:

- *Cultural and traditional uses:* Protection of cultural and traditional uses of reservation waters.

EPA is not proposing to define cultural and traditional uses in more detail in this rule because they can include a variety of uses specific to the ceremonies and traditions of each Tribe, and each use may require different levels of protection. For example, when developing NPDES permit limits, a separate limit may not be necessary to protect full body immersion in the water or fishing-related cultural or traditional practices, if the limit to protect the primary contact recreation use is sufficient. However, practices that require protection of aquatic plants used for basket weaving, for example, may not be adequately covered by an aquatic life use or its protective criteria. Further, Tribal treaty or other reserved rights to fish, hunt, and/or gather on Indian reservations could generally be protected by such cultural and traditional designated uses, to the extent they are not protected by an aquatic life use or primary contact recreation use.

EPA is considering whether to promulgate any non-101(a)(2) uses, such as public water supply use, agricultural use, or industrial use, for all waters covered by this baseline WQS rule in light of the requirements of 303(c) and 40 CFR 131.10(a). Specifically, EPA is soliciting comment on whether EPA should designate a public water supply use for all Indian reservation fresh waters[23] covered by the scope of this rule or whether this use is best addressed by allowing Tribes to request such a designation, as explained below. Many states have established such a use on large numbers of their water bodies, and EPA anticipates that many Tribes may similarly desire such a use to be designated on some or most of their waters to help protect public water supply sources. However, an important consideration is that designating a public water supply use for all Indian reservation waters in this rule without accounting for local considerations could result in a designation on a water body where such a use is not appropriate (*e.g.,* waters that may not have enough flow to support public water supply uses).

If EPA does not promulgate a public water supply use for all Indian reservation fresh waters covered by the final baseline WQS rule, a Tribe may subsequently request the Regional Administrator designate a public water supply use for its reservation water bodies if available information indicates that (1) there is use and value for such a use and (2) it is thus appropriate to be designated after this rule becomes effective. Conversely, if EPA were to promulgate a public water supply use for all Indian reservation waters covered by the final baseline WQS rule, a Tribe

[19] 80 FR 51024, August 21, 2015. Preamble to the final Water Quality Standards Regulatory Revisions, 2015.

[20] 80 FR 51024, August 21, 2015. Preamble to the final Water Quality Standards Regulatory Revisions, 2015.

[21] EPA's 1983 regulation and ''the rebuttable presumption stemming therefrom'' have been upheld as a ''permissible construction of the statute'' (*Idaho Mining Association* v. *Browner,* 90 F. Supp. 2d 1078, 1097–98 (D. Idaho 2000)). Also refer to, Water Quality Standards Regulatory Revision (80 FR 51019, p. 51024 and FN 12), August 21, 2015.

[22] CWA section 303(c)(2)(A): Such 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 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.

[23] Waters in which the salinity is equal to or less than 1 part per thousand 95% or more of the time. *Model Water Quality Standards Template for Waters on Indian Reservations,* June 2020. *https://www.epa.gov/wqs-tech/water-quality-standards-tools-tribes#tab3.*

could subsequently request that the Regional Administrator remove such a designation, consistent with 40 CFR 131.10(a) and (k)(3), from specific waters if information is available indicating that (1) there is no use and value for such a designated use; and (2) it is not an appropriate designated use.

EPA recognizes that the designated uses proposed in this rule may not be attainable in all Indian reservation waters because of Tribe-specific or site-specific factors. In such circumstances, EPA is proposing a process to subsequently revise designated uses (or establish WQS variances) in the future or add additional designated uses consistent with EPA's WQS requirements. Discussion of a Federal administrative procedure for a Regional Administrator to revise baseline designated uses for specific Indian reservation water bodies is provided in section VI of this preamble.

EPA invites comments on the proposed designated uses. Specifically, EPA requests comments on establishing an aquatic life use and primary contact recreation use consistent with CWA section 101(a)(2) for all Indian reservation waters covered by the final baseline WQS rule. EPA also requests comments on the explicit inclusion of a cultural and traditional designated use. Additionally, EPA requests comments on whether to include any of the designated uses specified in CWA section 303(c)(2)(A) but not included in CWA section 101(a)(2) such as public water supply use, agricultural use, or industrial use for all Tribal reservation waters identified for coverage under this baseline WQS proposed rule.

B. Proposed Baseline Water Quality Criteria

1. Overview of Water Quality Criteria in Standards

EPA's WQS regulation at 40 CFR 131.11 requires states and authorized Tribes to adopt water quality criteria that protect designated uses. These 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. (See 40 CFR 131.11(a) and (b)) Special requirements apply to priority pollutants as discussed below. Narrative criteria are qualitative descriptions of the conditions necessary to protect a water body's designated use, while numeric criteria—expressed as levels, concentrations, toxicity units or other values—are quantitative descriptions of those conditions. Narrative criteria accompanied by binding translation procedures, as part of the water quality standards, provide a basis for determining case-specific numeric values to protect the applicable designated use. Both narrative and numeric criteria provide a basis for the development of NPDES permit limits, water quality assessments, and other CWA purposes.

CWA section 304(a)(1) requires EPA to develop and publish, and from time-to-time update, recommended criteria for water quality accurately reflecting the latest scientific knowledge regarding concentrations of specific chemicals or levels of parameters in water that protect aquatic life and human health. These recommended criteria are based on sound scientific rationale to protect the designated use(s), and are based solely on data and scientific judgments on the relationship between pollutant concentrations and environmental and human health effects. CWA section 304(a)(1) criteria do not reflect consideration of economic impacts or the technological feasibility of meeting the concentrations in ambient water.

CWA section 304(a)(2) requires EPA to develop and publish, and from time-to-time update, information on the factors necessary to restore and maintain the chemical, physical, and biological integrity of all navigable waters and the factors necessary for the protection and propagation of shellfish, fish, and wildlife for classes of receiving waters and to allow recreation in and on the water.

States and authorized Tribes should establish numeric criteria based on EPA's recommended CWA section 304(a) criteria, CWA section 304(a) criteria modified to reflect site-specific conditions, or other scientifically defensible methods. See 40 CFR 131.11(b)(1). EPA's regulation at 40 CFR 131.11(b)(2) provides that states and authorized Tribes should establish narrative criteria where numeric criteria cannot be determined or to supplement numeric criteria. EPA must comply with these requirements when it promulgates Federal WQS (40 CFR 131.22(c)).

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 CWA section 304(a) criteria, as necessary to support the states' and authorized Tribes' designated uses. ''Priority toxic pollutants'' are identified in 40 CFR part 423, appendix A—126 Priority Pollutants. As articulated in EPA's guidance [24] that addresses the adoption of criteria for priority toxic pollutants in WQS, one approach to meet this requirement includes adopting a procedure for applying a narrative WQS provision that prohibits toxicity in receiving waters. Such a procedure would be used in calculating derived numeric values, which are to be used for all purposes under CWA section 303(c). At a minimum, states and authorized Tribes must develop numeric values for CWA section 307(a) toxic pollutants for which EPA has published CWA section 304(a) criteria where these pollutants are discharged or present in the affected waters and could reasonably be expected to interfere with designated uses.

As discussed in more detail below, EPA proposes narrative criteria with binding numeric translation procedures designed as the applicable WQS to protect the proposed designated uses for Indian reservation waters covered by a final rule. EPA would use these procedures to translate the narrative criteria into numeric values on a case-by-case basis to best reflect site-specific conditions and consideration of new and/or available information representing the latest sound science as discussed in more detail below. These procedures would be used for all purposes under CWA section 303(c) as necessary to protect the applicable designated uses. Although not specifically required for non-priority pollutants, providing the same information for those other pollutants is helpful toward meeting the CWA goals and increasing transparency for stakeholders.

2. EPA's Proposed Approach for Baseline Water Quality Criteria

This rulemaking proposes to establish CWA-effective WQS for waters on more than 250 Indian reservations nationwide where EPA is the primary CWA implementing authority. The baseline criteria would provide scientifically sound criteria, protect the applicable designated uses, and enable an appropriate degree of customization to best account for site-specific conditions and water attributes of importance to individual Tribes.

Consistent with the requirements of the CWA and EPA's regulation at 40 CFR part 131, EPA proposes to establish the narrative water quality criteria in proposed 40 CFR 131.XX(d)(1) to protect the applicable baseline

[24] Transmittal of Final ''Guidance for State Implementation for Water Quality Standards under CWA section 303(c)(2)(B).'' December 1988. *https://www.epa.gov/sites/production/files/2014-10/documents/cwa303c-hanmer-memo.pdf.*

designated uses proposed in this rule and discussed in section V.A of this preamble. The proposed narrative criteria are as follows:

1. All waters shall be free from toxic, radioactive, conventional, non-conventional, deleterious or other polluting substances in amounts that will prevent attainment of the applicable baseline designated uses;

2. All waters shall be free from adverse impacts to the chemical, physical or hydrologic, or biological integrity caused by pollutants or pollution that prevent the attainment of applicable designated uses;

3. All waters shall be free from substances attributable to wastewater or other discharges that:

A. Settle to form objectionable deposits;

B. Float as debris, scum, oil, or other matter to form nuisances;

C. Produce objectionable color, odor, taste, or turbidity; or

D. Produce undesirable or nuisance aquatic life.

4. All waters shall be free from conditions that would likely jeopardize the continued existence of any threatened or endangered species listed under the Federal Endangered Species Act or result in the destruction or adverse modification of such species' critical habitat.

5. All waters shall maintain a level of water quality at their pour points to downstream waters that provide for the attainment and maintenance of the water quality standards of those waters, including the waters of another state or a federally recognized Tribe.

For the first proposed element of the baseline narrative criteria under 1., the term ''polluting substances'' includes ''pollutants'' as defined in CWA section 502(6) and 40 CFR 122.2. The statute defines ''pollutant'' broadly to include dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discharged equipment, rock, sand, cellar dirt and industrial, municipal, or agricultural waste discharged into water. CWA section 502(6). For regulatory purposes, pollutants are grouped into conventional, toxic, and nonconventional pollutant categories under the National Pollutant Discharge Elimination System (NPDES) program:

Conventional pollutants are those defined in CWA section 304(a)(4) and 40 CFR 401.16 (5-day biochemical oxygen demand, total suspended solids, fecal coliform, pH, and oil and grease).

Toxic (priority) pollutants are those defined in CWA section 307(a)(1) (and listed in 40 CFR 401.15 and appendix A of 40 CFR part 423) and include 126 metals and predominately manmade organic compounds.

Nonconventional pollutants are those that do not fall under either of the above categories (conventional or toxic pollutants) and include parameters such as chlorine, ammonia, nitrogen, phosphorus, dissolved oxygen, temperature, chemical oxygen demand (COD), and whole effluent toxicity (WET).[25]

The second proposed element of the baseline narrative criteria under 2. relates to adverse impacts, caused by pollutants or pollution, to the chemical, physical or hydrologic, or biological integrity of the waters covered under this proposed rule. The term ''pollution'' is defined in CWA section 502(19) as the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water.

Chemical characteristics of waterbodies include values for parameters such as ions, hardness, pH, and dissolved organic carbon (DOC).

Physical and hydrologic characteristics and physical habitat of waterbodies, in the broad sense, include all those structural attributes that influence or provide sustenance to organisms within the water body, including the characteristic pattern of flow magnitude, timing, duration, frequency, and rate of change of a water body.[26] [27] Hydrology and habitat play a central role in supporting the chemical, physical, and biological integrity of streams and rivers and the services they provide. In addition, those characteristics are critical for addressing resiliency of watersheds in the face of climate change. EPA recognizes that Tribes are disproportionately vulnerable to the impacts of climate change, due in part to their dependence on specific geographic areas for their livelihoods; unique cultural, economic and political characteristics; and limited resources to prepare for, respond to and recover from climate-related hazards.[28] There is a strong need to develop adaptation strategies in partnership with Tribes that promote sustainability and reduce the impact of climate change on Tribes.[29] Observations, oral and written knowledge, innovations, practices, and beliefs developed by Tribes through interaction and experience with the environment contributes to the scientific, technical, social, and economic advancements of the United States and our collective understanding of the natural world. This knowledge should be fully integrated into the adaptation strategies. Adaptive capacity, or the ability of a stream ecosystem to withstand climate-driven stresses, may be seen in rivers whose flow patterns more closely resemble the natural flow regime.[30]

Biological characteristics of water bodies include the ability of an aquatic ecosystem to support and maintain a balanced and indigenous community of organisms having species composition, diversity, population densities, and functional organization similar to that of reference conditions.

The third proposed element of the baseline narrative criteria under 3. relates specifically to the discharge of substances that adversely affect the waters covered by this proposed rule. This element includes provisions that would prohibit the discharge of substances that would limit the enjoyment or utility of these waters.

The fourth proposed element of the baseline narrative criteria under 4. would prohibit conditions that would likely jeopardize endangered or threatened species that are listed under the Endangered Species Act or result in the destruction or adverse modification of such species' critical habitat.

The fifth proposed element of the baseline narrative criteria under 5. would require that all waters maintain a level of water quality at their pour points to downstream waters that provide for the attainment and maintenance of the water quality of downstream waters of those waters, including the waters of another state or a federally recognized Tribe. In this context, ''pour points'' refers to the points of entry into downstream water bodies. Pursuant to CWA sections 303 and 101(a), the Federal regulation at 40 CFR 131.10(b) requires that upstream WQS ensure the attainment and maintenance of downstream WQS.

The rationale for establishing a downstream protection narrative criterion is described in an EPA guidance document entitled ''Protection of Downstream Waters in Water Quality Standards: Frequently Asked Questions (June 2014).'' In that document, EPA interprets the term ''downstream'' to include both intra- and interstate waters, as well as waters that form a boundary between adjacent

[25] See *https://www.epa.gov/sites/default/files/2015-09/documents/pwm_chapt_01.pdf.*

[26] Consolidated Assessment and Listing Methodology, USEPA, July 2002.

[27] *USGS–EPA Technical Report: Protecting Aquatic Life from Effects of Hydrologic Alteration,* also called the Hydrologic Criteria Technical Document. 2016.

[28] See *https://www.epa.gov/system/files/documents/2021-09/epa-climate-adaptation-plan-pdf-version.pdf.*

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

[30] *USGS–EPA Technical Report: Protecting Aquatic Life from Effects of Hydrologic Alteration,* also called the Hydrologic Criteria Technical Document. 2016.

jurisdictions. The document highlights that designated uses and water quality criteria that ensure attainment and maintenance of downstream WQS (1) help to avoid situations where downstream segments become impaired due, either in part or exclusively, to pollution source(s) located in upstream segments; (2) may help support more equitable use of any assimilative capacity available to upstream and downstream pollution sources and/or jurisdictions and may facilitate restoration of the downstream waters; and (3) prevents the shifting of responsibility for pollution reductions from upstream sources and/or jurisdictions to downstream sources and/or jurisdictions.

The document further notes that state and Tribal designated uses and criteria that protect downstream waters may increase the resiliency of the United States' waters to climate change and may help address environmental justice issues in urban waters. In addition, designated uses and criteria that ensure attainment and maintenance of downstream WQS facilitate consistent and efficient implementation and coordination of water quality-related management actions (*e.g.,* water quality monitoring and assessment, development of TMDLs; watershed-based restoration and protection plans; NPDES permitting; and CWA section 401 certifications).

EPA invites comments on the proposed narrative water quality criteria.

3. Proposed Numeric Translation Procedures

EPA is proposing binding numeric translation procedures as part of the baseline WQS that would be used to develop numeric values, or ''translations,'' of the narrative criteria in local situations to protect the applicable designated uses. Specifically, the binding numeric translation procedures in proposed 40 CFR 131.XX(d)(2) would require the Regional Administrator to use the procedures as necessary to derive numeric translations for specific water bodies as needed for all purposes under the CWA. As such, these translations would occur during CWA implementation and would comply with public participation requirements of applicable CWA implementation programs. EPA has included the words ''as necessary'' to recognize not only that numeric values may be needed for different parameters in different circumstances, in accordance with EPA regulations, but also to reflect variations in the way criteria are applied in different CWA implementation programs.

a. Proposed Numeric Translation Procedures and Derivation of Numeric Values

The proposed numeric translation procedures are provided in 40 CFR 131.XX(d)(2) of the proposed rule. The five options established under the procedures are summarized in Table 1 of this preamble below.

TABLE 1—SUMMARY OF PROPOSED PROCEDURES FOR EPA TO TRANSLATE NARRATIVE CRITERIA TO NUMERIC VALUES

Option One	
For parameters for which EPA has section 304(a) criteria recommendations.	Translate the baseline narrative criteria using EPA's national recommended water quality criteria published under section 304(a).
Option Two	
For parameters for which EPA has section 304(a) criteria recommendations, and information and/or data are available that more accurately reflect site-specific conditions.	Translate the baseline narrative criteria using EPA's national recommended water quality criteria published under section 304(a) of the CWA modified to reflect site-specific conditions and aquatic communities based on a sound scientific rationale, including EPA published methodologies if available, incorporating where relevant: • A fish consumption rate protective of Tribal fish consumers or EPA's latest default fish consumption rate, if appropriate, or • Available ambient monitoring data reflecting site-specific water chemistry inputs, or • Protective default water chemistry inputs reflecting published EPA guidance, where available, or • Indigenous Knowledge, often referred to as Traditional Ecological Knowledge, as appropriate, or • Other scientifically defensible assessments, for example, guidance published by EPA regions, or those related to Endangered Species Act consultation.
Option Three	
Where Tribal or state numeric criteria are available (as described at right) that are more appropriate, and for parameters for which EPA does not have CWA section 304(a) criteria recommendations.	Translate the baseline narrative criteria using numeric criteria available in: • WQS adopted by the Tribe but not yet CWA effective, or • Applicable CWA-effective WQS in an adjacent or other relevant state(s) or Tribe(s) that are in either case based on a sound scientific rationale, reflect similar waterbody characteristics, and ensure protection of the applicable designated uses established under this rule, taking into consideration Indigenous Knowledge, as appropriate.
Option Four	
For waters of the Great Lakes System ...	Translate the baseline narrative criteria using provisions of the Water Quality Guidance for the Great Lakes System (40 CFR part 132), where applicable, to ensure that the translations are as protective as required by 40 CFR part 132.
Option Five	
If none of the above options apply or are available.	EPA may rely on existing CWA implementation provisions to translate applicable narrative criteria, as necessary.

Details regarding each of these options are as follows.

Option One. In translating the narrative criteria for specific situations, the Regional Administrator could rely on EPA's current national recommended CWA section 304(a) water quality criteria,[31] where available, to set appropriate standards to ensure protection of the applicable baseline designated uses. These water quality criteria provide guidance for states and authorized Tribes in adopting WQS under CWA section 303(c). They also provide guidance to EPA when promulgating WQS.

Option Two. The Regional Administrator could rely on *Option Two* if information or data are available that more accurately reflect site-specific

[31] See *Current Water Quality Criteria Tables* at *https://www.epa.gov/wqc.*

conditions. The second option of the binding translation procedure provides that EPA would modify the CWA section 304(a) recommended criteria to protect site-specific conditions based on a sound scientific rationale, including EPA published methodologies, if available, and, as appropriate, Indigenous Knowledge (IK), often referred to as Traditional Ecological Knowledge (TEK), where consistent with EPA's regulations and CWA statutory requirements,[32] [33] incorporating where relevant, but not limited to: (1) a fish consumption rate protective of Tribal fish consumers or EPA's latest default fish consumption rate, if appropriate, or (2) available ambient monitoring data reflecting site-specific water chemistry inputs, or (3) protective default inputs reflecting published EPA guidance where available, or (4) other scientifically defensible assessments, for example, those related to Endangered Species Act consultation.

This option provides that EPA may consider available data and information concerning the physical, chemical, and biological quality of the waters in Indian country and adjacent waters; scientifically defensible technical and scientific information, including EPA published methodologies, IK, as appropriate, ambient monitoring data reflecting site-specific waterbody chemistry and any EPA technical and regional guidance to inform those calculations; information regarding Tribal treaty or other reserved rights to aquatic or aquatic-dependent resources; and any EPA guidance on policy for, and implementation of, the WQS program, including the Water Quality Standards Handbook.[34]

EPA has developed several procedures to derive site-specific aquatic life criteria. The Recalculation Procedure accounts for relevant differences between the sensitivities of the aquatic organisms in the national dataset and the sensitivities of organisms that are present at the site. For more information, refer to EPA's Revised Deletion Process for the Site-specific Recalculation Procedure for Aquatic Life Criteria (2013). For fixed and hardness-based metals criteria (currently metals other than aluminum and copper), the Water-Effect Ratio (WER) procedure accounts for relevant differences between the toxicities of a metal in laboratory dilution water and in the site water. In performing a WER, care must be taken to ensure that samples and tests are representative of the potential conditions at a site, such that the WER-derived criteria continue to be protective under conditions when the metals are highly bioavailable. For more information, refer to EPA's Interim Guidance on Determination and Use of Water-Effect Ratios for Metals (1994) and Modifications to Guidance Site-Specific Criteria (1997). EPA's national recommended CWA section 304(a) criteria for aluminum and copper both take site-specific water chemistry into account, obviating the need for a separate procedure like the WER.

During Tribal consultation, many Tribes expressed support for use of appropriate fish consumption rates, one of the input parameters used to calculate human health criteria, to reflect the true rate of subsistence consumption by a Tribe. EPA recommends that Regional Administrators calculating human health criteria select a fish consumption rate based upon local data. Where sufficient data are available, a fish consumption rate should be selected that reflects consumption that is not suppressed by fish availability or concerns about the safety of fish for human consumption. Regional Administrators could rely on use of the ''Tribal/State Human Health Criteria Calculator,'' [35] available on EPA's website, to adjust EPA's CWA section 304(a) human health criteria recommendations to reflect a Tribe's fish consumption rate and selected cancer risk level.

In 2015, EPA revised 94 of the existing CWA section 304(a) human health criteria recommendations to reflect the latest scientific information, including updated exposure factors (body weight, drinking water consumption rate, fish consumption rate), bioaccumulation factors, and toxicity factors (reference dose, cancer slope factor). The updated criteria follow EPA's current methodology for deriving human health criteria (USEPA 2000).[36] EPA's updated recommended fish consumption rate (22 g/day) is protective of the general population of fish consumers. EPA's national default subsistence value of 142 g/day represents subsistence fishers whose daily consumption is greater than the general population, as presented in EPA's 2000 Human Health Methodology. A further discussion of fish consumption rates may be found in the 2000 Human Health Methodology and EPA's 2016 Guidance for Conducting Fish Consumption Surveys.

When translating the narrative criteria to protect consumers of fish, EPA would consult with the Tribe and determine the need for a modified fish consumption rate in those cases where the Tribe or EPA can support the modified rate with adequate scientifically defensible data and information,[37] or establish that Tribes rely on fish consumption for subsistence (thereby justifying applying the 142 g/day rate). Applicable treaty or other reserved fishing rights would inform this determination. In those consultations, EPA would apply its Guidance for Discussing Tribal Treaty Rights.[38]

Option Three. The binding translation procedure allows the Regional Administrator to utilize *Option Three* where appropriate. Specifically, the Regional Administrator could utilize this option when WQS adopted by the Tribe are not yet CWA effective, or CWA-effective WQS applicable in an adjacent or other relevant state(s) or Tribe(s), are based on a sound scientific rationale, reflect similar waterbody characteristics, and ensure protection of the applicable designated uses, taking into consideration IK, as appropriate.

EPA proposes *Option Three* to recognize the feedback received during the Tribal consultation process. Many Tribes stressed the value and importance of relying on existing Tribal WQS that, although not yet EPA-approved, are based on a sound scientific rationale and could fill gaps or provide more refined coverage than is available under *Option One* or *Two.* Similarly, under *Option Three,* the Regional Administrator could also rely on Tribal or state numeric criteria that are more appropriate because, for example, they protect designated uses not considered in *Options One* or *Two* or consider site-specific factors, exposure routes, human health

[32] Guidance for Federal Departments and Agencies on Indigenous Knowledge. *https://www.whitehouse.gov/wp-content/uploads/2022/12/OSTP-CEQ-IK-Guidance.pdf.*

[33] EPA Policy on Environmental Justice for Working with Federally Recognized Tribes and Indigenous People (2014). *https://www.epa.gov/sites/default/files/2017-10/documents/ej-indigenous-policy.pdf.*

[34] EPA Water Quality Standards Handbook. *https://www.epa.gov/wqs-tech/water-quality-standards-handbook.*

[35] See *https://www.epa.gov/wqs-tech/water-quality-standards-tools-tribes.*

[36] *Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health (2000),* EPA–822–B–00–004, October 2000.

[37] Guidance for Conducting Fish Consumption Surveys. 2016: *https://www.epa.gov/sites/default/files/2016-12/documents/guidance-fish-consumption-surveys.pdf.*

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

endpoints, or other factors not considered in *Option One* or *Two;* or for parameters for which EPA does not have CWA section 304(a) criteria recommendations.

Option Four. The Regional Administrator would use the Water Quality Guidance for the Great Lakes System (40 CFR part 132) (part 132 Guidance), where applicable, to translate the narrative criteria, as defined in 40 CFR 132.2, to ensure appropriate protection of Great Lakes waters. Both the Great Lakes provisions for water quality criteria discussed here (proposed 40 CFR 131.XX(d)(2)(iv)) and the broader requirements for baseline WQS decisions to be consistent with 40 CFR part 132 (proposed 40 CFR 131.XX(k)) are designed to reinforce the requirements in CWA section 118(c)(2) that all WQS, antidegradation policies, and implementation procedures within the Great Lakes system must continue to be consistent with the 40 CFR part 132 Guidance.

Option Five. For those parameters without established CWA section 304(a) water quality criteria recommendations, the Regional Administrator would follow *Option Three* or *Option Four* of the translation procedures if applicable. In circumstances where none of the first four options are applicable, *Option Five* provides that the Regional Administrator would rely on existing CWA implementation provisions to translate the baseline narrative criteria, where necessary. For example, the Regional Administrator could rely on 40 CFR 122.44(d)(1)(vi)(A) and (C) for NPDES permitting purposes. This fifth option would ensure consistency with the proposed requirement that the Regional Administrator derive numeric translations of the baseline narrative criteria for all purposes under CWA section 303(c) for specific parameters to protect the applicable designated uses for specific water bodies.

For all five options, when EPA translates the baseline narrative criteria for CWA implementation purposes after the final baseline WQS rule is in effect, the associated numeric values would be used for purposes of developing CWA section 402 and 404 permits, section 303(d) lists and TMDLs, and section 401 certifications, where applicable. In each case, EPA would identify and explain the derived numeric values as part of the public process associated with the respective CWA implementation program. EPA would rely on the public participation requirements associated with the respective CWA implementation programs to provide for public review of any resulting numeric values. At its discretion, a Regional Administrator could also provide a specific public process on EPA's translation of the baseline narrative criteria, in advance of the public process associated with the respective CWA implementation program, to solicit input from affected parties specifically on the derivation of the numeric values. EPA would make the numeric values, along with the spatial extent (*i.e.,* waterbody segment) for which the narrative criteria were translated, publicly available at a website that will be provided in the final rule. At the request of a Tribe, EPA could also provide this information to the Tribe in a non-electronic format.

Making information available to the respective Tribe, the public, the regulated community, and other stakeholders is important to ensuring regulatory certainty and clarity. Documents associated with CWA implementation also provide transparency for the public. For federally issued NPDES permits, for example, EPA would describe in the permit fact sheet or statement of basis how it used the numeric values translated from the applicable baseline narrative criteria to derive WQBELs.

EPA solicits comment on EPA's proposed approach to rely on narrative criteria with an associated binding numeric translation procedure. EPA also invites comment on other approaches that should be considered, including reliance on IK, as appropriate.

b. EPA To Translate the Baseline Narrative Criteria

EPA is the authority responsible for translating the applicable baseline narrative criteria for use in CWA regulatory actions because the baseline WQS would be federally promulgated, and the proposed regulatory text directs EPA to undertake this translation step. The most common example would be EPA issuance of a NPDES permit for a discharge to Indian reservation waters where the baseline WQS would apply. The EPA regional office (including the WQS and implementing programs) would rely on the binding translation procedures to translate narrative criteria for pollutants in the discharge to determine if they have a reasonable potential to cause or contribute to an exceedance of WQS. EPA would use those numeric values to derive WQBELs for those pollutants. Other implementation examples are discussed in section VII of this preamble.

EPA also notes that if situations arise where there are significant differences between upstream state WQS and baseline WQS, EPA would address them similarly to how EPA currently works with two states, or an authorized Tribe and a state, to address significantly differing standards set on a shared water body. Early communication among the potentially affected jurisdiction(s) and EPA is key to help define the scope of the issue and determine protective endpoints. This process entails working with the applicable entities to ensure all WQS are considered. States, Tribes, and EPA are also able to rely on the public notice and comment opportunities to inform the derivation of numeric values translated from the applicable baseline narrative criteria and the establishment of WQBELs as mentioned previously. In addition, EPA's regulation at 40 CFR 131.7 provides a mechanism for the resolution of unreasonable consequences that may arise from differing WQS set by states and authorized Tribes located on common bodies of water. Although 40 CFR 131.7 does not apply to situations with different Federal and state WQS on a shared water body, EPA could utilize procedural steps similar to those laid out in that section where appropriate to work with the relevant parties in a neutral fashion in an effort to resolve the issues involved.

C. Proposed Baseline Antidegradation Policy and Implementation Procedures

Antidegradation requirements are an essential component of WQS and play a critical role in maintaining and protecting valuable water resources. Antidegradation provides a framework for maintaining and protecting water quality that has already been achieved. This includes maintaining and protecting existing uses,[39] high quality waters, and the water quality of outstanding national resource waters (ONRWs). Maintaining water quality, particularly high water quality, is critical to supporting public health, economic growth, community growth, and high functioning natural systems. It provides a margin of safety that will afford the water body increased resilience to potential future stressors, including climate change. It is more cost effective and resource efficient to keep water clean than to restore or remediate waters that have been impaired. The Federal antidegradation regulation in 40 CFR part 131 requires development and adoption of an ''antidegradation policy'' and development of ''antidegradation implementation methods.'' 40 CFR 131.12.

[39] 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.''

EPA is proposing an antidegradation policy for Indian reservation waters consistent with the antidegradation regulation at 40 CFR 131.12(a). The proposed antidegradation policy for Indian reservation waters would establish three levels of protection: protection for existing uses, protection for high quality waters, and protection for ONRWs. Please refer to the proposed antidegradation policy found at 40 CFR 131.XX(e) of this proposed rule.

Protection for existing uses (Tier 1) would require that the water quality necessary to protect existing uses be maintained. ''Existing uses'' are defined at 40 CFR 131.3(e) as 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. Tier 1 protection would establish the floor of water quality for all Indian reservation waters.

Protection for high quality waters (Tier 2) would require that where water quality exceeds the levels necessary to support protection and propagation of fish, shellfish, and wildlife, and recreation in and on the water, that quality shall be maintained and protected. A lowering of water quality could be allowed if the Regional Administrator finds with written agreement from the Tribe, after public involvement and intergovernmental coordination, that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located. ''Exceeds'' in this context refers to water quality being better than necessary to support CWA section 101(a)(2) uses. The Regional Administrator must assure that any lowering of high water quality still results in water quality that protects existing uses. In addition, the Regional Administrator must assure that no lowering of high water quality is allowed unless statutory and regulatory requirements for existing point sources and all Tribal-regulated,[40] cost-effective, and reasonable best management practices for nonpoint source controls are achieved. Tier 2 protection is intended to establish protection for high quality waters, and to provide a public, systematic decision-making process for determining whether to allow limited degradation of water quality in these high quality waters.

This approach is in accordance with 40 CFR 131.12(a)(2) which provides that water quality shall be maintained and protected unless ''the State'' finds that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located. Here the Regional Administrator, as the entity implementing the antidegradation policy, would be making such a finding. In order to ensure that Tribes are able to exercise appropriate oversight over their waters based on local priorities, proposed 40 CFR 131.XX(e)(2) provides that the Regional Administrator would not allow the lowering of high water quality unless the relevant Tribe agrees in writing that such a lowering is necessary to accommodate important economic or social development in the area in which the waters are located. If the Tribe does not provide its written agreement, then the Regional Administrator will maintain the current high water quality WQS.

In determining whether a lowering of high water quality is necessary, the Regional Administrator and the Tribe would consider the results of an analysis of practicable alternatives, which is an analysis of pollution control and pollution prevention alternatives.[41] If identified, a less or non-degrading practicable alternative would be selected for implementation consistent with 40 CFR 131.12(a)(2)(ii). The Regional Administrator and Tribe would also consider the results of a socio-economic analysis which would assess the social and economic importance of the activity to the community impacted by the degraded water quality. These analyses could be completed by the agency, the Tribe, or a third party (for example, the discharger affecting water quality). EPA is considering whether these analyses could be completed by third parties and solicits comment on whether this rule should include such a requirement, or alternatively leave open which entity will provide such information.

Protection for ONRWs (Tier 3) would require that water quality in water bodies of exceptional recreational, ecological, or cultural significance would be maintained and protected. The term ''cultural significance'' is not a part of 40 CFR 131.12(a)(3). EPA is proposing to include this language at proposed 40 CFR 131.XX(f)(4) to clarify that Tribes are able to identify highly valued waters on their reservations based on their cultural significance in keeping with the intended purpose of this rule. This provision would establish the highest level of protection for water bodies by prohibiting the permanent lowering of water quality. However, activities that result in short-term and temporary changes in the water quality of the ONRW may be allowed. EPA interprets short-term and temporary as weeks or months, and not years. The intent is to limit degradation to the shortest possible time and prohibit any permanent degradation. EPA is not proposing to classify any water body as an ONRW in the final baseline standards rule. See the proposed antidegradation implementation method at proposed 40 CFR 131.XX(f)(4) and the associated preamble discussion of Tier 3 below for the process to nominate a water to be an ONRW.

The purpose of this antidegradation policy would be to maintain and protect the finite public resource of clean water and ensure that a decision to allow a lowering of high water quality is made in a public manner and serves the public good.

EPA invites comments on the proposed antidegradation policy provisions. EPA is not proposing to revise 40 CFR 131.12 with this proposal, and thus does not seek comment on the provisions in 40 CFR 131.12. Rather, EPA invites comment on the antidegradation policy as applied herein to certain Indian reservation waters for Tribal WQS decisions.

EPA also proposes to establish legally binding antidegradation implementation methods consistent with 40 CFR 131.12(b) and proposed 40 CFR 131.XX(e). Please refer to the proposed antidegradation implementation methods regulatory language found at 40 CFR 131.XX(f) of this proposed rule.

Antidegradation implementation methods (AIMs) are a set of provisions that describe how a state's or authorized Tribe's antidegradation policy will be implemented. As currently implemented under 40 CFR 131.12, AIMs can be legally binding or in guidance. As stated in 40 CFR 131.12(b), all states and authorized Tribes are required to develop AIMs that are consistent with 40 CFR 131.12(a) and their own antidegradation policy. States and authorized Tribes must make these AIMs available to the public and must provide the public an opportunity to provide input on the AIMs during their development and any subsequent revision (40 CFR 131.12(b)).

In addition to EPA's proposed antidegradation policy and consistent with 40 CFR 131.12, EPA is proposing antidegradation implementation methods, as provided at proposed § 131.XX(f), which address the following elements to implement EPA's proposed antidegradation policy:

[40] See *https://www.epa.gov/sites/default/files/2014-10/documents/davies-regrequire-memo.pdf*.

[41] ''*Practicable,* in the context of § 131.12(a)(2)(ii), means technologically possible, able to be put into practice, and economically viable.'' 40 CFR 131.3(n).

• *Existing use protection (Tier 1):* describes how the Regional Administrator would ensure the maintenance and protection of existing uses and the water quality to protect the existing uses. EPA would implement this provision for Tribes covered by this rule, by reviewing and determining whether a lowering of water quality would impair an existing use. If the Regional Administrator finds that a water body has an existing use that has not been designated, such as a public water supply use, the Regional Administrator would ensure protection of that undesignated, but existing use. If an undesignated use is identified as an existing use, then the Regional Administrator would work with the Tribe to adopt this use as a designated use to ensure its future protection. At minimum, 40 CFR 131.10(i) would dictate that the EPA and Tribe determine the best way to revise designated uses to protect any existing use that is presently being attained.

• *High quality water protection (Tier 2):* (1) describes how the Regional Administrator would identify high quality waters on a parameter-by-parameter basis; (2) describes how the Regional Administrator with written agreement from the Tribe, would determine whether a lowering of high quality water is necessary to accommodate important economic or social development in the area in which the waters are located through an analysis of alternatives and a socio-economic analysis; (3) describes how the Regional Administrator would provide for public involvement and intergovernmental coordination on any decision to lower water quality in a high quality water; (4) describes how the Regional Administrator would assure that any lowering of high water quality still results in water quality that protects existing uses fully; (5) describes how the Regional Administrator would assure that there shall be achieved the highest statutory and regulatory requirements for all new and existing point sources and all Tribal-regulated, cost-effective, and reasonable best management practices for nonpoint source control when allowing a lowering of water quality.[42]

• *ONRW protection (Tier 3):* describes how the Regional Administrator would ensure the maintenance and protection of water quality for waters identified as ONRWs. It also describes the nomination process to assign waters as ONRWs. In this process, any person or entity may nominate a specific water for such protection by providing written documentation of the qualifications of the reservation water to the Regional Administrator and the Tribe. The Regional Administrator would make a final decision with written agreement from the Tribe to assign the water as an ONRW and issue a public notice regarding that decision. EPA would provide a publicly available list of waters assigned as an ONRW at a website location to be provided in the final rule.

The requirements of the antidegradation policy and AIMs will be triggered by a request from a discharger or entity for authorization for any new or expanded regulated activity. Regulated activities include, but are not limited to, any activity that requires a permit, license, or water quality certification pursuant to sections 401, 402, and 404 of the CWA. States and authorized Tribes may implement antidegradation requirements in programs beyond those regulated under the CWA, such as state- or Tribal-regulated nonpoint source programs or voluntary programs. As part of the implementation of antidegradation in CWA section 402 permits, antidegradation protections will also be addressed in new or reissued general permits authorized, implemented, or administered by the Regional Administrator either at the time the permitting authority develops and issues the general permit or upon review of an applicant's request to be covered by a general permit.

For further discussion on AIMs, please refer to EPA's WQS Handbook, Chapter 4 Antidegradation.[43]

EPA solicits comment on the proposed antidegradation implementation methods.

D. Other Proposed Water Quality Standards Provisions of Baseline Water Quality Standards

1. Mixing Zone Policy

The proposed rule contains a detailed mixing zone policy that would allow the Regional Administrator to establish mixing zones on a case-by-case basis. But it would prohibit mixing zones for discharges of bioaccumulative pollutants and for pathogens and pathogen indicators without adequate evidence that designated uses will be protected. EPA's proposed mixing zone policy in this proposed rule draws upon the mixing zone policy included in EPA's Model WQS Template for Waters on Indian Reservations,[44] which builds upon mixing zone guidance produced by EPA over the years and the state of Washington's existing state mixing zone policy. EPA would follow its regulations regarding public notice and opportunity for public comment in applying its mixing zone policy in federally issued NPDES permits.

A mixing zone (sometimes also called a regulatory mixing zone) is defined through the NPDES permitting process and may be implemented in any waterbody type or discharge configuration where rapid and complete mixing does not occur. EPA's current guidance[45] describes a mixing zone as an allocated impact zone where certain water quality criteria may be exceeded, provided that there is no lethality to aquatic organisms that pass through the mixing zone; there are no significant health risks to humans; and the designated and existing uses of the water body as a whole are not impaired as a result of the mixing zone. Allocated impact zones or mixing zones, if disproportionately large, could unacceptably impact the integrity of the aquatic ecosystem and have unanticipated ecological consequences on the water body as a whole resulting in impairment of the designated or existing uses. A legally binding mixing zone policy is considered a WQS under EPA's existing regulations at 40 CFR 131.13. The policy describes the general characteristics of, and requirements associated with mixing zones without accounting for site-specific information. EPA's guidance has emphasized a holistic approach to mixing zone regulation which considers location, size, shape, outfall design, and in-zone quality.[46]

Mixing Zone Size

To protect the designated uses of the water body as a whole, it is critical that pollutant concentrations within any mixing zone are not lethal to mobile, migrating, and drifting organisms in the water body or cause unacceptable human health risks considering likely pathways of exposure. One means of achieving these objectives is to limit the size of the mixing zone. EPA is

[42] See Davies, Tudor. 1994. Memorandum: Interpretation of Federal Antidegradation Regulatory Requirement. *https://www.epa.gov/sites/default/files/2014-10/documents/davies-regrequire-memo.pdf.*

[43] EPA Water Quality Standards Handbook. *https://www.epa.gov/wqs-tech/water-quality-standards-handbook.*

[44] *https://www.epa.gov/wqs-tech/water-quality-standards-tools-tribes#tab3.*

[45] EPA Water Quality Standards Handbook. *https://www.epa.gov/wqs-tech/water-quality-standards-handbook.*

[46] EPA's guidance on mixing zones has been detailed in several agency publications, including the Water Quality Standards Handbook, August 1994, the Technical Support Document for Water Quality-based Toxics Control (TSD), March 1991, and EPA's Compilation of Mixing Zone Documents, 2006.

proposing to limit the size of mixing zones in 40 CFR 131.XX(g)(2)(vii) of this proposed rule by establishing specific metrics for: how far upstream and downstream mixing zones may extend: how much of the water body may be taken up by mixing zones (in terms of percentages); and prohibiting overlapping mixing zones. These proposed size metrics represent a balance among three interests: allowing a reasonable amount of water for mixing; allowing for sufficient space for human health protection and aquatic life survival, growth, and reproduction; and recognizing that multiple dischargers may exist on the same water. EPA solicits comments on the proposed size metrics and whether other metrics, metric values, or approaches may be more appropriate.

Mixing zone sizes are often determined using a set of critical conditions to ensure protection of the receiving water. Examples of critical conditions are the critical effluent concentration, critical effluent flow, and the critical low flow of the receiving stream. Critical low flows commonly used throughout the United States include these hydrologically-based metrics:

- 1Q10 (the lowest one-day average flow event expected to occur once every ten years) or the biologically-based 1B3 (the lowest one-day average flow event expected to occur once every three years) flow rate for acute aquatic life criteria;
- 7Q10 (the lowest seven-consecutive-day average flow event expected to occur once every ten years) or 4B3 (the lowest four-consecutive-day average flow event expected to occur once every three years) flow rate for chronic aquatic life criteria with a duration of less than 30 days and human health criteria based on a short-term toxicological effect; the 30Q10, 30Q5, or 30B3 flow rate for chronic aquatic life criteria with a duration of 30 days or longer; and
- harmonic mean flow rate for human health criteria is based on lifetime exposure.

Local, regional, and national guidance is available to determine critical low flows and other critical conditions for mixing zone calculations. EPA is proposing that for purposes of this rule, critical low flow will mean the 1Q10 or 1B3 flow rate for acute aquatic life criteria; the 7Q10 or 4B3 flow rate for chronic aquatic life criteria with a duration of less than 30 days and human health criteria based on a short-term toxicological effect; the 30Q10, 30Q5, or 30B3 flow rate for chronic aquatic life criteria with a duration of 30 days or longer; and the harmonic mean flow rate for human health criteria based on lifetime exposure.

Zones of passage within water bodies that allow for migrating, free-swimming, or drifting organisms are particularly important when determining the appropriate size of a mixing zone. Zones of passage are continuous water routes of such volume, area, and quality as to allow the passage of free-swimming and drifting organisms without significant adverse effects on their populations. Many species migrate for spawning and other purposes. Not only do migrating species (*e.g.,* anadromous and catadromous species) need to be able to reach suitable spawning areas, their young (and in some cases the adults) require a safe return route to their growing and living areas. Within a mixing zone, pollutant concentrations exceeding the established criteria can create barriers that hinder or prevent safe migration.

Mixing Zone Shape

The water body type, outfall design, and characteristics of the discharge will determine the shape of a mixing zone. The shape should be a simple configuration that is easy for both the discharger and the permitting authority to locate in a water body and that avoids impingement on biologically important areas. In lakes, a circle with a specified radius is generally preferable, but other shapes might be appropriate in the case of unusual site configurations. Mixing zone shapes and sizes may vary depending on the pollutant of concern and the specific criterion (*e.g.,* acute, chronic, or human health) being considered. Local, regional, and national guidance is available to determine mixing zone characteristics. Under EPA's proposal, the Regional Administrator would be able to adjust the size and extent of mixing zones within the limits allowable in proposed 40 CFR 131.XX(g)(2)(vii) to establish the desired shape of mixing zones where appropriate.

Outfall Design

Many different factors affect how well the outfall design allows the discharge to mix with the receiving water, including:

- The height of the outfall with respect to the surface and bottom of the water body. A surface discharge is least favorable for toxic discharges since it offers the least initial mixing. Submerged discharges offer greater flexibility in meeting the design goals for toxic discharges.
- The distance of the end of the pipe to the nearest bank (*i.e.,* whether the outfall is in the middle of the water body or close to one side). Discharges at the shoreline of a water body can yield high surface concentrations along the shoreline when there is significant cross-flow.
- The angle of the discharge. The initial dilution can be maximized when submerged discharges direct the effluent at an angle to the ambient flow. For example, in rivers, the preferred arrangement for a submerged discharge is to direct the outfall into the current flow direction or vertically upward.
- The type of submerged discharge that is used (*i.e.,* single-port or multi-port diffuser). A multiport submerged discharge, or diffuser, can help effluent to be mixed more rapidly than a single-port submerged discharge.

Shore hugging plumes are a particular concern in all water bodies. Shore areas are often the most biologically productive and sensitive areas of a water body, and they are often used for recreation. Shore-hugging plumes generally do not mix as well with receiving waters and, thus, do not dilute as well as mixing zones with other shapes that do not hug shorelines. Because shore-hugging plumes tend to keep unmixed water over the benthic area or in the recreational area, they are more likely to adversely affect the designated uses of the water body. Therefore, EPA is including avoidance of shore-hugging plumes in the design of outfalls.

Because an outfall design affects the amount of initial mixing that occurs, EPA is proposing language to encourage dischargers to utilize the best practicable engineering design of the outfall to maximize initial mixing. Sometimes, modifying the design of the diffuser, the location of the outfall, or other outfall design characteristics can reduce significant adverse impacts to the water body.

Quantitative measures for certain mixing zone elements that are sufficient for permitting authorities to develop associated WQBELs in a transparent and straightforward manner provide for regulatory certainty and consistency. EPA solicits comments on its chosen measures and whether other measures may be more appropriate.

Mixing zone guidance [47] produced by EPA since 1972 has consistently emphasized the need to protect both sessile organisms and swimming and drifting organisms, as well as human recreation, when developing and

[47] For example, the Water Quality Standards Handbook, August 1994, the Technical Support Document for Water Quality-based Toxics Control (TSD), March 1991, and EPA's Compilation of Mixing Zone Documents, 2006.

locating a mixing zone. Preventing adverse impacts can involve not only limiting the scope and location of the discharge but may warrant prohibition of the mixing zone for the pollutant type or location.

Mixing zones may not be appropriate for all pollutants. For example, mixing zones may not be appropriate for bioaccumulative pollutants because greater bioaccumulation in the portion of the aquatic food web located within the mixing zone may elevate human health risks and prevent protection of the designated use of the water body as a whole. Because fish tissue contamination tends to be a far-field problem affecting entire or downstream water bodies rather than a near-field problem confined to the area within a mixing zone, EPA's position is that without adequate justification that designated uses will be protected, it is not advisable for mixing zone policies to allow mixing zones for discharges of bioaccumulative pollutants. EPA adopted a similar approach in 2000 when it amended its 1995 final Water Quality Guidance for the Great Lakes System at 40 CFR part 132 to phase out mixing zones for existing discharges of bioaccumulative pollutants and ban such mixing zones for new discharges within the Great Lakes Basin.

Mixing zones also may not be appropriate for pathogens, such as bacteria, or pathogen indicators because they may cause significant human health risks and endanger critical areas (*e.g.,* recreational areas). EPA's position is that it is not advisable to allow mixing zones for bacteria or other pathogens in waters designated for primary contact recreation. For a river or stream segment designated for primary contact recreation, the presumption is that primary contact recreation can safely occur throughout the segment and, therefore, that pathogen levels will not exceed criteria throughout the segment. Epidemiological studies have demonstrated that illness rates are higher when the criteria are exceeded compared to when those criteria are not exceeded (see sections 3.2 and 3.3 of the EPA's Recreational Water Quality Criteria (2012)). Therefore, people recreating in or through a bacteria mixing zone (where bacteria levels may be elevated above the criteria levels) may be exposed to greater risk of gastrointestinal illness than would otherwise be allowed by the state or Tribal criteria for protection of the recreation use. For these reasons, EPA proposes in this rule to prohibit mixing zones for discharges of bioaccumulative pollutants and for pathogens and pathogen indicators without adequate justification that designated uses will be protected.

EPA's proposed mixing zone policy does not preclude reliance on dilution allowances for situations in which rapid and complete mixing of a discharge occurs in the receiving water. The term ''dilution allowance'' refers to a portion of the flow in a river or stream allocated for dilution of a discharge of pollutants. A dilution allowance may be authorized by the Regional Administrator at the time a CWA section 402 or section 404 permit is issued, renewed, or materially modified and is in effect as long as the permit remains in effect. For more information on dilution allowances, refer to EPA's NPDES Permit Writers' Manual.[48]

EPA invites comments on the proposed mixing zone policy and whether EPA should include a detailed mixing zone policy in its promulgation. In particular, EPA invites comments on the details proposed at 40 CFR 131.XX(g)(2)(vii)(A) and (B) of this proposed rule regarding mixing zone size and shape restrictions. EPA specifically seeks comment on whether: to alter any of the detailed restrictions; to include less detail in the final rule: or to consider additional information to inform the proposed mixing zone restrictions given the national scope of this rulemaking.

2. Compliance Schedule Authorizing Provision

EPA regulations also allow for compliance schedules to be included in NPDES permits to allow permittees additional time to comply with effluent limitations. Such schedules must require compliance by the permittees as soon as possible, but in no case may extend beyond compliance dates established by the CWA. See 40 CFR 122.47. Compliance schedules may not be issued for WQBELs unless authorized in the applicable water quality standards or implementing regulation. See 40 CFR 131.15.

EPA proposes to include a compliance schedule authorizing provision in the baseline WQS such that EPA could issue a compliance schedule as part of an NPDES permit that would require the discharger to comply as soon as possible with any WQBEL in a permit reissued or modified on or after the effective date of the final rule. EPA proposes the compliance schedule authorizing provision would provide that EPA may include compliance schedules where appropriate in establishing effluent limitations to meet these baseline WQS for Indian reservation waters, consistent with 40 CFR 122.47.

EPA invites comment on the inclusion of a compliance schedule authorizing provision, and on the compliance schedule authorizing provision in the proposed baseline standards.

VI. Proposed Procedure To Revise a Designated Use, Add a Designated Use, or Establish a Water Quality Standards Variance After the Proposed Rule Is Final

EPA anticipates that data and information may become available after the baseline WQS rule becomes final that could lead EPA to identify a need, or a Tribe to request, that EPA revise or add designated uses and associated criteria or establish a WQS variance for Indian reservation waters covered by this rule. While EPA retains the discretion to issue a subsequent Federal rulemaking to take such actions, EPA is proposing to include a Federal administrative procedure that could result in revisions to the applicable baseline WQS, where appropriate, for specified water bodies covered by this WQS rule and consistent with 40 CFR part 131. The Regional Administrator will follow the public participation requirements of CWA section 303(c)(1), 40 CFR 131.20(b), and 40 CFR part 25 for any action taken under this procedure. Under this procedure, the Regional Administrator would prepare and make available to the public supporting documentation consistent with what EPA regulations require of states and authorized Tribes, EPA regulation 40 CFR 131.10 and 131.14, and would provide an opportunity for public comment on the proposed designated use revisions, additions, or establishment of a WQS variance.

EPA's WQS regulation: (1) specifies requirements that must be met when states and authorized Tribes adopt or revise designated uses (40 CFR 131.10); and (2) authorizes and specifies requirements for states and authorized Tribes to adopt WQS variances that provide time to make incremental progress towards the applicable WQS where the applicable designated use and associated criteria are not currently attainable (40 CFR 131.14).

To revise a use specified in CWA 101(a)(2), a Use Attainability Analysis (UAA) must be conducted that finds the use(s) are unattainable based on one of the factors in 40 CFR 131.10(g). The UAA, defined in 40 CFR 131.3(g), is a structured scientific assessment of the

[48] U.S. EPA NPDES Permit Writers' Manual. *https://www.epa.gov/sites/default/files/2015-09/documents/pwm_2010.pdf.*

factors affecting the attainment of the use which may include physical, chemical, biological, and economic factors. When a UAA justifies revision of the unattainable designated use, 40 CFR 131.10(g) requires adoption of the highest attainable use. Additionally, states and authorized Tribes cannot remove an existing use, defined as those uses actually attained in the water body on or after November 28, 1975, whether or not they are included in the WQS. 40 CFR 131.3(e).

A non-101(a)(2) use as defined at 40 CFR 131.3(q) may be revised after taking into consideration the use and value of water for public water supplies, agricultural, industrial and other purposes including navigation. (See 40 CFR 131.10(k)(3))

WQS variances established in accordance with 40 CFR 131.14 provide a flexible but defined pathway to make incremental water quality improvements if the applicable designated use and associated criteria are not immediately attainable but may be attainable in the future. Per 40 CFR 131.14(b)(1)(ii), WQS variances specify the interim requirements that apply during the WQS variance term based on the highest attainable condition. Further, WQS variances, once applicable, serve as the basis for water quality based effluent limits in NPDES permits and for issuing certifications under CWA section 401 for the parameter and permittee or water body identified in the WQS variance. (40 CFR 131.14(a)(3)) Once the WQS variance expires, NPDES permits must be written to meet the underlying designated use and associated criterion or a subsequent WQS variance must be established. For additional information on WQS variances, please refer to *https://www.epa.gov/wqs-tech/water-quality-standards-variances*.

Title 40 CFR 131.XX(i) of this proposed rule lays out a Federal administrative procedure for the relevant Regional Administrator to determine whether a new or revised designated use and/or a WQS variance is appropriate for a water body covered by this rule. Under the proposed rule, in addition to the Regional Administrator being able to identify such a need, a Tribe whose Indian reservation is affected may also request a new or revised designated use and/or a WQS variance.

For additions or revisions of designated uses, the Regional Administrator would apply EPA regulations at 40 CFR 131.10 to evaluate whether the requested change is justified for the specified water body. If a Tribe requests the revision of any CWA section 101(a)(2) designated use applicable through the baseline WQS rule, the Regional Administrator would determine through a UAA where required by 40 CFR 131.10(j) whether the use is an existing use and whether any of the factors in 40 CFR 131.10(g) preclude attainment of that designated use. If a Tribe requests additions or revisions of any designated non-101(a)(2) use, the Regional Administrator would determine whether the requested change is appropriate based on a use and value demonstration per 40 CFR 131.10(k)(3). If a Tribe requests to establish WQS variances, the Regional Administrator would apply the provisions of 40 CFR 131.14 to evaluate whether the requested WQS variance is justified, including whether there is a demonstrated need for the variance based on the factors in 40 CFR 131.14(b)(2)(i)(A).

Any final decisions made by a Regional Administrator through this Federal administrative procedure that the requested use change or WQS variance is appropriate and justified would result in revisions to the applicable WQS for the specific parameter(s), water body/waterbody segments(s), and discharger (in the case of a discharger-specific WQS variance). Such revised or additional designated uses and the associated criteria, and/or WQS variances would be effective for purposes of the CWA, including for CWA section 402 NPDES permitting purposes. For WQS variances, those CWA purposes are limited to developing NPDES permit limits under 301(b)(1)(C), where appropriate, and issuing certifications under section 401 of the CWA pursuant to 40 CFR 131.14(a)(3).

Pursuant to the proposed Federal administrative procedure, a decision by a Regional Administrator would be final and effective upon signature without necessitating a subsequent Federal rulemaking revising the baseline WQS rule. This is because this decision would not result in a change to the baseline WQS rule, which is a nationally applicable framework that is intended to be tailored to specific Indian reservation waters as implemented. Rather, the decision would result in a change to the individual WQS applicable to a particular Indian reservation, as opposed to a change to any provision of the rule itself. While the agency is proposing this Federal administrative procedure as an alternative to subsequent Indian reservation-specific promulgations of revised designated uses or WQS variances, the agency could effectuate such changes through future rulemakings applicable to individual Indian reservations. This procedure is not integral to this proposed rule. Rather, this rule is designed to operate either with or without the Federal administrative procedure. To enhance public transparency under the proposed Federal administrative procedure, EPA would maintain a public website [49] containing an updated list of the applicable designated uses and associated criteria, and WQS variances with accompanying explanations of the statutory and regulatory basis for the decisions.

In all cases when implementing the procedure, the Regional Administrator would initiate consultation with the Tribe whose waters would be affected by the revised designated uses, consistent with the proposed Tribal consultation provision at 40 CFR 131.XX(b) and as described in section V of this preamble.

EPA solicits comment on whether EPA should include a provision as part of 40 CFR 131.XX(i) specifying that the Tribe must request in writing any designated use revision that would result in the designated use and associated criteria being less stringent than those applicable under the baseline WQS before the Regional Administrator would proceed with such an action. EPA solicits comment on whether a similar provision should be included when establishing a WQS variance. EPA is interested in whether such regulatory provisions would be beneficial to ensure Tribes have the opportunity to conduct appropriate oversight of any adoption of WQS less stringent than originally promulgated by this rule. Alternatively, rather than specify a requirement that a Tribe must make such a request in writing before the Regional Administrator would proceed with such an action, EPA seeks input on whether such Tribal oversight could be provided through existing Regional Tribal consultation procedures that will be implemented consistent with the proposed requirement at 40 CFR 131.XX(b) to initiate consultation on any action that may affect Tribal interests.

EPA envisions that the proposed Federal administrative procedure for revising or adding designated uses or establishing WQS variances would entail the following four steps:

- Step 1—The Regional Administrator identifies and/or the Tribe requests a water(s) for which a revised designated use or additional

[49] EPA will specify the website in the final rule.

designated use may be justified or identifies the water(s), permittee(s) and parameters for which a WQS variance may be justified.

- Step 2—EPA, working with the Tribe, assembles the data (including any data provided by a third party), conducts the analyses required by the relevant regulatory provision (including any analyses provided by a third party), and prepares the supporting documentation demonstrating that (1) the revised or added designated use is justified consistent with the requirements of the CWA and EPA's regulation, specifically at 40 CFR 131.10, or (2) the WQS variance is justified consistent with the requirements of the CWA and EPA's regulation, specifically at 40 CFR 131.14.
- Step 3—Regional Administrator publishes a notice of a public hearing at least 45 days in advance of the public hearing describing the proposed designated use revision or addition and the associated criteria and/or WQS variance, providing the relevant analyses and documentation at least 30 days in advance of the public hearing, announcing its intent to hold at least one public hearing, and establishing a 45-day public comment period for the public to submit written comments on the proposed revisions. EPA intends to rely on EPA's Public Notices website [50] to publish public notices and to leverage any existing public notification processes that relevant Tribes may have in place. These efforts must be consistent with the public participation requirements of CWA section 303(c)(1), 40 CFR 131.20(b), and 40 CFR part 25.
- Step 4—The Regional Administrator reviews and considers comments and makes a final decision concerning whether revising a designated use, adding a designated use, and/or establishing a WQS variance is justified, consistent with the requirements of the CWA and EPA's regulations 40 CFR 131.10 and/or 131.14. Where the Regional Administrator makes such a final decision, those changes become applicable for CWA purposes. (As mentioned previously, for WQS variances, those CWA purposes are limited to purposes of developing NPDES permit limits under 301(b)(1)(C), where appropriate, and issuing CWA section 401 certifications pursuant to § 131.14(a)(3). EPA maintains and makes available to the public an updated list of the applicable designated uses and WQS variances with the explanation of the statutory and regulatory basis for the decisions available at a website location to be provided in the final rule.

EPA is not reopening 40 CFR 131.10 or 131.14 with this proposal, and thus does not seek comment on the provisions in 40 CFR 131.10 or 131.14. Rather, EPA invites comment on the proposed Federal administrative procedure for EPA to revise a baseline designated use, add a designated use, or establish a WQS variance for a specific Indian reservation water body covered by this proposed rule based on consideration of location-specific factors involving the four steps as identified.

EPA continues to encourage Tribes who are interested in WQS that reflect site-specific, tailored designated uses for particular Indian reservation waters to obtain TAS for WQS and adopt their own WQS, subject to EPA review and approval under CWA section 303(c).[51]

VII. Implementation of Baseline Water Quality Standards in Clean Water Act Programs

A. Section 402 NPDES Discharge Permits

Under CWA section 402, any facility or activity that discharges pollutants (other than dredged or fill material) from a point source into the waters of the United States must obtain and comply with an NPDES permit. EPA regulations that describe the requirements and procedures for the development of NPDES permits are contained in 40 CFR parts 122, 124, 125, and 129. Effluent limitations for pollutants that are contained in NPDES permits can include TBELs and WQBELs. TBELs represent the level of pollutant reduction that can be achieved after application of secondary treatment for municipal publicly owned treatment works, defined at 40 CFR part 133, and best available treatment technologies for non-municipal (industrial) discharges. EPA has issued effluent limitation guidelines and standards that provide minimum national requirements that industrial discharges must meet. See 40 CFR chapter I, subchapter N. Where an EPA-promulgated applicable effluent limitations guideline is not available for an industry sector, permit authorities can develop TBELs based on best professional judgment. See CWA section 402(a)(1); 40 CFR 125.3(c)(2).

Where TBELs are not sufficient to assure attainment of WQS, including water quality standards in downstream jurisdictions, WQBELs are required by the CWA. WQBELs are generally derived from the applicable WQS.[52] See CWA section 301(b)(1)(C); 40 CFR 122.4(a) and (d). Congress intended that WQBELs in the NPDES program should derive from all applicable WQS, including Federal standards promulgated by EPA.

i. NPDES Permits for Discharges to Waters With Baseline Water Quality Standards

As described in section II.B of this preamble, EPA is generally the authority for issuing NPDES permits in Indian country unless and until EPA authorizes a Tribe to administer the NPDES permitting program. 40 CFR 123.1(h); see also 58 FR 67966, 67973–74 (December 22, 1993). When implementing baseline WQS in developing and issuing an NPDES permit, EPA would follow the regulation at 40 CFR part 122, including 40 CFR 122.44(d), and would be guided by procedures in the NPDES Permit Writers' Manual [53] and the Technical Support Document for Water Quality Based Toxics Control.[54] EPA would ensure public participation when EPA issues NPDES permits for discharges to Indian reservation waters, consistent with the requirements at 40 CFR part 124, subparts A and D. EPA also would consult with the appropriate Tribe when developing and issuing NPDES permits for discharges to Indian reservation waters to ensure that Tribal concerns and issues are considered.

ii. NPDES Permits for Upstream Facilities Discharging to Downstream Waters With Baseline Standards

Currently, there are no Tribes authorized to administer the NPDES program.[55] Tribes meeting the requirements of CWA section 518(e) may seek authorization to administer the NPDES program. EPA regulations

[50] Public Notices at U.S. EPA, website at *https://www.epa.gov/publicnotices.*

[51] Any state or authorized Tribe that is adopting its own WQS has the discretion to use an administrative procedure to streamline the rulemaking process; however, CWA section 303(c)(2)(A) still requires the state or authorized Tribe to submit any WQS adopted pursuant to state or Tribal law to EPA for review and approval or disapproval.

[52] For pollutants for which an EPA-approved total maximum daily load (TMDL) has been established under section 303(d) of the CWA to restore impaired waters to meet WQS, the permit must include WQBELs consistent with the assumptions and requirements of any wasteload allocation assigned to the discharge as part of the TMDL. See 40 CFR 122.44(d)(1)(vii)(B).

[53] ''NPDES Permit Writers' Manual,'' EPA Office of Wastewater Management, EPA–833–K–10–001, September 2010. Available at *https://www.epa.gov/npdes/npdes-permit-writers-manual.*

[54] ''Technical Support Document for Water Quality-Based Toxics Control,'' EPA Office of Water, EPA/505/2–90–001, March 1991. Available at *https://www3.epa.gov/npdes/pubs/owm0264.pdf.*

[55] Currently, 47 states and one U.S. territory are authorized to administer the NPDES program.

that specify how a Tribe can seek authorization to administer the NPDES program are contained in 40 CFR 123.31 through 123.34.

NPDES permits must ensure compliance with the applicable WQS of all affected waters. See CWA sections 301(b)(1)(C) and 402(b)(1)(A); 40 CFR 122.4(a), (d) introductory text, and (d)(1). The proposed rule would allow EPA to ensure that NPDES permits issued by authorized states, Tribes, or territories [56] for discharges to waters upstream from Indian reservation waters comply with the final baseline WQS. If a permitting authority failed to meet this requirement, EPA could use its oversight authority of approved programs, which includes the authority to review permits.

Authorized states, territories or Tribes implementing EPA-authorized NPDES programs must provide copies of proposed or draft permits to EPA, except where permit review has been waived. 40 CFR 123.43(a)(2). EPA's right to review may not be waived for permits with discharges which may affect the waters of a state other than the one in which the discharge originates. 40 CFR 123.24(d)(2).

EPA will coordinate with Tribes to ensure that Tribal concerns and issues are considered when EPA is reviewing NPDES permits issued by authorized states that may affect Indian reservation waters covered by the baseline WQS. If EPA determines that a NPDES permit issued by an authorized state would not ensure compliance with downstream baseline WQS, EPA can object to the permit. See 40 CFR 123.44(c)(1), (7), and (8). A state may not issue an NPDES permit over EPA's objection. CWA section 402(d)(2), 40 CFR 122.4(c). If the state does not revise the permit to meet EPA's objection, EPA may issue the permit. See CWA section 402(d)(4); 40 CFR 123.44(h)(2) and (3). Tribes that have TAS for WQS that may be affected by a state issued permit would also receive notice under the public notice procedures of 40 CFR 124.10(c) and have the opportunity to provide comments on the permit. EPA encourages affected Tribes to raise any concerns with an upstream state issued NPDES permit to both the state and EPA. EPA would follow applicable requirements to ensure public participation and would coordinate, as appropriate, with adjacent states and Tribes, and other interested parties when implementing the standards.

[56] ''Authorized'' in this section refers to states, Tribes, or territories that are authorized to administer the NPDES program.

B. Section 404 Permits for Discharges of Dredged or Fill Material

Water quality standards are among the criteria considered in the CWA section 404 program when reviewing permit requests for discharges of dredged or fill material into waters of the U.S. Currently, CWA section 404 permits for discharges must comply with all applicable state WQS (including standards in a downstream jurisdiction) in effect under the CWA. See CWA section 301(b)(1)(C); 40 CFR 230.10(b)(1) and 233.20(a). Section 404 of the CWA is jointly administered by the EPA and the United States Army Corps of Engineers (the Corps) or by states or Tribes with an EPA approved 404(g) program.

CWA section 404 permits for dredged or fill activities must include permit conditions to meet criteria set out in the section 404(b)(1) Guidelines, see 40 CFR part 230, discussed further below. These criteria are to include applicable WQS. The current section 404 program regulations at 40 CFR 230.10(b)(1), require permits to ensure compliance with any applicable state water quality standard. In this proposal, EPA is proposing to amend 40 CFR 230.10(b)(1) to clarify that, consistent with CWA section 301(b)(1)(C), CWA section 404 permits need to ensure compliance with federally promulgated WQS—which would include baseline WQS for Indian reservation waters—as well as with state WQS.

i. CWA Section 404 Permits Issued by the Army Corps of Engineers

The U.S. Army Corps of Engineers is the authority that issues CWA section 404 permits for discharge of dredged or fill material into ''waters of the United States'' where no state or Tribe has assumed responsibility for implementing the program. See CWA sections 404(a), (g)–(i). Generally, the Corps works closely with both state and Tribal governments to ensure that applicable WQS are met in CWA section 404 permitting actions.

In evaluating a CWA section 404 permit application, the Corps follows the requirements of 40 CFR part 230, commonly called the ''Section 404(b)(1) Guidelines'' after the CWA section authorizing their development. Except as provided in CWA Section 404(b)(2), the Corps may only issue a CWA section 404 permit if it determines that the proposed disposal site for the discharge of dredged or fill material complies with the 404(b)(1) Guidelines. The 404(b)(1) Guidelines require, among other things, that no discharge of dredged or fill material shall be permitted if it ''causes or contribute to a water quality violation of any applicable state water quality standard.'' 40 CFR 230.10(b)(1).

Because a Corps-issued section 404 permit is a ''Federal license or permit'' for the discharge of dredged or fill material into ''waters of the United States,'' a CWA section 401 certification from a state or authorized Tribe is required. EPA provides section 401 certifications on behalf of Tribes that do not have the authority to give CWA section 401 certification. Section 401 is discussed further in section VII.C of this preamble.

EPA is proposing to amend 40 CFR 230.10(b)(1) to read ''. . . any applicable state water quality standard or federally promulgated water quality standard.'' This would clarify that the CWA section 404 program must protect all applicable water quality standards, including federally promulgated standards. The Corps must forward public notices for all CWA section 404 individual permit applications to EPA for its discretionary review. See 33 CFR 325.3. If EPA determines that a proposal for a CWA section 404 individual permit could cause or contribute to a violation of the baseline WQS for Indian reservation waters, or other criteria set out in the 404(b)(1) Guidelines, EPA may provide its views to the Corps. EPA may prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site and is further authorized to deny or restrict the use of any defined area as a disposal site for dredged or fill material whenever EPA determines, after notice and opportunity for public hearing, that the discharge of such materials will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas, wildlife, or recreational areas. See CWA section 404(c).

ii. CWA Section 404 Permits Issued by States or Tribes Who Have Assumed the CWA Section 404 Program

States or eligible Tribes may assume the CWA section 404 program, as described in 40 CFR part 233. Currently, only three states (Florida, Michigan, and New Jersey) and no Tribes have requested and received EPA approval to administer the CWA section 404 program. State-issued CWA section 404 permits for discharges of dredged or fill material upstream or adjacent to Indian reservation waters covered by the baseline WQS would need to ensure compliance with those standards. See 40 CFR 230.10(b)(1) and 233.20(a). Under CWA section 404(j), states or Tribes who have assumed the CWA section 404 program must provide

copies of public notices for standard individual permits and for draft general permits to EPA, except those for which permit review has been waived. 40 CFR 233.51 and 233.13(b)(1). EPA's right to review may not be waived for any permits for discharges with reasonable potential for adverse impacts on waters of another state. 40 CFR 233.51(b)(3). EPA proposes to amend this regulation to clarify that EPA's right to review may not be waived for permits with reasonable potential to adversely impact waters of another state or waters subject to federally promulgated WQS.

Under 40 CFR 233.50, the EPA Regional Administrator may object to a state or Tribe-issued CWA section 404 permit if the permit would not ensure compliance with the 404(b)(1) guidelines. A state or Tribe that has assumed the CWA section 404 program may not issue a CWA section 404 permit unless EPA's objections or requirements for a permit condition have been resolved. 33 U.S.C. 1344(j); 40 CFR 233.50(f). States, Tribes, or any other interested person may request a public hearing on the Regional Administrator's comments, objection, or permit recommendations. 33 U.S.C. 1344(j); 40 CFR 233.50(d)–(f). The Regional Administrator must hold a hearing whenever requested by the entity proposing to issue the permit, or if warranted based on significant public interest. 33 U.S.C. 1344(j); 40 CFR 233.50(g)–(i). If a state or Tribe that has assumed CWA section 404 authority does not prepare a permit revised to satisfy EPA's objection or requirement for a permit condition, or deny the permit, EPA transfers processing of the permit application to the Corps of Engineers. 33 U.S.C. 1344(j); 40 CFR 233.50(h)–(j). If a permit is transferred to the Corps of Engineers, and EPA has concerns that the proposed permit would cause or contribute to a violation of WQS, including these baseline WQS if codified, EPA could provide comments to the Corps of Engineers.

EPA intends to work closely with the appropriate Tribe in determining whether a proposed CWA section 404 permit would comply with the baseline WQS. EPA would follow applicable requirements regarding public participation and intends to coordinate as appropriate with adjacent states and Tribes, and other interested parties when implementing the standards.

C. Section 401 Certifications

Under section 401 of the CWA, a Federal agency may not issue a permit or license to conduct any activity that may result in any discharge into waters of the United States unless a section 401 water quality certification is issued, or certification is waived.[57] States and authorized Tribes in which the discharge would originate or will originate are generally responsible for issuing water quality certifications.[58] [59] In cases where a state or Tribe does not have authority, EPA is responsible for issuing certification. 33 U.S.C. 1341(a)(1). Some of the major Federal licenses and permits subject to CWA section 401 include CWA section 402 permits issued by EPA, CWA section 404 permits issued by the Corps, Federal Energy Regulatory Commission (FERC) licenses for hydropower facilities and natural gas pipelines, and Rivers and Harbors Act of 1899 section 9 and 10 permits.

Tribes may receive TAS for section 401 when eligible for TAS to administer the section 303(c) program for water quality standards. 40 CFR 131.4(c) (''Where EPA determines that a Tribe is eligible to the same extent as a State for purposes of water quality standards, the Tribe likewise is eligible to the same extent as a State for purposes of certifications conducted under Clean Water Act section 401.''). To date, 81 federally recognized Tribes (out of 574) have received TAS for section 401 concurrently with obtaining TAS for section 303(c).[60]

i. CWA Section 401 Certification by Authorized Tribes

In circumstances where a Tribe has obtained authority to administer the CWA section 401 program due to treatment in a similar manner as a state, the Tribe is authorized to issue certifications under CWA section 401 (see 40 CFR 131.4(c)). In acting on a certification request for a federally licensed or permitted activity which may result in a discharge that originates in Indian reservation waters covered by the baseline WQS, the Tribe would determine whether any such discharge will comply with the applicable provisions of sections 301, 302, 303, 306, and 307 of the CWA, which would encompass the baseline WQS. See 33 U.S.C. 1341(a)(1). In many cases, the applicable baseline WQS, including the narrative criteria, would provide a basis for the Tribe to make its determination on a certification request. In cases where the Tribe needs to evaluate specific parameters, the Tribe could request EPA to derive numeric translations for those parameters to aid the Tribe in making its determination.

ii. CWA Section 401 Certification by EPA

The EPA Administrator is the CWA section 401 certifying authority for any activity requiring a Federal license or permit that may result in a discharge into navigable waters in Indian country where Tribes have not obtained authority to administer the CWA section 401 program. See 33 U.S.C. 1341(a)(1). In these situations, if the proposed baseline WQS are finalized, the Administrator would be able to rely on the baseline WQS among other water quality requirements when deciding whether to grant or deny section 401 certifications, or to develop conditions. The Administrator must provide public notice of receipt of a CWA section 401 certification request. See *id.*

iii. Authorized Tribes and CWA Section 401(a)(2)

Under CWA section 401(a)(2), the Administrator provides notice to states and authorized Tribes if the Administrator determines that a discharge originating in another jurisdiction may affect their water quality. See 33 U.S.C. 1341(a)(2). After receiving such notice from the Administrator, authorized Tribes may raise objections to the issuance of the license or permit if they determine that the discharge will violate their water quality requirements.

Under the CWA section 401(a)(2) process, the licensing or permitting Federal agency must notify the Administrator upon receipt of an application for a Federal license or permit and related certification. *Id.* Within 30 days of receiving this notification from the licensing or permitting Federal agency, the Administrator may determine that a discharge originating in another jurisdiction may affect the water quality of any other state or authorized Tribe. *Id.* If the Administrator determines that a discharge may affect the water quality of another state or authorized Tribe, the Administrator is required to notify that

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[57] EPA recently proposed revisions to the Clean Water Act Section 401 Certification Rule located at 40 CFR part 121. See Clean Water Act Section 401 Water Quality Certification Improvement Rule, 87 FR 35318 (June 9, 2022).

[58] ''Authorized tribes'' in this section refers to tribes that are authorized to administer the CWA section 401 program due treatment in a similar manner as a state. See 40 CFR 131.4(c).

[59] ''Authorized Tribes'' in this section refers to Tribes that are authorized to administer the CWA section 401 program due treatment in a similar manner as a state. See 40 CFR 131.4(c).

[60] EPA recently proposed a section 401-specific set of requirements and procedures for tribes seeking TAS for purposes of making section 401(a)(1) and 401(d) certification decisions and for exercising their statutory rights as a ''neighboring jurisdiction'' under section 401(a)(2). 87 FR 35370, June 9, 2022. This proposed approach would provide an alternate path for tribes wishing to obtain TAS status only for section 401 and not also for section 303(c).

state or authorized Tribe, the licensing or permitting Federal agency, and the applicant. *Id.* The state or authorized Tribe has a 60-day opportunity after receiving the notice to determine whether the discharge will violate any of its water quality requirements. If they determine that the action will violate their water quality requirements, they may raise an objection to the issuance of the license or permit to EPA and the Federal agency in writing and request a public hearing. See *id.* The Federal agency issuing the license or permit must hold a public hearing if requested by the state or authorized Tribe in these circumstances. *Id.* The licensing or permitting Federal agency will consider the recommendations of the state or authorized Tribe and the Administrator, as well as any additional evidence presented at the hearing, and determine whether additional conditions may be necessary to assure compliance with applicable water quality requirements. See *id.* If imposition of additional conditions cannot assure such compliance, the Federal agency cannot issue the license or permit. *Id.*

D. Section 303(d) Impaired Water Listings and Total Maximum Daily Loads

WQS provide the basis for identifying impaired waters (waters not attaining the applicable standards) and developing TMDLs pursuant to CWA section 303(d). Where applicable, the baseline WQS would provide this basis. On September 26, 2016, EPA promulgated the final rule ''Treatment of Indian Tribes in a Similar Manner as States for Purposes of Section 303(d) of the Clean Water Act.'' [61] That rule establishes regulatory procedures for eligible Tribes to apply for and obtain authority to identify impaired waters on their reservations and to establish TMDLs. 40 CFR 130.16. CWA section 303(d) provides for states and authorized Tribes to: (1) develop lists of impaired waters (and establish priority rankings for waters on the lists) and (2) establish TMDLs for these waters.

By listing impaired waters, a state or authorized Tribe identifies those waters in its territory that are not currently meeting applicable WQS, and/or are not expected to meet applicable WQS, even after the application of the TBELs required by CWA sections 301(b) and 306. 40 CFR 130.2(j). For purposes of determining whether a water body is impaired and should be included on the CWA section 303(d) list, EPA regulation requires states and authorized Tribes to assemble and evaluate all existing and readily available water quality-related data and information. 40 CFR 130.7(b)(5). These data and information may include, for example, physical, chemical, and biological data, including fish and shellfish tissue concentration data. EPA's regulation includes a non-exhaustive list of water quality-related data and information to be assembled and evaluated. *Id.* States and authorized Tribes establish priorities for development of TMDLs for waters on their CWA section 303(d) list considering the severity of the pollution and the uses to be made of the waters. 40 CFR 130.7(b)(4). States and authorized Tribes submit the list of impaired waters to EPA for review and approval.

Under the CWA, each state and authorized Tribe must, ''from time to time,'' establish and submit TMDLs for pollutants causing impairments in all the waters on its CWA section 303(d) list in accordance with the priority ranking. CWA sections 303(d)(1)(C) and 303(d)(2). A TMDL is a planning document intended to address impairment of waters. It includes the calculation and allocation to point and nonpoint sources of the maximum amount of a pollutant that a water body can receive and still meet applicable WQS. TMDLs must be established at a level necessary to implement the applicable WQS with seasonal variations and a margin of safety which accounts for any lack of knowledge concerning the relationship between effluent limitations and water quality. CWA section 303(d)(1)(C). Where a TMDL makes allocation tradeoffs between point and nonpoint sources, the TMDL record must also demonstrate ''reasonable assurance'' that the nonpoint source allocations will be achieved. 40 CFR 130.7(c)(1) and 130.2(i). The state or authorized Tribe submits the TMDL to EPA for review and approval. EPA notes that CWA section 303(d) does not establish any new implementation authorities for control of nonpoint source pollution, and nonpoint source load allocations are primarily implemented through existing state, local, Tribal, and other Federal programs.[62]

To date, no Tribe has applied for TAS for the CWA section 303(d) program. EPA is providing technical assistance and is encouraging Tribes to apply for TAS. When a Tribe lacks TAS authorization for CWA section 303(d), EPA generally is the authority for establishing impaired waters lists and TMDLs in Indian country. Where a Tribe is not in a position to apply for and receive TAS for the CWA section 303(d) program and is interested in having EPA develop lists or TMDLs for particular waters, EPA will work with the Tribe to determine appropriate next steps, consistent with available resources. In instances where EPA establishes lists of impaired waters and TMDLs for waters covered by baseline WQS or other WQS applicable in Indian country, EPA would work closely with impacted Tribes and would provide for full and meaningful public participation in both the listing and TMDL development processes.

VIII. Effective Date of the Baseline Water Quality Standards

EPA proposes to make a final rule effective for CWA purposes 120 days after it is published in the **Federal Register**. On that delayed effective date, baseline WQS would therefore become the CWA-effective WQS applicable to Indian reservation waters covered by a final rule. It would apply to all Indian reservation waters except those waters automatically excluded from coverage and those which the Regional Administrator has approved exclusion from coverage as discussed in sections IV.A and B of this preamble. EPA is proposing this delayed effective date to allow adequate time for Tribes to coordinate with the appropriate Regional Administrator regarding any possible exclusions from coverage by baseline WQS.

As mentioned in section IV.B of this preamble, a Tribe should communicate with the Regional Administrator after this proposal is published in the **Federal Register**, but no later than 90 days after the final rule is published, regarding Indian reservation waters to be excluded from coverage under the final baseline WQS rule. EPA expects that the Regional Administrator would decide, informed by consultation with the Tribe, no later than 120 days after the final rule is published in the **Federal Register** whether to approve an exclusion from coverage under the final baseline WQS.

EPA invites comments on whether there should be a delayed effective date and whether 120 days is an appropriate period of delay.

EPA further expects that after the final rule goes into effect for CWA purposes, the Regional Administrator generally would no longer exclude additional Indian reservation waters from coverage by the baseline WQS. EPA proposes this approach in the interest of promoting regulatory certainty and avoiding the confusion that could potentially result

[61] 81 FR 65901, September 26, 2016.

[62] Memorandum: New Policies for Establishing and Implementing TMDLs. See *https://www3.epa.gov/npdes/pubs/owm0124.pdf.*

after the effective date if waters are alternately covered or not covered by baseline WQS depending on the timing of discussions between Tribes and Regional Administrators about exclusions.

EPA acknowledges, however, that limited circumstances may warrant the ability of the Regional Administrator to exclude specific Indian reservation waters from coverage after the baseline WQS are in effect. EPA expects such circumstances would pertain to instances where a Tribe communicates with the Regional Administrator about an exclusion after a material change with respect to a Tribe's Indian reservation, for example, when (1) a Tribe becomes newly federally recognized after the effective date of a final rule and acquires Indian reservation lands or (2) a Tribe that was duly approved by the Regional Administrator to be excluded from coverage by baseline WQS later acquires new trust lands outside the boundaries of a formal reservation after the effective date of the final rule and wants to extend exclusion from coverage to the newly acquired trust lands.

EPA invites comments on this approach to limiting the exclusion of Indian reservation waters from coverage by baseline WQS after the final rule goes into effect for CWA purposes. Additionally, EPA invites comments on whether the proposed regulatory text should be amended to reflect the selected approach.

IX. Conditions Under Which Baseline Water Quality Standards Would No Longer Apply

Under the CWA, Congress gave states and authorized Tribes primary responsibility for developing and adopting WQS for their respective navigable waters (CWA sections 303(a) through (c)). Although EPA would be promulgating baseline WQS for Indian reservation waters covered by a final rule, federally recognized Indian Tribes retain the option to seek TAS authority to administer the WQS program and adopt and submit to EPA WQS consistent with CWA section 303(c) and EPA's implementing regulation at 40 CFR part 131. As discussed earlier in this preamble, EPA encourages and is committed to working with eligible Tribes to obtain TAS to administer a WQS program and adopt new/revised WQS for EPA approval.

Once a Tribe obtains TAS and submits WQS for EPA action, EPA will review and would approve those WQS if they meet the requirements of CWA section 303(c) and implementing regulation at 40 CFR part 131. Once a Tribe's new WQS are approved by EPA, in accordance with proposed 40 CFR 131.XX(a)(2), the Federal baseline WQS will no longer apply. Specifically, that provision excludes from coverage of the rule ''Indian reservation waters . . . where EPA has approved the applicable state or tribal water quality standards.'' Thus, a Tribe's WQS will go into effect for CWA purposes upon EPA's approval of the standards.[63]

The public would have the opportunity to provide comment on the Tribe's new/revised WQS submission and the exclusion of the relevant Indian reservation waters from the baseline WQS rule upon EPA-approval of those WQS during the Tribe's public comment period and hearing associated with the proposed WQS submission. EPA would work with the Tribe to ensure that it included a statement in its public notice that exclusion from the scope of federally promulgated baseline WQS would be a consequence of EPA's potential approval of the Tribe's new/revised WQS. After approving an authorized Tribe's WQS, EPA would update the public website that it intends to provide in the final rule to indicate that the Tribe is no longer subject to the baseline WQS.

EPA invites comment regarding when Federal baseline WQS would no longer apply to the Tribe's waters subject to the Tribe's new WQS once approved by EPA.

X. Economic Analysis

The baseline WQS proposed in this rule would not themselves impose costs on any entity. However, to best inform the public of the potential impacts of this proposed rule, EPA has developed an analysis of the potential control actions and costs that point source facilities discharging into or upstream from waters covered by this rule may incur as a result of implementing the baseline WQS. This analysis and the methods and assumptions used in estimating costs are documented in *Economic Analysis for Potential Federal Baseline Water Quality Standards for Indian Reservation Waters,* which can be found in the record for this rulemaking.

The current regulatory framework is the set of currently applicable requirements under the CWA without this proposed rule. These requirements include TBELs and WQBELs in NPDES permits. For purposes of this economic analysis, point source costs only reflect incremental changes that are needed to comply with new or more stringent WQBELs derived from the proposed baseline WQS.

As discussed in section V.B of this preamble, the water quality criteria in the proposed baseline WQS would consist of narrative water quality criteria with binding procedures to translate the narrative criteria into numeric values as needed for water quality regulatory purposes. Although the procedures include several options to fit case-by-case circumstances, for simplicity the economic analysis generally relies on *Option One* discussed in section V.B. of this preamble: that is, relying on EPA's national recommended CWA section 304(a) water quality criteria to protect human health and aquatic life.

Although the focus of the cost analysis is to estimate control costs for point sources, attaining the proposed baseline WQS may depend on additional actions such as nonpoint source controls. Nonpoint source controls, whether required through a nonpoint source program or implemented voluntarily, may lead to nonpoint sources incurring costs as an indirect result of the proposed baseline WQS. Conversely, implementing nonpoint source controls may relieve a portion of the estimated indirect burden on and cost to point sources within the same watershed. However, quantitative evaluation of the potential control needs beyond those potentially addressed under the NPDES program is not possible given the limited available data. Thus, EPA identified the types of controls and costs that may be incurred for nonpoint sources but did not develop nationwide nonpoint source cost estimates.

EPA seeks comment on all aspects of the economic analysis including, but not limited to, its assumptions relating to the current regulatory framework, affected entities, implementation, and compliance costs.

A. Identifying Affected Entities

EPA used a multi-step method for evaluating the effect of the proposed

[63] 40 CFR 131.21(c) provides that WQS adopted by an authorized Tribe go into effect for CWA purposes upon EPA approval, ''unless EPA has promulgated a more stringent water quality standard for the State or Tribe *that is in effect.*'' Emphasis added. Where a more stringent EPA-promulgated standard is in effect, 40 CFR 131.21(c) goes on to provide that the less stringent Tribal WQS will go into effect after EPA ''withdraws'' the more stringent Federal water quality standard. Here, in accordance with the proposed scope of coverage of the baseline WQS rule, 40 CFR 131.XX(a)(2) (excluding from coverage of the rule ''Indian reservation waters . . . where EPA has approved the applicable state or Tribal water quality standards''), Tribal WQS will go into effect for CWA purposes upon EPA approval regardless of stringency. Thus, because the baseline WQS are no longer ''in effect'' for Indian reservation waters once EPA has approved applicable Tribal WQS, there is no need to ''withdraw'' the baseline WQS for those waters.

baseline WQS applying to point sources. This method included the following steps: identification of potentially affected permittees, sample selection, extrapolation, determining the need for WQBELs (reasonable potential analysis), and projecting effluent limits.

EPA identified facilities discharging to Indian reservation waters as well as facilities within a five-mile radius and discharging upstream from Indian reservation waters. EPA focused its analysis on the 57 major [64] facilities identified; other facilities may also incur costs and EPA invites comments from minor facilities that believe they may be impacted. Seven of those facilities discharge directly to Indian reservation waters, and all these are sewerage systems.[65] Of the 50 major facilities discharging upstream from Indian reservation waters, 9 are industrial facilities, and 41 are sewerage systems. EPA evaluated all 7 direct dischargers to Indian reservation waters and all 9 upstream industrial facilities and selected a sample of 10 upstream sewerage systems with which to extrapolate for cost estimation purposes.

B. Method for Estimating Costs

EPA evaluated compliance scenarios and associated costs for the sample facilities based on available information about the facilities, their treatment systems, and current effluent quality. EPA determined whether a facility would most likely achieve compliance through optimization, pollution prevention and source control, additional effluent treatment, or alternative compliance mechanisms such as WQS variances or dilution credits. In some cases, available information did not clearly point to one compliance alternative. In such cases, EPA estimated a range of costs for compliance.

EPA extrapolated costs to the remaining major upstream sewerage systems from the sample based on facility flow. Most options include one-time costs (*e.g.,* costs to develop a pollution prevention program or develop a WQS variance) and on-going or annual costs (*e.g.,* financing the capital cost of constructing additional effluent treatment, operation and maintenance [O&M] of treatment units, maintaining a pollution prevention program).

C. Results

Total cost estimates range from $15.51 million in annualized costs over 20 years at a 3 percent discount rate (with $6.1 million in one-time costs) to $30.54 in annualized costs over 20 years at a 3 percent discount rate (with $1.23 million in one-time costs). Using a discount rate of 7 percent over 20 years, total annualized costs range from $18.94 million (also with $6.1 million in one-time costs) to $36.45 million (also with $1.23 million in one-time costs). Total one-time costs are larger in the low estimate than in the high estimate because one-time WQS variance costs are often used in lieu of annualized effluent treatment costs for facility-specific low estimates for certain pollutants. The potential costs presented in the *Economic Analysis for Potential Federal Baseline Water Quality Standards for Indian Reservation Waters* are a product of a series of assumptions and subsequent analyses that are intended to be both conservative and as comprehensive as possible. The document identifies uncertainties in the analysis associated with data limitations, potential pollutant load reductions achievable, and the methods dischargers would use to comply with potential requirements and permit conditions that affect the estimated costs.

Promulgating baseline WQS for Indian reservation waters would promote the implementation of pollution control measures and best practices to help improve water quality and prevent future degradation of Indian reservation waters, as well as potentially providing positive water quality benefits to waters in adjacent jurisdictions. Improved water quality for Indian reservation waters will benefit Tribes as well as anyone who recreates on Indian reservation waters or values environmental quality regardless of their current or anticipated uses of Indian reservation waters.

Although implementation of baseline WQS is likely to yield significant benefits, estimating the dollar value of these improvements to Tribes may not be feasible. First, Tribes often express the difficulty of placing a monetary value on ecosystem services, given the belief that these resources are sacred and beyond any earthly value. Second, estimating the value of water quality improvements to visitors of Indian reservations is challenging due to the lack of data on site-specific visitation, use (*e.g.,* recreational fishing) and valuation. Therefore, EPA provided a qualitative description of benefits categories that may stem from baseline WQS. These benefits include those related to human health, ceremonial and subsistence harvests of fish and shellfish, recreation, and other social welfare improvements. EPA anticipates, however, that the abovementioned benefits will ultimately outweigh the potential estimated incremental costs associated with promulgation of this rule and that this rule will help address the environmental challenges Tribes are currently facing.

XI. Statutory and Executive Order Reviews

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

A. Executive Order 12866: Regulatory Planning and Review; Executive Order 13563: Improving Regulation and Regulatory Review; and Executive Order 14094: Modernizing 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 Executive Order 12866 review have been documented in the docket. EPA prepared an analysis of the potential costs and benefits associated with this action. This analysis, *Economic Analysis for Potential Federal Baseline Water Quality Standards for Indian Reservations,* is summarized in section XI of the preamble and is available in the docket.

B. Paperwork Reduction Act (PRA)

This action does not impose any new information collection burden under the PRA. OMB has previously approved the information collection activities contained in the existing regulations at 40 CFR part 131 and has assigned OMB control number 2040–0049.

[64] EPA uses the designation of ''major'' for municipal discharges of 1 million gallons per day (MGD) or more, or serving a population of 10,000 or more, and industrial discharges with a major rating code over a specified value based on the presence of toxics and size of discharge flow (EPA, 2010). Minor dischargers typically do not have monitoring requirements for toxic pollutants so data to evaluate reasonable potential for these facilities is often limited. In addition, these dischargers may not contribute significantly to instream loads even if such pollutants were present in the effluent from these facilities. Thus, the potential for minor facilities to incur costs as a result of the potential criteria is low, and minor facilities were not included in the analysis. However, EPA acknowledges minor facilities with smaller operating budgets, such as those managed by smaller communities, could have more difficulty complying with any additional requirements than would major facilities. EPA also has programs and tools available to assist Tribes in these situations, such as the Lagoon Wastewater Treatment Action Plan, and various infrastructure funding opportunities.

[65] Sewerage systems are those facilities both public and private that collect and treat primarily domestic wastewaters. Some EPA databases refer to sewerage systems as wastewater treatment facilities (WWTFs), or wastewater treatment plants (WWTPs).

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 RFA. This action will not impose any requirements on small entities. EPA-promulgated standards are implemented through various water quality control programs including the NPDES program, which limits discharges to navigable waters except in compliance with an NPDES permit. The CWA requires that all NPDES permits include any limits on discharges that are necessary to meet applicable WQS. Thus, under the CWA, EPA's promulgation of WQS establishes standards that a state or EPA implements through the NPDES permit process. For this proposed rule, a state (upstream dischargers) or EPA has discretion in developing discharge limits, as needed to meet the standards. As a result of this action, states and EPA will need to ensure that permits they issue include any limitations on discharges necessary to comply with the standards established in the final rule. In doing so, states or EPA will have a number of choices associated with permit writing. While implementation of the rule may ultimately result in new or revised permit conditions for some dischargers, including small entities, EPA's action, by itself, does not impose any of these requirements on small entities. That is, the promulgated WQS are not self-implementing.

D. Unfunded Mandates Reform Act (UMRA)

This action does not contain an unfunded mandate of $100 million or more 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)

This action does not have federalism implications. EPA is proposing to promulgate Federal baseline WQS for Indian reservation waters that currently do not have CWA-effective WQS in place. However, it will not impose substantial direct compliance costs on state or local governments, nor will it preempt state law. Thus, Executive Order 13132 does not apply to this action.

Consistent with EPA's policy to promote communications between EPA and state and local governments, EPA nonetheless consulted with state officials early in the process of developing the proposed action to allow them to provide meaningful and timely input into its development. On September 15, 2021, EPA consulted with state representatives from the Association of Clean Water Administrators (ACWA) to hear their initial views on the proposed regulatory changes. Participants raised questions about EPA's implementation of baseline WQS under the CWA, EPA's prioritization of Tribes obtaining TAS to administer their own WQS programs, the ability of baseline WQS to be tailored to reflect region or location-specific information, and how EPA would reconcile differences between downstream WQS and upstream state WQS. EPA has considered these comments in developing this proposal.

In keeping with the spirit of E.O. 13132, and consistent with EPA's policy to promote communications between EPA and state and local governments, EPA specifically solicits comment on this proposed rule from state and local officials. In particular, EPA requests comment on any provision in this proposed rule that state officials believe would impose an undue burden on state WQS programs.

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. Its primary effect will be to establish Federal WQS for waters of federally recognized Tribes with Indian reservations that currently do not have CWA-effective WQS. It could also affect Tribes with Tribal WQS applicable under the CWA to waters adjacent to such reservations. As mentioned above, EPA-promulgated standards are implemented through various water quality control programs including the NPDES program. Under the CWA, EPA's promulgation of WQS establishes standards that a state or EPA implements through the NPDES permit process; EPA implements the NPDES program in the majority of Indian country waters that would be subject to this rule. For this proposed rule, a state (upstream dischargers) or EPA has discretion in developing discharge limits, as needed to meet the standards. While implementation of the rule may ultimately result in new or revised permit conditions for some dischargers, which could include Tribal governments, EPA's promulgation action, by itself, does not impose any of these requirements on dischargers. In any case, in accordance with proposed 40 CFR 131.XX(b), EPA would conduct timely and meaningful consultation with Tribes on any EPA permit actions where Tribal interests may be affected.

EPA consulted with Tribal officials under the EPA Policy on Consultation and Coordination with Indian Tribes early in the process of developing this regulation to allow them to provide meaningful and timely input into its development. EPA notified the leaders of all 574 federally recognized Tribes and held a 90-day Tribal consultation and coordination period from June 15 through September 13, 2021, to inform development of the proposed rule.

The pre-proposal input that EPA received from Tribes during the consultation and coordination process is documented in *Summary Report of Tribal Consultation and Coordination for the Proposed Rule: Federal Baseline Water Quality Standards for Indian Reservations,* available in the docket for this proposed rule.

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 EPA does not believe the environmental health or safety risks addressed by this action present a disproportionate risk to 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 pertains to 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)

Executive Order 12898 (59 FR 7629, February 16, 1994) directs Federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations (people of color and/or

Indigenous peoples) and low-income populations.

Environmental impacts to Tribes may be considered under the category of environmental justice in recognition that Tribal communities may at times be among the communities disproportionately impacted by environmental degradation. Where Tribal populations are part of a larger non-Tribal community, many of the environmental justice considerations are very similar to those of other vulnerable and underserved populations. However, there is a unique set of environmental justice considerations for Tribes, particularly where Tribal members are exercising their cultural practices. For EPA, the government-to-government relationship and trust responsibility that the Federal Government has with federally recognized Tribal governments further sets environmental justice issues for Tribes apart from those in other communities.[66]

EPA and other Federal agencies focus on resolving EJ issues affecting Tribes through a unique combination of approaches which center on (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 rule is relying on a combination of both approaches, as discussed below.

EPA believes that the human health or environmental conditions that exist prior to this action result in or have the potential to result in disproportionate and adverse human health or environmental effects on Tribes. 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.[67] [68] [69]

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.[70] Impairments of aquatic resources may also impact a Tribe's ability to provide for present and future generations and the maintenance of their lifeways. Water quality impacts may stretch even further into a Tribe's sacred practices when members can no longer rely on their waters for ceremonial uses.[71]

EPA believes that this action is likely to reduce existing disproportionate and adverse effects on Indigenous peoples. Specifically, the proposed rule provides several mechanisms for EPA, in consultation with a Tribe, to address such issues. These mechanisms include: flexibilities allowing for the consideration of Tribe-specific fish consumption rates when translating narrative criteria into numeric values; an opportunity for Tribes to protect culturally significant waters by nominating them to be designated as outstanding national resource waters; and the ability for EPA and Tribes to ensure the protection of unique Tribal cultural and traditional uses while implementing the baseline WQS. In short, implementing CWA-effective WQS in Indian reservation waters would provide a strong basis for NPDES permit limits and other controls that is not presently available to protect such waters. Establishing the baseline WQS would also enhance EPA's existing implementation in Indian country of section 401 certifications and other programs that rely on WQS in protecting Tribal waters.

EPA additionally identified and addressed environmental justice concerns by considering how this proposed rulemaking also promotes Tribal sovereignty over Tribes' water resources. The processes established in the rule would foster the active participation of Tribes in EPA's administration of baseline WQS. This participation should, in turn, improve Tribal understanding of CWA programs and may even help remove perceived barriers for some Tribes to obtain authority to administer CWA TAS programs themselves.

To achieve the benefits associated with a final rule, EPA recognizes that some facilities may need to add pollution control measures and incur additional compliance costs over time. This includes an estimated 164 NPDES dischargers on Indian reservations potentially covered by this rule and 274 NPDES dischargers located within 5 miles upstream from those reservations.[72] Most of these facilities are non-Tribally owned. Nevertheless, approximately 118 tribally-owned facilities could face added requirements. Given that this rule's intention is to address disproportionate impacts currently faced by Tribes, EPA realizes the importance of considering any potential impacts Tribes may experience in association with implementation of a final rule.

Several Federal funding streams available to facilities that serve Tribal communities in Indian country may help ensure that capital improvement costs, which are estimated to be $1 million to $3 million in aggregate, would not be passed on to ratepayers.[73] The Federal Tribal Infrastructure Task Force has developed a matrix summarizing the various Federal assistance vehicles for water and wastewater treatment services in Indian

[66] 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) 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.'' Policy available at *https://www.epa.gov/environmentaljustice/epa-policy-environmental-justice-working-federally-recognized-tribes-and.*

[67] National Environmental Justice Advisory Council (NEJAC). 2001. *Fish Consumption and Environmental Justice. https://www.epa.gov/sites/default/files/2015-02/documents/fish-consump-report_1102.pdf.* p. vii. Accessed 10/20/2021.

[68] EPA. 2016. Idaho Tribal Fish Consumption Survey. *https://www.epa.gov/columbiariver/idaho-tribal-fish-consumption-survey.* Accessed 1/26/2022.

[69] 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.* Accessed 10/18/21.

[70] 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.

[71] Martin, C., Simonds, V.W., Young, S.L., Doyle, J., Lefthand, M., Eggers, M.J. Our Relationship to Water and Experience of Water Insecurity among Apsáalooke (Crow Indian) People, Montana. Int. J. Environ. Res. and Public Health 2021, 18, 582. *https://doi.org/10.3390/ijerph18020582.* Accessed 1/26/2022.

[72] Facilities 5 miles upstream from areas that would be covered by baseline WQS were considered in the rule's economic analysis. However, facilities located greater than 5 miles upstream may be affected by the rule depending on local factors considered during the downstream protection analysis for a given facility.

[73] See EPA's *Economic Analysis for Potential Federal Baseline Water Quality Standards for Indian Reservation Waters.*

country and Alaskan Native Villages.[74,75]

Although there is funding for capital improvements, there is a general lack of Federal funding sources to support operation and maintenance (O&M) of such wastewater facilities. As a result, some Tribal communities may need to contribute toward O&M needs, which are estimated to range from approximately $50,000 to $500,000 in aggregate per year. Tribal communities, along with other communities that receive services, would need to fulfill these O&M needs with the resources and expertise they have on hand or by imposing an additional burden on ratepayers.

EPA anticipates, however, that the abovementioned benefits will ultimately outweigh these potential pass-through costs and that this rule will help address the environmental justice challenges Tribes are currently facing Tribes.

For more information on how EPA provided meaningful participation opportunities for Tribes in developing this proposal, please see Section F. Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments).

List of Subjects

40 CFR Part 131

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

40 CFR Parts 230 and 233

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

Michael S. Regan,

Administrator.

For the reasons set forth in the preamble, the EPA proposes to amend 40 CFR parts 131, 230, and 233 as follows:

[74] In 2007, the multi-agency Tribal Infrastructure Task Force was created to develop and coordinate Federal activities in delivering water infrastructure, wastewater infrastructure and solid waste management services to tribal communities. EPA is a member of the Task Force. See *https://www.epa.gov/tribal/federal-infrastructure-task-force-improve-access-safe-drinking-water-and-basic-sanitation.*

[75] Tribal Infrastructure Task Force. 2018. Tribal Resource Directory Matrix of Federal Assistance for Water and Wastewater Treatment Services. *https://www.epa.gov/tribal/tribal-resource-directory-matrix-federal-assistance-water-and-wastewater-treatment-services.*

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.*

■ 2. Add § 131.XX to read as follows:

§ 131.XX Federal baseline water quality standards for Indian reservation waters.

(a) *Scope.* The Federal water quality standards in this section apply to all waters of the United States in Indian country except:

(1) Indian reservation waters for which EPA has promulgated other Federal water quality standards;

(2) Indian reservation waters where EPA has explicitly found that a state has jurisdiction to adopt water quality standards or authorized a Tribe to adopt water quality standards pursuant to § 131.8, and where EPA has approved the applicable state or Tribal water quality standards;

(3) Indian country waters on off-reservation allotments and off-reservation dependent Indian communities; and

(4) Indian reservation waters of Tribes for which the Regional Administrator approves an exclusion from application of the standards in this section, informed by consultation with the Tribe. EPA will maintain a publicly available list of Indian reservation waters that are excluded from coverage of the baseline water quality standards in this section at [EPA website to be inserted in final rule].

(b) *Consultation with Tribes.* In taking actions under this section, the Regional Administrator will initiate Tribal consultation with the Tribe(s) whose interests may be affected, consistent with applicable EPA Tribal consultation policies.

(c) *Federal baseline designated uses.* The following designated uses apply to all Indian reservation waters specified in paragraph (a) of this section except where paragraph (i) of this section applies:

(1) *Aquatic life.* Protection and propagation of fish, shellfish, and wildlife, which includes protection of human health of consumers of fish, shellfish, and other aquatic life.

(2) *Primary contact recreation.* Provides for recreation in and on the water.

(3) *Cultural and traditional uses.* Protection of cultural and traditional uses of reservation waters.

(d) *Federal baseline water quality criteria*—(1) *Narrative criteria.* The following narrative criteria apply to all waters covered by paragraph (a) of this section and designated for the uses in paragraph (c) of this section or as revised per paragraph (i) of this section.

(i) All waters shall be free from toxic, radioactive, conventional, non-conventional, deleterious or other polluting substances in amounts that will prevent attainment of the designated uses specified in paragraph (c) of this section and revised designated uses made under paragraph (i) of this section, where appropriate;

(ii) All waters shall be free from adverse impacts to the chemical, physical or hydrologic, or biological integrity caused by pollutants or pollution that prevent the attainment of applicable designated uses specified in paragraph (c) of this section and revised designated uses made under paragraph (i) of this section, where appropriate;

(iii) All waters shall be free from substances attributable to wastewater or other discharges where appropriate, that:

(A) Settle to form objectionable deposits;

(B) Float as debris, scum, oil, or other matter to form nuisances;

(C) Produce objectionable color, odor, taste, or turbidity; or

(D) Produce undesirable or nuisance aquatic life;

(iv) All waters shall be free from conditions that would likely jeopardize the continued existence of any threatened or endangered species listed under the Federal Endangered Species Act or result in the destruction or adverse modification of such species' critical habitat; and

(v) All waters shall maintain a level of water quality at their pour points to downstream waters that provide for the attainment and maintenance of the water quality standards of those waters, including the waters of another state or a federally recognized Tribe.

(2) *Procedures to translate narrative criteria.* The Regional Administrator shall utilize one of the options set forth in this paragraph (d)(2) to derive numeric translations of the narrative criteria in paragraph (d)(1) of this section for all purposes under Clean Water Act (CWA) section 303(c) for specific parameters as necessary to protect the applicable designated uses in paragraph (c) of this section or as revised per paragraph (i) of this section for specific water bodies.

(i) Translate the narrative criteria in paragraph (d)(1) of this section using EPA's national recommended water quality criteria published under section 304(a) of the CWA for parameters for which EPA has section 304(a) criteria recommendations; or

(ii) Where information and/or data are available that more accurately reflect site-specific conditions, translate the narrative criteria in paragraph (d)(1) of this section using EPA's national recommended water quality criteria published under section 304(a) of the CWA modified to reflect site-specific conditions and aquatic communities. The modifications shall protect the applicable designated uses in paragraph (c) of this section or as revised per paragraph (i) of this section and be based on a sound scientific rationale, including EPA published methodologies if available, and Indigenous Knowledge, as appropriate, incorporating where relevant:

(A) A fish consumption rate protective of Tribal fish consumers or EPA's latest default fish consumption rate, if appropriate; or

(B) Available ambient monitoring data reflecting site-specific water chemistry inputs; or

(C) Protective default water chemistry inputs; or

(D) Other scientifically defensible assessments, for example, guidance published by EPA regions or those related to Endangered Species Act consultation, and Indigenous Knowledge, as appropriate; or

(iii) Where appropriate, translate the narrative criteria in paragraph (d)(1) of this section using water quality standards adopted by the Tribe, or CWA-effective water quality standards applicable in an adjacent or other relevant state(s) or Tribe(s), that are based on a sound scientific rationale, reflect similar waterbody characteristics, and ensure protection of the applicable designated use(s), taking into consideration Indigenous Knowledge, as appropriate; or

(iv) Where applicable, translate the narrative criteria in paragraph (d)(1) of this section using provisions of 40 CFR part 132 (the Water Quality Guidance for the Great Lakes System) to ensure the translations are as protective as required by 40 CFR part 132; or

(v) Where paragraphs (d)(2)(i) through (iv) of this section are not applicable, the Regional Administrator shall rely on existing CWA implementation provisions in this part to derive numeric translations of the narrative criteria in paragraph (d)(1) of this section where necessary; and

(vi) The Regional Administrator shall maintain and make available to the public for informational purposes a list of numeric translations of the narrative criteria derived per paragraph (d)(2) of this section at [location of list to be provided in final rule].

(e) *Federal baseline antidegradation policy.* (1) Existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected.

(2) Where the quality of the waters exceeds levels necessary to support the protection and propagation of fish, shellfish, and wildlife and recreation in and on the water, that quality shall be maintained and protected unless the Regional Administrator finds with written agreement from the Tribe, after full opportunity for intergovernmental coordination and public involvement, that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located. In allowing such degradation or lower water quality, the Regional Administrator shall assure water quality adequate to protect existing uses fully. Further, the Regional Administrator shall assure that there shall be achieved the highest statutory and regulatory requirements for all new and existing point sources and all Tribal-regulated cost effective and reasonable best management practices for nonpoint source control.

(i) Before allowing any lowering of high water quality, pursuant to paragraph (e)(2) of this section, the Regional Administrator shall find with written agreement from the Tribe, after an analysis of alternatives, that such a lowering is necessary to accommodate important economic or social development in the area in which the waters are located. The analysis of alternatives shall evaluate a range of practicable alternatives that would prevent or lessen the degradation associated with the proposed activity. When the analysis of alternatives identifies one or more practicable alternatives, the Regional Administrator shall only find with written agreement from the Tribe, that a lowering is necessary if one such alternative is selected for implementation.

(ii) [Reserved]

(3) Where high quality waters constitute an outstanding national resource, such as waters of national and Tribal parks and wildlife refuges and waters of exceptional recreational, ecological, or cultural significance, that water quality shall be maintained and protected.

(4) In those cases where potential water quality impairment associated with a thermal discharge is involved, the decision to allow such degradation shall be consistent with section 316 of the Clean Water Act.

(f) *Federal baseline antidegradation implementation methods*—(1) *Applicability.* The antidegradation policy in paragraph (e) of this section and the antidegradation implementation methods in this paragraph (f) shall apply to all Indian reservation waters of the United States included in paragraph (a) of this section.

(i) The requirements of paragraphs (e) and (f) of this section shall be followed when considering all requests to authorize new or expanded regulated activities. Regulated activities include, but are not limited to, any activity that requires a permit, license, or water quality certification pursuant to sections 401, 402, and 404 of the CWA.

(ii) Antidegradation protections will be addressed in new or reissued general permits authorized, implemented, or administered by the Regional Administrator either at the time the Regional Administrator develops and issues the general permit or upon review of an applicant's request to be covered by a general permit. The Regional Administrator will describe in writing in the permit fact sheet how the general permit is consistent with the antidegradation requirements of this paragraph (f)(1)(ii) and the antidegradation policy in paragraph (e) of this section.

(2) *Existing instream use protection consistent with paragraph (e)(1) of this section.* For all waters, the Regional Administrator, shall ensure that the level of water quality necessary to protect existing uses is maintained. In order to achieve the requirement in this paragraph (f)(2), the Regional Administrator shall consider whether a regulated activity would lower the water quality to the extent that it would no longer be sufficient to protect and maintain the existing uses of that water body. If the lowering of water quality would not protect and maintain the existing uses of that water body, then the Regional Administrator would not allow the lowering of water quality. Such consideration shall be based on all existing and readily available water quality-related data and information, as well as any additional water-quality related data and information submitted during the public comment period for the authorization.

(3) *High quality water protection consistent with paragraph (e)(2) of this section.* In determining which waters will receive high quality water protection consistent with paragraph (e)(2) of this section, the Regional Administrator will identify high quality water on a parameter-by-parameter basis. Each parameter that is determined to be high quality shall be considered and evaluated independently, consistent with this paragraph (f)(3), at the time an

applicant requests authorization to lower high water quality. A parameter is high quality if its water quality level exceeds its water quality criterion in paragraph (d) of this section. The Regional Administrator shall ensure that no regulated activity that results in a lowering of high water quality occurs unless the components outlined in paragraph (f)(3)(i) of this section are available and the Regional Administrator has made a finding with written agreement from the relevant Tribe, consistent with paragraph (f)(3)(ii) of this section. If the Tribe does not provide its written agreement, then the Regional Administrator will maintain the current high water quality.

(i) When determining whether to allow a lowering of high water quality for one or more parameters that exceed levels necessary to support the protection and propagation of fish, shellfish, and wildlife and recreation in and on the water, the Tribe and Regional Administrator will consider the following components and information:

(A) *Identifying information.* Name of the applicant, a description of the nature of the applicant's business and the pollutants to be discharged, location of the discharge, the name of and any water quality data for the receiving water body, daily maximum and average flow to be discharged, and effluent characterization.

(B) *Analysis of alternatives.* Identification and evaluation of a range of practicable alternatives that would prevent or lessen the degradation associated with the proposed activity to determine whether the degradation of water quality is necessary. When the analysis of alternatives identifies one or more practicable alternatives, the Regional Administrator shall only find with written agreement from the Tribe that a lowering of high water quality is necessary, consistent with paragraph (e)(2)(ii) of this section, if one such alternative is selected for implementation.

(C) *Socio-economic analysis.* Identification and evaluation of the social and economic development benefits to the area in which the waters are located that will be foregone if the lowering of water quality is not allowed. Along with the analysis of alternatives, the socio-economic analysis is used to determine whether the lowering of high water quality will accommodate important economic and social development in the area in which the water is located. The ''area in which the waters are located'' shall be determined on a case-by-case basis and shall include all areas directly impacted by the proposed regulated activity. Factors that must be considered in the socio-economic analysis include, but are not limited to, the ecological and economic importance of the affected waters, the importance of the development to the affected community, and the socio-economic health of the affected community as determined by appropriate analytical methods.

(ii) The Regional Administrator shall make a finding that a lowering of high water quality is necessary to accommodate important social and economic development in the area in which the water is located only if the information in paragraph (f)(3)(i) of this section supports such a conclusion and the Tribe has provided written agreement.

(A) If the lowering of high water quality is necessary to accommodate important social or economic development goals, and the Tribe has provided its written agreement, the Regional Administrator may allow a lowering of the high water quality as long as one of the alternatives identified in paragraph (f)(3)(i)(B) of this section is selected for implementation and incorporated into the authorization for the activity. If no practicable alternative was identified by the analysis of alternatives, but the lowering of high water quality will accommodate important social or economic development and the Tribe has provided written agreement, the Regional Administrator may allow the lowering of high water quality. If a non-degrading practicable alternative is selected, no lowering of the high water quality will occur, and the Regional Administrator does not need to allow the lowering.

(B) In no event will the Regional Administrator allow water quality to be lowered below the level required to fully protect existing and designated uses.

(C) To fulfill intergovernmental coordination, the Regional Administrator shall notify local, state, and Federal agencies that operate in the area impacted by the activity and request comment on the preliminary decision to allow a lowering of water quality in a high quality water based on whether it is necessary to accommodate important social and economic development in the area of the waters impacted by the activity.

(D) To ensure the opportunity for public involvement, the Regional Administrator shall provide public notice following EPA's own procedures and request public comment on the preliminary decision to allow a lowering of high water quality. In addition, the Regional Administrator will rely on any existing public notification and input procedures in place for the Tribe. The preliminary decision will provide relevant information regarding the lowering of high water quality, including the alternatives analysis, socio-economic analysis, the estimated amount of assimilative capacity available in the water body, and the estimated amount of assimilative capacity to be utilized by the proposed activity.

(E) The Regional Administrator's authorization of the regulated activity shall serve as notice of the final decision on whether to allow a lowering of high water quality.

(F) Before allowing any degradation of high water quality, the Regional Administrator shall identify point sources and Tribal-regulated nonpoint sources that discharge to, or otherwise impact, the receiving water. The Regional Administrator shall coordinate with other agencies, as necessary, to assure compliance with the highest statutory and regulatory requirements for all new and existing point sources and/or all Tribal-regulated cost-effective and reasonable best management practices for non-point source control. If compliance with the highest statutory and regulatory requirements for all new and existing point sources and all Tribal-regulated cost-effective and reasonable best management practices for non-point sources cannot be assured, the Regional Administrator will not allow a lowering of high water quality.

(4) *Outstanding national resource water protection consistent with paragraph (e)(3) of this section.* For Indian reservation waters assigned as Outstanding National Resource Waters, the Regional Administrator shall ensure, through the application of appropriate controls on point and Tribal-regulated nonpoint pollutant sources, that water quality is maintained and protected. No new or expanded regulated discharges will be allowed to Outstanding National Resource Waters or tributaries to such waters that would result in lower water quality unless it is on a short term and temporary basis, consistent with paragraph (f)(4)(v) of this section.

(i) Any person or entity may nominate a specific Indian reservation water with applicable baseline water quality standards under this section to be assigned as an Outstanding National Resource Water. The person or entity may transmit a written nomination to the Regional Administrator and the Tribe, at any time, including why the Indian reservation water warrants Outstanding National Resource Water protection.

(ii) The Regional Administrator shall determine with written agreement from the Tribe whether the nominated water qualifies as an Outstanding National Resource Water as described in paragraph (f)(4) of this section.

(iii) The Regional Administrator shall issue a public notice, utilizing EPA's own procedures and any existing Tribal public notice procedures, regarding the decision to assign a water as an Outstanding National Resource Water.

(iv) The Regional Administrator will maintain a comprehensive list of the Indian reservation waters that have been assigned as Outstanding National Resource Waters consistent with paragraph (e)(3) of this section at [location of list to be provided in final rule].

(v) The Regional Administrator may allow short-term, temporary water quality degradation in an Outstanding National Resource Water only if the short-term, temporary degradation is limited to the shortest possible time, does not impact existing uses, and does not alter the essential or special characteristics that make the Indian reservation water an Outstanding National Resource Water. For purposes of this section, short-term shall be considered any period that is measured in the context of weeks to months, not years.

(g) *Policy on dilution allowances and mixing zones.* In conjunction with the issuance of CWA section 402 and 404 permits for discharges to Indian reservation waters covered in paragraph (a) of this section:

(1) *Dilution allowances.* Where the discharge has rapid and complete mixing with the receiving water, a dilution allowance may be established by the Regional Administrator at the time a CWA section 402 or section 404 permit is issued, renewed, or materially modified which is in effect as long as the permit remains in effect.

(2) *Mixing zones.* Where the discharge does not have rapid and complete mixing with the receiving water, a mixing zone may be established by the Regional Administrator at the time a CWA section 402 or section 404 permit is issued, renewed, or materially modified which is in effect as long as the permit remains in effect.

(i) *Mixing zone* means an allocated impact zone where water quality criteria can be exceeded only if acutely toxic conditions are prevented.

(ii) Mixing zones shall not be authorized for a pollutant when the receiving water does not meet water quality criteria for that pollutant. Effluent limits established consistent with the assumptions and requirements of a wasteload allocation for the discharge in an EPA-approved or EPA-established total maximum daily load (TMDL) are acceptable if otherwise in accordance with this section.

(iii) Mixing zones shall not be authorized where they may fail to protect the applicable designated uses in paragraph (c) of this section or as revised per paragraph (i) of this section of the receiving water body, as a whole, including, but not limited to, any of the following scenarios:

(A) Impairment to the integrity of the aquatic community, including interference with successful spawning, egg incubation, rearing, or passage of aquatic life.

(B) Discharges into shellfish beds.

(C) Lethality to aquatic life passing through the mixing zone.

(D) Heat in the discharge that may cause thermal shock, lethality, or loss of cold water habitat or attract aquatic life to a toxic discharge.

(E) Conditions that impede or prohibit recreation in or on the water body.

(iv) Mixing zones shall not be authorized for pathogens, pathogen indicators, or bioaccumulative pollutants in the discharge, unless the Regional Administrator can demonstrate, after consideration of the effects of the mixing zone (including potential bioaccumulation within specific trophic levels of resident species or other relevant factors), that the designated use of the water body as a whole will be protected. *Bioaccumulative pollutant* means a pollutant that is taken up and retained by an aquatic organism from any surrounding media (*e.g.,* water, food, sediment).

(v) Mixing zones shall not overlap.

(vi) Water quality within an authorized mixing zone is allowed to exceed chronic water quality criteria for those parameters established by the Regional Administrator through the CWA section 402 or section 404 permit. Acute water quality criteria may be exceeded for such parameters within the zone of initial dilution inside the mixing zone. Acute criteria shall be met as near to the point of discharge as practicably attainable. Water quality criteria shall not be exceeded outside of the boundary of a mixing zone as a result of the discharge for which the mixing zone was authorized.

(vii) Mixing zones shall be no larger than necessary, and the concentrations of pollutants present shall be minimized. Mixing zones shall meet the following restrictions:

(A) Mixing zones in flowing waters shall not:

(*1*) Extend in a downstream direction for a distance from the discharge port(s) greater than 10 times the stream width plus the depth of water over the discharge port(s);

(*2*) Extend upstream for a distance of over 100 feet;

(*3*) Utilize greater than 25% of the applicable critical low flow when based on steady-state modeling;

(*4*) Utilize greater than 25% of the flow when based on dynamic modeling; nor

(5) Occupy greater than 25% of the width of the water body.

(B) Mixing zones in nonflowing waters shall not:

(*1*) Exceed 10% of the volume of the water body;

(*2*) Exceed 10% of the surface area of the water body (maximum radial extent of the plume regardless of whether it reaches the surface); nor

(*3*) Extend beyond 15% of the width of the water body.

(viii) *Critical low flow* means:

(A) The 1Q10 (the lowest one-day average flow event expected to occur once every ten years) or 1B3 (the lowest one-day average flow event expected to occur once every three years) flow rate for acute aquatic life criteria.

(B) The 7Q10 (the lowest seven-consecutive-day average flow event expected to occur once every ten years) or 4B3 (the lowest four-consecutive-day average flow event expected to occur once every three years) flow rate for chronic aquatic life criteria with a duration of less than 30 days and human health criteria based on a short-term toxicological effect.

(C) The 30Q10 (the lowest thirty-consecutive-day average flow event expected to occur once every ten years), 30Q5 (the lowest thirty-consecutive-day average flow event expected to occur once every five years), or 30B3 (the lowest thirty-consecutive-day average flow event expected to occur once every three years) flow rate for chronic aquatic life criteria with a duration of 30 days or longer.

(D) The harmonic mean flow rate for human health criteria based on lifetime exposure.

(ix) The Regional Administrator shall take the following elements into consideration when reviewing outfall designs as part of mixing zone applicability determinations and CWA section 402 permit development:

(A) Promote rapid mixing to the extent practicable through careful location and outfall design;

(B) Promote use of diffusers to the extent practicable; and

(C) Avoid shore-hugging plumes to the maximum extent practicable.

(h) *Authorization for NPDES permit compliance schedules.* When appropriate, the Regional Administrator may include a compliance schedule for water quality-based effluent limits in National Pollutant Discharge Elimination System (NPDES) permits consistent with 40 CFR 122.47, to permittees discharging to Indian reservation waters covered by paragraph (a) of this section.

(i) *Federal administrative procedure to revise baseline designated uses, add designated uses and establish water quality standards variances.* (1) The Regional Administrator may, upon the request of a Tribe for its reservation waters, or based on the Regional Administrator's identification, revise one or more designated uses in paragraph (c) of this section and associated criteria, add additional designated uses and associated criteria where such revisions will more appropriately reflect the Tribe-specific use and value of waters covered by paragraph (a) of this section, or establish water quality standards variances that apply to specific parameter(s), water body/waterbody segment(s), and permittee(s) covered by paragraph (a) of this section, as specified in the water quality standards variance. Any such designated use revision or addition, and associated criteria revisions, shall be consistent with §§ 131.10 and 131.11. Any such water quality standards variance shall be consistent with § 131.14.

(2) For any revision or addition of a designated use and associated criteria or water quality standards variance established under paragraph (i)(1) of this section, the Regional Administrator shall first provide for public notice of a public hearing on the proposed revision or addition to the designated use(s) and associated criteria and/or water quality standards variance at least 45 days in advance of the public hearing and hold a 45-day public comment period on the proposal, consistent with § 131.20(b) and EPA's public participation regulation at 40 CFR part 25. For any such proposal, the Regional Administrator shall prepare and make available to the public supporting documents identifying the specific surface water(s) affected and include the justification for each proposed designated use revision and/or water quality standards variance consistent with the requirements of the CWA and EPA's implementing regulation, specifically at §§ 131.10 and 131.14, respectively. The documents shall be made available to the public at least 30 days in advance of the date of a public hearing consistent with 40 CFR 25.5.

(3) Where the Regional Administrator makes a final decision to revise the designated use and associated criteria, add a designated use and associated criteria, or establish a water quality standards variance, those changes become applicable for CWA purposes, consistent with the requirements of the CWA and EPA's regulations including §§ 131.10 and 131.14. For water quality standards variances, those CWA purposes are limited to purposes of developing NPDES permit limits under section 301(b)(1)(C) of the CWA, where appropriate, and issuing certification under section 401 of the CWA pursuant to § 131.14(a)(3).

(4) The Regional Administrator shall maintain and make available to the public for informational purposes an updated list of designated use revisions, additions, and the associated criteria, as well as water quality standards variances established pursuant to this paragraph (i) at [location of list to be provided in final rule]. The Regional Administrator shall also maintain and make available to the public the supporting documents for each designated use revision, addition, and water quality standards variance.

(5) Nothing in this paragraph (i) shall limit the Administrator's authority to revise the designated uses in paragraph (a) of this section or establish a water quality standards variance through subsequent Federal rulemaking.

(j) *Applicability date.* The Federal water quality standards in this section will become the applicable water quality standards, effective for CWA purposes, for the waters identified in paragraph (a) of this section [DATE 120 DAYS AFTER THE FINAL RULE IS PUBLISHED IN THE **FEDERAL REGISTER**].

(k) *EPA implementation of the Federal baseline water quality standards of this section in waters of the Great Lakes system.* In making decisions under the CWA based on the water quality standards of this section for waters located in the Great Lakes System, as defined in 40 CFR 132.2, EPA will ensure that such decisions are consistent with the requirements for water quality standards, antidegradation policies, and implementation procedures for the Great Lakes System in 40 CFR part 132, as well as the water quality standards of this section.

PART 230—SECTION 404(b)(1) GUIDELINES FOR SPECIFICATION OF DISPOSAL SITES FOR DREDGED OR FILL MATERIAL

■ 3. The authority citation for part 230 is revised to read as follows:

Authority: 33 U.S.C. 1344(b) and 1361(a).

■ 4. Amend § 230.10 by revising paragraph (b)(1) to read as follows:

§ 230.10 Restrictions on discharge.

* * * * *

(b) * * *

(1) Causes or contributes, after consideration of disposal site dilution and dispersion, to violations of any applicable State water quality standard or federally promulgated water quality standard;

* * * * *

PART 233—404 STATE PROGRAM REGULATIONS

■ 5. The authority citation for part 233 continues to read as follows:

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

■ 6. Amend § 233.51 by revising paragraph (b)(3) to read as follows:

§ 233.51 Waiver of review.

* * * * *

(b) * * *

(3) Discharges with reasonable potential for adverse impacts on waters of another State or on waters subject to federally promulgated water quality standards;

* * * * *

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