prescribed set of steps for the virtual session, including recording the virtual session and maintaining/storing that recording.

*Response:* The Postal Service has not prescribed the steps a CMRA must follow when witnessing the execution of PS Form 1583 during a virtual session, just like it has not prescribed the steps a CMRA must follow when witnessing the execution of PS Form 1583 in person. In addition, based on the Postal Service's experience, the burden and expense associated with the proposed additional recording and maintenance/storage requirements also must be balanced against need for such additional measures, and the Postal Service has not yet determined such a need exists. Consequently, the Postal Service declines to adopt the commenter's suggestion.

*Comment:* The commenter recognized the changes to the Rules related to Private Mail Box (PMB) applicant registration will help prevent fraud.

*Response:* The Postal Service shares this conclusion and expects that changes will reduce the incidence of fraud and criminal activity through PMBs at CMRAs.

*Comment:* The commenter suggested that by allowing the addressee to ''acknowledge'' his or her signature in the real or virtual presence of a CMRA owner/manager, the Postal Service may be unintentionally conferring notarial authority on the CMRA owner/manager.

*Response:* Notaries in the United States are appointed by state governments. The Postal Service has no authority to confer any notarial authority on any person, and we believe the use of the term ''acknowledge'' in relation to a CMRA owner/manager does not confer, and was not intended to confer, any such authority. Nevertheless, in the final rule, the language has been changed to address the commenter's concern that using the term ''acknowledge'' in relation to a CMRA owner/manager may be construed to confer notarial authority upon the CMRA owner/manager; accordingly the term ''acknowledge'' will be replaced with ''confirm'' in relation to a CMRA owner/manager: ''[t]he addressee must sign or confirm his or her signature in the physical or virtual (in real-time audio and video) presence of the CMRA owner or manager or authorized employee. . . .''

The Postal Service is revising DMM subsection 508.1.8.3a3 to clarify that the notary public must be commissioned in a United States state, territory, possession, or the District of Columbia and to clarify the notary public's responsibilities with respect to the addressee's signature on PS Form 1583. This clarification is needed to establish that the notary public is domestically commissioned and to address particularities of some state notary public laws that do not authorize notaries public to attest a signature. The revision allows notaries public to recognize the PS Form 1583 applicant's acknowledged signature.

The revision also clarifies that the addressee must sign or confirm his or her signature on the PS Form 1583 in the physical or virtual (in real-time audio and video) presence of the CMRA owner, manager, or authorized employee, or acknowledge his or her signature on the PS Form 1583 in the physical or virtual (in real-time audio and video) presence of a notary public.

We believe this revision will provide CMRA owners/managers with a more efficient process for accepting the PS Form 1583 and establishing mail delivery for a private mailbox (PMB) customer of the CMRA.

The Postal Service adopts the described changes to *Mailing Standards of the United States Postal Service,* Domestic Mail Manual (DMM), incorporated by reference in the *Code of Federal Regulations.*

We will publish an appropriate amendment to 39 CFR part 111 to reflect these changes.

**List of Subjects in 39 CFR Part 111**

Administrative practice and procedure, Postal Service.

Accordingly, 39 CFR part 111 is amended as follows:

## PART 111—[AMENDED]

■ 1. The authority citation for 39 CFR part 111 continues to read as follows:

**Authority:** 5 U.S.C. 552(a); 13 U.S.C. 301–307; 18 U.S.C. 1692–1737; 39 U.S.C. 101, 401, 403, 404, 414, 416, 3001–3011, 3201–3219, 3403–3406, 3621, 3622, 3626, 3632, 3633, and 5001.

■ 2. Revise the *Mailing Standards of the United States Postal Service,* Domestic Mail Manual (DMM) as follows:

**Mailing Standards of the United States Postal Service, Domestic Mail Manual (DMM)**

* * * * *

**500 Additional Mailing Services**

* * * * *

**508 Recipient Services**

**1.0 Recipient Options**

* * * * *

**1.8 Commercial Mail Receiving Agencies**

* * * * *

**1.8.3 Delivery to CMRA**

Procedures for delivery to a CMRA are as follows:

a. The following applies:

* * * * *

*[Revise the first sentence of item a3 to read as follows:]*

The addressee must sign or confirm his or her signature in the physical or virtual (in real-time audio and video) presence of the CMRA owner or manager or authorized employee, or acknowledge his or her signature in the physical or virtual (in real-time audio and video) presence of a notary public commissioned in a United States state, territory, possession, or the District of Columbia. * * *

* * * * *

**Colleen Hibbert-Kapler,**

*Attorney, Ethics and Legal Compliance.*

[FR Doc. 2024–06989 Filed 5–1–24; 8:45 am]

**BILLING CODE P**

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 131

**[EPA–HQ–OW–2021–0791; FRL–8599–02–OW]**

**RIN 2040–AG17**

## Water Quality Standards Regulatory Revisions To Protect Tribal Reserved Rights

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** The U.S. Environmental Protection Agency (EPA) is finalizing revisions to the Clean Water Act (CWA) water quality standards (WQS) regulation to add requirements for states establishing WQS in waters where Tribes hold and assert rights to CWA-protected aquatic and aquatic-dependent resources reserved through treaties, statutes, or Executive orders.

**DATES:** This final rule is effective on June 3, 2024.

**ADDRESSES:** The EPA has established a docket for this action under Docket ID No. EPA–HQ–OW–2021–0791. All documents in the docket are listed on the *https://www.regulations.gov* website. Although listed in the index, some information is not publicly available, *e.g.,* Confidential Business Information or other information whose

disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available electronically through *https://www.regulations.gov*.

**FOR FURTHER INFORMATION CONTACT:** Jennifer Brundage or Kelly Gravuer, Office of Water, Standards and Health Protection Division (4305T), Environmental Protection Agency, 1200 Pennsylvania Avenue NW, Washington, DC 20460; telephone number: (202) 566–1265 or (202) 566–2946; email address: *brundage.jennifer@epa.gov* or *gravuer.kelly@epa.gov*.

**SUPPLEMENTARY INFORMATION:** This final rule is organized as follows:



## I. Executive Summary

Many Tribes hold rights to natural and cultural resources that are reserved, either expressly or implicitly, through treaties, statutes, or executive orders. Environmental regulatory schemes have often failed to recognize or protect such rights. This places Tribal members who rely on these vital resources for sustenance and to support longstanding cultural practices at disproportionate risk. This rule establishes a framework for how Tribal reserved rights, as defined in this final rule, must be considered in establishing WQS. In this final rule, the EPA is amending the Federal WQS regulation at 40 CFR part 131 to: (1) define Tribal reserved rights for purposes of that regulation; (2) establish and clarify the responsibilities of states [1] with regard to Tribal reserved rights in the WQS context; and (3) establish and clarify the EPA's related responsibilities and oversight role.

This rule defines Tribal reserved rights, for purposes of 40 CFR part 131, as ''any rights to CWA-protected aquatic and/or aquatic-dependent resources reserved by right holders, either expressly or implicitly, through Federal treaties, statutes, or executive orders.'' Pursuant to its CWA authority, the EPA is defining ''Tribal reserved rights,'' for purposes of this regulation for use in WQS actions. In defining ''Tribal reserved rights'' for purposes of the EPA's WQS regulation, the EPA is not purporting to establish or interpret rights that may exist, or the scope of such rights, under a Federal treaty or other sources of Federal law. Rather, this definition provides that rights reserved by treaty, statute, or executive order to aquatic and/or aquatic-dependent resources that also fall within the ambit of resources protected under the CWA are within the scope of potentially applicable rights for purposes of this rule. Whether a Tribal reserved right, as defined in this rule, will result in new or revised WQS is a case-by-case inquiry that will be undertaken in accordance with the provisions of this final rule.

The EPA has previously addressed Tribal reserved rights in specific WQS actions. In this final rule, the agency is amending the existing WQS regulation to explicitly address how the EPA and states must consider applicable Tribal reserved rights in establishing WQS. By doing so, the agency is providing greater transparency and clarifying its expectations for WQS in waters where Tribal reserved rights apply.

The rule requires that if a Tribe asserts a Tribal reserved right in writing to a state and the EPA for consideration in establishment of WQS, the state must, to the extent supported by available data and information: (1) take into consideration the use and value of its waters for protecting the Tribal reserved right in adopting or revising designated uses; (2) take into consideration the anticipated future exercise of the Tribal reserved right unsuppressed by water quality in establishing relevant WQS; and (3) establish water quality criteria to protect the Tribal reserved right where the state has adopted designated uses that either expressly incorporate protection of the Tribal reserved right or encompass the right. This latter requirement includes developing criteria to protect right holders using at least the same risk level (*e.g.,* cancer risk level, hazard quotient, or illness rate) as the state would otherwise use to develop criteria to protect the state's general population (*i.e.,* non-right holders), paired with exposure inputs (*e.g.,* fish consumption rate) representative of right holders exercising their reserved right. The EPA will be subject to the same requirements when promulgating Federal WQS.

The rule commits the EPA to: (1) providing assistance to both states and right holders in evaluating Tribal reserved rights, upon request, to the extent practicable; and (2) initiating the Tribal consultation process with any right holders that have asserted their rights for consideration in establishment of WQS.

The rule amends the list of minimum requirements for state submissions of new or revised WQS to the EPA for review pursuant to CWA section 303(c) to include, where applicable, submission of information provided by right holders about relevant Tribal reserved rights and of documentation indicating how the state considered that information.

The rule revises the list of factors that the EPA considers in determining whether state-adopted new or revised WQS are consistent with CWA section 303(c) and 40 CFR part 131 to include, where applicable, whether WQS are consistent with the requirements for states established by this rule.

Finally, the rule modifies the procedures for state review and revision of WQS to require that the triennial review process include any new information available about Tribal reserved rights.

[1] Pursuant to 40 CFR 131.3(j), ''states'' include the 50 states, the District of Columbia, Guam, the Commonwealth of Puerto Rico, Virgin Islands, American Samoa, the Commonwealth of the Northern Mariana Islands, and Indian Tribes that the EPA determines to be eligible for purposes of the WQS program.

## II. General Information

### A. Does this action apply to me?

States responsible for administering or overseeing water quality programs may be affected by this final rule, as they may need to consider and implement new provisions, or revise existing provisions, in their WQS. Federally recognized Indian Tribes [2] with reserved rights [3] may also be affected by this final rule. Entities that are subject to CWA regulatory programs, such as industrial facilities and municipalities that manage stormwater, separate sanitary, or combined sewer systems could be indirectly affected by this final rule. Categories and entities that could potentially be affected include the following:

TABLE 1—DISCHARGERS POTENTIALLY AFFECTED BY THIS FINAL RULE

| Category | Examples of potentially affected entities |
| --- | --- |
| Industry | Industrial point sources that discharge pollutants. |
| Municipalities, including those with stormwater or combined sewer system outfalls. | Publicly owned treatment works or similar facilities responsible for managing stormwater, separate sanitary, or combined sewer systems that discharge pollutants. |

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

### B. How did the EPA develop this final rule?

In developing this final rule, the EPA carefully considered the input from Tribes received during a 90-day Tribal consultation and coordination period following publication of the proposed rulemaking in the **Federal Register** on December 5, 2022, as well as public comments received from interested parties during a concurrent 90-day public comment period.[4] In addition, the EPA held two online public hearings on January 24 and 31, 2023, to discuss the contents of the proposed rulemaking and accept verbal public comments.

One hundred sixty-two organizations and individuals submitted comments on a range of issues. Some comments addressed issues beyond the scope of the rulemaking, and thus the EPA did not consider them in finalizing this rule. In this preamble, the EPA explains how it responded to certain comments received on aspects of the proposal. For a complete summary of all comments received and the EPA's responses, see the EPA's Response to Comments document in the official public docket. For a summary of input received from Tribes during the Tribal consultation and coordination period, please see section VI.F of this preamble.

## III. Statutory and Regulatory Background

### A. 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,'' and to achieve ''wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water'' (CWA sections 101(a) and 101(a)(2)).

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

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

- Water body assessments, identification of impaired waters, and development of total maximum daily loads (TMDLs) under CWA sections 305(b) and 303(d);
- Certifications of Federal licenses and permits under CWA section 401;
- Water quality-based effluent limits in National Pollutant Discharge Elimination System (NPDES) permits issued by approved state programs or by the EPA under CWA section 402; and
- Permits for dredged or fill material under CWA section 404.

Section 303(c)(2)(A) of the CWA provides that ''[water quality] standards shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation.'' CWA section 303(c)(2)(A) and the EPA's implementing regulation at 40 CFR part 131 require, among other things, that a state's WQS specify appropriate designated uses of the waters, and water quality criteria to protect those uses.[5] Such criteria must be based on sound scientific rationale, must contain sufficient parameters to protect the designated use, must support the most sensitive use where multiple use designations apply, and may be expressed in either narrative or numeric form.[6] In addition, 40 CFR 131.10(b) provides that ''[i]n designating uses of a water body and the appropriate criteria for those uses, the state shall take into

[2] *See* Federally Recognized Indian Tribe List Act of 1944, 25 U.S.C. 479a. The current list can be found at 88 FR 2112–2116 (January 12, 2023).

[3] The EPA is defining ''Tribal reserved rights'' for the purposes of 40 CFR part 131 as ''any rights to CWA-protected aquatic and/or aquatic-dependent resources reserved by right holders, either expressly or implicitly, through Federal treaties, statutes, or executive orders.''

[4] *See Water Quality Standards Regulatory Revisions to Protect Tribal Reserved Rights Proposed Rule,* 87 FR 74361 (December 5, 2022).

[5] *See* 40 CFR 131.10.

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

consideration the water quality standards of downstream waters and ensure that its water quality standards provide for the attainment and maintenance of the water quality standards of downstream waters.''

Antidegradation requirements provide a framework for maintaining and protecting water quality that has already been achieved.[7] States can also choose to include general policies in their WQS that affect WQS implementation, such as WQS variance policies and mixing zone policies.[8]

States are required to hold a public hearing to review applicable WQS at least once every three years (''triennial review'') and, if appropriate, to revise standards or adopt new standards.[9] Any new or revised WQS must be submitted to the EPA for review and approval or disapproval.[10] CWA section 303(c)(4)(B) authorizes the Administrator to independently determine that a new or revised standard is necessary to meet CWA requirements, referred to as an Administrator's Determination.

CWA section 501(a) authorizes the Administrator to ''prescribe such regulations as are necessary to carry out his functions under this chapter.'' CWA section 511(a)(3) provides that the Act ''shall not be construed as . . . affecting or impairing the provisions of any treaty of the United States.''

*B. Tribal Reserved Rights*

1. Overview of Tribal Reserved Rights in Federal Law

The EPA recognizes that many federally recognized Tribes hold rights to use and access natural and cultural resources, and that exercise of these rights is an intrinsic part of Tribal life and is of deep cultural, economic, and subsistence importance to Tribes.[11] The Supreme Court has described Tribal reserved rights to fish and access fishing locations as ''not much less necessary to the existence of the Indians than the atmosphere they breathed[.]'' [12] Such rights are ''reserved'' by Tribes, because, as the U.S. Supreme Court has explained, treaties are ''not a grant of rights to the Indians, but a grant of rights from them, a reservation of those not granted.'' [13] As described further below, these rights may be recognized in treaties, statutes, or Executive orders, and may be explicit or implied.

The U.S. Constitution defines treaties as part of the supreme law of the land, with the same legal force as Federal statutes.[14] From 1778 to 1871, U.S. relations with Tribes were defined and conducted largely through treaty-making. In 1871, Congress stopped making treaties with Tribes,[15] and subsequent agreements between Tribes and the Federal Government were instead generally memorialized through Executive orders or statutes, such as congressionally enacted Indian land claim settlements, with equally binding effect.[16] As one court explained, generally ''it makes no difference whether . . . [Tribal] rights derive from treaty, statute or executive order, unless Congress has provided otherwise.'' [17] Pursuant to the Constitution's Supremacy Clause, treaties and statutes also bind states.[18]

Courts generally adhere to several guiding principles, known as the ''Indian canons of construction,'' in interpreting treaties and other Federal legal instruments regarding Indian Tribes. In accordance with these canons, ''Indian treaties are to be interpreted liberally in favor of the Indians, and any ambiguities are to be resolved in their favor.'' [19] Further, treaties ''are to be construed as the Indians would have understood them'' at the time of signing.[20] Although Congress may abrogate Indian treaty rights, those rights remain absent clear evidence of congressional intent.[21] While these Indian canons of construction originated in the context of treaty interpretation by Federal courts, courts have also applied the canons in other contexts,[22] including determining the scope of Tribes' rights under statutes or Executive orders setting aside land for Tribes.[23] Some Tribes have treaty rights

[7] *See* 40 CFR 131.12.

[8] *See* 40 CFR 131.13.

[9] *See* CWA section 303(c)(1); 40 CFR 131.20(a).

[10] *See* CWA section 303(c)(2)(A) and (c)(3); 40 CFR 131.21(a).

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

[12] *United States* v. *Winans,* 198 U.S. at 381.

[13] *Id.*

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

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

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

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

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

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

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

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

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

[23] *See Winters* v. *United States,* 207 U. S. 564, 576–577 (1908) (applying the canons and holding that the Tribe was entitled to federally reserved rights to the Milk River); *Parravano,* 70 F.3d at 544 (applying the canons to determine the scope of

that are no longer enforceable because they have been abrogated or otherwise superseded by Congress in later Federal statutes.[24] In addition, some Tribes negotiated treaties with the U.S. government that were not ratified.[25]

Rights reserved to Tribes and reflected in treaties and other laws may apply in Indian country as well as outside of Indian country [26] and may be express or implied.[27] For example, in certain states in the Great Lakes region, Tribal reserved rights include hunting, fishing, and gathering rights both within Tribes' reservations and outside these reservations in specific areas that the Tribes ceded to the Federal Government.[28] In the Pacific Northwest, treaties explicitly reserved to many Tribes rights to fish in their ''usual and accustomed'' fishing grounds and at stations both within and outside their reservation boundaries and to hunt and gather throughout their traditional territories.[29] In addition to Tribes whose rights are reserved through treaties, other Tribes have statutorily reserved rights. For example, Tribes in Maine have statutorily reserved rights to practice traditional sustenance lifeways such as fishing in certain waters.[30]

2. Tribal Reserved Rights and Water Quality Standards

As explained in the proposed rulemaking, the EPA has previously addressed reserved rights held by Tribes in state-specific WQS actions. In this final rule, the agency is including additional information on its prior approaches to addressing how WQS should account for such rights, consistent with comments requesting that the agency provide a fuller description of how the requirements in this final rule differ from the agency's prior actions.

From 2015 through 2017, the EPA took actions related to three state WQS submittals where affected Tribes had asserted that they held reserved fishing rights. In those actions, the EPA ''harmoniz[ed] the requirements of the CWA with the terms of'' applicable statutes (in Maine) and treaties (in Washington and Idaho) and found that, based on that harmonization, the WQS submitted by those states were not sufficiently protective of the applicable reserved rights.[31] First, in 2015, the EPA disapproved certain human health criteria adopted by the State of Maine because they did not adequately account for Tribal members' rights to fish for sustenance, reserved under applicable Federal statutes. The agency explained that the initial step in reaching that outcome was to ''harmonize the CWA requirement that WQS must protect uses with the fundamental purpose for which land was set aside for the Tribes under the Indian settlement acts in Maine.'' [32] The agency explained that, pursuant to that harmonization, the ''EPA interprets the State's 'fishing' designated use, as applied in Tribal waters, to mean 'sustenance' fishing.'' [33]

Similarly in 2016, in promulgating human health criteria for the State of Washington, the EPA noted that most waters covered by the state's WQS were subject to Federal treaties that reserved Tribal fishing rights. The agency again harmonized the applicable treaties with the CWA and the EPA's WQS regulation and found that it was appropriate to interpret the state's relevant designated use to ''include or encompass a subsistence fishing component.'' [34] The EPA articulated a similar position in a January 2017 letter to Idaho regarding human health criteria submitted by Idaho in December 2016, reiterating the ''need to consider treaty-reserved fishing rights and harmonize those rights with the [CWA] when deriving criteria necessary to protect Idaho's designated uses for fishing.'' [35]

In each of these three actions, the EPA harmonized the CWA with the specific treaties or statutes by interpreting the relevant state uses. Based on that interpretation of each state's respective use as protecting applicable reserved rights, the agency concluded that in order to protect those uses, each state's human health criteria needed to protect Tribal members exercising the right to the same level as each state's respective general population, and the fish consumption rates used to derive those criteria needed to reflect unsuppressed consumption by that state's Tribal fish consumers.[36]

Tribes' reserved fishing rights under Executive orders and a statute).

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

[25] Bureau of Indian Affairs, Frequently Asked Questions, available at *https://www.bia.gov/frequently-asked-questions* (noting that ''[t]he treaties that were made often contain commitments that have either been fulfilled or subsequently superseded by Congressional legislation''); *Robinson* v. *Jewell,* 790 F.3d 910, 918 (9th Cir. 2015) (holding that an 1851 Treaty was never ratified by the Senate and thus carries ''no legal effect.'').

[26] 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.

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

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

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

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

[31] *See* 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); Revision of Certain Federal Water Quality Criteria Applicable to Washington, 81 FR 85417, 85424 (November 28, 2016); Letter from Dennis McLerran, Regional Administrator, EPA Region 10, to John Tippets, Director, Idaho Department of Environmental Quality, ''The EPA's Preliminary Review of DEQ'S December 13, 2016 Submittal of New and Revised Human Health Criteria'' at 10 (January 19, 2017).

[32] 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).

[33] *Id.*

[34] 81 FR 85417, 85424 (November 28, 2016).

[35] Letter from Dennis McLerran, Regional Administrator, EPA Region 10, to John Tippets, Director, Idaho Department of Environmental Quality, ''The EPA's Preliminary Review of DEQ'S December 13, 2016 Submittal of New and Revised Human Health Criteria'' at 10 (January 19, 2017).

[36] *See* 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); Revision of Certain Federal Water Quality Criteria Applicable to Washington, 81 FR 85417, 85424 (November 28, 2016); Letter from Dennis McLerran, Regional Administrator, EPA Region 10, to John Tippets, Director, Idaho Department of

Continued

These actions followed a December 2014 memorandum from the EPA Administrator Gina McCarthy that discussed the EPA's role with respect to Tribal treaty rights.[37] This memorandum was issued to commemorate the 30th anniversary of the EPA's 1984 Indian Policy, which addressed many issues related to the EPA's relationship with federally recognized Tribes and implementation of the EPA's statutes in Indian country, but did not expressly address the EPA's consideration of Tribal treaty and other reserved rights.[38] In pertinent part, the 2014 memorandum provides that the ''EPA has an obligation to honor and respect Tribal rights and resources protected by treaties,'' and that the ''EPA must ensure its actions do not conflict with Tribal treaty rights.'' [39] In 2016, as part of the agency's efforts to implement the memorandum, the EPA issued an addendum to its Tribal consultation policy entitled ''Guidance for Discussing Tribal Treaty Rights'' with the purpose of enhancing the EPA's consultations where agency actions may affect Tribal treaty rights.[40] The goal of this document was to help ensure that the EPA's actions do not conflict with treaty rights, and that the EPA is fully informed as it seeks to implement its programs to further protect Tribal treaty rights and resources when it has discretion to do so.[41] Even before this guidance was issued in 2016, the EPA routinely discussed Tribal treaty rights during consultation with Tribes. For example, in the agency's actions in Maine, Washington, and Idaho with regard to WQS, the EPA undertook extensive consultation with the federally recognized Tribes in those states which included, consistent with the objectives of that guidance, gathering information regarding relevant reserved rights.[42]

Although the agency did not rescind the Memorandum and Guidance for Discussing Tribal Treaty Rights, in subsequent state-specific WQS actions taken in 2019 the agency disavowed the approach to protecting Tribal reserved rights that the EPA had set forth in the Maine (2015) and Washington (2016) actions, as well as in the EPA's 2017 letter to the State of Idaho regarding protection of applicable treaty rights in that state.[43] In 2019, the EPA approved Idaho's human health criteria, despite its prior expression of concern that the state's WQS did not sufficiently protect applicable Tribal reserved rights.[44] In its approval, the EPA acknowledged the approach the agency had applied in Maine and Washington in 2015 and 2016 but noted that that approach ''had not been promulgated in any nationally applicable rule or articulated in any national recommended guidance,'' and had not gone through public comment prior to the agency applying it in those states.[45] To the extent that assertion implied a procedural deficiency, that assertion is now moot because the agency is establishing, through this rule, regulatory requirements addressing how WQS are to reflect consideration and protection of applicable Tribal reserved rights, as defined by this rule.

The legal basis for the requirements in this final rule differs in an important respect from the legal underpinnings of the agency's WQS disapprovals in Maine and Washington in 2015 and 2016, respectively, and the EPA's 2017 letter to Idaho regarding its WQS. Namely, as explained above, the legal rationale for those actions was harmonizing the CWA and existing regulatory requirements with specific Federal treaties and statutes and concluding that, read together, the CWA and WQS regulatory requirements and the respective treaties and statutes justified interpreting existing state designated uses to encompass relevant Tribal fishing rights.[46] As explained in section III.C of this preamble, the EPA's authority to add the requirements set forth in this final rule does not derive from harmonizing a specific treaty, statute, or Executive order with the CWA. Rather, the regulatory requirements in this final rule are an exercise of the EPA's CWA oversight function provided by Congress in CWA section 303(c).

While the legal basis for these requirements differs from that of the EPA's 2015–2017 actions in Maine, Washington, and Idaho, there are similarities between the substantive elements of this final rule and what the EPA found would protect applicable Tribal reserved rights in those actions. Namely, in those actions, the EPA found that the applicable human health criteria needed to protect Tribal members to the same risk level as the states' general populations at an unsuppressed fish consumption rate. In this rule, as described in section IV of this preamble, the EPA is explicitly adding similar, though not identical, carefully tailored requirements regarding uses, suppression, and risk level in its regulation governing the establishment of WQS that reflect extensive input from states, Tribes, and the regulated community and are grounded in the CWA and consistent with the EPA's longstanding approach to overseeing state WQS.

### *C. EPA Authority*

#### 1. CWA Statutory Authority for This Final Rule

The EPA's authority for this rule derives primarily from section 303(c) of the CWA. In CWA section 303(c),

Environmental Quality, ''The EPA's Preliminary Review of DEQ'S December 13, 2016 Submittal of New and Revised Human Health Criteria'' at 10 (January 19, 2017).

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

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

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

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

[41] *Id.*

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

[43] *See e.g.,* U.S. EPA, Letter and enclosed Technical Support Document from Chris Hladick, Regional Administrator, EPA Region 10, to John Tippets, Director, Department of Environmental Quality, Re: EPA's Approval of Idaho's New and Revised Human Health Water Quality Criteria for Toxics and Other Water Quality Standards Provisions (April 4, 2019) at 10; U.S. EPA, Letter and enclosed Technical Support Document from Chris Hladick, Regional Administrator, EPA Region 10, to Maia Bellon, Director, Department of Ecology, Re: EPA's Reversal of the November 15, 2016 Clean Water Act Section 303(c) Partial Disapproval of Washington's Human Health Water Quality Criteria and Decision to Approve Washington's Criteria (May 10, 2019), at 21.

[44] U.S. EPA, Letter and enclosed Technical Support Document from Chris Hladick, Regional Administrator, EPA Region 10, to John Tippets, Director, Department of Environmental Quality, Re: EPA's Approval of Idaho's New and Revised Human Health Water Quality Criteria for Toxics and Other Water Quality Standards Provisions (April 4, 2019) at 10.

[45] *Id.* at 10–11.

[46] *See* 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); Revision of Certain Federal Water Quality Criteria Applicable to Washington, 81 FR 85417, 85424 (November 28, 2016); Letter from Dennis McLerran, Regional Administrator, EPA Region 10, to John Tippets, Director, Idaho Department of Environmental Quality, ''The EPA's Preliminary Review of DEQ'S December 13, 2016 Submittal of New and Revised Human Health Criteria'' at 10 (January 19, 2017).

Congress set forth statutory requirements governing the establishment of WQS and tasked the EPA with overseeing state implementation of and compliance with those requirements.[47] Congress established a structure whereby states are responsible for establishing WQS applicable to their waters, obtaining the EPA's approval of those standards, and reviewing their standards at least once every three years. Congress also provided direction regarding the nature of such standards. As noted previously, CWA section 303(c) provides that WQS ''shall be such as to protect the public health or welfare, enhance the quality of water, and serve the purposes of'' the Act.[48] It further provides that WQS ''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.'' [49] State discretion to determine appropriate standards for their waters is not unfettered.[50] While CWA section 303(c) directs states to establish WQS in the first instance, Congress expressly gave the EPA the responsibility to review state WQS, and to disapprove them and promulgate Federal standards if state standards do not meet the applicable requirements of the Act.[51] The ''EPA is permitted—and in fact statutorily required—to scrutinize a state's water quality standards.'' *Id.* The Act ''requires EPA to determine whether the standard is 'consistent with' the Act's requirements.'' [52]

To inform the EPA's statutorily mandated review of state WQS, the EPA's implementing regulation at 40 CFR part 131 specifies requirements for state WQS submissions. This rule, like the existing requirements in 40 CFR part 131, is issued in exercise of the EPA's oversight authority in CWA section 303(c) and is in accordance with the EPA's longstanding general approach to implementing CWA section 303(c), which is to ''use standards as a basis of restoring and maintaining the integrity of the Nation's waters.'' [53] The operative requirements in this rule are set forth in 40 CFR 131.9 and explained in detail in section IV of this preamble. This explanation includes the EPA's authority to add the specific requirements in 40 CFR 131.9.

While CWA section 303(c) is the substantive source of authority for this rule, CWA section 501 authorizes the agency to prescribe regulations as necessary to carry out the Administrator's functions under the Act,[54] and the EPA has from time to time issued regulations necessary to carry out its functions under CWA section 303(c). Those regulations, codified at 40 CFR part 131, provide a framework for implementing CWA section 303(c) and related sections, translating the statutory provisions, processes, and directives in CWA section 303(c) into specific requirements consistent with the statutory scheme. This rule adds to that existing framework.

The EPA received many comments asserting that the EPA lacks authority to promulgate the requirements in this rule. The EPA disagrees. The statutory bases for the EPA's action are outlined above and explained in detail in section IV of this preamble. Specific contentions that the EPA lacks authority for particular aspects of this rule are addressed in section IV of this preamble. As described further in section IV of this preamble, these regulatory changes are designed to ensure that WQS will in fact ''protect the public health and welfare,'' including the health and welfare of right holders, and otherwise serve the purposes of the Act, and that consideration of the waters' ''use and value'' does not overlook right holders' use pursuant to the identified reserved rights.[55]

Some commenters asserted that the EPA improperly relied on CWA section 511 as a grant of regulatory authority. These commenters assert that CWA section 511 is a savings clause and an interpretative limitation on the CWA as a whole rather than a basis for these requirements. The EPA is clarifying that, contrary to the characterizations in these comments, the agency is not relying on CWA section 511(a)(3) as a source of rulemaking authority.

In the proposed rulemaking, the agency acknowledged that there may be instances where a later-enacted statutory provision intentionally limits federally reserved rights, citing to *United States* v. *Dion,* 476 U.S. 734, 739–40 (1986). In that case, the Supreme Court applied the principle that courts will not find that Congress intends to abrogate a treaty right absent an indication of clear Congressional intent to do so, holding that ''Congressional intent to abrogate Indian treaty rights to hunt bald and golden eagles is certainly strongly suggested on the face of the Eagle Protection Act,'' the statute at issue in that decision.[56] The EPA's reference to CWA section 511(a)(3) in the proposed rulemaking was to illustrate that there is no such similar Congressional intent to abrogate treaty rights in the CWA, given that in section 511 Congress explicitly provided that the Act ''shall not be construed as . . . affecting or impairing the provision of any treaty of the United States.'' [57] While it is not an affirmative grant of authority, CWA section 511(a)(3) nonetheless supports the agency's approach in adding these requirements, which, in practice, will aid in ensuring that WQS will not ''affect[ ] or impair[ ] the provisions'' of treaties reserving rights to aquatic or aquatic-dependent resources. Indeed, the requirements in this rule will help to ensure that future WQS reflect consideration of and provide protection for treaty rights, where applicable. As explained above, rather than relying on CWA section 511(a)(3) as an affirmative source of authority for this rule, the EPA's substantive authority to promulgate this rule derives from CWA section 303(c).

2. Legal Significance of Applicable Treaties, Statutes, or Executive Orders In Informing This Final Rule's Requirements

In this final rule, the EPA is clarifying that these requirements are not based on any one treaty, statute, or Executive order, but rather reflect the EPA's judgment regarding the necessary considerations and level of protection appropriate under the CWA where such rights apply. In the proposed rulemaking, the EPA explained that, in exercising its CWA section 303(c) authority, the EPA is ensuring that its actions are consistent with treaties, statutes, Executive orders, and other sources of Federal law reflecting reserved rights of Tribes. The EPA received some public comments reflecting confusion regarding how the interpretation of a relevant treaty, statute, or Executive order relates to the

[47] *See* CWA section 303(c)(2)(A), 303(c)(3) and (4).

[48] *See* CWA section 303(c)(2)(A).

[49] *Id.*

[50] *See El Dorado Chem. Co.* v. *EPA,* 763 F.3d 950, 956 (8th Cir. 2014).

[51] *See* CWA section 303(c)(3) and 4.

[52] *See Miss Comm'n on Natural Res.* v. *Costle,* 625 F.2d 1269, 1275–76 (5th Cir. 1980).

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

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

[55] *See* CWA section 303(c)(2)(A).

[56] *Dion,* 476 U.S. at 739–40.

[57] *See* CWA section 511(a)(3); *Water Quality Standards Regulatory Revisions to Protect Tribal Reserved Rights Proposed Rule,* 87 FR 74361, 74379 (December 5, 2022).

rule's requirements. Specifically, these commenters stated that the EPA was placing an undue reliance on judicial decisions in which courts have found that reserved rights to an aquatic resource also encompass subsidiary rights to support the resource.[58] These commenters opined that those decisions do not stand for the proposition that a resource reserved pursuant to a treaty, statute, or Executive order demands a certain level of water quality. The EPA disagrees with these comments because they misconstrue the role of this framework rule and the relevant inquiry into Tribal reserved rights, as used in this rule.[59]

Consideration of whether Tribal treaty, statutory or Executive order-based rights are applicable turns in part on whether they reserved a right to aquatic and/or aquatic-dependent resources that are protected under the CWA. If they do, and they are asserted by right holders, then the requirements in this rule would apply such that consideration of those rights would be part of the standard-setting process under CWA section 303(c). Their consideration in that process, however, does not hinge on whether the relevant treaty, statute, or Executive order, explicitly references water quality or has been interpreted to imply a right to a certain level of water quality. The requirements set forth in this final rule are not premised on any one treaty, statute, or Executive order, and, accordingly, the rule's substantive water quality requirements set forth in 40 CFR 131.9 do not stem from any potential water quality subsidiary rights in any one treaty, statute, or Executive order. Rather, the rule's requirements are premised on the EPA's recognition of the multitude of Federal treaties, statutes, and Executive orders that reflect various reserved rights to aquatic and aquatic-dependent resources held by Tribes. Whether, and how, a particular reserved right applies will be determined on a case-by-case basis given the facts and the relevant Federal treaties, statutes, and Executive orders.

For purposes of this rule's application in a specific context, the relevant question is not whether a treaty, statute, or Executive order is properly interpreted to reserve a subsidiary right to a particular level of water quality, but rather, whether such an instrument is properly interpreted to reserve a right to an aquatic or aquatic-dependent resource. For example, does a treaty reserve a right to fish? If so, this rule's requirements are aimed at ensuring that where Tribes wish to bring such rights to the state's attention, the state will consider the Tribe's assertion of the right in following the well-established standard setting process pursuant to the EPA's CWA section 303(c) implementing regulation at 40 CFR part 131. In that context, where supported by available data and information, the state will take into consideration whether water quality is sufficient to protect that aquatic resource and right holders exercising their right to that resource. In this final rule, the agency is revising its implementing regulation to set forth a transparent framework to ensure that such aquatic resource rights are protected under the CWA.

Some commenters also asserted that the then-pending Supreme Court case, *Arizona* v. *Navajo Nation,* is relevant to this rule and/or that the United States' position in that case was inconsistent with the EPA's position in the proposed rulemaking. The issue in that case was whether the United States has an affirmative, judicially enforceable fiduciary duty to assess and address the Navajo Nation's need for water from particular sources. The Navajo Nation argued, in pertinent part, that implied rights to water quantity pursuant to *Winters* v. *United States,* 207 U.S. 564, 576–577 (1908), created such an affirmative fiduciary trust duty. The United States argued that prior Supreme Court decisions made clear that a Tribe cannot sue to enforce an asserted fiduciary trust obligation against the United States unless the Tribe can ''identify a specific, applicable, trust-creating statute or regulation that the Government violated.'' [60] The Supreme Court issued its opinion on June 22, 2023, holding that, consistent with the United States' position, while pursuant to the *Winters* doctrine the Tribe held treaty-reserved water quantity rights, those rights ''did not require the United States to take affirmative steps to secure water for the Tribe.'' [61]

Nothing in this rule conflicts with or is contrary to that position. As explained above, the EPA's authority for this rule is the CWA. The EPA is not issuing this rule pursuant to any specific, trust-creating language in any treaty, statute, or Executive order. Rather, it is issuing this rule to ensure that, in implementing the CWA's WQS requirements, the EPA and states are adequately considering rights reserved by treaty, statute or Executive order in establishing WQS for waters where Tribal reserved rights, as defined in this rule, apply. As further explained below, this rule also does not apply to rights to specific quantities of water nor address the quantification of *Winters* rights. Rather, this rule applies to rights to aquatic or aquatic-dependent resources that are protected under the CWA. Accordingly, the EPA disagrees with comments asserting that the *Navajo Nation* case is relevant here.

3. Basis for Amending the Existing WQS Regulations

The EPA established the core of the WQS regulation in a final rule issued in 1983. Since that time, the agency has modified 40 CFR part 131 three times.[62] The agency has explained that such updates have been in response to challenges that ''necessitate a more effective, flexible and practicable approach for the implementation of WQS and protecting water quality,'' and that such updates are informed by the extensive experience with WQS implementation by states, authorized Tribes, and the EPA.[63]

As described above in section III.B.2 of this preamble, in the absence of explicit regulatory requirements aimed at ensuring protection of Tribal reserved rights, the EPA has previously addressed Tribal reserved rights case-by-case in exercising its oversight authority in reviewing state-adopted WQS. Notably, when the EPA promulgated the WQS regulation at 40 CFR part 131 in 1983, the agency considered adding regulatory requirements to ensure that state WQS complied with applicable international treaties. Specifically, in the 1983 final

[58] One commenter also cited to case law in which a court held that a treaty right to fish did not equate to ''an absolute right to the preservation of the fish runs in their original 1855 [treaty] condition, free from all environmental damage caused by the migration of increasing numbers of settlers and the resulting development of land.'' *Nez Perce* v. *Idaho Power,* 847 F. Supp. 791, 808 (D. Id. 1994).

[59] In response to comments on a 2020 decision reversing aspects of the EPA's 2015 Maine WQS disapproval, the EPA expressed a similar view to these commenters. There, the EPA asserted that it was ''unnecessary'' to ensure protection of applicable statutorily reserved rights because the Indian land claims settlement statutes at issue did not ''themselves . . . address or reference designated uses, water quality criteria, or the desired condition or use goal of the waters covered by the sustenance fishing provisions.'' As explained herein, the EPA has clarified that whether the relevant treaty, statute, or Executive order explicitly references water quality or has been interpreted to imply a right to a certain level of water quality is not relevant to applying this rule.

[60] Petition for Certiorari, *United States* v. *Navajo Nation,* Dkt. No. 22–51 at 14 (U.S. July 15, 2022) (citing *United States* v. *Jicarilla Apache Nation,* 564 U.S. 162, 177 (2011)). The United States' petition was granted and consolidated with a petition filed by the State of Arizona. Dkt. No. 21–1484.

[61] *Arizona* v. *Navajo Nation,* 599 U.S. 555, 564 (2023).

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

[63] *Id.*

rule establishing the WQS regulation, the agency noted that it had received comments asserting that the EPA should ''require States to adopt standards that meet treaty requirements.'' [64] In response, the agency explained that such issues ''have been adequately resolved previously without the need for regulatory language,'' and, accordingly, that the ''EPA sees no need to include such language in the Final Rule.'' [65] The agency further reasoned that ''[a]ny specific treaty requirements have the force of law,'' and therefore, ''State water quality standards will have to meet any treaty requirements.'' [66]

With respect to Tribal treaties, part of the rationale that the EPA articulated in the 1983 final rule applies equally here: like international treaties, Tribal treaty requirements have the force of law, and thus, in the context of the CWA where WQS must protect the public health or welfare and enhance the quality of water, state WQS must be consistent with any applicable treaty requirements. However, the other element of the agency's asserted reasoning for not adding explicit requirements regarding international treaties has less application here. Namely, while issues regarding WQS and international treaties had been ''resolved previously without the need for regulatory language,'' such resolution—while it has occurred—has been more challenging with respect to issues with WQS and Tribal treaties.[67] As detailed above, in practice the application of specific Tribal reserved rights in the WQS context has lacked consistency and transparent national expectations. The agency's prior incorporation of rights reserved to Tribes by treaty or other sources of Federal law in the WQS context was premised on harmonizing the relevant treaties or statutes with existing CWA requirements, and included interpreting Maine, Washington, and Idaho's fishing designated uses, which those states opposed.[68] That opposition was in part based on those states' views of their own uses, as well as what those states perceived as a new approach to WQS that was taken without notice and comment.[69] The explicit regulatory requirements contained in this final rule, which the agency is promulgating after receiving input from states, Tribes, and other commenters, are thus necessary to establish a set of consistent procedures, expectations, and definitions.

## IV. Overview of This Final Rule

### *A. Definitions and Scope*

This final rule provides new regulatory definitions of ''Tribal reserved rights'' and ''right holders'' at 40 CFR 131.3. This rule defines Tribal reserved rights, for purposes of 40 CFR part 131, as ''any rights to CWA-protected aquatic and/or aquatic-dependent resources reserved by right holders, either expressly or implicitly, through Federal treaties, statutes, or executive orders.'' Similarly, for purposes of 40 CFR part 131, this final rule defines ''right holders'' as ''any Federally recognized Tribes holding Tribal reserved rights, regardless of whether the Tribe exercises authority over a Federal Indian reservation.'' The scope of resources covered by this final rule is reflected in the definition of ''Tribal reserved rights,'' which refers to ''rights to CWA-protected aquatic and/or aquatic-dependent resources.''

#### 1. Changes to Proposed Definitions

The final definitions differ from the proposed definitions in three ways, based on public input. First, the EPA added ''for purposes of this part,'' to both the definitions of ''Tribal reserved rights'' and ''right holders,'' simplified the definition of ''right holders'' to reference the definition of ''Tribal reserved rights'' to reduce redundancy, and added ''CWA-protected'' to the definition of ''Tribal reserved rights.'' Second, the EPA revised both definitions to address comments about potential confusion with the definition of ''Indian Tribe or Tribe'' at 40 CFR 131.3(l). Third, in the definition of ''Tribal reserved rights'' the EPA added ''Federal'' before ''treaties, statutes, or executive orders'' and deleted ''or other sources of Federal law.'' These changes from proposal are discussed, in turn, below.

The first set of revisions the EPA made to the proposed definitions at 40 CFR 131.3 was to add ''for purposes of this part,'' to both the definitions of ''Tribal reserved rights'' and ''right holders'' to clarify that both new definitions are applicable only for purposes of the EPA's 40 CFR part 131 regulation. The EPA made this change in response to some commenters who requested that the EPA revise the definition of ''Tribal reserved rights'' to clarify that the way Tribal reserved rights are considered in the WQS context does not dictate or limit how those rights could be considered in other contexts. Similarly, the EPA's addition of the phrase ''CWA-protected'' in the definition of ''Tribal reserved rights'' clarifies that for purposes of this rule the EPA is establishing that definition pursuant to its CWA authority, for consideration in the WQS context. This also does not dictate or limit how treaty, statutory or Executive order-based reserved rights may be considered in other contexts. In response to comments noting that the proposed definition of ''right holders'' was redundant because it repeated the definition of ''Tribal reserved rights'' from 40 CFR 131.3(r), the EPA replaced ''holding rights to aquatic and/or aquatic dependent resources pursuant to . . .'' with ''holding Tribal reserved rights.''

The second change the EPA made to the proposed definitions at 40 CFR 131.3 is intended to clarify that the definition of ''Indian Tribe or Tribe'' at 40 CFR 131.3(l) is not implicated in the definitions of either ''Tribal reserved rights'' or ''right holders.'' Some commenters noted that the definition of ''Indian Tribe or Tribe'' at 40 CFR 131.3(l) is limited to federally recognized Tribes ''exercising governmental authority over a Federal Indian reservation.'' This definition mirrors the definition in CWA section 518(h), which defines ''Indian Tribe or Tribe'' as ''any Indian Tribe, band, group, or community recognized by the Secretary of the Interior and exercising governmental authority over a Federal

[64] *Water Quality Standards Regulation.* 48 FR 51400, 51412 (November 8, 1983).

[65] *Id.*

[66] *Id.* at 51413.

[67] The EPA previously took the position that the best way to ensure that risk levels and criteria protect Tribal reserved rights is in reviewing WQS submissions. In response to comments on the EPA's 1998 draft Human Health Methodology revisions, the agency asserted: ''As stated in the 1998 draft Methodology revisions, 'risk levels and criteria need to be protective of tribal rights under Federal law (*e.g.,* fishing, hunting, or gathering rights) that are related to water quality.' We believe the best way to ensure that Tribal treaty and other rights under Federal law are met, consistent with the Federal trust responsibility, is to address these issues at the time EPA reviews water quality standards submissions.'' (*See* 65 FR 66444, 66457 (November 3, 2000)). As explained herein, the EPA has revisited the latter position based on its subsequent application of these principles and is now finalizing these regulations to establish transparent national expectations with respect to WQS and Tribal rights.

[68] *See* Plaintiff's Motion for Judgment on the Administrative Record, *Maine* v. *Pruitt,* No. 1:14–cv–00264–JDL. Dkt. No. 119 at 19 (D. Me. 2018) (Asserting that the EPA's interpretation of Maine's fishing use, with which the State disagreed, and related requirements to protect that use were ''never subjected to any public notice, comment or other process.''); Amicus Curiae the State of Idaho's Brief in Support of Plaintiffs, *Maine* v. *Pruitt,* No. 1:14–cv–00264–JDL, Dkt. No. 126 at 9 (D. Me. 2018).

[69] *See id.; see also* Northwest Pulp & Paper Association, et al., Petition for Reconsideration of EPA's Partial Disapproval of Washington's Human Health Water Quality Criteria and Implementation Tools submitted by the State of Washington on August 1, 2016, and Repeal of the Final Rule Revision of Certain Federal Water Quality Standards Applicable to Washington (February 21, 2017).

Indian reservation.'' This definition is expressly limited to CWA section 518, the provision of the statute in which Congress authorized the EPA to treat an Indian Tribe as a state for purposes of enumerated CWA programs for waters ''within the borders of an Indian reservation.''

The EPA's authority for these new regulatory requirements is distinct from the treatment as a state authority granted in CWA section 518. Accordingly, to avoid any confusion regarding the CWA section 518-based definition of ''Indian Tribe or Tribe'' at 40 CFR 131.3(l), the EPA replaced the phrase ''reserved or held by Tribes'' in the definition of ''Tribal reserved rights'' with ''reserved by right holders.'' This change is intended to streamline the text and provide clarification and does not alter the scope of the rights covered.

For the same reasons, the EPA also added language to the definition of ''right holders'' to clarify that the limitation included in the definition of ''Indian Tribe or Tribe'' at 40 CFR 131.3(l) to Tribes ''exercising governmental authority over a Federal Indian reservation'' does not apply to this definition. Namely, ''right holders'' are defined to include ''any Federally recognized Tribes holding Tribal reserved rights, regardless of whether the Tribe exercises authority over a Federal Indian reservation.'' This additional language is intended to clarify that, for purposes of this rule, ''right holders'' can include federally recognized Tribes that are outside the scope of the definition at 40 CFR 131.3(l).

Lastly, for both the definition of ''Tribal reserved rights'' and the definition of ''right holders,'' the EPA added the word ''Federal'' before ''treaties, statutes, or executive orders'' and deleted ''or other sources of Federal law.'' The EPA added the word ''Federal'' to clarify that, for purposes of this rule, the rights at issue are those reserved through Federal law. Some commenters requested that the EPA broaden the scope of legal instruments in the definition of ''Tribal reserved rights'' to encompass rights that are not reflected in Federal law, such as rights pursuant to state law and rights specified in treaties that were never ratified by the U.S. government. The EPA is maintaining the intent of the proposed rulemaking, which defined reserved rights as those reserved through Federal law. This is consistent with the agency's approach to ensure its actions—including its approval and disapproval actions under CWA section 303(c)(3) and its promulgation of final rules under CWA section 303(c)(4)—are consistent with Federal treaties, statutes, and Executive orders memorializing the rights of federally recognized Tribes.

Regarding the deletion of ''or other sources of Federal law,'' some commenters noted that this term was vague. The EPA initially included this term to capture the full universe of Federal legal rights. However, after consideration of comments, the EPA concluded that the definition sufficiently captures all relevant rights without this additional language.

2. Scope of Resources Covered

This final rule, consistent with the proposed rulemaking, provides at 40 CFR 131.3 that ''Tribal reserved rights'' for purposes of 40 CFR part 131 are ''any rights to CWA-protected aquatic and/or aquatic-dependent resources . . .'' In the preamble to the proposed rulemaking, the EPA noted that examples of resources to which Tribes may have reserved rights ''include but are not limited to the rights to fish; gather aquatic plants; and to hunt for aquatic-dependent animals,'' and the agency requested comment on whether there are additional types of rights reserved to Tribes by treaty, statute, or Executive order that it should consider that were not included in the rule's proposed text.[70] The EPA received many comments on this point.[71] A few commenters supported the scope of resources covered under the definition in the proposed rulemaking, asserting that it is not necessary or appropriate to enumerate all the possible resources to which Tribes could hold reserved rights. Most commenters took the opposite view and requested that the EPA delineate the scope of resources or waters potentially covered by the rule. About half of these asserted that the definition of Tribal reserved rights is overbroad and should be narrowed, while the other half requested that the EPA explicitly expand the definition of Tribal reserved rights to ensure that the rule covers additional resources. After careful consideration, and for the reasons explained herein, the agency decided to maintain the regulatory language as proposed and not to enumerate potentially covered rights in the definition of ''Tribal reserved rights'' or otherwise expand or narrow the definition. The definition of ''Tribal reserved rights'' in this final rule is intended to capture the full spectrum of rights to aquatic and aquatic-dependent resources that are covered by the CWA and thus could be addressed by WQS. The key inquiry in determining whether a right is ''to [a] CWA-protected aquatic and/or aquatic-dependent resource[ ]'' for purposes of this rule is whether the right falls within the ambit of the resources protected under the CWA. CWA section 303(c)(2)(A) states that WQS ''shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this Act.'' ''Serve the purposes of this Act,'' as defined in CWA sections 101(a)(2) and 303(c), means that WQS should, wherever attainable, provide water quality ''for the protection and propagation of fish, shellfish and wildlife and for recreation in and on the water'' and take into consideration the use and value of public water supplies, propagation of fish, shellfish, and wildlife, recreation in and on the water, and agricultural, industrial, and other purposes including navigation. Consistent with CWA sections 101(a)(2) and 303(c)(2)(A), 40 CFR 131.2 provides that ''states adopt water quality standards to protect public health or welfare, enhance the quality of water and serve the purposes of the Clean Water Act (the Act).'' Accordingly, any aquatic or aquatic-dependent resources or practices to which Tribes have reserved rights that fall within that ambit may be relevant Tribal reserved rights for purposes of this rule. The EPA is available upon request to assist right holders and states in assessing the relevance of rights to aquatic or aquatic-dependent resources for purposes of this rule.

3. Scope Related to Allocation or Quantification of Water Rights

Under the Supreme Court's longstanding reserved water rights doctrine, sometimes referred to as the *Winters* doctrine, the reservation of land for an Indian Tribe (or other Federal purposes) ''also implicitly reserves the right to use needed water from various sources—such as groundwater, rivers, streams, lakes, and springs—that arise on, border, cross, underlie, or are encompassed within the reservation.'' [72] In the proposed rulemaking, the EPA noted ''Tribal reserved rights as defined in this proposed rule generally do not

[70] *See Water Quality Standards Regulatory Revisions to Protect Tribal Reserved Rights Proposed Rule,* 87 FR 74361, 74367 (December 5, 2022).

[71] Commenters provided many examples of reserved resources and practices, including terrestrial species, medicinal plants, shellfish, hunting and trapping of waterfowl and mammals, commercial harvest and international trade of resources, as well as the right to pray and/or conduct traditional ceremonial practices such as weaving and sweat lodge ceremonies in which Tribal members utilize and come into direct contact with water.

[72] *Arizona* v. *Navajo Nation,* 599 U.S. at 561.

address the quantification of *Winters* rights.'' [73] The EPA received some comments addressing that statement, as well as the perceived implications of the proposed rulemaking on *Winters* rights allocations and water quantity allocations generally. Almost all of these commenters requested that this rule explicitly include or exclude federally reserved water rights. Many of these commenters expressed concern that the proposed rulemaking had the potential to complicate or improperly interfere with the quantification of water rights.

The EPA disagrees with commenters asserting that regulatory text is necessary to address *Winters* rights and other water rights and disagrees with comments asserting that this rule will complicate or interfere with new or existing water rights allocations or quantifications. Congress explicitly addressed the intersection between the CWA and water quantity allocations in CWA section 101(g), providing that ''the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated, or otherwise impaired'' by the Act, and that nothing in the CWA ''shall be construed to supersede or abrogate rights to quantities of water which have been established by any State.'' Relatedly, in CWA section 518(a) Congress clarified that ''Indian Tribes shall be treated as States for purposes of such section 101(g).'' Nothing in this rule conflicts with these statutory provisions, or the EPA's WQS regulations at 40 CFR 131.4(a) (''[W]ater quality standards shall not be construed to supersede or abrogate rights to quantities of water.''). Nothing in this rule affects a state's or Tribe's authority to allocate water quantities nor provides a basis to supersede or abrogate rights to quantities of water.[74] In accordance with these provisions of the CWA and the EPA's implementing regulations, whether a Tribe has right to a quantity of the water itself is not relevant to the application of this rule, which sets forth requirements for states in establishing WQS where Tribes assert rights to CWA-protected aquatic or aquatic-dependent resources.

The EPA is also clarifying its statement in the preamble of the proposed rulemaking that ''Tribal reserved rights generally do not address the quantification of *Winters* rights.'' [75] The EPA's inclusion of the term ''generally'' in the proposed rulemaking preamble, which created confusion, was solely to recognize that, consistent with other WQS actions, water quantity would come into play only to the extent that a certain quantity or flow was under consideration in WQS development to protect an aquatic or aquatic-dependent resource. For example, that a Tribe may have a right to a certain number of acre feet of water is itself not relevant in establishing WQS. In contrast, if a Tribe has a right to fish and provides data that a certain flow rate is necessary for fish survival, that would be potentially relevant under this rule. In that scenario, considerations regarding quantity or flow would not be based on *Winters* rights, but rather would be focused on protecting a relevant designated use. Accordingly, any effects of this rule on water rights, including *Winters* rights, would be incidental to water quality goals.[76]

### *B. Protecting Applicable Tribal Reserved Rights*

Section 131.9(a) of this final rule adds several requirements to the EPA's existing WQS regulation that apply where a right holder asserts a Tribal reserved right in writing to a state and the EPA for consideration in establishment of WQS. In such circumstances, the state must, to the extent supported by available data and information: (1) take into consideration the use and value of its waters for protecting the Tribal reserved right in adopting or revising designated uses; (2) take into consideration the anticipated future exercise of the Tribal reserved right unsuppressed by water quality in establishing relevant WQS; and (3) establish water quality criteria to protect the Tribal reserved right where the state has adopted designated uses that either expressly incorporate protection of the Tribal reserved right or encompass the right. This latter requirement includes, for human health criteria, developing criteria to protect right holders using at least the same risk level (*e.g.,* cancer risk level, hazard quotient, or illness rate) as the state would otherwise use to develop criteria to protect the state's general population (*i.e.,* non-right holders), paired with exposure inputs (*e.g.,* fish consumption rate) representative of right holders exercising their reserved right. Each of these requirements is discussed in turn in section IV.B.1 through IV.B.3 of this preamble, along with an explanation of the changes that the EPA made to the proposed requirements in response to public comments, to improve clarity and implementation of this final rule.

Pursuant to the language in 40 CFR 131.9(a), this rule's requirements are triggered when right holders assert their reserved rights to CWA-protected aquatic and aquatic-dependent resources for consideration in the establishment of WQS. The EPA recognizes that treaties, statutes, and Executive orders constitute binding legal requirements regardless of whether a right holder chooses to assert rights reserved by such instruments in the context of the CWA WQS program. A right holder's decision to raise such reserved rights for consideration in establishing WQS is based on the specific nature of that right and the specific WQS in question. For example, a right holder may have a treaty-reserved right to fish but choose not to assert or raise that right in the context of a state's planned revision to its human health criteria. The right holders' calculus in whether to assert a right entails numerous considerations, such as whether the WQS revisions at issue are focused on pollutants that impact the right holders' ability to exercise their right. If not, and the right holder decides not to raise their right to the state and the EPA, that decision in no way alters the legal scope or meaning of that right. Accordingly, a decision not to raise a right in a specific WQS context does not amount to a general waiver or disclaimer of that right in the WQS context or in other contexts, including with respect to other state or Federal actions that may impact Tribal reserved rights. Additionally, a decision not to raise a right during a specific state WQS development process does not

[73] *See Water Quality Standards Regulatory Revisions to Protect Tribal Reserved Rights Proposed Rule,* 87 FR 74361, 74363 (December 5, 2022).

[74] *Winters* rights arise by implication, vest no later than the establishment or creation date of the Indian or non-Indian Federal reservation and may be quantified through a Congressionally enacted settlement or through adjudication in Federal or state court consistent with the McCarran Amendment. *See, e.g., Colorado River Water Conserv. Dist.* v. *United States,* 424 U.S. 800, 808–09 (1976); *Arizona* v. *California,* 373 U.S. 546, 595–601 (1963); *United States* v. *Adair,* 723 F.2d 1394, 1413–14 (9th Cir. 1983), cert. denied, 467 U.S. 1252 (1984).

[75] *See Water Quality Standards Regulatory Revisions to Protect Tribal Reserved Rights Proposed Rule,* 87 FR 74361, 74363 (December 5, 2022).

[76] *See Public Utility District No. 1 of Jefferson County et al.* v. *Washington Department of Ecology,* 511 US 700, 720 (1994) (''Sections 101(g) and 510(2) preserve the authority of each State to allocate water quantity as between users; they do not limit the scope of water pollution controls that may be imposed on users who have obtained, pursuant to state law, a water allocation.''); citing to the Legislative History of the Clean Water Act of 1977 (''The requirements [of the Act] may incidentally affect individual water rights . . . . It is not the purpose of this amendment to prohibit those incidental effects. It is the purpose of this amendment to insure that State allocation systems are not subverted, and that effects on individual rights, if any, are prompted by legitimate and necessary water quality considerations.'').

preclude the right holder from raising that reserved right during another WQS development process.

The rule's requirements are premised on a right holder asserting a right to a state and the EPA ''for consideration in establishment of [WQS],'' and accordingly, an assertion that occurs after the state has established its WQS would not trigger the rule's requirement that the state consider that right, at that time, but would be relevant for future WQS revisions. Assertions that occur as early as possible in a state's WQS development process will help to ensure adequate time for all parties to resolve any uncertainties and consider whether and how WQS may need to be revised in accordance with 40 CFR 131.9(a). Additionally, asserting the rights and providing associated details early in the WQS development process ensures that the state can consider that information before it has invested significant resources in drafting new or revised WQS, and before those new or revised WQS have been duly adopted.[77] The CWA requires states to conduct a triennial review of their WQS and solicit public input on changes that may be needed to those WQS. In the absence of a separate state process for engaging potential right holders, the state's triennial review process is an ideal opportunity for Tribes to assert their rights for consideration.

The EPA does not intend for the requirement for right holders to assert their rights to a state and the EPA in writing for consideration in establishment of WQS to be onerous. For example, an email with information about the rights would suffice. When right holders choose to assert their rights in the WQS context, the EPA encourages right holders to provide as much detail and documentation as possible on the geographic scope and nature of the rights (*e.g.,* the right to fish for subsistence in geographic area Y; the right to gather plants in waterbody A).

If a right holder asserts a right in the WQS context, then the next step is for the state to seek further information from the right holder and other sources, if needed, to help the state determine the nature and geographic scope of the right, and whether and how state WQS may need to be revised in accordance with 40 CFR 131.9.[78] Accordingly, the EPA also encourages right holders to provide data and information, where available, about desired revisions to relevant WQS. It may be useful for the state to initiate a collaborative process with the EPA and the right holder so all parties receive the same information and can jointly discuss any areas of uncertainty. In the proposed rulemaking, the EPA explained that ''a first step'' in determining the rule's applicability ''should be engagement with potential right holders.'' [79] Accordingly, the EPA proposed adding § 131.6(g)(1), which would have required that WQS submissions include ''[i]nformation about the scope, nature, and current and past use of the [T]ribal reserved rights, *as informed by the right holders*'' (emphasis added).[80] The intent of this provision was to ensure that the identification and interpretation of any relevant Tribal reserved rights would be informed by input from the right holders.[81] Some commenters expressed confusion regarding what the EPA meant by ''as informed by the right holders,'' and what the respective roles of states, the EPA, and right holders would be in initially determining whether there are relevant rights to consider. Accordingly, the EPA revised 40 CFR 131.9(a) to clarify that §§ 131.9(a)(1) through (3) only apply where ''a right holder has asserted a Tribal reserved right in writing to the State and EPA for consideration in establishment of [WQS].'' The EPA also revised the proposed language at 40 CFR 131.6, discussed further below.

This revision to 40 CFR 131.9(a) serves two important purposes. First, in response to concerns raised by some commenters regarding states or the EPA interpreting and applying rights reserved to Tribes pursuant to treaties, statutes or Executive orders in ways that are contrary to right holders' characterizations of their rights, it allows right holders to decide whether to raise their rights for consideration in the WQS context and provide relevant information about those rights. The EPA is available to assist right holders in understanding state WQS development processes to help them determine when they may wish to assert relevant rights in the WQS context. For example, the EPA can direct right holders to information on state WQS development processes so they can stay informed, such as through participation in workgroups and signing up for state email distribution lists on WQS topics.[82]

Second, this revision provides states with requested clarity regarding the scope of rights that they need to consider in the WQS context, *i.e.,* those rights asserted by right holders. The EPA received some comments expressing concerns regarding implementation of the rule and the potential burden placed on states if they had to independently identify all applicable Tribal reserved rights in their waters before proceeding with WQS revisions. This change clarifies that such an identification is not required to comply with this rule. However, the EPA recommends that states engage with Tribes at the earliest stages of their WQS development processes to gain additional knowledge regarding any potentially applicable reserved rights and related WQS concerns before right holders assert those rights. The EPA understands from public comments that some states are already aware of potentially applicable reserved rights and routinely engage with right holders on WQS and other actions that may impact those rights; the EPA encourages that practice. By proactively providing opportunities for Tribes to engage in the WQS development process (for example, by notifying all federally recognized Tribes in the early stages of a triennial review that the Tribes may be affected by amendments to a state's WQS), states can best position right holders to make informed decisions about whether to assert their reserved rights at a stage when the state has the most flexibility to consider new information and use that information to develop revised WQS, as appropriate. The EPA is also available to assist states in identifying potential right holders.

Some commenters requested that the EPA and states keep confidential certain information about Tribal reserved rights, such as culturally sensitive information on water uses. Where a Tribe has concerns about sensitivity of

[77] Tribal assertions of reserved rights to the EPA and the relevant state(s) do not necessarily need to occur solely as part of the WQS development process but can be part of any other process addressing expressed Tribal interests, as long as the assertion relates specifically to WQS.

[78] The EPA notes that a right holder asserting a right does not necessarily mean that application of 40 CFR 131.9 will lead to a WQS revision in that instance.

[79] *See Water Quality Standards Regulatory Revisions to Protect Tribal Reserved Rights Proposed Rule,* 87 FR 74361, 74367 (December 5, 2022).

[80] *Id.*

[81] In its slides for the public hearings on the proposed rulemaking, the EPA stated, ''Whether reserved rights apply to waters subject to a specific new/revised WQS is a complex inquiry that will be informed by several factors, including: input from the right holders; language of the treaties, statutes, or Executive orders and relevant judicial precedent.'' *See https://www.epa.gov/system/files/documents/2023-02/01-24-23-Reserved-Rights-Public-Hearing-Slides-508.pdf.*

[82] The EPA has included in the docket for this rule an example implementation scenario illustrating the types of information that could constitute an assertion of rights for consideration in establishment of WQS, as well as the process steps leading from an assertion of rights to state adoption of new or revised WQS and the EPA's approval or disapproval. The EPA expects to further work with Tribes and states in the implementation of this rule.

information, in advance of sharing that information, the EPA and the Tribe should discuss the extent to which the information would likely influence the WQS revision process and steps that could be taken to protect confidentiality. The EPA and states are unlikely to be able to keep most information provided by Tribes confidential, for two reasons. First, to have any bearing on a WQS action, a right holder's assertion of a right would need to be part of the public record for any related WQS action. CWA section 101(e) provides that ''public participation in the development, revision, and enforcement of any regulations, standard, effluent limitation, plan, or program established . . . under this Act shall be provided for, encouraged, and assisted . . .'' In addition, the EPA's regulation related to public participation in the development of WQS, 40 CFR 131.20(b), references 40 CFR part 25, which requires states to provide ''[r]eports, documents and data'' relevant to discussion of proposed WQS revisions in advance of public hearings on such revisions. Information relevant to the proposed WQS and their relationship to Tribal reserved rights would therefore be subject to public review and comment. Second, the EPA is subject to the Freedom of Information Act (FOIA), and, accordingly, FOIA disclosure requirements would apply to information provided to the EPA by right holders.[83] The EPA is only able to maintain confidentiality of information protected by one of the nine exemptions in the FOIA. FOIA disclosure requirements would likely apply to most information provided to the EPA by right holders in the context of this rule.

The requirements in 40 CFR 131.9(a) are premised on states having ''available data and information'' supporting the application of those requirements. As explained above in this section of this preamble, once a right holder asserts a right, the state would seek available data and information, with assistance from the EPA if requested, and then evaluate the data and information to determine whether and how WQS may need to be revised to comply with 40 CFR 131.9(a). The EPA and the state will need to make their decisions based on the information available at the time of the WQS revision. Where a right holder asserts a right but only limited data and information about the nature and scope of the right, or the level of protection required to protect the relevant resource, can be found at the appropriate stage in the state's WQS development process (for example, before a state has duly adopted its WQS and/or the WQS are before the EPA for review under CWA section 303(c)), it could be reasonable to conclude that the information was not ''available'' per § 131.9(a) when the WQS were being developed. The triennial review process exists to ensure that any new information that was not previously addressed is considered and incorporated in a future WQS revision, as appropriate. In such cases, the state, the right holder, and the EPA should discuss next steps for a future WQS revision to address the new information, as needed, as well as how the right could be protected until that future WQS revision occurs (*e.g.,* through implementation of a narrative criterion).

A few commenters raised concerns about the complexity for right holders with rights that span multiple states of needing to engage with different states on different WQS revision timelines and with different strategies for protecting Tribal reserved rights. In such situations, if requested by one or more states or Tribes, the EPA is available to engage with multiple states and right holders to negotiate regional solutions.

Some commenters stated that the phrase ''to the extent supported by available data and information'' needed additional clarification on the appropriate data that would satisfy this requirement. The quality and soundness of available data and information will need to be evaluated case-by-case during the WQS development process. As is currently the case in development of WQS under the EPA's existing regulation at 40 CFR part 131, different parties sometimes have different opinions on the types of data to consider, and the quality and soundness of those data. The EPA received some comments expressing concern that there would be disputes between states and Tribes on appropriate methodologies and/or scientific data and information, and that there is the potential for additional workload burden to resolve these disputes or produce data and information. As stated in 40 CFR 131.9(b), ''States and right holders may request EPA assistance with evaluating Tribal reserved rights''—which could include gathering or producing data and information—and ''EPA will provide such assistance to the extent practicable.'' As for any WQS decision, states must evaluate all the available information and make their decisions based on that information. As explained below in section IV.E, the EPA will review all of the available information and the state's documentation of how that information was considered per 40 CFR 131.6(g) and decide whether to approve or disapprove a state WQS submission in the same way the EPA currently makes decisions when there are disagreements between different parties, including different states, on WQS protections.

The EPA requested comment on whether there are other factors it should consider when making WQS decisions where there are gaps in information, and/or a difference of opinion exists between the state and one or more Tribes about the level of water quality necessary to protect a reserved right. A few commenters asserted that relevant Traditional Ecological Knowledge, also referred to as Indigenous Knowledge, should be considered along with other types of data and information; the EPA agrees.

Some commenters noted that right holders may need resources and support from the EPA to collect data and information. The EPA intends to provide support to right holders, as well as states, during the WQS development process to help gather available data and evaluate differing scientific views to meet the requirements in this final rule. The EPA has, on occasion, provided funding to collect data and information to inform the level of water quality necessary to support Tribal reserved rights. The EPA could support similar projects in the future, as appropriate and as funding allows.

In the proposed rulemaking, 40 CFR 131.9(a) provided that ''[w]ater quality standards must protect [T]ribal reserved rights applicable to waters subject to such standards.'' [84] In response to comments expressing confusion about the meaning and application of this language, in this final rule, the EPA removed the initial overarching statement of principle proposed at 40 CFR 131.9(a), which the agency did not intend as a stand-alone requirement.

Finally, some commenters requested that the EPA amend proposed 40 CFR 131.9(a) to specify that upstream WQS must protect downstream Tribal reserved rights. The EPA made no changes to the final rule in response to these comments because, pursuant to the existing WQS regulation at 40 CFR 131.10(b), upstream states are already obligated to ensure that their WQS provide for the attainment and maintenance of downstream state WQS, including WQS that protect Tribal

[83] *See https://www.epa.gov/foia/learn-about-foia.*

[84] *See Water Quality Standards Regulatory Revisions to Protect Tribal Reserved Rights Proposed Rule,* 87 FR 74361, 74378 (December 5, 2022).

reserved rights.[85] Many state WQS already include a broad narrative criterion to protect downstream WQS, for example, or a tailored downstream protection narrative focused on specific waters or pollutants. In practice, where a downstream state's WQS are not yet protective of applicable reserved rights, the EPA would prioritize working with that state and the right holder(s) to gather available data and information and adopt appropriate WQS to protect the rights.

1. Considering Tribal Reserved Rights in Designating Uses

The final rule at 40 CFR 131.9(a)(1) requires states to consider the use and value of their waters for protecting applicable Tribal reserved rights in adopting or revising designated uses pursuant to 40 CFR 131.10. Specifically, it requires that states must ''*[t]ake into consideration* . . . Tribal reserved rights in adopting or revising designated uses[.]'' (Emphasis added). This requirement is consistent with CWA section 303(c)(2)(A), which provides that WQS ''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.'' (Emphasis added).

The EPA's existing regulation at 40 CFR 131.6(a) requires that each state's WQS submitted to the EPA for review must include ''[u]se designations consistent with the provisions of [S]ections 101(a)(2) and 303(c)(2) of the Act.'' [86] Some of the uses specified in CWA section 303(c)(2)(A) are also specified in CWA section 101(a)(2), which sets a national goal of ''water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water,'' wherever attainable. The EPA refers to the uses listed in section 303(c)(2)(A) but not listed in section 101(a)(2) as ''non-101(a)(2) uses.'' [87]

The EPA is not delineating in this final rule a list of uses that states must take into consideration, but notes that the full scope of uses that states are required to consider under the CWA includes those that are explicitly listed in sections 303(c)(2)(A) and 101(a)(2) of the CWA, and those that are not, as evidenced by Congress' inclusion of the phrase ''and other purposes . . .'' in CWA section 303(c)(2)(A). As described in section IV.A.2 of this preamble, commenters provided examples of reserved resources and practices that are captured explicitly in CWA sections 101(a)(2) and 303(c)(2)(A) such as propagation of fish and wildlife, as well as examples that are not captured explicitly in either provision but could fall under section 303(c)(2)(A)'s ''other purposes,'' such as ceremonial practices. As noted above in section III.B.1 of this preamble, rights reserved to Tribes pursuant to treaties, statutes and Executive orders are binding Federal law, and thus, for any such rights that do not already fall within the explicit list of uses set forth in CWA section 101(a)(2) or section 303(c)(2)(A), consideration of waters' use and value for protecting Tribal rights reserved by such legal instruments is encompassed within the ''other purposes'' clause of CWA section 303(c)(2)(A).[88]

In this final rule, where a state finds that certain waters have use and value for protecting a Tribal reserved right based on information provided by right holders that have asserted a relevant right, the state would then consider whether those rights are already encompassed by a state's designated uses, or whether a new or revised use may be needed to protect the Tribal reserved right. 40 CFR 131.10 remains the regulatory framework for guiding this consideration. Many state-designated uses already protect the CWA section 101(a)(2) uses, which likely encompass protection of certain Tribal reserved rights. For example, a state with a ''fishing'' designated use applicable to waters where there is a subsistence fishing reserved right could conclude that its ''fishing'' use encompasses that right such that a new use would not be needed, although the state may still choose to adopt a separate subsistence fishing use for transparency and clarity.

For non-101(a)(2) uses, in the preamble to the EPA's final 2015 revisions to the Federal WQS regulation, the EPA provided several recommendations on the types of information that a state might consider when determining the use and value of its waters for various purposes.[89] In addition to the requirements in 40 CFR 131.10 to provide for the attainment and maintenance of downstream WQS and protect existing uses, the EPA recommended that states consider information such as: (1) the quality and physical characteristics of the water(s) being evaluated, (2) public comments, (3) attainability considerations, and (4) the value and/or benefits (including environmental, social, cultural, and/or economic value/benefits) associated with the use. The EPA also recommended that states work closely with the EPA when developing such ''use and value demonstrations'' for non-101(a)(2) uses in their waters.

In the EPA's view, many waters where Tribal reserved rights apply will have significant environmental, social, cultural and/or economic use and value for protecting those rights in accordance with 40 CFR 131.9. In such cases, the EPA expects that a state would either explicitly adopt a use to protect the Tribal reserved rights or conclude that its current uses encompass the rights. This is because, as emphasized in comments from Tribes, the exercise of rights reserved by Tribes is an intrinsic part of Tribal life and of deep cultural, economic, and subsistence importance to Tribes. For example, where a right holder has a reserved subsistence fishing right on a river, that river would have use and value for protecting subsistence fishing. As such, the state would either explicitly adopt a use to protect subsistence fishing or determine that its current use designation already encompasses subsistence fishing. There may be situations, however, where the use and value of certain waters suggests that designating uses for those waters to protect the reserved right is a higher priority than for other waters where the right applies. For example, natural physical characteristics in one waterbody may inhibit growth or survival of a resource covered by a Tribal reserved right, such that there is little value in designating uses for that

[85] USEPA. 2014. *Protection of Downstream Waters in Water Quality Standards: Frequently Asked Questions.* EPA–820–F–14–001. *See https://www.epa.gov/sites/default/files/2018-10/documents/protection-downstream-wqs-faqs.pdf.*

[86] The existing WQS regulation at 40 CFR part 131 interprets and implements CWA section 101(a)(2) and 303(c)(2)(A) through requirements that WQS protect the uses specified in section 101(a)(2) of the Act unless those uses are shown to be unattainable, effectively creating a rebuttable presumption of attainability. This final rule does not alter the existing requirements at § 131.10 that the uses specified in CWA section 101(a)(2) are presumed attainable unless a state affirmatively demonstrates through a Use Attainability Analysis (UAA) that 101(a)(2) uses are not attainable as provided by one of six regulatory factors at 40 CFR 131.10(g). A UAA is defined at 40 CFR 131.3(g) as ''a structured scientific assessment of the factors affecting the attainment of the use which may include physical, chemical, biological, and economic factors as described in § 131.10(g).''

[87] *See* 40 CFR 131.3(q) defining ''non-101(a)(2) uses'' as ''any use unrelated to the protection and propagation of fish, shellfish, wildlife or recreation in or on the water.''

[88] *Grand Portage Band et al.* v. *EPA,* Civil No. 22–1783 (D. Minn. March 29, 2024) at 30 (''States and EPA must consider Tribal treaty rights to aquatic and aquatic-dependent resources to comply with the Clean Water Act and implementing regulations. See 33 U.S.C. 1313(c)(2)–(3), 1371(a); 40 CFR 131.5, 131.6, 131.10(b).'').

[89] *See Water Quality Standards Regulatory Revisions,* 80 FR 51027 (August 21, 2015).

waterbody to specifically protect the reserved right. As with any evaluation of waters' use and value for various purposes, compliance with the requirement at 40 CFR 131.9(a)(1) will require a case-specific evaluation of the waters and circumstances in question. The EPA recommends that states work closely with right holders and with the EPA when undertaking such an analysis.

The final rule reflects two key modifications from the use requirement in the proposed rulemaking, which at 40 CFR 131.9(c)(1) proposed to require states to ''[d]esignate uses . . . that either expressly incorporate protection of the [T]ribal reserved rights or encompass such rights[.]'' [90] First, the EPA aligned the rule's requirement regarding designation of uses with the language of section 303(c)(2)(A) of the CWA by requiring that states must ''[t]ake into consideration . . . Tribal reserved rights in adopting or revising designated uses[.]'' Some commenters viewed the proposed requirement in 40 CFR 131.9(c)(1) that states must ''[d]esignate uses . . .'' as a broad mandate requiring states to adopt designated uses and asserted this was inconsistent with the CWA's framework set forth in section 303(c) and improperly usurped states' roles. The EPA's intent in proposing 40 CFR 131.9(c)(1) was not to impose a new use designation requirement, but rather to make explicit that designating a use to protect rights to aquatic and/or aquatic-dependent resources reserved to Tribes by treaty, statute, or Executive order was one option available to states. It was not intended as a mandate. Given the confusion expressed in comments, the EPA is revising the proposed rulemaking language on designated uses to align with the CWA language.

The second key change the EPA made between proposed 40 CFR 131.9(c) and final 40 CFR 131.9(a)(1) was to remove proposed 40 CFR 131.9(c)(1) through (3), which provided that, in order to meet the requirements of proposed 40 CFR 131.9(a), ''states must'' either: (1) designate uses and (2) establish criteria to protect Tribal reserved rights, ''and/or'' (3) use applicable antidegradation requirements to maintain water quality that protects Tribal reserved rights.[91] As explained immediately above, the final rule includes a revised requirement with respect to designated uses, set forth at 40 CFR 131.9(a)(1). The final rule also includes a revised requirement regarding criteria, related to proposed 40 CFR 131.9(c)(2), that is described below in section IV.B.3 of this preamble. For the reasons explained immediately below, the EPA is not finalizing a requirement related to antidegradation, as set forth at proposed 40 CFR 131.9(c)(3).

The EPA requested comments on whether two proposed antidegradation policy options related to Tier 2 and Tier 3 could be used to protect Tribal reserved rights in lieu of the proposed requirements for designated uses and criteria at 40 CFR 131.9(c)(1) and (2), respectively. Some commenters expressed concerns that, as drafted, the proposed rulemaking implied that applying antidegradation requirements alone could satisfy the statement set forth at proposed 40 CFR 131.9(a) that WQS must protect Tribal reserved rights and expressed confusion about whether the proposed requirement at 40 CFR 131.9(c)(3) differed from the requirements already encompassed in the existing WQS regulation at 40 CFR 131.12. The EPA has determined not to include the proposed provision related to antidegradation because the existing antidegradation requirements can be used to protect reserved rights. Among other requirements, 40 CFR 131.12 specifies that states must develop and adopt a statewide antidegradation policy. As specified in 40 CFR 131.12(a)(2), that policy must require that water quality be maintained and protected for high quality waters 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. This requirement applies to all high quality waters, including those where reserved rights apply. In addition, the existing regulation at 40 CFR 131.12(a)(3) specifies that an antidegradation policy must also provide for the maintenance and protection of water quality where states have determined that such waters constitute an Outstanding National Resource Water (ONRW). Again, this requirement applies to ONRWs where reserved rights apply. In the final rule, the EPA streamlined and clarified the operative requirements set forth in 40 CFR 131.9 by removing the language related to antidegradation. The EPA concluded that existing antidegradation tools specified at 40 CFR 131.12 can be used to protect Tribal reserved rights, therefore the EPA determined it was not necessary to include an additional provision related to antidegradation in 40 CFR 131.9.

The final rule does not change or affect the antidegradation requirements in the EPA's existing WQS regulation at 40 CFR 131.12 or add any new antidegradation regulatory requirements regarding protection of Tribal reserved rights. However, the EPA recommends that states consider applying ONRW protections to maintain and protect waters where Tribal reserved rights apply. The EPA also recommends that states amend their antidegradation implementation methods to explicitly account for Tribal reserved rights when evaluating whether to authorize a lowering of water quality in Tier 2 waters.

2. Accounting for Suppression Effects

In the final rule, 40 CFR 131.9(a)(2) requires that, where a right holder has asserted a Tribal reserved right and where supported by available data and information, the state must ''[t]ake into consideration the anticipated future exercise of the Tribal reserved right unsuppressed by water quality[.]'' This requirement is intended to address situations where existing water quality does not allow for right holders to fully exercise their reserved rights. For example, a Tribe's exercise of its right to fish for subsistence is suppressed if the Tribe consumes fish below subsistence levels due to concerns about contamination. Consideration of suppression effects is important to minimize the potential that WQS merely reinforce an existing suppressed use or allow further contamination and/or depletion of the aquatic resources such that it leads to a ''downward spiral'' of further reduction/suppression.[92]

The EPA proposed to require, at 40 CFR 131.9(a)(1), states to establish WQS to ''protect'' the exercise of Tribal reserved rights ''unsuppressed by water quality or availability of the aquatic or aquatic-dependent resource.'' [93] The requirement related to suppression in the final rule reflects several key modifications to the proposed requirement: first, the EPA made it less prescriptive, while maintaining a requirement that states *consider* the effect suppression is having on the exercise of Tribal reserved rights; second, the EPA clarified the need to evaluate the ''anticipated future'' exercise of Tribal reserved rights

[90] *See Water Quality Standards Regulatory Revisions to Protect Tribal Reserved Rights Proposed Rule,* 87 FR 74361, 74378 (December 5, 2022).

[91] *Id.*

[92] National Environmental Justice Advisory Council, *Fish Consumption and Environmental Justice,* pp. 44–49 (2002) (NEJAC Fish Consumption Report) available at *https://www.epa.gov/sites/default/files/2015-02/documents/fish-consump-report_1102.pdf.*

[93] *See Water Quality Standards Regulatory Revisions to Protect Tribal Reserved Rights Proposed Rule,* 87 FR 74361, 74378 (December 5, 2022).

unsuppressed by water quality; and third, the EPA removed the reference to availability of the resource.

Requiring consideration of the anticipated future exercise of Tribal reserved rights unsuppressed by water quality is consistent with the objectives of CWA section 303(c)(2)(A), the oversight authority that Congress granted the EPA in CWA section 303(c), and the EPA's existing WQS regulation, and builds on the EPA's longstanding recommendations on derivation of human health criteria. Specifically, requiring states to consider suppression effects in establishing WQS is consistent with the CWA goal in section 101(a) to ''restore and maintain the chemical, physical, and biological integrity of the Nation's waters,'' section 303(c)(2)(A)'s requirement that WQS ''shall be such as to protect the public health or welfare'' and ''enhance the quality of the water,'' and the EPA's longstanding position that WQS are water quality goals that are not intended to merely reflect currently attained or existing conditions.[94] As the ''Purpose'' section in the existing WQS regulation at 40 CFR 131.2 explains, WQS ''serve the dual purposes of establishing the water quality goals for a specific water body and serve as the regulatory basis for the establishment of water-quality-based treatment controls and strategies[.]'' Relatedly, the EPA's longstanding regulation at 40 CFR 131.3 defines designated uses as ''those uses specified in water quality standards for each water body or segment *whether or not they are being attained*'' (emphasis added). This definitional language illustrates the principle that WQS may be set based on goals for future water quality, even if such goals are not presently attained.

The requirement at 40 CFR 131.9(a)(2) also builds on the EPA's longstanding guidance addressing derivation of water quality criteria to protect designated uses. For example, in the EPA's *Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health* (2000 Methodology), the agency refers to human health criteria as ''health *goals*'' (emphasis added).[95] The EPA's 2016 *Guidance for Conducting Fish Consumption Surveys* recommends avoiding establishing standards based on suppressed conditions and recommends gathering information about anticipated future conditions.[96] In 2013, in a guidance document addressing human health criteria and fish consumption rates, the agency noted the importance of avoiding ''suppression effects'' that may occur when a fish consumption rate ''reflects an artificially diminished level of consumption from an appropriate baseline level of consumption . . . because of a perception that fish are contaminated with pollutants.'' [97]

The requirement in this final rule builds both on the agency's prior guidance on avoiding establishing WQS based on suppressed fish consumption rates, which was not specific to consideration of Tribal reserved rights, as well as on the case-specific actions the agency took in Maine, Washington, and Idaho, discussed previously in section III.B.2 of this preamble, where Tribal reserved rights were a factor in determining the appropriate fish consumption rate. In 2015 and 2016, in disapproving human health criteria for Maine and Washington, respectively, the EPA stated that, where Tribal rights applied, human health criteria must be based on fish consumption data ''that reasonably represent Tribal consumers taking fish from Tribal waters and fishing practices unsuppressed by concerns about the safety of the fish available to them to consume.'' [98] In 2019, the agency revisited the position taken in the Maine and Washington actions, acknowledging the EPA's prior consideration of suppression in evaluating fish consumption rates, but indicating that the concept of requiring a state to use an unsuppressed fish consumption rate based on heritage or historic data was ''new and novel[.]'' [99] The EPA noted that its applicable guidance did not explain how ''historic fish consumption rates are to be used in deriving'' criteria, and indicated that requirements to use heritage or historic data ''should have been presented for thorough public notice and comment prior to being incorporated into the EPA's human health criteria recommendations.'' [100] This final rule is informed by the general principles reflected in the EPA's pre-2019 guidance. In addition, while this final rule does not mandate use of historic or heritage data, in this rule, the EPA expressly addressed any implied procedural deficiency based on the agency's 2019 assertion by requesting public comment on the concepts of requiring protection of unsuppressed exercise of Tribal reserved rights and of using heritage or historic data to evaluate suppression (discussed further in subsequent paragraphs).

Many commenters expressed concerns that a mandate that WQS must protect unsuppressed exercise of a right would be challenging to implement, as determining what constitutes unsuppressed exercise of a Tribal reserved right could be subjective. Many other commenters supported such a mandate to prevent WQS from being established based on suppressed use of a resource. The EPA agrees, as explained above, that it is important to avoid establishing WQS that lock in current levels of contamination. However, based on public input, the EPA is finalizing a requirement that is less prescriptive than proposed and more flexible than the approach the agency took in its Maine and Washington actions. The final requirement does not mandate that states in establishing WQS in waters with applicable Tribal reserved rights,

[94] *See Water Quality Standards Regulatory Revisions,* 80 FR 51020, 51025 (August 21, 2015) (''When conducting a UAA and soliciting input from the public, states and authorized Tribes need to consider not only what is currently attained, but also what is attainable in the future after achievable gains in water quality are realized.'').

[95] USEPA. 2000. Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health. U.S. Environmental Protection Agency, Office of Water, Washington, DC EPA–822–B–00–004 at 1–5, *https://www.epa.gov/wqc/human-health-water-quality-criteria-and-methods-toxics.*

[96] *See* USEPA. 2016. *Guidance for Conducting Fish Consumption Surveys.* EPA–823B16002 at 18, *https://www.epa.gov/sites/default/files/2016-12/documents/guidance-fish-consumption-surveys.pdf* (''Environmental standards utilizing suppressed rates may contribute to a scenario in which future aquatic environments will support no better than suppressed rates'' and p. 84: ''. . . by asking people to predict their level of future use under the change of a single condition (*e.g.,* alleviation of their concerns about contamination), a survey can provide useful information on the qualitative scale of change that usage rates are likely to undergo as remediation and/or risk communication progresses.'').

[97] *Human Health Ambient Water Quality Criteria and Fish Consumption Rates: Frequently Asked Questions. https://www.epa.gov/sites/default/files/2015-12/documents/hh-fish-consumption-faqs.pdf* (''It is also important to avoid any suppression effect that may occur when a fish consumption rate for a given subpopulation reflects an artificially diminished level of consumption from an appropriate baseline level of consumption for that subpopulation because of a perception that fish are contaminated with pollutants.'').

[98] 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'', Attachment A at 3 (February 2, 2015); *see also* Revision of Certain Federal Water Quality Criteria Applicable to Washington, 81 FR 85417, 85424 (November 28, 2016) (''It is also important, where sufficient data are available, to select a FCR that reflects consumption that is not suppressed by concerns about the safety of available fish.'').

[99] *See Water Quality Standards Regulatory Revisions to Protect Tribal Reserved Rights Proposed Rule,* 87 FR 74361, 74369 (December 5, 2022), citing to the EPA's Approval of Idaho's New and Revised Human Health Water Quality Criteria for Toxics and Other [WQS] Provisions (April 4, 2019), p. 12.

[100] The EPA's Approval of Idaho's New and Revised Human Health Water Quality Criteria for Toxics and Other [WQS] Provisions (April 4, 2019), p. 12.

''must protect'' the unsuppressed exercise of those rights, nor does it mandate that, with respect to human health criteria, states must categorically use an unsuppressed fish consumption rate in each instance where Tribal reserved fishing rights apply. The final rule instead requires that states must ''take into consideration'' the anticipated future exercise of Tribal reserved rights unsuppressed by water quality. The EPA's existing WQS regulation at 40 CFR 131.11 already requires that WQS protect applicable designated uses and be based on sound science. Protection of applicable designated uses includes analysis of relevant data. Thus, states should already be considering data regarding suppression effects pursuant to the existing WQS regulation and guidance. This final rule underlines the importance of such consideration in the context of protecting Tribal reserved rights.

Consideration of suppression effects pursuant to this final rule will inform states' development of criteria that protect applicable designated uses and are based on sound scientific rationale. In complying with this requirement, states must consider right holders' anticipated future exercise of relevant rights in light of available data and information regarding suppression effects. Consistent with the final rule's requirements at 40 CFR 131.6, states must include in their WQS submittal their analysis of such information and explain how they considered it in revising their WQS. The additional changes that the agency made to this requirement, described below, are aimed at further clarifying what it means to consider suppression effects in establishing WQS.

The next substantive change in the final rule clarifies that states must take into consideration the ''*anticipated future* exercise of the Tribal reserved right unsuppressed by water quality'' (emphasis added). In the proposed rulemaking preamble, the EPA explained that the proposed requirement at 40 CFR 131.9(a)(1) requiring protection of the ''exercise of Tribal reserved rights unsuppressed by water quality'' was ''intended to result in WQS that protect reasonably anticipated future uses.'' [101] Some commenters expressed confusion regarding the meaning of unsuppressed exercise of Tribal reserved rights in the proposed regulatory text and on the distinction between that text and the preamble phrase ''protect reasonably anticipated future uses.'' In response to these commenters' concerns, the EPA added the words ''anticipated future'' to the final regulatory text, to ensure that the regulatory text clearly matches the agency's intent in adding this requirement.

Consideration of the anticipated future exercise of a Tribal reserved right is consistent with the longstanding principle that WQS establish goals for future water quality, regardless of present conditions, as discussed above. This consideration may include learning about the cultural and/or nutritional importance of the resource to the right holders, determining modern-day availability of the resource as well as alternatives to that resource, considering whether any restoration efforts that are planned or underway could impact availability of the resource, and understanding right holders' current lifestyles and practices. Determining the anticipated future exercise of a reserved right will require a case-specific evaluation to the extent supported by available data and information per 40 CFR 131.9(a). Where available data and information indicate that the existing exercise of the right is suppressed and support a quantitative determination of the anticipated future exercise of the right, the EPA expects that consideration of such data and information will lead states to revise applicable criteria, as needed, to protect the anticipated future exercise of the right. Conversely, if the state does not have sufficient available data and information to determine the anticipated future exercise of the right, after considering any information provided by right holders, it would explain that conclusion in its WQS submission, per 40 CFR 131.6(g)(1), as discussed below in section IV.E of this preamble.

One commenter requested that the EPA promulgate a minimum fish consumption rate that states must use where Tribal reserved rights to fish for subsistence apply. The EPA can provide guidance on default rates to assist states in developing criteria that take into account suppression effects but disagrees that it is appropriate to promulgate a specific rate across-the-board in this nationally applicable rule. Quantifying the anticipated future use unsuppressed by water quality is an evolving area, often requiring a complex and case-specific analysis reconciling multiple lines of evidence, in some cases including differing temporal estimates. However, the EPA agrees with commenters that the absence of data regarding an exact unsuppressed rate need not prevent a state from protecting subsistence consumption where Tribes have a right to such consumption. The EPA notes that in the absence of case-specific data and information, where a Tribal reserved right relates to subsistence fishing, the default fish consumption rate of 142 grams per day (g/day) in the EPA's 2000 methodology [102] can represent a reasonable fish consumption subsistence rate floor.

With respect to fish consumption, some commenters noted that there are other factors, beyond contamination or availability, that may affect right holders' consumption level over time, such as changes in social customs, social makeup, and dietary preferences. Additionally, some commenters noted that there are a variety of ecological and non-ecological factors other than contamination that could affect the availability of fish, including regulations that protect fish populations from overfishing. The EPA agrees that there are factors beyond contamination that could change how a reserved right is exercised, and, as explained above, the EPA intends for these other factors to be considered and discussed with right holders when determining the anticipated future exercise of the right.

Consideration of the anticipated future exercise of a Tribal reserved right unsuppressed by water quality could also include consideration of historical use of that resource. Some commenters opposing proposed 40 CFR 131.9(a)(1) conflated the proposed requirement to protect the unsuppressed use of a resource with a requirement to protect the ''heritage'' use of that resource, *i.e.,* the amount of the resource used prior to non-indigenous or modern sources of contamination and interference with natural processes. Specifically, commenters expressed concern about the use of heritage or historic rates, asserting that those are too speculative, hypothetical, and unreliable to be used in setting WQS. These commenters stated that only contemporary or current fish consumption rates should be used when establishing human health criteria, consistent with longstanding state practices. The EPA disagrees that studies of heritage rates are, as a rule, inherently speculative or unreliable such that only studies of current practices can be used in establishing WQS. Historical data are often used in

[101] *See Water Quality Standards Regulatory Revisions to Protect Tribal Reserved Rights Proposed Rule,* 87 FR 74361, 74367 (December 5, 2022).

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

the WQS program, such as to establish reference conditions to target as a future goal in impacted waters. However, the EPA agrees that heritage data are not determinative but should be considered in the context of other available information estimating future anticipated practices and goals.

The final substantive change the EPA made between the proposed and final requirements related to suppression was to delete ''or availability of the aquatic or aquatic-dependent resource'' from the phrase ''unsuppressed by water quality or availability of the aquatic or aquatic-dependent resource.'' Some commenters addressed the inclusion of the term ''availability,'' including comments expressing concern that the proposed regulation would have required states to increase the availability of fish, and/or protect pre-contact, pristine conditions. This was not the agency's intent, and in this final rule, the EPA is removing the explicit reference to ''availability'' to avoid the implication that this rule would require states to set WQS that ignore practical realities regarding availability of resources. However, the EPA notes that consideration of ''the anticipated future exercise'' of a Tribal reserved right would include consideration of the availability of the aquatic or aquatic-dependent resource, since anticipated future exercise of the right depends in part on anticipated future availability of the resource. While this rule does not require states to increase the availability of resources, states would take into consideration under 40 CFR 131.9(a)(2) planned actions or anticipated changes that may impact resource availability and therefore the anticipated future exercise of Tribal reserved rights, such as restoration efforts that are planned or underway. This is consistent with the EPA's expectations for how states should establish other WQS.[103]

3. Criteria To Protect Tribal Reserved Rights

The final rule at 40 CFR 131.9(a)(3) establishes two new requirements related to water quality criteria. This provision requires, first, that where a state has adopted designated uses that either expressly incorporate protection of Tribal reserved rights or encompass the right, it must establish criteria to protect the right consistent with 40 CFR 131.11. In contrast to the proposal, the final requirement ties the establishment of criteria to protection of an adopted use rather than calling for establishment of criteria as a freestanding requirement. This requirement in the final rule combines parts of the requirements of proposed 40 CFR 131.9(c)(1) and proposed 40 CFR 131.9(c)(2).

As explained above in section IV.B.1 of this preamble, in this final rule the EPA has removed the proposed requirement that states must ''[d]esignate uses . . . that either expressly incorporate protection of the [T]ribal reserved rights or encompass such rights.'' Instead, the final regulatory language on designated uses in this rule specifies that states must take into consideration the use and value of their waters for protecting Tribal reserved rights in adopting or revising designated uses pursuant to 40 CFR 131.10. Accordingly, the final criteria requirement, which now appears at 40 CFR 131.9(a)(3) rather than 40 CFR 131.9(c)(2), provides that states must establish criteria to protect Tribal reserved rights ''where the State has adopted designated uses that either expressly incorporate protection of or encompass the right.'' This final criteria requirement aligns with the longstanding principle, as memorialized in 40 CFR 131.11, that states must adopt criteria that protect the designated use.

Second, the final rule clarifies that the requirements at 40 CFR 131.9(a)(3) include ''developing criteria to protect right holders using at least the same risk level (*e.g.,* cancer risk level, hazard quotient, or illness rate) as the State would otherwise use to develop criteria to protect the State's general population, paired with exposure inputs (*e.g.,* fish consumption rate) representative of right holders exercising their reserved right.'' This final provision merges the proposed requirement at 40 CFR 131.9(a)(2) that WQS must protect ''[t]he health of the right holders to at least the same risk level as provided to the general population of the State[,]'' into the provision setting forth the general requirement related to adoption of criteria discussed above. The EPA expects that this clause will apply to human health criteria, which are scientifically derived values intended to protect human health from the adverse effects of pollutants in ambient water, and will most often apply to cancer risk levels, which are a critical input in deriving protective human health criteria. The EPA's longstanding agency-wide practice has been to assume, in the absence of data to indicate otherwise, that carcinogens exhibit linear ''non-threshold'' dose-responses which means that there are no ''safe'' or no ''no-effect'' levels.[104] Therefore, the EPA recommends calculating human health criteria for carcinogens as pollutant concentrations corresponding to lifetime increases in the risk of developing cancer.

Under the EPA's 2000 Methodology, a key step in deriving human health criteria is identifying the population that the criteria should protect, sometimes referred to as the ''target'' population.[105] The 2000 Methodology explains that states could set criteria to target protection of individuals with ''average'' or ''typical'' exposure (*i.e.,* the general population), or to protect more highly exposed individuals. The 2000 Methodology goes on to recommend, with respect to carcinogens, $10^{-5}$ (1 in 100,000) and $10^{-6}$ (1 in 1 million) risk levels for the general population and further says that ''highly exposed'' subpopulations should not exceed a $10^{-4}$ (1 in 10,000) risk level.[106] The EPA also recommends ''that priority be given to identifying and adequately protecting the most highly exposed population.'' [107] If a state determines that a highly exposed population is not adequately protected by criteria that target protection of the general population, the EPA's 2000 Methodology recommends the adoption of more stringent criteria using alternative exposure assumptions.[108]

Prior to this rulemaking, in its 2019 decision document reversing its prior disapproval of Washington's human health criteria, the EPA took the position that it was appropriate to protect Tribal members exercising their subsistence fishing rights to a lesser degree than the state's general population. In that document, the EPA made the following assertion: ''[A] state may consider Tribes with reserved fishing rights to be highly exposed populations, rather than the target general population, in order to derive criteria, and that such consideration gives due effect to reserved fishing

[103] *See Water Quality Standards Regulatory Revisions,* 80 FR 51020, 51025 (August 21, 2015) (''When conducting a UAA and soliciting input from the public, states and authorized Tribes need to consider not only what is currently attained, but also what is attainable in the future after achievable gains in water quality are realized. EPA recommends that such a prospective analysis involve the following: Identifying the current and expected condition for a water body; evaluating the effectiveness of best management practices (BMPs) and associated water quality improvements; examining the efficacy of treatment technology from engineering studies; and using water quality models, loading calculations, and other predictive tools.'').

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

[105] *Id.* at 2–1.

[106] *Id.* at 2–6.

[107] *Id.* at 2–2.

[108] *Id.*

rights.'' [109] As explained in the proposed rulemaking, the EPA has reconsidered this assertion and it no longer represents the agency's view.[110] For designated uses that either expressly incorporate protection of Tribal reserved rights or encompass such rights, a Tribal member utilizing such rights is more appropriately viewed as an individual with ''average'' or ''typical'' exposure because, as noted in the proposed rulemaking, Tribal members exercising reserved rights are a distinct, identifiable class of individuals holding legal rights under Federal law to resources with a defined geographic scope. In the EPA's judgment, their unique status as right holders warrants treating them as a target population for purposes of deriving human health criteria. The statements in the 2000 Methodology allowing a less stringent risk level for ''highly exposed subpopulations'' or ''subgroups''—as a subset of the general population—did not take into account the unique circumstances addressed here—*i.e.,* the unique attributes of Tribes with reserved rights as described above—in its general statements that such ''highly exposed subpopulations'' may receive less protection than chosen by states as the target population for derivation of criteria for carcinogens.

The final language in 40 CFR 131.9(a)(3) regarding risk level reflects a clarification to proposed 40 CFR 131.9(a)(2). Specifically, the EPA: (1) edited wording and sentence structure to clarify the intended meaning, (2) added examples of types of risk level inputs, and (3) explicitly stated that—when developing criteria to protect right holders—these risk level inputs are required to be paired with exposure inputs (*e.g.,* fish consumption rate) representative of right holders exercising their reserved right. These edits are intended to clarify that, where the designated use either expressly incorporates protection of Tribal reserved rights or encompasses such rights, Tribal members are the population, or one of the populations, that the designated use is designed to protect, and their health should be protected to at least the same risk level as the state would have provided to the general, non-right holder population if there were no applicable Tribal reserved rights in that location. These changes are explained further below in the context of responses to comments received on this point.

A few commenters expressed concerns that, under the proposed rulemaking, states would be required to revise all of their applicable criteria including criteria for the protection of aquatic life and aquatic-dependent wildlife. That was neither the EPA's intent with the proposal, nor is it the anticipated effect of the final rule. The agency anticipates that the new requirements in 40 CFR 131.9(a) will not generally necessitate more stringent criteria to protect aquatic life, wildlife, or primary contact recreation than already required by 40 CFR 131.11.

This final rule builds on requirements in the existing Federal WQS regulation at 40 CFR part 131 regarding adoption of designated uses and criteria. In accordance with the interim goal specified by CWA section 101(a)(2) of ''water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water,'' the existing Federal WQS regulation requires that state WQS provide for protection and propagation of fish, shellfish and wildlife, and recreation in and on the water, wherever attainable.[111] With respect to aquatic life and wildlife criteria, the EPA anticipates that for many aquatic and aquatic-dependent resources to which Tribes have reserved rights, the level of protection for the species resulting from application of the EPA's existing Federal WQS regulation, without specific consideration of reserved rights, is already consistent with protection of those resources. For example, where a Tribe has the right to fish for subsistence, the existing WQS regulation already requires the state to protect fish and other aquatic species with aquatic life criteria.[112] Protection of human health from fish consumption is discussed separately below.

For Tribal ceremonial practices involving activities where the principal risk is from immersion in and potential ingestion of water, the EPA anticipates that pollutant exposure would be indistinguishable from exposure through primary contact recreation (*e.g.,* swimming), and state criteria to protect primary contact recreation would therefore be protective of such Tribal practices.

Conversely, water quality criteria to protect human health for fish/shellfish and water consumption uses that were written with a state's general population in mind may not protect Tribal consumers of those resources who have higher consumption rates and therefore are exposed to greater risk. In states where right holders assert reserved fishing rights and the states' human health criteria are currently based on protection of the states' general population, the requirement the EPA is finalizing at 40 CFR 131.9(a)(3) may result in more stringent criteria than had been explicitly required by the existing Federal WQS regulation, to ensure that the right holders are protected by criteria developed using at least the same risk level (*e.g.,* cancer risk level, hazard quotient, or illness rate) as the state would otherwise use to develop criteria to protect the state's general population, paired with exposure inputs (*e.g.,* fish consumption rate) representative of right holders exercising their reserved right. For example, a state with a fishing designated use may have established its human health criteria for carcinogens using a 1 in 1 million ($10^{-6}$) cancer risk level and exposure inputs (including a fish consumption rate) representative of its general population, which consumes one fish meal per week. In that scenario, a member of a Tribe in that state exercising the Tribe's reserved right to fish for subsistence who consumes ten fish meals per week would be protected at a 1 in 100,000 ($10^{-5}$) cancer risk level, an order of magnitude less than the cancer risk level the state had determined was appropriate for its general population. In revising those criteria upon an assertion of that right by the right holders and supported by available data and information, the state

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

[110] *See Water Quality Standards Regulatory Revisions to Protect Tribal Reserved Rights Proposed Rule,* 87 FR 74361, 74370 (December 5, 2022).

[111] 40 CFR 131.10 requires that, where waters are designated for less than the full CWA section 101(a)(2) use, that designation be supported by a use attainability analysis (UAA) demonstrating that attaining the use is not feasible. These waters must be designated for the highest attainable use. 40 CFR 131.20 requires these use designations to be reviewed at every triennial review and revised when new information indicates that the uses specified in section 101(a)(2) of the CWA are attainable.

[112] In some cases, 40 CFR 131.9(a)(3) may prompt a state to consider adjusting aquatic life criteria in a certain area to protect a culturally important species, consistent with the EPA's recommended definition of ''protection of aquatic organisms and their uses'' as, in part, prevention of unacceptable effects on ''commercially, recreationally, and other important species.'' (USEPA. 1985. Guidelines for Deriving Numerical National Water Quality Criteria for the Protection of Aquatic Organisms and Their Uses. U.S. Environmental Protection Agency, Office of Water, Washington, DC PB85–227049). Additionally, it may encourage efforts to advance the scientific understanding of pollutant impacts to wildlife and plants that have not been the historic focus of criteria development.

would revise its criteria to afford the right holders a 1 in 1,000,000 ($10^{-6}$) cancer risk level, which is the level of protection the state had determined was appropriate for its general population. This revision would have the effect of protecting the state's general population at a 1 in 10,000,000 ($10^{-7}$) cancer risk level given their lower fish consumption level.

Some commenters opposed the proposed requirement to protect right holders to at least the same risk level as used to calculate criteria to protect the state's general population, asserting that the CWA does not prescribe precisely how a state must establish its WQS so long as WQS are protective. The EPA does not intend for this rule to dictate specific outcomes to states. Under this rule, states maintain their statutory role set forth in CWA section 303(c) in establishing WQS. The EPA maintains its CWA section 303(c) statutory oversight role in ensuring that WQS are meeting the requirements of the Act, including that WQS are such as to protect public health and enhance the quality of water. In exercising its oversight function, the EPA also brings substantial technical expertise to the topic of criteria development. In section 304(a) of the CWA, Congress explicitly charged the EPA with developing recommended water quality criteria based on the latest scientific knowledge related to health and welfare.[113] As the EPA explained in its 2015 update to its recommended ambient water quality criteria for the protection of human health, ''[w]ater quality criteria developed under Section 304(a) are based solely on data and scientific judgments on the relationship between pollutant concentrations and environmental and human health effects.'' [114] These recommended criteria are not legally binding, and states have discretion to modify the criteria, where appropriate, to reflect site-specific conditions or criteria based on other scientifically defensible methods.

Contrary to the characterization of the proposed requirements in some of the comments, the EPA did not intend to suggest that the requirement to develop criteria to protect right holders using at least the same risk level as the state would otherwise use to develop criteria to protect the state's general population would result in criteria that protect right holders and the general population equally. The EPA recognizes that risk increases with exposure and based on susceptibility factors such as age or lifestage, pre-existing disease, genetic variation, or co-exposures. As the EPA explained in its 2000 Methodology,[115] ''. . . the incremental cancer risk levels are *relative,* meaning that any given criterion associated with a particular cancer risk level is also associated with specific exposure parameter assumptions (*e.g.,* intake rates, body weights). When these exposure parameter values change, so does the relative risk.'' (Emphasis in original). This concept is illustrated in the example above. The EPA added clarifying text to 40 CFR 131.9(a)(3) providing examples of types of risk level inputs (''*e.g.,* cancer risk level, hazard quotient, or illness rate'') to highlight that it is the risk level input *itself* that must be equal in the criteria calculations, not that the state is required to establish criteria that protect right holders and the general population equally (*i.e.,* if the state uses a $10^{-6}$ cancer risk level to calculate criteria to protect the general population, the state must also use a $10^{-6}$ cancer risk level to establish water quality criteria to protect the Tribal reserved right, where the state has adopted designated uses that either expressly incorporate protection of or encompass the right). To further address the confusion expressed by some commenters, the EPA also added clarifying text to 40 CFR 131.9(a)(3) noting that appropriate exposure inputs must be used in each of these calculations: when calculating criteria to protect the general population, the state's chosen risk level (*e.g.,* $10^{-6}$ cancer risk level) would be paired with exposure inputs (*e.g.,* fish consumption rate) representative of the general population, whereas when establishing water quality criteria to protect a Tribal reserved right, that same chosen risk level must be ''paired with exposure inputs (*e.g.,* fish consumption rate) representative of right holders exercising their reserved right.'' In other words, the EPA is simply requiring that right holders, in areas where they have reserved rights, be protected using the same (or a more stringent) risk level input (*e.g.* cancer risk level) to calculate criteria as is used to calculate criteria to protect the general population in areas where there are no Tribal reserved rights reserved to Tribes by treaty, Federal statute, or Executive order. As explained above, the practical effect is that in some situations in a waterbody with Tribal reserved rights, the general population will be even more protected (that is, receive protection to a more stringent risk level) than if there were no Tribal reserved rights in that waterbody. This approach does not prescribe the state's overall approach to risk management policy, but rather ensures that right holders receive the level of protection (that is, they are exposed to the same risk level) consistent with the state's risk management decision for the general population in the absence of reserved rights.

In the proposed rulemaking, the EPA explained that it anticipated the primary application of the requirement to protect the health of the right holders with criteria developed using at least the same risk level as the state would otherwise use to develop criteria to protect its general population would be in establishing human health criteria for toxic pollutants to protect Tribal reserved rights to fish for subsistence. The EPA requested comment on whether there may be other situations where this provision could apply. While the EPA received general support for this requirement, commenters did not raise, and the EPA is not currently aware of, situations other than human health criteria for toxic pollutants where the level of risk may be different for right holders versus the general population.

The EPA is not mandating any specific risk level in this rule. As explained in the EPA's 2000 Methodology,[116] with respect to carcinogens, $10^{-5}$ (1 in 100,000) and $10^{-6}$ (1 in 1 million) risk levels may be reasonable for the general population.[117] Some commenters stated that the final rule should require Tribal fishing right holders to be protected to a $10^{-6}$ cancer risk level to provide a baseline level of protection for subsistence fishing rights, consistent with the EPA's recommendation for the general population and with environmental justice principles. The EPA disagrees that an across-the-board requirement of $10^{-6}$ is appropriate. In this final rule, states maintain the discretion to utilize a cancer risk level that is within a reasonable risk management range. Per the 2000 Methodology, the EPA recommends protecting the general population using a cancer risk level of

[113] *See* CWA section 304(a).

[114] USEPA, Notice of Availability: Final Updated Ambient Water Quality Criteria for the Protection of Human Health, 80 FR 36986 (June 29, 2015).

[115] USEPA. 2000. Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health. U.S. Environmental Protection Agency, Office of Water, Washington, DC EPA–822–B–00–004. *https://www.epa.gov/wqc/human-health-water-quality-criteria-and-methods-toxics.* p. 2–7.

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

[117] *Id.* at 2–6.

$10^{-5}$ or $10^{-6}$ to derive criteria, recognizing the need to protect highly exposed or sensitive populations, as appropriate. Therefore, consistent with the EPA's longstanding recommendation for states' general populations in the 2000 Methodology, the EPA also considers $10^{-5}$ acceptable to protect right holders in areas where they are exercising reserved rights relevant to the activities that human health criteria for toxic pollutants are designed to protect. This approach does not prescribe a risk management decision to the state but rather ensures that right holders benefit from the same level of protection that the state has chosen to protect the general population for a given designated use.

One commenter requested that the EPA establish a minimum fish consumption rate for protecting rights to subsistence fishing. While the EPA is declining to establish a required minimum level of protection, as noted in section IV.B.2 of this preamble, the EPA's national recommended default fish consumption rate of 142 g/day for subsistence fishers can represent a reasonable fish consumption subsistence rate floor.[118]

[118] The EPA evaluated whether 142 g/day is still representative of current consumption rates for highly exposed groups, as noted in the 2000 Methodology. Post-2000 consumption surveys of high fish consuming populations (*e.g.,* Tribes and Asian Pacific Islanders) resulted in mean fish consumption rates ranging from 18.6 g/day to 233 g/day and 90th percentile fish consumption rates ranging from 48.9 g/day to 528 g/day. 142 g/day falls within these ranges and therefore, 142 g/day appears to still be representative of current consumption rates for certain highly exposed groups, albeit possibly on the low end. *See:* Polissar, N.L., Salisbury, A., Ridolfi, C., Callahan, K., Neradilek, M., Hippe, D.S., and Beckley, W.H. (2016). *A Fish Consumption Survey of the Nez Perce Tribe.* The Mountain-Whisper-Light Statistics, Pacific Market Research, Ridolfi, Inc. *https://www.epa.gov/sites/production/files/2017-01/documents/fish-consumption-survey-nez-perce-dec2016.pdf;* Polissar, N.L., Salisbury, A., Ridolfi, C., Callahan, K., Neradilek, M., Hippe, D.S., and W.H. Beckley. (2016). *A Fish Consumption Survey of the Shoshone-Bannock Tribes.* The Mountain-Whisper-Light Statistics, Pacific Market Research, Ridolfi, Inc. *https://www.epa.gov/sites/production/files/2017-01/documents/fish-consumption-survey-shoshone-bannock-dec2016.pdf;* Seldovia Village Tribe. (2013). *Assessment of Cook Inlet Tribes Subsistence Consumption.* Seldovia Village Tribe Environmental Department; Suquamish Tribe. (2000). *Fish Consumption Survey of The Suquamish Indian Tribe of The Port Madison Indian Reservation, Puget Sound Region.* Suquamish, W.A.; Sechena, R., Liao, S., Lorenzana, R., Nakano, C., Polissar, N., Fenske., R. (2003). *Asian American and Pacific Islander seafood consumption—a community-based study in King County, Washington.* J of Exposure Analysis and Environ Epidemiology. (13): 256–266; Lance, T.A., Brown, K., Drabek, K., Krueger, K., and S. Hales. (2019). *Kodiak Tribes Seafood Consumption Assessment: Draft Final Report,* Sun'aq Tribe of Kodiak, Kodiak, AK. *http://sunaq.org/wp-content/uploads/2016/09/Kodiak-Tribes-Seafood-Consumption-Assessment-DRAFT-Final-Report-26Feb19-FINAL.pdf.*

### *C. Designated Use Revisions, WQS Variances, and Existing Uses*

As discussed above in section IV.B.1 of this preamble, in this final rule at 40 CFR 131.9(a)(1), the EPA is requiring that states consider the use and value of their waters for protecting Tribal reserved rights in adopting or *revising* designated uses, including use revisions that are required to be supported by a use attainability analysis, per 40 CFR 131.10(g) and (j). The EPA is not adding language in this final rule addressing WQS variances or existing uses and is not making changes to those sections of the existing 40 CFR part 131 regulation (*i.e.,* §§ 131.14 and 131.10, respectively).

The proposed rulemaking did not include any provisions related specifically to designated use revisions (such as provisions related to use attainability analyses), WQS variances, or existing uses. Instead, the EPA requested comment on whether and how states can revise designated uses in accordance with 40 CFR 131.10, while also ensuring the protection of Tribal reserved rights. Additionally, the EPA requested comment on whether it should specify in 40 CFR 131.9 how other WQS provisions, such as WQS variances under 40 CFR 131.14, should be used to ensure protection of Tribal reserved rights. The EPA noted that it was ''not proposing to modify the existing language in [the existing 40 CFR part 131] sections'' and was ''not reopening them for comment.'' [119] Rather, the agency was considering whether ''potential discrete additions'' to the proposed regulatory framework may be necessary.

Some commenters recommended that the final rule prohibit states from revising designated uses or adopting WQS variances in waters where Tribes hold reserved rights, especially based on factors related to economic feasibility. Some commenters recommended that a WQS variance or designated use removal should only be allowed in extremely limited circumstances, with express written consent of right holders, and/or that right holders should be able to impose conditions on designated use revisions. Conversely, some commenters stated that designated use revisions and WQS variances must be allowed in waters with applicable Tribal reserved rights, consistent with the framework in the EPA's existing WQS regulation, and that any restriction of these approaches would be inconsistent with the CWA.

[119] *See Water Quality Standards Regulatory Revisions to Protect Tribal Reserved Rights Proposed Rule,* 87 FR 74361, 74373 (December 5, 2022).

Nothing in this final rule alters the existing regulatory requirements at 40 CFR 131.10 related to use attainability analyses. With respect to designated use revisions and use attainability analyses, CWA section 101(a)(2) contains the phrase ''wherever attainable,'' which the EPA has implemented in 40 CFR 131.10(g) and (j) as allowing a state to designate uses that do not include the uses specified in section 101(a)(2) of the Act, to remove a 101(a)(2) use that is not an existing use, or to designate a subcategory of such a use if the state conducts a use attainability analysis demonstrating that attaining the use is not feasible because of one or more factors at 40 CFR 131.10(g). After a state demonstrates that a use is not attainable for a certain water, 40 CFR 131.10(g) also requires the state to adopt ''the highest attainable use'' of that water, which is the aquatic life, wildlife, or recreation use that is both closest to the CWA 101(a)(2) use and attainable, as defined at 40 CFR 131.3(m). The final rule at 40 CFR 131.9(a)(1) requires states to consider the use and value of their waters for protecting Tribal reserved rights in revising designated uses, including use revisions that are required to be supported by a use attainability analysis, per 40 CFR 131.10(g) and (j). The EPA recognizes that some of the factors at 40 CFR 131.10(g) may be amenable to greater consideration than others. The EPA is available to help work with any states that are contemplating revising designated uses that expressly incorporate protection of Tribal reserved rights or encompass such rights.

Regarding WQS variances, the EPA has concluded there is no compelling reason to make additions to the Federal regulation related to WQS variances to address Tribal reserved rights, at this time. Therefore, this final rule does not explicitly address WQS variances, nor does it add to the existing WQS regulation at 40 CFR 131.14 governing WQS variances. While the EPA acknowledges the concerns raised by commenters regarding the potential impacts of WQS variances on reserved rights, it disagrees with comments asserting that the current regulatory provisions at 40 CFR 131.14 are insufficient to protect water quality necessary to support reserved rights. The existing WQS regulation at 40 CFR 131.14(b)(1)(ii) requires that WQS variances ''shall not result in any lowering of the currently attained ambient water quality, unless a WQS variance is necessary for restoration activities.'' Therefore, allowing WQS variances in waters where Tribal

reserved rights apply does not result in degraded water quality; rather, WQS variances are a time-limited tool that states may use to improve water quality over time. WQS variances provide states with time and flexibility to make incremental water quality improvements where the water body is not currently attaining WQS, with accountability measures to ensure that such improvements will occur. At the end of the specified variance term, the underlying designated use and criterion apply and, thus, WQS variances do not permanently revise the protections for a water body. Nothing in this final rule alters the existing regulatory requirements related to WQS variances.

Finally, some commenters requested clarification about how this rule relates to the existing WQS regulation governing protection of existing uses. The existing WQS regulation defines existing uses 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.'' The EPA did not propose to modify the definition of existing uses in the proposed rulemaking and is not altering that definition in this final rule. If use of an aquatic or aquatic-dependent resource pursuant to a Tribal reserved right is presently being attained, the EPA's existing regulation at 40 CFR 131.10(i) requires states to revise their WQS to reflect the presently attained use. For example, if a Tribe has a right to gather an aquatic plant in a state waterbody and that use is presently attained, state WQS must reflect that as a designated use, per 40 CFR 131.10(i), and thus this resource should be protected in accordance with 40 CFR 131.9(a).

*D. General WQS Policies*

This final rule does not change the existing WQS regulation at 40 CFR 131.13 and 131.15 governing establishment of general WQS policies and permit compliance schedule authorizing provisions. The proposed rulemaking requested comment on whether the EPA should specify how general WQS policies, such as mixing zone policies, or permit compliance schedule authorizing provisions, should be used to ensure protection of Tribal reserved rights. The agency decided in this final rule not to revise the existing Federal regulation or add new regulatory requirements for general WQS policies adopted by states, such as mixing zone policies, or for permit compliance schedule authorizing provisions. Decisions about specific mixing zones or the use of compliance schedules in areas where Tribal reserved rights apply would be made case-by-case by the applicable NPDES permitting authority.

Some commenters recommended that the final rule require a state proposing to include a schedule of compliance in an NPDES permit discharging to a water with Tribal reserved rights demonstrate that it has conducted timely outreach to Tribe(s) whose rights are impacted, obtained written consent from the Tribe(s), and implemented reasonable conditions as requested by the Tribe(s). Compliance schedules in NPDES permits serve as a tool for dischargers to obtain additional time to implement actions that will lead to compliance with water quality-based effluent limits based on the applicable WQS. While the EPA's existing regulation at 40 CFR 131.15 requires states to include provisions in their WQS that authorize the use of compliance schedules if they intend to include compliance schedules in NPDES permits, the eventual compliance schedules that may be issued in specific NPDES permits discharging in areas where Tribal reserved rights apply are governed by the NPDES regulation at 40 CFR 122.47. The NPDES regulation, which is not affected by this final rule, requires compliance with water quality-based effluent limits ''as soon as possible'' and if an individual compliance schedule exceeds one year, the permitting authority must include interim requirements and the dates for their achievement. Additionally, interested persons such as right holders would have an opportunity to comment on any draft NPDES permits that are discharging in areas where Tribal reserved rights apply, subject to the NPDES regulation public participation requirements.[120]

*E. Roles, Responsibilities, and WQS Submission Requirements*

An important objective of the changes set forth in this final rule is to ensure that, in implementing CWA section 303(c), the states' and EPA's roles with respect to Tribal reserved rights in the WQS context are clearly delineated and explained. This section clarifies respective roles and responsibilities and describes the relevant regulatory language at 40 CFR 131.6(g), 131.9(b) and (c) of the final rule.

The EPA received many comments related to the roles of the EPA and/or other parts of the Federal Government, states, and right holders in implementing this rule, particularly with respect to identifying and interpreting Tribal reserved rights. Some commenters asserted that the rule should provide a clear and specific role for right holders in identifying and interpreting their rights. Many commenters expressed concerns regarding states' ability, both as a legal and practical matter, to identify and interpret rights, and many commenters stated that the Federal Government, and not States, should be interpreting and applying relevant treaties and other legal instruments reserving Tribal rights. The EPA disagrees it is the Federal Government's sole responsibility to interpret relevant treaties, statutes, and Executive orders, and provide those interpretations to states. While the EPA intends to work closely with states and right holders, where requested, in identifying and interpreting relevant rights, states are already bound to comply with Tribal reserved rights codified in Federal law even absent a Federal position on such rights.

As explained above in section III of this preamble, this final rule is premised on right holders asserting rights that they have identified as relevant in the WQS context, thus providing a specific role for right holders in identifying and interpreting their rights in the first instance. Accordingly, the EPA disagrees that this rule would place a burden on states to interpret and analyze all potentially relevant treaties, statutes, or Executive orders that reserve rights within their respective state. The operative inquiry for this rule is whether a treaty, statute, or Executive order reserves a right to a CWA-protected aquatic or aquatic-dependent resource, and as such, a full analysis of every legal instrument would not be necessary. As a practical matter, where a state chooses to undertake an analysis of asserted rights, there are interpretive resources available. Many Tribal reserved rights reflected in treaties, statutes, or Executive orders have been interpreted by courts and/or applied by the Federal Government, States, and Tribes for many years. This information regarding interpretation and application of the rights is available to right holders for purposes of asserting relevant rights in the WQS context and to the EPA and states when engaging with right holders. Additionally, the U.S. Department of Agriculture and the U.S. Department of Interior, working with Oklahoma State University, have developed a publicly available, searchable database of Tribal treaties that can provide a starting point

[120] *See, e.g.,* 40 CFR 124.10.

for research on potentially applicable Tribal reserved rights.[121]

In relation to identifying or interpreting Tribal reserved rights, final 40 CFR 131.9(b) provides that at any time in the WQS development process, a state or right holder may request EPA assistance with evaluating Tribal reserved rights. The EPA added this provision to the final rule in response to comments and in anticipation that, even with the clarifications provided in this final rule with respect to roles and expectations, states and right holders may still have questions regarding the applicability and implementation of the rule's requirements in light of particular asserted rights. The EPA will work collaboratively with states and right holders, engaging other Federal agencies as appropriate, to evaluate the available information and help states to develop WQS to protect applicable rights. In addition, the EPA periodically offers opportunities for Tribes to learn more about the WQS process and regulations, should they not yet have experience in this field.

Some commenters requested clarification about how disputes or disagreements between states and Tribes, or different Tribes holding the same rights, would be resolved. For example, some commenters noted that there may be instances when a right holder does not agree with the EPA or a state's conclusions about protecting their rights, and requested clarity on how the EPA will evaluate the right holder's position if it asserts during consultation that state WQS do not consider or protect applicable Tribal reserved rights. In some cases, the nature and precise location of some rights might not be certain, or new information may come to light that challenges prior assumptions. Much of the existing WQS development process depends on navigating situations in which consensus or clarity is lacking or where new information emerges, such as the appropriate use of a waterbody or what constitutes sound science. Where there is a lack of clarity or disagreement regarding relevant reserved rights, the EPA can work with states, right holders, and Federal partners to interpret the right, as appropriate. The CWA requirement to review WQS every three years also provides an opportunity to revisit WQS issues characterized by limited data or disputes.

The EPA did not propose a formal dispute resolution process for addressing and resolving such disputes and is not including one in this final rule.[122] In considering these comments, the EPA concluded that a formal dispute resolution mechanism would not be an efficient or practically implementable means to handle such disagreements. Rather, the agency is adding additional regulatory language at 40 CFR 131.9(b) to clarify its commitment to engaging early and partnering with states and right holders in implementing the rule's requirements. The agency intends to engage early in states' WQS processes where Tribes assert potential reserved rights to prevent or resolve disputes to the extent practicable.

The EPA recognizes that there may be situations where disputes about the relevance of the rights and/or WQS needed to protect the rights may prove intractable, and in some cases states may need to move forward with the development of their WQS in the absence of consensus. In such cases, where the state submits new or revised WQS to the EPA, the state should explain in its submission why it believes it lacks ''available data and information'' to resolve the dispute and the EPA will review all of the available information submitted pursuant to 40 CFR 131.6(g) and decide whether to approve or disapprove the submission in the same way the EPA currently makes decisions when there are disagreements between different parties on WQS protections.

Where a right holder has asserted a relevant right and 40 CFR 131.9 applies, 40 CFR 131.6(g) addresses states' obligations to provide information regarding that right and how the state considered it in establishing new or revised WQS. In the proposed rulemaking at 40 CFR 131.6(g), the EPA proposed requiring states to submit, where applicable, ''[i]nformation about the scope, nature, and current and past use of the [T]ribal reserved rights, as informed by the right holders[.]'' Many commenters disagreed with the wording of proposed 40 CFR 131.6(g), asserting that the phrase ''as informed by the right holders'' was ambiguous and that it was not clear whether or how this required states to solicit input from right holders, or what it required states to do with that input. Commenters also expressed questions and concerns with the EPA's expectations from states as far as gathering and submitting information about reserved rights, echoing the comments described above raising the appropriate role for both states and right holders in that process.

In response to these comments, the EPA revised the wording of 40 CFR 131.6(g) in the final rule to require that, where 40 CFR 131.9 applies, *i.e.,* where Tribal reserved rights apply and right holders have asserted their rights for consideration in establishment of WQS, the supporting information that the state must provide to the EPA includes ''[a]ny information provided by right holders about *relevant* Tribal reserved rights and documentation of how that information was considered,'' (emphasis added) along with data and methods used to develop the WQS. As explained in section IV.G. of this preamble below, for example, Tribal reserved rights related to human health, such as fish consumption, would be relevant to WQS related to protection of human health; rights related to human health would not be relevant to WQS targeted at protection of aquatic life or industrial uses.

To further ensure that right holders can meaningfully engage in states' WQS processes and in response to comments on this point, the EPA added the requirement for states to include in their CWA section 303(c) submission to the EPA documentation of how the information provided by right holders was considered in establishment of WQS. The EPA recommends that such documentation include how any information provided by right holders was integrated into the state's WQS; any substantive suggestions the right holders made that the state did not adopt; and the state's justification for not adopting those suggestions. The EPA also acknowledges that states can only provide information to fulfill 40 CFR 131.6(g)(1) that they have received. The

[121] Oklahoma State University Libraries. 2003. Tribal Treaties Database (public beta). *https://treaties.okstate.edu/.*

[122] Several commenters cited the existing WQS dispute resolution provision at 40 CFR 131.7. *See* 40 CFR 131.7(a) (''Where disputes between States and Indian Tribes arise as a result of differing water quality standards on common bodies of water, the EPA Regional Administrator . . . will be responsible for acting in accordance with the provisions of this section.''). One commenter pointed to that provision as a potential model for addressing disputes between states and Tribes, or Tribes and Tribes, regarding reserved rights; one commenter pointed to that provision, which was added pursuant to CWA section 518(e), as evidence that where Congress intended for the EPA to be the arbiter of disputes between states and Tribes, it said so explicitly; and one commenter questioned whether that provision would apply here. The EPA notes that 40 CFR 131.7 was added pursuant to direction from Congress set forth in CWA section 518(e), and the agency is not purporting to rely on that regulation in implementing this rule. 40 CFR 131.7 is narrowly focused on disputes between states and Tribes authorized to administer a WQS program arising as a result of differing, existing WQS on common bodies of water. Accordingly, this dispute resolution mechanism would not apply here, where disputes between a state and Tribe(s) would relate to the state's WQS, as opposed to differing state and Tribal WQS. As explained above, the EPA is not codifying a new dispute resolution provision addressing disputes relating to Tribal reserved rights. Rather, the EPA is expressing its commitment to engage on a more informal basis to prevent or resolve disputes where needed.

EPA recommends that where right holders did not respond or declined to engage, the state's record should document the opportunities afforded to right holders to engage in the WQS process and should memorialize where Tribal engagement efforts did not identify any Tribal assertions of relevant rights.

*F. The EPA's Tribal Engagement and Consultation*

This final rule at 40 CFR 131.9(c) requires the EPA to initiate the Tribal consultation process with right holders that have asserted their rights for consideration in establishment of WQS, as discussed in section IV.B. of this preamble above. That is, the relevant EPA regional office will notify the right holders of the opportunity for government-to-government consultation when taking actions under this rule. Government-to-government consultation between the EPA and right holders will aid the EPA in evaluating whether WQS submissions protect applicable Tribal reserved rights. The EPA updated the wording of the proposed consultation provision (previously at proposed 40 CFR 131.9(b)) for consistency with the changes to 40 CFR 131.9(a) and moved this provision to 40 CFR 131.9(c) in the final rule given the other changes that the EPA made to 40 CFR 131.9 from the proposed rulemaking. This final provision largely tracks proposed 40 CFR 131.9(b), with three clarifying edits.

First, the final rule clarifies that the EPA ''will initiate the Tribal consultation process.'' In the proposed rulemaking, the EPA proposed to ''initiate [T]ribal consultation'' with right holders when the EPA is reviewing a relevant WQS submission. This edit is being made to clarify that the EPA will notify right holders that have asserted their rights that they have the opportunity to consult with the EPA on the EPA action to approve or disapprove submitted WQS. It will then be the right holder's decision whether or not to proceed with Tribal consultation. If a right holder does not respond affirmatively to a Tribal consultation notification from the EPA, consultation would not advance beyond this notification step.[123]

The second clarifying edit the EPA made to 40 CFR 131.9(c) was to specify that the EPA will initiate the Tribal consultation process with right holders ''that have asserted their rights,'' to conform with the changes the EPA made to 40 CFR 131.9(a). In addition to initiating the Tribal consultation process with right holders that have asserted their rights for consideration in establishment of WQS per final 40 CFR 131.9(c), the EPA intends to initiate the Tribal consultation process with all federally recognized Tribes potentially affected by an EPA action per the EPA's consultation policy,[124] including any potentially affected right holders that have not asserted those rights for consideration in establishment of WQS.

Finally, 40 CFR 131.9(c) also notes that the EPA will initiate the Tribal consultation process in determining whether state WQS ''are consistent with'' final 40 CFR 131.9(a), as opposed to ''protect applicable Tribal reserved rights in accordance with'' proposed 40 CFR 131.9(a). The EPA made this change to streamline 40 CFR 131.9 and keep the operative requirements in the same regulatory section.

Some commenters stated that to ensure consultation is meaningful and the state has adequate time to fully consider critical information provided by right holders, the EPA should consult with Tribes earlier in the WQS development process. The EPA added 40 CFR 131.9(b) in response to these comments to clarify that the EPA is available to assist both states and right holders in evaluating Tribal reserved rights at any time, upon request, and will engage potential right holders whenever it provides assistance to the state with evaluating Tribal reserved rights. It is the EPA's policy to consult on a government-to-government basis with federally recognized Tribal governments when EPA actions or decisions may affect Tribal interests.[125]

Some commenters expressed the view that to ensure the EPA's consultation is meaningful, the final rule should specify consultation procedures, specify minimum thresholds of engagement, or specifically invite right holders to contribute to or collaborate on WQS to protect their rights. In light of different Tribes' varying preferences for consultation procedures, the EPA was not able to identify any universally applicable procedures or thresholds of engagement that would be appropriate to include in regulatory text. The EPA intends to implement consultation consistent with its existing consultation policies and procedures.

Some commenters stated that states or other stakeholders should be engaged in the EPA's consultation with right holders. Consultation with federally recognized Tribes, consistent with the EPA's consultation policy,[126] is government-to-government consultation between the Tribe and the EPA. It would therefore not be appropriate to add other parties to those consultations. However, in the WQS context, the EPA generally recommends close coordination between the state, the EPA, and right holders to maximize transparency, collaboration, and mutual understanding between all parties.

Finally, some commenters requested that the EPA provide a mechanism to maintain confidentiality of information Tribes provide during consultation upon request. As explained in section IV.B of this preamble, the EPA is subject to the FOIA, and accordingly, FOIA disclosure requirements would apply to information provided to the EPA by Tribes.

*G. The EPA's Oversight Authority of New and Revised State WQS*

40 CFR 131.5(a) sets forth the requirements that the EPA looks for in reviewing and approving or disapproving state WQS. The final rule amends the list of requirements at 40 CFR 131.5(a) to include, ''[w]here applicable, whether State adopted [WQS] are consistent with § 131.9.''

In the proposed rulemaking, the EPA proposed adding 40 CFR 131.5(a)(9), which provided that, as part of its review, the EPA would determine ''[w]hether any State adopted water quality standards protect [T]ribal reserved rights, where applicable, consistent with § 131.9.'' The EPA received several comments on the language of 40 CFR 131.5(a)(9), including comments requesting clarification on how the EPA would apply that provision. In the final rule, the EPA made two sets of changes to proposed 40 CFR 131.5(a)(9) to add greater clarity and for consistency with revisions made to 40 CFR 131.9.

First, the EPA revised the clause ''protect [T]ribal reserved rights . . . consistent with § 131.9,'' to instead provide in final 40 CFR 131.5(a)(9) that the EPA will determine whether WQS ''are consistent with § 131.9.'' Because 40 CFR 131.9 lays out the operative requirements for states to apply where Tribal reserved rights have been asserted and are applicable to the establishment of WQS, the clause ''protect [T]ribal reserved rights'' was

[123] Where a right holder does not respond or declines Tribal consultation, the EPA will proceed with reviewing a state WQS submittal in accordance with 40 CFR 131.5, including ''[w]here applicable, whether State adopted water quality standards are consistent with § 131.9,'' consistent with final § 131.5(b)(9).

[124] USEPA 2023. EPA Policy on Consultation with Indian Tribes. *https://www.epa.gov/sites/default/files/2013-08/documents/cons-and-coord-with-indian-tribes-policy.pdf.*

[125] *Id.*

[126] *Id.*

unnecessary and the EPA is removing it for clarity and simplicity.

Second, the EPA made two changes to clarify when the agency would evaluate compliance with 40 CFR 131.5(a)(9). The proposed rulemaking provided that the EPA would evaluate whether ''any'' state-adopted WQS protected reserved rights, ''where applicable,'' consistent with 40 CFR 131.9. The EPA deleted ''any'' and moved ''where applicable'' to the beginning of the clause. The EPA made these changes to clarify that WQS must only be consistent with 40 CFR 131.9 where those WQS are applicable to the exercise of the Tribal reserved right in question. If a state has a designated use that encompasses a Tribal reserved right, then the criteria applicable to that use must protect that right. For example, a Tribal reserved right to gather aquatic resources may be encompassed by a state's broadly defined aquatic life use. If so, then the aquatic life criteria must protect those aquatic resources and/or right holders that are consuming those resources, as appropriate. This revision is intended to address concerns that the provision as proposed could be read to require consideration and protection of Tribal reserved rights in every WQS revision in the future. The EPA does not intend for this rule to blur the lines between the different WQS that states establish to protect different uses of their waters. For example, this rule would not require WQS intended to protect human health uses such as fish consumption to also protect aquatic life uses such as survival, growth, and reproduction of fish or shellfish.

*H. Triennial Reviews*

This final rule modifies the existing regulation governing state review and revision of WQS at 40 CFR 131.20(a) to require that the triennial review process include an evaluation of whether there is any new information that needs to be considered about Tribal reserved rights applicable to waters subject to the state's WQS and whether WQS need to be revised to be consistent with 40 CFR 131.9.

In the proposed rulemaking, the EPA proposed modifying 40 CFR 131.20(a) to require that state triennial reviews include ''evaluating whether there are [T]ribal reserved rights applicable to State waters and whether water quality standards need to be revised to protect those rights pursuant to § 131.9.'' Some commenters indicated that it is overly burdensome to require states to re-evaluate Tribal reserved rights at every triennial review. In response to these comments, the EPA added the clause ''new information available . . . that needs to be considered'' to clarify that states are not expected to independently evaluate whether there are applicable Tribal reserved rights to consider at every triennial review. Rather, in conjunction with the revisions to 40 CFR 131.9(a), states are expected to evaluate whether a right has been newly asserted since the state's last triennial review or there is new information relevant to the protection of a previously asserted Tribal reserved right.

This regular review of WQS and evaluation of new information to determine whether WQS need to be modified is consistent with the triennial review requirement in CWA section 303(c)(1). In order for these new requirements and the existing requirements at 40 CFR 131.20(a) to be meaningful, states must conduct regular triennial reviews and must provide opportunities for interested and affected parties to bring forward new information for the state's consideration. The CWA makes clear that each state's fulfillment of their triennial review responsibilities is an integral part of the WQS paradigm.[127] The EPA strongly urges states to fulfill their triennial review requirements.

Many commenters stated that it should be the Federal Government's rather than states' responsibility to periodically re-evaluate Tribal reserved rights, and that the EPA should inform states of any new information relevant for WQS. As discussed above, final §§ 131.20(a) and 131.9, are intended to clarify the expectation that at each triennial review states consider and evaluate new assertions of Tribal reserved rights and any new data and information relevant to protection of asserted rights. If the EPA becomes aware of any new information relevant to the protection of applicable Tribal reserved rights, it will endeavor to inform states of that information as expeditiously as possible.

One commenter asserted that proposed 40 CFR 131.20(a) was redundant with their state's existing process for engaging Tribes. Some commenters recommended that the EPA specify a process to ensure that states work directly with right holders early in the triennial review process, separate from and well before engagement with the general public. As explained in section IV.E of this preamble, the EPA revised 40 CFR 131.6(g) in the final rule to require that, where 40 CFR 131.9 applies, state WQS submissions to the EPA include information provided by right holders. The EPA recommends that states provide opportunities for known and potential right holders to engage as early as possible in the WQS development process to ensure adequate time for consideration of any information they provide. The EPA is not establishing a specific process but rather is deferring to existing state processes in place that could serve this purpose, including state public engagement processes that are required for all WQS revisions.

[127] *See* CWA section 303(c)(1).

## V. Economic Analysis

Pursuant to Executive Orders 12866 (Regulatory Planning and Review) and 13563 (Improving Regulation and Regulatory Review), the EPA has prepared an economic analysis to inform the public of potential benefits and costs of this final rule. The EPA's economic analysis is documented in *Economic Analysis for Water Quality Standards Regulatory Revisions to Protect Tribal Reserved Rights (Final Rule)* and can be found in the docket for this final rule.

This final rule does not establish any requirements directly applicable to regulated entities, such as industrial dischargers or municipal wastewater treatment facilities, but could ultimately lead to additional compliance costs to meet permit limits put in place to comply with new WQS adopted by states because of this final rule. Some commenters on the economic analysis that accompanied the EPA's proposed rulemaking asserted that the EPA must estimate costs to regulated entities before finalizing the rule and that many NPDES permits would need to be modified or reissued with more stringent water quality-based effluent limits as a result of this rule. While the EPA has included a qualitative assessment of indirect costs and benefits in the economic analysis that accompanies this final rule, the EPA is unable to quantify indirect costs and benefits since it cannot anticipate precisely how states will implement the rule and because of a lack of data.

While this rule would not directly lead to improvements in water quality, it establishes a framework that, where applicable, is expected to result in future improvements in water quality in geographic areas where Tribes hold reserved rights. Better protection of Tribal reserved rights has the potential to provide a variety of economic benefits associated with cleaner water. The EPA also anticipates that the rule will result in improved coordination between Federal, State, and Tribal governments regarding the protection of water resources that support the exercise of Tribal reserved rights. Tribal

members and the general public may indirectly benefit from this rule through targeted improvements to water quality that are implemented to meet more stringent WQS adopted in accordance with this rule.

The primary benefits of the rule for reserved right holders will likely be improved ability to maintain traditions and cultural landscapes and reduced risk to human health while exercising their reserved rights. Reducing pollutant levels so that traditional foods such as fish and wild rice are abundant and safe to eat in subsistence quantities would allow for unsuppressed levels of Tribal consumption of these resources, which in turn contributes to restoring and maintaining traditional lifeways, preserving Indigenous Knowledge, and cultural self-determination. This rule seeks to ensure that water quality does not limit right holders' ability to exercise their rights, and therefore achieve any corresponding economic, cultural, and social benefits.

Other potential benefits as a result of state actions taken pursuant to this rule include the availability of clean, safe, and affordable drinking water, greater recreational opportunities, water of adequate quality for agricultural and industrial use, and water quality that supports the commercial fishing industry and higher property values. These benefits could accrue to both Tribal and non-Tribal populations.

The EPA acknowledges that achievement of any benefits associated with cleaner water would involve additional control measures, and thus costs to regulated entities and nonpoint sources, that, for the reasons explained above, have not been included in the economic analysis for this rule. The EPA has not attempted to quantify either the costs of control measures that might ultimately be required as a result of state actions taken pursuant to this rule, or the benefits they would provide.

Instead, the focus of the EPA's quantitative analysis of costs is to estimate the potential administrative burden and costs to state and Tribal governments. The EPA does not anticipate this rule would impose any compliance costs on territorial governments because the EPA is not aware of any federally recognized Tribes with reserved rights in any U.S. territory.

The EPA assessed the potential incremental burden and cost of this final rule using the same basic methodology used to assess the potential incremental burden and cost of the EPA's proposed rulemaking. First, the EPA identified the elements of the regulatory revisions that may impose incremental burdens and costs. Then, the EPA estimated the incremental number of labor hours potentially required to comply with those elements of the regulatory revisions, and then estimated the costs associated with those additional labor hours.

The EPA's cost estimate for the final rule is higher than the estimate for the proposed rulemaking for the following reasons:

1. The EPA added estimated costs for all federally recognized Tribes to determine whether they wish to assert their rights for consideration in the WQS context.

2. The EPA increased the estimated labor hours for states in response to comments that the proposed rulemaking underestimated these costs. The EPA made several changes between the proposed and final rule as detailed in this preamble above that the agency anticipates will mitigate the burdens that commenters perceived this rule would impose on states. However, in light of comments received on the additional resources that may be required for activities such as coordinating with right holders to understand the scope and nature of the rights or developing criteria to protect resources that have not been the historic focus of criteria development, the EPA increased its low-end burden estimate five-fold and doubled its high-end burden estimate based on the best professional judgment of EPA staff experienced in the WQS program.

3. The EPA added estimated costs for authorized Tribes to comply with the final rule. The economic analysis for the proposed rulemaking assumed that no authorized Tribes would incur costs as a result of the rule. This was based on the assumption that few, if any Tribes have reserved rights to resources on another Tribe's reservation or otherwise under the jurisdiction of another Tribe, and that if there are Tribes with reserved rights to resources under the jurisdiction of a different Tribe that is an authorized Tribe, their interests may align such that any adopted WQS would reflect consideration and protection of such rights in absence of this rule. In response to comments that these assumptions were not valid, the EPA added estimated costs to account for authorized Tribes who may set WQS for waters where other Tribes hold reserved rights.

4. The EPA updated the labor rates and cost of benefits used in its cost estimates from 2020 to 2022 to reflect the latest available data from the United States Bureau of Labor Statistics (USBLS).

The EPA assumed for the purpose of this analysis that all 574 currently federally recognized Tribes would incur a burden of 10 hours, on average, to evaluate whether they wish to assert their reserved rights in the context of WQS development and, if so, to do so. The EPA also assumed that all 50 states would each undertake three WQS rulemakings to consider and protect Tribal reserved rights. The agency assumed one rulemaking for each of the following purposes:

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

Finally, the EPA assumed that all 84 Tribes currently authorized for treatment in a manner similar to a state for the purpose of establishing WQS (*i.e.,* authorized Tribes) would each undertake two rulemakings to comply with this final rule, one with equivalent burden to the first state rulemaking, and a second rulemaking with 50% less burden than the first.

The EPA has likely over-estimated the incremental burden and costs of this rule. The EPA has included burden and costs for all 574 federally recognized Tribes, all 50 states, and all 84 authorized Tribes, although it is not likely that Tribal reserved rights to aquatic and/or aquatic-dependent resources exist in all 50 states and 84 reservations, nor is it likely that all 574 federally recognized Tribes have relevant reserved rights and will need time to evaluate whether to assert them for consideration in establishment of WQS. Since attributing costs to all currently federally recognized Tribes is likely an overestimate, the EPA anticipates that this estimated burden accounts for any additional Tribes that gain Federal recognition in the foreseeable future, as well as for the fact that some Tribes may incur a higher burden while others incur less or none. For example, some Tribes may elect to incur a higher burden to coordinate with states and authorized Tribes to facilitate a better understanding of the scope and nature of the rights. As a result, the assertion burden estimate should be considered an average value for all federally recognized Tribes.

Further, the EPA also included burden and cost estimates for states and authorized Tribes to consider and revise WQS for protection of aquatic life as a

result of this rule, even though, as explained above in section IV.B.3. of this preamble, this rule is not expected to result in widespread changes to aquatic life criteria. As noted above, in some cases, 40 CFR 131.9(a)(3) may prompt a state to consider adjusting aquatic life criteria in a certain area to protect a culturally important species or to advance the scientific understanding of pollutant impacts to wildlife and plants that have not been the historic focus of criteria development. In addition, states and authorized Tribes may choose to revise designated uses to explicitly denote protection of particular aquatic species to which Tribal reserved rights (as defined in this rule) apply, even if they conclude that existing aquatic life criteria for the relevant water bodies are protective of those species. The EPA included burden and cost related to aquatic life rulemakings to ensure that these burdens, if they occur, would be covered, but including this burden for all 50 states and all 84 authorized Tribes is likely a significant overestimate.

The EPA considered the costs associated with labor from economists, engineers, scientists, and lawyers for development of state and authorized Tribal WQS regulations. The EPA did not include any labor or other costs associated with potential litigation, as this would not be a direct consequence of this rule and would be highly speculative. However, the EPA included costs associated with lawyers in the labor mix in anticipation that legal advice could be needed in evaluating reserved rights.

The EPA anticipates that once a state or authorized Tribe takes into consideration and, where it determines is necessary, adopts new or revised WQS to protect Tribal reserved rights, it will not have any recurring costs (*i.e.,* ongoing annual burden and costs) that would be specifically attributable to the rule revisions to 40 CFR 131.20, because periodic evaluation of and revision to WQS is already a requirement of the CWA and WQS regulation. The EPA also determined that a federally recognized Tribe's evaluation of whether they wish to assert their reserved rights in the context of WQS development was best modeled as a one-time cost, although the right may be asserted in stages.

Estimates of the incremental administrative burden and costs to state and Tribal governments associated with this final rule are summarized in table 2.

TABLE 2—SUMMARY OF POTENTIAL ADMINISTRATIVE BURDENS AND COSTS TO STATE AND TRIBAL GOVERNMENTS ASSOCIATED WITH THE FINAL RULE

| Government entity | Burden per entity (hours) | Cost per entity (2022$) | Number of potentially affected entities | Total burden (hours) | Total cost (2022$; one-time) |
|---|---|---|---|---|---|
| Federally Recognized Tribes | 10 | $897.40 | 574 | 5740 | $515,100 |
| States | 1,325–2,650 | 108,020–216,055 | 50 | 66,250–132,500 | 5,401,000–10,802,000 |
| Authorized Tribes | 750–1,500 | 61,147.50–122,295 | 84 | 63,000–126,000 | 5,136,000–10,272,000 |
| Total | | | | 134,990–264,240 | 11,052,000–21,589,000 |

Total one-time costs for this final rule are estimated to range from $11,052,000 to $21,589,000. The EPA chose not to annualize these costs given uncertainty about the period over which that annualization would occur.

## VI. 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 and Executive Order 14094: Modernizing Regulatory Review*

This action is a ''significant regulatory action'' as defined in Executive Order 12866, as amended by Executive Order 14094. Accordingly, the EPA submitted this action to the Office of Management and Budget (OMB) for Executive Order 12866 review. Documentation of any changes made in response to the Executive Order 12866 review is available in the docket. The EPA prepared an economic analysis of the potential impacts associated with this action. The economic analysis is available in the docket for this action and is summarized in section V of this preamble.

### *B. Paperwork Reduction Act (PRA)*

The information collection activities in this rule have been submitted for approval to the Office of Management and Budget (OMB) under the PRA. The Information Collection Request (ICR) document that the EPA prepared has been assigned EPA ICR number 2700.02; OMB assigned control number 2040–0309 when approving the ICR for the proposed rule. A copy of the ICR can be found in the docket for this rule, and it is briefly summarized here. The information collection requirements are not enforceable until OMB approves them.

The information collection requirements in this rule will be in addition to the requirements described in the existing ICR for the Water Quality Standards Regulation and approved by OMB through February 2025.[128] At this time, the EPA is not revising the existing ICR to consolidate the requirements of this rule. The EPA will use the information required by this rule to carry out its responsibilities under the CWA to review and approve or disapprove new and revised WQS submitted by states. In reviewing state WQS submissions, the EPA considers whether those submissions are consistent with the WQS regulation at 40 CFR part 131. The existing regulation requires states to include supporting information to accompany WQS submissions to help the EPA determine whether the submitted new and revised WQS are consistent with 40 CFR part 131. This rule adds new requirements to 40 CFR part 131 that holders of Tribal reserved rights must assert their rights in writing to the state and the EPA to receive the benefits of this rule, and that, where applicable, state WQS submissions must include any information provided by right holders about relevant Tribal reserved rights and documentation of how that information was considered. This information collection will provide the EPA with information necessary to review and approve or disapprove WQS in accordance with the CWA and 40 CFR part 131.

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

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

*Respondents/affected entities:* states, federally recognized Tribes, and Tribes authorized for treatment in a manner similar to a state for purposes of establishing WQS under the CWA.

*Respondent's obligation to respond:* mandatory under 40 CFR part 131 for states and authorized Tribes in their capacity of establishing WQS; for all federally recognized Tribes, required to obtain the benefit of having their rights considered under 40 CFR part 131.

*Estimated number of respondents:* 624 (84 of which are both federally recognized Tribes and Tribes authorized for treatment in a manner similar to a state for purposes of establishing WQS under the CWA).

*Frequency of response:* on occasion/as necessary.

*Total estimated burden:* 20,000 hours (per year). Burden is defined at 5 CFR 1320.3(b).

*Total estimated cost:* $1.63 million (per year), includes $0 annualized capital or operation and maintenance costs.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for the EPA's regulations in 40 CFR are listed in 40 CFR part 9. When OMB approves this ICR, the agency will announce that approval in the **Federal Register** and publish a technical amendment to 40 CFR part 9 to display the OMB control number for the approved information collection activities contained in this final rule.

### *C. Regulatory Flexibility Act (RFA)*

I certify that this action will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act. In making this determination, the EPA concludes that the impact of concern is any significant adverse economic impact on small entities and that the agency is certifying that this rule will not have a significant economic impact on a substantial number of small entities because small entities are not directly regulated by this rule and this action will not impose any requirements on small entities; rather, this action will impose requirements only on states to take into consideration whether and how WQS may need to be revised in accordance with 40 CFR 131.9(a).

### *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.

### *E. Executive Order 13132: Federalism*

The EPA has concluded that this action does not have federalism implications as defined by the EPA's policy for implementing E.O. 13132 [129] on federalism. This rule does not impose substantial compliance costs on state and local governments or on small governments or preempt state or local laws. As explained above, this rule establishes the EPA's expectations for states in setting WQS where Tribal reserved rights apply. This rule adds new requirements that are applicable in certain instances, *i.e.,* where right holders assert relevant Tribal reserved rights consistent with 40 CFR 131.9, and which build on and are consistent with the EPA's existing WQS paradigm at 40 CFR part 131. The requirement to have criteria that protect the designated use is an existing requirement, and the states maintain their role in designating uses. States continue to have considerable discretion in adopting and implementing WQS. This rule will not have substantial direct effects [130] on the states, on the relationship between the Federal Government and the states, or on the distribution of power and responsibilities among the various levels of government. Thus, E.O. 13132 does not apply to this action.

In the spirit of E.O. 13132 and consistent with the EPA's policy to promote communications between the EPA and state and local governments, in January 2023, the EPA presented an overview of the proposed rulemaking to the Association of Clean Water Administrators (ACWA)'s Monitoring, Standards and Assessment Subcommittee. The EPA provided additional engagement during three additional meetings with ACWA representatives in 2023 at their request to hear their views on implementation of this rule in addition to accepting written comments on the proposal.

Written comments on the proposed rulemaking were submitted by 13 state governments, including state environmental agencies, water boards, governors' offices, and attorneys general. Comments were also submitted by national and regional state associations. The EPA summarized and responded in detail to public comment letters from state governments and associations in a Response to Comments document that can be found in the docket for this rule.

Participants reiterated concerns raised in their comment letters, including that the EPA did not provide sufficient engagement with states in shaping the proposed rulemaking. The EPA provided states with the same opportunities for engagement provided to the general public plus additional dedicated meetings. In addition, the EPA has carefully considered the states' comments and in some instances has made changes to the proposed rulemaking language in this final rule that may mitigate the states' concerns. These changes are detailed in relevant sections of this preamble.

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

This action has Tribal implications, however it will neither impose substantial direct compliance costs on federally recognized Tribal governments, nor preempt Tribal law. This rule may affect Tribes with reserved rights to aquatic and/or aquatic-dependent resources in waters subject to state WQS, and it may also affect Tribes administering a CWA section 303(c) WQS program. To date, 84 Indian Tribes have been approved for treatment in a manner similar to a state (TAS) for CWA sections 303(c) and 401.[131] Some of these authorized Tribes could be subject to this final rule, depending on the location and nature of any other Tribes' rights.

The EPA consulted with Tribal officials early in the process of developing this regulation to permit

[129] E.O. 13132 requires meaningful and timely consultation with elected state and local officials or their representative national organizations early in the process of developing the proposed regulation. Under the technical requirements of E.O. 13132, agencies must conduct a federalism consultation as outlined in the Executive order for regulations that (1) have federalism implications, that impose substantial direct compliance costs on state and local governments, and that are not required by statute; or (2) that have federalism implications and that preempt state law. Where actions are determined to have federalism implications as defined by agency policy for implementing E.O. 13132, a federalism summary impact statement is published in the preamble to the regulation, and the agencies must provide OMB copies of all written communications submitted by state and local officials.

[130] *i.e.,* imposed intergovernmental costs or preemption of state/local law.

[131] To date, one Tribe with TAS for CWA section 303(c) (Havasupai Tribe in Arizona) has declined TAS for CWA section 401. For the most current information please refer to *https://www.epa.gov/wqs-tech/epa-actions-tribal-water-quality-standards-and-contacts.*

them to have meaningful and timely input into its development. The EPA held a 90-day pre-proposal Tribal consultation and coordination period from June 15 through September 13, 2021, to inform development of the proposed rulemaking. The EPA conducted the consultation and coordination process in accordance with the EPA Policy on Consultation and Coordination with Indian Tribes in effect at the time.[132] In addition to two national Tribal listening sessions held in July and August 2021, the EPA presented at 20 meetings of Tribal staff and leadership, as well as held seven staff-level coordination meetings and seven leader-to-leader meetings at the request of Tribes. The EPA continued outreach and engagement with Tribes at national and regional Tribal meetings after the end of the consultation period before publishing the proposed rulemaking. Twenty-one Tribes and Tribal organizations submitted written pre-proposal comments to the EPA. These are included in the docket for the rule.

The EPA held a second 90-day Tribal consultation and coordination period after the Administrator signed the proposed rulemaking from November 30, 2022, to February 28, 2023. During the second Tribal consultation and coordination period and throughout the public comment period, the EPA held two additional national listening sessions for Tribal representatives, in January 2023, as well as seven leader-to-leader meetings and twelve staff-level coordination meetings with representatives of individual Tribes upon request. A summary of the EPA's Tribal consultation titled *Summary Report of Tribal Consultation on Revisions to the Federal Water Quality Standards Regulation to Protect Tribal Reserved Rights* is available in the docket for this rule.

The EPA encouraged Tribal representatives to submit written comments through the docket on the proposed rulemaking. The EPA received written comments representing 47 Tribes and Tribal organizations raising a wide variety of complex questions and concerns, which largely captured the questions and concerns Tribes raised during consultation and engagement meetings. Key themes included how Tribal interests and sensitive information will be protected, how disputes will be resolved, and numerous specific recommendations for expanding the inclusiveness and protectiveness of the rule. The EPA carefully considered all Tribal comments in development of the final rule and made several clarifications in the preamble to this final rule and changes in response to comments on the proposed regulation to address Tribal concerns. The EPA has responded in detail to Tribal comments along with other public comments received in the Response to Comment document available in the docket for this rule. In addition, the EPA has continued to engage with Tribes to discuss their water quality concerns, including concerns centered on reserved rights and protection of subsistence fishing, in a variety of forums, including regular meetings and discussions with the National Tribal Water Council.[133]

As required by section 7(a), the EPA's Designated Consultation Official has certified that the requirements of the Executive order have been met in a meaningful and timely manner. A copy of the certification is included in the docket for this action.

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

Executive Order 13045 directs Federal agencies to include an evaluation of the health and safety effects of the planned regulation on children in Federal health and safety standards and explain why the regulation is preferable to potentially effective and reasonably feasible alternatives. This action is not subject to Executive Order 13045 because it is not a significant regulatory action under section 3(f)(1) of Executive Order 12866, and because the EPA does not believe the environmental health or safety risks addressed by this action present a disproportionate risk to children. 40 CFR 131.9(a) will be relevant to protection of human health in situations where it is applied to establishing WQS to protect human health. It is not possible to evaluate whether this provision would result in disproportionate risks on children in any given case since the EPA lacks information about every instance where the rule will be applied. However, in general, the EPA recommends that human health criteria be designed to reduce the risk of adverse cancer and non-cancer effects occurring from a lifetime of exposure to pollutants through the ingestion of drinking water and consumption of fish/shellfish obtained from inland and nearshore waters. Any human health criteria established pursuant to this regulation would similarly be based on reducing the chronic health effects occurring from lifetime exposure and therefore are expected to be protective of a person's exposure during both childhood and adult years.

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

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

### *I. National Technology Transfer and Advancement Act of 1995*

This rule does not involve technical standards.

### *J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations and Executive Order 14096: Revitalizing Our Nation's Commitment to Environmental Justice for All*

The 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 communities with environmental justice concerns. The failure to consider and protect Tribal reserved rights in WQS may contribute to suppression effects that can negatively impact the health, culture, and economy of Indigenous peoples. These impacts may be further exacerbated by climate change, resulting in cumulative disproportionate and adverse effects on the health and environment of Indigenous peoples. As mentioned in section V of this preamble above and more fully explained in the economic analysis for the final rule, which is available in the docket for this rule, the EPA was unable to quantify disproportionate and adverse impacts of the existing condition prior to this rule because the EPA does not have complete data about where Tribal reserved rights exist and where existing WQS do and do not protect those rights. Instead, below the EPA has qualitatively assessed the disproportionate and adverse impacts of the existing condition prior to this rule. This assessment was conducted to inform the

[132] USEPA, 2011. EPA Policy on Consultation and Coordination with Indian Tribes.

[133] The National Tribal Water Council (NTWC) is a technical and scientific body created to assist the EPA; federally recognized Indian Tribes, including Alaska Native Tribes; and their associated Tribal communities and Tribal organizations with research and information for decision-making regarding water issues and water-related concerns that affect Indian and Alaska Native Tribal members, as well as other residents of Alaska Native Villages and Indian country in the United States.

EPA's understanding of the benefits of the rule.

Many Tribes in the U.S. rely on subsistence fishing or otherwise have reserved rights to use aquatic and aquatic-dependent resources in ways that differ from how the U.S. general population uses these resources, and/or have rights to harvest such resources at relatively higher rates than the general population. As a result, in some parts of the country, WQS that may sufficiently protect the general population may not be sufficiently stringent and/or comprehensive to protect Tribes exercising their reserved rights. These rights often reflect traditional practices that support a Tribe's cultural self-determination and can be pivotal to the economic well-being of the community. Impacts to these rights can affect the very foundation of Tribal social and political organization [134] as well as a Tribe's ability to provide for present and future generations and the maintenance of their lifeways.

For example, some Tribes have rights to fish for subsistence, which typically implies a higher rate of fish consumption than that at which the general population consumes fish from U.S. waters. The fish consumption rate is a key input to the equation used to calculate water quality criteria to protect human health; [135] such criteria represent the maximum levels of contaminants that can be present in waters for the fish caught in those waters to be safe to eat at the given rate. If all other inputs to the human health criteria equation remain the same, increasing the fish consumption rate results in more stringent criteria. For subsistence fishers, the EPA recommends a default fish consumption rate of 142 g/day in the absence of local data.[136] This rate is the estimated 99th percentile fish consumption rate from the 1994–96 Continuing Survey of Food Intake by Individuals (CSFII) conducted by the U.S. Department of Agriculture.[137] The EPA's 2000 Methodology noted that at the time 142 g/day was ''representative of average rates for highly exposed groups such as subsistence fishermen, specific ethnic groups, or other highly exposed people.'' [138] Post-2000 consumption surveys of high fish consuming populations (*e.g.,* Tribes and Asian Pacific Islanders) resulted in mean fish consumption rates ranging from 18.6 g/day to 233 g/day and 90th percentile fish consumption rates ranging from 48.9 g/day to 528 g/day.[139]

In contrast, states generally rely on the EPA's nationally recommended default fish consumption rate for the general population to calculate their human health criteria. The EPA's current nationally recommended default fish consumption rate is 22 g/day, which represents the 90th percentile consumption rate of fish and shellfish from inland and nearshore waters for the U.S. adult population 21 years of age and older, based on National Health and Nutrient Examination Survey (NHANES) data from 2003 to 2010.[140] Some states rely on this current national default fish consumption rate to calculate their statewide human health criteria, and many others have not updated their human health criteria since 2015 and rely on the EPA's prior, outdated default general population fish consumption rates (17.5 g/day or 6.5 g/day), which results in less stringent human health criteria. In states that rely on current or outdated national default general population fish consumption rates, for waters in which Tribes have rights to fish for subsistence, the existing human health criteria may expose Tribal members exercising their legal rights to consume higher amounts of fish to greater risk from toxic pollutants. The rule will have the benefit of ensuring that criteria are set at appropriate levels to protect the exercise of Tribal reserved rights.

Additionally, the EPA's current guidance for developing human health criteria [141] does not address how Tribal populations with reserved rights should be treated in developing human health criteria. Some states have treated Tribal populations as high consuming subpopulations. Since the 2000 Methodology is not specific about how to treat Tribal populations with reserved rights, it could be read as implying those Tribal populations could be protected at a less stringent cancer risk level of $10^{-4}$ as compared to the general population, for which the EPA recommends $10^{-5}$ or $10^{-6}$. This regulation clarifies this important point on which the EPA's current guidance is silent.

The EPA believes that this action is likely to reduce existing disproportionate and adverse effects on communities with environmental justice concerns. Specifically, one benefit of this action is to directly address existing disproportionate and adverse effects of state WQS that fail to protect Tribal reserved rights by requiring states to consider Tribal reserved rights in establishing their WQS and requiring states to protect Tribal populations to the same risk level to which the general population of the state would otherwise be protected. This action makes the EPA's regulation explicit about how states are to consider Tribal reserved rights in adopting and revising WQS.

Finally, as discussed in section IV.F of this preamble, this rule establishes explicit regulatory requirements to provide right holders with meaningful opportunities to engage during the WQS development process. Specifically, the final rule requires state WQS submissions to include as supporting information any information provided by the right holders. This will encourage

[134] 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.*

[135] USEPA. (2000). *Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health.* EPA–822–B–00–004. *https://www.epa.gov/sites/default/files/2018-10/documents/methodology-wqc-protection-hh-2000.pdf.*

[136] *Id.* at 1–13.

[137] Jacobs, H.L., Kahn, H.D., Stralka, K.A., and Phan, D.B. (1998). *Estimates of per capita fish consumption in the U.S. based on the continuing survey of food intake by individuals (CSFII).* Risk Analysis: An International Journal 18(3).

[138] USEPA. (2000). *Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health.* EPA–822–B–00–004. *https://www.epa.gov/sites/default/files/2018-10/documents/methodology-wqc-protection-hh-2000.pdf* at 4–27.

[139] Polissar, N.L., Salisbury, A., Ridolfi, C., Callahan, K., Neradilek, M., Hippe, D.S., and Beckley, W.H. (2016). *A Fish Consumption Survey of the Nez Perce Tribe.* The Mountain-Whisper-Light Statistics, Pacific Market Research, Ridolfi, Inc. *https://www.epa.gov/sites/production/files/2017-01/documents/fish-consumption-survey-nez-perce-dec2016.pdf;* Polissar, N.L., Salisbury, A., Ridolfi, C., Callahan, K., Neradilek, M., Hippe, D.S., and W.H. Beckley. (2016). *A Fish Consumption Survey of the Shoshone-Bannock Tribes.* The Mountain-Whisper-Light Statistics, Pacific Market Research, Ridolfi, Inc. *https://www.epa.gov/sites/production/files/2017-01/documents/fish-consumption-survey-shoshone-bannock-dec2016.pdf;* Seldovia Village Tribe. (2013). *Assessment of Cook Inlet Tribes Subsistence Consumption.* Seldovia Village Tribe Environmental Department; Suquamish Tribe. (2000). *Fish Consumption Survey of The Suquamish Indian Tribe of The Port Madison Indian Reservation, Puget Sound Region.* Suquamish, W.A.; Sechena, R., Liao, S., Lorenzana, R., Nakano, C., Polissar, N., Fenske., R. (2003). *Asian American and Pacific Islander seafood consumption—a community-based study in King County, Washington.* J of Exposure Analysis and Environ Epidemiology. (13): 256–266; Lance, T.A., Brown, K., Drabek, K., Krueger, K., and S. Hales. (2019). *Kodiak Tribes Seafood Consumption Assessment: Draft Final Report,* Sun'aq Tribe of Kodiak, Kodiak, AK. *http://sunaq.org/wp-content/uploads/2016/09/Kodiak-Tribes-Seafood-Consumption-Assessment-DRAFT-Final-Report-26Feb19-FINAL.pdf.*

[140] USEPA. (2014). *Estimated Fish Consumption Rates for the U.S. Population and Selected Subpopulations* (NHANES 2003–2010). EPA 820–R–14–002. *https://www.epa.gov/sites/default/files/2015-01/documents/fish-consumption-rates-2014.pdf.*

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

states to meaningfully engage Tribes in WQS development, although states retain discretion on how and when to engage. Consistent with applicable EPA Tribal consultation policies, the final rule also requires the EPA to offer consultation to Tribes when the EPA is evaluating state WQS submissions that impact Tribal reserved rights that the right holder has asserted for consideration in the WQS context. These new regulatory requirements recognize the importance of State and Federal coordination with Tribes by establishing mechanisms for Tribal input in the WQS setting process.

A few comments the EPA received on the proposed rulemaking also asserted that a legacy of and ongoing environmental injustices imposes disproportionate health risks on Tribal communities throughout the U.S., and that this rule is important for advancing environmental justice and protecting vulnerable communities from climate change.

For the reasons explained in section V of this preamble above and as more fully explained in the economic analysis for this final rule, which is available in the docket for this rule, the EPA is unable to quantify the anticipated reduction in disproportionate and adverse effects to Tribal populations that will result from this final rule. This revision to the Federal WQS regulation is not self-implementing. It establishes rules for states and will be implemented by states revising their WQS. While the EPA is aware of particular situations in certain parts of the country in which Tribal reserved rights have previously been identified in relation to water quality issues, the EPA cannot estimate with certainty the geographic distribution of Tribal reserved rights across the country and how those rights apply to various CWA-protected aquatic and/or aquatic-dependent resources, which of those rights Tribes would choose to assert for consideration in establishment of WQS, whether and how states may revise various WQS components to protect the asserted rights, or how the scope or stringency of any state WQS will change as a result.

The EPA additionally identified and addressed environmental justice concerns by maximizing opportunities for meaningful involvement of Tribal governments in providing input on the rulemaking through both pre- and post-proposal Tribal consultation, as explained in section VI.F. of this preamble above.

The information supporting this Executive order review is contained in the above preamble, the document titled *Summary Report of Tribal Consultation on Revisions to the Federal Water Quality Standards Regulation to Protect Tribal Reserved Rights* and the Economic Analysis for this final rule. The latter two documents can be found in the docket for this rule.

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

*K. Congressional Review Act (CRA)*

This action is subject to the CRA, and the EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

**List of Subjects in 40 CFR Part 131**

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

**Michael S. Regan,**

*Administrator.*

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

## PART 131—WATER QUALITY STANDARDS

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

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

### Subpart A—General Provisions

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

**§ 131.3 Definitions.**

* * * * *

(r) *Tribal reserved rights,* for purposes of this part, are any rights to CWA-protected aquatic and/or aquatic-dependent resources reserved by right holders, either expressly or implicitly, through Federal treaties, statutes, or Executive orders.

(s) *Right holders,* for purposes of this part, are any Federally recognized Tribes holding Tribal reserved rights, regardless of whether the Tribe exercises authority over a Federal Indian reservation.

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

**§ 131.5 EPA authority.**

(a) * * *

(9) Where applicable, whether State adopted water quality standards are consistent with § 131.9.

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

* * * * *

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

**§ 131.6 Minimum requirements for water quality standards submission.**

* * * * *

(g) Where applicable, information that will aid the Agency in evaluating whether the submission is consistent with § 131.9, including:

(1) Any information provided by right holders about relevant Tribal reserved rights and documentation of how that information was considered; and

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

### Subpart B—Establishment of Water Quality Standards

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

**§ 131.9 Protection of Tribal reserved rights.**

(a) Where a right holder has asserted a Tribal reserved right in writing to the State and EPA for consideration in establishment of water quality standards, to the extent supported by available data and information, the State must:

(1) Take into consideration the use and value of their waters for protecting

the Tribal reserved right in adopting or revising designated uses pursuant to § 131.10;

(2) Take into consideration the anticipated future exercise of the Tribal reserved right unsuppressed by water quality in establishing relevant water quality standards; and

(3) Establish water quality criteria, consistent with § 131.11, to protect the Tribal reserved right where the State has adopted designated uses that either expressly incorporate protection of or encompass the right. This requirement includes developing criteria to protect right holders using at least the same risk level (*e.g.,* cancer risk level, hazard quotient, or illness rate) as the State would otherwise use to develop criteria to protect the State's general population, paired with exposure inputs (*e.g.,* fish consumption rate) representative of right holders exercising their reserved right.

(b) States and right holders may request EPA assistance with evaluating Tribal reserved rights. EPA will provide such assistance to the extent practicable. In providing assistance to States as they adopt and revise water quality standards consistent with paragraph (a) of this section, EPA will engage with right holders.

(c) In reviewing State water quality standards submissions under this section, EPA will initiate the Tribal consultation process with the right holders that have asserted their rights for consideration in establishment of water quality standards, consistent with applicable EPA Tribal consultation policies, in determining whether State water quality standards are consistent with paragraph (a) of this section.

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

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

### § 131.20 State review and revision of water quality standards.

(a) *State review.* The State shall from time to time, but at least once every 3 years, hold public hearings for the purpose of reviewing applicable water quality standards adopted pursuant to §§ 131.9 through 131.15 and Federally promulgated water quality standards and, as appropriate, modifying and adopting standards. This review shall include evaluating whether there is any new information available about Tribal reserved rights applicable to State waters that needs to be considered to establish water quality standards consistent with § 131.9. The State shall also re-examine any waterbody segment with water quality standards that do not include the uses specified in section 101(a)(2) of the Act every 3 years to determine if any new information has become available. If such new information indicates that the uses specified in section 101(a)(2) of the Act are attainable, the State shall revise its standards accordingly. Procedures States establish for identifying and reviewing water bodies for review should be incorporated into their Continuing Planning Process. In addition, if a State does not adopt new or revised criteria for parameters for which EPA has published new or updated CWA section 304(a) criteria recommendations, then the State shall provide an explanation when it submits the results of its triennial review to the Regional Administrator consistent with CWA section 303(c)(1) and the requirements of paragraph (c) of this section.

* * * * *

[FR Doc. 2024–09427 Filed 5–1–24; 8:45 am]

**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 372

**[EPA–HQ–TRI–2022–0262; FRL–2425.1–05–OCSPP]**

**RIN 2025–AA17**

## Addition of Diisononyl Phthalate Category; Community Right-to-Know Toxic Chemical Release Reporting; Correction

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Correcting amendment.

**SUMMARY:** The Environmental Protection Agency (EPA or the Agency) is correcting a final rule that appeared in the **Federal Register** on July 14, 2023, which added a diisononyl phthalates (DINP) category to the list of toxic chemicals subject to the reporting requirements under the Emergency Planning and Community Right-to-Know Act (EPCRA) and the Pollution Prevention Act (PPA). However, the amendment could not be incorporated into the regulation due to an inaccurate amendatory instruction. This document corrects the amendatory instructions.

**DATES:** Effective on May 2, 2024.

**ADDRESSES:** The docket for this action, identified by docket identification (ID) number EPA–HQ–TRI–2022–0262, is available at *https://www.regulations.gov.* Additional instructions on visiting the docket, along with more information about dockets generally, is available at *https://www.epa.gov/dockets.*

**FOR FURTHER INFORMATION CONTACT:**

*For technical information contact:* Rachel Dean, Data Collection Branch, Data Gathering, Management, and Policy Division (Mail code: 7406M), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460; telephone number: (202) 566–1303; email address: *dean.rachel@epa.gov.*

*For general information contact:* The Emergency Planning and Community Right-to-Know Information Center; telephone number: (800) 424–9346 or (703) 348–5070 in the Washington, DC Area and International; website: *https://www.epa.gov//hotlines.*

**SUPPLEMENTARY INFORMATION:**

### I. Does this action apply to me?

The Agency included in the July 14, 2023, final rule a list of those who may be potentially affected by this action.

### II. What does this correction do?

EPA issued a final rule in the **Federal Register** on July 14, 2023 (88 FR 45089) (FRL–2425.1–03–OCSPP) which added a diisononyl phthalates (DINP) category to the list of toxic chemicals subject to the reporting requirements under the EPCRA and the PPA. In the final rule's instructions to amend the Code of Federal Regulations (CFR), EPA intended to add the DINP category alphabetically to the list of TRI chemical categories at 40 CFR 372.65(c). However, the list of TRI chemical categories in the CFR at the time had been incorporated as a static image of a table, which introduced formatting challenges with regard to updating 40 CFR 372.65(c) per the amendatory instructions in the DINP category rule because the Agency did not provide a new static image of the table. This document corrects the formatting in Table 3 to paragraph (c) of 40 CFR 372.65(c) by removing the static image of the table and replacing it with a table consisting of text and images of chemicals structures, as applicable.

### III. Why is this correction issued as a final rule?

Section 553 of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)(3)(B)) provides that, when an agency for good cause finds that notice and public procedure are impracticable, unnecessary, or contrary to the public interest, the agency may issue a final rule without providing notice and an opportunity for public comment. EPA has determined that notice and public