

Treatment in a Similar Manner as States for Purposes of Clean Water Act Section 303(d): Proposed Rule

Information Webinar
February 2016



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Webinar Logistics

- **To Ask a Question** – Type your question in the “Questions” tool box on the right side of your screen and click “Send.” Also, we will open the phone line after the presentation and have time for questions and dialogue with our audience, speaker, and moderator.
- **To Report Any Technical Issues** (such as audio problems) – Type your issue in the “Questions” tool box on the right side of your screen and click “Send” and we will respond by posting an answer in the “Questions” box.

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Summary

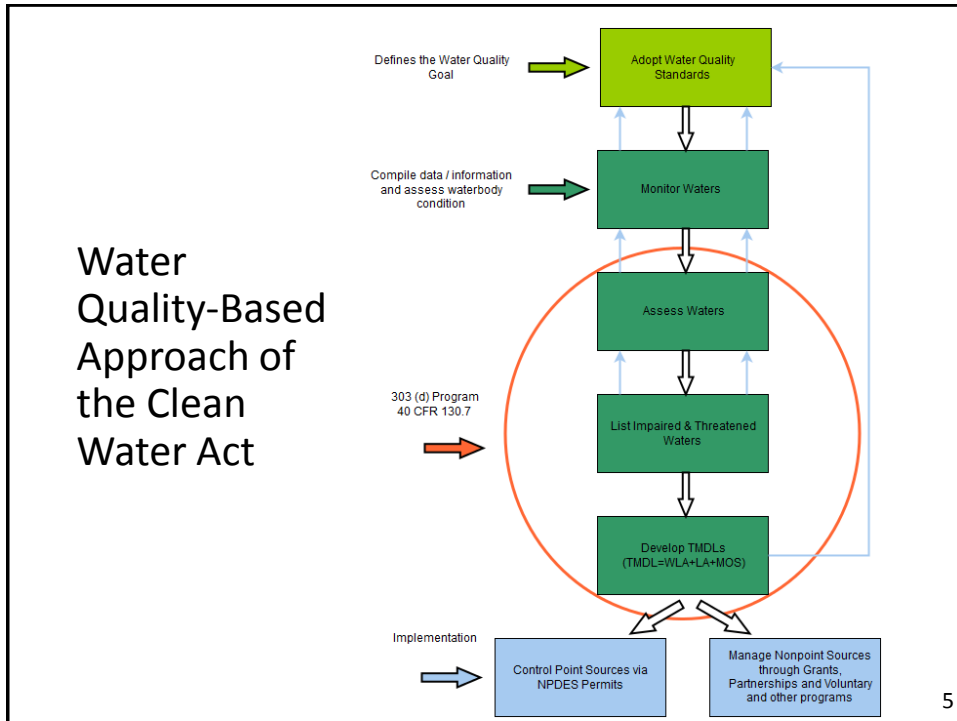
- In section 518(e) of the Clean Water Act (CWA), Congress authorized EPA to treat eligible federally recognized Indian tribes in a similar manner as states for purposes of administering section 303 and certain other provisions of the CWA, and directed the agency to promulgate regulations effectuating this authorization.
- EPA has not yet promulgated regulations expressly establishing a process for such tribes to obtain treatment in a similar manner as states (TAS) authority to administer the water quality restoration provisions of CWA section 303(d), including issuing lists of impaired waters and developing total maximum daily loads (TMDLs) under CWA section 303(d).
- EPA is now proposing to remedy this gap.
- This proposed rule would not require anything of tribes that are not interested in TAS for the 303(d) Program.

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Overview of Today's Webinar

- Background
 - Impaired Water Listing and TMDL Program
 - TAS
- EPA's Proposal
- Next Steps
- How to Comment on the Proposal
- How to Obtain More Information

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What is the Impaired Waters Listing and TMDL Program?

- Under the CWA, states, territories, and authorized tribes:
 - Assemble and evaluate existing and readily available water quality data and information
 - Develop lists of impaired waters every two years (2014, 2016, 2018...)
 - Establish TMDLs for waters on the list

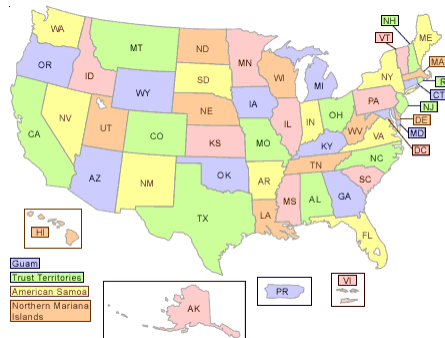
Developing a 303(d) List of Impaired and Threatened Waters

- Assemble and evaluate all readily available water quality data and information
- Develop assessment methodology
 - Water quality data and information and applicable water quality standards (WQS) used to make listing decisions
- Identify waters that do not meet WQS (impaired) or are not likely to meet WQS (threatened)
- Establish priority ranking of all listed waters
- Identify specific waters targeted for TMDL development (in next 2 years)
- Request and respond to public comments
- Submit final impaired and threatened waters list to EPA for review and action (2 year cycle)

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The National Picture

- ~ 43,000 waters listed as impaired
- Top causes of impairments:
 - pathogens
 - metals
 - nutrients
 - sediment
 - temperature



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What is a TMDL?

- A planning document intended to address impairment of waters, including the calculation and allocation to point and nonpoint sources of the maximum amount of a pollutant that a waterbody can receive and still meet applicable WQS, with a margin of safety.



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Developing TMDLs

- TMDLs are established considering priority rankings developed by a 303(d) program authority for each waterbody / pollutant combination
- TMDLs often address multiple impairments within a watershed
- TMDLs and supporting documents typically include:
 - data summary / analysis,
 - pollutant source assessment,
 - pollutant loading targets,
 - calculations for loading capacity, wasteload allocation (WLA; point sources), load allocation (LA; nonpoint sources), margin of safety (MOS),
 - reasonable assurance demonstration, and
 - summary of and response to public comments
- TMDLs may be accompanied by an implementation plan designed to meet WQS and restore water quality

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Developing TMDLs, cont.

- Under the CWA, states, territories, and authorized tribes develop TMDLs for waters on the 303(d) list
- A TMDL could take a year or two to develop, or longer if it is very complex
- TMDL interim alternatives may exist in some circumstances

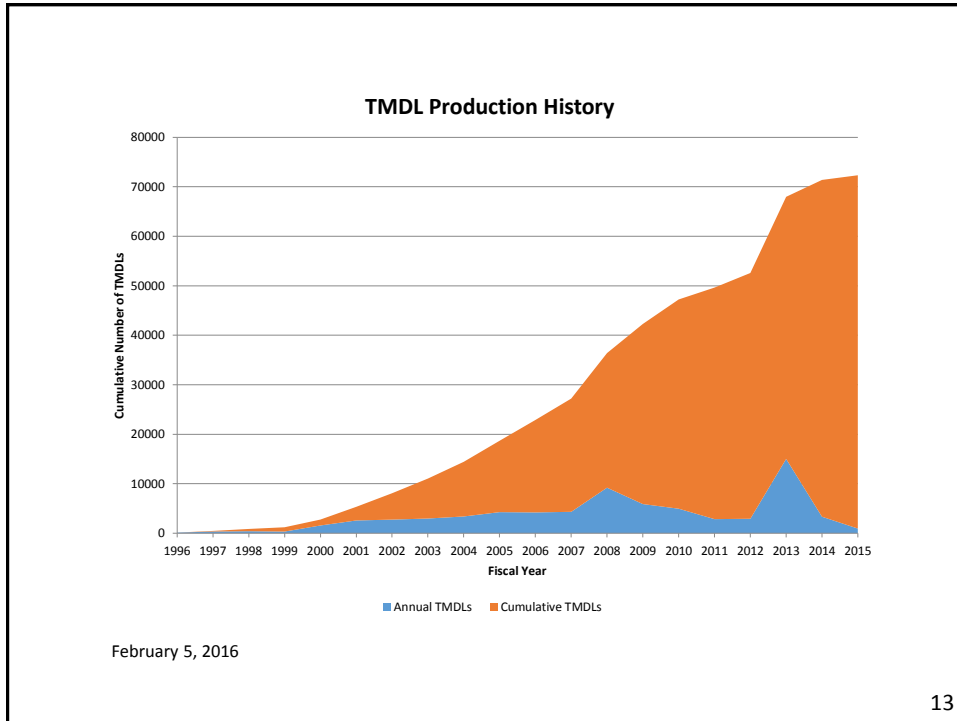
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How is a TMDL Used to Reduce Water Pollution?

- National Pollutant Discharge Elimination System (NPDES) permits must include limits consistent with a TMDL's WLA
- Nonpoint sources are not directly regulated under the CWA. TMDL LAs for nonpoint sources provide guidance to inform actions implemented through a wide variety of programs at the state, tribal, and federal levels



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Number of Tribes with TAS under the CWA

Program	Number of Tribes with TAS
Pollution Control Program Grants (§106)	271
Nonpoint Source Grants and Planning (§319)	186
Water Quality Standards (§303(c)) and §401 Certification Authority	50 (42 of these TAS tribes have approved WQS)
Listing and TMDLs (§303(d)) Authority	0
NPDES (§402) Authority	0
Dredge or Fill Permit (§404) Authority	0

Data as of February 2016

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CWA TAS Provision

- Under section 518 of the Clean Water Act EPA is authorized to treat a tribe in a similar manner as a state for purposes of a regulatory program if:

1. The tribe is federally recognized and has a reservation.*
2. The tribe has a governing body carrying out substantial governmental duties and powers.
3. The tribe has appropriate authority to regulate the quality of reservation waters.
4. The tribe is reasonably expected to be capable of carrying out the functions of the program.

* **Reservation** means all land within the limits of an Indian reservation notwithstanding the issuance of any patent, and including rights of way running through the reservation.

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TAS Background

- Under the CWA section 518(e), EPA shall promulgate final regulations that specify how Indian tribes shall be treated similarly to states for purposes of the Act
- In the 1990s, EPA issued regulations establishing a process for federally recognized tribes to obtain TAS for several provisions of the CWA.

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EPA's Proposal

- On January 19, 2016, EPA published a proposed rule to establish a process for tribes to apply to EPA for authority to establish lists of impaired waters and establish TMDLs pursuant to section 303(d) of the CWA. See 81 FR 2791.
- The proposal is comparable to similar regulations that EPA issued in the 1990s for the CWA Section 303(c) WQS and CWA Section 402 and 404 Permitting Programs, and includes features designed to minimize paperwork and unnecessary reviews.

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EPA's Proposal

Category	Examples of potentially affected or interested entities
Tribes	Federally recognized tribes with reservations that are interested in applying for TAS for CWA Section 303(d) Impaired Water Listing and TMDL Program, and other interested tribes.
States	States adjacent to reservations of potential applicant tribes.
Industry dischargers	Industrial and other commercial entities discharging pollutants to waters within or adjacent to reservations of potential applicant tribes.
Municipal dischargers	Publicly owned treatment works or other facilities discharging pollutants to waters within or adjacent to reservations of potential applicant tribes.

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EPA's Proposal

Highlights:

- The statutory and regulatory history of TAS under the CWA.
- Reasons a tribe might be interested in seeking TAS for the 303(d) Program.
- Program responsibilities tribes would have upon obtaining TAS for the 303(d) Program.
- Proposed regulatory procedures for a tribe to seek TAS for the 303(d) Program.
- Special circumstances that may exist regarding qualification for TAS for the 303(d) Program.
- Regulatory procedure EPA would follow in reviewing a tribe's TAS application.
- An example of a stepwise approach for tribes applying for TAS for CWA programs.
- Availability of EPA financial and technical support to tribes that choose to develop and implement a 303(d) program.

The preamble to the proposed rule requests comments on all aspects of the proposal, and also specifically requests comments on some issues.

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Specific Requests for Comment

Preamble section VII -- What procedure would EPA follow in reviewing a tribe's TAS application?

- A. Notice to Appropriate Governmental Entities
- B. Avoidance of Duplicative Notice and Comment Procedures

→ Where a tribe has previously qualified for TAS for a CWA regulatory program and EPA has provided notice and an opportunity to comment on the tribe's assertion of authority as part of its review of the prior application, **no further notice** would be provided with regard to the same tribe's application for the 303(d) Program **unless** the 303(d) TAS application presents different jurisdictional issues/significant new factual/legal information relevant to jurisdiction.

→ **EPA requests comment** on its proposed approach. Further, EPA requests comment on whether the notice and comment exemption should be available only **prospectively** (*i.e.*, only where applicant tribe obtains TAS for CWA Section 303(c) Program, 402 Program, or 404 Program *after* this proposed rule is finalized) **and only** if different jurisdictional issues or significant new factual/legal information relevant to jurisdiction are **not** present in tribe's 303(d) TAS application.

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Specific Requests for Comment

Preamble section VIII -- What is an example of a stepwise approach for tribes applying for TAS authority for CWA programs?

- The proposed rule does not require tribes to have EPA-approved or EPA-promulgated (*i.e.*, applicable) WQS in place on their reservations prior to applying for TAS eligibility for the 303(d) Program.
- Under section 303(d), however, states and authorized tribes must develop lists of impaired waters and TMDLs based on applicable WQS.
- **EPA requests comment regarding whether:**
 - a tribe applying for TAS for the 303(d) Program should be required to have already received EPA approval – or at least simultaneously apply – for TAS for the CWA Section 303(c) WQS Program
 - EPA-approved or EPA-promulgated (*i.e.*, applicable) WQS should be a prerequisite for obtaining TAS for the 303(d) Program

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Next Steps

<ul style="list-style-type: none"> • Proposed rule published • Tribal consultation and coordination process begins • Outreach to intergovernmental associations begins 	January 19, 2016
EPA outreach to public, tribes, states	
<ul style="list-style-type: none"> • 60-day public comment period ends • Tribal consultation and coordination process ends • Outreach to intergovernmental associations ends 	March 21, 2016
EPA reviews, analyzes comments and issues	
<i>If finalized:</i> <ul style="list-style-type: none"> • Final rule published 	Mid-to-late 2016

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How can I provide comments on the proposal?

Provide comments to the public docket **not later than March 21, 2016** to www.regulations.gov (use Docket ID No. EPA-HQ-OW-2014-0622)



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Questions?

We will now consider

- Questions from the "Questions" chat box
 - *Type in at any time*
- Questions from the phone lines
 - *Wait for instructions*
 - *Please mute your phone when you are not speaking*

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For More Information

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References:

- USEPA “Proposed Rule - Treatment of Indian Tribes in a Similar Manner as States for Purposes of Section 303(d) of the Clean Water Act” website with fact sheet, FAQs, more, <http://www.epa.gov/tmdl/proposed-rule-treatment-indian-tribes-similar-manner-states-purposes-section-303d-clean-water>
- USEPA Implementing Clean Water Act Section 303(d): Impaired Waters and TMDLs Home Page, <http://www.epa.gov/tmdl>
- USEPA “New Vision for the CWA 303(d) Program,” <http://www.epa.gov/tmdl/new-vision-cwa-303d-program-updated-framework-implementing-cwa-303d-program-responsibilities>
- USEPA Assessment, TMDL Tracking, and Implementation Database, http://iaspub.epa.gov/waters10/attains_nation.cy.control?p_report_type=T