

Regulatory Revisions to Water Quality Standards Protect Tribal Reserved Rights

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The U.S. Environmental Protection Agency (“EPA”) has finalized revisions to the Clean Water Act (“CWA”) Water Quality Standards (“WQS”) at 40 CFR Part 131. The [final rule](#) will be effective on June 3, 2024. The new rule considers tribes’ explicit and implicit rights to natural and cultural resources. The revised regulatory framework expressly (1) defines Tribal reserved rights, (2) establishes and clarifies the responsibilities of states regarding Tribal reserved rights in the WQS context, and (3) establishes and clarifies EPA’s role and responsibilities.

The rule outlines how Tribal reserved rights, defined as any rights to Clean Water Act-protected aquatic and/or aquatic-dependent resources reserved to tribes, “either expressly or implicitly,” through treaties, statutes, or executive orders where tribes assert these rights, must be considered when establishing both federal and state WQS.

Pursuant to 40 CFR 131.9(a), the final rule imposes several requirements on EPA and states where a right holder has asserted a reserved right in writing. The requirements in 40 CFR 131.9(a) are premised on states having “available data and information” supporting the application of those requirements. “[T]he 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).” To have an impact on a WQS action, a Tribal reserved right must be asserted as part of the public record and subject to public review and comment.

EPA’s stated purpose of the revisions is to provide “transparency and clarity” regarding the expectations of WQS where Tribal reserved rights are applicable. However, mandating inclusion of Tribal rights in WQS adds significant substantive requirements to the standards applicants for Clean Water Act authorizations must meet and we expect the mandate to result in more stringent conditions on such authorizations.

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