

# TAS for the Water Quality Standards Program

## *Frequently Asked Questions*

This document answers frequently asked questions about how tribes can become eligible to be treated in a similar manner as states for the water quality standards and water quality certification programs under the Clean Water Act, and how tribes would administer these programs.

### *Abbreviations*

#### *General Questions about TAS for WQS*

#### *Obtaining TAS Authority for WQS*

#### *Administering a WQS Program*

#### *Administering a Water Quality Certification Program*

#### *Relationship to Other Programs*

## Abbreviations

CWA ..... Clean Water Act

FAQ ..... frequently asked question

NPDES ..... National Pollutant Discharge Elimination System

TAS ..... treatment of a tribe in a similar manner as a state to enable the tribe to carry out a Clean Water Act program

TMDL ..... total maximum daily load

WQS ..... water quality standard or standards

## General Questions about TAS for WQS

### 1. Why do tribes seek TAS for the WQS program?

EPA's longstanding [Indian policy](#) encourages and supports tribal efforts to administer their own environmental programs. To date, over 50 tribes have applied for and received TAS authorization to administer the WQS program, a larger number than for any other EPA regulatory program.\*

These tribes generally share an interest in restoring and maintaining the quality of their surface waters, which serve many purposes including providing drinking water and healthy aquatic life, and supporting cultural and traditional tribal uses. With EPA-approved WQS come many important protections established in the CWA, including enforceable controls on pollutants from specific dischargers. Refer to [tribal case studies, video, and publications](#) on EPA's Web site.

## 2. Is a tribe required to apply for TAS?

No. A tribe is free to choose whether to apply for TAS and for which programs. This paper is designed for tribes interested in seeking TAS for the WQS and water quality certification programs under sections 303(c) and 401 of the CWA, respectively.

## Obtaining TAS Authority for WQS

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

In 1987, Congress amended the CWA by adding section 518 to address the role of tribes. Section 518 provides authority for EPA to approve eligible tribes to administer certain CWA programs. In particular, [section 518\(e\)](#) and EPA's [regulation at 40 CFR 131.8](#) describe the criteria a tribe must meet in order to be eligible for TAS for the WQS program. 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 the borders of an Indian reservation and has requisite legal authority (refer to FAQs #4 and #5); and
- is reasonably expected to be capable of carrying out the functions of an effective WQS program.

### 4. Which tribal lands and waters can be included in a TAS application?

Under [CWA section 518](#), tribes can seek eligibility to administer CWA regulatory programs over their entire reservations. Tribes can seek TAS with respect to water resources pertaining to any type of on-reservation land, including, for example, reservation land held in trust by the United States for a tribe, reservation land owned by or held in trust for a member of the tribe, and reservation land owned by non-tribal members. Conversely, tribes cannot obtain TAS under the CWA for water resources pertaining to any non-reservation Indian country or any other type of non-reservation land. Refer to [81 FR 30183](#) at 30191.

The term "reservation" includes:

- *Formal Indian reservations* established through federal treaties with tribes, federal statutes, or Executive Orders of the President.
- Tribal trust lands validly set aside for Indian tribes, sometimes termed *informal reservations*. Such trust lands have the same status as formal reservations for purposes of EPA's programs. Some tribes may have tribal trust lands within the borders of a formal reservation, or in addition to, and separate from, a formal reservation. For other tribes, such tribal trust lands may

constitute the tribe's entire reservation land base. In any case, tribal trust lands, wherever located, qualify as within the borders of an Indian reservation.<sup>1</sup>

In its TAS application for WQS, a tribe should provide a map or legal description of the lands and waters for which it seeks TAS.

#### **5. What authority does a tribe need for TAS?**

EPA's regulation at [40 CFR 131.8\(b\)\(3\)\(ii\)](#) specifies that the tribe's TAS application should include a statement by the tribe's legal counsel (or equivalent official) that describes the tribe's assertion of authority. [Section 518 of the CWA](#) includes an express delegation of authority by Congress to Indian tribes to administer regulatory programs over their entire reservations, subject to the eligibility requirements in section 518 (refer to [81 FR 30183](#), May 16, 2016). Thus, the tribe's legal statement can generally rely on this congressional delegation of authority as the source of its authority to regulate its entire reservation under the CWA without distinguishing among various categories of on-reservation land.

The tribe, however, may need to supply additional information to address any potential impediments to the tribe's ability to effectuate the delegation of authority. Such impediments may include, for example, a separate federal statute that limits the tribe's regulatory authority.

#### **6. Is there an application form for TAS?**

No, there is no form or pre-set format for a tribal application. However, EPA has developed a non-mandatory [TAS application template](#) that a tribe can use to structure its application for the WQS program. The template contains text that a tribe can use directly where appropriate, and guides the tribe to insert or attach any additional information that EPA does not already have about the tribe's qualifications.

Tribal applications should be transmitted by letter from the tribe's leadership to the EPA Regional Administrator requesting TAS and should include the documentation required to show that the tribe meets the eligibility criteria in EPA's [regulation at 40 CFR 131.8](#) (see FAQ #3). EPA encourages tribes to (1) contact the [EPA Regional Office staff](#) for their advice and assistance, and (2) use the TAS application template to organize the needed documentation.

#### **7. How long will it take for a tribe to obtain TAS status?**

The EPA places a high priority on efficient and effective review of TAS applications and timely decisions, and will work with an applicant tribe throughout the TAS application process specified in EPA regulations at [40 CFR part 131.8](#). See a description of [EPA's four procedural steps](#) for tribal TAS applications. These steps can generally be completed within one year, but can take a longer or shorter time depending on the complexity of the application and the availability of tribal and EPA resources.

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<sup>1</sup> This reflects EPA's longstanding approach to tribal trust lands. Refer to [81 FR 30183](#) at 30192.

## 8. Will the adjacent state(s) have an opportunity to comment on a tribe's TAS application?

Yes. Under EPA's regulations, EPA must provide notice of a tribe's TAS application to appropriate governmental entities (*e.g.*, adjacent states, tribes, other federal entities) and an opportunity for such entities to comment on the applicant tribe's assertion of authority. As a matter of established practice, EPA also provides local governments and the local public an opportunity to comment on the tribe's assertion of authority.

This does not imply that any potential commenters have veto power over tribal TAS applications. Rather, the procedure is intended to identify relevant jurisdictional information and any competing jurisdictional claim and thereby ensure that EPA's decision making is well informed and the tribe has the necessary authority to administer the WQS program. The Agency will not rely solely on the assertions of a commenter who challenges the tribe's assertion of authority, and the tribe will have an opportunity to respond to such comments. In its decision, EPA will make an independent evaluation of the tribal showing and all available information.

## 9. What does it mean if a tribe receives TAS for WQS?

EPA's approval of a tribe's TAS eligibility for the WQS program:

- **Does mean** that the tribe has full authority – and responsibility – to adopt WQS for its reservation waters and to submit the WQS to EPA for approval or disapproval. Refer to [Administering a Water Quality Standards Program](#) below.
- **Does mean** that the tribe is automatically eligible for TAS for the water quality certification program under [CWA section 401](#), as provided in [40 CFR 131.4\(c\)](#), unless the tribe elects not to seek such eligibility. Refer to [Administering a Water Quality Certification Program](#) below.
- **Does not mean** that the tribe is approved for TAS status for any other CWA program. A tribe needs to apply for TAS for each CWA program it seeks, such as [section 106](#) water pollution control grants, the [section 303\(d\)](#) program for listing impaired waters and establishing TMDLs, and the [section 402](#) NPDES permits program.
- **Does not mean** that any tribal standards previously adopted under tribal law are automatically applicable under the CWA. Any such standards would need to be approved under EPA's regulations before they could become applicable under the CWA. Refer to [Administering a Water Quality Standards Program](#) below.

## Administering a Water Quality Standards Program

### 10. When does an authorized tribe need to adopt its initial WQS?

EPA expects a newly authorized tribe<sup>2</sup> to adopt its initial WQS as soon as possible within three years after being notified that TAS status has been approved.<sup>3</sup> EPA believes that this is an equitable arrangement, and that tribes should be allowed sufficient time to develop their programs and adopt appropriate WQS for reservation waters.

Using the [Model WQS Template on EPA's Web site](#) can significantly shorten the time to draft WQS.

A tribe can either (1) initially apply for TAS and then develop WQS later, or (2) submit both the TAS application and the WQS for EPA review at the same time. EPA cannot approve the WQS, however, until TAS is approved.

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

Like states, authorized tribes must follow the procedures for developing EPA-approved standards set forth in EPA's regulations.<sup>4</sup> See the [WQS Handbook on EPA's Web site](#) for details. As resources allow, EPA provides technical assistance to tribes in establishing standards that are appropriate for the reservation and consistent with the Clean Water Act. The key steps for an authorized tribe are:

- a. Developing its own WQS, including designating uses for its waters, determining which water quality criteria are needed to protect the uses, and establishing an antidegradation policy and implementation methods. The WQS should cover all waters specified in the TAS approval and comply with EPA's regulations.
- b. Adopting WQS under tribal law and EPA's regulations after holding a public hearing, inviting public comments, and considering all comments received.
- c. Submitting adopted WQS and necessary supporting information to EPA for review and approval or disapproval, and making any corrections needed if EPA disapproves elements of the WQS. Once approved, the WQS are applicable for all CWA purposes.

After the WQS are approved and applicable under the CWA, authorized tribes are expected to carry out their antidegradation implementation methods and may interpret their WQS as necessary to facilitate various other implementation actions.

In the longer term, tribes also need to conduct a review of their WQS every three years (triennial review) and adopt any needed new or revised WQS as in b and c above, in accordance with EPA's regulations.

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<sup>2</sup> An authorized tribe is a tribe that EPA has found eligible for TAS under [CWA section 518](#) for the WQS program.

<sup>3</sup> The three-year time frame corresponds to that provided to states under the provisions of the 1965 Federal Water Pollution Control Act when the WQS program was created.

<sup>4</sup> The primary EPA WQS regulations are at [40 CFR part 131](#) (Water Quality Standards). Additional requirements for waters of the Great Lakes system are in [40 CFR part 132](#) (Water Quality Guidance for the Great Lakes System).

## **12. Do EPA-approved state WQS apply to any reservation waters?**

Under principles of federal law, states generally lack authority to regulate on Indian reservations. Thus, EPA-approved state WQS generally do not apply on Indian reservations. There are uncommon circumstances where a separate federal law grants a particular state the authority to establish WQS on an Indian reservation. Where EPA expressly approves such a state's authority and the state's WQS for waters on an Indian reservation, such WQS will apply under the CWA for those waters. Please check with the appropriate [EPA Regional Office](#) for information about any state WQS applicable to specific tribal waters.

## **13. Are state and tribal WQS expected to be compatible?**

Tribal WQS should be developed considering the quality and uses of waters entering and leaving reservations. [EPA's regulations at 40 CFR 131.10](#) require that a state or tribe ensure that its WQS provide for the attainment and maintenance of the WQS of downstream waters. Thus, it is important that the tribes recognize what the adjacent state or tribal WQS are even though there is no requirement for the standards to be identical.

A tribe can consider the EPA-approved WQS of adjacent states or tribes as well as the [Model WQS Template on EPA's Web site](#) as a starting point for developing its own WQS. In considering previously-approved adjacent WQS, however, the tribe should coordinate with the EPA Regional Office to help determine whether the WQS are up to date with EPA's requirements and the latest scientific information.

To the extent that differences do arise between the tribe's WQS and a state's WQS, EPA encourages the tribe and state to resolve their differences without EPA involvement, ideally before either one begins the WQS adoption process. EPA is available upon request, however, to help resolve state-tribal disputes over differing WQS on common bodies of water. Refer to the [Tribal-State WQS Dispute Resolution Mechanism](#) on EPA's Web site.

## **Administering a Water Quality Certification Program**

### **14. Are authorized tribes required to issue water quality certifications under section 401?**

As described in FAQ #9, a tribe with TAS for the [section 303\(c\)](#) WQS program is automatically eligible for the [section 401](#) water quality certification program unless the tribe elects not to seek such eligibility. Section 401 offers states and authorized tribes opportunities to affect the issuance of a range of federal licenses and permits, but it is up to the state or tribe whether to take or waive each such opportunity as it arises.

## 15. How does section 401 work?

For an authorized tribe to participate in [section 401](#), it must designate a certifying agency.<sup>5</sup> That agency would then be 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. EPA regulations ([40 CFR part 121](#)) and EPA's [Clean Water Act 401 Handbook](#) address the issuance of water quality certifications by states and authorized tribes. Refer also to EPA's [Water Quality Standards Handbook](#).

To implement section 401, an authorized 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 CWA section 401. 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. The CWA also provides a tribe authorized to administer section 401 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). EPA retains authority for issuing water quality certifications on reservations where a tribe has not been authorized for water quality certifications.

## Relationship to Other Programs

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

No. EPA's approval of TAS for CWA sections [303\(c\)](#) and [401](#) does not provide any enforcement authority to the tribe under the CWA. WQS and water quality certifications serve as a basis for specific and enforceable control actions, such as effluent limitations in NPDES permits. To issue and enforce such permits, however, a tribe must also be approved by EPA to administer a CWA permitting program. To date, no tribe has been approved for TAS to administer a CWA permitting program. In the absence of such tribal approval, EPA is generally responsible for issuing and enforcing NPDES permits for facilities discharging to reservation waters.

### 17. How would tribal water quality standards affect TMDLs?

A TMDL is a "pollution budget" developed under [CWA section 303\(d\)](#) 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 applicable WQS, and (2) allocations of that total pollutant load to point and nonpoint sources affecting the water body. Tribal WQS approved by EPA would be the applicable WQS for any TMDL developed for the tribe's water bodies.

A TMDL is required under certain circumstances for water bodies that a state or authorized tribe has listed under section 303(d) of the CWA as not expected to meet applicable WQS.

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<sup>5</sup> Refer to [40 CFR 121.1\(e\)](#).

Tribes may apply for TAS to administer the section 303(d) program. See [40 CFR 130.16](#) and [EPA's Web page concerning TAS for section 303\(d\)](#).