Planned Proposed Rulemaking to Address the Process for Tribes to Obtain Treatment in a Similar Manner as States for the Clean Water Act Impaired Water Listing and Total Maximum Daily Load Program

USEPA Office of Wetlands, Oceans and Watersheds
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Overview of Today’s Meeting

• Issue & Purpose
• Basics of the Impaired Water Listing and Total Maximum Daily Load (TMDL) Program
• Treatment in a Similar Manner as a State (TAS) Background
• Consultation and Coordination
• Relationship to Potential Reinterpretation of Clean Water Act Provision Regarding Tribal Eligibility to Administer Regulatory Programs
• Working Schedule
• For More Information
Issue

- Section 518 of the Clean Water Act (CWA) authorizes treatment of tribes in a similar manner as states for several programs – including the Section 303(d) Impaired Water Listing and TMDL Program – and directs EPA to promulgate TAS regulations.
- Because existing regulations do not explicitly address TAS for the 303(d) Program, EPA plans to propose a new regulation.
- With 48 tribes having obtained TAS for the Section 303(c) Water Quality Standards (WQS) Program, tribes are now expressing interest in obtaining TAS for section 303(d).

Purpose

To describe a planned proposed rulemaking to establish the process for tribes to obtain TAS for the CWA Section 303(d) Impaired Water Listing and TMDL Program, as required by the CWA.
What is the Impaired Waters Listing and TMDL Program?

• The CWA provides for states, territories, and authorized tribes to:

  • Solicit and compile existing and readily available water quality data and information

  • Develop lists of impaired waters every two years (2012, 2014, 2016...)

  • Establish TMDLs for waters on the list

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

• Assemble all readily available water quality data
• Develop assessment methodology
  • Water quality data and applicable 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 approval (2 year cycle)
The National Picture

• ~ 42,000 waters listed as impaired

• Top causes of impairments:
  • pathogens
  • metals
  • nutrients
  • low dissolved oxygen
  • sediment

What is a TMDL?

• A calculation of the maximum amount of a pollutant that a waterbody can receive and still meet WQS, an allocation of that amount to the pollutant’s sources, and a margin of safety.

➢ The TMDL comes in the form of a technical document or plan.
Developing TMDLs

- TMDLs are established in accordance with 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

Developing TMDLs, cont.

- The CWA provides for states, territories, and authorized tribes to develop TMDLs for waters on the 303(d) list, and in accordance with priority ranking
- Typically, a TMDL could take a year or two to develop, or more if it is very complex
- EPA guidance provides that TMDL development schedules for all impaired waters in a particular jurisdiction should be “expeditious” and “normally extend from eight to thirteen years in length, but could be shorter or slightly longer” depending on jurisdiction-specific factors
- TMDL alternatives may exist in some circumstances
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. Therefore, TMDL LAs for nonpoint sources provide guidance to inform federal, state, or tribal action under other authorities
TAS Background

There are 566 federally recognized tribes

<table>
<thead>
<tr>
<th>Program</th>
<th>Number of Tribes with TAS</th>
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<tbody>
<tr>
<td>Pollution Control Program Grants (106)</td>
<td>268</td>
</tr>
<tr>
<td>WQS (303(c))</td>
<td>48 (40 tribes have approved WQS; 1 tribe without TAS has federally promulgated WQS)</td>
</tr>
<tr>
<td>Listing and TMDLs (303(d))</td>
<td>0</td>
</tr>
<tr>
<td>NPDES (402)</td>
<td>0</td>
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<tr>
<td>Nonpoint Source Grants and Planning (319)</td>
<td>180</td>
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Data as of September 5, 2014

TAS Background

• Under the CWA, EPA shall promulgate final regulations that specify how Indian tribes shall be treated similar to states for purposes of the Act
• Other CWA programs (e.g., 106, 303(c), 319, 402) have promulgated final TAS regulations
• Existing regulations do not explicitly address steps to take for obtaining TAS for 303(d)
Consultation and Coordination

- Through a rulemaking, EPA plans to propose a process for tribes to apply to EPA for TAS eligibility to establish lists of impaired waters and TMDLs pursuant to section 303(d) of the CWA
  - Statutory TAS criteria would apply
  - EPA is evaluating specific TAS application procedures
- EPA conducted tribal consultation and coordination on the planned proposed rulemaking from April 8 to June 6, 2014
- About 40 tribes provided comments, which were supportive
- EPA is now consulting with intergovernmental associations
- EPA plans to issue a Federal Register notice publication of a proposed rule and continue
  - coordination with the Association of Clean Water Administrators (ACWA)
  - tribal consultation and coordination

Relationship to Potential Reinterpretation of Clean Water Act Provision Regarding Tribal Eligibility to Administer Regulatory Programs

- This planned proposed rulemaking to establish a TAS process for Listing and TMDLs is separate from the EPA Office of Water’s potential reinterpretation of the Agency’s approach to tribal jurisdiction to administer CWA regulatory programs, a subject about which many state associations have recently been briefed.

- EPA is planning to proceed with the proposed rulemaking to establish a TAS process for listing and TMDLs irrespective of the reinterpretation.
Working Schedule

• Now to late 2014: EPA begins to draft preamble, rule and supporting documents
  → Intergovernmental Association Outreach Meeting
      October 1, 2014; EPA requests PRE-PROPOSAL comments by November 1, 2014, or as soon as possible thereafter

• Late 2014: Publish proposed rule in Federal Register for 60-day public comment; Concurrent tribal consultation; Coordination with ACWA

• Late 2014 to mid-2015: Review / respond to comments; Draft preamble / any rule revisions

• Late 2015: Publish final rule; Outreach / coordination with tribes and others

For More Information

• To view background materials:
  http://water.epa.gov/lawsregs/lawsguidance/cwa/tmdl/policy.cfm

• To ask questions or provide comments/views, please email Sarah Furtak at furtak.sarah@epa.gov by November 1, 2014

References:
• USEPA Impaired Waters and Total Maximum Daily Loads Home Page, http://epa.gov/owow/tmdl
• USEPA New Vision for the CWA 303(d) Program, http://water.epa.gov/lawsregs/lawsguidance/cwa/tmdl/programvision.cfm
• USEPA Indian Policies and 1984 Indian Policy, http://www.epa.gov/indian/basicinfo/presidential-docs.html
Questions?