

Tribal Consultation on the Proposed Rulemaking to Provide More Opportunities for Tribes to Engage in the Clean Water Act Impaired Water Listing and Total Maximum Daily Load Program -- April 8, 2014 to June 6, 2014

Summary of Issues and Questions Raised

How will tribes get funding to develop Total Maximum Daily Loads (TMDLs)? Can tribes get funding under Clean Water Act Section 604(b) as states do?

The U.S. Environmental Protection Agency (EPA) recognizes that funding for TMDL development is an important consideration for tribes as they consider whether to apply for treatment in a similar manner as a state (TAS) for Clean Water Act (CWA) section 303(d) purposes. The most likely sources of funding are: 1) the grant program under section 106 of the Clean Water Act, which supports a range of state and tribal water quality management activities including, as appropriate, listing waters as impaired and developing TMDLs under section 303(d); and 2) the Section 319 Grant Program, which supports demonstration projects that protect and restore water quality. Currently tribes receive about 12 percent of the Section 106 Grant Program and about five percent of the Section 319 Grant Program. EPA anticipates that tribes interested in the Section 303(d) Program would work with their EPA Regional office to include appropriate section 303(d) activities in their grant workplans. However, EPA cannot assure or assume that additional funding will be available for a tribe developing or implementing the Section 303(d) Program. A tribe choosing to administer the Section 303(d) Program will need to carefully weigh its priorities for EPA assistance.

In some circumstances, a tribe may be able to use its General Assistance Program (GAP) Grant under the Indian Environmental General Assistance Program Act to support development of a section 303(d) program. Tribes interested in this approach would need to contact their Regional GAP program coordinator.

Unfortunately, CWA section 604(b) funds are not directly available to tribes, even if they obtain TAS, because the availability of such funds is restricted by the section's "allotment" language. EPA is looking into whether tribes may be able to access such funds "indirectly" as state grantees.

As resources allow, EPA intends to partner with tribes using Agency staff resources and contract funding to support CWA section 303(d) actions in Indian country.

If EPA finalizes the rule it is considering, will action be required of tribes?

Through this potential rulemaking, EPA would establish the TAS process for tribes that are interested in applying for TAS for 303(d). The rule would establish TAS application requirements and the procedures EPA would use to process TAS applications. However, tribes are not required to seek TAS status for any CWA program. EPA does

not anticipate the rulemaking will require anything of tribes that are not interested in TAS for 303(d).

Has EPA developed TMDLs for Indian country?

In certain circumstances, EPA has developed TMDLs for waters in Indian country.

In at least one EPA Region, cooperative approaches (documented in a memorandum of understanding) have been worked out between tribes, the state, and EPA in which there has been agreement among the relevant entities to develop a TMDL for waters that are shared across Indian country and non-Indian country areas.

What are the requirements that tribes must meet to be considered eligible for TAS for the CWA Section 303(d) Impaired Water Listing and TMDL Program?

EPA is exploring this question as part of the potential rulemaking. We are expecting that applications for TAS for the Water Quality Standards (WQS) Program and TAS for Impaired Water Listing and TMDL Program would be very similar, and fulfill the TAS eligibility criteria of CWA section 518(e):

1. The Indian tribe has a governing body carrying out substantial governmental duties and powers;
2. The functions to be exercised by the Indian tribe pertain to the management and protection of water resources which are held by an Indian tribe, held by the United States in trust for Indians, held by a member of an Indian tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of an Indian reservation; and
3. The Indian tribe is reasonably expected to be capable, in the Administrator's judgment, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of this Act and of all applicable regulations.

If a tribe already has TAS for WQS, EPA expects that the tribe would need to submit only material that had not previously been provided as part of the WQS TAS application process, consistent with the [TAS Simplification Rule](http://www.epa.gov/fedrgstr/EPA-WATER/1994/December/Day-14/pr-26.html) (available at <http://www.epa.gov/fedrgstr/EPA-WATER/1994/December/Day-14/pr-26.html>). This means a tribe could either refer to or copy the parts of the tribe's earlier submission that have not changed. For issues that call for material focused specifically on 303(d) (e.g., the description of the tribe's capability to carry out the program, any changes in the geographic scope of the reservation area being covered, etc.) a tribe would need to develop and submit new material.

How does EPA plan to coordinate with states?

EPA is coordinating outreach to states regarding this potential rulemaking. For

example, EPA plans to conduct pre-proposal consultation and coordination on the potential rulemaking with intergovernmental associations and coordinate with the Association of Clean Water Administrators (ACWA) in tandem with the *Federal Register* notice publication of a proposed rule and concurrent public comment period.

What happens when a waterway is shared between a state/tribal boundary (e.g., if the tribe drafts a TMDL based upon EPA-approved WQS of the tribe)?

A TMDL is established at a level necessary to attain and maintain the applicable narrative and numeric water quality standards. Jurisdictions that share a waterbody or watershed can make the Section 303(d)-listing and TMDL development processes more effective by cooperating to develop consistent water quality standards for those shared waterbodies and cooperating in the establishment of 303(d) lists and TMDLs. This will make impaired waterbody identifications and TMDLs more effective tools for protecting water quality. EPA's draft "Considerations for the Development of Multijurisdictional TMDLs" document, available at http://water.epa.gov/lawsregs/lawsguidance/cwa/tmdl/upload/Draft-MJTMDL_032212.pdf, provides additional detail on this topic.

Will there be any significant changes to QAPP [Quality Assurance Project Plan] process when a tribe issues a TMDL [i.e., once a tribe has TAS for CWA Section 303(d)]?

In this potential rulemaking, EPA would establish the process for tribes to obtain TAS for listing and TMDLs, pursuant to CWA section 303(d). The QAPP process is largely separate from this rulemaking (i.e., the QAPP may be an aspect of writing the TMDL itself), but would not generally be relevant for the TAS eligibility process.

If a tribe applies for TAS for 303(d), will the tribe need to do a CWA section 305(b) report?

The fact that a tribe applies for and obtains TAS for 303(d) purposes does not impose a requirement on the tribe to develop and submit a CWA section 305(b) report. Sections 303(d) and 305(b) are separate sections of the CWA. Section 305(b) does not require Indian tribes to submit CWA section 305(b) biennial water quality reports. Hence, acquisition of TAS for 303(d) purposes does not impose new CWA reporting requirements under section 305(b).

EPA reduced CWA section 319 funding this year, and further reductions are anticipated. How are tribes supposed to perform restoration that follows the TMDL?

Section 319 is one source of funding for implementing projects to control nutrients and other nonpoint source pollution. Since fiscal year 2011 (FY11) Section 319 funding overall has fallen by 20 percent from historical funding levels. Over that same time interval EPA has allotted about 4.8% of the national CWA section 319 allocation to tribes, approximately \$7.5M. Meanwhile additional tribes continue to become eligible for the program -- 180 tribes are now eligible for CWA section 319 funding, increased by over 20 tribes in the last several years. In response to this growing need to support tribal 319 programs, beginning in FY15 EPA will allot to the tribal CWA Section 319 Program either \$8M or 5% of the total nonpoint source allocation, whichever is greater. EPA will continue with this approach in subsequent fiscal years as long as the total 319 funding amounts remain in the range of the last few fiscal years.