

ENDING THE INTERMINABLE GAP IN INDIAN COUNTRY WATER QUALITY PROTECTION

The Struggle for Adequate Water Quality Standards

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Brief Background

1973 CWA Regs: no state primacy for CWA programs in Indian country (= EPA DI)

1980 Indian Policy: recognize EPA-state cooperative federalism model creates possible **Indian country regulatory gap** (early predecessor of EJ)

1987 Treatment as a State: Congress adds § 518 **TAS provision** to CWA

1989/1991 TAS Regs: Tribes must **show jurisdiction over non-Indian water polluters** by asserting serious & substantial impacts on tribal health & welfare

1992-2016

573 tribes: EPA estimates ~300 reservations

2015: 40 Tribes have EPA-approved WQS (~13%)

“Waters on *the majority of Indian reservations* do not have water quality standards ...
to protect human health and the environment.”

2016: EPA reinterprets the CWA TAS as a Congressional delegation to Tribes of jurisdiction over non-Indian water polluters

2021: 45 Tribes have EPA-approved WQS (~15%)

(16 more Tribes have basic TAS approval; 4 Tribes w/pending TAS applications)

Federal WQS to fill regulatory gap in Indian Country

CWA § 303: EPA WQS authority if states submit no standards, submit standards inconsistent w/CWA, or EPA determines new or revised WQS needed

1989: EPA issues **first IC WQS**—for Colville Indian Reservation

2001: unofficial pre-proposal of **Core federal WQS** for parts of Indian country without TWQS

2016: advance notice of proposed rulemaking for **federal Baseline WQS** for reservations without TWQS

Main Concepts of Federal WQS for Indian Country

Applicable areas: Indian country without TWQS; superseded at any time by TWQS

Designated Uses: CWA § 101 minimum fishable/swimmable uses cover cultural & traditional uses?

- Protection & propagation of aquatic organisms includes safe consumption
- Ceremonial immersion similar exposure to primary recreational contact?
- Non-consumptive uses (e.g., reeds for basket weaving)

Water quality criteria: specifically tied to

- Indigenous (heritage?) fish consumption rates (numeric standards)
- Other consumptive & non-consumptive indigenous uses (likely narrative standards)

Federal WQS as a Manifestation of EPA's Indian Policy

Immediate step toward goal: EPA DI addresses HHE risks now, and sets path toward tribal environmental self-determination

Respect for tribal sovereignty:

- FWQS superseded by later TWQS; tribal opt-out provision
- Possible “tailoring” to local tribal interests & concerns (*Phillips Petroleum v. EPA*)
- Possible “site-specific” interpretations of general FWQS as applied in individual NPDES permits (*Backcountry Against Dumps v. EPA*)
- EPA authority over “disputed” lands during dispute (*HRI, Inc. v. EPA*, *Michigan v. EPA*)
- Possible hedge against diminishment claims (*South Dakota v. Yankton Sioux Tribe*, *Wyoming v. EPA*) via transboundary mechanisms (*Albuquerque v. EPA*)