

Treatment of Indian Tribes in a Similar Manner as States for Purposes of Section 303(d) of the Clean Water Act – Final Rule

Frequently Asked Questions

1. What are the environmental benefits of a tribe getting Treatment in a Similar Manner as a State (TAS) for the Clean Water Act (CWA) Section 303(d) Impaired Water Listing and Total Maximum Daily Load (TMDL) Program?

Obtaining TAS for CWA regulatory programs enables tribal governments to make decisions and carry out CWA program responsibilities affecting their reservations, their environments, and the health and welfare of the reservation populace.

A tribe with TAS for the 303(d) Program would:

- Have the opportunity to participate directly in restoring and protecting its reservation waters through implementing the Program.
- Assume *the primary role* under the CWA in deciding (1) what waters on their reservations are impaired and in need of total maximum daily loads (TMDLs), (2) the priority ranking for TMDL development, and (3) the nature of TMDLs and pollutant source allocations for those waters.

2. Are EPA-approved/EPA promulgated water quality standards (WQS) (collectively referred to as “applicable WQS”) a prerequisite for obtaining TAS for 303(d)?

The rule does not require tribes to have applicable WQS in place on their reservations prior to applying for TAS eligibility for the 303(d) Program. The rule also does not require tribes seeking TAS eligibility for the 303(d) Program to have previously obtained EPA approval for TAS for the WQS Program. Under section 303(d), however, states and authorized tribes must develop lists of impaired waters and TMDLs based on applicable WQS (See CWA Section 303(d)(1) and (2)). Accordingly, EPA anticipates that the tribes most likely to be interested in applying for TAS for the 303(d) Program will be those that also have TAS for the WQS Program and have applicable WQS for their reservation waters.

The final rule and response to comments are available at <http://www.regulations.gov>, Docket ID No. EPA-HQ-OW-2014-0622.

3. Is the CWA Section 303(d) Impaired Water Listing and TMDL Program a grant program?

No. The Impaired Water Listing and TMDL Program is not a grant program. No federal grant funds are available directly from the Impaired Water Listing and TMDL Program.

More detail on what financial and technical support is available from EPA to tribes should they choose to develop and implement a CWA Section 303(d) Impaired Water Listing and TMDL Program is available within the rule at <http://www.regulations.gov>, Docket ID No. EPA-HQ-OW-2014-0622.

4. What action will be required of tribes?

Through this rulemaking, EPA is establishing the TAS process for tribes that are interested in applying for TAS for 303(d). The rule establishes TAS application requirements and the procedures EPA will use to process TAS applications. However, tribes are not required to seek TAS status for any CWA program. The rule does not require anything of tribes that are not interested in TAS for 303(d).

5. If a tribe receives TAS for one Clean Water Act regulatory program, is it automatically eligible to administer other such programs?

No. If EPA approves a tribe's TAS status for a particular program under the Act, the tribe is generally eligible to administer that program in a manner similar to a state. However, an EPA TAS approval is limited to the specific program(s) and lands covered by that decision. Tribes must receive TAS approval for each regulatory program they wish to administer.

Nevertheless, to avoid duplicative TAS application requirements, EPA's final rulemaking provides that, if a tribe has previously qualified for eligibility to administer another CWA program, the tribe need only provide the required information that has not been submitted in a previous application. For example, if a tribe has previously demonstrated that it is federally recognized and has a government carrying out substantial duties and powers (and if there is no change regarding those issues), then such information need not be resubmitted. Generally speaking, certain issues, such as the demonstration of capability, might need to be addressed anew because the new program's requirements may differ from those of the previously approved program.

The TAS application procedures and criteria for the CWA Sections 303(c) WQS and 303(d) Impaired Water Listing and TMDL Programs are similar in many respects, and a tribe interested in both programs may wish to streamline the application process by combining a request for TAS eligibility for 303(c) and 303(d) into a single application. A tribe may submit such a combined application to EPA, which addresses the criteria and application requirements of § 131.8 and § 130.16, if the tribe is interested in applying for TAS for both programs. Under this rule, however, a tribe is not be required to apply simultaneously for TAS for both programs.

6. How does this rule relate to the Agency’s re-interpretation rule regarding tribal jurisdiction under the CWA?

EPA issued an interpretive rule, “Revised Interpretation of Clean Water Act Tribal Provision,” on May 16, 2016. That rule provides a new interpretation of tribal jurisdiction to administer CWA regulatory programs, and eliminates the need for tribes seeking TAS for CWA regulatory programs to demonstrate inherent authority to regulate under the Act.

Today’s final rule is a separate action. It establishes a process for tribes to obtain TAS for the CWA Section 303(d) Impaired Water Listing and TMDL Program. Today’s rule fulfills a Congressional requirement by providing appropriate TAS procedures for tribes interested in the Section 303(d) Program, regardless of any particular approach to tribal jurisdiction

7. Did EPA consult with any parties outside the federal government in preparing this rule?

Yes. EPA consulted and coordinated with tribes, tribal organizations, states, and state associations before promulgating the rule.

Consistent with Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments) and the EPA Policy on Consultation and Coordination with Indian Tribes (available at <http://www.epa.gov/tribal/epa-policy-consultation-and-coordination-indian-tribes>), EPA initiated a tribal consultation and coordination process for this action by sending a “Notification of Consultation and Coordination” letter on March 28, 2014, to all of the then 566 federally recognized tribes.¹ EPA received pre-proposal input from tribes in a webinar and five comment letters.

In the spirit of Executive Order 13132 (Federalism), EPA consulted with representatives of state governments. EPA invited 10 national and regional state associations by letter to an October 1, 2014, informational meeting, participated in two follow-up meetings with interested state associations and their members as well as certain individual states and received two comment letters.

EPA held additional informational meetings in May and June 2015 with state and tribal representatives, including members of the Western Governors’ Association, the Environmental Council of the States, the National Tribal Water Council, and the National Tribal Operations Committee.

During the public comment period on the proposed rule (proposed January 19, 2016), EPA provided informational webinars for the public, tribes, and states, and conducted

¹ There are now 567 federally recognized tribes. See <https://www.gpo.gov/fdsys/pkg/FR-2016-05-04/pdf/2016-10408.pdf>.

further consultation with tribes and states. Following the public comment period, EPA participated in informational meetings with some tribes and states.

Summaries of these meetings and copies of written comments submitted by tribes, states, and others are included in the docket for this rule.