



WESTERN STATES WATER COUNCIL

682 East Vine Street, Suite 7/Murray, Utah 84107/(801) 685-2555/FAX (801) 685-2559

Web Page: www.westernstateswater.org

Environmental Protection Agency

Proposed rulemaking on baseline water quality standards for Indian reservations

Docket ID: HQ-OW-2016-0405

The Western States Water Council represents 18 Western states, many of which have a large tribal presence within their state boundaries. We appreciate the efforts EPA has made to provide information to the states in advance of this rulemaking effort. However, promulgation of nationwide baseline water quality standards (WQS) have the potential to create a more complicated regulatory environment for state water quality and water resources managers and users, and at this time may raise more questions and conflicts that they will resolve.

The proposed rulemaking has raised questions and concerns about: (1) how EPA would implement such a rule and under what authorities, particularly with regard to non-jurisdictional waters and unquantified reserved water rights; (2) how the baseline WQS would impact existing state jurisdictions and water quality programs, particularly where the outer reservation boundaries do not reflect current regulatory jurisdictions and/or non-tribal lands within reservation boundaries; and (3) how EPA would resolve any differences between states and tribal standards, as well as states' standards and EPA's baseline standards for tribes without treatment as states (TAS) authority.

Legal Authority and Administrative Issues

A fundamental question is whether or not any waters for which EPA proposes standards and regulations are waters of the United States and/or trust waters specifically reserved by the Congress for reservation purposes and duly quantified as part of a general state adjudication or otherwise decreed. If not, what if any authority does EPA have to promulgate standards?

Other related questions also arise. Does EPA have the requisite Congressional statutory authority to promulgate baseline WQS on reservations, or trust lands outside the boundaries of reservations, for tribes that lack TAS authority? What authority is there to recognize tribal designations to protect "cultural," "ceremonial," and other traditional uses not mentioned in the Clean Water Act? What, if any, authority does EPA have over intrastate waters that do not cross state boundaries and therefore may not be jurisdictional waters of the United States? While the federal government holds land in trust for the tribes, that does not necessarily mean that it also holds the local waters in trust. Many reserved water rights currently remain unquantified by the federal government and inaccessible to tribes. How will EPA determine to which waters the baseline WQS apply?

Will these baseline WQS be directly enforceable by EPA? How will these standards be used where there is no point source in the area? Will these baseline WQS go through a CWA §303(c) triennial

review to modify and improve the standards, with public hearings and opportunities for public participation, as the states and tribes with TAS are required to do?

Will EPA consider the potentially less disruptive alternative of allowing existing state standards to become the baseline WQS for tribes where appropriate? Further, where there are differences between the state or states and tribes, should they not first be allowed to negotiate and develop cooperative standards, or seek mediation before EPA promulgates standards?

Boundaries of Tribal Lands and Jurisdiction

Uncertainty surrounds the legal boundaries of many tribal lands in the West. How will EPA determine the boundaries of reservations and trust lands, particularly where those boundaries are subject to ongoing dispute? Additionally, non-tribal ownership of lands within reservation boundaries are often subject to state rather than tribal laws. How will EPA develop and enforce WQS standards across lands that alternate between tribal and non-tribal ownership?

For example, several of our states have raised concerns in previous comments to EPA's recent rulemaking efforts regarding tribes. In Idaho, there are significant outstanding issues regarding the borders of Indian reservations, as well as issues of land patents and rights-of-way running through reservations. Additionally, there are concerns about how the baseline WQS will impact Idaho's ability to apply state water quality laws to non-tribal members on tribal lands. South Dakota has similar concerns, with disputed reservation boundaries and lands within reservations owned by non-tribal members currently subject to state regulation. In North Dakota, there are many private landowners engaged in agricultural production on tribal lands who are subject to state regulation. While North Dakota supports and acknowledges the importance of clean water, it wants to ensure that private landowners are not unnecessarily subject to overlapping or uncertain authority under the Clean Water Act.

Utah's eastern Uncompahgre reservation's historic boundary includes nearly 2 million acres, only a small portion of which contains tribal lands. Thousands of acres of private and state trust lands within the historic boundary are currently subject to Utah jurisdiction and multiple Clean Water Act programs. In Colorado, land within the Southern Ute reservation boundary has a checkerboard pattern, with half of the land owned in fee by Colorado citizens, and the other half owned by the federal government, partly in trust for the Southern Ute Tribe. The complex boundaries and jurisdictional authority are governed by P.L. 98-290. In Oklahoma, the tribes have allotments rather than reservations with boundaries. Although EPA has provided initial assurances that allotments would not be included in the baseline WQS, Oklahoma also has several trust lands with boundaries that may be in dispute.

Dispute Resolution

EPA's regulations under 40 CFR §131.7 provide a mechanism for resolving disputes between States and Indian tribes with TAS status that arise as a result of differing water quality standards on common bodies of water.¹ Eligibility for EPA's §131.7 dispute resolution depends on six criteria,

¹ EPA's dispute resolution mechanism has only arisen in two instances to our knowledge: (1) *Arkansas v. Oklahoma*, 503 U.S. 91 (1992); (2) City of Albuquerque v. Browner, 97 F.3d 415 (10th Cir. 1996) (over EPA's approval of the Isleta Pueblo's numeric and narrative WQS for ceremonial, recreational, fishery, agricultural and industrial water supply uses).

RE: WSWC Comments on proposed WQS rulemaking

including §131.7(b)(2) which requires the tribe to be “eligible to the same extent as a state for purposes of water quality standards,” and §131.7(b)(5) which requires the WQS to not only be approved by EPA, but also to be adopted pursuant to the respective state and tribal laws. Tribes without TAS authority as required under (b)(2), and tribes that have not adopted EPA’s proposed baseline WQS pursuant to that tribe’s laws as required under (b)(5) would appear to fall outside the 40 CFR §131.7 dispute mechanism. Will there still be an available avenue to resolve prospective state-tribal differences in WQS that result in unreasonable consequences? If not, does EPA have the necessary authority to develop appropriate regulations to address disputes over baseline WQS?

Thank you for the opportunity to comment on EPA’s advanced notice of proposed rulemaking regarding baseline water quality standards (WQS) for tribes. We look forward to EPA providing answers to our questions. Until such questions can be answered, it would appear unwise to rush into the promulgation of any regulation, the result of which may very well be more confusion and conflict.

Sincerely,



Tony Willardson
Executive Director
Western States Water Council