

Tribal Treaty Rights Take Center Stage in Two Landmark Federal Water Quality Actions



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Key Takeaways

- ◆ **What Happened?** The U.S. Environmental Protection Agency (EPA) is seeking to increase the protection of tribal treaty rights through water quality standards. First, EPA issued a [final rule](#) re-establishing strict federal water quality criteria in Washington State with a stated goal of “protect[ing] the health of...tribes with treaty-reserved rights to fish” (2022 Human Health Criteria Rule). Second, on the heels of its human health criteria rulemaking for Washington, EPA published a [proposed rule](#) expressly mandating that states, tribes, and EPA consider treaty rights to aquatic and aquatic-dependent resources when setting water quality standards nationwide, and detailing the requirements and mechanisms for doing so (2023 Water Quality Standards Revision Rule).
- ◆ **Who Is Affected?** The 2022 Human Health Criteria Rule affects industries, municipalities, trade organizations, and tribes in the State of Washington. If adopted, the 2023 Water Quality Standards Revision Rule will affect industries, municipalities, trade organizations, and tribes throughout the country.
- ◆ **Next Steps?** We anticipate future legal challenges to EPA’s 2022 Human Health Criteria Rule, as the final rule is unlikely to settle the controversial saga of Washington’s human health criteria. On the 2023 Water Quality Standards Revision Rule, we recommend that interested parties consider submitting written comments on the proposed rule and/or presenting oral comments at one of two upcoming public hearings on January 24 and 31, 2023.

Summary

EPA’s two back-to-back Clean Water Act (CWA) rulemaking actions bring protection of tribal treaty rights into sharp focus.

1. EPA’s [2022 Human Health Criteria Rule](#) seeks to protect tribal reserved rights to aquatic and aquatic-dependent resources by re-establishing strict human health criteria for Washington State based on assumptions regarding the dietary intake of fish and other aquatic species by tribal members, which are assumed to be substantially higher than dietary intake of fish by members of

other ethnic groups. The rule follows decades of state and federal position changes and, much like Washington State and EPA's prior actions on the topic, is highly controversial. The rule takes effect on December 19, 2022, and is subject to legal challenge through March 20, 2023, under the 120-day limitation provided in the CWA at 33 U.S.C. § 1369(b)(1).

2. EPA's [proposed 2023 Water Quality Standards Revision Rule](#) seeks to (1) amend EPA's current water quality standard regulations to require states, tribes, and the federal government to consider treaty rights when setting water quality standards, and (2) provide a regulatory [framework](#) for setting water quality standards in a manner that "protect(s) aquatic and aquatic-dependent resources reserved to tribes through treaties, statutes, executive orders, or other sources of Federal law." Public comment on the proposed rule is open through March 6, 2023.

Both actions clearly convey that the protection of tribal treaty rights is a central policy concern of the Biden EPA.

Changes to a state's human health criteria and water quality standards more broadly can have significant implications for National Pollutant Discharge Elimination System (NPDES) permit limits, including industrial and construction stormwater discharge permit limits, National Pre-Treatment Program limits for discharging into publicly owned treatment works, state-level nonpoint source controls, and other regulatory programs under the CWA. Human health criteria also can play a central role in shaping the extent of required cleanup efforts under federal and state environmental cleanup statutes.

Background: A Long, Strange Trip—Tribal Treaty Rights and Washington's Human Health Criteria Saga

The chronicle of EPA's 2022 Human Health Criteria Rule reaches back decades, with the state and EPA shuffling positions numerous times:

- ◆ **1972:** The U.S. enacted the CWA, which mandated that all states implement human health criteria, among other requirements. Washington State failed to do so.
- ◆ **1992:** EPA promulgated human health criteria for Washington State based on a fish consumption rate of 6.5 g/day and a cancer risk level of 10^{-6} in its [National Toxics Rule](#).
- ◆ **December 2010:** EPA advised Washington State's Department of Ecology to enact more stringent human health criteria.
- ◆ **June 2015:** EPA issued updated [water quality criteria recommendations](#) based on a fish consumption rate of 22 g/day.
- ◆ **September 2015:** EPA [proposed revised federal human health criteria](#) for Washington State based on an elevated fish consumption rate of 175 g/day while maintaining the cancer risk level of 10^{-6} . The elevated fish consumption rate, which matches the fish consumption rate used for [Oregon's human health criteria](#), was heightened in recognition of the treaty rights and comparatively higher reliance of tribal members on locally caught fish and shellfish. EPA explained that the majority of waters under Washington's jurisdiction are subject to tribal treaty-reserved fishing rights and that tribal treaty fishing rights "appropriately must be considered when determining which criteria are necessary to adequately protect Washington's fish and shellfish harvesting designated uses." EPA's proposal represented a significant shift toward considering tribal populations as a target general population, instead of a "highly exposed population," for purposes of deriving protective criteria.
- ◆ **August 2016:** Before EPA finalized its proposed human health criteria, Washington State adopted its own human health criteria and submitted the criteria to EPA for approval. Washington's

proposed human health criteria were generally less stringent than the federal proposed human health criteria, despite being based on the same 175 g/day fish consumption rate and 10^{-6} cancer risk level (except for polychlorinated biphenyls (PCBs)) that EPA used to derive the proposed federal human health criteria. (For PCBs, Washington used a cancer risk level of 2.3×10^{-5} . The federal 2015 proposed human health criteria used 10^{-6} for all pollutants, including PCBs).

- ◆ **November 2016:** EPA approved 45 of Washington's proposed human health criteria and [disapproved](#) the remaining 143 of Washington's proposed human health criteria. For the 143 criteria that EPA disapproved, the agency concurrently [promulgated a rule](#) setting the federal human health criteria it had proposed in 2015. The federal human health criteria were more restrictive than those disapproved by EPA. EPA maintained that the partial disapproval and final federal rule were driven by considerations of tribal treaty rights following consultation with several federally recognized tribes.
- ◆ **February 2017:** A number of concerned industry members petitioned EPA to reconsider its rejection of 143 of Washington's proposed human health criteria. The stricter federal human health criteria raised a number of significant challenges for industries and municipalities, including but not limited to setting human health criteria below many pollutant analytical quantitation limits.
- ◆ **August 2018:** EPA [announced it would reconsider rejecting](#) the 143 Washington proposed human health criteria.
- ◆ **May 2019:** EPA reversed its rejection of Washington's proposed 2016 human health criteria and approved all but two of the Washington proposed 2016 human health criteria it had previously rejected. The agency expressed its intent to initiate rulemaking to formally withdraw the federally promulgated human health criteria standards. It explained that its 2019 approval of Washington's proposed 2016 human health criteria would take effect once the state withdrew the federally promulgated human health criteria.
- ◆ **June 2019:** Washington State [filed suit](#) against EPA in *State of Washington v. U.S. Env't'l Prot. Agency*, Case No. 2:19-cv-00884-RAJ (W.D. Wash., June 6, 2019) to challenge EPA's reconsideration and reversal. The lawsuit put Washington State in the peculiar position of effectively opposing its proposed human health criteria.
- ◆ **April 2020:** EPA finalized the withdrawal of its federal human health criteria for all but three pollutants. The federal human health criteria for arsenic, methylmercury, or bis (2-chloro-1-methylethyl) were left in place.
- ◆ **2021:** The federal court in *Washington v. EPA* granted a series of abeyances to provide time for EPA to reconsider its decisions related to Washington State's human health criteria and to propose "protective" human health criteria for Washington State.
- ◆ **April 1, 2022:** EPA proposed reinstating the 141 federal human health criteria it had previously enacted for Washington State and withdrew in 2020.
- ◆ **November 18, 2022:** EPA [announces its final rule](#) reinstating the 2016 federal human health criteria, thereby superseding the 141 Washington proposed human health criteria EPA originally disapproved in 2016 and then approved in 2019. The rule does not change or supersede the federal human health criteria that EPA promulgated for arsenic, methylmercury, or bis (2-chloro-1-methylethyl) ether in 2016 and did not withdraw in 2020. Nor does it change or supersede the 43 Washington human health criteria that EPA approved in 2016. Both sets of human health criteria have remained in effect since 2016.

Continuing Whiplash? EPA's Re-Commitment of Washington State to Strict Water Quality Standards is Legally Vulnerable

EPA's 2022 Human Health Criteria Rule is slated to take effect on December 19, 2022. Although this rule change resolves litigation between Washington State and EPA, it positions EPA for a new set of potential legal challenges. Opponents of the re-enacted federal standards argue that EPA's intervention exceeds the scope of its authority under the CWA and violates cooperative federalism principles. Additionally, EPA's proposed 2023 Water Quality Standards Revision Rule potentially increases the vulnerability of its 2022 Human Health Criteria Rule. The proposed rule expressly acknowledges that current regulations do not require consideration of treaty rights when setting water quality standards and implicitly acknowledges that there is currently no regulatory framework to guide such considerations. As such, EPA arguably put the cart before the horse by issuing human health criteria for Washington State designed to protect tribal reserved rights before the agency has finalized a regulatory requirement and framework requiring consideration of tribal rights.

Implications of EPA's Proposed Rule

The proposed 2023 Water Quality Standards Revision Rule will, if adopted, have significant impacts in states where federally recognized tribes hold reserved rights to aquatic or aquatic-dependent resources in waters subject to state water quality standards. First, under the proposed rule, states would need to "determine if tribal reserved rights apply in waters subject to state [water quality standards], and if so, the nature of those rights and where they apply". As EPA acknowledges, this threshold step may be a complex process. In Washington, for example, tribal reserved water rights are extensive. Every treaty tribe in Washington has reserved water rights to fish at usual and accustomed grounds and stations. For fifteen tribes in Western Washington, these rights extend to gathering shellfish. Shellfish and resident fish can be particularly susceptible to contamination and thus may be a driver for more stringent water quality standards.

Second, states would then need to derive water quality standards using designated uses, water quality criteria, and/or antidegradation to protect identified tribal reserved rights to aquatic and/or aquatic-dependent resources consistent with the requirements and mechanisms set forth in the proposed rule. For example, under the proposed rule water quality standards must be established to "protect the exercise of the tribal reserved rights unsuppressed by water quality or availability of the aquatic or aquatic-dependent resource" (emphasis added). The notice of proposed rulemaking identifies a number of factors that could be considered when determining the "unsuppressed" level of a resource for the purpose of establishing water quality standards, such as heritages use of a resource and planned restoration efforts that could increase opportunities for the use of the resource in the future.

Takeaways

The Biden EPA signaled a commitment to increase protection of tribal treaty rights through water quality standards not just in Washington State but nationally, as part of addressing [Environmental Justice](#) and other issues affecting tribes. In the immediate future, potential legal challenges to EPA's 2022 Human Health Criteria Rule may alter EPA's course, as the controversial saga of Washington's human health criteria is unlikely to be settled by the 2022 Human Health Criteria Rule. Industries, municipalities, trade organizations, and other interested parties may also consider submitting written comments on the proposed 2023 Water Quality Standards Revision Rule and/or presenting oral comments at one of two upcoming public hearings: January 24, 2023, from 4:00 to 6:00 PM ET and Tuesday, January 31, 2023,

from 2:00 to 4:00 PM ET. For more information on these actions or assistance with the public comment process, please contact the authors.

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