



**EPA Region 10 Tribal Operations Committee (RTOC)
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James Ray
U.S. EPA, Office of Science and Technology
Standards and Health Protection Division
1200 Pennsylvania Avenue NW (MC 4305T)
Washington, DC 20460

SUBMITTED VIA REGULATIONS.GOV

RE: Docket ID No. EPA-HQ-OW-2016-0405: Tribal Baseline Water Quality Standards

Dear Mr. Ray:

These comments are submitted on behalf of the Region 10 Tribal Operations Committee (“RTOC” or “Committee”) on the proposed promulgation of Tribal Baseline Water Quality Standards (“Standards”). This letter is not sent on behalf of EPA Region 10 or any employees of EPA, but solely tribal government representatives of the RTOC. The following comments and the meetings that occurred during the rulemaking process do not replace or fulfill the EPA’s obligation to consult with the Tribes of EPA Region 10.

The RTOC strongly supports this effort and believes it is an important step forward to assist Tribes who face jurisdictional and/or capacity challenges to protect and restore clean water within their jurisdictional lands and provide effective regulations are critical to efficient water management, healthy ecosystems, and healthy communities. Many Tribes in Region 10 face challenges to full implementation of the Clean Water Act (“CWA”) through the Treatment-in-the-Same-Manner-as-State (“TAS”) process due to a legacy of checkerboarded ownership and challenges by local and state governments to Tribal jurisdiction. This effort presents a reasonable solution to that problem. Moreover, there is a serious question as to whether EPA’s current approach of utilizing an adjacent state’s water quality standards is legal without action to promulgate those standards for Tribal lands. This effort resolves that problem.

While the RTOC supports this effort, we do have the following comments for consideration:

1. A reasonable estimate of a Tribe’s traditional fish consumption rate should be obtained when translating narrative criteria.

As written, the translation procedure incorporates site-specific conditions only “[w]here information and/or data are available.” This does not impose any obligation to find information that would be relevant for protecting Tribal fish consumption.

Many Tribes do not have a scientifically derived fish consumption rate to offer the EPA Regional Administrator. Therefore, the same financial barriers that precluded Tribes from conducting their own studies and thereby precluded them from applying for TAS could undermine the efficacy of these baseline standards.

The use of neighboring water quality standards provides dubious assurances for Tribes. While every Tribe will have a neighboring state’s standards to look to, the fish consumption rate for Tribal populations is significantly greater than the general U.S. population. Neighboring state standards are unlikely to capture Tribal practices and needs. Although a neighboring Tribe’s EPA-approved standards may be more representative, the rule does not ensure that such a source will be found or utilized.

Therefore, if there are not resources for a full, scientific study of Tribal fish consumption, baseline water quality standards should at least be based on best estimates of that rate, with input from the Tribe itself.

2. A Tribe’s fish consumption rate should be more explicitly defined, and the rate should reflect traditional practices.

The Standards appear to incorporate a Tribe’s fish consumption rate only when translating the broad designated use of “Aquatic Life” into a numerical limit on pollutants. “Option Two” of the translation procedure allows for the incorporation of a fish consumption rate protective of Tribal fish consumers. Without explicit reference to a specific fish consumption rate, several different rates could be used. A “fish consumption rate protective of Tribal fish consumers” could mean the relatively low prevailing rate that is caused by current contamination. However, the traditional fish consumption rate and the desired fish consumption rate will both be much higher. Translation of narrative criteria should be done using fish consumption rates that reflect Indigenous fishing and subsistence traditions and that adequately protect the health of Indigenous communities.

This concern was noted and addressed in favor of an unsuppressed rate consistent with subsistence practices when present, but only in the proposed rule’s supplementary information, not the rule itself.¹ The fish consumption rate being used in the rule should be clarified within the operative language of the rule.

¹ 88 Fed. Reg. 29507 (“When translating the narrative criteria to protect consumers of fish, EPA would consult with the Tribe and determine the need for a modified fish consumption rate . . .”).

3. Preference should be given to translation methods that respect site and Tribal specific conditions.

The Standards allow the Regional Administrator to “utilize one of the options” articulated for translating narrative criteria, but the selection of the specific method is left to the discretion of the Regional Administrator. Although a Tribe’s own water quality standards *may* be used in translating, this is not a necessary, or even explicitly recommended, method. To ensure better-tailored standards and to promote predictability in the rule’s application, there should be a hierarchy of translation methods, giving primary importance to the Tribe’s knowledge and goals.

For example, the rule does not necessarily incorporate a Tribe’s desired outcomes for water quality regulation. If a Tribe desires a lower cancer risk than what is conventionally used by EPA, even if the Tribe has formally adopted the standard through Tribal Council, that standard will only be incorporated when the Regional Administrator finds it “appropriate.”

By granting the Regional Administrator excessive discretion in selecting translation procedures, it creates the possibility of undermining the rule’s ability to create region- and site-specific standards.

The Standards present laudable progress in establishing much-needed water quality standards for Tribes. The protection of fish consumption at traditional rates is an important and positive step. One of the great strengths of this rule is its ability to create site-specific standards that protect both new and traditional uses. It is hoped that the translation methods are such that Tribal input is given due credence in establishing standards for Tribal waters.

The RTOC appreciates your consideration of these comments.

Sincerely,



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Central Council of the Tlingit and Haida Indian Tribes of Alaska
Region 10 Tribal RTOC Co-Chair