



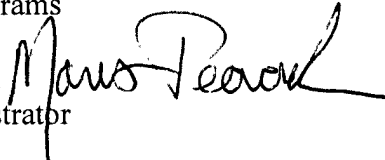
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JAN 23 2008

DEPUTY ADMINISTRATOR

MEMORANDUM

SUBJECT: Strategy for Reviewing Tribal Eligibility Applications to Administer EPA Regulatory Programs

FROM: Marcus Peacock 
Deputy Administrator

TO: Assistant Administrators
Regional Administrators

The purpose of this memorandum is to establish the U.S. Environmental Protection Agency's strategy for improving the review of tribal applications for treatment in the same manner as a state (TAS) to administer EPA regulatory programs.¹ This Strategy takes effect immediately.

Background

Several federal environmental laws authorize EPA to treat eligible federally recognized Indian tribes (tribe or tribal) in the same manner as states for implementing and managing certain environmental programs.

The Strategy outlined in this memorandum is designed to improve both the TAS review process and ongoing communications with tribal TAS applicants. This Strategy is the product of an Agency-wide workgroup. To ensure that this Strategy considered the interests of tribes, EPA partnered with a tribal workgroup, organized by EPA's National Tribal Caucus, to obtain and provide tribal input. EPA also consulted with tribes on a government-to-government basis in developing this Strategy.

This Strategy was developed in response to the Government Accountability Office (GAO) report titled "Indian Tribes: EPA Should Reduce the Review Time for Tribal Requests to Manage Environmental Programs" (GAO-06-95).² The report found that "EPA followed its

¹ This Strategy document sets out the TAS process EPA intends to follow. EPA retains the discretion to deviate from this process when appropriate. This Strategy imposes no binding legal requirements.

² The GAO report is available at <http://www.gao.gov/new.items/d0695.pdf>.

processes in most respects for approving tribal requests for TAS status and program authorization for the 20 cases we reviewed, but we found some lengthy delays in these processes.” The report also noted that some tribes are frustrated by what they perceive as difficulty in getting clear information about the status of pending TAS applications. GAO recommended that “EPA should develop a written strategy, including estimated time frames, for reviewing tribes’ TAS applications for program authority and updating the tribes on the review status.”

Applicability

This Strategy guides EPA’s internal processes for reviewing TAS eligibility applications to administer EPA regulatory programs. This Strategy does not address the processes used to review program submissions or TAS applications for grants or cooperative agreements.

Purpose

The purpose of this Strategy is to improve the timeliness and efficiency of EPA’s review process and provide regular, useful TAS information to applicant tribes. This Strategy will also strengthen implementation of EPA’s long-standing policy regarding review of TAS applications for regulatory programs: that EPA works directly with each tribe on a government-to-government basis throughout the application and review process and that EPA implements a process to ensure reliably defensible decisions without undue burdens or delays.

Strategic Actions

This Strategy is designed to facilitate the timely review of TAS applications to administer EPA regulatory programs, consistent with the above purpose, and to improve ongoing communications with tribal applicants. Under this Strategy, EPA takes strategic actions in five specific areas:

1. **Common expectations** – EPA works with tribes to establish common expectations concerning the TAS process.
2. **Tools for tribal applicants** – EPA supplies additional tools to assist applicants in preparing TAS applications and to facilitate timely reviews.
3. **Internal review procedures** – EPA establishes improved internal review procedures to facilitate more efficient TAS reviews and continues to promote consistent application of established TAS review criteria.
4. **Open communications** – EPA works with each tribal applicant to facilitate regular and effective communications regarding the TAS review process.
5. **Reaching out, where appropriate, to other governments and the public** – EPA identifies potential approaches for EPA to reach out to other governmental entities and to the public to improve understanding of TAS.

Each of these strategic actions is described in detail below.

1. Establish common expectations concerning the TAS process.

EPA generally takes a case-by-case approach in reviewing TAS applications because each tribe's application may present unique circumstances concerning sources of pollution, geography, or legal authorities. Some applications raise issues about borders of or the status of certain categories of lands within reservations. This means that the amount of information needed for an application and the length of time to review the application can vary from application to application. An important component of a satisfactory TAS process is for both the tribal applicant and EPA to have an early, common understanding of what is involved in developing and reviewing a TAS application. Common understanding establishes realistic expectations of what preparing a complete application entails, what EPA needs to do to complete its review, and how long the process is likely to take.

Strategic Actions:

- Meet or hold conference calls with the tribal applicant at the beginning of the TAS application process. Ideally, participants would include the lead attorney and lead program/technical staff assigned to the TAS application from both the tribe and EPA. In these calls or meetings, EPA clearly identifies, to the extent practicable, each TAS step and stage and discusses with the tribe the expected time frames for completing those steps.
- Maintain regular communication with the tribe using, where practicable, means preferred by the tribe. This could include meetings, telephone calls to designated tribal officials, e-mail, or first class mail. See Section 4 for further discussion.
- Meet or hold conference calls with the tribal applicant within 45 days of the close of the comment period to discuss the next steps and establish a tentative schedule for completing the review if applicable regulations provide notice to appropriate government entities and the public.³
- Maintain continuity of EPA staff working on a tribe's application, where possible, including assigning backup staff to ensure continuity.

2. Supply additional tools to tribal applicants to assist in preparing TAS applications and in facilitating timely reviews.

This Strategy provides for EPA to supply basic tools to tribal applicants for use in preparing a TAS application.

Strategic Actions:

- Develop, where needed, and distribute on EPA's Web site, TAS information and related tools.⁴ Tools to develop and distribute include:
 - The typical procedural steps in the TAS application and review process discussed in Section 1 above. See Attachments A and F for specific procedural steps for

³ Or within 30 days after receiving a complete TAS application if notice to appropriate governmental entities and the public is not required.

⁴ TAS information and related tools are available at <http://www.epa.gov/tribalportal/laws/tas.htm>.

TAS applications under the Clean Water Act (CWA) water quality standards (WQS) and certification programs and Clean Air Act (CAA) regulatory programs.

- Examples of documentation for addressing regulatory provisions governing TAS applications, where possible. See Attachments B, G, and H for the CWA WQS and certification programs, the CAA regulatory programs, and the Safe Drinking Water Act (SDWA) public water system supervision (PWSS) program.
- A Frequently Asked Questions (FAQs) document with answers concerning the overall TAS process for regulatory programs. See Attachment E for FAQs for the CWA WQS and certification programs and Attachment I for FAQs for the SDWA PWSS program.
- Information on other possible approaches tribes can use to participate in environmental programs (regulatory or non-regulatory) apart from the TAS process. These could include various collaborative approaches, such as CWA Section 518(d) cooperative agreements; cooperative arrangements, such as the Direct Implementation Tribal Cooperative Agreements; grants; approaches to environmental and human health protection based on tribal law; or non-regulatory activities such as those described in EPA's *Final Guidance on Awards of Grants to Indian Tribes under Section 106 of the Clean Water Act* issued in 2006.⁵
- Additional tools, developed as appropriate, for other TAS regulatory programs.
- Assist tribes interested in obtaining copies of completed TAS applications from other tribes with similar situations.
- Develop targeted TAS training for tribes and EPA staff. For example, EPA program offices and regions could offer an annual short course specifically on the TAS process or develop a TAS process training module that could be incorporated into other meetings and workshops with tribes.

3. Establish improved internal procedures to facilitate more efficient TAS reviews and continue to promote consistent application of established TAS review criteria.

EPA places a high priority on efficient and effective reviews of TAS applications and the timely review and completion of EPA decision documents. This Strategy updates the procedures for review of nationally-significant issues raised by TAS determinations for environmental regulatory programs contained in the Cannon-Perciasepe Memorandum.⁶ In light of experience, we are updating that process to promote more timely and efficient decisions on TAS applications by having an EPA regional-headquarters team review each application. The strategic actions below are designed to carry out this priority.

⁵ The Final Guidance on Awards of Grants to Indian Tribes under Section 106 of the Clean Water Act is available at <http://www.epa.gov/owm/cwfinance/106tgg07.htm>.

⁶ This memorandum, *Adoption of the Recommendations from the EPA Workgroup on Tribal Eligibility Determinations*, was issued jointly by then-General Counsel Jonathan Cannon and then-Assistant Administrator for the National Indian Program Robert Perciasepe (March 19, 1998) and also provides other guidance that EPA continues to use in processing TAS applications.

Strategic Actions:

- Continue with the joint EPA headquarters-regional “team approach” that EPA began using in late 2005 to review TAS applications for regulatory programs.⁷
 - The team for each TAS review is composed of EPA experts in tribal, program, and legal matters from both the EPA region and appropriate headquarters offices. The EPA region will have the lead for communicating with the tribe and will generally be the lead for the team. The team will collaborate on the substantive review of each TAS application and develop and review key TAS documents, e.g. the Proposed Findings of Fact (where appropriate), the Decision Document, and the Response to Comments.
 - The team determines the relative efforts needed between regional and headquarters staff to ensure full consideration of relevant issues, including those that are nationally significant, as they arise, and how the team can expedite the TAS review process.
 - While EPA regions remain responsible for issuing the TAS documents, the team works closely in advance of final actions to ensure that all appropriate EPA offices are afforded an opportunity to participate in a timely manner.
 - The team approach has worked successfully in the past two years, resulting in an increasing rate of decisions on TAS applications.
- To ensure EPA executive-level involvement where needed to expedite TAS reviews, provide regular TAS reports to EPA’s Indian Program Policy Council (IPPC). In particular, EPA managers provide an explanation to the IPPC when an application has remained at the same stage of EPA review for more than one quarter (90 days). The IPPC consists of each EPA Deputy Assistant Administrator, the EPA Principal Deputy General Counsel, and each EPA Deputy Regional Administrator for regions with federally recognized tribes.
- Tribal leaders may request that EPA managers check the status of their TAS application at any time.

4. Establish open communications by working with each tribal applicant to facilitate regular and effective communications regarding the TAS review process.

Under this Strategy, EPA seeks to place a priority on regular and open communications with the tribal applicant during the TAS review process.

Strategic Actions:

- Keep the tribe informed about the status of its application regularly, but not less frequently than quarterly. The tribe can request that this status report be written. EPA keeps the tribe informed of the stage and timing of the review process, the nature of issues being addressed, and whether there are any additional steps the tribe could take to enhance the review.

⁷ Since the inception of the “team approach,” there has been a significant increase in the rate of TAS decisions. For example, in the two years since August 2005, EPA has approved TAS applications from ten tribes to administer the Water Quality Standards program. This is the largest number of such TAS approvals in a comparable period since 1996.

- Maintain regular communication with the tribe using, where practicable, means preferred by the tribe. This could include meetings, telephone calls to designated tribal officials, e-mail, or first class mail. It is important to maintain two-way communication at all times.
- Establish a process to treat certain TAS applications as “inactive.” This can occur when the tribe has not taken agreed-upon actions for an extended time (a year or more) and attempts to follow up have failed. In these cases, EPA informs the tribe that its application has been identified as being in “inactive status” for tracking purposes and that EPA will retain the current files as inactive until notified in writing of a change in status. Tribes are able to submit new or supplemental applications at any time. An explanation of the steps the tribe can take to reactivate the application will be provided at the time the tribe is notified that its application has been identified as being in “inactive status.”

5. Reach out, where appropriate, to other governments and the public to improve understanding of TAS.

A variety of governmental entities and members of the public often express an interest in a tribe’s TAS application. EPA and tribal applicants have sometimes found it useful to reach out to governmental entities and members of the public and provide additional opportunities for input during the TAS process, beyond what is required under EPA regulations. The purpose of this strategic action is to facilitate such additional outreach where it would be beneficial in order to facilitate timely TAS approvals.

Strategic Actions:

- EPA may sponsor outreach activities associated with a TAS application and/or assist the tribe in its own outreach activities. EPA should consult with the tribe as to whether particular outreach activities would be beneficial and appropriate, and should tailor the activities to the specific circumstances. Listed below are examples of outreach approaches that EPA and tribes have used successfully in the past. They are provided here to outline a range of available outreach options.
 - Education concerning the overall TAS process.
 - Explanation of the tribe’s environmental goals and its expectations for the environmental program for which it is applying.
 - Description of the opportunities for public participation offered by EPA during the TAS process.
 - Collaborative discussions between the tribe and the state where there is mutual interest.
- For TAS applications for the CWA’s WQS and certification programs, examples of approaches that EPA and tribes have used to reach out to governmental entities and the public include:
 - Providing a document on FAQs to interested parties regarding the TAS process for WQS, with answers for governmental entities and the public. FAQs can be included in the notification packages EPA sends to appropriate governmental entities. See FAQs in Attachment E.
 - Explaining the differences between EPA’s TAS decision on eligibility for a WQS program and EPA’s decision on actual new or revised tribal WQS.

- Describing the process that the tribe would use to adopt standards, including roles governments and nonmembers of the tribe will have.
- Describing possible collaborative methods to work together cooperatively on water quality issues.

Attachments to the Strategy

This Strategy includes the following attachments to assist in implementation:

- Attachment A is a document titled “Procedural Steps for Processing Tribal Applications for TAS Eligibility for the Clean Water Act Water Quality Standards and Certification Programs.” This document outlines a set of steps, including estimated time frames for TAS WQS eligibility reviews.
- Attachment B lists the regulatory provisions governing TAS eligibility under the WQS and certification programs and provides examples of documentation for addressing those provisions.
- Attachment C provides examples of information for EPA to use in assessing tribal authority over the activities of nonmembers on a reservation under the *Montana* test for TAS WQS application reviews.
- Attachment D provides an overview on the significance of TAS for WQS.
- Attachment E provides answers to FAQs regarding the TAS eligibility process for the WQS program, including public input.
- Attachment F is a document titled “Procedural Steps for Processing Tribal Applications for TAS Eligibility for Regulatory Programs under the Clean Air Act.” This document outlines a set of steps, including estimated time frames for TAS eligibility reviews under the CAA for the purpose of regulatory programs.
- Attachment G lists the regulatory provisions governing TAS eligibility under the CAA and provides examples of documentation for addressing those provisions.
- Attachment H lists the regulatory provisions governing TAS eligibility under the SDWA PWSS program and provides examples of documentation for addressing those provisions.
- Attachment I provides answers to FAQs regarding the TAS eligibility process for the PWSS program.

Future Updates to the Strategy

This Strategy also provides for continuous EPA review of progress under this Strategy to decide whether further tools are needed, such as additional outreach materials or materials for other TAS regulatory programs. The American Indian Environmental Office (AIEO) will oversee this review and, in coordination with appropriate EPA offices, will issue new or revised attachments to the Strategy from time-to-time as needed. The AIEO will notify affected offices when changes are made and will maintain updated information on its Tribal Portal Web site, <http://www.epa.gov/tribalportal/>.

The Strategy and attachments include estimated time frames for a number of the steps in the TAS process for the water quality standards and air programs. This Strategy and attachments will be reviewed and amended, as appropriate, in approximately three years to include additional

estimated time frames for the review steps in the TAS process based on experience gained in implementing this Strategy.

Procedural Steps for Processing Tribal Applications for TAS Eligibility for the Clean Water Act Water Quality Standards and Certification Programs¹

As a general matter, the U.S. Environmental Protection Agency process for reviewing federally recognized Indian tribes' (tribe or tribal) applications for treatment in the same manner as a state (TAS) eligibility for the Clean Water Act (CWA) water quality standards (WQS) and certification programs consists of five steps. They are:

- **Step 1: The Tribe Submits an Application.**² Tribes are encouraged to work with EPA in developing their TAS eligibility applications to administer a WQS and certification program. Drafts or components of the application may be shared with EPA before being formally submitted to the Agency. After EPA examines the tribe's application, EPA may request additional information.

| Step | Description | Responsibility |
|------|--|---------------------------|
| 1A | Pre-application discussions and technical assistance (if appropriate) | Joint Tribe-EPA |
| 1B | EPA review of pre-application materials (if requested) | |
| 1C | Tribe submits application to EPA | |
| 1D | EPA initial review and request for additional information (as appropriate) as soon as practicable. | EPA (Region) ³ |
| 1E | Tribe submits additional information (if requested) | Tribe |

- **Step 2: Comment Period.** Within 30 days of receipt of an application that is ready for review, EPA provides appropriate governmental entities with notice of the tribe's application, including information as to the substance and basis of the tribe's claims regarding authority to regulate reservation water quality, and provides 30 days for comments on the tribe's assertion of authority. EPA also publishes a notice in relevant newspapers, offering the public the opportunity to provide comments on tribal authority through appropriate governmental entities. EPA then affords the tribe the opportunity to respond to the comments.

¹ This document sets out the procedures EPA intends to follow in processing TAS applications under the CWA WQS and certification programs. EPA retains the discretion to deviate from this process when appropriate. This document imposes no binding legal requirements.

² Special provisions of law apply to tribes in the State of Oklahoma. Tribes in Oklahoma should contact EPA for more information on TAS eligibility for EPA regulatory programs.

³ EPA regions always have the lead for communicating with the tribe and will generally be the lead for the EPA team, which consists of EPA regional and headquarters personnel, involved in processing a particular application. The team is generally activated when an application is received and works collaboratively as needed, especially in later stages of substantive review and preparation of decision documentation.

Attachment A

| Step | Description | Responsibility |
|------|--|----------------|
| 2A | EPA notifies appropriate governmental entities and the public (within 30 days after receipt of a tribal application that is ready for review) | EPA (Region) |
| 2B | Comment period (30 days) ⁴ | Commenters |
| 2C | Within 45 days of the close of the comment period, EPA assembles comments, provides them to the tribe, and discusses a tentative schedule and next steps | EPA (Region) |
| 2D | Tribe responds to comments (if any) | Tribe |

- **Step 3: EPA Review.** A team of EPA regional and headquarters staff reviews the application to determine whether it meets the requirements for eligibility. EPA may request additional information from the tribe, as appropriate.

| Step | Description | Responsibility |
|------|---|----------------|
| 3A | EPA reviews comments and tribal response (if any) | EPA (Team) |
| 3B | Within 90 days, to the extent practicable, of the close of the comment period, EPA discusses the need for any additional information with the tribe (as needed) | EPA (Region) |
| 3C | Tribe provides additional information (if requested) | Tribe |

- **Step 4: Proposed Findings of Fact (if needed).** Where appropriate, EPA prepares a proposed Findings of Fact document regarding tribal authority over nonmember activities on the reservation that would form a basis for EPA's decision on whether the tribe has adequate authority for purposes of the WQS and certification programs. After EPA has received comments from the tribe, if any, on the draft proposed findings of fact, EPA provides the proposed findings of fact to appropriate governmental entities. EPA also offers the public the opportunity to provide comments on the proposed factual findings through appropriate governmental entities. The tribe is given the opportunity to respond to comments received.

⁴ In some cases, it may be appropriate for EPA to extend the comment period. EPA coordinates with the tribe prior to allowing an extension of the comment period.

| Step | Description | Responsibility |
|------|--|----------------|
| 4A | EPA reviews comments, tribal response to comments (if any), and additional information (if any) | EPA (Team) |
| 4B | EPA prepares a draft proposed Findings of Fact | EPA (Team) |
| 4C | Tribe provides comments, if any, on draft proposed Findings of Fact | Tribe |
| 4D | EPA issues proposed Findings of Fact and notifies appropriate governmental entities ⁵ and the public | EPA (Region) |
| 4E | Comment period (30 days) ⁶ | Commenters |
| 4F | Within 45 days of the close of the comment period, EPA assembles comments, provides them to the tribe, and discusses a tentative schedule and next steps | EPA (Region) |
| 4G | Tribe responds to comments (if any) | Tribe |

- Step 5: Final Decision.** Based on its review of all of the materials – including the application, any proposed findings of fact, and all comments submitted – the EPA team prepares a draft decision document, including a response to comments, and submits it for final review within the Agency. If EPA approves the tribe’s application, the findings of fact may be included as an appendix to the decision document. The EPA regional office notifies the tribe in writing of EPA’s decision regarding the tribe’s application. Where EPA approves the application, the approval letter and the decision document are transmitted to the tribe.

| Step | Description | Responsibility |
|------|---|----------------|
| 5A | EPA prepares decision document, response to comments | EPA (Team) |
| 5B | EPA regional official signs decision document and notifies the tribe ⁷ | EPA (Region) |

⁵ EPA also provides supplemental application information, if any, to appropriate governmental entities.

⁶ In some cases, it may be appropriate for EPA to extend the comment period. EPA coordinates with the tribe prior to allowing an extension of the comment period.

⁷ In accordance with EPA’s delegation manual, regions will seek headquarters concurrence on the first TAS application for each program (including WQS) within a region.

Attachment A

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Regulatory Requirements for TAS Eligibility Under the Clean Water Act Water Quality Standards and Certification Programs and Examples of Supporting Documentation

The information below identifies the regulatory requirements the U.S. Environmental Protection Agency considers in assessing a federally recognized Indian tribe (tribe or tribal) eligibility for treatment in the same manner as a state (TAS) under the Clean Water Act (CWA) water quality standards (WQS) and certification programs set forth in 40 CFR 131.8 and 131.4(c) and provides examples of documentation that has been provided by tribes to meet those requirements.¹

| Regulatory Provision | Examples of Documentation |
|--|--|
| <p>1) The Indian tribe is recognized by the Secretary of the Interior and exercises governmental authority over a reservation. 40 CFR 131.8(a)(1); 131.3(k) and (l). An application must include a statement that the tribe is recognized by the Secretary of the Interior. 40 CFR 131(b)(1).</p> | <p>The Secretary of the Interior publishes in the <i>Federal Register</i> (FR) a list of federally recognized Indian tribes. See http://www.usa.gov/Government/Tribal_Sites/ Applicants often submit a recent copy of the FR list to establish that the tribe has federal recognition.</p> |
| <p>2) The Indian tribe has a governing body carrying out substantial governmental duties and powers. 40 CFR 131.8(a)(2). An application must include a descriptive statement demonstrating that the tribal government is carrying out substantial governmental duties and powers over a defined area. 40 CFR 131.8(b)(2). The statement should:</p> <ul style="list-style-type: none"> • Describe the form of the tribal government. 40 CFR 131.8(b)(2)(i). • Describe the types of governmental functions currently performed by the tribal government, such as, but not limited to, the exercise of police powers affecting (or relating to) the health, safety, or welfare of the affected population, taxation, and the exercise of eminent domain. 40 CFR 131.8(b)(2)(ii). • Identify the source of the tribal government’s authority to carry out the governmental functions currently being performed. 40 CFR 131.8(b)(2)(iii). | <p>Applications discuss the organizational structure of the tribe and identify and describe the entities that exercise the executive, legislative, and judicial functions of government.</p> <p>Applications discuss specific regulatory, legislative, executive and judicial activities the tribe undertakes, including actions to exercise its police power to protect the environment, e.g. establishing regulatory programs or carrying out permitting and enforcement activities.</p> <p>Applications identify sources of the tribal government’s authority, which may include oral or written tradition, an oral or written tribal constitution, tribal ordinances, codes, by-laws, charters, and resolutions, relevant provisions of federal treaties, executive orders or statutes, etc.</p> |

¹ If information or a document is provided for one purpose, it need not be reproduced again for other purposes, as long as it is identified and explained. Where a tribe has previously qualified for TAS for another CWA program or Safe Drinking Water Act program, it need only submit the required information not previously provided. See 40 CFR 131.8(b) (6).

Attachment B

| Regulatory Provision | Examples of Documentation |
|---|---|
| <p>3) The WQS program to be administered by the Indian tribe pertains to the management and protection of water resources that are within the borders of the tribe's reservation. 40 CFR 131.8(a)(3). An application must include a descriptive statement of the Indian tribe's authority to regulate water quality. 40 CFR 131.8(b)(3). That statement should include:</p> <ul style="list-style-type: none"> • A map or legal description of the area over which the tribe asserts authority to regulate surface water quality. 40 CFR 131.8(b)(3)(i). • A statement by the tribe's legal counsel (or equivalent official) that describes the basis for the tribe's assertion of authority, and that may include a copy of documents such as tribal constitutions, by-laws, charters, executive orders, codes, ordinances, and/or resolutions that support the tribe's assertion of authority. 40 CFR 131.8(b)(3)(ii). • An identification of the surface waters for which the tribe proposes to establish water quality standards. 40 CFR 131.8(b)(3)(iii). | <p>Applications include maps showing the area and water resources over which the tribe asserts authority. Some tribes provide maps based on an official survey by the U.S. Department of the Interior or an official map of the reservation prepared by the Bureau of Indian Affairs. A written legal description discusses with some specificity the locations of the boundaries of the reservation areas over which the tribe asserts authority.</p> <p>Legal counsel statements identify and discuss the legal basis for the tribe's assertions of authority over areas/waters covered by the application, with special attention to showing the tribe has jurisdiction over nonmember activities within the reservation, if applicable. (Attachment C provides more information about how EPA addresses the jurisdiction of tribes over nonmember activities.) Statements may provide land ownership information, including maps and summary information on tribal trust, Indian trust, Indian fee, nonmember fee, and other types of land status or ownership. Statements summarize information within relevant provisions of listed documents and explain how the documents support the tribe's assertion of authority.</p> <p>Applications identify rivers, lakes, reservoirs, tidelands, wetlands, or other surface waters for which the tribe is proposing to establish water quality standards and may include a map that shows the locations and configurations of those waters. Where a tribe has been developing water quality standards, the application may use information from that effort to identify covered surface waters.</p> |

| Regulatory Provision | Examples of Documentation |
|--|---|
| <p>4) The tribe is reasonably expected to be capable of administering an effective WQS program. 40 CFR 131.8(a)(4). The application must include a narrative statement describing the tribe’s capability to administer an effective program. 40 CFR 131.8(b)(4). The narrative statement should include:</p> <ul style="list-style-type: none"> • A description of the tribe’s previous management experience, which may include the administration of programs and services authorized by the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.), the Indian Mineral Development Act (25 U.S.C. 2101 et seq.), or the Indian Sanitation Facility Construction Activity Act (42 U.S.C. 2004a). 40 CFR 131.8(b)(4)(i). • A list of existing environmental or public health programs administered by the tribal governing body and copies of related tribal laws, policies, and regulations. 40 CFR 131.8(b)(4)(ii). • A description of the entity (or entities) that exercise the executive, legislative, and judicial functions of the tribal government. 40 CFR 131.8(b)(4)(iii). • A description of the existing, or proposed, agency of the tribe that will assume primary responsibility for establishing, reviewing, implementing, and revising water quality standards. 40 CFR 131.8(b)(4)(iv). • A description of the technical and administrative capabilities of the staff to administer and manage an effective water quality standards program or a plan that proposes how the tribe will acquire additional administrative and technical expertise. The plan must address how the tribe will obtain the funds to acquire the administrative and technical expertise. 40 CFR 131.8(b)(4)(v). | <p>In addition to experience with the federal programs listed in the regulation, tribal applications may also discuss the tribe's previous management experience with its own tribal programs. This discussion need not address environmental program management experience, which is included in the next heading.</p> <p>Applications describe a tribal air, water, or waste management program, or any other environmental or public health programs administered by the tribe, as well as tribal experience with resource management, including forestry and fisheries. Relevant documents include copies or summaries of tribal laws and regulations governing the described program(s). A tribe is not required to have experience in administering environmental programs, but a tribe with such experience may wish to provide such information.</p> <p>Applications describe the tribal governmental system. This information may overlap with or duplicate information about the tribal governmental structure and functions discussed under 40 CFR 131.8(b)(2)(i) above, and a tribe may refer to, rather than repeat, that information.</p> <p>Applications describe the tribe’s environmental management program. Before a tribe can be authorized to issue water quality certifications, 40 CFR 121.1(e) requires that it identify the tribal entity that will be responsible for conducting water quality certifications under CWA § 401.</p> <p>Applications describe the qualifications of tribal staff, including resumes. Position descriptions are also useful documentation, since individual staff may change in future years. Or an application may include a plan that describes how the tribe will acquire the needed expertise to operate an effective program and how it will obtain the funds required to develop technical and administrative expertise. Evidence of management of previous EPA financial grants may be included. A tribe may choose, but is not required, to submit draft water quality standards as part of the showing of capability.</p> |

Attachment B

| Regulatory Provision | Examples of Documentation |
|--|---|
| 5) Additional documentation required by EPA that, in EPA's judgment, is necessary to support a tribal application. 40 CFR 131.8(b)(5). | Additional documentation from a tribe when needed to clarify or supplement the application. |

Examples of Information to Show Tribal Authority over Nonmember Activities Under *Montana v. United States*: Impacts of Nonmember Activities on Tribal Political Integrity, Economic Security, or Health or Welfare¹

The information below briefly summarizes the jurisdictional showing a tribe must generally make to establish eligibility for treatment in the same manner as a state (TAS) approval for the water quality standards (WQS) and certification programs and provides examples of the types of information federally recognized Indian tribes (tribe or tribal) have found useful in making that showing. Please note, the showing any specific tribe must make will be case-specific, based on facts applicable to the tribe's reservation. Thus, a tribe using these examples should carefully consider how each example applies to the tribe's reservation – some examples may be helpful and appropriate, but others may have only limited application, or may not apply at all. Finally, a tribe may find that the facts concerning its reservation make it appropriate to provide information not contained in these examples.

Introduction

The Clean Water Act (CWA) Section 518(e) (2) authorizes the U.S. Environmental Protection Agency to treat a tribe as a state for functions that pertain to management and protection of water resources “within the borders of an Indian reservation.” EPA has interpreted this provision to require that a tribe show authority over the water resources for which it seeks TAS approval, including any authority the tribe asserts over nonmember activities on the reservation. 56 Fed. Reg. 64876, 64880 (Dec. 12, 1991). EPA analyzes a tribe's inherent authority over nonmember activities under the test established in *Montana v. United States*, 450 U.S. 544 (1981) (*Montana* test). *Montana* held that absent a federal grant of authority, tribes generally lack inherent jurisdiction over nonmember activities on nonmember fee land, but retain inherent civil jurisdiction over nonmember activities within the reservation where (i) nonmembers enter into “consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements” or (ii) “. . . [nonmember] conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.” *Id.* at 566.

In the preamble to EPA's 1991 water quality standards regulation, the Agency noted that, in applying the second prong of the *Montana* test and assessing the impacts of nonmember activities on a tribe, EPA will rely upon an operating rule that evaluates whether the potential impacts of regulated activities on the tribe are serious and substantial. 56 Fed. Reg. at 64878-79. EPA also recognized that the analysis of whether the *Montana* test is met in a particular situation necessarily depends on the specific circumstances presented by the tribe's application. *Id.* at 64878. Thus, EPA's approach to the second prong of the *Montana* test involves a fact-specific inquiry to determine whether the tribe has shown that existing and potential nonmember activities

¹ EPA first announced this test in the Water Quality Standards preamble, but generally uses the test whenever it needs to determine a tribe's inherent authority over nonmember activities.

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within the reservation affecting water quality have or may have serious and substantial direct impacts on the political integrity, economic security, or health or welfare of the tribe.

Examples of General Information to Support a Claim of Inherent Authority to Protect Water Quality²

To support a claim of inherent authority to protect water quality, a tribal application documents the importance of protecting reservation waters to the tribe. General information that may help in showing this importance could describe how the following relate to water quality protection for these waters:

- The tribe:
 - tribal culture
 - tribal political and social organization
 - tribal lifestyles, folkways, and values
 - tribal religion
- The reservation:
 - economic activity currently taking place
 - economic activity that the reservation's characteristics could support, such as information about:
 - natural resources
 - climate
 - soil conditions
 - topography

The following types of land use information could be relevant to this inquiry:

- A copy of the Bureau of Indian Affairs map of the area over which the Indian tribe asserts authority for purposes of the TAS application under Section 518 of the CWA
- Land ownership information (maps and summary information on tribal trust, Indian trust, Indian fee, nonmember fee and other lands)
- Zoning maps and information about the tribe's zoning requirements
- Sewer districts or irrigation districts (maps and summary information)
- Water Resources and hydrogeology of the reservation:
 - Watersheds (maps and summary information about how water flows from lands into downstream water bodies)
 - Water bodies on and around the reservation (location, description, water quality issues, uses, environmental sensitivity)
 - Wetlands and sensitive areas
 - Groundwater and surface water, including hydrogeologic connectivity, and how pollution in one surface water body can migrate to other water bodies, or to ground water that may be used as a drinking water source

² The discussion below and the examples of information provided in tribal applications generally focus on the second prong of the *Montana* test relating to impacts of nonmember activities. Tribes should, however, also consider providing information regarding consensual relationships with nonmembers that may be relevant to a demonstration of authority under the first prong of the test.

In addition to the above, EPA's analysis may focus on the following specific types of information:

Examples of Information About Uses of Water to be Protected

Tribal applications have identified various ways tribes use or depend on reservation waters:

- Cultural, ceremonial, etc.
- Domestic drinking water supply
- Fisheries management
- Fishing, gathering plants, and other in-water activities
- Fish and wildlife watering habitat
- Ranching/grazing (stock watering)
- Recreation
- Water rights
- Agriculture (source of irrigation water)

Examples of Nonmember Activities Identified in Tribal Applications

EPA analyzes nonmember activities that actually occur on the reservation or that could occur, consistent with the reservation's characteristics, and the environmental consequences of those activities, including the following:

- Agriculture:
 - Uses of pesticides or fertilizers
 - Diversion of water for irrigation
- Businesses, Schools, Places of Worship:
 - Wastewater facilities or septic systems
 - Underground storage tanks
 - Industrial operations
 - Automotive repair chemicals
- Construction:
 - Stormwater runoff
 - Erosion and sedimentation
 - Increase in amount of impervious surfaces
 - Use of road chemicals
 - Operation of vehicles and machinery
- Energy Development and Transport (e.g. pipelines):
 - Oil and gas operations
 - Coal or other mining operations
- Ranching/Grazing:
 - Streambank erosion
 - Concentrated animal feeding operations
 - Animal access to surface water
- Residences:
 - Wastewater facilities or septic systems
 - Use of lawn chemicals
 - Improper disposal of household hazardous chemicals

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- Forestry and Timber harvesting:
 - Erosion
 - Reduction in extent or quality of stream buffers
- Recreation:
 - Boating
 - Fueling facilities
 - Waste facilities or septic systems
 - Marinas and docks
 - Increase in aquatic invasive species

Examples of How Pollutants May Affect a Tribe

Applications have also discussed how pollutants actually or potentially released by nonmember activities could affect the tribe, its members, or its resources. Those discussions have included the following types of information:

- Impact of pollution on natural resources available to tribal members – shellfish, fin fish, plants (e.g. wild rice)
- Impact of pollution on natural resources affecting the income of the tribe and tribal members
- Impact of pollution on drinking water sources:
 - Human health
 - Costs of meeting treatment requirements
 - Costs and difficulties caused by need to obtain water supplies from other sources

Overview of a Tribe's TAS Eligibility for the CWA Water Quality Standards Program

This document briefly describes the significance of a federally recognized Indian tribe's (tribe or tribal) application for the U.S. Environmental Protection Agency's approval to be treated in the same manner as a state (TAS) under Section 518(e) of the Clean Water Act (CWA) for purposes of water quality standards (WQS) and certification programs. The CWA authorizes TAS for a tribe that meets the requirements set forth in CWA Section 518(e) and 40 CFR 131.8, which include a showing that the tribe has adequate authority over the reservation waters covered by the application. Before making a decision on an application, EPA provides notice to appropriate governmental entities, as well as other interested stakeholders, as to the substance and basis of the tribe's assertions regarding its authority.

When EPA approves a tribe's TAS application the tribe becomes *eligible* to seek federal approval of its WQS. WQS consist of designated uses for water bodies, water quality criteria to protect those uses, and an antidegradation policy consistent with 40 CFR 131.12. A tribe's WQS would establish water quality goals for specific water bodies and serve as the regulatory basis for establishing water quality-based treatment controls and strategies. To obtain federal approval of its standards, a tribe must develop proposed standards, make them available for public comment, hold a public hearing regarding those proposed standards, and submit them to EPA for approval. Upon EPA approval, tribal WQS would apply to the reservation waters covered by the tribal TAS application. However, under the CWA, standards do not impose any direct enforceable requirements on any party, unless and until they are incorporated into a permit or used as the basis for some other regulatory decision.

WQS are an important step in protecting water quality. Such protection benefits everyone, including tribal members and nonmembers (including property owners), by helping ensure that waters are fishable and swimmable.

In addition, when EPA determines a tribe is eligible for TAS for purposes of WQS, the tribe is likewise eligible for and (once it designates a certifying agency, *see* 40 CFR 121.1(e)) assumes authority for issuing water quality certifications under CWA Section 401 for the reservation waters covered by the approval (*see* 40 CFR 131.4(c)). Under CWA Section 401, a federal entity cannot issue a permit or license to discharge into waters of the United States unless the relevant state or eligible tribe certifies that the discharge will comply with applicable water quality requirements, including WQS, or waives such certification. EPA retains authority for issuing water quality certifications within Indian country where a tribe has not been approved as eligible for TAS for WQS and water quality certifications. EPA regulations at 40 CFR part 121 address issuance of water quality certifications.

TAS approval for WQS does not give a tribe authority to administer the National Pollutant Discharge Elimination System or any other federal permitting program. Federal approval for issuing permits would require a separate TAS approval.

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Frequently Asked Questions: TAS Eligibility Process for the Clean Water Act Water Quality Standards and Certification Programs

This document provides answers to FAQs about the treatment in the same manner as a state (TAS) eligibility process for the Clean Water Act (CWA) water quality standards (WQS) and certification programs. It explains the processes under which governmental entities or other stakeholders can provide input during the U.S. Environmental Protection Agency's review of TAS eligibility applications and on WQS proposed by a federally recognized Indian tribe (tribe or tribal). It also provides information on how WQS and certifications are implemented through other CWA programs.

1. What requirements must a tribe meet in order to obtain approval of a TAS application under the CWA?

Answer: In 1987, Congress amended the CWA by adding Section 518 to address the role of tribes. Section 518 provides a method for tribes to be treated in the same manner as states for certain CWA programs. Section 518(e) describes the criteria a tribe must meet in order to be eligible for TAS. In accordance with CWA Section 518(e), EPA established regulations at 40 CFR 131.8 that describe the process and requirements for TAS approval to establish WQS and provide water quality certifications under the CWA (*see also* 40 CFR 131.4(c)). To obtain approval for WQS TAS under CWA Section 518(e) and EPA regulations at 40 CFR 131.8, a tribe must show that it:

- is federally recognized by the Secretary of the U.S. Department of the Interior;
- has a governing body carrying out substantial governmental duties and powers over a reservation;
- is proposing to carry out water quality standards functions that pertain to the management and protection of water resources within a reservation and has authority to regulate water quality; and
- is reasonably expected to be capable of carrying out the functions of an effective WQS program.

2. What public participation opportunities are available for TAS applications?

Answer: Under EPA's regulations, EPA provides notice of a tribe's assertion of authority over waters included in its TAS application to appropriate governmental entities (states, tribes, and other federal entities located contiguous to the reservation of the tribe applying for TAS) for comment. Comments are limited to the tribe's assertion of authority. EPA also provides notice to local governments and the public, whose comments are submitted through appropriate governmental entities. In addition, EPA provides similar opportunities for comment regarding tribal authority over nonmember activities when it develops a Proposed Findings of Fact document and makes that available for review prior to issuing a decision.

3. What does it mean if a tribe receives TAS for WQS and 401 certification under the CWA?

Answer: Once EPA approves a tribe's TAS status for a particular program under the CWA, the tribe is generally eligible to administer that program as a state would, with TAS status limited to the specific program covered by EPA's TAS decision. Thus, when a tribe submits a TAS application requesting CWA authority under Section 303(c) and Section 401, EPA's

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approval of the TAS application would apply only to those programs, and only to the reservation waters for which the tribe seeks approval.

4. Is EPA's approval of a TAS application for Sections 303(c) and 401 of the CWA the same as EPA approval of tribal WQS?

Answer: No. TAS approval is not the same as EPA approval of tribal WQS. TAS makes a tribe eligible to administer a WQS program. A tribe with TAS must still obtain federal approval of the WQS it submits to EPA before those standards can become effective under the CWA.

WQS consist of designated uses for water bodies, water quality criteria to protect those uses, and an antidegradation policy consistent with 40 CFR 131.12. A tribe's WQS would set goals for how clean reservation waters covered by the TAS approval should be and establish benchmarks for how activities that affect those waters can maintain acceptable water quality. EPA approval of the tribe's standards would enable the standards to serve as a basis for limitations in permits for discharges into reservation waters and would enable reservation waters to be protected by federally approved tribal CWA standards just as waters outside Indian country may be protected by federally approved state CWA standards.

5. What is the process for development and EPA review of tribal WQS?

Answer: Like states, all tribes with TAS must follow the procedures for developing EPA-approved standards set forth at 40 CFR 131.20. Thus a tribe would develop proposed standards, make them available to the public, hold a public hearing regarding the proposed standards, and submit standards to EPA for approval within 30 days of adopting the standards. A tribe with TAS that has previously developed and adopted WQS under tribal law may use this process to seek EPA approval for its existing standards, or, where necessary, may modify its standards to comply with the CWA. Or a tribe may develop new standards and seek EPA approval of such standards. But in every case, a tribe with TAS must obtain EPA approval of its standards following the same process a state must follow before the standards take effect under the CWA.

6. Will the public be able to comment on the tribe's WQS?

Answer: Yes. The tribe would need to hold a public hearing for the purpose of reviewing water quality standards in accordance with provisions of tribal law, as provided in EPA's water quality standards regulation at 40 CFR part 131, and the public participation regulations at 40 CFR part 25, including the requirement to make the proposed standards and supporting analyses available to the public prior to the hearing. *See* 40 CFR 131.20. The tribe would evaluate the public's comments, adopt any appropriate revisions, and then submit the WQS to EPA for review. EPA reviews the tribe's standards following the same process it uses to review WQS submitted by a state. The tribe's WQS would be in effect under the CWA only after EPA approval.

7. Do federally approved state WQS apply to waters in Indian country?

Answer: State standards generally do not apply to waters in Indian country under the CWA unless the state has demonstrated authority to set such standards and EPA has expressly found state authority and approved state standards for Indian country.

8. Are state and tribal WQS expected to be compatible?

Answer: Tribal WQS should be developed considering the quality and designated uses of waters entering and leaving reservations. EPA's regulations require that a state or tribe ensure that its WQS provide for the attainment and maintenance of the WQS of downstream

waters. *See* 40 CFR 131.10. Thus, it is important that the tribes recognize what the surrounding state (or another Indian reservation) WQS are even though there is no requirement to match those standards.

EPA has recommended to tribes that they use the standards of the adjacent states as a starting point for developing tribal standards. In most cases, the state standards are based on EPA's recommendations for narrative and numeric criteria. EPA's experience has been that tribes often set standards that are based on, or are similar to, standards set by an adjacent state. Often, even if there are differences between a tribe's and a state's use designations, the water quality criteria used by each jurisdiction to protect those uses are largely the same. Approved tribes, as well as states, often adopt water quality criteria that are the same as EPA's current national recommendations. Where differences exist in numeric criteria for a particular substance, it may simply be due to the timing of the state's and tribe's WQS revisions.

To the extent that differences do exist between state and tribal standards, a tribe and state may work together to resolve differences on a case-by-case basis, just as neighboring states work out differences. EPA regulations also provide for a mechanism to address disputes between states and tribes arising as a result of differing WQS adopted on common bodies of water where the difference in WQS results in unreasonable consequences. *See* 40 CFR 131.7.

9. Once a tribe has received TAS for Sections 303(c) and 401 of the CWA, can a tribe issue National Pollutant Discharge Eliminations System (NPDES) Permits?

Answer: No. EPA will continue to issue NPDES permits for the reservation. The tribe's TAS for WQS applies only to the tribe's authority to establish WQS under Section 303(c) of the CWA for reservation waters covered by the application and to issue water quality certifications under Section 401 of the CWA for federal permits and licenses for activities that discharge to those waters. A tribe must qualify for TAS status for each provision of the CWA or environmental program that it seeks to implement. At this time, no tribe has been approved for TAS status to administer the NPDES or any other CWA permit program on its reservation. An NPDES permit issued by EPA would need to contain any limits necessary to ensure compliance with EPA-approved tribal WQS. For a discharge upstream of the reservation, an NPDES permit must include conditions that ensure compliance with the applicable water quality requirements of the downstream waters covered by a TAS approval. *See* 40 CFR 122.4(d); 40 CFR 122.44(d) (3) and (4).

10. Once a tribe has received TAS for Sections 303(c) and 401 of the CWA, can the tribe prepare Section 401 Water Quality Certifications?

Answer: Once a tribe with TAS designates a certifying agency, *see* 40 CFR 121.1(e), that agency becomes authorized to prepare water quality certifications for federal permits and licenses for activities that may result in any discharge to the reservation waters covered by the TAS approval. Where EPA approves a tribe for TAS for purposes of WQS, the tribe likewise is eligible to the same extent as a state for purposes of certifications conducted under Section 401 of the CWA. EPA regulations (40 CFR part 121) address the issuance of water quality certifications by states and tribes with TAS.

This means that a tribe would evaluate whether a discharge under a federal license or permit would be consistent with the tribe's WQS and decide whether to grant, deny, or condition a water quality certification under Section 401 of the CWA. Thus, a federally issued NPDES or Section 404 permit for a facility (or activity) discharging into reservation waters covered by the TAS approval could not be issued without a tribal CWA Section 401 certification or waiver. EPA retains authority for issuing water quality certifications where a tribe has not been approved for TAS for WQS and water quality certifications. The CWA also provides a

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tribe with TAS a formal role in commenting on federal licenses or permits for discharges upstream from or adjacent to tribal waters. *See* CWA Section 401(a) (2).

11. Does TAS approval for Sections 303(c) and 401 of the CWA give a tribe enforcement authority for WQS under the CWA?

Answer: No. EPA's approval of a tribe's TAS application would not provide any enforcement authority to the tribe under the CWA. WQS help protect and improve water quality, but do not impose any directly enforceable requirements on any party. They do serve as a basis for specific control actions, such as effluent limitations in permits, that are enforceable, but the tribe's TAS approval to establish WQS and provide water quality certifications does not provide the tribe with any authority to enforce the standards. EPA would remain the entity with enforcement authority under the CWA. Unless and until a tribe is federally approved to implement a federal permitting program, if a tribe chooses to establish any regulations or enforcement measures to enforce the standards, it must do so under tribal law pursuant to the tribe's inherent authority as a sovereign government.

Under the CWA, a tribe's WQS would serve as benchmarks for water quality when EPA issues NPDES permits to facilities or when the U.S. Army Corps of Engineers issues Section 404 permits for activities that discharge to the reservation waters covered by the TAS approval. EPA or the Corps of Engineers is responsible for both issuing and enforcing these permits, which would include any conditions based on a tribe's Section 401 certification.

12. How would tribal water quality standards affect Total Maximum Daily Loads (TMDLs)?

Answer: A TMDL is a "pollution budget" for a water body that is failing to meet applicable WQS. A TMDL includes (1) a calculation of the maximum amount of a pollutant that a water body can receive and still meet WQS and (2) allocations of that total pollutant load to its point and nonpoint sources.

Water bodies on a reservation that have been listed under Section 303(d) of the CWA as not meeting applicable WQS require development of a TMDL set at a level that will implement the applicable WQS with seasonal variations and a margin of safety. For reservation waters, EPA could establish any needed TMDLs until the tribe obtains TAS for the TMDL program. TAS approval for TMDLs under Section 303(d) requires a separate approval beyond a TAS approval for Section 303(c) and Section 401 of the CWA.

Procedural Steps for Processing Tribal Applications for TAS Eligibility for Regulatory Programs Under the Clean Air Act¹

The U.S. Environmental Protection Agency process for reviewing a federally-recognized tribe’s (tribe or tribal) application for treatment in the same manner as a state (TAS) eligibility to administer a regulatory program under the Clean Air Act (CAA) consists of four steps. They are:

- **Step 1: The Tribe Submits an Application.**² Tribes are encouraged to work with EPA in developing their TAS eligibility applications to administer CAA programs. Drafts or components of the application may be shared with EPA before being formally submitted to the Agency. After EPA examines the tribe’s application, EPA may request additional information.

| Step | Description | Responsibility |
|------|--|-----------------|
| 1A | Pre-application discussions and technical assistance if appropriate | Joint Tribe-EPA |
| 1B | EPA review of pre-application materials (if requested) | |
| 1C | Tribe submits application to EPA | |
| 1D | EPA notifies the tribe of receipt of the application, and, as needed, requests additional information from the tribe, within 30 days of receipt of the application | EPA (Region) |
| 1E | Tribe submits additional information (if applicable) | Tribe |

- **Step 2: EPA Review.** EPA reviews the initial or revised application to verify that it is complete, i.e. includes all the basic information required for an eligibility determination. When EPA determines it has received a complete, initial application, it notifies the tribe that the application is complete, and provides notice to appropriate governmental entities regarding the application.

| Step | Description | Responsibility |
|------|---|----------------|
| 2A | EPA reviews application and determines if the application is complete | EPA (Region) |
| 2B | EPA notifies all appropriate governmental entities of the application and how it identifies the reservation’s boundaries, and of any assertions regarding tribal authority over non-reservation areas, within 30 days of receipt of initial, complete application | EPA (Region) |
| 2C | EPA notifies the tribe, in writing, that the application is complete no later than when EPA provides the notification in Step 2B | EPA (Region) |

¹ This document sets out the procedures EPA intends to follow in processing TAS applications under the CAA. EPA retains the discretion to deviate from this process when appropriate. This document imposes no binding legal requirements.

² Special provisions of law may apply to tribes in the State of Oklahoma. Tribes in Oklahoma should contact EPA for more information on TAS eligibility for EPA regulatory programs.

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- Step 3: Comment Period (if needed).** Appropriate governmental entities and the public have 30 days to comment regarding the reservation’s boundaries and tribal authority over non-reservation areas. *See* 40 CFR 49.9(b). EPA provides the comments to the tribe, which has the opportunity to respond. Where there is a dispute concerning tribal authority that EPA cannot promptly resolve, it may approve the portion of an application addressing undisputed areas. *See* 40 CFR 49.9(e).

| Step | Description | Responsibility |
|------|---|----------------|
| 3A | Appropriate governmental entities and the public have the opportunity to comment regarding the reservation’s boundaries or tribal authority over non-reservation areas; comments are generally due within 30 days | Commenters |
| 3B | EPA provides the comments to the tribe within 30 days of the close of the comment period | EPA (Region) |
| 3C | The tribe reviews the comments and may respond | Tribe |

- Step 4: Final TAS Eligibility Decision.** Based on its review of all the material – including the application, the administrative record, comments submitted, and any tribal responses – if EPA is prepared to approve the tribe’s TAS application, the EPA team produces a draft decision document, including a response to comments for final review within the Agency.³ The regional office notifies the tribe in writing of EPA’s approval of the tribe’s TAS application. The approval letter and the decision document are transmitted to the tribe. A determination by the EPA Regional Administrator concerning the boundaries of a reservation or tribal jurisdiction over non-reservation areas applies to all future CAA applications from the tribe, with no further notice to governmental entities unless the application presents different jurisdictional issues or significant new factual or legal information relevant to jurisdiction. *See* 40 CFR 49.9(f).

| Step | Description | Responsibility |
|------|--|----------------|
| 4A | EPA prepares decision document and response to comments | EPA (Team) |
| 4B | EPA regional official signs decision document | EPA (Region) |
| 4C | EPA notifies tribe of decision within 30 days of signature | EPA (Region) |

³ If the EPA Regional Administrator determines that a tribe meets the requirements of 40 CFR 49.6 for purposes of a CAA provision, the tribe is eligible to be treated in the same manner as a state with respect to that provision. The eligibility will extend to all areas within the exterior boundaries of the tribe’s reservation, as determined by the EPA Regional Administrator, and any other areas the EPA Regional Administrator has determined to be within the tribe’s jurisdiction. *See* 40 CFR 49.9(g).

Regulatory Requirements for TAS Eligibility Under the Clean Air Act and Examples of Supporting Documentation

The information below identifies the regulatory requirements the U.S. Environmental Protection Agency considers in assessing a federally recognized Indian tribe's (tribe or tribal) application for treatment in the same manner as a state (TAS) under the Clean Air Act (CAA) Tribal Authority Rule set forth in 40 CFR part 49 and provides examples of documentation that has been provided by tribes to meet those requirements.¹

| Regulatory Provision | Examples of Documentation |
|---|--|
| <p>1) An Indian tribe must be federally recognized. 40 CFR 49.6(a). To meet this requirement, a tribe should provide a concise statement that it is recognized by the Secretary of the Interior. 40 CFR 49.7(a) (1).</p> | <p>The Secretary of the Interior publishes in the <i>Federal Register</i> (FR) a list of federally recognized Indian tribes. Applicants often submit a recent copy of the FR list to establish that the tribe has federal recognition.</p> |
| <p>2) The tribe has a governing body carrying out substantial governmental duties and powers. 40 CFR 49.6(b). An application should include a descriptive statement demonstrating that it is currently carrying out substantial governmental duties and powers over a defined area. 40 CFR 49.7(a) (2). The statement should:</p> <ul style="list-style-type: none"> • Describe the form of the tribal government. 40 CFR 49.7(a) (2) (i). • Describe the types of government functions currently performed by the tribal governing body such as, but not limited to, the exercise of police powers affecting (or relating to) the health, safety, and welfare of the affected population; taxation; and the exercise of the power of eminent domain. 40 CFR 49.7(a) (2) (ii). • Identify the source of the tribal government's authority to carry out the governmental functions currently being performed. 40 CFR 49.7(a) (2) (iii). | <p>Applications discuss the organizational structure of the tribe and identify and describe the entities that exercise the executive, legislative, and judicial functions of government.</p> <p>Applications discuss specific regulatory, legislative, executive and judicial activities the tribe undertakes, including actions to exercise its police power to protect the environment, e.g. establishing regulatory programs or carrying out permitting and enforcement activities.</p> <p>Applications identify sources of the tribal government's authority, which may include oral or written tradition, an oral or written tribal constitution, tribal ordinances, codes, by-laws, charters, and resolutions, relevant provisions of federal treaties, executive orders or statutes, etc.</p> |

¹ Where the applicant has previously received authorization for a CAA program or for any other EPA-administered program, the applicant need only identify the prior authorization and provide the required information that has not been submitted in the previous application. 40 CFR 49.7(a) (8).

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| Regulatory Provision | Examples of Documentation |
|---|---|
| <p>3) The functions to be exercised by the Indian tribe pertain to the management and protection of air resources within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction. 40 CFR 49.6(c). A tribe's application should include a descriptive statement of the Indian tribe's authority to regulate air quality. 40 CFR 49.7(a) (3).</p> <ul style="list-style-type: none"> ▪ For applications covering areas within the exterior boundaries of the applicant's reservation, the statement must identify with clarity and precision the exterior boundaries of the reservation including, for example, a map and legal description of the area. 40 CFR 49.7(a) (3). • For tribal applications covering areas outside the boundaries of the reservation, the statement should include: <ul style="list-style-type: none"> ○ A map or legal description of the area over which the application asserts authority. 40 CFR 49.7(a) (3) (i). ○ A statement by the applicant's legal counsel (or equivalent official) that describes the basis for the tribe's assertion of authority (including the nature or subject matter of the asserted regulatory authority) which may include a copy of documents such as tribal constitutions, by-laws, charters, executive orders, codes, ordinances, and/or resolutions that support the tribe's assertion of authority. 40 CFR 49.7(a) (3) (ii). | <p>EPA interprets CAA § 301(d) as a Congressional delegation of authority to eligible federally recognized tribes for all air resources within a reservation. Thus, a tribe's application must establish the reservation's location and boundaries. Applications include maps showing the area and air resources over which the tribe asserts authority. A map may be based on an official survey by the U.S. Department of the Interior or an official map of the reservation prepared by the Bureau of Indian Affairs. A written legal description discusses with some specificity the locations of the boundaries of the reservation areas over which the tribe asserts authority.</p> <p>Applications include maps showing the area and air resources over which the tribe asserts authority. A map may be based on an official survey by the U.S. Department of the Interior or an official map of the reservation prepared by the Bureau of Indian Affairs. A written legal description discusses with some specificity the locations of the boundaries of the reservation areas over which the tribe asserts authority.</p> <p>Legal counsel statements identify and discuss the legal basis for the tribe's assertions of authority over areas covered by the application, with special attention to showing the tribe has jurisdiction over nonmember activities, if applicable.</p> |

| Regulatory Provision | Examples of Documentation |
|--|--|
| <p>4) The tribe is reasonably expected to be capable of effectively administering the Clean Air Act program for which the tribe is seeking approval. 40 CFR 49.6(d). The application should include:</p> <ul style="list-style-type: none"> • A narrative statement describing the capability of the applicant to administer effectively the Clean Air Act program for which the tribe is seeking approval. The narrative statement must demonstrate the applicant's capability consistent with the applicable provisions of the Clean Air Act and implementing regulations. 40 CFR 49.7(a) (4). <p>And, if requested by the Regional Administrator, the statement may include:</p> <ul style="list-style-type: none"> • A description of the Indian tribe's previous management experience which may include the administration of programs and services authorized by the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450, et seq.), the Indian Mineral Development Act (25 U.S.C. 2101, et seq.), or the Indian Sanitation Facility Construction Activity Act (42 U.S.C. 2004a). 40 CFR 49.7(a) (4) (i). • A list of existing environmental or public health programs administered by the tribal governing body and a copy of related tribal laws, policies, and regulations. 40 CFR 49.7(a) (4) (ii). • A description of the entity (or entities) that exercise the executive, legislative, and judicial functions of the tribal government. 40 CFR 49.7(a) (4) (iii). • A description of the existing, or proposed, agency of the Indian tribe that will assume primary responsibility for administering a Clean Air Act program (including a description of the relationship between the existing or proposed agency and its regulated entities). 40 CFR 49.7(a) (4) (iv). | <p>Examples of the recommended content of this narrative are listed below:</p> <p>In addition to experience with the federal programs listed in the regulation, tribal applications may also discuss the tribe's previous management experience with its own tribal programs. This discussion need not address environmental program management experience, which is included in the next heading.</p> <p>Applications describe a tribal air, water, or waste management program, or any other environmental or public health programs administered by the tribe, as well as tribal experience with resource management. Relevant documents include copies or summaries of tribal laws and regulations governing the described program(s). A tribe is not required to have experience in administering environmental programs, but a tribe with such experience may wish to provide such information.</p> <p>Applications describe the tribal governmental system. This information may overlap with or duplicate information about the tribal governmental structure and functions discussed under 40 CFR 49.7(a) (2) above, and a tribe may refer to, rather than repeat, that information.</p> <p>Applications describe the tribe's environmental management program.</p> |

Attachment G

| Regulatory Provision | Examples of Documentation |
|---|--|
| <ul style="list-style-type: none"> • A description of the technical and administrative capabilities of the staff to administer and manage an effective air quality program or a plan which proposes how the tribe will acquire administrative and technical expertise. The plan should address how the tribe will obtain the funds to acquire the administrative and technical expertise. 40 CFR 49.7(a) (4) (v). | <p>Applications describe the qualifications of tribal staff, including resumes. Position descriptions are also useful documentation, since individual staff may change in future years. Or an application may include a plan that describes how the tribe will acquire the needed expertise to operate an effective program and how it will obtain the funds required to develop technical and administrative expertise.</p> |
| <p>5) Additional information required by EPA that, in EPA’s judgment, is necessary to support a tribal application. 40 CFR 49.7(a) (7).</p> | <p>Additional documentation from a tribe when needed to clarify or supplement the application.</p> |

Regulatory Requirements for TAS Eligibility Under the Safe Drinking Water Act Public Water System Supervision Program and Examples of Supporting Documentation

The information below identifies the regulatory requirements that the U.S. Environmental Protection Agency considers in assessing a federally recognized Indian tribe's (tribe or tribal) application for treatment in the same manner as a state (TAS) as part of its review of a tribal application for primary enforcement responsibility to implement the national standards for the Safe Drinking Water Act public water system supervision (PWSS) program under 40 CFR part 142, subpart B. This document addresses the TAS requirements set forth in 40 CFR 142.72 and 142.76 and provides examples of documentation that can meet those requirements.¹

| Regulatory Provision | Examples of Documentation |
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| <p>1) The Indian tribe must be federally recognized by the Secretary of the Interior. 40 CFR 142.72(a). To meet this requirement, the tribe's application must include a statement that the tribe is recognized by the Secretary of the Interior.</p> <p>40 CFR 142.76(a)</p> | <p>The Secretary of the Interior publishes in the <i>Federal Register</i> (FR) a list of federally recognized Indian tribes. Applicants often submit a recent copy of the FR list to establish that the tribe has federal recognition.</p> |
| <p>2) The Indian tribe has a tribal governing body carrying out substantial governmental duties and powers. 40 CFR 142.72(b). An application must include a concise, descriptive statement demonstrating that the tribal governing body is currently carrying out substantial governmental duties and powers over a defined area. 40 CFR 142.76(b). That statement should:</p> <ul style="list-style-type: none"> • Describe the form of the tribal government. 40 CFR 142.76(b) (1). • Describe the types of governmental functions currently performed by the tribal governing body such as, but not limited to, the exercise of police powers affecting (or relating to) the health, safety, and welfare of the affected population; taxation; and the exercise of the power of eminent domain. 40 CFR 142.76(b) (2). • Identify the sources of the tribal government's authority to carry out the governmental functions currently being performed. 40 CFR 142.76(b) (3). | <p>An application may discuss the organizational structure of the tribe and identify and describe the entities that exercise the executive, legislative, and judicial functions of government.</p> <p>An application may discuss specific regulatory, legislative, executive, and judicial activities the tribe undertakes, including actions to exercise its police power to protect the environment, e.g. establishing regulatory programs or carrying out permitting and enforcement activities.</p> <p>Applications identify sources of the tribal government's authority, which may include oral or written tradition, an oral or written tribal constitution, tribal ordinances, codes, by-laws, charters, resolutions, relevant provisions of federal treaties, executive orders, or statutes, etc.</p> |

¹ Where the applicant has previously been granted TAS eligibility for a Safe Drinking Water Act, Clean Water Act, or Clean Air Act program, the applicant need only provide the required information unique to the Public Water System Supervision program. *See* 40 CFR 142.76(f).

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| Regulatory Provision | Examples of Documentation |
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| <p>3) The Indian tribe demonstrates that the functions to be performed in regulating the public water systems that the applicant intends to regulate are within the area of the Indian tribal government's jurisdiction. 40 CFR 142.72(c).² The application must include:</p> <ul style="list-style-type: none"> • A map or legal description of the area over which the Indian tribe asserts jurisdiction. 40 CFR 142.76(c). • A statement by the Tribal Attorney General (or equivalent official) that describes the basis for the tribe's jurisdictional assertions (including the nature or subject matter of the asserted jurisdiction) and a copy of those documents such as tribal constitutions, by-laws, charters, executive orders, codes, ordinances, and/or resolutions that the tribe believes are relevant to its assertions regarding jurisdiction. 40 CFR 142.76(c). • A description of the locations of the public water systems the tribe proposes to regulate. 40 CFR 142.76(c). | <p>Applications include maps showing the area and public water systems over which the tribe asserts authority. Some tribes provide maps based on an official survey by the U.S. Department of the Interior or an official map of the reservation prepared by the Bureau of Indian Affairs. A written legal description discusses with some specificity the locations of the boundaries of the reservation areas over which the tribe asserts authority.</p> <p>Legal counsel statements identify and discuss the legal basis for the tribe's assertions of authority over areas/water systems covered by the application, with special attention to showing the tribe has jurisdiction over nonmember activities, if applicable. Statements may provide land ownership information, including maps and summary information on tribal trust, Indian trust, Indian fee, nonmember fee, and other types of land status or ownership. Statements summarize information within relevant provisions of listed documents and explain how the documents support the tribe's assertion of authority.</p> <p>Applications identify the public water systems for which the tribe intends to regulate, describe their locations, and may include a map that shows the locations and configurations of those public water systems.</p> |

² This overlaps with the requirement that a state or tribe seeking primacy must demonstrate that its laws and ordinances to carry out the PWSS program were duly adopted and are enforceable, 40 CFR 142.11(a) (7) (i), and that it has adequate authority to carry out primary enforcement responsibility. 40 CFR 142.11(a) (7) (ii).

| Regulatory Provision | Examples of Documentation |
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| <p>4) The Indian tribe is reasonably expected to be capable of administering (in a manner consistent with the terms and purposes of the Safe Drinking Water Act and all applicable regulations) an effective Public Water System Supervision program. 40 CFR 142.72(d). The application must include a narrative statement describing the capability of the Indian tribe to administer an effective Public Water System Supervision program. 40 CFR 142.76(d). That statement should include:</p> <ul style="list-style-type: none"> • A description of the Indian tribe's previous management experience, which may include the administration of programs and services authorized by the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.), the Indian Mineral Development Act (25 U.S.C. 2101, et seq.), or the Indian Sanitation Facility Construction Activity Act (42 U.S.C. 2004a). 40 CFR 142.76(d) (1). • A list of existing environmental or public health programs administered by the tribal governing body and a copy of related tribal laws, regulations, and policies. 40 CFR 142.76(d) (2). • A description of the Indian tribe's accounting and procurement systems. 40 CFR 142.76(d) (3). • A description of the entity (or entities) that exercise the executive, legislative, and judicial functions of the tribal government. 40 CFR 142.76(d) (4). • A description of the existing, or proposed, agency of the Indian tribe that will assume primary enforcement responsibility, including a description of the relationship between owners/operators of the public water systems and the agency. 40 CFR 142.76(d) (5). | <p>In addition to experience with the federal programs listed in the regulation, tribal applications may also discuss the tribe's previous management experience with its own tribal programs. This discussion need not address environmental program management experience, which is included in the next heading.</p> <p>Applications describe a tribal air, water, or waste management program, or any other environmental or public health programs administered by the tribe, as well as tribal experience with resource management, including forestry and fisheries. Relevant documents include copies or summaries of tribal laws and regulations governing the described program(s). A tribe is not required to have experience in administering environmental programs, but a tribe with such experience may wish to provide such information.</p> <p>Applications may describe the system of record-keeping and accounting the applicant uses for managing tribal funds and how it procures goods or services. A tribe that has received EPA financial assistance will have managed procurement under its grant using a system consistent with the procurement requirements set forth at 40 CFR 31.36.</p> <p>Applications describe the tribal governmental system. This information may overlap with or duplicate information about the tribal governmental structure and functions discussed under 40 CFR 142.76(b) (1) above, and a tribe may refer to, rather than repeat, that information.</p> <p>Applications describe the tribe's environmental management program.</p> |

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| Regulatory Provision | Examples of Documentation |
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| <ul style="list-style-type: none"> • A description of the technical and administrative capabilities of the staff to administer and manage an effective Public Water System Supervision program or a plan that proposes how the tribe will acquire additional administrative and/or technical expertise. The plan must address how the tribe will obtain the funds to acquire the additional administrative and technical expertise. 40 CFR 142.76(d) (6). | <p>Applications describe the qualifications of tribal staff, including resumes. Position descriptions are also useful documentation, since individual staff may change in future years. Or an application may include a plan that describes how the tribe will acquire the needed expertise to operate an effective program and how it will obtain the funds required to develop technical and administrative expertise. Evidence of management of EPA grants may also be included.</p> |
| <p>5) Additional information required by EPA that, in EPA's judgment, is necessary to support a tribe's eligibility. 40 CFR 142.76(e).</p> | <p>Additional documentation as requested from a tribe by EPA may be needed to clarify or supplement the application.</p> |

Frequently Asked Questions: TAS Eligibility Process for the Safe Drinking Water Act Public Water System Supervision Program

This document provides answers to FAQs about the treatment in the same manner as a state (TAS) eligibility process for the Safe Drinking Water (SDWA) Public Water System Supervision (PWSS) program.

1. What is the Public Water System Supervision program?

Answer: The SDWA is designed to protect public health through maintaining and improving the quality of the nation's drinking waters. The 1974 law was amended in 1986 to address federally recognized Indian tribes (tribes or tribal) and further amended in 1996. The SDWA authorizes many actions to protect drinking water and its sources. Through the PWSS program, the U.S. Environmental Protection Agency implements and enforces drinking water standards to protect public health.

2. What water systems are regulated under the SDWA?

Answer: The SDWA regulates water systems that serve 25 or more persons or have at least 15 connections. Regulated systems can be either privately or publicly owned. The SDWA does not regulate private wells or systems that serve fewer than 25 individuals.

3. What is TAS?

Answer: The SDWA authorizes EPA to treat eligible Indian tribes in the same manner as a state for the purpose of assuming primary enforcement responsibility for the PWSS program. A tribe must obtain TAS eligibility approval in order to assume such a role. TAS is sought in conjunction with primacy or a program development grant and is not a separate process.

4. What is Primacy?

Answer: Tribes may be approved for primary enforcement responsibility (or "primacy") to implement the national standards for the PWSS program at public water systems under their jurisdiction. For a tribe to obtain primacy, EPA must approve the tribe for TAS and determine that the tribe meets the requirements for primacy under Section 1413(a) of the SDWA, 42 U.S.C. § 300g-2(a), and 40 CFR part 142, subpart B. TAS is sought in conjunction with primacy and is not a separate process. The *Tribal Primacy: An Overview* brochure (EPA 816-K-02-007) provides more details about primacy requirements for the PWSS program. EPA regions retain primary enforcement authority for the PWSS program in the absence of an EPA-approved PWSS program in Indian country.

5. Can my tribe receive funding from EPA to develop a primacy program?

Answer: Yes. The SDWA authorizes financial assistance to states and to tribes with TAS approval for the PWSS program to develop primacy programs. As part of the process for obtaining a PWSS grant to develop a primacy program, a tribe must obtain approval for TAS for purposes of receiving a grant.

6. Is my tribe eligible for TAS for the PWSS Program?

Answer: There are four requirements for tribal TAS eligibility. A tribe must 1) be recognized by the Secretary of the Interior; 2) have a functional tribal government responsible for the health, safety, and welfare of the tribal community; 3) be able to demonstrate that the

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regulatory functions to be performed in the public water systems are within the Indian tribal government's jurisdiction; and 4) be capable of administering an effective PWSS program consistent with the SDWA and all applicable regulations. 40 CFR 142.72

7. How can my tribe apply for TAS?

Answer: Your tribe applies for TAS as part of the process of applying for a grant or for primacy. To apply for TAS, your tribe must meet the TAS eligibility requirements at 40 CFR 142.72 by providing the following information identified in 40 CFR 142.76: 1) a statement that the tribe is recognized by the Secretary of the Interior; 2) information about the tribal government; 3) proof of tribal authority; and 4) a description of administrative capabilities. The EPA Administrator may request further documentation necessary to support a tribe's eligibility for TAS.

More detailed information about the TAS application process and application materials can be found in the *Treatment in the Same Manner as a State (TAS) for the Public Water System Supervision (PWSS) Program Fact Sheet* (EPA 816-F-07-006) and in Attachment H of this TAS review strategy.

8. What if my tribe has already met the requirements for TAS eligibility under the SDWA for the Underground Injection Control (UIC) Program, the Clean Water Act (CWA), or the Clean Air Act (CAA)?

Answer: If the EPA Administrator has previously determined that a tribe has met the requirements for TAS eligibility under the SDWA for the UIC Program, the CWA, or the CAA, then that tribe only needs to provide information unique to the PWSS program. More details can be found in the *Treatment in the Same Manner as a State (TAS) for the Public Water System Supervision (PWSS) Program Fact Sheet* (EPA 816-F-07-006) (see paragraphs 3, 4e, and 4f under *TAS Application Materials*).

9. Where should my tribe send the application materials?

Answer: You will want to work closely with the EPA regional office as you are preparing your application. The EPA regional office can answer questions and provide guidance while you prepare your application. When completed, applications should be sent to the EPA regional office that currently implements and enforces the SDWA for your tribe. To find information about which EPA region works with your tribe, visit <http://www.epa.gov/indian/map.htm>.

10. Where can I get more information about TAS?

Answer: The *Treatment in the Same Manner as a State (TAS) for the Public Water System Supervision (PWSS) Program Fact Sheet* (EPA 816-F-07-006) and Attachment H of this TAS review strategy provide detailed information about the TAS application process and application materials. EPA's American Indian Environmental Office also has information on TAS as well as other laws, regulations, and guidance related to Indian country on its Web site at <http://www.epa.gov/indian/>.