ENVIRONMENTAL PROTECTION AGENCY

4O CFR PART 121, 122, 123, 131, 230, and 233

[FRL-OW-]

[RIN-XXXXXX]

Federal Water Quality Standards for Indian Country and Other Provisions Regarding Federal Water Quality Standards

AGENCY: Environmental Protection Agency (EPA)

ACTION: Proposed Rule

SUMMARY: EPA is proposing core Federal water quality standards to support tailored, site-specific decisions for certain Indian country waters. EPA is proposing this rule as a first step toward ensuring that the core Clean Water Act framework for protecting water quality is in place for all Indian country waters that do not yet have water quality standards under the Clean Water Act. The proposed rule would establish the core framework of the Clean Water Act for standards; use designations consistent with the section 101(a) goals of the Clean Water Act, water quality criteria to protect those uses, and an antidegradation policy. EPA would seek to implement the core Federal water quality standards, in consultation with Tribal governments, in a manner that would address, as appropriate, Tribal priorities and site-specific water quality conditions. EPA would also work, as appropriate, with adjacent States and Tribes, and other interested parties when implementing the standards.

Tribes would continue to be able to apply for eligibility and develop their own standards for approval under the Clean Water Act, and the core Federal standards would no longer apply to those waters for which an eligible Tribe's own standards are adopted and approved. EPA will continue to work closely with and offer support to Tribes that wish to develop their own standards under the Clean Water Act. In addition, Tribes would be able to seek to have their Indian country waters excluded from the core standards where the Tribe and/or the Tribe and the Regional Administrator have a plan, or intend to develop a plan, for establishing water quality standards under the Clean Water Act within a reasonable amount of time.

In this proposal, EPA is also including regulatory amendments to clarify that Federally-promulgated water quality standards must be protected under the National Pollutant Discharge Elimination System (NPDES) and Clean Water Act section 404 permit programs, and that, for the purposes of the NPDES program and section 404 programs, EPA will treat areas for which it determines the Indian country status is in question as Indian lands.

DATES: Comments on this proposed rule received or postmarked on or before [insert date 90 days after date of publication in the Federal Register] will be considered in developing the final rule.

ADDRESSES: Send written comments to W-00-02, Indian Country Standards Comment Clerk, Water Docket, MC 4101, U.S. EPA, 1200 Pennsylvania Avenue NW, Washington, DC 20460. Written comments should include an original and three copies. Hand-delivered comments may be submitted to the Water Docket, East Tower Basement, Room EB57, U.S. EPA, 401 M Street, SW, Washington, DC. Electronic comments are encouraged and should be submitted to OW-Docket@epa.gov. Electronic comments must be submitted as an ASCII file or a WordPerfect file, and must be identified by the docket number, W-00-02. The record for this rulemaking is available for inspection from 9:00 a.m. to 4:00 p.m., Monday through Friday, excluding legal holidays, at the Water Docket, East Tower Basement, Room EB57, U.S. EPA, 401 M Street, SW, Washington, DC. For access to docket materials, please call (202) 260-3027 to schedule an appointment.

FOR FURTHER INFORMATION CONTACT: Joanne Dea, U.S. EPA, Office of Science and Technology, Standards and Health Protection Division, 1200 Pennsylvania Avenue NW (MC 4305), Washington, DC 20460, (202) 260-7301, dea.joanne@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Who is affected by the proposed rule?

Citizens concerned with water quality may be interested in this rulemaking. Entities discharging pollutants to waters of the United States could potentially be indirectly affected by this rulemaking since water quality standards are used in determining National Pollutant Discharge Elimination System (NPDES) permit limits and serve as a basis for section 404 permit decisions. Potentially affected entities include:

Category	Examples of potentially affected entities
States, Tribes, and Territories	States, Tribes
Industry	Industries discharging pollutants to surface waters of Indian country, or that may affect surface waters in Indian country.
Municipalities	Publicly-owned treatment works and stormwater outfalls discharging pollutants to surface waters of Indian country, or that may affect surface waters in Indian country.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. This table lists the types of entities that EPA is now aware could potentially be affected by this action. Other types of entities not listed in the table could also be affected. To determine whether your facility is affected by this action, you should carefully examine the applicability criteria of proposed sections 131.40(a) and 131.40(b) of this rule. If you have questions regarding the effect of this action to a particular entity, please consult the person listed in the preceding "FOR FURTHER INFORMATION CONTACT" section.

II. Background

A. What is the role of water quality standards under the Clean Water Act?

When the Clean Water Act was enacted in 1972, its focus was on the establishment of a system for controlling pollution at the source through imposition of categorical technology-based effluent limitations on point sources. However, Congress recognized that such controls would not always be sufficient to meet the goals of the Clean Water Act, and therefore complemented that technology-based program with the water quality standards program under section 303 of the Clean Water Act. Under the Clean Water Act and EPA's implementing regulations, water quality standards consist of designated uses for waterbodies, water quality criteria to protect those uses, an antidegradation policy to maintain water quality, and any policies affecting the application and implementation of such standards. Such standards serve both as a description of the desired water quality for particular waterbodies and as a means of ensuring that such quality is attained and maintained.

The Clean Water Act prescribes various ways water quality standards are used. For example, water quality standards are the foundation for water quality-based effluent limitations for NPDES permits under sections 301(b)(1)(C) and 402, serve to limit variances under section 301(h) and (m), and are a floor for permit modifications under section 402(o)(3). Under section 401, they also serve as a basis for granting or denying State, Tribal, or Federal certifications for Federal licenses or permits for activities that may result in a discharge. Water quality standards are also the basis for identifying impaired waters under sections 303(d)(1)(A) and developing total maximum daily loads (TMDLs) under section 303(d)(1)(C). They are used as benchmarks for water quality management planning under section 205(j), and contained disposal facilities for dredged spoil under 33 U.S.C. 1293a. They are also a basis for assessing and reporting on water quality biannually under section 305(b) of the Clean Water Act.

B. What water quality standards may apply in Indian country?

"Indian country" is defined by Federal statute (18 U.S.C. 1151) and discussed in section IV.A of this preamble. Indian country waters with water quality standards under the Clean Water Act would be (a) those Indian country waters where EPA has explicitly found that a State or Tribe has jurisdiction to adopt water quality standards under the Clean Water Act, and where the State or Tribe has adopted standards in accordance with EPA regulations – there are currently 18 Indian Tribes that have adopted Clean Water Act standards in this manner (see section II.C), and (b) where EPA has promulgated Federal water quality standards – EPA has promulgated such standards for one Tribe, the Confederated Tribes of the Colville Reservation (40 CFR 131.35).

C. What Tribes have adopted their own water quality standards under the Clean Water Act?

In 1987, Congress amended the Clean Water Act to add, in section 518(e), a provision that allows the Administrator to treat an Indian Tribe in the same manner as a State for purposes of various Clean Water Act provisions, including section 303, provided that the Tribe meets certain eligibility criteria. On December 12, 1991 (56 FR 64895), EPA issued a final rule to implement section 518(e) for the water quality standards program (40 CFR 131.8). The rule adopts the criteria contained in Clean Water Act section 518 that Tribes must meet in order to be eligible to administer a water quality standards program, and establishes procedures for the EPA Regional Administrator to receive and make determinations on Tribal applications. The criteria are:

(1) The Indian Tribe is recognized by the Secretary of the Interior and meets the definitions in §131.3(k) and (l),

(2) The Indian Tribe has a governing body carrying out substantial governmental duties and powers,

(3) The water quality standards program to be administered by the Indian Tribe pertains to the

management and protection of water resources which are within the borders of the Indian reservation and held by the Indian Tribe, within the borders of the Indian reservation and held by the United States in trust for Indians, within the borders of the Indian reservation and held by a member of the Indian Tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of the Indian reservation, and

(4) The Indian Tribe is reasonably expected to be capable, in the Regional Administrator's judgment, of carrying out the functions of an effective water quality standards program in a manner consistent with the terms and purposes of the Act and applicable regulations. § 131.8 (a)(1) through (4).

To be eligible to apply, a Tribe must be recognized by the Secretary of the Interior and be exercising governmental authority over a Federal Indian reservation. See § 131.8, 131.3(k), and 131.3(l).

Currently there are 21 Tribes for which EPA has approved such applications. Those Tribes with an approved application may then adopt water quality standards under section 303 of the Clean Water Act. There are currently 18 Tribes that have adopted water quality standards that are effective under the Clean Water Act, of which 15 have been approved to date by an EPA Regional Administrator. Under 40 CFR 131.21, new and revised water quality standards adopted by authorized Tribes after May 30, 2000, become the applicable standards for Clean Water Act purposes only when approved by EPA. See 65 FR 24641 (April 27, 2000). The 18 Tribes are as follows:

- Pueblo of Isleta, New Mexico (approved by EPA on December 24, 1992).
- Pueblo of Sandia, New Mexico (approved August 10, 1993).
- Pueblo of San Juan, New Mexico (approved September 16, 1993, and June 4, 1998).
- Puyallup Tribe of the Puyallup Reservation, Washington (approved October 31, 1994).
- Pueblo of Santa Clara, New Mexico (approved July 19, 1995).
- Pueblo of Picuris, New Mexico (approved August 7, 1995).
- Pueblo of Nambe, New Mexico (approved August 18, 1995).
- Sokaogon Chippewa Community of the Mole Lake Band of Chippewa Indians, Wisconsin (approved January 22, 1996).
- Confederated Salish & Kootenai Tribes of the Flathead Reservation, Montana (approved March 18, 1996).
- Pueblo of Pojoaque, New Mexico (approved March 21, 1996).
- Confederated Tribes of the Chehalis Reservation, Washington (approved February 3, 1997).
- Pueblo of Tesuque, New Mexico (approved April 29, 1997).
- Seminole Tribe of Florida, Big Cypress and Brighton Reservations (approved September 26, 1997, and November 18, 1999).
- Miccosukee Tribe of Indians of Florida (approved May 25, 1999).
- Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, Montana (approved April 25, 2000).
- Fond du Lac Band Reservation of the Minnesota Chippewa Tribe, Minnesota (under EPA review).
- Confederated Tribes of the Warm Spring Reservation of Oregon (under EPA review).
- White Mountain Apache Tribe of Arizona (under EPA review).

EPA provides assistance to Tribes in developing their applications and standards, in addition to providing financial support through various grant programs. For example, in 1991 EPA began publishing technical guidance and training materials concerning water quality standards, and beginning in 1999 has conducted classroom-style Water Quality Standards Academy training programs specifically for Tribes. Additionally, EPA plans to announce the availability of water quality standards information for Tribes on EPA's Internet web site, including detailed templates for developing applications and standards. EPA's Regional Offices also provide direct technical and financial assistance to Tribes on an ongoing basis.

III. Why is EPA proposing the core water quality standards?

A. Why does EPA believe there is a gap in water quality standards protection in Indian country?

EPA is proposing a national rule containing core Federal water quality standards to support tailored, site-specific decisions for certain Indian country waters. EPA proposes this rule as a first step towards ensuring that the core framework of the Clean Water Act for protecting water quality is in place for all such waters. Tribes would continue to be able to seek eligibility and develop their own standards for approval under the Clean Water Act. The proposed core Federal standards would no longer apply to the Indian country waters of the Tribe once the Tribe's own standards are in place and approved. EPA will continue to work closely with and offer support to Tribes that wish to develop their own standards under the Clean Water Act.

The proposed rule would establish the core framework of the Clean Water Act for standards: use designations consistent with the section 101(a) goals of the Clean Water Act, water quality criteria to protect those uses, and an antidegradation policy. The standards would ensure that the Clean Water Act's mechanism for protecting water quality is in place for the Indian country waters covered by this rule. EPA would seek to implement the core Federal water quality standards, in consultation with Tribal governments, in a manner that would address, as appropriate, Tribal priorities and site-specific water quality conditions. EPA would also work, as appropriate, with adjacent States and Tribes, and other interested parties when implementing the standards.

EPA believes that the core water quality standards approach is a reasonable first step toward ensuring standards coverage in Indian country under the Clean Water Act. The approach is authorized by the Clean Water Act and consistent with Federal Indian law. It is also consistent with EPA's long-standing policy of directly implementing Federal environmental programs in Indian country where Tribes have not sought and obtained approval to do so. See EPA's 1984 Indian Policy ("EPA Policy for the Administration of Environmental Programs on Indian Reservations," EPA, November 8, 1984,); see also 40 CFR 144.2 (Underground Injection Control Program); 40 CFR 123.1(h) (National Pollution Discharge Elimination System Program); 40 CFR 71.4(b) (Clean Air Act Title V Permit Program); 40 CFR 281.12(a)(2) (Underground Storage Tanks Program).

Several provisions of the Clean Water Act provide EPA with the authority to propose and promulgate this rule. Section 303(c)(4) of the Clean Water Act provides that "[t]he Administrator shall promptly prepare and publish proposed regulations setting forth a revised or new water quality standard for the navigable waters involved . . . in any case where the Administrator determines that a

revised or new standard is necessary to meet the requirements of [the Act]." In addition, section 501(a) of the Clean Water Act provides that "[t]he Administrator is authorized to prescribe such regulations as are necessary to carry out his functions under this chapter."

EPA is concerned that there is currently a gap in water quality standards coverage in Indian country under the Clean Water Act. Although there are hundreds of Tribes that may apply to administer water quality standards programs under the Clean Water Act, only 21 Tribes currently have such applications approved by EPA. Of these 21 Tribes, only 18 Tribes to date have adopted water quality standards and submitted them to EPA for review and approval. EPA does not expect that the proportion of Tribes seeking EPA approval of water quality standards under the Clean Water Act will increase significantly in the near future. Furthermore, States generally lack the authority to regulate in Indian country. EPA generally believes that demonstrating such authority to establish water quality standards in Indian country would be difficult for a State. See California v. Cabazon Band of Mission Indians, 480 U.S. 202, 216 and n.18 (1987) (States are generally precluded from implementing regulatory programs in Indian country absent an explicit Congressional authorization); HRI v. EPA, 198 F.3d 1224, 1242 (10th Cir. 2000); Montana v. EPA. 137 F.3d 1135 (9th Cir. 1998).

In addition to those Tribes that may seek eligibility to adopt water quality standards under the Clean Water Act, there are many Federally-recognized Tribes that do not have Federal Indian reservations. Even though the waters of many of these Tribes fall within the definition of Indian country, as discussed in section IV.A, they cannot adopt water quality standards under section 518 because they do not have reservations. EPA's Federal water quality standards regulation at 40 CFR 131.8 pertains to implementing section 518 for Indian Tribes with reservations. See 56 FR at 64881.

Thus, there is a gap in water quality protection under the Clean Water Act for those Indian country waters where EPA has neither promulgated specific Federal standards nor explicitly found Tribal or State jurisdiction to promulgate water quality standards under the Clean Water Act.

This gap is not insignificant. Tribal reservations without approved standards account for as much land area as all of New England plus the State of New Jersey, and as many people as Wyoming, Alaska, and Vermont combined.

In addition, section 303 of the Clean Water Act clearly contemplates water quality standards for all waters of the United States. Under section 303(a) States were required to adopt water quality standards for all interstate and intrastate waters. Where a State does not establish such standards, Congress directed EPA to do so under the Clean Water Act section 303(b). EPA believes it has a similar responsibility in Indian country where EPA has not explicitly found Tribal or State jurisdiction to promulgate standards under the Clean Water Act. Congress intended for the Clean Water Act to be a general statute applying to all waters of the United States, including those within Indian country. See Clean Water Act sections 101(a) (the objective of the Act is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters"), 303(c)(2)(A) (water quality standards are to apply to "navigable waters") and 502(7) (the term "navigable waters" means the "waters of the United States"); see also Phillips Petroleum Co. v. EPA, 803 F.2d 545, 553-558 (10th Cir. 1986) (holding that the Safe Drinking Water Act applies in Indian country by virtue of being a nationally applicable statute).

Furthermore, water quality standards are important to the proper functioning of several provisions of the Clean Water Act. Water quality standards are an important element of the permitting scheme of the Clean Water Act for discharges of pollutants. See Clean Water Act sections 301(b)(1)(C) and 402(a). Water quality standards are also the foundation of the total maximum daily loads program under section 303(d) of the Clean Water Act. In addition, water quality standards are a basis for State, Tribal, and Federal certifications under section 401(a) of the Clean Water Act.

Although it is important that EPA begin to establish water quality standards for all Indian country waters currently lacking standards under the Clean Water Act, EPA believes, after consulting with many Tribes, that it is appropriate for the Agency to provide a reasonable time for Tribes to develop their own standards under the Clean Water Act for their reservations or develop a plan with the EPA Regional Administrator for EPA to propose and promulgate individualized Federal standards for their Indian country waters. This is particularly appropriate in light of the Federal trust responsibility and EPA's Indian Policy (see, e.g., EPA's 1984 Indian Policy), which recognizes Tribes as the appropriate entities to set environmental standards for Indian country. The Federal government has a trust responsibility to Federally-recognized Indian Tribes arising from Indian treaties, statutes, executive orders, and the historical relations between the United States and Indian Tribes. Consistent with the trust responsibility, President Clinton, in a 1994 Memorandum, directed all Federal agencies to assess the impacts of their plans, projects, programs, and activities on Tribal trust resources, assure that Tribal rights and concerns are considered in decision-making, and, to the extent practicable and permitted by law, consult with Tribal governments before taking actions that affect them. This Federal trust responsibility includes considerations of Tribal sovereignty.

Thus, under the proposed rule, the Federal core water quality standards would not apply to the Indian country waters of a Tribe that demonstrates to the Regional Administrator's satisfaction that: (1) the Tribe has a plan for adopting water quality standards under the Clean Water Act within a reasonable amount of time, (2) the Tribe needs time to consider options, and then will develop a plan for establishing water quality standards under the Clean Water Act within a reasonable amount of time; or (3) the Tribe and the EPA Regional Administrator have agreed on a plan for proposing and promulgating individualized Federal standards within a reasonable amount of time.

Thus, except where the Tribe wants to have its Indian country waters excluded from this rule and the Tribe and/or EPA has or intends to develop a plan for establishing water quality standards under the Clean Water Act within a reasonable time, and for off-reservation allotments (which for the reasons discussed in section IV.A of this preamble would not be included in this first phase of the core water quality standards rulemaking), the EPA Administrator finds under the Clean Water Act sections 303(c)(4)(B) and 501(a) that water quality standards are necessary to meet the requirements of the Clean Water Act for all Indian country waters where EPA has not either 1) promulgated other Federal water quality standards or 2) explicitly found State or Tribal jurisdiction to adopt water quality standards (and Tribal or State standards are in effect) under the Clean Water Act. For Indian country waters that are excluded from this rule based on an existing or future plan for establishing water quality standards, EPA intends to make a similar finding under

sections 303(c)(4)(B) and 501(a) of the Clean Water Act in the future if those waters are not covered by standards under the Clean Water Act within a reasonable time. EPA also intends to make a similar finding for waters on off-reservation allotments once current gaps in information regarding such allotments are remedied.

B. How did EPA develop the core water quality standards concept?

EPA has an ongoing dialog with Tribal representatives in many forums, including meetings of the Tribal Operations Committee established by Administrator Carol M. Browner in February 1994. Membership in the Committee is limited to Federal officials from EPA and elected Tribal officials or their designated or authorized employees. Members include the EPA Administrator, Deputy Administrator, and senior managers from EPA's Regions and program offices, and representatives from nineteen Tribes and consortia. Beginning with discussions at meetings in 1998, both EPA and Tribal members of the Committee suggested the concept of a Federal rule containing water quality standards as an efficient and effective means to establish standards for a large number of waters in Indian country. In an August 1998 Committee meeting, EPA representatives agreed to explore the concept in greater depth and report back to the Committee on progress. Since then, EPA staff have continued to discuss the concept and issues with Tribal representatives on at least a quarterly basis in meetings of the full Committee and in smaller meetings of the Committee's Tribal Caucus.

In 1999, EPA completed a series of internal discussions on the different ways a Federal rule could be implemented efficiently and effectively. In October 1999, EPA circulated a paper to all Federally-recognized Tribes on the subject entitled "Core Water Quality Standards for Indian Country Waters Without EPA-Approved Tribal Standards," corrected draft, October 15, 1999, which is available in the administrative record for this rulemaking.

During October 1999 through January 2000, EPA Regional and Headquarters officials consulted with Tribes on whether the Agency should move forward with core water quality standards. Regional officials sent the leader of each Federally-recognized Tribe a letter requesting written comments and feedback on the core standards approach.

These consultations were varied in the number of Tribes participating in discussions (e.g., Regional meetings, smaller workshops, one-on-one discussions), the form of participation (e.g., face-to-face meetings, conference calls), and the level of representation (e.g., Tribal leaders, Tribal council members, Tribal environmental managers and staff). Representatives from over 235 Tribes participated in these discussions. These discussions were useful in identifying issues and concerns that today's proposal addresses. EPA also received written comments from over 70 Tribes in response to the letters sent out from EPA Regional officials. These letters and other correspondence received by EPA in the course of developing the proposal are available for review in the docket for this rulemaking.

EPA also sought input from States and other stakeholders. Responses to date from these other stakeholder groups have been limited, but were useful in identifying issues addressed in the proposal. These responses are also available for review in the docket for this rulemaking.

C. Why is EPA proposing core standards and not individualized standards for Indian country at this time?

EPA developed the concept of the core standards to meet two needs: first, to provide a framework of water quality protection in Indian country, parallel to that currently in effect for all State waters, where Tribes have not adopted or are not ready to develop and propose water quality standards of their own for approval under the Clean Water Act; and second, as an efficient and effective means to establish standards in a large number of waters in Indian country in a timely manner. A Federal rule containing core standards would meet both of these needs. The first need would be met by EPA developing and promulgating standards under the Clean Water Act where Tribes have not adopted or are not ready to develop standards. The second need – for efficiency and effectiveness in a timely manner – posed a challenge to EPA. Water quality standards may differ from ecoregion to ecoregion and from waterbody to waterbody to reflect the designated uses and local chemical, physical, and biological conditions that may result in differing water quality criteria. EPA's experience with promulgating standards for the Confederated Tribes of the Colville Reservation, however, indicates that it would take significantly greater resources than EPA currently has available, and many years, to establish such individualized, Tribal-specific and waterbody-specific standards for the hundreds of Federally-recognized Tribes that currently do not have water quality standards under the Clean Water Act. The Colville promulgation, for which the Tribe itself had developed draft standards for EPA to consider, required over three years to complete. In contrast with the Confederated Tribes of the Colville Reservation, only a few of the Tribes currently without standards have developed draft standards. Even allowing for efficiencies in the technical development of standards that EPA may be able to achieve, the process of proposing and promulgating hundreds of individualized rules for Tribal water quality standards, each with public hearings and public comments to review, would be extremely difficult and time consuming.

EPA therefore began exploring more efficient and effective ways to achieve expanded coverage of water quality standards in Indian country in the short term. EPA found that an approach that involved promulgation of a core set of standards for all covered Indian country waters, followed by site-specific interpretation of the core standards to make water quality decisions under the Clean Water Act as appropriate, offered a significant opportunity for effectively covering a large number of Indian country waters in the short run. Under this approach, the Federal rulemaking could be shortened to a minimum, since only one set of core standards would need to be developed and reviewed. Reasonable time would then be available for EPA to develop site-specific interpretations, consult further with individual Tribes, and obtain additional public input. These activities could be carried out by EPA Regional Offices in the context of individual decisions, such as NPDES permit issuance. Since these individual decisions are likely to be relatively limited in number (for example, EPA identified approximately 293 NPDES dischargers that can readily be determined to be located within the external boundaries of Federally-recognized reservations), and since the decisions do not occur simultaneously but rather occur in regular cycles, such as once every five years for NPDES permit issuance, the administrative burden on EPA to carry out the core standards approach would be reasonable. In addition, subsequent phases could include further Federal promulgation of more detailed or individualized standards where appropriate.

EPA's selection of the core standards approach for Indian country reflects the unique situation existing at this time for Indian country. The core standards approach would not apply to waters outside of Indian country. Because the vast majority of Tribes

have simply not had the resources to develop water quality standards under the Clean Water Act or under Tribal law, many Tribes are several decades behind the States and EPA in developing standards. EPA believes the core standards approach is needed, and appropriate, as a first phase to address the gap of water quality standards in Indian country. In contrast, all States and all 18 Tribes that have adopted Clean Water Act water quality standards to date have progressed well beyond this first phase, and have developed not only State- or Tribal-specific standards for their waters, but also in most cases waterbody-specific standards, and implementation procedures for using the standards to make water quality decisions under the Clean Water Act. EPA does not believe it would be appropriate to use the core standards approach for waters for which water quality standards have been adopted under the Clean Water Act.

IV. Where would the proposed standards be applicable?

A. To what waters would the standards apply?

Under today's proposal, the core water quality standards would apply to all waters of the United States that are now, or become after the effective date of this rule, within Indian country except: (1) Indian country waters for which EPA has promulgated other Federal water quality standards; (2) Indian country waters where EPA has explicitly found that a State or Tribe has jurisdiction to adopt water quality standards, and State or Tribal water quality standards are effective under the Clean Water Act; (3) Indian country waters of those Tribes that EPA has found meet the criteria for being excluded from the rule; and (4) Indian country waters on allotments outside of Indian reservations.

The proposed rule, at § 131.40(k), would define "Indian country" as it is defined in 18 U.S.C. 1151. That is, Indian country means:

(1) All land within the limits of any Indian reservation under the jurisdiction of the United States government, not withstanding the issuance of any patent, and including rights-of-way running through the reservation;

(2) All dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a State; and

(3) All Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

This definition of Indian country has been applied to criminal, civil judicial, and regulatory jurisdiction. DeCoteau v. District County Court, 420 U.S. 425, 427n.2 (1975); see also 40 CFR 144.3 and 40 CFR 71.2. As the Supreme Court recently reiterated, Indian country is the area where the Tribes and the Federal government generally have jurisdiction and States generally do not. See Alaska v. Native Village of Venetie Tribal Government, 522 U.S. 520, 526n.1 (1998).

Indian country includes all of the territory within an Indian reservation (including land owned in fee simple by non-Indians), and also includes ''dependent Indian communities,'' and Indian allotments held in trust by the Federal government or under a restriction on alienation, regardless of whether or not they are located within a reservation. Based on Supreme Court case law, EPA construes the term ''reservation'' to include trust land that has been validly set apart for use by a Tribe, even if that land has not been formally designated as a ''reservation.'' See 56 FR 64881 (December 12, 1991); see also Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 505 U.S. 505, 511 (1991); HRI v EPA 198 F.3d 1224 (10th Cir. 2000); Arizona Public Service Co. v EPA, 211 F.3d 1280 (D.C. Cir. 2000). EPA will be guided by relevant case law in interpreting the scope of the term ''reservation.''

Congress has used two principal forms in creating Indian allotments: trust allotments and restricted fee allotments. Indian trust allotments are lands held in trust for the benefit of Indians by the United States. Restricted fee allotments are lands that are owned by Indians, but there is a restriction on the ability of the Indians to sell the lands. However, there is no distinction between the two types of allotments with respect to their Indian country status. See United States v. Ramsey, 271 U.S. 467, 471-72 (1926). Indian allotments exist both within and outside of Indian reservations.

Dependent Indian communities are Indian lands that have been set aside by the Federal government for the use of Indians as Indian land, and that are under Federal superintendence. See Alaska v. Native Village of Venetie Tribal Government, 522 U.S. 520, 527 (1998).

EPA invites public comment on the use of "Indian country" in the proposed rule.

For purposes of this rule, EPA would treat areas for which EPA believes the Indian country status is in question as Indian country. This approach will achieve a number of important objectives. Federal implementation in such areas will help ensure no gap in water quality standards coverage. If it is unclear whether a Tribe or a State has authority over an area, EPA can effectively ensure that the water quality standards program has legal effect by carrying out the program Federally. See "Underground Injection Control Programs for Certain Indian Lands, Final Rule," 53 FR 43096, 43097 (Oct. 25, 1988) (observing that where there is a dispute, both States and Tribes may disagree with each other's assertions of jurisdiction, thereby raising doubts as to whether either has enforcement authority over the area's sources); Clean Air Act Federal Operating Permits Program, Final Rule, 64 FR 8247, 8254 (February 19, 1999) (same). EPA believes that disputes and uncertainty could prevent both the State and Tribe from effectively carrying out a water quality standards program. Where a State and Tribe asserts jurisdiction over an area whose Indian country status EPA believes is in question (and EPA has not explicitly found State or Tribal jurisdiction to establish water quality standards under the Clean Water Act for the area), EPA would not view either the State or the Tribe as having established water quality standards under the Clean Water Act for the area. By Federally implementing the water quality standards program where EPA believes the Indian country status of an area is in question, EPA can help avoid jurisdictional disputes that might hinder effective implementation of the Clean Water Act. Furthermore, Federal implementation in such areas will help provide the regulated community with certainty as to which entity (EPA, the State, or the Tribe) will implement the water quality standards program under the Clean Water Act. Finally, EPA notes that the U.S. Court of Appeals for the Tenth Circuit, citing the Federal trust responsibility to Indian Tribes, recently concluded that it is appropriate for EPA to implement the underground injection control program under the Safe Drinking Water Act in areas where the Indian country status is in dispute. HRI v. EPA, 198 F.3d 1224, 1244-47 (10th Cir. 2000).

In determining whether the Indian country status of an area is in question and will be treated as Indian country for purposes of this rule, the Regional Administrator would first consult with the affected Tribal and State governments and, where

appropriate, the Department of the Interior. EPA would make such determinations on a case-by-case basis. There may be circumstances where EPA makes no determination regarding whether the Indian country status of a particular area is in question. In such instances EPA would not be precluded from later determining the Indian country status of that area for purposes of EPA's direct implementation of an environmental program (including the water quality standards program) or a Tribe's application for eligibility to implement an EPA program. In addition, when the Regional Administrator determines that a particular area is in question, the Regional Administrator may consult with the Tribe, consider environmental, geographical, administrative and other factors, and decide that the area should be excluded from the core Federal water quality standards under proposed section 40 CFR 131.40(c)(4) if 1) the Tribe wants the area to be excluded and 2) the Tribe and/or the Tribe and the Regional Administrator have a plan, or intend to develop a plan, for establishing water quality standards under the Clean Water Act within a reasonable time.

For the reasons discussed, where EPA determines that the Indian country status of an area is in question, EPA believes it is also appropriate for the Agency to treat that area as Indian country for purposes of related Clean Water Act programs, including the section 402 NPDES program and section 404 dredged or fill materials program. EPA is proposing to amend the NPDES permitting regulation (40 CFR 123.1(h)) to make clear that EPA is the proper entity to implement the NPDES permitting program in such areas where no Tribe or State has been explicitly approved to run the program. 40 CFR 123.1(h) specifies the circumstances under which EPA will administer the NPDES program on Indian lands. EPA notes that the Agency has consistently interpreted the term "Indian lands" to be equivalent to "Indian country." See 40 CFR 144.3; see also State of Washington Department of Ecology v. EPA, 752 F.2d 1465, 1467, n.1 (9th Cir. 1985). EPA would expect to use a process similar to that previously described for water quality standards in determining whether an area is in question for purposes of the NPDES program. EPA (in consultation with the Army Corps of Engineers) is proposing a similar amendment to the regulations governing the Clean Water Act section 404 program (proposed 40 CFR 233.1(b)).

EPA recognizes that the core standards approach needs to be coordinated with any Tribal plans for developing their own standards, with any EPA plans to promulgate individualized standards, and with Tribes' own decision processes. Further, EPA recognizes that some Tribes may not want the core standards to apply to their Indian country waters during the interim period. Therefore, EPA believes the most practical approach to implementing core standards and one that is respectful of Tribal sovereignty is to provide Tribes flexibility and provide a number of approaches.

First, for all Indian country areas covered by the proposed rule, EPA would provide Tribes a means to have their Indian country waters excluded from the core standards before the core standards become effective. For a Tribe's Indian country waters to be excluded, the Regional Administrator would need to determine that 1) the Tribe has a plan for adopting water quality standards under the Clean Water Act within a reasonable amount of time; or 2) the Tribe needs time to consider options, and then will develop a plan for establishing water quality standards under the Clean Water Act within a reasonable time, or 3) the Tribe and the EPA Regional Administrator have agreed to a plan for proposing and promulgating individualized Federal standards.

Second, EPA proposes a different approach for off-reservation allotments. There are an estimated 25,000-30,000 off-reservation allotments. They are generally relatively small in size, and they tend to be scattered throughout various geographical areas around the United States in a checkerboard pattern. Furthermore, the Department of the Interior's Bureau of Indian Affairs and Bureau of Land Management are still in the process of identifying, patenting, and mapping off-reservation allotments in several geographical areas around the country. EPA believes such information would be very helpful in identifying and locating off-reservation allotments when it becomes available. In the meantime, however, it would be extremely difficult to locate all affected off-reservation allotments at the time water quality decisions are made. Without such information it may not be practical to ensure the decisions properly implement the core standards. While the Department of the Interior expects to develop this information over the next five years, at this time it would require considerable efforts on the part of EPA to acquire such information. Further, EPA may need more time to evaluate the best approach to implementing the core standards in off-reservation allotments.

For these reasons, particularly the time and resources needed to locate and map thousands of parcels, as well as the time needed to resolve decision-making processes, EPA believes an incremental approach will provide a more feasible option for the administration and implementation of Federal core standards. As a result, the proposed rule contains an exclusion at this time for Indian country waters located in off-reservation allotments.

EPA invites comment on whether off-reservation allotments should be excluded.

B. Which waters would automatically be excluded from application of the standards?

The proposed rule standards would automatically not apply to the following categories of Indian country waters (see proposed § 131.40(a)(i) through (iii)):

- The standards would not apply to waters for which EPA has promulgated other Federal water quality standards. Currently, EPA has promulgated standards for only one Tribe, the Confederated Tribes of the Colville Reservation (see § 131.35). If EPA were to promulgate other Federal standards for other Tribes in the future, the proposed core Federal standards would no longer be applicable for the Indian country waters of those Tribes.
- The standards would not apply to Indian country waters where EPA has explicitly found that a State or Tribe has jurisdiction to adopt water quality standards, and the State or Tribe has adopted standards that are in effect under the Clean Water Act. Currently this has occurred for only 18 Tribes (see section II.C).
- The standards would not apply to Indian country waters in off-reservation allotments.

EPA believes these exclusions are warranted. EPA does not believe the core Federal water quality standards are appropriate where EPA has promulgated other Federal standards or has found a State or Tribe to have jurisdiction and the State or Tribe has adopted water quality standards applicable under the Clean Water Act. See further discussion in section III. Further, for the reasons discussed in section IV.A of the preamble, EPA has excluded Indian country waters in off-reservation allotments from this proposal.

EPA invites comments on the automatic exclusions in proposed § 131.40(a)(i) through (iii).

EPA considered adding an automatic exclusion for Tribes that have submitted applications under the Clean Water Act for water quality standards program authorization, or draft water quality standards for EPA review that are not yet effective under the Clean Water Act. This could occur if EPA has not yet approved the program application, or if EPA has approved the program application but the Tribal standards have not been submitted or have not become effective. EPA decided not to add this additional automatic exclusion to today's proposal, but rather to offer Tribes that have submitted program applications or draft standards the choice of allowing the core standards to take effect while the submission and approval process take place, or to request that their waters be excluded using the process in proposed § 131.40(c). EPA believes the proposed approach provides flexibility to Tribes without compromising the purpose of the core standards promulgation.

EPA invites comments on the alternative of amending § 131.40(a) to automatically exclude waters of Tribes that have submitted applications for program authorization or draft standards to EPA for approval.

C. How may additional Indian country waters of a Tribe be excluded from application of the standards?

While it is important that EPA promulgate water quality standards for all Indian country waters currently lacking standards under the Clean Water Act, in light of the government-to-government relationship and the Federal trust responsibility to Federally-recognized Tribes, EPA believes it is appropriate that the Agency provide a reasonable time for Tribes to develop their own standards under the Clean Water Act or develop a plan with the EPA Regional Administrator for EPA to propose and promulgate individualized Federal standards for their Indian country waters. Thus, the proposed rule provides procedures under which the Federal core water quality standards could be determined not to apply to the Indian country waters of a Tribe where:

(1) The Tribe has a plan for adopting water quality standards under the Clean Water Act within a reasonable amount of time; or

(2) The Tribe needs time to consider options, and then will develop a plan for establishing water quality standards under the Clean Water Act within a reasonable time; or

(3) The Tribe and the EPA Regional Administrator have agreed on a plan for proposing and promulgating individualized Federal standards within a reasonable amount of time.

The first option is for the Tribe to request an exclusion because the Tribe has a plan for establishing water quality standards under the Clean Water Act within a reasonable amount of time. For example, Tribes that have already begun the process to establish standards under the Clean Water Act could use this first option to exclude their waters from the Federal core standards in the interim period.

The second option is for the Tribe to take time to consider options and then to develop a plan for establishing water quality standards under the Clean Water Act within a reasonable amount of time. This option recognizes that some Tribes may not want the core standards to become effective at this time for their waters, and may need more time to consider options and develop a plan to establish standards. For example, some Tribes have only recently received grant assistance from EPA to develop environmental programs. Until these programs are fully functioning, it may not be possible for the Tribe to develop a plan to establish standards. This option may also be suitable for Tribes that are currently undecided whether to develop their own standards for adoption, or to work with EPA to promulgate Federal individualized standards.

The third option is for the Tribe to request an exclusion because the Tribe and the EPA Regional Administrator have agreed on a plan for EPA to propose and promulgate individualized Federal standards within a reasonable amount of time. Under this option, a Tribe could develop water quality standards of its own and request EPA to propose and promulgate them as Federal standards for their Indian country waters. This would be similar to the approach used in 1989 when EPA promulgated Federal standards for the Confederated Tribes of the Colville Reservation at 40 CFR 131.35 (54 FR 28625, July 6, 1989). For example, a Tribe that has developed and adopted standards under Tribal law, but does not have EPA approval for administering the Federal standards program, could use this option.

EPA notes that developing individualized Federal standards in this way can require a considerable amount of time and resources. For example, the Colville promulgation required over three years from the time the Tribe requested EPA promulgation. Although EPA may be able to complete such a promulgation in less time now, several steps in the process can be lengthy. For example, EPA would need to evaluate the Tribe's standards to determine whether they are consistent with the Clean Water Act and the implementing Federal regulations. Furthermore, EPA would need to conduct formal rulemaking, which can require considerable time to comply with existing statutes and Executive Orders, to consult with stakeholders, and to obtain and review public comments. For this reason, EPA proposes that the Tribe and EPA Regional Administrator would need to agree on a plan for establishing the individualized Federal standards within a reasonable amount of time. Having the plan would ensure that both EPA and the Tribe have the same expectations. The plan should describe the approach for developing Clean Water Act water quality standards for the Tribe's waters, identify EPA Regional and Tribal resources to be used to develop the Clean Water Act standards, and identify deadlines and milestones by which the EPA Region and the Tribe would accomplish necessary tasks.

EPA encourages Tribes that are eligible to apply to administer the water quality standards program under the Clean Water Act to consider carefully whether or not the third option is the best option for them. On the one hand, developing individualized Federal standards may have some advantages for the Tribe. For example, it may be a good approach for Tribes that may not be able to provide all of the required information, may not be able to meet all of the provisions of § 131.8(a)(1) through (4), or may not wish to apply. In addition, the Tribe may adopt provisions in its own standards that are more stringent than EPA might propose and promulgate. See City of Albuquerque v. Browner, 97 F.3d 415 (10th Cir. 1996). cert. denied 522 U.S. 965 (1997). On the other hand, it may take more time for EPA and the Tribe to propose and promulgate individualized Federal standards than for the Tribe to adopt its own standards under the Clean Water Act.

EPA invites comments on what a "reasonable time" would be under proposed 40 CFR 131.40(c). For example, some have suggested that five years would be a reasonable time. EPA also invites comment on whether such time should be made

explicit in the final rule. EPA also invites comments on whether steps to be completed during the "reasonable time," and any information concerning what is a "reasonable time" for each of the actions.

To exercise any one of the three options, the Tribe would need to submit a request to the EPA Regional Administrator. The request would need to be submitted by the Tribal governmental authority, in writing, and be based on one of the three choices in proposed § 131.40(c)(2). The request should include any supporting information, such as the plans called for in proposed § 131.40(c)(2)(i) and (iii). The Tribe's plan for developing the Tribal standards should describe the approach for developing an application for administering the standards program, describe its approach for developing standards for the Tribe's waters, identify the resources it would use to develop its application and standards, and identify the deadlines and milestones by which the Tribe would commit to accomplishing these tasks. The Regional Administrator would review the request to determine whether the request and supporting information meet the requirements of the proposed rule. A number of factors may be considered by the Regional Administrator including: 1) the readiness of the Tribe to proceed; 2) whether the Tribe has any other means of establishing water quality standards; and 3) Regional priorities and staff availability. The Regional Administrator would then decide whether to approve or disapprove the request. The Regional Administrator's approval or disapproval of the request would determine whether the standards in the final § 131.40 would apply to the Indian country waters of the Tribe.

In addition to these opportunities for Tribes to provide a written request to EPA to have their waters be excluded from the rule, EPA also proposes in § 131.40(c)(4) to provide the EPA Regional Administrator with discretion to exclude Indian country waters without a written request from a Tribe in cases where the Regional Administrator determines, in consultation with the Tribe, that: 1) the Tribe wants to have its Indian country waters excluded from the rule, and 2) the Tribe and/or the Tribe and the Regional Administrator have a plan, or intend to develop a plan, for establishing water quality standards under the Clean Water Act within a reasonable time.

EPA encourages Tribes that are contemplating developing their own standards or asking EPA to promulgate individualized standards not to request an exclusion from the core standards. Having the core standards in place, even temporarily, would enable EPA, in consultation with the Tribe, to use the core standards to guide decisions protecting the water quality of the Tribe's Indian country waters until the adoption or promulgation process is complete.

If a Tribe wants its waters to be excluded from the rule, it should apply for one of the three exclusions within 120 days after the effective date of the final rule. EPA will then make its best efforts to review and approve or disapprove the request before the core standards take effect 210 days after the effective date of the final rule. See the discussion of effective dates in section V of this preamble.

With all of the options, it is EPA's intent to work with all Tribes toward the goal of achieving the protection of water quality standards under the Clean Water Act for all waters in Indian country within a reasonable amount of time. EPA believes this can be achieved through a combination of eligible Tribes adopting their own standards under the Clean Water Act, EPA promulgating individualized Federal standards for interested Tribes, and EPA promulgating the core Federal standards.

EPA Regional Offices will maintain a record of Tribes whose Indian country waters have been excluded from application of the rule. The record will be included as part of the Water Quality Standards Docket in each Regional Office. See the final rule, EPA Review and Approval of State and Tribal Water Quality Standards, for a discussion of the Water Quality Standards Dockets. 65 FR 24641 (April 27, 2000).

EPA invites comments on all aspects of the proposed options for excluding waters from the Federal core water quality standards. Specifically, EPA requests comments on whether the proposed exclusion options are appropriate, whether additional options should be included, and whether the request and approval process is appropriate.

The rule as proposed would not prevent the Regional Administrator from rescinding his or her original decision to exclude a Tribe's waters in the event that commitments made in the request or consultation are not fulfilled. Rescinding the exclusion would cause the core standards to become applicable for waters of the Tribe. Rescinding an exclusion could also be helpful in the case of a Tribe who, having originally requested exclusion, later changes its view and wishes its waters to be covered by the core standards. EPA invites comment on whether the Regional Administrator should be able to rescind exclusions, and whether the final rule should explicitly provide for rescinding of exclusions. EPA invites comments on whether the final rule should also give the Regional Administrator the ability to rescind an exclusion in the event that he or she determines, in consultation with the Tribe, that the core water quality standards are essential to address a particular environmental issue not contemplated at the time of the original exclusion.

EPA considered not providing any options for Tribes to request exclusion from the rule. Under this approach, the final rule would apply to all waters of the United States in Indian country except the automatic exclusions in proposed § 131.40(a)(1). Proposed § 131.40(a)(1)(iv) and 131.40(c) would be deleted. This approach would reflect a strict interpretation of EPA's long-standing policy of directly implementing Federal environmental programs in Indian country where Tribes have not sought and obtained approval to do so. EPA chose not to propose this approach because, based on our consultations with Tribes, EPA believes that Tribal plans and preferences should play a role in the way the rule is applied.

EPA invites comments on whether the final rule should be applied in all cases to Indian country waters where there are no water quality standards in effect under the Clean Water Act.

EPA considered an approach in which the core standards would not be promulgated for the waters of a Tribe unless the Tribe expressly requested the promulgation. That is, the final rule would only apply to the Indian country waters of a Tribe if the Tribe were to submit to EPA a request for its waters to be included. EPA believes that such an "opt in" approach could be developed, so long as the ultimate goal of the approach is to ensure the establishment of water quality standards under the Clean Water Act for all waters in Indian country within a reasonable amount of time, and that EPA would ultimately intend to promulgate the core standards for those waters if this goal is not met.

EPA invites comments on whether the final rule should use a "request for inclusion" (or "opt in") approach, and if so how such an approach could be implemented in a way that assures the ultimate protection of water quality standards under the Clean Water Act

for all waters in Indian country within a reasonable amount of time.

EPA considered an option to promulgate water quality standards only where "environmental problems" are in evidence. This approach may be of limited use in preventing pollution problems and would be limited by available site-specific data.

EPA invites comments on whether the final rule should use an "environmental problems" approach, and if so, how the approach could be implemented.

D. Can Tribes adopt water quality standards of their own?

An eligible Tribe would continue to be able to adopt water quality standards of its own under section 518 of the Clean Water Act, even after the proposed rule becomes effective. The Tribe would need to apply to EPA to administer the water quality standards program. If EPA determines the Tribe is eligible to administer the program, using the eligibility criteria and procedures in § 131.8, then EPA would be able to review and approve appropriate standards adopted and submitted by a Tribe to EPA. Therefore, this proposal would not affect a Tribe's ability to apply to administer its own water quality standards program and adopt water quality standards under § 131.8.

Any standards that the Tribe adopts must satisfy the requirements of subparts A, B, and C of 40 CFR part 131. If the Regional Administrator approves the adopted water quality standards, the Federal water quality standards established for Indian country waters of the Tribe under this proposal would no longer apply to those waters covered by the approved Tribal standards. That is, upon the Regional Administrator's approval, the Tribe's standards would become effective under the Clean Water Act, and the proposed exclusion in § 131.40(a)(1)(i) would immediately apply, meaning that the core water quality standards would cease to apply. Section 131.40(a)(1)(ii) is the exclusion from the core standards for "Indian country waters where EPA has explicitly found that a State or Tribe has jurisdiction to adopt water quality standards, and State or Tribal water quality standards are effective under the Clean Water Act."

EPA is proposing § 131.40(j), "Can my Tribe adopt Tribal water quality standards under the Clean Water Act?," to clarify this approach within the rule text.

EPA invites comments on the above approach for Tribes adopting their own water quality standards.

V. When would the rule become effective?

The final rule would become effective 30 days after it is published in the Federal Register. This means that a Tribe could begin developing a request for exclusion from the core standards immediately after publication, and the Regional Administrator could act on the request as early as 30 days after the publication date.

The core standards themselves, on the other hand, would not become applicable to any waters until 210 days after the effective date, or 240 days after the publication date. See proposed 40 CFR 131.40(b). The reason EPA is proposing such a delayed applicability date is to allow an adequate time for a Tribe and the Regional Administrator to complete the exclusion process before the standards take effect. For example, it would allow those Tribes that need time to develop a request for exclusion to submit this request several months after the effective date of the rule, leaving the Regional Administrator time to make his or her best efforts to review and approve or disapprove the request before the core standards take effect, including consulting further with the Tribe if necessary.

EPA invites comments on the delayed applicability provision of proposed 40 CFR 131.40(b).

VI. What would be the "core water quality standards"?

The provisions of the Federal core water quality standards that would be most directly used in water quality decisions affecting Indian country waters are contained in proposed § 131.40(e) through (i), describing designated uses, criteria, antidegradation policy, and other policies. These are described in the following sections.

The proposed regulation would apply to the authority responsible for implementing water quality programs under the Clean Water Act for the covered Indian country waters. In most cases, EPA would be the authority for programs involving section 402 NPDES permits, section 303(d) listing, and section 303(d) total maximum daily loads (TMDLs), since to date no Tribes have received section 518 approval to administer those programs. EPA would also be the certifying entity under section 401 of the Clean Water Act with respect to the core water quality standards. See section VII. for further discussion of how decisions will be made when using the core standards.

EPA emphasizes that when interpreting and implementing the core water quality standards for Indian country, EPA would consult, as appropriate, with States and Tribes. In particular, Tribal governments have a significant and crucial role in providing data and information to EPA for the interpretation and implementation of the core water quality standards. EPA intends to work directly with Tribal governments to ensure Tribal water quality goals are considered in protecting waters covered by the core Federal water quality standards. EPA would also work as appropriate with adjacent States and Tribes, and other interested parties when implementing the standards.

A. What would be the designated uses?

The core Federal water quality standards would establish the following use designation consistent with the Clean Water Act section 101(a) goals and other provisions of the Clean Water Act:

> Wherever attainable, water quality must provide for protection and propagation of fish, shellfish, and wildlife, and for recreation in and on the water, and for cultural and traditional uses. Where such water quality is not attainable, water quality must provide for the most protective use that is attainable. Where a waterbody is appropriate for use as a public water supply, or for use for agricultural purposes, industrial purposes, or navigational purposes, water quality must provide for such use(s). (Proposed § 131.40(e).)

In administering these designated uses, and the criteria to support the uses, EPA would seek to ensure that the core standards protect public health and welfare, enhance the quality of the water, and serve the purposes of the Clean Water Act. See Clean Water Act section 303(c)(2)(A).

As discussed in section III of this preamble, EPA views these designated uses as the first step in implementing water quality standards in Indian country. They would form the regulatory basis for making water quality decisions under the Clean Water Act. For example, when issuing a NPDES permit in Indian country, EPA would interpret the designated use by deciding what levels of aquatic life and human health protection are attainable, and whether the waterbody is appropriate for use as a public water supply. EPA's process for interpreting the designated uses together with water quality criteria is described in more

detail in section VII of this preamble. The proposed designated uses include the following major components.

First, EPA included the uses specified by section 101(a)(2) of the Clean Water Act, which states "it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983." EPA has treated this interim goal as a rebuttable presumption in its water quality standards regulation, and in implementing the water quality standards program. For example, EPA's water quality standards regulation requires States and Tribes to conduct a use attainability analysis whenever the State or Tribe wishes to remove a designated use that is specified in section 101(a)(2) or to adopt subcategories of such uses which require less stringent criteria. See § 131.10(j). Furthermore, when EPA has found that a State did not conduct such an analysis as required above, EPA has used this rebuttable presumption, in the absence of data indicating a use is not attainable, when promulgating Federal replacement standards. See EPA's promulgation of water quality standards for the State of Idaho, 62 FR 41161 (July 31, 1997). See also Idaho Mining Association v. Browner, 90 F. Supp. 2d 1078 (D. Idaho 2000) (upholding the rebuttable presumption approach).

Second, the proposed designated uses provide that when this interim goal use is not attainable, water quality must provide for the "most protective use" that is attainable. EPA believes that this concept was intended by the objective of the Clean Water Act under section 101(a): "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." EPA believes that the objectives of restoring and maintaining water quality support the designation of the most protective attainable use for the waterbody. Therefore, in interpreting the designated use in, for example, issuing a NPDES permit, if EPA were to find that the full primary contact recreation use is not attainable, EPA would nevertheless likely include some requirements in the discharge permit to limit bacterial contamination in order to provide the next best attainable level of protection (e.g., a secondary contact recreational use or a seasonal recreational use if EPA determined such uses were attainable). See further discussion of how EPA will interpret designated uses in section VII of this preamble.

Third, EPA is proposing the drinking water consumption use for waterbodies where use as a public water supply is appropriate. This provision reflects the requirements in section 303(c) that in establishing water quality standards the waters' use and value for public water supplies shall be taken into consideration, and that water quality standards protect the public health or welfare, enhance the quality of water, and serve the purposes of the Clean Water Act. In all cases where a public water supply is an existing use (i.e., the use is currently being attained or has been attained since November 1975), the proposed core standards would be interpreted to protect the water supply use. For example, where a waterbody is the source of withdrawals that are used for a public water supply, EPA would interpret the core standards to protect the water supply use. This includes cases where a surface waterbody is determined to be directly influencing ground water that is being used as a drinking water supply. Often, for example, the quality of alluvial drinking water wells is directly dependent on the quality of hydrologically-connected surface waters. Note also that under the Safe Drinking Water Act these wells are designated as "ground water source(s) under the direct influence," and are held to the same regulatory standards as surface water supplies. See 40 CFR 141.70. In these situations, public water supply is an existing use of the surface waterbody, and the core standards will be interpreted and applied to protect that use, consistent with § 131.10(a).

In situations where a waterbody is not currently used as a public water supply, in interpreting the core water quality standards EPA would determine whether there is a potential for the waterbody to be used as a water supply in the future, and whether water quality that would support a drinking water use is attainable. For example, there may be situations where a Tribe might have plans for using a waterbody as a drinking water supply in the future, and wants to restore or maintain water quality for that purpose. To assist the Agency with making these determinations, it may be advantageous for a Tribe or downstream jurisdiction to provide a written statement of intent, explaining the reasons for protecting the waterbody as a future water supply. Based on the information available, if EPA determines that water supply is a potential use and is attainable, the core standards would be interpreted and applied to protect that use when making water quality decisions.

Because the water supply use may be of critical importance in Indian country, the following represents EPA's initial views on how it would intend to identify a drinking water use and protect that use when implementing the core standards:

- Where water supply is an existing use, the core standards would be interpreted and applied to achieve criteria to protect public water supply at all points within one-half mile in each direction except downstream from the point of intake or diversion. Where there is a need for an implementation decision regarding an activity that is located outside that range (unless another distance is more appropriate in the particular circumstance), EPA could establish appropriate control requirements to achieve appropriate criteria at all points within the range, considering fate and transport processes.
- Where water supply is a potential and attainable use of a waterbody, the core standards would be interpreted and applied in such a way as to ensure that the quality of the waterbody will be adequate to meet water supply criteria at the point of use. In cases where the future point of intake or diversion is known, the core standards could be interpreted and applied as discussed above for existing water supply uses. Implementation decisions will require judgment in cases where the future point of intake or diversion is not known. For small reservations, it may be appropriate to apply water supply protection to the waterbody throughout the reservation. However, for large reservations, it may be appropriate to protect water supply uses only in a portion of the waterbody. Control requirements for activities located upstream from the protected portion would be determined to ensure that appropriate criteria are achieved within the portion protected for water supply use. For reservoirs and lakes with potential water supply uses, for example, it may be appropriate to apply water supply criteria to the entire reservoir or lake, but not to tributary waters.

Fourth, EPA included uses for agricultural, industrial, and navigational purposes, where appropriate. These uses are included to establish the same structure that section 303(c)(2)(a) established for State standards. This section provides that State

standards "shall be established taking into account their use and value for . . . agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation." In cases where a surface waterbody is currently used for one of these purposes, or where EPA determines that such a use is a potential and appropriate use and is attainable, the core standards would be interpreted and applied to protect that use when making water quality decisions using an approach similar to that described above for public water supplies.

In interpreting the designated uses in water quality decisions, EPA would follow the part 131 regulatory requirements that apply to the adoption or removal of designated uses. For example, since § 131.10(g) provides that States and authorized Tribes may not remove a designated use that is an "existing" use, EPA would not interpret the designated use in the core standards as being any less than an existing use in an Indian country waterbody, and "existing use" means "those uses actually attained in the waterbody on or after November 28, 1975, whether or not they are included in the water quality standards," as defined in § 131.3(e).

In interpreting the term "appropriate" in proposed 40 CFR 131.40(e), EPA would consider not only whether the Tribe or others are currently using the waterbody as a source for drinking water, industrial use, agricultural use, or for navigation, but also whether the use is attainable. In evaluating whether the use is attainable, EPA would consider the guidance used for implementing the part 131 requirements for use attainability analyses.

In interpreting designated uses in water quality decisions, EPA would also consider the importance of wetlands in Indian country. Wetlands are an important and integral component in achieving the Clean Water Act goals expressed in section 101(a), including protection and propagation of fish, shellfish and wildlife. Since wetlands are waters of the United States, EPA would determine appropriate designated uses for wetlands based on their physical, chemical, and biological characteristics with the goal of maintaining water quality within an appropriate natural range of variation.

When designating uses of a waterbody, and the appropriate criteria for protection of those uses, 40 CFR 131.10(b) requires the standard-setting authority to take into consideration the water quality standards of downstream waters and ensure that standards provide for the attainment and maintenance of the water quality standards of downstream waters. Consistent with this requirement, when interpreting the core standards for waters of Indian country, EPA intends to consider the standards of downstream waters and ensure that both the uses, and the criteria to protect those uses, provide for the attainment and maintenance of the downstream standards.

EPA invites comments on the proposed designated uses for Indian country waters in § 131.40(e). Specifically, EPA requests comments on establishing the interim goal uses of section 101(a)(2) "wherever attainable," and the next most protective use where not attainable. EPA also requests comments on the explicit inclusion of the public water supply use and uses for agricultural, industrial, or navigation purposes. Additionally, EPA requests comments on its plans to interpret the designated uses by following existing regulatory requirements and considering existing guidance for adopting and removing uses, and, specifically, whether such plans should be made explicit in the final regulatory text or supplementary guidance.

EPA recognizes that there may be additional uses of waterbodies in Indian country that are not explicitly identified in proposed § 131.40(e). However, where EPA determines such uses are existing uses, as discussed within this section, EPA would ensure these uses are protected and maintained consistent with 40 CFR 131.10.

During the Tribal consultation process, many Tribes stressed the value and importance of protecting water quality at levels appropriate for use in various cultural and traditional activities of individual Tribes. Some Tribes asked how the core designated uses might be interpreted to protect these Tribal-specific values when making water quality decisions. Others specifically asked EPA to include "cultural uses" or "traditional uses" as designated uses in this proposal. EPA believes that the proposed designated uses of protection and propagation of fish, shellfish, and wildlife and for recreation in and on the water whenever attainable would implicitly provide protection for many of these cultural and traditional values. The Agency believes that Congress, in setting forth the uses in sections 101(a)(2) and 303(c) of the Clean Water Act, established a concept broad enough to include a Tribe's cultural and traditional uses of waters. In addition, the Agency does not interpret, nor does it believe, that Congress intended the term "recreation in and on the water" to be limited solely to water sports like swimming and waterskiing. Rather, the Agency believes that "recreation in and on the water" can be interpreted more broadly. Furthermore, Clean Water Act section 303(c)(2)(A) provides that uses are those to protect "the public health or welfare" and take into account a waterbody's use for "other purposes." Cultural and traditional values fall within these concepts. Thus, EPA is proposing to include cultural and traditional uses explicitly within the scope of the core standards. See proposed 40 CFR 131.40(e). To protect these uses, EPA would rely on any criteria or other information that may be available.

EPA invites comment on whether cultural and traditional uses should be listed explicitly as designated uses. In addition, EPA is interested in any information that may be used in interpreting the narrative criteria to protect cultural and traditional uses.

The Agency is also considering how to provide Tribes an opportunity to request designation of additional uses or more refined uses for their Indian country waters that may not be addressed by this proposal and its implementation. See section IX of this preamble for a discussion of this and other possibilities for additional phases in implementing the core standards.

Indian Tribes often have rights under Federal law that arise from treaties, statutes, executive orders, or agreements, including rights to fish, hunt, and gather in Indian country waters. EPA recognizes that in many instances, particularly in the Pacific Northwest and the Great Lakes regions, Tribes not only reserved rights to fish, hunt, or gather within Indian country areas, but also retained rights outside of Indian country in ceded territories that were their "usual and accustomed" hunting, fishing, or gathering places. A discussion of Tribal rights outside of Indian country is beyond the scope of this proposal, which only addresses Indian country waters.

EPA believes that Tribal rights to fish, hunt, and gather in Indian country can be generally encompassed by the designated uses contained in proposed 40 CFR section 131.40(e). Where such rights relate to water quality, EPA believes that implementation of the core Federal water quality standards would also help ensure protection of treaty rights.

EPA requests comment on whether EPA would be able to adequately protect Tribal treaty and other rights in Indian country in

implementing and interpreting the core Federal water quality standards as proposed.

B. What would be the water quality criteria?

The proposed core Federal water quality standards would include both narrative and numeric water quality criteria. Each is described in the sections below.

1. Narrative water quality criteria

The proposed core Federal water quality standards would establish narrative water quality criteria for protecting the designated uses. Narrative criteria are descriptions of the conditions necessary for the waterbody to attain its designated use. The narrative criteria would read as follows:

> Waters shall be free from toxic, radioactive, conventional, non-conventional, deleterious or other polluting substances in amounts that will prevent attainment of the designated uses specified above. (Proposed § 131.40(f).)

As discussed more fully below, in interpreting the narrative criteria for specific situations, EPA intends to use as guidance its current national recommended section 304(a) water quality criteria, Great Lakes criteria (for Tribes in the Great Lakes basin), appropriate standards set under Tribal law and the laws of an adjacent State, and other appropriate scientific data and information. In 1976, EPA recommended the following narrative criteria for "aesthetic qualities" under section 304(a) of the Clean Water Act (republished in *Quality Criteria for Water*, EPA, May 1, 1987, EPA 440/5-86-001):

> All waters free from substances attributable to wastewater or other dischargers that:
>
> (1) Settle to form objectionable deposits;
>
> (2) Float as debris, scum, oil, or other matter to form nuisances;
>
> (3) Produce objectionable color, odor, taste, or turbidity;
>
> (4) Injure or are toxic or produce adverse physiological responses in humans, animals or plants; and,
>
> (5) Produce undesirable or nuisance aquatic life.

EPA would consider these recommended narrative criteria when interpreting the proposed uses in § 131.40(f) and making water quality decisions.

EPA's current water quality standards regulation requires adoption of water quality criteria that protect designated uses. 40 CFR § 131.11. Such criteria must be based on sound scientific rationale, must contain sufficient parameters to protect the designated use, and may be expressed in either narrative or numeric form. In adopting water quality criteria, States and authorized Tribes should establish numeric values based on section 304(a) criteria, section 304(a) criteria modified to reflect site specific conditions, or other scientifically defensible methods. States and authorized Tribes should also establish narrative criteria where numeric criteria cannot be determined, or to supplement numeric criteria.

EPA believes that effective State and authorized Tribal water quality standards should include both narrative and numeric water quality criteria. EPA notes that all States have narrative criteria for the protection of designated uses. EPA's long-standing policy has been that narrative criteria should apply to all waters, regardless of designated uses or flows, and are necessary to meet the statutory requirements of section 303(c)(2)(A) of the Clean Water Act. See The Water Quality Standards Handbook, 3-24. Narrative criteria are descriptions of the conditions necessary to attain a waterbody's designated use, while numeric criteria are values expressed as levels, concentrations, toxicity units or other numbers that quantitatively define the necessary level of protection. Thus, narrative water quality criteria establish the basic foundation for attainment of designated uses while numeric water quality criteria provide a specific quantitative translation of the necessary level of protection.

EPA requests comment on the use of narrative water quality criteria, including their implementation as described in section VII of this preamble, to protect designated uses of Indian country waters.

When interpreting the narrative criteria of proposed § 131.40(f), EPA would consider the recommended national criteria it has developed pursuant to section 304(a)(1) of the Clean Water Act. Section 304(a)(1) requires EPA to develop and publish, and from time to time revise, criteria for water quality accurately reflecting the latest scientific knowledge. Water quality criteria developed under section 304(a) are based solely on data and scientific judgments on the relationship between pollutant concentrations and environmental and human health effects. Section 304(a) criteria do not reflect consideration of economic impacts or the technological feasibility of meeting the chemical concentrations in ambient water.

EPA's process for interpreting the designated uses and narrative criteria for specific water quality decisions is discussed in more detail in sections VI.B.4 and VII of this preamble.

EPA requests comments on the proposed narrative criteria in § 131.40(f).

2. Numeric water quality criteria for priority toxic pollutants

In addition to the proposed narrative criteria, EPA also is proposing numeric water quality criteria for certain priority toxic pollutants to protect section 101(a) designated uses as part of the core water quality standards for Indian country. EPA is proposing numeric criteria for the protection of human health for 99 pollutants and numeric criteria for the protection of aquatic life for 24 pollutants. These criteria are included in a table, Water Quality Criteria for Priority Toxic Pollutants in Indian Country, at proposed § 131.40(g)(1).

EPA believes that including these numeric criteria, together with the narrative criteria described above, would ensure protection of the "fishable/swimmable" uses in Indian country waters where EPA determines that such uses are attainable. Proposed § 131.40(g)(5) provides that these numeric criteria would apply to all waters covered by the core standards for which EPA determines that designated uses are attainable that provide for the protection and propagation of fish, shellfish, and wildlife, and for recreation in and on the water. The numeric criteria would not automatically apply if EPA determined that a more protective use was attainable, or if EPA determined that the "fishable/swimmable" uses were not attainable and a next most protective use were to apply. EPA would rely on the narrative criteria in today's proposed rule and interpretation of the narrative criteria on a case-by-case basis to derive the appropriate levels of protection for the more or less protective uses.

As with the narrative criteria described above, EPA interprets the uses under section 101(a) of the Clean Water Act to include, at a minimum, designated uses providing for the protection of basic aquatic communities, and therefore protecting human consumption of fish and shellfish. In other words, "protection . . . of fish and shellfish" means that not only can fish and shellfish thrive in a waterbody, but when caught, can also be safely eaten by humans. This is EPA's position with regard to State and Tribal water quality standards even where fish and shellfish consumption is not explicitly

included in a State's or an authorized Tribes's definition of a section 101(a) use. In the National Toxics Rule, EPA explained that all waters designated for public water supply use or minimal aquatic life protection (and therefore a potential fish and shellfish consumption exposure route) are to be protected for human health. See 57 FR 60848, 60859 (December 22, 1992).

EPA believes inclusion of these numeric criteria in the core water quality standards is consistent with section 303(c)(2)(B) of the Clean Water Act, which directs States to adopt numeric criteria for those priority toxic pollutants for which EPA has published recommended water quality criteria pursuant to Clean Water Act section 304(a), the discharge or presence of which in affected waters could reasonably be expected to interfere with the designated uses for such waters. "Priority toxic pollutants" are identified in Appendix A -- 126 Priority Pollutants, of 40 CFR 423. The priority toxic pollutants for which EPA is proposing numeric criteria in the core standards include all priority toxic pollutants for which EPA currently has published recommended water quality criteria. EPA selected this approach because it ensures comprehensive coverage of the priority toxic pollutants with scientifically defensible criteria. EPA did not believe it would be feasible in a reasonable amount of time to identify only those pollutants that might be present or discharged into waters of Indian country. This approach also is consistent with EPA=s previous rulemakings in which EPA promulgated criteria pursuant to section 303(c)(2)(B). See "National Toxics Rule," 57 FR 60848 (December 22, 1992); "California Toxics Rule," 65 FR 31682 (May 18, 2000).

EPA recently updated its national recommended water quality criteria for priority toxic pollutants, developed pursuant to section 304(a) of the Clean Water Act. EPA is incorporating these updated criteria in the proposed core water quality standards. These recommended section 304(a) water quality criteria provide guidance for States and authorized Tribes in adopting water quality standards under section 303(c) of the Clean Water Act. They also provide guidance to EPA when promulgating water quality standards under section 303(c) of the Clean Water Act.

The proposed numeric criteria for the core standards together with requirements for their implementation appear in proposed § 131.40(g). EPA is also providing a detailed explanation of the derivation of the proposed criteria in the administrative record for this rulemaking. Included in this record is a description of the derivation of the criteria, including a calculation matrix showing each of the components (e.g., q1*s, RfDs and BCFs) and formulas used to derive the human health criteria.

If a pollutant is listed in proposed § 131.40(g)(1) without an entry in one of the columns, that means that EPA has not issued a recommended criterion for that water use for that pollutant and is not proposing a numeric criteria as part of the core water quality standards.

EPA requests comment on the above approach for priority toxic pollutants. EPA specifically invites comments on whether the final rule should include the numeric criteria in § 131.40(g), and on the alternative approach of relying solely on narrative criteria.

All of the criteria in § 131.40(g) have been reviewed and the majority have been updated by EPA for this proposal. The following sections describe in more detail how EPA performed the revisions for certain criteria or groups of criteria, and how they should be applied.

EPA invites comment on scientific and technical aspects of the proposed numeric criteria for priority toxic pollutants, including the aspects of those criteria discussed in the following sections. EPA also notes that many of the scientific and technical issues related to today's proposed numeric criteria for priority toxic pollutants were addressed in detail during the promulgation of the National Toxics Rule and the California Toxics Rule. In addition, other issues were addressed during the revisions to the Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health. The Agency refers commenters to the administrative records for these actions for further information. (See 57 FR 60848, 65 FR 31682, and 65 FR 66444).

a. Human health criteria

Proposed § 131.40(g) includes water quality criteria for the protection of human health. In November 2000 EPA revised the methodology it uses to develop water quality criteria for protection of human health. See *Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health (2000)*, EPA-822-B-00-004, October 2000, (the "2000 Human Health Methodology"), and the accompanying Federal Register notice, 65 FR 66443 (November 3, 2000). Many of the human health criteria published in the table have been revised based on this 2000 Human Health Methodology. These revisions of human health criteria include:

- EPA's new recommended fish consumption rate (17.53 g/day) protective of the general population of fish consumers. The fish consumption rate is discussed in section VII.B of this preamble, and in the 2000 Human Health Methodology. This consumption rate is higher than the 6.5 g/day rate generally used in previous EPA promulgations of Federal standards, and generally results in more stringent criteria values.
- A Relative Source Contribution (RSC) component, to allow for non-water sources of exposure to a pollutant. The RSCs for each pollutant were adapted from EPA's primary drinking water standards for the corresponding pollutant. Including RSCs generally results in criteria values that are more stringent than criteria without RSCs. EPA's previous promulgations of Federal standards have not included RSCs.
- Any new cancer potency factors (q1*s) or reference doses (RfDs) in the Agency's Integrated Risk Information System (IRIS).

In order to prevent harmful exposures to water-borne chemicals through the consumption of contaminated fish and shellfish, EPA's national section 304(a) water quality criteria for the protection of human health address the process of chemical bioaccumulation in aquatic organisms. EPA's 2000 Human Health Methodology emphasizes the measurement of chemical bioaccumulation by aquatic organisms through the use of national bioaccumulation factors (BAFs). A national BAF is a ratio (in L/kg) which relates the concentration of a chemical in water to its expected concentration in commonly consumed aquatic organisms in a specified trophic level. In contrast, the 1980 Methodology emphasized the assessment of bioconcentration (organism chemical uptake from water only) through the use of the bioconcentration factor (BCF). Based on the 1980 Methodology, measured BCFs were usually determined from laboratory data unless field data demonstrated consistently higher or lower accumulation compared to laboratory data. In these cases, "field BCFs" (currently termed field-measured BAFs in the 2000 Methodology) were recommended for

use. EPA is emphasizing the use of BAFs in the 2000 Methodology because BAFs reflect an organism's exposure to a chemical through all relevant exposure routes (e.g., water, sediment, diet), which provides a better estimate of the amount of chemical humans may be exposed to through consumption of contained fish and shellfish.

The human health criteria in today's proposal generally have not been revised to include BAFs based on the 2000 Human Health Methodology, since EPA has not yet completed reviewing and evaluating data necessary to develop nationally-applicable BAFs. Instead, the human health criteria in today's proposal generally were developed with BCFs or field-measured BAFs previously developed using the 1980 Methodology. The BCFs used in deriving the criteria are consistent with BCFs used in promulgating human health criteria for priority toxic pollutants in previous rules, such as the 1992 National Toxics Rule (40 CFR 131.36) and the 2000 California Toxics Rule (40 CFR 131.38).

New IRIS information was available for benzene, vinyl chloride and 1,3-dichloro-propylene. The benzene criteria were revised based on the new cancer slope factor, which is presented in IRIS as a range, so the updated criteria for benzene are presented as a range. The vinyl chloride criteria were updated using the new q1* for continuous lifetime exposure from birth derived by the linearized multistage method. For the 1,3-dichloropropylene criteria, both an RfD and q1* are available in IRIS, but the q1* was used to derive the criteria because it resulted in the more protective criteria.

Not all of EPA's national recommended water quality criteria for protection of human health were revised for today's proposal. For example:

- Criteria currently undergoing major reassessments, such as arsenic, mercury and nickel were not revised.
- For copper and asbestos the Agency chose to base water quality criteria on the Agency's drinking water action levels and maximum contaminant levels (MCLs), respectively, which are established on drinking water regulation methodologies.

b. Dioxin

EPA has conducted an ongoing evaluation of dioxin toxicity and exposure science for over two decades. In 1985, EPA summarized its understanding of dioxin toxicity with the publication of *Health Assessment Document for Polychlorinated Dibenzo-p-Dioxins*. This document has served as EPA's principle reference of dioxin toxicity and continues today to provide the basis for EPA estimates of dioxin cancer risk. EPA is currently in the processes of updating its characterization of dioxin science through its dioxin reassessment effort. Drafts of the reassessment have undergone extensive scientific peer review and public comment. EPA has submitted its revised reassessment to the EPA Science Advisory Board (SAB) for final review and is currently awaiting the SAB's formal comments. When completed, the reassessment will provide a new scientific basis for EPA risk-based decisions on dioxin. At the time this rule is being proposed, the dioxin reassessment has not yet completed the SAB review process; therefore, it is inappropriate to use the findings of the reassessment as the technical basis for decision. Because of this, EPA is proposing these dioxin criteria based on its 1984 Clean Water Act section 304(a) water quality criteria guidance for dioxin which is consistent with the 1985 Health Assessment Document, the National Toxics Rule promulgated in 1992 (57 FR 60848), and the California Toxics Rule promulgated in 2000 (65 FR 31682). In proposing this rule, the Agency reaffirms its commitment to move forward with the protection of public health from the risks of dioxin, and not to allow the ongoing dioxin reassessment effort to unnecessarily delay or impede progress in dioxin risk management. EPA recognizes that the current draft of the dioxin reassessment proposes changes in EPA's estimate of dioxin cancer potency, provides a broader perspective for consideration of dioxin's non-cancer effects, and raises a number findings which could potentially affect establishing future water quality criteria. When EPA completes the dioxin reassessment, the Agency intends to revisit its Clean Water Act section 304(a) water quality criteria guidance.

The human health ambient water quality criteria for dioxin in the proposal are expressed in terms of 2,3,7,8-Tetrachloro-dibenzo-p-dioxin (2,3,7,8-TCDD). In order to ensure protection of the designated uses in section VI.A of this preamble, EPA expects to implement the numeric criteria for 2,3,7,8-TCDD in conjunction with the narrative criteria at section VI.B of this preamble. This combined approach will allow EPA to address other dioxin-like compounds (dioxins) along with 2,3,7,8-TCDD. EPA expects to translate the narrative criteria using the national/international convention of toxicity equivalence factors (TEFs/TEQs) to account for the additive effects of other dioxin-like compounds. The TEF/TEQ procedure accounts for the toxicity of 7 chlorinated dibenzo-p-dioxin, including 2,3,7,8-TCDD, 10 chlorinated dibenzofuran (CDD/CDF) congeners, and 12 co-planar polychlorinated biphenyl cogeners. This procedure uses a set of derived TEFs to convert the concentration of any CDD/CDF congener into an equivalent concentration of 2,3,7,8-TCDD. EPA supports the use of either the 1989 interim procedures or the 1998 World Health Organization (WHO) TEF scheme, but prefers the 1998 WHO TEF scheme because it is based on more recent data, includes the dioxin like polychlorinated biphenyls, and is now internationally accepted. See *Update to the Interim Procedures for Estimating Risks Associated with Exposures to Mixtures of Chlorinated Dibenzo-p-dioxins and -dibenzofurans*, EPA/625/3-89/016, March 1989 and M. Van den Berg, et.al. 1998. By applying the TEF/TEQ approach, the other highly toxic dioxins will be properly taken into account. EPA intends to apply this approach in developing controls based on the core water quality standards.

c. Revised definition of total PCBs for aquatic life criteria

The aquatic life criteria for PCBs revised in today's proposal apply to total PCBs. The definition of total PCBs is the sum of all homolog, all isomer, all congener, or all Aroclor analyses. The aquatic life criteria contained in the previous publication of the National Recommended Water Quality Criteria, 63 FR 68354, December 10, 1998, were also based on total PCB concentrations, but the definition of total PCBs only applied to the sum of seven particular Aroclors (1242, 1254, 1221, 1232, 1248, 1260 and 1016, CAS numbers 53469219, 11097691, 11104282, 11141165, 12672296, 11096825, and 12674112 respectively). The revision of the aquatic life criteria for PCBs in today's proposal makes them consistent with EPA's human health criteria for PCBs.

3. Site-specific modifications of numeric criteria for priority toxic pollutants

Although the numeric water quality criteria in proposed § 131.40(g) represent the best information now available, EPA believes it is appropriate to have some measure of flexibility to modify the criteria on a case-by-case basis to reflect site-specific conditions and to reflect new information. Therefore, EPA has included a procedure at proposed § 131.40(g)(6) whereby the EPA

Regional Administrator (RA) may modify the criteria.

EPA believes the site-specific modification procedure would provide an expeditious way to modify the numeric criteria in the core water quality standards when such a modification is justified. Although the procedure for making a modification under proposed § 131.40(g)(6) is not a rulemaking, each modification would be a final Agency action, and would therefore be subject to consultation pursuant to section 7 of the Endangered Species Act as appropriate.

The site-specific modification procedures are designed to ensure that the public would have adequate input on any determination. Proposed § 131.40(g)(6) provides that the public would have notice of and an opportunity to comment on any proposed modification. If this action can be combined with another concurrent and related process, such as action on an NPDES permit, EPA would endeavor to do so. Proposed § 131.40(g)(6) requires the Regional Administrator to make available publicly any proposed modification and an explanation supporting it, and to make available publicly the record of past decisions.

EPA would plan to develop a mailing list to facilitate public awareness of final decisions to modify numeric criteria under these procedures.

4. Considerations for both narrative and numeric criteria

The following sections address issues that are related to implementing both the narrative criteria and numeric criteria provisions of the core water quality standards.

a. Fish consumption

As previously discussed, section 101(a)(2) of the Clean Water Act establishes as a national goal water quality that provides for the protection and propagation of fish, shellfish, and wildlife, and recreation in and on the water, wherever attainable. Section 303(c)(2)(A) requires water quality standards to protect the public health and welfare, enhance the quality of water, and serve the purposes of the Clean Water Act.

EPA interprets these uses under section 101(a) of the Clean Water Act to include, at a minimum, designated uses providing for the protection of basic aquatic communities, and therefore protecting human consumption of fish and shellfish. In other words, " protection . . . of fish and shellfish" means that not only can fish and shellfish thrive in a waterbody, but when caught, can also be safely eaten by humans. This interpretation also satisfies the section 303(c)(2)(A) requirement that water quality standards protect public health. Including human consumption of fish and shellfish in the definition of section 101(a) "fishable" uses is not new. In the preamble to the National Toxics Rule, EPA explained that all waters designated for public water supply use or minimal aquatic life protection (and therefore a potential fish and shellfish consumption exposure route) are to be protected for human health. See 57 FR 60848, 60859 (December 22, 1992).

In deciding whether to modify the numeric criteria for priority toxic pollutants (and deciding whether any site-specific modifications are justified) and when interpreting the narrative water quality criteria for Indian country to protect consumers of fish, consistent with the definition of section 101(a) uses, EPA would consult with the Tribe and expects that it would apply a fish consumption rate for fresh and estuarine species using the following order of preference. First, EPA would use the results of any existing fish consumption surveys of local Indian country watersheds to establish fish intake provisions that are representative of the defined populations being addressed. Second, EPA would consider results from existing fish consumption surveys that reflect similar geography and population groups to the watersheds above. Third, EPA would select consumption rate assumptions for different population groups from national food consumption surveys that are similar to the defined populations being addressed in the Indian country watershed. Fourth, if available information does not allow the use of any of these options, EPA would consult with the Tribe when determining an appropriate fish consumption value and EPA would use any other appropriate information. EPA expects that it would generally apply a fish consumption rate of 17.5 grams/day in the absence of site-specific fish consumption data or information. EPA believes this value is reasonable and adequately protective of the general population of fish consumers based on the 1994 to 1996 data from the United States Department of Agriculture's Continuing Survey of Food Intake by Individuals (CSFII) Survey. This value represents the 90th percentile of the CSFII data. It also represents the uncooked weight estimated from the CSFII data, and represents consumption of freshwater and estuarine finfish and shellfish only. EPA expects that it would also consider a value of 142.4 grams/day as representing subsistence fishers whose daily consumption is greater then the general population. EPA would determine if the numeric criteria provide adequate protection for any subsistence fishers. A further discussion of fish consumption rates may be found in the 2000 Human Health Methodology.

When making a determination regarding a site-specific fish consumption value, EPA would consult with the Tribe and would determine the need for a higher consumption rate in those cases where the Tribe or EPA can support the higher rate with adequate scientifically defensible data and information.

b. Cancer risk levels

EPA's water quality criteria for the protection of human health rely in part on risk levels accounting for the incidence of cancer. Agency guidance sets forth a range of risk levels to account for the incremental increase in cancer incidences resulting from exposure to a pollutant. See the 2000 Human Health Methodology for a more complete discussion. EPA has developed the numeric criteria in the table at proposed § 131.40(g)(1) using a 10^{-6} risk level, and expects that it would apply a 10^{-6} risk level in interpreting the narrative criteria. A 10^{-6} risk level means one additional cancer incidence per 1,000,000 exposed individuals. EPA's regulatory actions have evolved in recent years to target a 10^{-6} risk level as an appropriate risk for the general population. This risk level is also consistent with Agency-wide practice. Using a 10^{-6} risk would also ensure that highly-exposed sub-populations would at least be protected at the 10^{-5} risk level.

EPA is also considering applying a 10^{-5} risk level for the protection of the general population within Indian country. However, because no State or authorized Tribe has adopted water quality standards based on a cancer risk level of greater than 10^{-5}, EPA does not believe any such higher risk levels would be appropriate in the core Federal water quality standards. EPA would also consult with the affected Tribe on the appropriate risk level and might consider a lower risk level (e.g., 10^{-7} or 10^{-8}) where appropriate. EPA would follow its regulations regarding public notice and opportunity for public comment in applying its interpretations, and for site-specific modifications of the numeric criteria, would follow the procedures at proposed § 131.40(g)(6).

EPA solicits comments on whether it is appropriate for EPA to use a risk level other than 10^{-6} when interpreting the narrative or applying the numeric criteria.

c. Applicability of freshwater and saltwater criteria

EPA's national recommended water quality criteria include guidelines for applying freshwater and saltwater criteria for the protection of aquatic life, based on the degree of salinity. EPA is proposing to use these guidelines when applying the numeric criteria for priority toxic pollutants in proposed § 131.40(g), and when using the national section 304(a) criteria as numeric translators when implementing the narrative water quality criteria in proposed § 131.40(f). The guidelines are as follows:

(1) For water in which the salinity is equal to or less than 1 part per thousand 95% or more of the time, the applicable criteria are the freshwater criteria in column B of the table.

(2) For water in which the salinity is equal to or greater than 10 parts per thousand 95% or more of the time, the applicable criteria are the saltwater criteria in column C of the table.

(3) For water in which the salinity is between 1 and 10 parts per thousand, the applicable criteria are the more stringent of the freshwater or saltwater criteria, as described in items (1) and (2) above. However, an alternative freshwater or saltwater criteria may be used if scientifically defensible information and data demonstrate on a site-specific basis that the biology of the waterbody is dominated by freshwater aquatic life and that freshwater criteria are more appropriate; or conversely, the biology of the waterbody is dominated by saltwater aquatic life and that saltwater criteria are more appropriate.

d. Great Lakes issues

In making decisions under the Clean Water Act based on the core water quality standards, including interpreting the narrative criteria and implementing the numeric criteria of this proposal, and as discussed further in section VII.A of this preamble, for waters located in the Great Lakes System, as defined in § 132.2, EPA would ensure that those decisions are consistent with the minimum water quality standards, antidegradation policies, and implementation procedures for the Great Lakes System in 40 CFR part 132.

C. What would be the antidegradation policy?

The core Federal water quality standards in proposed section 131.40(h) would establish the following antidegradation policy consistent with the Federal antidegradation policy at 40 CFR 131.12:

(1) Existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected.

(2) Where the quality of the waters exceeds levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water, that quality shall be maintained and protected unless the Regional Administrator finds after consultation with the appropriate Tribal governments, and after full opportunity for intergovernmental coordination and public participation, that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located. In allowing such degradation or lower water quality, the Regional Administrator shall assure water quality adequate to protect existing uses fully. Further, the Regional Administrator shall assure that there shall be achieved the highest statutory and regulatory requirements for all new and existing point sources and all cost-effective and reasonable best management practices for nonpoint source control.

(3) Where high quality waters constitute an outstanding National resource, such as waters of National and Tribal parks and wildlife refuges and waters of exceptional recreational or ecological significance, that water quality shall be maintained and protected.

(4) In those cases where potential water quality impairment associated with a thermal discharge is involved, the antidegradation policy and implementing method shall be consistent with section 316 of the Clean Water Act. (Proposed § 131.40(h).)

The proposed antidegradation policy for Indian country is consistent with the Federal antidegradation policy at 40 CFR 131.12, and therefore establishes the levels of water quality protection required, at a minimum, by the Clean Water Act and Federal regulation. See 61 FR 64816. As discussed in implementing this antidegradation policy, EPA intends to consider its current national guidance contained in the Water Quality Standards Handbook, other implementing program guidance and policies, standards set under Tribal law, the laws of an adjacent State, and other appropriate guidance. EPA would provide an opportunity for notice and public comment in regulatory decisions it makes. The proposed antidegradation policy for Indian country would establish the following three levels of protection.

First, at a minimum, water quality necessary to support existing uses would be maintained (Tier 1). Second, where water quality is better than the minimum level necessary to support protection and propagation of fish, shellfish and wildlife, and recreation in and on the water, that water quality would also be maintained and protected unless, in consultation with the affected Tribe and through public participation and intergovernmental coordination, EPA determines that to implement the antidegradation policy some lowering of water quality is deemed to be necessary to allow important economic or social development to occur (Tier 2). And third, where waterbodies are of exceptional recreational or ecological significance, water quality would be maintained and protected (Tier 3). The basic purpose of this antidegradation policy is to maintain and protect the finite public resource of clean water and ensure that decisions to allow reductions in water quality are made in a public manner and serve the public good.

The first provision, in effect, establishes the floor of water quality for waters of Indian country, and that all waters of Indian country are subject to Tier 1 protection. In general, waters that would be subject only to Tier 1 antidegradation policies are those waterbodies that do not exceed the Clean Water Act section 101(a) goals. These waters generally either do not have any remaining assimilative capacity to receive additional loads of pollutants without causing the loss of the existing use or the water quality already is degraded below that necessary to maintain an existing use. "Existing uses" are defined at 40 CFR 131.3(c) as those uses actually attained in the waterbody on or after November 28, 1975, whether or not they are included in the water quality standards. The Agency would generally implement this provision by

reviewing and determining whether a NPDES discharge would impair an existing use.

The second provision is intended to establish a systematic, public decision-making process for determining whether or not to allow limited deterioration of water quality in high quality waters from a proposed point source discharge. EPA intends to use a pollutant-by-pollutant approach to identify high quality waters. EPA would next determine if a proposed point source discharge is significant enough to warrant further review. Where the degradation is not significant, the antidegradation review would be terminated. When the proposed point source discharge is significant, water quality would not be lowered unless the Agency determines that such degradation is necessary to accommodate important social and economic development in the area where the proposed point source discharge is located. This would generally include an analysis of pollution control and pollution prevention alternatives, including all feasible alternatives, with the least degrading reasonable alternative generally being implemented.

The third provision is intended to protect waters of extraordinary ecological, recreational or other significance, e.g. outstanding National resource waters (ONRWs). This provision establishes the highest level of protection for waterbodies by prohibiting the lowering of water quality. The only exception to this prohibition is for a point source discharge that results in short-term and temporary changes in the water quality of the ONRW. EPA interprets these terms as limiting water quality degradation for weeks or months, and not years. The intent is to limit degradation to the shortest possible time. Classification of any particular waterbody as an ONRW is at the discretion of the standards setting authority. EPA is not proposing to classify any waterbody in Indian country as an ONRW. However, EPA may consider classifying waterbodies as ONRWs in the future if EPA undertakes subsequent phases of establishing water quality standards for Indian country.

EPA invites comments on the proposed antidegradation provisions at proposed 40 CFR 131.40(h).

In the case of section 404 discharges, EPA interprets 40 CFR 131.12(a)(1) of the antidegradation policy to be satisfied with regard to discharges of dredged or fill material in wetlands if the discharge does not result in "significant degradation" to the aquatic ecosystem as defined under section 230.10(c) of the section 404(b)(1) guidelines.

D. What would be the other provisions of the core standards?

Today's proposed rule contains a provision that would allow mixing zones to be established on a case-by-case basis after consultation with the appropriate Tribal government. EPA would follow its regulations regarding public notice and opportunity for public comment in applying its interpretations.

EPA's current policy describes a mixing zone as an allocated impact zone where certain numeric water quality criteria may be exceeded provided that there is no lethality to aquatic organisms that pass through the mixing zone, there are no significant health risks to humans, and the designated and existing uses of the waterbody as a whole are not impaired as a result of the mixing zone. These allocated impact zones or mixing zones, if disproportionately large, could unacceptably impact the integrity of the aquatic ecosystem and have unanticipated ecological consequences on the waterbody as a whole resulting in impairment of the designated or existing uses. Therefore, EPA's policy has emphasized a holistic approach to mixing zone regulation which considers location, size, shape, outfall design and in-zone quality. Mixing zone guidance produced by EPA since 1972 has consistently emphasized the need to protect both nonmotile benthic and sessile organisms as well as swimming and drifting organisms when developing and locating a mixing zone. For nonmotile benthic and sessile organisms, adverse impacts on such organisms may be a reason to carefully limit mixing zone size. Such impacts may also be a reason to prohibit a mixing zone if necessary and is an important reason for carefully locating new discharges. In addition, adverse impacts to swimming and drifting organisms passing through the mixing zone should also be prevented. EPA's guidance on mixing zones has been detailed in a number of Agency publications, including the Water Quality Standards Handbook, August 1994, and the Technical Support Document for Water Quality-based Toxics Control (TSD), March 1991.

EPA invites comments on the proposed mixing zone provisions at proposed 40 CFR 131.40(i)(1).

EPA regulations allow for compliance schedules to be included in NPDES permits to allow permittees additional time to achieve compliance with effluent limitations implementing the requirements of the Clean Water Act and applicable regulations. Such schedules must require compliance by the permittees as soon as possible, but in no case may extend beyond compliance dates established by the Clean Water Act. See 40 CFR 122.47. Compliance schedules may not be issued for water quality-based effluent limitations unless provided for in the applicable water quality standards or implementing regulations. Orders in In Re Star-Kist Caribe, Inc., NPDES Appeal No. 88-5, have emphasized the need for States and Tribes to provide specific authorization for such schedules in their water quality standards or implementing regulations.

The proposed core water quality standards at proposed 40 CFR 131.40(i)(2) would provide for the use of compliance schedules for dischargers in certain circumstances. A new discharger to waters of the United States in Indian country would not be allowed a compliance schedule -- that is, it would need to comply upon commencing discharge with any water quality-based limitation in a permit issued on or after the effective date of the final rule. An existing discharger, however, would be eligible for a compliance schedule. Pursuant to the regulations cited above and the proposed core standards, EPA could issue a compliance schedule as part of a NPDES permit that would require the discharger to comply with any water quality-based limitation in a permit reissued or modified on or after the effective date of the final rule as soon as possible but no later than five years from the date of permit issuance.

This approach is consistent with the approach that EPA has taken elsewhere in promulgating Federal water quality standards, including the Final Water Quality Guidance for the Great Lakes System (40 CFR part 132, appendix F, procedure 9) and the promulgation of criteria for toxic pollutants for the State of California, or California Toxics Rule (CTR) (40 CFR 131.38(e).

In establishing effluent limitations to meet these core water quality standards for Indian country, EPA may, where appropriate, include compliance schedules consistent with 40 CFR 122.47 and the provisions in proposed 40 CFR 131.40(i)(2).

In situations where the permittee would be unable to meet permit conditions, and where a compliance schedule pursuant to 40 CFR 122.47 is not permitted, EPA would also consider issuance of Administrative

Orders. EPA expects it would implement the compliance schedule provision of the core standards using an approach consistent with that contained in the CTR. For example:

- A new discharger would be defined as any building, structure, facility, or installation from which there is or may be a "discharge of pollutants" (as defined in 40 CFR 122.2), the construction of which commences on or after the effective date of the core standards regulation.
- Where an existing discharger reasonably believes that it will be infeasible to promptly comply with a new or more restrictive water quality-based effluent limit (WQBEL) based on the core water quality standards, the discharger would be able to request approval from the permit issuing authority for a schedule of compliance.
- A compliance schedule would require compliance with WQBELs based on the core standards as soon as possible, taking into account the dischargers' technical ability to achieve compliance with such WQBEL.
- If the schedule of compliance exceeds one year from the date of permit issuance, reissuance or modification, the schedule would set forth interim requirements and dates for their achievement. The dates of completion between each requirement would not exceed one year. If the time necessary for completion of any requirement is more than one year and is not readily divisible into stages for completion, the permit would, at a minimum, specify dates for annual submission of progress reports on the status of interim requirements.
- In no event would EPA issue a schedule of compliance for a point source discharge which exceeds five years from the date of permit issuance, reissuance, or modification of the permit which initiates the compliance schedule.
- If a schedule of compliance exceeds the term of a permit, interim permit limits effective during the permit would be included in the permit and addressed in the permit's fact sheet or statement of basis. The administrative record for the permit would reflect final permit limits and final compliance dates. Final compliance dates for final permit limits, which do not occur during the term of the permit, would be established to occur within five years from the date of issuance, reissuance or modification of the permit which initiates the compliance schedule.

EPA invites comment on the inclusion of compliance schedules, and on the compliance schedule provisions in the proposed core standards at proposed 40 CFR 131.40(i)(2). In particular, EPA invites comment on whether more detailed provisions consistent with those in § 131.38(e) and outlined above should be included in the final rule.

VII. How would the core standards be implemented in decisions?

A. What process would be used to interpret the core standards?

In interpreting and applying the designated uses, narrative criteria, numeric criteria, antidegradation policy, mixing zone policy, and compliance schedule policy in the proposed rule, EPA would consider available information in the following categories as guidance:

(a) Any water quality standards developed and/or adopted by the Tribe, whether or not the standards have been submitted to EPA under the Clean Water Act, and any information available through consultation with the Tribe concerning current or planned use of water resources in Indian country, such as fish or shellfish consumption patterns, that would aid EPA in understanding actual or planned uses and appropriate criteria.

(b) The water quality standards and implementation procedures applicable in the adjacent State(s) or Tribe(s).

(c) EPA's recommended water quality criteria published under section 304(a) of the Clean Water Act, including updates. The most recent summary of updated criteria appears in 63 FR 68354 (December 10, 1998), and 64 FR 19781 (April 22, 1999) (see also http://www.epa.gov/ost/Standards/wqcriteria.html). EPA intends to publish an updated summary in the near future.

(d) Available data and information concerning the physical, chemical, and biological quality of the waters in Indian country and adjacent waters, and uses that are or have been attained in those waters.

(e) Available technical and scientific information, including site-specific data, that would assist in applying the numeric criteria for priority toxic pollutants, and using the section 304(a) criteria as numeric translators. Examples include hardness, pH, and temperature measurements, water effect ratios, and local bioaccumulation factors.

(f) Any EPA guidance on policy for the water quality standards program, including the Water Quality Standards Handbook.

(g) Provisions of the Water Quality Guidance for the Great Lakes System in 40 CFR part 132, and associated guidance. EPA would use this information to ensure that decisions made implement the core Federal water quality standards are consistent with the minimum water quality standards, antidegradation policies, and implementation procedures for the Great Lakes System in 40 CFR part 132 (see further discussion in step 9 below).

(h) Any other readily available relevant information or scientifically defensible data and information.

The following step-wise procedure is one approach EPA may use in consultation with the Tribe and the adjacent State(s) and Tribe(s) to evaluate the above information to make decisions under the Clean Water Act. The order of most of the steps could be changed without affecting the decisions made.

Step 1. Consult with the appropriate Tribe about uses and criteria. EPA would consult with the Tribe to gather information under category (a) listed in this section. For example, Tribes that are in the process of applying for authority to administer water quality standards programs under Clean Water Act section 518 may have developed draft standards, including designated uses, narrative and numeric criteria, and antidegradation policies. Also, a Tribe may have developed and adopted standards or equivalent provisions under Tribal authorities. During consultation EPA would review any standards and other information from the Tribe that could be used to ascertain current and/or planned uses of the waterbody and appropriate criteria. Where appropriate, EPA would conduct a field investigation to confirm existing uses or attainability of uses planned, developed, or adopted by the Tribe.

Step 2. Identify the applicable criteria and uses of the adjacent State(s) or Tribe(s). EPA would review the water quality standards applicable in the adjacent State(s) or Tribe(s), category (b) previously discussed, and consult with the State(s) or Tribe(s) if necessary, to identify which standards are applicable to waterbodies in the State(s) or Tribe(s) that are immediately

adjacent to, or in other ways similar to, the Indian country water in question.

Step 3. Determine which uses are to be applied. EPA would review the uses identified in steps 1 and 2, together with ambient water quality data and information in category (d) above, to determine which uses should be applied as designated uses. Consistent with EPA's current regulations in § 131.10, EPA would at a minimum interpret any uses that are found to be existing uses as designated uses to be applied. EPA would evaluate which "fishable/swimmable" uses (that is, any uses that provide for the protection and propagation of fish, shellfish, and wildlife, or for recreation in and on the water) and which cultural and traditional uses are attainable, and would apply them as designated uses consistent with section 101(a) of the Clean Water Act. Fishable and swimmable uses would be presumed to be attainable unless information is presented or uncovered to indicate that they are unattainable. See Idaho Mining Association v. Browner, 90 F. Supp 2d 1078 (D. Idaho 2000).

EPA requests comments on this "rebuttable assumption" approach. In determining which uses to apply, if a highly protective use, such as "cold water fishery," were found not to be attainable using the general criteria of current § 131.10(g), then EPA would identify the next most protective aquatic life use, such as "limited cold water fishery" or "warm water fishery." In other words, EPA would apply the next "most stringent" level of protection that is attainable. Each next most protective use would be evaluated as above, until an attainable use was found. EPA would then apply that attainable, next most protective use as a designated use.

Finally, EPA would evaluate the other uses specified in proposed § 131.40(e) – public water supply, agricultural use, industrial use, and navigational use – to determine whether any were appropriate. For example, EPA could find that an agricultural use has been identified as necessary or planned by the Tribe, and that it is attainable and otherwise appropriate, and apply it as a designated use.

EPA requests comments on this approach for determining which uses to apply.

EPA's current regulations allow for a State to adopt a variance policy, subject to EPA review and approval, as part of their water quality standards. 40 CFR 131.13. EPA has not included such a provision in the proposed core standards. The proposed standards allow EPA, in implementing the standards in individual decisions, to take into account the attainability of a designated use. In making designated use decisions, EPA would apply essentially the same decision criteria identified in existing § 131.10(g) that are used in issuing variances for NPDES-permitted dischargers. For this reason, EPA believes a variance provision in proposed § 131.40(i) would be redundant.

EPA requests comment on whether the Regional Administrator should be given the discretion to apply a discharger-specific variance provision in proposed § 131.40(i).

Step 4. Determine the appropriate interpretation of narrative criteria to protect the uses. EPA would identify the appropriate interpretation of the narrative criteria to protect the designated uses identified in step 3. EPA would consider EPA's recommended section 304(a) water quality criteria in category VII.A(c), all EPA-approved water quality criteria in State or Tribal water quality standards in category VII(b), all Tribe-developed criteria that are scientifically defensible in category VII.A(a), and, for Indian country waters in the Great Lakes System, EPA's criteria and criteria methodologies in part 132 in category VII.A(g). In determining how to interpret the narrative criteria, EPA will make site-specific adjustments as needed, following EPA's site-specific criteria guidance in *Water Quality Standards Handbook: Second Edition*, EPA-823-B-94-005, August 1994, and related program guidance.

Step 5. Determine the appropriate numeric criteria for priority toxic pollutants to be applied. EPA would evaluate available information, including the scientific and technical information in category VII.A(e), to determine whether any site-specific modifications are needed to the criteria in proposed § 131.40(g)(1) in order to protect the designated uses.

Step 6. Determine whether a mixing zone would be used to derive permit limits. EPA would review whether a mixing zone could be used in developing wasteload allocations for implementation in NPDES permits or in developing load allocations. In making this decision, EPA would follow its own guidance in the *Water Quality Standards Handbook* and related program guidance. Mixing zones are discussed further in section VI.D of this preamble.

Step 7. Determine whether a compliance schedule would be necessary. In the case of the issuance of an NPDES permit, EPA would consider whether a compliance schedule is necessary. Compliance schedules are discussed further in section VI.D of this preamble.

Step 8. Ensure that the antidegradation policy would be implemented. EPA would evaluate whether the action (for example, a NPDES permit issuance), after imposing any necessary controls based on the designated uses, criteria, and mixing zones from steps 1-5, would need further analysis to ensure that the antidegradation policy of the proposed core standards would be implemented. For example, if an NPDES permit derived from and complying with steps 1-5 would increase the permittee's discharges and lower water quality in a high quality water, then EPA would need to conduct an antidegradation analysis to determine whether the lowering of water quality was necessary to accommodate important economic or social development in the area in which the waters are located. If not, the permit conditions might need to be changed, or the permit might not be able to be issued. In implementing this step, EPA would follow its own guidance in the *Water Quality Standards Handbook* and related program guidance. Antidegradation is discussed further in section VI.C.

Step 9. Ensure that the Great Lakes Guidance would be implemented. Section 118 of the Clean Water Act required EPA to publish water quality guidance on minimum water quality standards, antidegradation policies, and implementation procedures for the Great Lakes System, and that States adopt water quality standards, antidegradation policies, and implementation procedures consistent with the guidance. In 1995 EPA published a final rule implementing this requirement at 40 CFR 132, 60 FR 15366 (March 23, 1995). With regard to Tribes, the rule applies specifically to those Tribes that have adopted water quality standards under section 518 of the Clean Water Act. EPA believes that Congress intended for all of the waters of the Great Lakes System to be subject to the section 118 water quality guidance for the Great Lakes System, including those waters in Indian country. For this reason, EPA is proposing the inclusion of § 131.40(l). This provision would state that in making decisions under the Clean Water Act based on the water quality standards of this section for waters located in the Great Lakes System, as defined in § 132.2, EPA will ensure that such decisions are consistent with the water quality standards, antidegradation policies, and implementation procedures for the Great

Lakes System in 40 CFR part 132, in addition to the water quality standards of proposed § 131.40. This provision means that, in interpreting the core standards when making a decision affecting waters in Indian country in the Great Lakes System, EPA would ensure that any water quality-based controls would be as protective as those based on 40 CFR part 132.

EPA requests comment on proposed § 131.40(l). In particular, EPA invites comments on whether EPA decisions in Indian country in the Great Lakes System should be subject to the provisions of part 132, even in cases where Tribes have not adopted water quality standards under sections 303 and 518 of the Clean Water Act.

Step 10. Implement the decision based on steps 1 through 9. Based on the results of steps 1 through 9, EPA would develop its interpretation of the core standards for use in the implementation decision at hand. EPA would follow its regulations regarding public notice and opportunity for public comment in applying its interpretations. In the case of permits to be issued under section 402, and development of total maximum daily loads under section 303(d), EPA would provide notice and an opportunity for public comment on such interpretation and related implementation decision. For example, in the public notice process required for a NPDES permit, EPA would explain how it interpreted the core water quality standards in developing any water quality-based effluent limits.

EPA requests comments on the above step-wise procedure. EPA is particularly interested in whether the steps outlined would ensure that the core standards are implemented properly in EPA's decisions. EPA is interested in comments on each of the steps. Additionally, EPA is interested in comments on whether the step-wise procedure or other guidance on implementation of the core standards in Clean Water Act decisions should be included in the text of the final rule.

EPA also recognizes that this step-wise procedure provides a description of what steps would generally be accomplished, but does not provide detail on how they are to be accomplished. EPA intends to develop further implementation guidance. EPA requests comments on whether EPA should develop more detailed guidance on this procedure, whether such guidance is needed by parties other than EPA, and if guidance should be developed, what specific areas or topics should receive the highest priority for development of detailed guidance.

B. How would specific decisions be made?

Under the Clean Water Act, water quality standards are used as a basis for effluent limitations in NPDES permits, for ensuring Clean Water Act section 404 dredged or fill material permits protect water quality, for issuing certifications under Clean Water Act section 401 and for developing total maximum daily loads (TMDLs).

1. NPDES permits

Under section 402 of the Clean Water Act, any facility that discharges pollutants (other than dredged or fill material) from a point source into the waters of the United States must obtain and comply with an NPDES permit. EPA regulations that describe the requirements and procedures for the development of NPDES permits are contained in 40 CFR Parts 122, 124, 125 and 129. Effluent limitations for pollutants that are contained in NPDES permits are either the more stringent of technology-based limitations or water quality-based limitations. Technology-based limitations are developed by NPDES permitting authorities to represent the level of pollutant reduction that can be achieved after application of available treatment technologies. EPA promulgates technology-based limits in effluent limitation guidelines that provide minimum national requirements that industrial discharges must meet. Discharges from municipal publically-owned treatment works must meet effluent limits based upon secondary treatment technology. Where technology-based effluent limitations are not sufficient to assure attainment of water quality standards (including water quality standards in downstream jurisdictions), water quality-based effluent limitations are required by the Clean Water Act. Water quality-based limitations are derived from the applicable water quality standards. See Clean Water Act section 301(b)(1)(C); 40 CFR 122.4(a) and 122.44(d).

EPA believes that Congress intended that water quality-based limitations in the NPDES program should derive from all applicable water quality standards, including Federal standards promulgated by EPA as well as standards adopted by States and authorized Tribes. The current section 402 NPDES program regulations at 40 CFR 122.4(d) mention "the applicable water quality requirements of all affected States" (emphasis added). In this proposal, consistent with Clean Water Act section 301(b)(1)(C) and 40 CFR 122.4(a) and 122.44(d)(1), EPA is proposing to clarify this provision to read "the water quality requirements applicable to all affected waters." This would clarify that all applicable water quality standards, including Federally-promulgated standards must, be protected by the NPDES program.

a. NPDES permits issued by EPA

EPA is the authority for issuing NPDES permits in Indian country unless and until EPA authorizes a Tribe (or State) to implement the NPDES permitting program for discharges in Indian country. 40 CFR 123.1(h); see also 58 FR 67966, 67973-74 (December 22, 1993). When applying core Federal water quality standards in developing and issuing an NPDES permit, EPA would follow the regulations at 40 CFR part 122, including section 122.44(d), and would be guided by procedures in the NPDES Permit Writers Manual (EPA 833-B-96-003, December 1996) and the Technical Support Document for Water Quality Based Toxics Control (EPA/505-2-90-001, March 1991). EPA would ensure public participation when EPA issues NPDES permits for discharges to waters of Indian country, consistent with the requirements at 40 CFR part 124, Subparts A, and D. EPA also would intend to work closely with the affected Tribe when developing and issuing NPDES permits for discharges to waters of Indian country to ensure that Tribal concerns and issues are considered. EPA would also work as appropriate with adjacent States and Tribes, and other interested parties when implementing the standards.

EPA invites comment on the proposed revision to 40 CFR 122.4(d).

b. NPDES permits issued by authorized States or Tribes

Currently, 43 States, and one United States Territory administer the NPDES program in lieu of EPA outside of Indian country. Indian Tribes meeting the requirements of Clean Water Act section 518(e) may seek authorization to administer the NPDES program. EPA regulations that specify how a Tribe can seek authorization to administer the NPDES program are contained in 40 CFR sections 123.31-34. Currently, there are no Tribes that have been authorized to administer the NPDES program.

Where States (or authorized Tribes) issue NPDES permits that may affect Indian country waters covered by the core Federal water quality standards, EPA would be able to ensure compliance with these core Federal

water quality standards through the permit review process. NPDES permits issued by States or by authorized Tribes must ensure compliance with downstream or adjacent water quality standards established by EPA, a State or an authorized Tribe and in effect under the Clean Water Act. See Clean Water Act sections 301(b)(1)(C) and 402(b)(1)(A); 40 CFR 122.4(a) and (d) and 122.44(d)(1).

Under EPA's regulations, States or authorized Tribes seeking to issue NPDES permits which may affect Indian country waters covered by the core Federal water quality standards would need to notify EPA of the draft or proposed permits. State or authorized Tribes implementing EPA-authorized NPDES programs must provide copies of proposed or draft permits to EPA, except where permit review has been waived. 40 CFR 123.43(a)(2). EPA's right to review may not be waived for permits with discharges which "may affect the waters of a State other than the one in which the discharge originates." 40 CFR 123.24(d)(2). EPA interprets this provision to mean that EPA's right to review may not be waived for NPDES permits issued by States or authorized Tribes for discharges which may affect Indian country waters protected by EPA-promulgated standards. EPA is proposing to amend 40 CFR 123.24(d)(2) to clarify that EPA's right to review may not be waived for NPDES permits issued by States or authorized Tribes that may affect Indian country waters covered by Federal water quality standards, including the core Federal water quality standards. EPA, to date, has not waived review of permits with discharges which may affect downstream or adjacent Indian country waters covered by EPA-promulgated standards and believes that it has not provided such waiver under current regulations or under the terms of existing Memorandums of Agreement (MOAs) that EPA approved as part of authorizing State NPDES programs. The regulatory change, however, would clarify a permitting authority's obligation to provide EPA with notice of all such permits.

EPA invites comment on the proposed clarifying amendment to 40 CFR 123(d)(2).

EPA intends to work closely with Tribes to ensure that Tribal concerns and issues are considered when EPA is reviewing NPDES permits issued by States or authorized Tribes affecting Indian country waters covered by the core standards. If EPA determined that a NPDES permit issued by a State or authorized Tribe would not ensure compliance with downstream core Federal water quality standards, the Regional Administrator would be able to object to the permit. See 40 CFR 123.44(c)(1), (7) and (8). A State may not issue an NPDES permit over EPA's objection. Clean Water Act section 402(d)(2), 40 CFR 122.4(c). The State or any other interested person (which EPA interprets to include a Tribe) may request a public hearing on the Regional Administrator's objection. The Regional Administrator must hold a hearing, whenever a hearing is requested by the State or interstate agency that proposed the permit. 40 CFR 123.44 (e). Other requests by an interested person will result in a hearing if the Regional Administrator determines a hearing is warranted by "significant public interest." If the State does not revise the permit to meet EPA's objection, EPA may issue the permit. See Clean Water Act section 402(d)(4); 40 CFR 123.44(h)(2). Indian Tribes that may be affected by a permit issued by a State may also receive notice under the public notice procedures of 40 CFR 124.10(c). EPA encourages affected Indian Tribes to raise any concerns with an upstream NPDES permit issued by a State to both the State and EPA. EPA would follow applicable requirements to ensure public participation and would work, as appropriate, with adjacent States and Tribes, and other interested parties when implementing the standards.

EPA invites comment on the proposed revision to 40 CFR 230.10(b)(1).

2. Section 404 permits for discharges of dredged or fill material

Water quality standards are also used in the Clean Water Act section 404 permit program for discharges of dredged or fill material. Section 404 permits for discharges must include limitations as necessary to meet applicable water quality standards (including standards in a downstream jurisdiction) in effect under the Clean Water Act. See Clean Water Act section 301(b)(1)(C); 40 CFR 230.10(b)(1) and 233.20(a). Section 404 of the Clean Water Act is jointly administered by the EPA and the United States Army Corps of Engineers (the Corps).

EPA believes that Congress intended that section 404 permits for dredged or fill activities must include limitations as necessary to meet all applicable water quality standards, including Federal standards promulgated by EPA as well as standards adopted by States and authorized Tribes. The current section 404 program regulations at 40 CFR 230.10(b)(1) mention only "any applicable State water quality standard" (emphasis added). In this proposal EPA, consistent with Clean Water Act section 301(b)(1)(C) is proposing to clarify this provision to read "any applicable water quality standard." This would clarify that all applicable water quality standards, including Federally-promulgated standards must be protected by the section 404 program.

a. Section 404 permits issued by the Army Corps of Engineers

The Corps is the authority for issuing Clean Water Act section 404 permits for discharge of dredged or fill material in Indian country where no State or Tribe has assumed responsibility for implementing the program. See Clean Water Act sections 404(a), (g)-(i); 40 CFR 233.1(a). Generally, the Corps works closely with both State and Tribal governments to ensure that applicable water quality standards are met in section 404 permitting actions. In evaluating a 404 permit application, the Corps follows the requirements of 40 part CFR 230, commonly called the "Section 404(b)(1) Guidelines" after the Clean Water Act section authorizing their development. Under the Guidelines, section 404 permits may not be issued if the discharge would cause or contribute to a water quality violation or significant degradation of waters of the United States, if a practicable alternative is available with less adverse impacts, or if unavoidable adverse impacts are not minimized to the extent practicable. Because a Corps-issued section 404 permit is a "Federal permit or license," a 401 certification is required. EPA conducts section 401 certifications in Indian country where Tribes do not have the authority to administer the water quality standards program and section 401 authority.

Section 404 permits issued by the Corps for discharges of dredged or fill material upstream or adjacent to Indian country waters must ensure compliance with applicable core Federal water quality standards in affected Indian country waters. See Clean Water Act section 301(b)(1)(C); 40 CFR 230.10(b)(1) and 233.20(a). 40 CFR section 230.10(b)(1) prohibits the issuance of section 404 permits for discharges of dredged or fill material that would cause or contribute to violations of any applicable State or authorized Tribal water quality standards. EPA is proposing to amend this regulation to clarify that, consistent with Clean Water Act section 301(b)(1)(C), section 404 permits also need to ensure compliance with Federal water quality standards, including the core water quality standards in Indian country. The Corps must forward notices of all applications for section 404 permits. See 33 CFR 325.3(b) and (d). If EPA determines

that any section 404 permit would cause or contribute to violation of the core Federal water quality standards in Indian country, EPA provides the Corps its views under 33 CFR part 325, and also may veto the Corps permit under Clean Water Action section 404(c) if EPA determines that the discharge will have an unacceptable adverse impact on aquatic resources. EPA would follow applicable requirements regarding public participation, and would work as appropriate with adjacent States and Tribes, and other interested parties when implementing the standards.

b. Section 404 permits issued by States or Tribes who have assumed the section 404 program

States or eligible Tribes may assume the section 404 program, as described in 40 CFR Part 233. Currently, there are no Tribes that have been approved to administer the section 404 program. State-issued section 404 permits for discharges of dredged or fill material upstream or adjacent to Indian country waters covered by the core Federal water quality standards would need to ensure compliance with those standards. See Clean Water Act section 301(b)(1)(C); 40 CFR 230.10(b)(1) and 233.20(a). Under EPA's regulations, States or Tribes who have assumed the section 404 programs must provide copies of public notices or draft general permits to EPA, except those for which permit review has been waived. 40 CFR 233.51; 40 CFR 233.13(b)(1). EPA's right to review may not be waived for any permits for "discharges with reasonable potential for adverse impacts on waters of another State." 40 CFR 233.51(b)(3). Under this provision, EPA's right to review may not be waived for any State section 404 permits for discharges which may affect downstream or adjacent Indian country waters covered by EPA-promulgated standards. Nonetheless, EPA is proposing to amend this provision to make clear that EPA's right to review may not be waived for any State section 404 permits that may affect waters covered by Federal water quality standards, including the core Federal water quality standards in Indian country.

EPA invites comment on its clarifying amendment to 40 CFR 233.51(b)(3).

Under 40 CFR 233.50, the EPA Regional Administrator is able to object to a State or Tribe-issued section 404 permit if the permit would not ensure compliance with the applicable standards, including the core Federal standards in Indian country. A State or Tribe that has assumed the section 404 program may not issue a section 404 permit over EPA's objection. States, Tribes, or any other interested person may request a public hearing on the Regional Administrator's objection. The Regional Administrator must hold a hearing whenever requested by the entity proposing to issue the permit, or if warranted based on significant public interest. If a State or Tribe that has assumed section 404 authority does not deny the permit or revise the permit in accordance with EPA's objection, processing of the permit application becomes the responsibility of the Corps of Engineers as described in 40 CFR 233.50(j). EPA would provide comments to the Corps of Engineers under 40 CFR 121.30 if EPA determines that the proposed permit would cause or contribute to a violation of the core Federal water quality standards in Indian country. EPA would work closely with the affected Tribe in determining if a proposed 404 permit ensures compliance with the core Federal water quality standards, regardless of whether the permit is being processed by the Corps of Engineers or by an authorized State or Tribe. EPA would follow applicable requirements regarding public participation, and would work as appropriate with adjacent States and Tribes, and other interested parties when implementing the standards.

3. Federal licenses or permits subject to Clean Water Act section 401

Section 401(a)(1) of the Clean Water Act requires applicants for Federal licenses or permits that may result in a discharge into navigable waters to obtain certification that the discharge will comply with, among other things, the applicable water quality standards. EPA regulations that address the section 401 certification process are contained in 40 CFR part 121. Examples of activities that require section 401 certifications include NPDES permits issued by EPA, permits for the discharge of dredged or fill material issued by the Corps of Engineers under section 404 of the Clean Water Act, and Federal Energy Regulatory Commission (FERC) licenses for the operation of dams under the Federal Power Act.

EPA, through the Regional Administrator, would be the Agency authorized to issue or deny section 401 certifications for Federal licenses and permits in Indian country with respect to the core Federal water quality standards. See 40 CFR 121.1(e) and 121.21.

Pursuant to 40 CFR 121.23, the Regional Administrator would notify the appropriate Tribe and other affected parties (State, county and municipal authorities, heads of agencies responsible for water quality improvement and other interested parties) by letter or by notice in a local newspaper (where a notice by mail is not practical) when an action requiring section 401 certification is requested. When granting or denying certification for discharges that originate in Indian country waters covered by the core Federal water quality standards, the Agency would work closely with the affected Tribe and solicit input from the Tribe in determining whether the activity complies with the core water quality standards. EPA would notify the Tribe and other affected parties, and would work as appropriate with adjacent States and Tribes, and other interested parties in determining whether the activity complies with the core standards.

As discussed previously, section 301(b)(1)(C) of the Clean Water Act makes clear that section 402 and 404 permits for activities upstream from and/or adjacent to Indian country would need to ensure compliance with core Federal water quality standards applicable to affected Indian country waters. EPA can use the process described for reviewing and objecting to permits to address section 402 and 404 permits issued for discharges to waters upstream of Indian country waters. For upstream or adjacent Federal permits or licenses other than permits under Clean Water Act sections 402 and 404 for discharges to waters upstream from Indian country waters, EPA proposes to use the process described in this section to ensure these activities will not lead to violations of the core Federal water quality standards in the downstream jurisdiction.

Under Clean Water Act section 401(a)(2), and the implementing regulations at 40 CFR part 121, the Regional Administrator is authorized to act as an intermediary to ensure that discharges that originate in an upstream jurisdiction that the Regional Administrator determines may affect water quality in other jurisdictions will comply with the water quality standards. Under the Clean Water Act section 401(a)(2) process, upon receipt of an application for a Federal license or permit which may result in a discharge of pollutants into navigable waters of the United States, the Federal agency must forward copies to the Regional Administrator 40 CFR 121.11(a); see also Clean Water Act section 401(a)(2). Currently, when EPA receives notification of a Federal permit or license application, the Agency reviews the application to determine whether the discharge may cause any violation of another

State's water quality standards (or a Tribe treated in the same manner as a State). EPA then notifies the other affected State within 30 days. The affected State has a 60-day opportunity to raise its objection to the issuance of the license or permit to EPA, and further, to request a public hearing to discuss the objections. The Federal agency issuing the Federal license or permit must hold a hearing if requested and must impose conditions to ensure that the other affected State water quality standards are met. If imposition of such conditions cannot insure such compliance, the Federal license or permit cannot be issued under Clean Water Act section 401(a)(2).

For Federal licenses or permits (other than those issued under Clean Water Act sections 402 and 404) which may affect downstream or adjacent Indian country waters covered by Federal water quality standards, EPA proposes to use the process in section 401(a)(2) to help ensure that the core Federal water quality standards are met. EPA proposes to support this approach through a proposed rule change to 40 CFR part 121 (regulations regarding Clean Water Act section 401 certifications). Pursuant to the proposed regulatory change, if the Regional Administrator determines that the Federal license or permit may result in a violation of the core Federal water quality standards in place in adjacent or downstream waters, the Regional Administrator would consider, in consultation with the affected Tribe, whether EPA may treat the Tribe in the same manner as a State for the limited purpose of playing the role of an affected State under Clean Water Act section 401(a)(2). EPA would be authorized to treat a Tribe in the same manner as a State for purposes of section 401(a)(2) if the Tribe meets the eligibility criteria contained in section 518 of the Clean Water Act. EPA proposes to add a new § 121.17 to its regulations implementing Clean Water Act section 401 which would allow EPA to treat a Tribe in the same manner as a State for the limited purpose of the Tribe playing a role under section 401(a)(2). The Tribe would need to request such treatment in writing and meet the eligibility criteria contained in Clean Water Act section 518. EPA would make this determination on a case-by-case basis, but generally expects that most Tribes would be able to meet these criteria for the limited purpose of playing the role of an affected State under section 401(a)(2).

If EPA treats the Tribe in the same manner as a State for section 401(a)(2) purposes, EPA would have 30 days to determine whether the discharge may affect the quality of water in Indian country and notify the Tribe. The Tribe, in consultation with EPA, would then have a 60-day opportunity to evaluate whether the upstream or adjacent Federal license or permit would lead to a violation of the core Federal water quality standards and, if so, notify EPA and the licensing or permitting agency of its objections in writing and request a hearing. The Federal agency issuing the Federal license or permit must hold a hearing if requested. EPA and the Tribe would then each be able to provide recommendations to the Federal agency, and that agency must impose conditions to ensure that its Federal license or permit does not violate the standards. If conditions cannot be imposed to ensure such compliance, the Federal permit or license cannot be issued under section 401(a)(2). In cases where the Tribe does not wish to be treated in the same manner as a State for this purpose, or the Tribe does not meet the eligibility criteria in proposed 40 CFR 121.17, EPA would be able to use its review and advice process under 40 CFR 121.30 to inform the Federal agency about potential effects relative to the proposed licensed or permitted activity on the downstream or adjacent Indian country waters and applicable water quality standards. EPA would work, as appropriate, with adjacent States and Tribes, and other interested parties in determining whether the activity complies with the core standards.

EPA invites comments on the proposed addition of 40 CFR 121.17.

4. Total maximum daily loads

Water quality standards also provide the basis for identifying impaired waters (waters not attaining the applicable standards) and developing TMDLs pursuant to Clean Water Act section 303(d). Under section 303(d)(1)(A), States and authorized Tribes must identify waterbodies that do not meet applicable water quality standards after the application of technology-based controls. Waterbodies on the section 303(d) list are then prioritized for TMDL establishment. EPA's regulations define a TMDL as the sum of wasteload allocations for point sources, load allocations for nonpoint sources and natural background, and a margin of safety to account for uncertainty while taking into account seasonal variation 40 CFR 130.2. TMDLs are often derived through mathematical models that quantify the pollutant loads from point and nonpoint sources that can be introduced into a waterbody while still attaining applicable water quality standards.

For purposes of determining whether a waterbody is impaired and should be included on the section 303(d) list, EPA regulations require consideration of all existing and readily available water quality-related data and information 40 CFR 130.7(b)(5). This may include physical, chemical and biological data, including fish and shellfish tissue concentration data, where such data is existing and readily available. States and authorized Tribes generally collect several types of data and information to help determine if waterbodies are attaining or maintaining applicable water quality standards. EPA would also consider all existing and readily available water quality-related data and information to determine if the core Federal water quality standards are being attained.

TMDLs specify the amount of a particular pollutant that may be present in a waterbody, allocate allowable pollutant loads among sources, and provide a mechanism to attain and maintain water quality standards. TMDLs are established for waterbody and pollutant combinations, where the impairment is from point sources, nonpoint sources, or a combination of both. EPA notes that the Clean Water Act does not require States or authorized Tribes to regulate nonpoint sources of pollution through enforceable controls, and EPA cannot require such controls.

In establishing lists of impaired waterbodies and TMDLs in Indian country, EPA would provide for full and meaningful public participation in both the listing and TMDL development processes. EPA would work closely with any affected Tribe in establishing lists of impaired waterbodies and TMDLs for Indian country waters covered by the core Federal water quality standards.

VIII. What will be the benefits of implementing the core standards?

Water quality standards serve as the foundation for the water quality-based approach to pollution control and are a fundamental component of watershed management. Water quality standards are essential to a wide range of actions under the Clean Water Act that can protect surface water, including setting and revising water quality goals for watersheds and individual waterbodies; monitoring to assess attainment of water quality goals; establishing water quality-based permit limits for point source dischargers under the NPDES; providing the basis for establishing TMDLs, "waste load

allocations" for point sources of pollution, and "load allocations" for natural background and nonpoint sources of pollution; and ensuring through certifications under section 401 of the Clean Water Act that discharges from activities requiring Federal licenses or permits are consistent with water quality goals. Water quality standards can be used as a basis for States and Tribes (or EPA where a Tribe is not administering the water quality standards program) to protect water quality from upstream discharges.

Core Federal water quality standards can provide an important tool for Tribes and EPA to use in making defensible, site-specific decisions that protect Tribal waters. The primary benefit of core Federal water quality standards would be to ensure that Indian country waters that are currently without EPA-approved Tribal standards have direct water quality-based protection under the Clean Water Act. As discussed previously, many of the Clean Water Act's mechanisms for protecting water quality rely on water quality standards as the foundation for water quality-based decisions. Without applicable water quality standards, these mechanisms are limited.

Core Federal water quality standards would provide the basis for including water quality-based limitations or conditions in permits or certifications for discharges within Indian country. In addition, core Federal water quality standards would provide the basis to ensure that discharges occurring upstream from Indian country waters meet water quality requirements in Indian country. For example, if an upstream permit applicant proposes a pollution discharge that would cause or contribute to the non-attainment of the core water quality standards, that discharge would not be allowed.

Furthermore, the core water quality standards would provide a basis for establishing TMDLs for Indian country waters. A TMDL specifies the amount of a pollutant that needs to be reduced to meet water quality standards, allocates allowable pollutant loadings among sources in a watershed, and provides a basis for taking actions needed to restore a waterbody.

IX. Will there be additional phases of rulemaking to address core water quality standards in Indian country?

EPA would consider subsequent phases of rulemaking that could, for example, add uses of importance to particular Tribes that may not be addressed by the first phase; add additional numeric criteria; set water quality standards specifically tailored to a particular Tribe; or establish waterbody classifications for ONRWs. EPA is also considering how to address off-reservation allotments in the future.

EPA invites comments on whether there should be subsequent phases of rulemaking, and if so, what they should be.

X. What are the other proposed provisions regarding Federal water quality standards?

In this proposal, EPA is including clarifying amendments to existing regulations for the National Pollutant Discharge Elimination System (NPDES) and section 404 dredged or fill material programs.

EPA believes that Congress intended that water quality-based limitations in the NPDES program should derive from all applicable water quality standards, including Federal standards promulgated by EPA as well as standards adopted by States and authorized Tribes. The current section 402 NPDES program regulations at 40 CFR 122(d) mention only "the applicable water quality requirements of all affected States" (emphasis added). In this proposal, consistent with Clean Water Act section 301(b)(1)(C), EPA is proposing to clarify this provision to read "the water quality requirements applicable to all affected waters." This would clarify that all applicable water quality standards, including Federally-promulgated standards, must be protected by the NPDES program. See also section VII.B.1 of this preamble.

EPA invites comment on the proposed revision to 40 CFR 122.4(d).

EPA believes that Congress intended that section 404 permits for discharge of dredged or fill materials must include limitations as necessary to meet all applicable water quality standards, including Federal standards promulgated by EPA as well as standards adopted by States and authorized Tribes. The current section 404 program regulations at 40 CFR 2301.10(b)(1) mention only "any applicable State water quality standard" (emphasis added). In this proposal, consistent with Clean Water Act section 301(b)(1)(C), EPA is proposing to clarify this provision to read "any applicable water quality standard." This would clarify that all applicable water quality standards, including Federally-promulgated standards must be protected by the section 404 program. See also section VII.B.2 of this preamble.

EPA invites comment on the proposed revision to 40 CFR 230.10(b)(1).

EPA is also proposing clarifying amendments to 40 CFR 123.24(d)(2) and 233.51(b)(3). These amendments are discussed in sections VII.B.1 and VII.B.2 of this preamble. In addition, EPA is proposing amendments to 40 CFR sections 121.1(h) and 233.1(b) to conform to the proposed core water quality standards rule. These amendments are discussed in section IV.A of this preamble.

XI. Impact Analysis

This proposed rule would have no direct impact on any entity because the proposed rule, once finalized, will simply establish water quality standards, and standards by themselves do not impose any costs. These standards, however, may serve as a basis for development of NPDES permit limits. EPA, as the NPDES permitting authority in Indian country, would retain considerable discretion in implementing standards. Thus, until these water quality standards are implemented, there will be no effect on any entity. Nonetheless, EPA identified 21 major dischargers and 272 minor dischargers with NPDES permits located on Tribal lands throughout the United States that may be affected by future implementation of this proposed rule. Eleven of the 21 permits for major facilities are associated with sewerage systems with an average design flow of 0.5 million gallons per day (mgd) and a maximum design flow of 8 mgd. The remaining major facility permits are associated with electrical services, uranium and vanadium ore, surface coal mining, softwood veneer and plywood, petroleum and coal products, and a federal fish hatchery.

Any NPDES-permitted facility that discharges to waterbodies affected by the proposed rule could potentially incur compliance costs. However, EPA believes that any cost impacts associated with this proposal would be insignificant on a national level because of the limited number and type of facilities affected. In addition, EPA believes that the proposal will have an insignificant cost impact on nonpoint sources, such as agricultural and forestry-related nonpoint sources, although EPA recognizes that controls on these sources may be necessary to achieve designated uses.

EPA invites comment on its conclusions concerning the impact of its proposal.

XII. Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866 (58 FR 51735, October 4, 1993), EPA must determine whether a regulatory action is "significant" and therefore subject to Office of Management and Budget (OMB) review and the requirements of the Executive Order. The Executive Order defines "significant regulatory action" as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of $ 100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Pursuant to the terms of the Executive Order 12866, it has been determined that this rule is a "significant regulatory action." As such, this action was submitted to OMB for review. Changes made in response to OMB suggestions or recommendations will be documented in the public record.

XIII. Regulatory Flexibility Act as Amended by the Small Business Regulatory Enforcement Fairness Act of 1996

The Regulatory Flexibility Act (RFA) as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) (5 U.S.C. 601 et. seq.), generally requires an Agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the Agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations and small governmental jurisdictions.

For purposes of assessing the impacts of today's proposed rule on small entities, small entity is defined as: (1) a small business as defined by the RFA (based on SBA size standards); (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering these economic impacts of today's proposed rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. This proposed rule will not impose any requirements on small entities. The RFA requires analysis of the impacts of a rule on the small entities subject to the rule's requirements. *See United States Distribution Companies v. FERC*, 88 F.3d 1105, 1170 (D.C. Cir. 1996). Today's proposed rule establishes no requirements applicable to small entities, and so is not subject to the regulatory flexibility analysis and other requirements as prescribed by the RFA. ("[N]o [regulatory flexibility] analysis is necessary when an Agency determines that the rule will not have a significant economic impact on a substantial number of small entities that are subject to the requirements of the rule,"*United Distribution at 1170, quoting Mid-Tex Elec. Co-op v. FERC*, 773 F.2d 327, 342 (D.C. Cir. 1985) (emphasis added by *United Distribution* court).) The Agency is thus certifying that today's proposed rule will not have a significant economic impact on a substantial number of small entities, within the meaning of the RFA.

Today's proposed rule, as explained earlier, does not itself establish any requirements that are applicable to small entities. The proposed rule has no direct impact on any small entities, because the proposed rule simply establishes core water quality standards for waters within Indian country, parallel to the Clean Water Act framework currently in effect for State waters. This rule proposes designated uses consistent with the Clean Water Act, narrative water quality criteria to protect those uses and an antidegradation policy. Water quality standards do not subject any party to requirements directly, and thus do not themselves impose any costs. Rather, EPA would need to ensure that any NPDES permits it issues include any limitations on discharges necessary to comply with the applicable water quality standards established in the final rule. In doing so, EPA and other NPDES permit writers would have a number of discretionary choices (e.g., variances, mixing zones) associated with the issuance of an NPDES permit. While EPA's implementation of the final rule may ultimately result in some new or revised NPDES permit conditions for some dischargers, including small entities, EPA's action today does not impose any of these as yet unknown requirements on small entities.

XIV. Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), P.L. 104.4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local and Tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with "Federal mandates" that may result in expenditures to State, local, and Tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation of why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including Tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

Today's proposed rule contains no Federal mandates (under the regulatory

provisions of Title II of the UMRA) for State, local, or Tribal governments or the private sector. The proposed rule imposes no enforceable duty for any State, local or Tribal government or the private sector; rather, this rule proposes designated uses equivalent to those specified in the Clean Water Act, narrative water quality criteria to protect these uses, and an antidegradation policy. The proposed regulation is principally an administrative correction to fill the gap in water quality-based protections for waters within Indian country. The proposed rule provides a framework of water quality protection in Indian country parallel to that currently in effect for State waters to protect waters in Indian country where Tribes have not adopted or are not ready to develop and propose standards of their own for approval under the Clean Water Act. If the final rule becomes effective EPA would interpret the designated uses and narrative criteria on a site-specific basis when establishing NPDES water quality-based effluent limits or other decisions under the Clean Water Act. Thus, these proposed water quality standards do not impose any costs until implemented through NPDES permits or other Clean Water Act enforceable mechanisms. Today's proposed rule is not subject to the requirements of sections 202 and 205 of the UMRA.

EPA has determined that this proposed rule contains no regulatory requirements that might significantly or uniquely affect small governments. Moreover, any water quality standards, including those proposed here, apply broadly to dischargers and are not uniquely applicable to small governments. Thus, this proposed rule is not subject to the requirements of section 203 of UMRA.

XV. Paperwork Reduction Act

This rule imposes no new or additional information collection requirements. Therefore, this rule is not subject to the Paperwork Reduction Act.

XVI. Endangered Species Act

Section 7(a)(2) of the Endangered Species Act (ESA) requires each Federal agency, in consultation with the U.S. Fish and Wildlife Service, or the National Marine Fisheries Service for species under its jurisdiction – collectively, the Services – to ensure that actions authorized, funded or carried out by the Federal agency are not likely to jeopardize the continued existence of any endangered or threatened species listed under the ESA, or result in the destruction or adverse modification of such species' critical habitat (i.e., are not likely to "cause jeopardy").

EPA is considering whether to initiate consultation with the Services under section 7(a)(2) regarding this rule. If the Agency decides to consult, EPA will consider the results of the consultation with the Services in determining whether to include any specific provisions in the final rule related to protection of endangered and threatened species. See, e.g., 60 FR 15384-85 (describing provisions for the protection of endangered and threatened species promulgated by EPA in 40 CFR part 132). EPA requests comment on such potential provisions.

If EPA consults with the Services under section 7 of the ESA on the proposed core standards rule, EPA would be seeking to carry out its responsibilities under the Clean Water Act in a manner that also helps achieve the objectives of the ESA. Obviously, the two statutes promote similar goals, because improving water quality can have beneficial effects on the viability of endangered or threatened aquatic life and wildlife. EPA believes that EPA, States and Tribes should pay particular attention to preventing water quality degradation where it would have detrimental effects on endangered and threatened species. If EPA were to include provisions addressing endangered and threatened species in the final rule, however, EPA would not be seeking to impose any procedural obligation on any States or Tribes to consult with the Services under section 7(a)(2) of the ESA. The section 7 consultation provisions apply only to Federal agencies (although Federal agencies can in certain cases designate non-Federal representatives for purposes of informal consultation). Rather, EPA would be explicitly addressing the need for protecting endangered and threatened species in order to ensure that promulgation of the final rule is consistent with the substantive requirements of section 7(a)(2) of the ESA.

XVII. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law-No.104-113, section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through the Office of Management and Budget, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This proposed rulemaking does not involve technical standards. Therefore, EPA is not considering the use of any voluntary consensus standards. Nevertheless, EPA welcomes comments on this aspect of the proposed rulemaking and specifically invites the public to identify potentially applicable voluntary consensus standards and to explain why such standards should be used in this regulation.

XVIII. Executive Order 13132: Federalism

Executive Order 13132, entitled "Federalism" (64 FR 43255, August 10, 1999) requires EPA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have Federalism implications." "Policies that have Federalism implications" is defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government."

Under section 6 of Executive Order 13132, EPA may not issue a regulation that has Federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or EPA consults with State and local officials early in the process of developing the proposed regulation. EPA also may not issue a regulation that had Federalism implications and that preempts State law, unless the Agency consults with State and local officials early in the process of developing the proposed regulation.

The proposed rule does not have Federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. The proposed rule

would not have substantial direct effects on the States, because the proposed water quality standards would not directly regulate any entity. See sections XI and XIV of this preamble. The proposed rule would not have substantial direct effects on the nature of the relationship between EPA and States generally, because the rule only applies to waterbodies where EPA has not explicitly found State or Tribal jurisdiction to adopt water quality standards under the Clean Water Act. Further the proposed rule would not substantially affect the relationship between the States and EPA, as EPA currently is the permitting authority for NPDES regulated discharges to waters of Indian country. EPA's proposal to specify that the core water quality standards regulations and Federal Clean Water Act permitting programs apply in areas for which a finding is made that the Indian country status is in question would not have "substantial direct effects" on the relationship between EPA and the States or the distribution of power and responsibilities among the various levels of governments. These "in question" areas are areas over which EPA does not believe a State has demonstrated jurisdiction to implement the Clean Water Act. To the extent the proposal has any effect on the relationship between EPA and the States or the distribution of power and responsibility among the various levels of government, any such effects would not be "substantial direct effects"as EPA expects "in question" areas to be a very small percentage of the total areas to be covered by this rule. Thus, the requirements of section 6 of the executive order do not apply to this rule.

Although section 6 of Executive Order 13132 does not apply to this rule, EPA did consult with State and local officials in developing this proposed rule. An opportunity was provided during development of this rule to provide feedback from several organizations that included: the Association of State and Interstate Water Pollution Control Administrators, the National Governor's Association, the National Conference of State Legislatures, the Council of State Governments, the National League of Cities, the U.S. Conference of Mayors, the National Association of Counties, the International City/County Management Association, the National Association of Counties, the International City/County Management Association, the National Association of Towns and Townships, and the County Executives of America. In addition, in the spirit of Executive Order 13132, and consistent with EPA policy to promote communications between EPA and State and local governments, EPA specifically solicits comments on this proposed rule from State and local officials. Further, EPA intends to consult with State or local authorities, as appropriate, in EPA's development and issuance of NPDES permits for discharges to waters of Indian country, or discharges to waters outside of Indian country which may affect Indian country waters.

XIX. Executive Orders 13084 and 13175: Consultation and Coordination with Indian Tribal Governments

On November 6, 2000, the President issued Executive Order 13175 (65FR 67249) entitled, "Consultation and Coordination with Indian Tribal Governments." Executive Order 13175 takes effect on January 6, 2001, and revokes Executive Order 13084 (Tribal Consultation) as of that date. EPA developed this proposed rule, however, during the period when Executive Order 13084 was in effect; thus, EPA addressed Tribal considerations under Executive Order 13084. EPA will analyze and fully comply with the requirements of Executive Order 13175 before promulgating the final rule.

Under Executive Order 13084, EPA may not issue a regulation that is not required by statute, that significantly or uniquely affects the communities of Indian Tribal governments, and that imposes substantial direct compliance costs on those communities, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by the Tribal governments, or EPA consults with those governments. If EPA complies by consulting, Executive Order 13084 requires EPA to provide to the Office of Management and Budget, in a separately identified section of the preamble to the rule, a description of the extent of EPA's prior consultation with representatives of affected Tribal governments, a summary of the nature of their concerns, and a statement supporting the need to issue the regulation. In addition, Executive Order 13084 requires EPA to develop an effective process permitting elected officials and other representatives of Indian Tribal governments "to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities."

EPA has determined that this proposed rule contains no regulatory requirements that might significantly or uniquely affect the communities of Indian Tribal governments. Water quality standards do not impose any directly enforceable requirements on any party. Moreover, any water quality standards, including those proposed here, apply broadly to dischargers and are not uniquely applicable to Indian Tribal governments. In addition, it will not impose substantial direct compliance costs on such communities. Accordingly, the requirements of section 3(b) of Executive Order 13084 do not apply to this rule.

EPA consulted with Tribal governments to permit them to have meaningful and timely input into development of this proposal. The concept for this rule grew from discussions with Tribes, beginning with discussions at meetings of the Tribal Operations Committee in 1998. Both EPA and Tribal members of the Committee suggested the concept of a Federal rule containing water quality standards as an efficient and effective means to establish standards for a large number of waters in Indian country.

In October 1999 EPA circulated a paper, "Core Water Quality Standards for Indian Country," to all Tribes describing the basic concepts for such a rule. During the course of EPA's consultation process, EPA formally consulted with over 235 Tribes from October 1999 through January 2000 in a variety of settings that included face-to-face meetings, workshops, forums, and conference calls. Based on these discussions and consultation with Tribes, including written comments from over 70 Tribes, EPA decided to develop this proposed rule. The proposal is based on the October 1999 concept paper, as modified to reflect Tribal and other input.

XX. Executive Order 13045: Protection of Children from Environmental Health Risks and Safety Risks

Executive Order 13045: Protection of Children from Environmental Health Risks and Safety Risks (62 FR 19885, April 23, 1997) applies to any rule that: (1) is determined to be "economically significant" as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonable feasible alternatives considered by the Agency.

While this rule is not subject to the Executive Order because it is not economically significant as defined in Executive Order 12866, we nonetheless have reason to believe that the environmental health or safety risk addressed by this action may have a disproportionate effect on children. As a matter of EPA policy, we therefore have assessed the environmental health or safety effects of ambient water quality criteria on children.

In the absence of this rule, there may be particular risks to children. EPA believes that children are protected by the human health criteria contained in this rule. Children are protected against other less sensitive adverse health endpoints due to the conservative way that the RfDs are derived. An RfD is a public health protective endpoint. It is an amount of a chemical that can be consumed on a daily basis for a lifetime without expecting an adverse effect. RfDs are based on sensitive health endpoints and are calculated to be protective for sensitive human sub-populations including children. If the basis of the RfD was due to an acute or shorter-term developmental effect, EPA uses exposure parameters other than those indicated above. Specifically, EPA uses parameters most representative of the population of concern (e.g., the health criteria for nitrates based on infant exposure parameters). For carcinogens, the risk assessments are upper bound one in a million (10^{-6}) lifetime risk numbers. The risk to children is not likely to exceed these upper bounds estimates and may be zero at low doses. The exposure assumptions for drinking water and fish protect children because they are conservative for infants and children. EPA assumes 2 liters of untreated surface water and 6.5 grams of freshwater and estuarine fish are consumed each day. EPA believes the adult fish consumption assumption is conservative for children because children generally consume marine fish not freshwater and estuarine fish.

The public is invited to submit or identify peer-reviewed studies and data, of which the Agency may not be aware, that indicates these water quality standards are not adequate to protect children's health.

XXI. Plain Language Directives

The President's memorandum of June 1, 1998, requires each agency to write all rules in plain language. We invite your comments on how to make this proposed rule easier to understand. For example:

- Have we organized the material to suit your needs?
- Are the requirements in the rule clearly stated?
- Does the rule contain technical language or jargon that isn't clear?
- Would a different format (grouping and order of sections, use of headings, paragraphing) make the rule easier to understand?
- Would more (but shorter) sections be better?
- What else could we do to make the rule easier to understand?

List of Subjects

40 CFR Part 121

Environmental protection, Administrative practice and procedure, Intergovernmental relations, Water pollution control.

40 CFR Part 122

Environmental protection, Administrative practice and procedure, Confidential business information, Hazardous substances, Reporting and recordkeeping requirements, Water pollution control.

40 CFR Part 123

Environmental protection, Administrative practice and procedure, Confidential business information, Hazardous substances, Indians - lands, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements, Water pollution control.

40 CFR Part 131

Environmental protection, Reporting and recordkeeping requirements, Water pollution control.

40 CFR Part 230

Environmental protection, Water pollution control.

40 CFR Part 233

Environmental protection, Administrative practice and procedure, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements, Water pollution control.

Dated: January 18, 2001

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Carol M. Browner,
Administrator.

For the reasons set forth in the preamble, EPA proposes to amend 40 CFR parts 121, 122, 123, 131, 230, and 233.

PART 121–STATE CERTIFICATION OF ACTIVITIES REQUIRING A FEDERAL LICENSE OR PERMIT

1. The authority citation for part 121 is revised to read as follows:

Authority: Sec. 21(b) and (c), 84 Stat. 91 (33 U.S.C. 1171(b) (1970)); Reorganization Plan No. 3 of 1970; 33 U.S.C. 1251 *et seq*.

SUBPART B–[Amended]

2. Section 121.17 is added to read as follows:

§ 121.17 Eligibility of an Indian Tribe to play the role of an affected State.

The Regional Administrator may treat an Indian Tribe in the same manner as a State for the limited purpose of the Tribe playing the role of an affected State under Clean Water Act section 401(a)(2) if the Tribe requests such treatment in writing and the Regional Administrator determines that the Tribes meets the eligibility requirements of § 131.8(a)(1) through (a)(3) of this chapter, and the Tribe is reasonably expected to be capable, in the Regional Administrator's judgment, of carrying out the functions of playing the role of an affected State under Clean Water Act section 401(a)(2) in a manner consistent with the terms and purposes of the Clean Water Act and applicable regulations.

PART 122--EPA ADMINISTERED PERMIT PROGRAMS: THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

1. The authority citation for part 122 continues to read as follows:

Authority: 33 U.S.C. 1251 *et seq*.

SUBPART A–[Amended]

2. Section 122.4 is amended by revising paragraph (d) to read as follows:

§ 122.4 Prohibitions (applicable to State NPDES programs, see § 123.25).

* * * * *

(d) When the imposition of conditions cannot ensure compliance with the applicable water quality requirements for all affected waters;

* * * * *

PART 123--STATE PROGRAM REQUIREMENTS

1. The authority citation for part 123 is revised to read as follows:

Authority: 33 U.S.C. 1251 *et seq*.

SUBPART A–[Amended]

2. Section 123.1 is amended by adding a sentence to the end of paragraph (h) to read as follows:

§ 123.1 Purpose and scope.

* * * * *

(h) * * * For purposes of the NPDES program in parts 122 and 123 of this chapter, EPA will treat areas for which EPA determines the Indian country status is in question as Indian lands.

* * * * *

3. Section 123.24 is amended by revising paragraph (d)(2) to read as follows:

§ 123.24 Memorandum of Agreement with the Regional Administrator.

* * * * *

(d) * * *

(2) Discharges which may affect the waters of a State other than the one in which the discharge originates or waters in Indian country subject to Federally promulgated water quality standards;

* * * * *

PART 131–WATER QUALITY STANDARDS

1. The authority citation for part 131 continues to read as follows:

Authority: 33 U.S.C. 1251 *et seq*.

SUBPART A–[Amended]

2. Section 131.4 is amended by adding a note at the end of paragraph (c) to read as follows:

§ 131.4 State authority.

* * * * *

(c) * * *

Note to paragraph (c): Section 121.17 of this chapter also provides that under certain circumstances the Regional Administrator may treat an Indian Tribe in the same manner as a State for the limited purpose of the Tribe playing the role of an affected State under Clean Water Act section 401(a)(2).

SUBPART D–[Amended]

3. Section 131.40 is added to read as follows:

§ 131.40 Core Federal Water Quality Standards for Waters of Indian country.

(a) To what waters of the United States do these standards apply? (1) These Federal water quality standards apply to all waters of the United States in Indian country except:

(i) Indian country waters for which EPA has promulgated other Federal water quality standards;

(ii) Indian country waters where EPA has explicitly found that a State or Tribe has jurisdiction to adopt water quality standards, and State or Tribal water quality standards are effective under the Clean Water Act;

(iii) Indian country waters on off-reservation allotments; and

(iv) Indian country waters of Tribes for which EPA approves an exclusion from applicability under paragraph (c) of this section.

(2) For purposes of this section, EPA will treat areas for which EPA determines, in consultation with States and Tribes, that the Indian country status is in question as Indian country.

(b) When will these Federal water quality standards become applicable?

These Federal water quality standards will become the applicable water quality standards for the waters identified in paragraph (a) of this section on [210 days after effective date of the final rule].

(c) How may additional Indian country waters of a Tribe be excluded from the application of these standards? The Indian country waters of a Tribe may be excluded from application of these standards if EPA approves an exclusion under the following procedure:

(1) The Tribe submits a request to be excluded to the Regional Administrator.

(2) The request is based on one of the following:

(i) The Tribe has a plan for adopting water quality standards under the Clean Water Act within a reasonable amount of time;

(ii) The Tribe needs time to consider options, and then will develop a plan for establishing water quality standards under the Clean Water Act within a reasonable amount of time; or

(iii) The Tribe and the EPA Regional Administrator have agreed on a plan for proposing and promulgating individualized Federal standards in a reasonable amount of time.

(3) The Regional Administrator will review and approve or disapprove the Tribe's request.

(4) The Regional Administrator may exclude Indian country waters without a written request from a Tribe in cases where the Regional Administrator determines, in consultation with the Tribe, that:

(i) The Tribe wants to have its Indian country waters excluded from the rule, and

(ii) The Tribe and/or the Tribe and the Regional Administrator have a plan, or intend to develop a plan, for establishing water quality standards under the Clean Water Act within a reasonable time.

(d) What is the purpose of this section?

This section establishes water quality standards for Indian country waters covered in paragraph (a) of this section. These water quality standards define the water quality goals of waterbodies or portions of waterbodies in Indian country by designating the use or uses to be made of the water, by establishing criteria necessary to protect the uses, and establishing an antidegradation policy and other policies.

(e) What are the designated uses?

Wherever attainable, water quality must provide for protection and propagation of fish, shellfish, and wildlife, and for recreation in and on the water, and for cultural and traditional uses. Where such water quality is not attainable, water quality must provide for the most protective use that is attainable. Where a waterbody is appropriate for use as a public water supply, or for use for agricultural purposes, industrial purposes, or navigational purposes, water quality must provide for such use(s).

(f) What are the narrative water quality criteria to protect the designated uses?

All waters shall be free from toxic, radioactive, conventional, non-conventional, deleterious or other polluting substances in amounts that will prevent attainment of the designated uses specified in paragraph (e) of this section.

(g) What are the numeric water quality criteria to protect the designated uses?

(1) Criteria for Priority Toxic Pollutants in Indian Country as described in the following table:

A		B		C		D	
		Freshwater		Saltwater		Human Health (10^{-6} risk for carcinogens) For consumption of:	
# Compound	CAS Number	Criterion Maximum Conc. (c) (ug/L) B1	Criterion Continuous Conc. (c) (ug/L) B2	Criterion Maximum Conc. (c) (ug/L) C1	Criterion Continuous Conc. (c) (ug/L) C2	Water & Organisms (ug/L) D1	Organisms Only (ug/L) D2
1. Antimony	7440360					5.6 a	640 a
2. Arsenic	7440382	340 h,l,r	150 h,l,r	69 h,l	36 h,l		
3. Beryllium	7440417						
4. Cadmium	7440439	4.3 d,h,l,r	2.2 d,h,l,r	42 h,l	9.3 h,l		
5a. Chromium (III)	16065831	570 d,h,l,r	74 d,h,l,r				
5b. Chromium (VI)	18540299	16 h,l,r	11 h,l,r	1,100 h,l	50 h,l		
6. Copper	7440508	13 d,h,l,r	9.0 d,h,l,r	4.8 h,l	3.1 h,l	1,300 k	
7. Lead	7439921	65 d,h,l	2.5 d,h,l	210 h,l	8.1 h,l		

A		B Freshwater		C Saltwater		D Human Health (10^{-6} risk for carcinogens) For consumption of:	
8a. Mercury	7439976	1.4 h,l,r	0.77 h,l,r	1.8 h,l	0.94 h,l		
8b. Methylmercury	22967926						0.3 mg/kg i
9. Nickel	7440020	470 d,h,l,r	52 d,h,l,r	74 h,l	8.2 h,l	610	4,600
10. Selenium	7782492	o,p	5.0	290 h	71 h	170 a	4,200 a
11. Silver	7440224	3.4 d,f,h,l		1.9 f,h,l			
12. Thallium	7440280					0.24 a	0.47 a
13. Zinc	7440666	120 d,h,l	120 d,h,l,r	90 h,l,r	81 h,l	7,400 a	25,000 a
14. Cyanide	57125	22 r,s	5.2 r,s	1	1	140 a	16,000 a,j
15. Asbestos	1332214					7 million fibers/L k	
16. 2,3,7,8-TCDD (Dioxin)	1746016					5.0 E-9 b	5.1 E-9 b
17. Acrolein	107028					190	290
18. Acrylonitrile	107131					0.051 a,b	0.25 a,b
19. Benzene	71432					0.61 - 2.2 a,b	14 - 51 a,b
20. Bromoform	75252					4.3 a,b	130 a,b
21. Carbon Tetrachloride	56235					0.23 a,b	1.6 a,b
22. Chlorobenzene	108907					130 a	1,600 a,j
23. Chlorodibromomethane	124481					0.40 a,b	13 a,b
24. Chloroethane	75003						
25. 2-Chloroethylvinyl Ether	110758						
26. Chloroform	67663						
27. Dichlorobromomethane	75274					0.55 a,b	17 a,b
28. 1,1-Dichloroethane	75343						
29. 1,2-Dichloroethane	107062					0.38 a,b	37 a,b
30. 1,1-Dichloroethylene	75354					0.056 a,b	1.2 a,b
31. 1,2-Dichloropropane	78875					0.50 b	15 b
32. 1,3-Dichloropropene	542756					0.34 a,b	21 a,b
33. Ethylbenzene	100414					530 a	2,100 a
34. Methyl Bromide	74839					47 a	1,500 a
35. Methyl Chloride	74873						
36. Methylene Chloride	75092					4.6 a,b	590 a,b

A		B		C		D	
		Freshwater		Saltwater		Human Health (10^{-6} risk for carcinogens) For consumption of:	
37. 1,1,2,2-Tetrachloroethane	79345					0.17 a,b	4.0 a,b
38. Tetrachloroethylene	127184					0.69 b	3.3 b
39. Toluene	108883					1,300 a	15,000 a
40. 1,2-Trans-Dichloroethyl-ene	156605					140 a	10,000 a
41. 1,1,1-Trichloroethane	71556						
42. 1,1,2-Trichloroethane	79005					0.59 a,b	16 a,b
43. Trichloroethylene	79016					2.5 b	30 b
44. Vinyl Chloride	75014					0.025 a,b	2.4 a,b
45. 2-Chlorophenol	95578					80 a	150 a
46. 2,4-Dichlorophenol	120832					77 a	290 a
47. 2,4-Dimethylphenol	105679					380 a	850 a
48. 2-Methyl-4,6-Dinitrophenol	534521					13	280
49. 2,4-Dinitrophenol	51285					69 a	5,300 a
50. 2-Nitrophenol	88755						
51. 4-Nitrophenol	100027						
52. 3-Methyl-4-Chlorophenol	59507						
53. Pentachlorophenol	87865	19 e,r	15 e,r	13	7.9	0.27 a,b	3.0 a,b,j
54. Phenol	108952					21,000 a	1,700,000 a,j
55. 2,4,6-Trichlorophenol	88062					1.4 a,b	2.4 a,b
56. Acenaphthene	83329					670 a	990 a
57. Acenaphthylene	208968						
58. Anthracene	120127					8,300 a	40,000 a
59. Benzidine	92875					0.000086 a,b	0.00020 a,b
60. Benzo(a)Anthracene	56553					0.0038 a,b	0.018 a,b
61. Benzo(a)Pyrene	50328					0.0038 a,b	0.018 a,b
62. Benzo(b)Fluoranthene	205992					0.0038 a,b	0.018 a,b
63. Benzo(ghi)Perylene	191242						
64. Benzo(k)Fluoranthene	207089					0.0038 a,b	0.018 a,b
65. Bis(2-Chloroethoxy)Meth-ane	111911						

A		B Freshwater		C Saltwater		D Human Health (10^{-6} risk for carcinogens) For consumption of:	
66. Bis(2-Chloroethyl)Ether	111444					0.030 a,b	0.53 a,b
67. Bis(2-Chloroisopropyl)Eth-er	108601					1,400 a	65,000 a
68. Bis(2-Ethylhexyl)Phthalate (x)	117817					1.2 a,b	2.2 a,b
69. 4-Bromophenyl Phenyl Ether	101553						
70. Butylbenzyl Phthalate (w)	85687					1,500 a	1,900 a
71. 2-Chloronaphthalene	91587					1,000 a	1,600 a
72. 4-Chlorophenyl Phenyl Ether	7005723						
73. Chrysene	218019					0.0038 a,b	0.018 a,b
74. Dibenzo(a,h)Anthracene	53703					0.0038 a,b	0.018 a,b
75. 1,2-Dichlorobenzene	95501					420 a	1,300 a
76. 1,3-Dichlorobenzene	541731					320	960
77. 1,4-Dichlorobenzene	106467					63	190
78. 3,3'-Dichlorobenzidine	91941					0.021 a,b	0.028 a,b
79. Diethyl Phthalate	84662					17,000 a	44,000 a
80. Dimethyl Phthalate	131113					270,000	1,100,000
81. Di-n-Butyl Phthalate	84742					2,000 a	4,500 a
82. 2,4-Dinitrotoluene	121142					0.11 b	3.4 b
83. 2,6-Dinitrotoluene	606202						
84. Di-n-Octyl Phthalate	117840						
85. 1,2-Diphenylhydrazine	122667					0.036 a,b	0.20 a,b
86. Fluoranthene	206440					130 a	140 a
87. Fluorene	86737					1,100 a	5,300 a
88. Hexachlorobenzene	118741					0.00028 a,b	0.00029 a,b
89. Hexachlorobutadiene	87683					0.44 a,b	18 a,b
90. Hexachlorocyclopentadi-ene	77474					47 a	1,300 a,j
91. Hexachloroethane	67721					1.4 a,b	3.3 a,b
92. Ideno(1,2,3-cd)Pyrene	193395					0.0038 a,b	0.018 a,b
93. Isophorone	78591					35 a,b	960 a,b

A		B Freshwater		C Saltwater		D Human Health (10^{-6} risk for carcinogens) For consumption of:	
94. Naphthalene	91203						
95. Nitrobenzene	98953					17 a	690 a,j
96. N-Nitrosodimethylamine	62759					0.00069 a,b	3.0 a,b
97. N-Nitrosodi-n-Propylamine	621647					0.0050 a,b	0.50 a,b
98. N-Nitrosodiphenylamine	86306					3.3 a,b	6.0 a,b
99. Phenanthrene	85018						
100. Pyrene	129000					830 a	4,000 a
101. 1,2,4-Trichlorobenzene	120821					35 a	70 a
102. Aldrin	309002	3.0 f		1.3 f		0.000049 a,b	0.000050 a,b
103. alpha-BHC	319846					0.0026 a,b	0.0049 a,b
104. beta-BHC	319857					0.0091 a,b	0.017 a,b
105. gamma-BHC (Lindane)	58899	0.95 r		0.16 f		0.012 b	0.023 b
106. delta-BHC	319868						
107. Chlordane	57749	2.4 f	0.0043 f	0.09 f	0.004 f	0.00080 a,b	0.00081 a,b
108. 4,4'-DDT	50293	1.1 f	0.001 f	0.13 f	0.001 f	0.00022 a,b	0.00022 a,b
109. 4,4'-DDE	72559					0.00022 a,b	0.00022 a,b
110. 4,4'-DDD	72548					0.00031 a,b	0.00031 a,b
111. Dieldrin	60571	0.24 r	0.056 r	0.71 f	0.0019 f	0.000052 a,b	0.000053 a,b
112. alpha-Endosulfan	959988	0.22 f	0.056 f	0.034 f	0.0087 f	62 a	89 a
113. beta-Endosulfan	33213659	0.22 f	0.056 f	0.034 f	0.0087 f	62 a	89 a
114. Endosulfan Sulfate	1031078					62 a	89 a
115. Endrin	72208	0.086 r	0.036 r	0.037 f	0.0023 f	0.059 a	0.060 a,j
116. Endrin Aldehyde	7421934					0.29 a	0.30 a,j
117. Heptachlor	76448	0.52 f	0.0038 f	0.053 f	0.0036 f	0.000078 a,b	0.000079 a,b
118. Heptachlor Epoxide	1024573	0.52 f	0.0038 f	0.053 f	0.0036 f	0.000039 a,b	0.000039 a,b
119. Polychlorinated Biphenyls (PCBs)			0.014 q		0.03 q	0.000064 a,b,q	0.000064 a,b,q

A		B		C		D	
		Freshwater		Saltwater		Human Health (10^{-6} risk for carcinogens) For consumption of:	
120. Toxaphene	8001352	0.73	0.0002	0.21	0.0002	0.00027 a,b	0.00028 a,b
Total Number of Criteria (g)		23	21	23	21	96	95

Footnotes to Table in Paragraph (g)(1):

a. This criterion reflects the Environmental Protection Agency's q1* or RfD, as contained in the Integrated Risk Information System (IRIS) as of August 28, 2000. The fish tissue bioconcentration factor (BCF) from the 1980 Ambient Water Quality Criteria document was retained in each case (unless otherwise noted).

b. This criterion is based on carcinogenicity of 10^{-6} risk.

c. Criterion Maximum Concentration (CMC) equals the highest concentration of a pollutant to which aquatic life can be exposed for a short period of time without deleterious effects. Criterion Continuous Concentration (CCC) equals the highest concentration of a pollutant to which aquatic life can be exposed for an extended period of time (4 days) without deleterious effects. The term "ug/L" means micrograms per liter.

d. Freshwater aquatic life criteria for metals are expressed as a function of total hardness (mg/L) in the waterbody. The equations are provided at paragraph (g)(2)(i) through (iv) of this section. Values displayed in the table correspond to a total hardness of 100 mg/L.

e. Freshwater aquatic life criteria for pentachlorophenol are expressed as a function of pH, and are calculated as follows: Values displayed in the table correspond to a pH of 7.8. CMC = exp(1.005(pH) - 4.869). CCC = exp(1.005(pH) - 5.134).

f. This Criterion is based on 304(a) aquatic life criterion issued in 1980, and was issued in one of the following documents: Aldrin/Dieldrin (EPA 440/5-80-019), Chlordane (EPA 440/5-80-027), DDT (EPA 440/5-80-038), Endosulfan (EPA 440/5-80-046), Endrin (EPA 440/5-80-047), Heptachlor (EPA 440/5-80-052), Hexachlorocyclohexane (EPA 440/5-80-054), Silver (EPA 440/5-80-071). The Minimum data requirements and derivation procedures used to derive the 1980 criteria were different from those in the 1985 Guidelines. For example, a "CMC" derived using the 1980 Guidelines was derived to be used as an instantaneous maximum. If assessment is to be done using an averaging period, the values given should be divided by 2 to obtain a value that is more comparable to a CMC derived using the 1985 Guidelines.

g. These totals simply sum the number of criteria in each column. For aquatic life, there are 24 priority toxic pollutants with some type of freshwater or saltwater, acute or chronic criteria. For human health, there are 99 priority toxic pollutants with either "water + organism" or "organism only" criteria. Note that these totals count chromium as one pollutant even though EPA has developed criteria based on two valence states. In the matrix, EPA has assigned numbers 5a and 5b to the criteria for chromium to reflect the fact that the list of 126 priority pollutants includes only a single listing for chromium.

h. Criteria for these metals are expressed as a function of the water-effect ratio, WER, as defined in paragraphs (g)(2)(vii) through (ix) of this section. CMC = (column B1 or C1 value) x WER; CCC = (column B2 or C2 value) x WER.

i. This criterion is a fish tissue residue criterion based on a total fish consumption weighted rate of 0.0175 kg/day. See EPA-823-R-01-001

j. No criterion for protection of human health from consumption of aquatic organisms (excluding water) was presented in the 1980 criteria document or in the 1986 Quality Criteria for Water. Nevertheless, sufficient information was presented in the 1980 document to allow a calculation of a criterion, even though the results of such a calculation were not shown in the document.

k. The CWA 304(a) criterion for this compound is the MCL or drinking water action level.

l. These freshwater and saltwater criteria for metals are expressed in terms of the dissolved fraction of the metal in the water column. Criterion values were calculated by using EPA's Clean Water Act 304(a) guidance values (described in the total recoverable fraction) and then applying the conversion factors in (g)(2)(v) and (g)(2)(vi).

o. The CMC = 1/[(f1/CMC1) + (f2/CMC2)] where f1 and f2 are the fractions of total selenium that are treated as selenite and selenate, respectively, and CMC1 and CMC2 are 185.9 µg/l and 12.82 µg/l, respectively.

p. This water quality criterion is expressed in terms of total recoverable metal in the water column. It is scientifically acceptable to use the conversion factor (0.996 for the CMC, or 0.922 for the CCC) to convert this criterion to a value that is expressed in terms of dissolved metal. (See 40 CFR part 132.)

q. This criterion applies to total PCBs (that is, the sum of all homolog, all isomer, all congener, or all Aroclor analyses).

r. This criterion has been recalculated pursuant to the 1995 Updates: Water Quality Criteria Document for the Protection of Aquatic Life in Ambient Water, Office of Water, EPA-820-B-96-001, September 1996. See also Great Lakes Water Quality Initiative Criteria Document for the Protection of Aquatic Life in Ambient Water, EPA-80-B-95-004, March 1995.

s. This water quality criterion is expressed as µg free cyanide (as CN)/L.

General Notes to Table in Paragraph (g)(1)

1. This table lists all of EPA's priority toxic pollutants whether or not criteria guidance is available. Blank spaces indicate EPA is not proposing numeric criteria for these contaminants. However, the Regional Administrator should address these contaminants in NPDES permit actions and TMDLs using the narrative criteria in paragraph (f) of this section.

2. The following chemicals have organoleptic-based criteria recommendations that are not included on this chart: zinc, 3-methyl-4-chlorophenol,Acenaphthene, Chlorobenzene, 2-Chlorophenol, Copper, 2,4-Dichlorophenol, 2,4-Dimethylphenol, Hexachlorocyclopentadiene, Pentachlorophenol and Phenol.

3. Freshwater and saltwater aquatic life criteria apply as specified in paragraphs (g)(4) of this section.

4. Because of variations in chemical nomenclature systems, this listing of toxic pollutants does not duplicate the listing in Appendix A to 40 CFR part 423 – 126 Priority Pollutants. EPA has added the Chemical Abstracts Services (CAS) registry numbers, which provide a unique identification for each chemical.

(2) Calculating Metals Criteria. Final CMC and CCC values should be rounded to two significant figures.

(i) CMC = WER x (Acute Conversion Factor) x (exp{m_A[ln(hardness)] + b_A})

(ii) CCC = WER x (Chronic Conversion Factor) x (exp{m_C[ln(hardness)] + b_C})

(iii) Table 1 to paragraph (g)(2) of this section:

Chemical	m_A	b_A	m_C	b_C
Cadmium	1.128	-3.6867	0.7852	-2.715
Chromium III	0.8190	3.7256	0.8190	0.6848
Copper	0.9422	-1.700	0.8545	-1.702
Lead	1.273	-1.460	1.273	-4.705
Nickel	0.8460	2.255	0.8460	0.0584
Silver	1.72	-6.52	--	--
Zinc	0.8473	0.884	0.8473	0.884

Note to Table 1 in Paragraph (g)(2): The term "exp" represents the base e exponential function.

(iv) Table 2 to paragraph (g)(2) of this section.

Metal	Conversion factor (CF) for freshwater acute criteria	CF for freshwater chronic criteria	CF for saltwater acute criteria	CF[a] for saltwater chronic criteria
Antimony	d	d	d	d
Arsenic	1.000	1.000	1.000	1.000
Beryllium	d	d	d	d
Cadmium	0.994 b	0.909 b	0.994	0.994
Chromium (III)	0.316	0.860	--	--
Chromium (VI)	0.982	0.962	0.993	0.993
Copper	0.960	0.960	0.83	0.83
Lead	0.791 b	0.791 b	0.951	0.951
Mercury	0.85	0.85	0.85	0.85
Nickel	0.998	0.997	0.990	0.990
Selenium	--	c	0.998	0.998
Silver	0.85	d	0.85	d
Thallium	d	d	d	d
Zinc	0.978	0.986	0.946	0.946

Footnotes to Table 2 of Paragraph (g)(2): a. Conversion Factors for chronic marine criteria are not currently available. Conversion Factors for acute marine criteria have been used for both acute and chronic marine criteria.

b. Conversion Factors for these pollutants in freshwater are hardness dependent. CFs are based on a hardness of 100 mg/L as calcium carbonate ($CaCO_3$). Other hardness can be used; CFs should be recalculated using the equations in table 3 to paragraph (g)(2) of this section.

c. Bioaccumulative compound and inappropriate to adjust to percent dissolved.

d. EPA has not published an aquatic life criterion value.

Note to Table 2 of Paragraph (g)(2): The term "Conversion Factor" represents the recommended conversion factor for converting a metal criterion expressed as the total recoverable fraction in the water column to a criterion expressed as the dissolved fraction in the water column. See "Office of Water Policy and Technical Guidance on Interpretation and Implementation of Aquatic Life Metals Criteria," October 1, 1993, by Martha G. Prothro, Acting Assistant Administrator for Water, available from the Water Resource Center, U.S. EPA, Mailcode RC4100, 1200 Pennsylvania Avenue NW, Washington, DC, 20460.

(v) Table 3 to paragraph (g)(2) of this section:

	Acute	Chronic
Cadmium	1.136672-[(ln hardness)(0.041838)]	1.101672-[(ln hardness)(0.041838)]
Lead	1.46203-[(ln hardness)(0.145712)]	1.46203-[(ln hardness)(0.145712)]

(vi) For purposes of calculating freshwater aquatic life criteria for metals from the equations in paragraphs (g)(2)(i) through (iii) of this section, for waters with a hardness of 400 mg/l or less as calcium carbonate, the actual ambient hardness of the surface water shall be used in those equations. For waters with a hardness of over 400 mg/l as calcium carbonate, a hardness of 400 mg/l as calcium carbonate shall be used with a default Water-Effect Ratio (WER) of 1, or the actual hardness of the ambient surface water shall be used with a WER. The same provisions apply for calculating the metals criteria for the comparisons provided for in paragraph (g)(2)(ix) of this section.

(vii) The hardness values used shall be consistent with the design discharge conditions established in paragraph (g)(3) of this section for design flows and mixing zones.

(viii) The criteria for metals – compounds #1 through #13 in paragraph (g)(1) of this section – are expressed as dissolved except where otherwise noted. For purposes of calculating aquatic life criteria for metals from the equations in footnote h to the table in paragraph (g)(1) of this section and the equations in paragraphs (g)(2)(i) through (iii) of this section, the water effect ratio is generally computed as a specific pollutant's acute or chronic toxicity value measured in water from the site covered by the standard, divided by the respective acute or chronic toxicity value in laboratory dilution water. To use a water effect ratio other than the default of 1, the WER must be determined as set forth in Interim Guidance on Determination and Use of Water Effect Ratios, U.S. EPA Office of Water, EPA-823-B-94-001, February 1994, or alternatively, other scientifically defensible methods approved by the Regional Administrator. For calculation of criteria using site-specific values for both the hardness and the water effect ratio, the hardness used in the equations in paragraphs (g)(2)(i) through (iii) of this section must be determined as required in paragraphs (g)(2)(vii) and (viii) of this section. Water hardness must be calculated from the measured calcium and magnesium ions present, and the ratio of calcium to magnesium should be approximately the same in standard laboratory toxicity testing water as in the site water.

(3) The design flows in table 4 to paragraph (g)(3) of this section shall be used to implement the criteria in paragraph (g) for streams and rivers. Table 4 to paragraph (g)(3) of this section:

Criteria	Design Flow
Aquatic Life Acute Criteria (CMC)	1 Q 10 or 1 B 3
Aquatic Life Chronic Criteria (CCC)	7 Q 10 or 4 B 3
Human Health Criteria	Harmonic Mean Flow

Notes to Table 1 of paragraph (g)(3):

a. CMC (Criteria Maximum Concentration) is the water quality criterion to protect against acute effects in aquatic life and is the highest instream concentration of a priority toxic pollutant consisting of a short-term average not to be exceeded more than once every three years on the average;

b. CCC (Continuous Criteria Concentration) is the water quality criterion to protect against chronic effects in aquatic life and is the highest in stream concentration of a priority toxic pollutant consisting of a 4-day average not to be exceeded more than once every three years on the average;

c. 1 Q 10 is the lowest one day flow with an average recurrence frequency of once in 10 years determined hydrologically;

d. 1 B 3 is biologically based and indicates an allowable exceedence of once every 3 years. It is determined by EPA's computerized method (DFLOW model);

e. 7 Q 10 is the lowest average 7 consecutive day low flow with an average recurrence frequency of once in 10 years determined hydrologically;

f. 4 B 3 is biologically based and indicates an allowable exceedence for 4 consecutive days once every 3 years. It is determined by EPA's computerized method (DFLOW model);

(iii) If the design flows in Table 4 to paragraph (g)(3) of this section are inappropriate for a criterion or the site to which a criterion applies, the Regional Administrator may apply an alternative averaging period, frequency, and related design flow. Before applying any alternatives, the Regional Administrator will publish for public comment a notice proposing the change.

(4) The freshwater and saltwater aquatic life criteria in the table to paragraph (g)(1) of this section apply as follows:

(i) For waters in which the salinity is equal to or less than 1 part per thousand 95% or more of the time, the applicable criteria are the freshwater criteria in Column B;

(ii) For waters in which the salinity is equal to or greater than 10 parts per thousand 95% or more of the time, the applicable criteria are the saltwater criteria in Column C; and

(iii) For waters in which the salinity is between 1 and 10 parts per thousand as defined in paragraphs (g)(4)(i) and (ii) of this section, the applicable criteria are the more stringent of the freshwater or saltwater criteria. However, the Regional Administrator may approve the use of the alternative freshwater or saltwater criteria if scientifically defensible information and data demonstrate that on a site-specific basis the biology of the waterbody is dominated by freshwater aquatic life and that freshwater criteria are more appropriate; or conversely, the biology of the waterbody is dominated by saltwater aquatic life and that saltwater criteria are more appropriate. Before approving any change, EPA will publish for public comment a notice proposing the change.

(5) The numeric criteria in paragraphs (g)(1) through (4) of this section shall apply

to all waters for which EPA determines that designated uses are attainable that provide for the protection and propagation of fish, shellfish, and wildlife, and for recreation in and on the water.

(6) Procedures for site specific modifications of the numeric criteria in paragraphs (g)(1) through (4) of this section. The Regional Administrator may, at his discretion, modify the numeric water quality criteria in paragraphs (g)(1) through (4) of this section as they pertain to a specific waterbody or portion thereof.

(i) Any such modified criteria shall be based on sound scientific rationale, contain sufficient parameters or constituents, and shall protect the use that EPA determines is attainable.

(ii) Prior to modifying any numeric criteria in paragraphs (g)(1) through (4) of this section, the Regional Administrator shall provide for public notice of and comment on such proposed modification. For any such proposed modification, the Regional Administrator shall make available to the public an explanation of the basis for each the proposed modification. This explanation shall be made available to the public not later than the date of public notice.

(iii) Nothing in this section shall limit the Administrator's authority to modify the numeric water quality criteria in paragraphs (g)(1) through (4) of this section.

(iv) The Regional Administrator shall maintain and make available to the public an updated list of modified criteria adopted pursuant to paragraphs (g)(6)(i) through (iii) of this section.

(h) What is the antidegradation policy?

(1) Existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected.

(2) Where the quality of the waters exceeds levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water, that quality shall be maintained and protected unless the Regional Administrator finds, after consultation with the Tribal governments and after full opportunity for intergovernmental coordination and public participation, that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located. In allowing such degradation or lower water quality, the Regional Administrator shall assure water quality adequate to protect existing uses fully. Further, the Regional Administrator shall assure that there shall be achieved the highest statutory and regulatory requirements for all new and existing point sources and all cost-effective and reasonable best management practices for nonpoint source control.

(3) Where high quality waters constitute an outstanding National resource, such as waters of National and Tribal parks and wildlife refuges and waters of exceptional recreational or ecological significance, that water quality shall be maintained and protected.

(4) In those cases where potential water quality impairment associated with a thermal discharge is involved, the antidegradation policy and implementing method shall be consistent with section 316 of the Clean Water Act.

(i) What other policies apply?

(1) Mixing Zones: In conjunction with the issuance of section 402 and 404 permits, the Regional Administrator may after consultation with the Tribal government designate mixing zones in the waters of the United States in Indian country on a case-by-case basis. The size of such mixing zones and the in-zone water quality in such mixing zones must protect the designated use.

(2) Compliance Schedules: A new discharger to waters of the United States in Indian country shall comply with any water quality-based limitation in a permit issued on or after [effective date of final rule] upon commencing discharge. An existing discharger to waters of the United States in Indian country shall comply with any new or more restrictive water quality-based limitation in a permit reissued or modified on or after [effective date of final rule] as soon as possible but no later than five years from the date of permit issuance.

(j) Can my Tribe adopt Tribal water quality standards under the Clean Water Act?

Yes, if EPA determines your Tribe is eligible to administer a water quality standards program under the Clean Water Act. This section does not affect your Tribe's ability to apply to administer its own water quality standards program and adopt water quality standards under

§ 131.8. If your Tribe applies to administer the water quality standards program under § 131.8, and the Regional Administrator determines that your Tribe meets the requirements for Indian Tribes to administer a water quality standards program, the Regional Administrator may approve water quality standards adopted by your Tribe for your Tribe's reservation if they satisfy the requirements of subparts A, B, and C of this part 131. If the Regional Administrator approves your adopted water quality standards, the core Federal water quality standards will no longer apply to waters covered by your Tribe's approved standards.

(k) What term do I need to know while reading this section ?

Indian country means:

(1) All land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation;

(2) All dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a State; and

(3) All Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

(l) How will EPA implement the water quality standards of this section in waters of the Great Lakes System?

In making decisions under the Clean Water Act based on the water quality standards of this section for waters located in the Great Lakes System, as defined in § 132.2 of this chapter, EPA will ensure that such decisions are consistent with the water quality standards, antidegradation policies, and implementation procedures for the Great Lakes System in part 132 of this chapter, in addition to the water quality standards of this section.

PART 230--SECTION 404(b)(1) GUIDELINES FOR SPECIFICATION OF DISPOSAL SITES FOR DREDGED OR FILL MATERIAL

1. The authority citation for part 230 is revised to read as follows:

Authority: 33 U.S.C. 1344(b) and 1361(a)

SUBPART B–[Amended]

2. Section 230.10 is amended by revising paragraph (b)(1) to read as follows:

§ 230.10 Restrictions on discharge.

* * * * *

(b) * * *

(1) Causes or contributes, after consideration of disposal site dilution and dispersion, to violations of any applicable State water quality standard or Federally promulgated water quality standard;

* * * * *

PART 233--404 STATE PROGRAM REGULATIONS

1. The authority citation for part 233 continues to read as follows:

Authority: 33 U.S.C. 1251 *et seq*.

SUBPART A--[Amended]

2. Section 233.1 is amended by adding a sentence to the end of paragraph (b) to read as follows:

§ 233.1 Purpose and scope.

* * * * *

(b) * * * For purposes of the section 404 program, EPA and the Corps of Engineers will treat areas for which EPA and the Corps of Engineers determine the Indian country status is in question as Indian lands.

* * * * *

SUBPART F–[Amended]

3. Section 233.51 is amended by revising paragraph (b)(3) to read as follows:

§ 233.51 Waiver of review.

* * * * *

(b) * * *

(3) Discharges with reasonable potential for adverse impacts on waters of another State or on waters in Indian country subject to Federally promulgated water quality standards;

* * * * *

[End of document]