

The EPA Administrator, Gina McCarthy, signed the following final rule on September 16, 2016, and EPA is submitting it for publication in the Federal Register (FR). While we have taken steps to ensure the accuracy of this Internet version of the rule, it is not the official version of the rule. Please refer to the official version in a forthcoming FR publication, which will appear on the Government Printing Office's FDsys website (<http://fdsys.gpo.gov/fdsys/search/home.action>) and on Regulations.gov (<http://www.regulations.gov>) in Docket No. EPA-HQ-OW-2014-0622. Once the official version of this document is published in the FR, this version will be removed from the Internet and replaced with a link to the official version.

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## **ENVIRONMENTAL PROTECTION AGENCY**

### **40 CFR Part 130**

**[EPA-HQ-OW-2014-0622; FRL-9952-61-OW]**

**RIN 2040-AF52**

### **Treatment of Indian Tribes in a Similar Manner as States for Purposes of Section**

#### **303(d) of the Clean Water Act**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** In section 518(e) of the Clean Water Act (CWA), Congress authorized the Environmental Protection Agency (EPA) to treat eligible federally recognized Indian tribes in a similar manner as a state 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 issued regulations establishing a process for federally recognized tribes to obtain treatment in a similar manner as states (TAS) for several provisions of the CWA; for example, 53 tribes have obtained TAS authority to issue water quality standards under CWA section 303(c). EPA has not yet promulgated regulations expressly establishing a process for tribes to obtain 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

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(TMDLs), as states routinely do. EPA is now remedying this gap. By establishing regulatory procedures for eligible tribes to obtain TAS for the CWA Section 303(d) Impaired Water Listing and TMDL Program, this final rule enables eligible tribes to obtain authority to identify impaired waters on their reservations and to establish TMDLs, which serve as plans for attaining and maintaining applicable water quality standards (WQS). The rule is comparable to similar regulations that EPA issued in the 1990s for the CWA Section 303(c) WQS and CWA Section 402 and Section 404 Permitting Programs, and includes features designed to minimize paperwork and unnecessary reviews.

**DATES:** This final rule is effective [\[Insert date\]](#) 30 days after date of publication in the **Federal Register**].

**ADDRESSES:** EPA has established a docket for this rule under Docket identification (ID) No. EPA-HQ-OW-2014-0622. All documents in the docket are listed and accessible for viewing at <http://www.regulations.gov>.

**FOR FURTHER INFORMATION CONTACT:** Ruth Chemerys, Assessment and Watershed Protection Division, Office of Wetlands, Oceans and Watersheds (4503T), Environmental Protection Agency, 1200 Pennsylvania Ave., NW, Washington, DC 20460; telephone number: (202) 566-1216; fax number: (202) 566-1331; email address: [TASTMDL@epa.gov](mailto:TASTMDL@epa.gov).

**SUPPLEMENTARY INFORMATION:** This supplementary information is organized as follows:

- I. General Information
  - A. Does this action apply to me?
  - B. Over what area may tribes apply for TAS for the CWA Section 303(d) Impaired Water Listing and TMDL Program?
  - C. How was this rule developed?
  - D. What is the Agency's authority for issuing this rule?
- II. What is the statutory and regulatory history of TAS under the CWA?
  - A. Statutory History

- B. Regulatory History
- III. Why might a tribe be interested in seeking TAS authority for the CWA Section 303(d) Impaired Water Listing and TMDL Program?
- IV. What program responsibilities will tribes have upon obtaining TAS for the CWA Section 303(d) Impaired Water Listing and TMDL Program?
  - A. Identification of Impaired Waters and Submission of Section 303(d) Lists
  - B. Establishment and Submission of TMDLs
  - C. EPA Review of Lists and TMDLs
- V. What are EPA's procedures for a tribe to seek TAS for the CWA Section 303(d) Impaired Water Listing and TMDL Program?
- VI. What special circumstances may exist regarding qualification for TAS for the CWA Section 303(d) Impaired Water Listing and TMDL Program?
- VII. What procedure will EPA follow in reviewing a tribe's TAS application?
  - A. Notice to Appropriate Governmental Entities
  - B. Avoidance of Duplicative Notice and Comment Procedures
    - 1. What did EPA consider regarding the notice and comment exemption?
    - 2. What is EPA's position on certain public comments regarding notice and comment?
  - C. Treatment of Competing or Conflicting Claims
  - D. EPA's Decision Process
- VIII. What are EPA's expectations regarding WQS and WQS TAS as prerequisites for tribes applying for TAS authority for the 303(d) Program?
  - A. What did EPA consider regarding WQS and WQS TAS as prerequisites for 303(d) TAS?
  - B. What is EPA's position on certain public comments regarding WQS and WQS TAS as prerequisites for 303(d) TAS?
- IX. What financial and technical support is available from EPA to tribes as they choose to develop and implement a CWA Section 303(d) Impaired Water Listing and TMDL Program?
- X. What is EPA's position on certain other public comments received?
  - A. Impact on State/Local Authority for CWA Programs
  - B. Relation to May 16, 2016, Interpretive Rule
- XI. Statutory and Executive Order Reviews
  - A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review
  - B. Paperwork Reduction Act (PRA)
  - C. Regulatory Flexibility Act (RFA)
  - D. Unfunded Mandates Reform Act (UMRA)
  - E. Executive Order 13132: Federalism
  - F. Executive Order 13175: Tribal Consultation and Coordination
  - G. Executive Order 13045: Protection of Children from Environmental Health Risks and Safety Risks
  - H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use
  - I. National Technology Transfer and Advancement Act
  - J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations

K. Congressional Review Act

**I. General Information**

A. *Does this action apply to me?*

This rule applies to federally recognized tribal governments with reservations interested in seeking TAS eligibility to administer the CWA Section 303(d) Impaired Water Listing and TMDL Program. Although this rule applies directly only to Indian tribes applying for TAS, state and local governments, as well as other entities including other Indian tribes, may be interested to the extent they are adjacent to the Indian reservation<sup>1</sup> lands of TAS applicant tribes, share water bodies with such tribes, and/or discharge pollutants to waters of the United States located within or adjacent to such reservations. The table below provides examples of entities that could be affected by this action or have an interest in it.

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.

If you have questions regarding the effect of this rule on a particular entity, please consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

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<sup>1</sup> See “Over What Area May Tribes Apply for TAS for the CWA Section 303(d) Impaired Water Listing and TMDL Program?” below.

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*B. Over what area may Tribes apply for TAS for the CWA Section 303(d) Impaired Water Listing and TMDL Program?*

Under section 518(e) of the CWA, 33 U.S.C. 1377(e), Indian tribes may seek TAS authorization to administer certain CWA programs pertaining to water resources of their reservations. Tribes are not eligible to administer CWA programs pertaining to any non-reservation Indian country<sup>2</sup> or any other type of non-reservation land. The term “federal Indian reservation” is defined at CWA section 518(h)(1) to include all land within the limits of any Indian reservation under the jurisdiction of the United States Government notwithstanding the issuance of any patent, and including rights-of-way running through the reservation. CWA sections 518(e)(2), (h)(1); *see also* 40 CFR 131.3(k). EPA’s longstanding position is that reservations include both formal reservations (*e.g.*, named reservations established through federal treaties with tribes, federal statutes, or Executive Orders of the President) as well as tribal trust lands that may not be formally designated as reservations, but that qualify as informal reservations. *See, e.g.*, 56 FR 64876, 64881, December 12, 1991; *Arizona Public Service Co. v. EPA*, 211 F.3d 1280, 1292-1294 (D.C. Cir. 2000), *cert. denied sub nom., Michigan v. EPA*, 532 U.S. 970 (2001). Tribes may seek TAS authorization for both formal and informal reservations, and both types of lands are referred to herein as “reservations.”

Although this rule facilitates eligible tribes’ administration of an additional regulatory program, nothing in this rule changes, expands, or contracts the geographic scope of potential tribal TAS eligibility under the CWA.

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<sup>2</sup> The term Indian country is defined at 18 U.S.C. 1151.

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*C. How was this rule developed?*

In developing this rule, EPA conducted consultation and coordination with tribes and states before proposing this rule in the Federal Register on January 19, 2016. 81 FR 2791. On March 28, 2014, EPA initiated consultation and coordination with federally recognized Indian tribes concerning the planned proposed rulemaking. On September 19, 2014, EPA invited input from intergovernmental associations and met with them on October 1, 2014. Additional consultation and coordination occurred in 2015. During the 60-day public comment period in 2016, EPA provided informational webinars for the public, tribes, and states, and conducted further consultation and coordination with tribes and states. Following the public comment period, EPA also participated in informational meetings with tribes.

EPA received over 830 public comments on the proposed rule. EPA received over 800 mass email comments in support of the rule, as well as individual comments from nine tribes and tribal associations, expressing support for the rule. EPA also received individual comments from eight states, one local government, one local non-governmental organization, two regulated entities, several private citizens, and one federal agency. Most states generally were neutral regarding the proposed rule overall. Some states cited special circumstances regarding applicability of the rule in their states. Two states and the two local entities opposed the proposed rule, citing concern regarding impacts on state and local programs, as well as objections to EPA's proposed (now final) interpretive rule regarding tribal jurisdiction under the Clean Water Act. *Revised Interpretation of Clean Water Act Tribal Provision*, 80 FR 47430 (August 7, 2015) (proposed rule); 81 FR 30183 (May 16, 2016) (final rule).

This final rule establishing regulatory procedures for eligible tribes to obtain TAS for the CWA Section 303(d) Impaired Water Listing and TMDL Program reflects EPA's careful

consideration of all the comments. The comments and EPA's responses to the comments are available in the public docket at <http://www.regulations.gov>.

*D. What is the Agency's authority for issuing this rule?*

The CWA, 33.U.S.C. 1251, *et seq*, including section 518 (33 U.S.C.1377).

**II. What is the statutory and regulatory history of TAS under the CWA?**

*A. Statutory History*

Congress added section 518 to the CWA as part of amendments made in 1987. Section 518(e) authorizes EPA to treat eligible Indian tribes in the same manner as it treats states for a variety of purposes, including administering each of the principal CWA regulatory programs and receiving grants under several CWA funding authorities. Section 518(e) is commonly known as the "TAS" provision. Section 303 is expressly identified in section 518(e) as one of the provisions available for TAS.

Section 518(e) also requires EPA to promulgate regulations specifying the TAS process for applicant tribes. Section 518(h) defines "Indian tribe" to mean any Indian tribe, band, group, or community recognized by the Secretary of the Interior and exercising governmental authority over a federal Indian reservation.

*B. Regulatory History*

Pursuant to section 518(e), EPA promulgated several final regulations establishing TAS criteria and procedures for Indian tribes interested in administering programs under the Act. The relevant regulations addressing TAS requirements for the principal CWA regulatory programs are:

- 40 CFR 131.8 for section 303(c) water quality standards, published December 12, 1991 (56 FR 64876);

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- 40 CFR 131.4(c) for CWA section 401 water quality certification, published December 12, 1991 (56 FR 64876);
- 40 CFR 123.31-34 for CWA section 402 National Pollutant Discharge Elimination System (NPDES) permits and other provisions, and 40 CFR 501.22-25 for the sewage sludge management program, published December 22, 1993 (58 FR 67966); and
- 40 CFR 233.60-62 for CWA section 404 dredge or fill permits, published February 11, 1993 (58 FR 8172).

In 1994, EPA amended the above regulations to simplify the TAS process and eliminate unnecessary and duplicative requirements. 59 FR 64339 (December 14, 1994) (“Simplification Rule”). For example, the Simplification Rule eliminated the need for a tribe to prequalify for TAS before applying to administer the section 402 and section 404 permit Programs. Instead, the rule provided that a tribe would seek to establish its TAS eligibility at the Program approval stage (subject to notice and comment procedures in the *Federal Register*). However, the rule retained the separate TAS prequalification requirement (including local notice and comment procedures) for section 303(c) water quality standards and section 401 water quality certifications. *Id.*; *see also*, 40 CFR 131.8(c)(2), (3).<sup>3</sup> The TAS regulations for CWA regulatory programs have remained intact since promulgation of the Simplification Rule. EPA is now addressing a gap in its current TAS regulations by finalizing regulations that specify how tribes may seek TAS for the CWA Section 303(d) Impaired Water Listing and TMDL Program.

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<sup>3</sup> Under the CWA and EPA’s regulations, tribes may simultaneously (1) apply for TAS under CWA section 518 for the purpose of administering water quality standards and (2) submit actual standards for EPA review under section 303(c). Although they may proceed together, a determination of TAS eligibility and an approval of actual water quality standards are two distinct actions.



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On May 16, 2016, EPA published an interpretive rule revising the Agency's approach to tribal jurisdiction under the CWA. *Revised Interpretation of Clean Water Act Tribal Provision*, 81 FR 30183 (May 16, 2016). In the interpretive rule, EPA concluded definitively that section 518 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. This reinterpretation eliminates the need for applicant tribes to demonstrate inherent authority to regulate under the CWA, thus allowing tribes to implement the congressional delegation of authority. The reinterpretation also brings EPA's treatment of tribes under the CWA in line with EPA's treatment of tribes under the Clean Air Act, which has similar statutory language addressing tribal regulation of Indian reservation areas.

The interpretive rule did not result in any revisions to the application procedures of EPA's TAS regulations as codified in the Code of Federal Regulations. EPA will continue to review CWA TAS applications in accordance with existing TAS regulations, which provide the procedural infrastructure for the TAS application and review processes. This rule, which is closely based on the existing CWA TAS regulations, provides similar regulatory infrastructure for tribes interested in applying to administer the section 303(d) Program. Any application of the interpretive rule would occur solely in the context of an EPA final decision approving a tribe's TAS application based on the revised interpretation of tribal jurisdiction. *See, e.g.*, 81 FR at 30185.

### **III. Why might a tribe be interested in seeking TAS authority for the CWA Section**

#### **303(d) Impaired Water Listing and TMDL Program?**

TAS for the CWA Section 303(d) Impaired Water Listing and TMDL Program provides a tribe with the opportunity to participate directly in restoring and protecting its reservation waters

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through implementing the Program, as Congress authorized under CWA section 518(e). In the rest of this notice, EPA refers to the functions identified in CWA section 303(d) regarding listing of impaired waters and establishment of TMDLs as the “Section 303(d) Impaired Water Listing and TMDL Program” or “303(d) Program.” Section 303(d) provides for states and authorized tribes to (1) develop lists of impaired waters (and establish priority rankings for waters on the lists) and (2) establish TMDLs for these waters. By listing impaired waters, a state or authorized tribe identifies those waters in its territory that are not currently meeting EPA-approved or EPA-promulgated WQS (collectively referred to as “applicable WQS”). A TMDL is 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 water body can receive and still meet applicable WQS, with a margin of safety.

By obtaining TAS for section 303(d), tribes can take the lead role under the CWA in identifying and establishing a priority ranking for impaired water bodies on their reservations and in establishing TMDLs and submitting them to EPA for approval. These are important informational and planning steps that tribes can take to restore and maintain the quality of reservation waters.

TMDLs must allocate the total pollutant load among contributing point sources (“waste load allocations” or “WLAs”) and nonpoint sources (“load allocations” or “LAs”). 40 CFR 130.2. Point source WLAs are addressed through the inclusion of water quality-based effluent limits in national pollutant discharge elimination system (NPDES) permits issued to such sources. Under EPA’s regulations, NPDES permitting authorities shall ensure that “[e]ffluent limits developed to protect a narrative water quality criterion, a numeric water quality criterion, or both, are consistent with the assumptions and requirements of any available waste load allocation for the

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discharge prepared by the State and approved by EPA pursuant to 40 CFR 130.7.” 40 CFR 122.44(d)(1)(vii)(B). WLAs under 40 CFR 122.44(d)(1)(vii)(B) would include WLAs developed by a tribe with TAS authorization and approved by EPA pursuant to 40 CFR 130.7. For water bodies impaired by pollutants from nonpoint sources, authorized tribes would not acquire new or additional implementation authorities when listing such impaired water bodies and establishing TMDLs. Instead, the mechanisms for implementing the nonpoint source pollutant reductions, or LAs, identified in any tribal TMDLs would include existing tribal authorities, other federal agencies’ policies and procedures, as well as voluntary and incentive-based programs.

This rule does not require anything of tribes that are not interested in TAS for the 303(d) Program. Based on pre- and post-proposal input, EPA understands that not all tribes will be interested in obtaining TAS for 303(d), and some may consider other approaches that might benefit their reservation waters. Clean Water Act section 319 watershed-based plans, for example, may help tribes protect and restore water resources threatened or impaired by nonpoint source pollution.<sup>4</sup>

#### **IV. What program responsibilities will tribes have upon obtaining TAS for the CWA**

##### **Section 303(d) Impaired Water Listing and TMDL Program?**

The goal of the CWA is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." CWA section 101(a). Identification of impaired waters and TMDLs are important tools for achieving that goal. After a tribe receives EPA approval of its eligibility to implement a CWA Section 303(d) Impaired Water Listing and TMDL Program, it is treated in a manner similar to a state and, for purposes of list and TMDL development, it would

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<sup>4</sup> See *Handbook for Developing and Managing Tribal Nonpoint Source Pollution Programs under Section 319 of the Clean Water Act*, February 2010, available at [http://www2.epa.gov/sites/production/files/2015-09/documents/2010\\_02\\_19\\_nps\\_tribal\\_pdf\\_tribal\\_handbook2010.pdf](http://www2.epa.gov/sites/production/files/2015-09/documents/2010_02_19_nps_tribal_pdf_tribal_handbook2010.pdf).

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become an “authorized tribe.” Generally, the federal statutory and regulatory requirements for state 303(d) Programs would be applicable to authorized tribes. *See* 40 CFR 130.16(c)(5). The following paragraphs identify important 303(d) Program responsibilities that tribes with TAS would assume and implement.

*A. Identification of Impaired Waters and Submission of Section 303(d) Lists*

Under section 303(d) of the CWA, every two years, authorized tribes will be required to develop lists of waters not meeting, or not expected to meet, applicable water quality standards. 40 CFR 130.7(d). These lists are commonly called “impaired waters lists” or “303(d) lists.” Impaired waters are waters for which technology-based limitations and other required controls are not stringent enough to meet applicable CWA water quality standards. Threatened waters are waters that currently attain applicable WQS, but for which existing and readily available data and information indicate that applicable WQS will likely not be met by the time the next list of impaired or threatened waters is due to EPA.<sup>5</sup> The authorized tribe’s section 303(d) list would include all impaired and threatened waters within the scope of its 303(d) TAS authorization. In this notice, EPA uses the term “impaired waters” to refer to both impaired and threatened waters.<sup>6</sup> The authorized tribe would be required to “assemble and evaluate all existing and readily available information” in developing its section 303(d) list. 40 CFR 130.7(b)(5). EPA’s regulations include a non-exhaustive list of water quality-related data and information to be considered. *Id.* The tribe would establish priorities for development of TMDLs for waters on its

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<sup>5</sup> *Guidance for 2006 Assessment, Listing and Reporting Requirements Pursuant to Sections 303(d), 305(b) and 314 of the Clean Water Act*, July 29, 2005, available at <https://www.epa.gov/sites/production/files/2015-10/documents/2006irg-report.pdf>.

<sup>6</sup> Under EPA’s regulations, “water quality limited segments” include both impaired waters and threatened waters, and are defined as “any segment where it is known that water quality does not meet applicable water quality standards, and/or is not expected to meet applicable water quality standards, even after the application of the technology-based effluent limitations required by sections 301(b) and 306 of the Act.” 40 CFR 130.2(j).

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section 303(d) list based on the severity of the pollution and the uses to be made of the waters. 40 CFR 130.7(b)(4).<sup>7</sup> The tribe would then submit its list of impaired waters to EPA for review and approval.

Like states, authorized tribes are required to submit their "303(d) lists" to EPA for approval every two years on April 1 (lists are due April 1 of even-numbered years). As indicated in section 130.16(c)(5) of this rule, a tribe gaining TAS status is provided at least 24 months to submit its first impaired waters list to EPA. The tribe's first impaired waters list is due to EPA the next listing cycle due date that is at least 24-months from the later of (1) the date the tribe's TAS application for 303(d) is approved or (2) the date EPA-approved/promulgated WQS for the tribe's waters are effective. (See section VII for the procedure EPA will follow in reviewing a tribe's TAS application.). Thus, for example, if EPA approves a tribe's TAS application on March 15, 2017 and the tribe's WQS on June 30, 2017, the tribe's first list would be due on April 1, 2020. The tribe could submit its list to EPA prior to that date, if it chooses.

Most tribes that would be eligible for TAS authorization under this rule are likely to be recipients of CWA section 106 grants and would thus be required to submit section 106 grant work plans annually. If a tribe's CWA section 106 grant work plan includes ambient water quality monitoring activities, the tribe is also required to develop a tribal assessment report

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<sup>7</sup> Section 303(d)(1) requires states to "establish a priority ranking" for the segments it identifies on the list, taking into account the severity of the pollution and the uses to be made of such segments, and to establish TMDLs "in accordance with the priority ranking." EPA will review the priority ranking but does not take action to approve or disapprove it. See *Guidance for 2006 Assessment, Listing and Reporting Requirements Pursuant to Sections 303(d), 305(b) and 314 of the Clean Water Act*, July 29, 2005, available at <https://www.epa.gov/sites/production/files/2015-10/documents/2006irg-report.pdf>.

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(TAR) pursuant to the CWA section 106 grant reporting requirements.<sup>8</sup> EPA encourages tribes that obtain TAS for the CWA Section 303(d) Program and also develop CWA section 106 TARs to consider combining their CWA section 303(d) impaired waters list with their CWA section 106 TAR, and to submit the integrated report electronically through the Assessment TMDL Tracking and Implementation System (ATTAINS).<sup>9</sup> ATTAINS is a database and website used for state reporting and displaying of CWA 303(d) and 305(b)<sup>10</sup> “Integrated Report”<sup>11</sup> and TMDL data. EPA is working with tribes on a pilot for submitting TAR information into ATTAINS.

#### *B. Establishment and Submission of TMDLs*

Under the CWA, each state and authorized tribe must, “from time to time,” establish and submit TMDLs for pollutants causing impairments in all the waters on its 303(d) list. CWA sections 303(d)(1)(C) and 303(d)(2). States and authorized tribes set priorities for developing TMDLs for their listed waters.

TMDLs must be established “at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.” CWA section 303(d)(1)(C). Where a TMDL makes allocation tradeoffs between point and nonpoint sources, the TMDL record must also demonstrate “reasonable assurance” that the nonpoint source allocations will be achieved. 40 CFR 130.2(i). Calculations to establish TMDLs must be

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<sup>8</sup> *Final Guidance on Awards of Grants to Indian Tribes under Section 106 of the Clean Water Act*, (<http://www2.epa.gov/sites/production/files/2014-09/documents/final-tribal-guidance.pdf>) at page 8-1.

<sup>9</sup> “Water Quality Assessment and TMDL Information,” available at [http://ofmpub.epa.gov/waters10/attains\\_index.home](http://ofmpub.epa.gov/waters10/attains_index.home).

<sup>10</sup> CWA section 305(b) requires states to provide every two years an assessment of the quality of all their waters. EPA explicitly exempted tribes from the section 305(b) reporting requirement. 40 CFR 130.4(a); 54 FR 14354, 14357 (April 11, 1989).

<sup>11</sup> *Guidance for 2006 Assessment, Listing and Reporting Requirements Pursuant to Sections 303(d), 305(b) and 314 of the Clean Water Act*, July 29, 2005, available at <https://www.epa.gov/sites/production/files/2015-10/documents/2006irg-report.pdf>.

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subject to public review. 40 CFR 130.7(c)(1)(ii). Once established, the state or authorized tribe submits the TMDL to EPA for review.

### *C. EPA Review of Lists and TMDLs*

Once EPA receives a list or TMDL, it must either approve or disapprove that list or TMDL within 30 days. CWA section 303(d)(2). If EPA disapproves the list or TMDL, EPA must establish a replacement list or TMDL within 30 days of disapproval. 40 CFR 130.7(d)(2).

## **V. What are EPA's procedures for a tribe to seek TAS for the CWA Section 303(d) Impaired Water Listing and TMDL Program?**

Consistent with the statutory requirement in section 518 of the CWA, this rule establishes the procedures by which an Indian tribe may apply and qualify for TAS for purposes of the CWA Section 303(d) Impaired Water Listing and TMDL Program. Such procedures are codified in a new section 130.16 of the water quality planning and management regulation. Section 130.16 identifies (1) the criteria an applicant tribe is required to meet to be treated in a similar manner as a state, (2) the information the tribe is required to provide in its application to EPA, and (3) the procedure EPA will use to review the tribal application. Section 130.16 is intended to ensure that tribes treated in a similar manner as states for the purposes of the CWA Section 303(d) Impaired Water Listing and TMDL Program are qualified, consistent with CWA requirements, to conduct a Listing and TMDL Program. The procedures are meant to provide more opportunities for tribes to engage fully in the Program and are not intended to act as a barrier to tribal assumption of the 303(d) Program.

The TAS procedures in this rule are closely based on the existing TAS regulation at 40 CFR 131.8, which established the TAS process for the CWA Section 303(c) WQS Program. EPA established the TAS process for WQS in 1991, and the great majority of TAS activity for regulatory programs under the CWA has occurred in the WQS Program. The WQS TAS rule has

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proven very effective in ensuring that applicant tribes satisfy statutory TAS criteria and are prepared to administer WQS Programs under the Act. It thus served as a useful model for this TAS rule.

The TAS criteria tribes are required to meet for purposes of the CWA Section 303(d) Impaired Water Listing and TMDL Program originate in CWA section 518. As reflected in the regulatory language, the tribe must (1) be federally recognized and meet the definitions in sections 131.3(k) and (l), (2) carry out substantial governmental duties and powers, (3) have appropriate authority to regulate the quality of reservation waters, and (4) be reasonably expected to be capable of administering the Impaired Water Listing and TMDL Program. These criteria are discussed below.

The first criterion for TAS requires the tribe to be federally recognized by the U.S. Department of the Interior (DOI) and meet the definitions in sections 131.3(k) and (l). The tribe may address the recognition requirement either by stating that it is included on the list of federally recognized tribes published periodically by DOI, or by submitting other appropriate documentation (*e.g.*, if the tribe is federally recognized but is not yet included on the DOI list). The definition of “tribe” in section 131.3(l), along with requiring federal recognition, additionally requires that the tribe is exercising governmental authority over a Federal Indian reservation. “Federal Indian reservation” is defined in section 131.3(k) as “all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation.” (See further discussion of the term “reservation” in section I B of this preamble.) The governmental authority and reservation aspects of these definitions would be addressed in



the tribe's application, including as part of its descriptive statements that it currently carries out substantial governmental duties and powers over a defined area, and that it has authority to regulate water quality over a reservation.

The second criterion requires the tribe to have a governing body "carrying out substantial governmental duties and powers." The Agency considers "substantial governmental duties and powers" to mean that the tribe is currently performing governmental functions to promote the health, safety, and welfare of the affected population within a defined geographical area. *See* 54 FR at 39101. Examples of such functions may include, but are not limited to, the power to tax, the power of eminent domain, and police power. Federal recognition by DOI would not, in and of itself, satisfy this criterion. EPA expects that most tribes should be able to meet this criterion without much difficulty. *Id.*

To address the second criterion, the tribe is required to submit a descriptive statement demonstrating that the tribal governing body is currently carrying out substantial governmental duties and powers over a defined area. The descriptive statement should (1) describe the form of tribal government, (2) describe the types of essential governmental functions currently performed, such as those listed above, and (3) identify the sources of authorities to perform these functions (*e.g.*, tribal constitutions and codes).

The third criterion, concerning tribal authority, means that a tribe seeking TAS for purposes of the CWA Section 303(d) Impaired Water Listing and TMDL Program must adequately demonstrate authority to manage and protect water resources within the borders of the tribe's reservation. To verify authority and satisfy the third criterion of the rule, a tribe must include a descriptive statement of its authority to regulate water quality, which should include a statement signed by the tribe's legal counsel, or an equivalent official, explaining the legal basis for the

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tribe's regulatory authority, and appropriate additional documentation (e.g., maps, tribal codes, and ordinances).

As described in EPA's May 16, 2016, interpretive rule, EPA previously took an initial cautious approach that required tribes applying for eligibility to administer regulatory programs under the CWA to demonstrate their inherent tribal authority over the relevant regulated activities on their reservations. *See, e.g.*, 81 FR at 30185-86; 56 FR at 64877-81. This included a demonstration of inherent regulatory authority over the activities of non-tribal members on lands they own in fee within a reservation under the principles of *Montana v. United States*, 450 U.S. 544 (1981), and its progeny. *Montana* held that, absent a federal grant of authority, tribes generally lack inherent civil jurisdiction over nonmember activities on nonmember fee land, but retain inherent civil authority to regulate nonmember activities on fee land 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." *Montana*, 450 U.S. at 565-66.

In addressing the second exception of *Montana* regarding the effects of nonmember conduct, EPA has previously described the Agency's operating approach to require – to the extent a demonstration of inherent regulatory authority is needed – a showing that the potential impacts of regulated activities on the tribe are serious and substantial. 56 FR at 64878. EPA also explained that the activities regulated under the various environmental statutes, including the CWA, generally have serious and substantial potential impacts on human health and welfare. *Id.* EPA described the Agency's expert assessment regarding the critical importance of water quality management to self-government and also explained that because of the mobile nature of

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pollutants in surface waters and the relatively small size of water bodies on reservations, it would be very likely that any water quality impairment on non-Indian fee land within a reservation would also impair water quality on tribal lands. *Id.* at 64878-79. EPA reiterates the generalized statutory and factual findings set forth in those prior TAS rulemakings, which apply equally to the regulation of water quality under the CWA Section 303(d) Program.

EPA has also separately revised its interpretation of the CWA tribal provision by conclusively determining that Congress intended to delegate authority to eligible tribes to regulate their entire reservations under the CWA irrespective of land ownership. In prior CWA TAS promulgations, EPA recognized that there was significant support for the view that Congress had intended to delegate authority to eligible Indian tribes to administer CWA regulatory programs over their entire reservations, irrespective of land ownership, and EPA expressly stated that the issue of tribal authority under the CWA remained open for further consideration in light of additional congressional or judicial guidance. *See, e.g.*, 56 FR at 64878-81. On May 16, 2016, as part of an entirely separate regulatory action, EPA published in the *Federal Register* a rule to reinterpret the CWA tribal provision as including such an express delegation of authority by Congress. 81 FR 30183. Under that reinterpretation, applicant Indian tribes are no longer required to demonstrate inherent authority to regulate their reservation waters under the CWA. Among other things, tribes are thus no longer required to meet the test established in *Montana v. United States*, 450 U.S. 544 (1981), and its progeny with regard to exercises of inherent tribal regulatory authority over nonmember activity. *Id.* Instead, under that reinterpretation, absent rare circumstances that may affect a tribe's ability to effectuate the delegation of authority, a tribe is able to rely on the congressional delegation of authority

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included in section 518 of the statute as the source of authority to administer CWA regulatory programs over its entire reservation as part of its legal statement. *Id.*

In the preamble to the proposed 303(d) TAS rule, EPA noted that the proposed rule intended to provide appropriate TAS application and review procedures irrespective of which interpretation of tribal authority under the Act applies. As explained in EPA's reinterpretation of section 518, EPA's existing TAS regulations – including 40 CFR 131.8, upon which this rule is modeled – accommodate either interpretation of tribal authority under the CWA and provide appropriate application procedures to ensure that relevant jurisdictional information is provided to EPA and made available for comment. 80 FR 47430. The same is true of this rule, which establishes procedures needed to fill the gap in TAS regulatory infrastructure for the CWA Section 303(d) Program. Now that the May 16, 2016, interpretative rule is finalized, the revised interpretation would be applied in the context of EPA's review of a TAS application submitted under these CWA section 303(d) regulations. Finalization of these procedural regulations, however, is a separate and distinct regulatory action from the reinterpretation and is not based upon, nor does it depend upon that earlier action.

The fourth criterion requires that the tribe, in the Regional Administrator's judgment, be reasonably expected to be capable of administering an effective CWA Section 303(d) Impaired Water Listing and TMDL Program. To meet this requirement, tribes should either (1) show that they have the necessary management and technical skills or (2) submit a plan detailing steps for acquiring the necessary management and technical skills. When considering tribal capability, EPA will also consider whether the tribe can demonstrate the existence of institutions that exercise executive, legislative, and judicial functions, and whether the tribe has a history of successful managerial performance of public health or environmental programs.

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The specific information required for tribal applications to EPA is described in section 130.16 (a) and (b). The application must, in general, include a statement regarding federal recognition by DOI, documentation that the tribal governing body is exercising substantial duties and powers, documentation of authority to regulate water quality on the reservation, a narrative statement of tribal capability to administer the CWA Section 303(d) Impaired Water Listing and TMDL Program, and any other information requested by the Regional Administrator.

Consistent with EPA's other TAS regulations, the rule also provides that where a tribe has previously qualified for TAS for purposes of a different EPA program, the tribe need only provide the required information that has not been submitted as part of a prior TAS application. To facilitate review of tribal applications, EPA requests that a tribe, in its application, inform EPA whether the tribe has been approved for TAS or deemed eligible to receive authorization for any other EPA program. *See* 59 FR at 64340.

The TAS application procedures and criteria for the CWA Sections 303(c) WQS and 303(d) Impaired Water Listing and TMDL Programs are similar in many respects, and a tribe interested in both programs may wish to streamline the application process by combining a request for TAS eligibility for 303(c) and 303(d) into a single application. Although a tribe is not required to do so, EPA's approach allows a tribe to submit a combined application, which addresses the criteria and application requirements of sections 131.8 and 130.16, to EPA if the tribe is interested in applying for TAS for both the CWA Section 303(c) and 303(d) Programs.

## **VI. What special circumstances may exist regarding qualification for TAS for the CWA Section 303(d) Impaired Water Listing and TMDL Program?**

There could be rare instances where special circumstances limit or preclude a particular tribe's ability to be authorized to administer the 303(d) Program over its reservation. For

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example, there could be a separate federal statute establishing unique jurisdictional arrangements for a specific state or a specific reservation that could affect a tribe's ability to exercise authority under the CWA. It is also possible that provisions in particular treaties or tribal constitutions could limit a tribe's ability to exercise relevant authority.<sup>12</sup>

Under section 130.16(b), which requires tribal applicants to submit a statement describing their authority to regulate water quality, EPA encourages tribes to include a statement of their legal counsel (or equivalent official) describing the basis for their assertion of authority. The statement can include copies of documents such as tribal constitutions, by-laws, charters, executive orders, codes, ordinances, and resolutions. The provision for a legal counsel's statement is designed to ensure that applicant tribes appropriately describe the bases of their authority and address any special circumstances regarding their assertion of authority to administer the 303(d) Program. The rule provides an appropriate opportunity for "appropriate governmental entities" (*i.e.*, states, tribes and other federal entities located contiguous to the reservation of the applicant tribe) to comment on an applicant tribe's assertion of authority and, among other things, inform EPA of any special circumstances that they believe could affect a tribe's authority to administer the 303(d) Program.

EPA is also aware that section 10211(b) of the Safe, Accountable, Flexible, Efficient Transportation Equity Act of 2005 ("SAFETEA"), Public Law 109-59, 119 Stat. 1144 (August 10, 2005) established a unique TAS requirement with respect to Indian tribes located in the State

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<sup>12</sup> EPA takes no position in this rule regarding whether any particular tribe or Indian reservation is subject to any potential impediment relating to authority to take on the 303(d) Program. Any such issue would need to be addressed on a case-by-case basis and with the benefit of a full record of relevant information that would be developed during the processing of a particular TAS application. To the extent EPA is ever called upon to make a decision regarding this type of issue, such a decision would be rendered in the context of EPA's final action on a specific TAS application, and any judicial review of that decision would occur in that context.

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of Oklahoma. Under section 10211(b) of SAFETEA, tribes in Oklahoma seeking TAS under a statute administered by EPA for the purpose of administering an environmental regulatory program must, in addition to meeting applicable TAS requirements under the relevant EPA-administered environmental statute, enter into a cooperative agreement with the state that is subject to EPA approval and that provides for the tribe and state to jointly plan and administer program requirements. This requirement of SAFETEA applies apart from, and in addition to, existing TAS eligibility criteria, including the TAS criteria set forth in section 518 of the CWA. This rule relates solely to the CWA TAS requirement; it thus has no effect on the separate requirement of section 10211(b) of SAFETEA.

*What is EPA's position on certain public comments regarding special circumstances?*

EPA received several comments asserting that special circumstances limit particular tribes' ability to obtain TAS for the CWA 303(d) Program. For instance, one state asserted that, under federal law specific to that state, the state has primary regulatory authority and jurisdiction for environmental programs throughout the state, including over Indian territories and waters. The state requested that EPA confirm that in this state, a tribe would not be eligible to attain TAS for the 303(d) Program or any other CWA regulatory program. One state asserted that a tribe located in the state is precluded by federal statute specific to that tribe from regulating reservation land that is owned in fee by non-tribal citizens. An industry commenter asserted that the tribe where its facility is located entered into a binding agreement waiving regulatory authority over the commenter's facility, and accordingly, making the tribe ineligible to assert jurisdiction over the facility for CWA purposes.

EPA appreciates the information about special circumstances provided in the comments. Importantly, the precise outcome of any such circumstance could only be determined in the

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context of a particular tribe's TAS application and upon a full record of information addressing the issue. The substance of these specific situations is thus outside the scope of – and is not affected by – this rule. This rule only establishes criteria and a process for tribes to apply for TAS for the 303(d) Program; it does not adjudicate the outcome of that process for any particular tribe. However, EPA notes that the comments are both illustrative and instructive regarding the types of special circumstances and jurisdictional issues that may affect a tribe's ability to obtain TAS for the 303(d) Program. Federal statutes other than the CWA may, for instance, limit a particular tribe's or group of tribes' ability to participate, in whole or in part, in CWA regulation through the TAS process. Before approving a tribe's TAS eligibility, EPA would carefully consider whether any binding contractual arrangements or other legal documents such as tribal charters or constitutions might affect the tribe's regulatory authority generally, or with regard to any specific members of the regulated community. Finally, under this rule – and consistent with TAS requirements for other regulatory programs – the geographic scope of the reservation boundaries over which a tribe asserts authority would continue to be a relevant and appropriate issue for consideration in the TAS process. Sections 130.16(b)(3) and (c)(2) of this rule require applicant tribes to address these types of issues in their jurisdictional statements and provide states and other appropriate entities an appropriate opportunity to comment and inform EPA of any potential impediments to tribal regulatory authority. These comment opportunities help ensure that EPA's decision making is well informed.

EPA also received comments on the proposed rule from the State of Oklahoma regarding section 10211(b) of SAFETEA. In its comments, the State of Oklahoma requested additional information regarding the process or sequence of events that will be used to ensure that this provision of SAFETEA is satisfied in the context of particular tribal TAS applications that may



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be submitted following finalization of this rule. EPA notes that section 10211(b) expressly contains certain procedural requirements – *i.e.*, the state/tribal cooperative agreement must be subject to EPA review and approval after notice and an opportunity for public hearing. Nothing in this rule alters or affects those requirements. Further, because the SAFETEA requirement must be satisfied for a tribe in Oklahoma to obtain TAS to regulate under an EPA statute, the final cooperative agreement must be fully executed and approved by EPA before EPA can approve a 303(d) TAS application. Because the State of Oklahoma is a required signatory to the agreement, this sequence of events ensures that the State will have a full opportunity to participate in the TAS process – separate from opportunities that states have through EPA’s TAS notice and comment procedures. Nothing in this rule alters or affects Oklahoma’s participation in the SAFETEA cooperative agreement or the requirement that the agreement be in place as a prerequisite to TAS for the 303(d) Program. EPA notes that there are no regulations establishing procedures for the State and applicant tribes to negotiate SAFETEA cooperative agreements or for tribes to submit, and EPA to review, such agreements. There is thus flexibility for the State and applicant tribes in Oklahoma to work together to develop these agreements as they deem appropriate.

## **VII. What procedure will EPA follow in reviewing a tribe’s TAS application?**

### *A. Notice to Appropriate Governmental Entities*

The EPA review procedure, included in section 130.16(c), specifies that the Regional Administrator, following receipt of tribal applications, will process such applications in a timely manner. EPA will promptly notify the tribe that the complete application has been received. Within 30 days after receipt of a tribe’s complete TAS application for 303(d), EPA will provide notice to appropriate governmental entities (*i.e.*, states, tribes, and other federal entities located contiguous to the reservation of the applicant tribe) of the complete application and the substance

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of and basis for the tribe's assertion of authority over reservation waters, and will provide a 30-day opportunity to comment to EPA on the tribe's assertion of authority. *See, e.g.*, 56 FR at 64884. EPA will also provide, consistent with prior practice, sufficiently broad notice (*e.g.*, through local newspapers, electronic media, or other appropriate media) to inform other potentially interested entities of the applicant tribe's complete application and of the opportunity to provide relevant information regarding the tribe's assertion of authority. As described below, EPA's notice and comment procedure applies unless such process would be duplicative of a notice and comment process already performed in connection with EPA's approval, after the effective date of this rule, of the same tribe's prior application for TAS for another CWA regulatory program.

*B. Avoidance of Duplicative Notice and Comment Procedures*

In this rule, EPA includes provisions intended to help avoid unnecessary and wasteful duplication of the notice and comment procedures described in section VII.A. Specifically, the rule (section 130.16(c)(4)) provides that, where a tribe has previously qualified for TAS for a CWA regulatory program<sup>13</sup> 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 section 303(d) TAS application presents different jurisdictional issues or significant new factual or legal information relevant to jurisdiction to the Regional Administrator.

Where different jurisdictional issues or information are not present, additional notice and comment regarding the tribe's assertion of jurisdiction would be duplicative of the process

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<sup>13</sup> Specifically, the CWA Section 303(c) WQS Program, CWA Section 402 NPDES Program or Sewage Sludge Management Program, or CWA Section 404 Dredge and Fill Permit Program.

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already undertaken during EPA's review of the prior TAS application. Under these circumstances, the rule avoids such duplication of efforts by providing that the relevant EPA Regional Administrator will process a TAS application for the 303(d) Program without a second notice and comment process.

Where different jurisdictional issues or new or changed information are present, the notice and comment process described in section 130.16(c)(2) applies. For example, if the geographic reservation area over which an applicant tribe asserts authority is different from the area covered by a prior TAS application or EPA approval, the process in section 130.16(c)(2) applies and provides an appropriate opportunity for comment on the tribe's assertion of authority over the new area. In such circumstances, a tribe may find it appropriate and useful to update its prior TAS application at the same time it applies for TAS for 303(d). This would help ensure that the tribe's TAS eligibility for the various CWA programs covers the same geographic area. Such a combined TAS application would be subject to the section 130.16(c)(2) notice and comment process.

This approach applies *prospectively* only, *i.e.*, where the tribe obtains TAS for the CWA Section 303(c) WQS Program, CWA Section 402 NPDES Program or Sludge Management Program, or CWA section 404 dredge and fill Permit Program *after* the effective date of this rule. In other words, if a tribe first gains TAS for 303(c) or another CWA regulatory program *after* this rule is finalized, and subsequently seeks TAS for the 303(d) Program, additional notice and comment would not be required as part of the 303(d) TAS application unless different jurisdictional issues or significant new factual or legal information relevant to jurisdiction are presented in the 303(d) application. However, if a tribe had been approved for TAS only for 303(c) or another CWA program prior to the effective date of this rule, the notice and comment

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procedures of section 130.16(c)(2) will apply. Further notice and comment may not be necessary, for example, where a tribe has been approved for a TAS application for 303(c) (WQS) after the effective date of this rule, and then subsequently applies for TAS for the 303(d) Program. If that tribe had previously demonstrated that it may effectuate the congressional delegation of authority for a CWA regulatory program, and the tribe is applying for the same geographic area, a new notice and comment procedure generally would not be needed for the 303(d) TAS. A tribe in this circumstance might note in its 303(d) TAS application that it is applying for the same geographic scope and using the same legal basis as the previous CWA TAS regulatory approval.

EPA notes that the notice and comment procedures (and the exemption thereto) described in this rule relate solely to tribal assertions of authority as part of TAS applications. They do not address any issues relating to notice and comment on section 303(d) lists and TMDLs associated with 303(d) Program implementation by a TAS-eligible tribe.

1. What did EPA consider regarding the notice and comment exemption?

In the proposed rule, EPA proposed to apply this exemption generally – that is, to all tribal applications that meet the exemption criteria even if the earlier CWA TAS approval occurred prior to the finalization of the 303(d) TAS rule. EPA requested comment on its proposed exemption and alternative approaches. In addition, we requested comment on whether the section 130.16(c)(4) notice and comment exemption should instead be available only prospectively – *i.e.*, only where the applicant tribe obtains TAS for the CWA Section 303(c) WQS Program, CWA Section 402 NPDES Program or Sewage Sludge Management Program, or CWA Section 404 Dredge and Fill Permit Program *after* the rule is finalized (and, again, only if different jurisdictional issues or significant new factual or legal information relevant to jurisdiction are not present in the tribe’s 303(d) TAS application). EPA also considered not providing such a notice

and comment exemption, regardless of whether tribes have obtained TAS for other CWA regulatory programs.

2. What is EPA's position on certain public comments regarding notice and comment?

EPA received several comments on the proposed notice and comment approach, including from several tribes, several states, one local government, and one non-governmental organization. The tribal commenters generally expressed support for the proposed approach, noting that tribes that have TAS approval for another CWA program should not have to go through additional delay for a duplicative notice and comment process. Two tribal commenters also noted that the approach should not be limited to prospective applications, with one commenter asserting that anyone with objections to previous applications already had an opportunity to express those concerns. States, local entities, and industry generally opposed the proposed streamlined notice and comment approach. One state asserted that states should have an opportunity to comment on all applications, regardless of previous TAS applications. One state commenter, while generally opposed to the approach, indicated that the approach at a minimum should be applied prospectively only. One state asserted that the proposed approach would not provide an opportunity to have input to the development of a new tribal program. Another state noted that the public should have an opportunity to comment on a program such as 303(d) that may have more direct and broader public implications than other TAS programs. One state commenter supported the proposed approach, but said that it should be applied prospectively only. A local government and a nongovernmental organization asserted that the approach limits due process and expands tribal control over non-tribal persons and lands.

EPA agrees with the commenters who supported the proposed approach as an effective and efficient means to ensure appropriate notice procedures on tribal assertions of authority in 303(d)

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TAS applications, while avoiding unnecessary and wasteful duplication. EPA also appreciates, but disagrees with, the comments that additional notice and comment should be required, regardless of previous CWA TAS applications. As discussed previously, where different jurisdictional issues or information are not present, additional notice and comment procedures would be duplicative of the process already undertaken during EPA's review of a prior TAS application. Eliminating unnecessary burdens is consistent with longstanding EPA and Executive policy to support tribal self-determination and promote and streamline tribal involvement in managing and regulating their lands and environments. *See, e.g.*, Executive Order 13175, 65 FR 67249, November 9, 2000; Presidential Memorandum: Government-to-Government Relations with Native American Tribal Governments, 59 FR 22951, April 29, 1994; EPA Policy for the Administration of Environmental Programs on Indian Reservations, November 8, 1984.<sup>14</sup> This rule thus maintains the notice and comment exemption in section 130.16(c)(4).

EPA also notes that the notice and comment procedures described in this rule are not required by the CWA or other federal law. Instead, they are provided by EPA as a matter of the Agency's discretion to ensure that EPA's decision making on tribal assertions of authority in TAS applications is well-informed, including by any relevant information that may be made available by appropriate governmental entities.

EPA has, however, decided to make the notice and comment exemption available only prospectively. Limiting the notice and comment exemption to prospective applications is appropriate because the notice and comment exemption will not provide any streamlining benefit to tribes with prior CWA TAS approvals in light of EPA's recent publication of an interpretive

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<sup>14</sup> *EPA Policy for the Administration of Environmental Programs on Indian Reservations*, November 1984, available at <https://www.epa.gov/tribal/epa-policy-administration-environmental-programs-indian-reservations-1984-indian-policy>.

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rule revising the Agency's approach to tribal jurisdiction under the CWA. *Revised Interpretation of Clean Water Act Tribal Provision*, 81 FR 30183 (May 16, 2016). In the interpretive rule, EPA announced the Agency's conclusion that section 518 of the CWA includes a delegation of authority from Congress to eligible tribes to regulate waters throughout their reservations under the statute, irrespective of who owns the relevant reservation area. This revised interpretation thus eliminated the need for tribes seeking TAS for the purpose of administering a CWA regulatory program to demonstrate their inherent authority to regulate reservation water resources under principles of federal Indian law. To date, all of the tribes that have been approved by EPA for eligibility to administer a CWA regulatory program were approved consistent with EPA's prior (pre-interpretive rule) approach to tribal jurisdiction. Because the interpretive rule revised EPA's approach to tribal jurisdiction, new TAS applications for a CWA regulatory program, including the 303(d) Program, will proceed under the revised interpretation, thus presenting a different jurisdictional issue than prior applications. Even if EPA opted to apply the notice and comment exemption retrospectively, the procedures of section 130.16(c)(2) would apply in all such cases because the circumstances authorizing the exemption of section 130.16(c)(4) will be absent. Applying the exemption retrospectively would not provide the intended streamlining benefit, given the existence of different jurisdictional issues. Going forward, however, EPA will apply the exemption per the provisions in section 130.16(c)(4).

### *C. Treatment of Competing or Conflicting Claims*

Where a tribe's assertion of authority is subject to a competing or conflicting claim, the procedures in this rule provide that the Regional Administrator, after due consideration and in consideration of any other comments received, will determine whether the tribe has adequately demonstrated authority to regulate water quality on the reservation for purposes of the 303(d)

Program. Where the Regional Administrator concludes that a tribe has not adequately demonstrated its authority with respect to an area in dispute, then tribal assumption of the CWA Section 303(d) Impaired Water Listing and TMDL Program may be restricted accordingly. If a dispute is focused on a limited area, this would not necessarily delay EPA's decision to treat the tribe in a similar manner as a state for non-disputed areas.

This procedure does not imply that states, tribes, other federal agencies, or any other entity have veto power over tribal TAS applications. Rather, it is intended to assist EPA in gathering information that may be relevant to the Agency's determination whether the applicant tribe has the necessary authority to administer the CWA Section 303(d) Impaired Water Listing and TMDL Program. EPA will consider comments but will make an independent evaluation of the tribal showing.

#### *D. EPA's Decision Process*

The rule requires EPA to process a tribe's TAS application in a timely manner, but does not specify a precise time frame for review of tribal TAS applications. Each TAS application will present its own set of legal and factual issues, and EPA anticipates that in some cases it may be necessary to request additional information when examining tribal TAS applications. Similarly, the Agency's experience with states applying for various EPA programs and with tribes applying for TAS for the WQS Program indicates that additional engagement between EPA and the applicant may be necessary before final decisions are made. EPA expects that similar exchanges with tribes will often be helpful and enhance EPA's processing of tribal TAS applications for the CWA Section 303(d) Impaired Water Listing and TMDL Program.

Where the Regional Administrator determines that a tribal TAS application satisfies the requirements of section 130.16(a) and (b), the Regional Administrator will promptly notify the tribe that the tribe has qualified for TAS for the CWA Section 303(d) Impaired Water Listing



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and TMDL Program. A decision by the Regional Administrator that a tribe does not meet the requirements for TAS for purposes of the CWA Section 303(d) Impaired Water Listing and TMDL Program would not preclude the tribe from resubmitting an application at a future date. If the Regional Administrator determines that a tribal application is deficient or incomplete, EPA will identify such deficiencies and gaps so the tribe can make changes as appropriate or necessary.

#### **VIII. What are EPA’s expectations regarding WQS and WQS TAS as prerequisites for tribes applying for TAS authority for the 303(d) Program?**

This final rule does not require tribes to have applicable WQS in place for their reservation waters prior to applying for TAS eligibility for the 303(d) Program. The rule also does not require tribes seeking TAS eligibility for the 303(d) Program to have previously obtained EPA approval for TAS for the WQS Program. Under section 303(d), however, states and authorized tribes must develop lists of impaired waters and TMDLs based on applicable WQS. CWA sections 303(d)(1) and (2). Accordingly, EPA expects that the tribes most likely to be interested in applying for TAS for the 303(d) Program will be those that also have TAS for CWA section 303(c) and have applicable WQS for their reservation waters. EPA has taken final action approving TAS for WQS for 53 tribes. Forty-two of those tribes have EPA-approved WQS, and one tribe without TAS for WQS has EPA-promulgated WQS.<sup>15</sup> These tribes will already have demonstrated an interest in directly administering certain fundamental elements of the CWA as well as the capacity to do so.

Since applicable WQS are a foundation of the CWA’s water quality-based approach to protecting our nation’s waters, EPA recommends that establishing EPA-approved/EPA-

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<sup>15</sup> EPA maintains a current list of authorized tribes and tribal WQS approvals at <https://www.epa.gov/wqs-tech/epa-approvals-tribal-water-quality-standards>.

promulgated WQS for reservation water bodies is an important first step for tribes interested in protecting and restoring their reservation waters. As tribes gain experience developing and administering applicable WQS on their reservations, they may become interested in greater involvement in additional CWA programs – such as the 303(d) Program – designed to ensure that applicable WQS are achieved. Obtaining TAS to implement a CWA Section 303(d) Impaired Water Listing and TMDL Program for its reservation waters is one potential next step for interested tribes.

Table 1 is an example of a step-wise approach that tribes may follow in developing their water quality programs under the CWA and ultimately seeking TAS for the CWA Section 303(d) Impaired Water Listing and TMDL Program. This is only one possible approach. Many of the identified steps could be completed in parallel rather than sequentially. In particular, this approach does not preclude a tribe from seeking TAS for the 303(d) Program, either separately or concurrently with TAS for the WQS Program.

<b>Table 1. Example of a Step-Wise Approach to Regulatory Activities for Tribes Interested in Applying for TAS Authority to Implement the CWA Section 303(d) Impaired Water Listing and TMDL Program</b>	
<b>Step 1:</b> Tribe seeks TAS for CWA 303(c) WQS	<ul style="list-style-type: none"> <li>• Tribe decides to evaluate and address water quality within its reservation by establishing WQS under the CWA</li> <li>• Tribe identifies and inventories reservation water bodies</li> <li>• Tribe applies for TAS for WQS</li> <li>• EPA approves tribe’s TAS application</li> </ul>
<b>Step 2:</b> Tribe Adopts WQS	<ul style="list-style-type: none"> <li>• Tribe develops its water quality goals</li> <li>• Tribe drafts and adopts WQS and submits for EPA approval</li> <li>• EPA approves tribal WQS</li> </ul>
<b>Step 3:</b> Tribe seeks TAS for CWA Section 303(d) Impaired Water	<ul style="list-style-type: none"> <li>• Tribe decides to assess water quality conditions against applicable WQS (<i>i.e.</i>, comparing water quality monitoring data and information against applicable WQS), identify impaired waters, and develop TMDLs</li> </ul>

<p>Listing and TMDL Program</p>	<ul style="list-style-type: none"> <li>• Tribe applies for TAS to implement a 303(d) Program under the CWA</li> <li>• EPA approves TAS for 303(d)</li> </ul>
<p><b>Step 4:</b> Tribe implements the CWA Section 303(d) Impaired Water Listing and TMDL Program</p>	<p>Tribe conducts activities identified in 40 CFR 130.7, including but not limited to:</p> <ul style="list-style-type: none"> <li>• Assembles and evaluates all existing and readily available water quality-related data and information on reservation water bodies</li> <li>• Develops section 303(d) list of impaired waters (that is, reservation water bodies that do not meet or are not likely to meet applicable WQS)</li> <li>• Prioritizes list of impaired water bodies for TMDL development</li> <li>• Submits section 303(d) list to EPA for approval</li> <li>• Develops TMDLs for listed waters</li> <li>• Submits TMDLs to EPA for approval</li> </ul>
<p><b>Step 5:</b> Tribe implements TMDLs (not required by 40 CFR 130.7)</p>	<ul style="list-style-type: none"> <li>• Tribe carries out watershed-specific plans and actions to implement TMDLs</li> <li>• Tribe monitors TMDL implementation and effectiveness</li> </ul>
<p><b>Step 6:</b> Tribe seeks other CWA regulatory programs</p>	<p>Possibilities include:</p> <ul style="list-style-type: none"> <li>• CWA Section 402 NPDES Program</li> <li>• CWA Section 405 Sewage Sludge Management Program</li> <li>• CWA Section 404 Dredge and Fill Permit Program</li> </ul>

*A. What did EPA consider regarding WQS and WQS TAS as prerequisites for 303(d) TAS?*

In the proposed rule, EPA did not propose to require tribes to have CWA-applicable WQS – *i.e.*, either approved by EPA or promulgated by EPA – in place on their reservations prior to applying for TAS eligibility under CWA section 518 for purposes of administering the 303(d) Program. This approach is consistent with other CWA and EPA programs, which authorize tribes to seek TAS eligibility without requiring as a prerequisite the existence of any separate EPA-approved tribal environmental programs. Because the listing of waters and development of TMDLs under section 303(d) must be based on applicable WQS (see CWA sections 303(d)(1)

and (2)), EPA specifically invited public comment in the proposed rule on whether applicable WQS should instead be a prerequisite for obtaining TAS eligibility for the CWA Section 303(d) Impaired Water Listing and TMDL Program. EPA also invited public comment on 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.

*B. What is EPA's position on certain public comments regarding WQS and WQS TAS as prerequisites for 303(d) TAS?*

EPA received comments on this topic from several tribes and tribal organizations, as well as several states. Two tribal organizations and one tribe asserted that applicable WQS should not be required prior to a tribe applying for TAS for the 303(d) Program. One of these tribal commenters reasoned that developing WQS requires time and should not be a barrier to tribes seeking 303(d) TAS. Another tribe asserted that WQS should not be required, in order to allow for an expedited process for a tribe seeking 303(d) TAS. One tribe commented that WQS should be required because lists of impaired waters must be based on applicable WQS. Five states asserted that WQS should be required because lists must be based on applicable WQS. One of these states also commented that both WQS and TAS for 303(c) should be required. Another state commented that resources would be wasted by tribes developing applications, and by the government in reviewing applications, for a program that tribes cannot implement without WQS.

EPA also received comments on whether a tribe should have TAS for 303(c) before applying for 303(d) TAS, or at least apply concurrently for 303(c) and 303(d) TAS. Two tribes asserted that TAS for 303(c) should not be a requirement in order for a tribe to seek 303(d) TAS. Two states supported the opposite position: that TAS for 303(c) should be in place before a tribe

applies for 303(d) TAS. Another state also asserted that tribes should apply for 303(c) TAS prior to, or at least concurrent with, their application for 303(d) TAS.

EPA agrees with the commenters that WQS are the basis for the development of impaired waters lists and TMDLs. See sections 303(d)(1) and (2). As discussed in Section IV, under section 303(d) of the CWA, every two years authorized tribes would be required to develop lists of waters not meeting, or not expected to meet, applicable water quality standards. 40 CFR 130.7(d). Impaired waters are waters for which technology-based limitations and other required controls are not stringent enough to meet applicable CWA water quality standards. Under section 303(d), a tribe would use applicable WQS as the basis for identifying impaired waters and calculating TMDLs, which quantify the maximum amount of a pollutant that a water body can receive and still meet the WQS.

Although 303(d) lists and TMDLs are developed based on applicable WQS, EPA disagrees that the Agency should impose a regulatory requirement that such WQS must be in place before a tribe can apply under section 518 for 303(d) TAS eligibility. Similarly, EPA disagrees that the Agency should impose a regulatory requirement that a tribe must have TAS for 303(c) prior to applying for 303(d) TAS. This rule establishes the process for a tribe to seek TAS for the 303(d) Program. The process of applying for 303(d) TAS eligibility under section 518 is a separate step distinct from the process of implementing section 303(d) through the development of 303(d) lists or TMDLs. The TAS review focuses on the applicant tribe's governmental functions, authority, and capability to administer the program. Approval of the tribe's TAS application does not, by itself, allow the tribe to submit lists of impaired waters and establish TMDLs. Authorizing tribes to seek TAS eligibility in the absence of applicable WQS thus creates no conflict with the CWA requirement that such WQS provide the basis for 303(d) lists and TMDLs. Once a tribe has TAS

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for the 303(d) Program, the tribe would still be required to develop lists and TMDLs on the basis of applicable WQS, once they are in place. In addition, the 303(d) TAS application process is designed to provide an opportunity for tribes to begin to engage with the 303(d) Program.... EPA does not intend for it to act as a barrier. Requiring applicable WQS as a prerequisite to a TAS application would establish an unnecessary barrier to tribes seeking TAS eligibility for the 303(d) Program. *See, e.g.*, EPA Policy for the Administration of Environmental Programs on Indian Reservations, November 8, 1984 and Executive Order 13175, 65 FR 67249, November 9, 2000.

EPA notes that, under this approach, tribes seeking and obtaining 303(d) TAS eligibility will have ample opportunity to develop and seek EPA approval or establishment of WQS that would be the basis for section 303(d) implementation. This rule takes into consideration the time needed for development of WQS. As indicated in section 130.16(c)(5) of this rule, an authorized tribe's first impaired waters list must be submitted to EPA on the next listing cycle due date that is at least 24 months from the later of: (1) the date the tribe's TAS application for 303(d) is approved or (2) the date EPA-approved/promulgated WQS for the tribe's waters are effective.

Similarly, making TAS for section 303(c) a requirement for tribes seeking TAS for 303(d) would be unduly restrictive of tribal options regarding the development of WQS and implementation of the 303(d) Program. As discussed, eligible tribes may develop lists or TMDLs under 303(d) based on any WQS that are "applicable" under the Act. "Applicable" WQS include EPA-approved tribal WQS as well as those promulgated by EPA. *See* CWA sections 303(d)(1) and (2). Thus, a tribe may reasonably decide to seek TAS for section 303(d) now to prepare itself to develop lists and TMDLs in anticipation of having either EPA-approved tribal or EPA-promulgated WQS in place at a later date. Requiring a tribe to apply for and receive 303(c) TAS

to develop its own WQS would be an unnecessary step for a tribe seeking to develop lists and TMDLs based on EPA-promulgated WQS. In fact, requiring a tribe to have 303(c) TAS prior to seeking 303(d) TAS would prevent a tribe from choosing to implement federal WQS under section 303(d), without also unnecessarily expending resources to pursue 303(c) TAS.

Finally, although EPA expects that the tribes most likely to be interested in applying for TAS for section 303(d) will be those that also have TAS for section 303(c) and have applicable WQS, the rule should not preclude other tribes from obtaining TAS status for section 303(d), and thus ensuring that TAS eligibility requirements are satisfactorily addressed prior to expending resources on developing WQS. While one commenter asserted that resources would be wasted on 303(d) applications in the absence of tribal WQS, EPA disagrees and concludes that the approach finalized in this rule will allow tribes, at their discretion, to streamline and minimize expenditures on TAS procedures. For example, a tribe could combine TAS requests for sections 303(c) and 303(d) into a single application – an option that EPA encourages, but does not require. Requiring that WQS be in place prior to applying for 303(d) TAS would eliminate the ability for tribes to streamline their TAS applications by applying concurrently for 303(c) and 303(d) TAS. In any event, questions regarding how best to expend tribal resources and to organize and address tribal environmental priorities in pursuing eligibility for CWA programs should be left to the sovereign decision making of tribal governments.

**IX. What financial and technical support is available from EPA to tribes as they choose to develop and implement a CWA Section 303(d) Impaired Water Listing and TMDL Program?**

Pre-proposal input from tribes indicated that resources and funding available for TMDL development would be important considerations for tribes in deciding whether to apply for TAS

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for CWA section 303(d) purposes. During the public comment period, EPA also received comments from tribes reiterating the importance of funding and technical assistance for tribes interested in TAS for the 303(d) Program. As noted in section XI.F of the preamble to this rule, EPA considered tribal comments in developing this final rule, and intends to remain sensitive to tribal resource issues in its budgeting and planning process. EPA understands the tribes' resource concerns, but observes that the Impaired Water Listing and TMDL Program is not a grant program, and no federal grant funds are available directly from the Impaired Water Listing and TMDL Program. 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 and capacity to implement such a program, but GAP funds are not available for ongoing 303(d) Program implementation. Tribes interested in using GAP funds should contact their Regional GAP Program coordinator. In addition, other potential sources of tribal funding, such as CWA section 319 grants and section 106 grants, are already tightly constrained and may not be available to support additional work under section 303(d). Some tribes that receive CWA funding may be able to identify program activities that could also support 303(d) activities (*e.g.*, assessing water quality to develop impaired water lists), but the availability of such funding opportunities is uncertain.

As resources allow, EPA may be able to work cooperatively with tribes, as appropriate, on impaired water listing and TMDL issues in Indian country. For example, EPA intends to develop training and/or provide other technical support to tribes interested in obtaining TAS for 303(d) and implementing a CWA Section 303(d) Impaired Water Listing and TMDL Program if EPA staff and other resources are available to do so. As a general matter, however, EPA cannot assure that funding will be available for a tribe to develop or implement the 303(d) Program; a tribe



considering whether to apply to administer the Program should carefully assess its priorities and the availability of EPA assistance or other resources.

## **X. What is EPA’s position on certain other public comments received?**

In this section, EPA responds to several additional topics that were raised in public comments.

### *A. Impact on State/Local Authority for CWA Programs*

EPA received several comments regarding the impact of the rule on local and state authority over water quality programs. One state commented that the rule should clarify the meaning of “within the borders of the Indian reservation” to reflect that a state may have legal holdings within the exterior border of a reservation that do not qualify as Indian land. One local government commented that the proposed rule supplants the role of state and local governments in managing county or municipal waters on Indian reservations, and tribal jurisdiction applies only to federal trust parcels. The local government commenter also asserted that states, counties, and municipalities are complying with section 303(d) and therefore there is no need to expand tribal government involvement. The commenter further asserted that the rule would exacerbate state-tribal jurisdictional issues. A local water organization also commented that the rule supplants state and local authority, asserting that only the state has regulatory authority over water in the states.

EPA appreciates these comments and wishes to clarify that this rule has no effect on the scope of existing state implementation of section 303(d). Generally speaking, civil regulatory authority in Indian country lies with the federal government and the relevant Indian tribe, not with the states. *See, e.g., Alaska v. Native Village of Venetie Tribal Gov’t*, 522 U.S. 520, 527 n.1, 1998. In the absence of an express demonstration of authority by a state for such areas, and an EPA finding that the state has authority for those Indian country waters, EPA has generally

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excluded Indian country from its approvals of state regulatory programs under the CWA and excluded waterbodies in Indian country from its approval of state 303(d) lists and TMDLs.

This rule relates solely to the process for tribes to seek TAS for the purpose of administering CWA section 303(d) over their reservation waters; it has no effect on the scope of existing CWA regulatory programs administered by states. It neither diminishes nor enlarges the scope of such approved state programs.

There are uncommon situations where a federal statute other than the CWA grants a state jurisdiction to regulate in areas of Indian country. For example, in a few cases EPA has approved states to operate CWA regulatory programs in areas of Indian country where the states demonstrated jurisdiction based on such a separate federal statute. This rule does not address or affect such jurisdiction that other federal statutes may provide to states.

*B. Relation to May 16, 2016, Interpretive Rule*

Several of the comments EPA received on the proposed rule raised issues relating to EPA's separate interpretive rule revising the Agency's approach to tribal jurisdiction under the CWA. The interpretive rule was pending at the time EPA received these comments, but the rule has since been finalized. 81 FR 30183. One commenter supported the interpretive rule and asked EPA to cross-reference it in the 303(d) TAS rule. One state asked how the interpretive rule would be applied where there is state-specific law addressing unique issues arising in that state. Two states, one local government, and two industry commenters expressed opposition to the interpretive rule. Reasons for opposing the re-interpretation included objections to tribal jurisdiction over non-member activities and concern regarding impacts on state CWA programs.

EPA appreciates the issues raised by the commenters but notes that any questions or comments regarding the interpretive rule are outside the scope of this final rule. This rule relates

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solely to the procedures that will apply to tribal applications for TAS for the section 303(d) Program and to EPA's review of such applications. This rule thus fills a gap in TAS infrastructure, and fulfills the requirement of CWA section 518(e) that EPA promulgate final regulations specifying how tribes shall be treated as states for purposes of section 303(d). This rule provides appropriate TAS procedures irrespective of which interpretation of tribal jurisdiction applies. The rulemaking itself neither adopts, nor implements, any particular approach to tribal jurisdiction. It simply provides a process for tribes to apply for TAS, and for EPA to review such applications (with relevant input from appropriate governmental entities and others). Any application of EPA's revised approach to tribal jurisdiction under section 518 as described in the final interpretive rule would occur in the context of EPA's final decision on a particular tribe's TAS application for a CWA regulatory program, in this case the 303(d) Program. EPA also notes that the issues raised by commenters regarding the then-proposed interpretive rule were addressed by EPA in the context of finalizing that rule. 81 FR 30183.<sup>16</sup>

## **XI. Statutory and Executive Order Reviews**

Additional information about these statutes and Executive Orders can be found at

<http://www2.epa.gov/laws-regulations/laws-and-executive-orders>.

### *A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review*

The Office of Management and Budget (OMB) determined that this action is not a significant regulatory action and therefore it was not submitted to the OMB for review.

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<sup>16</sup> EPA's Response to Public Comments on Revised Interpretation of Clean Water Act Tribal Provision at <https://www.regulations.gov/document?D=EPA-HQ-OW-2014-0461-0110>.

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**B. Paperwork Reduction Act (PRA)**

EPA has submitted the information collection requirements in this legislative rule to OMB for approval under the PRA. The Information Collection Request (ICR) document that EPA prepared has been assigned EPA ICR number 2553.02. You can find a copy of the ICR in the docket for this rule, and it is briefly summarized here. This ICR supplements the current information collection requirements in EPA ICR number 1560.11 (National Water Quality Inventory Reports (Renewal)) and addresses the tribes' CWA Section 303(d) Impaired Water Listing and TMDL TAS application and 303(d) Program implementation burden, as well as EPA's burden for reviewing the tribes' applications and 303(d) Program submittals. ICR 1560.11 is a renewal of ICR 1560.10. OMB approved ICR number 1560.11 in March 2016.

This legislative rule establishes a process for tribes to obtain TAS for the 303(d) Program. As described in the ICR, EPA estimates the total burden on tribes to apply for TAS for the 303(d) Program would be 3,240 staff hours annually for an estimated 12 tribes that would apply for and receive TAS approval per year.

Tribes that receive TAS approval and have applicable WQS will then need to implement the requirements of section 303(d) to list impaired waters, set TMDL priorities, and develop TMDLs. EPA estimates that such 303(d) Program implementation burden would entail 86,664 staff hours annually for the estimated 12 tribes. ICR 1560.11 already includes the estimated burden for states to implement section 303(d), but does not include estimates for tribes. Therefore, the ICR for this rule includes the tribal section 303(d) implementation burden as well as the TAS application burden described in the previous paragraph.

As discussed in section V of this notice, EPA's regulations require that a tribe seeking to administer a CWA regulatory program must submit information to EPA demonstrating that the tribe meets the statutory criteria described in section V. EPA requires this information in order to

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determine that the tribe is eligible to administer the 303(d) Program. The CWA would require an authorized tribe to submit additional information to EPA – in this case, the lists of impaired waters and the TMDLs – once the tribe begins implementing the 303(d) Program.

Respondents/affected entities: Any federally recognized tribe with a reservation can potentially apply to administer a regulatory program under the CWA. Tribes with TAS for the 303(d) Program would then implement the Program, as described in section IV.

Respondent's obligation to respond: The information discussed in this rule is required from a tribe only if the tribe seeks TAS and is found eligible to administer a CWA Section 303(d) Impaired Water Listing and TMDL Program. See EPA's regulations cited in section V of this notice.

Estimated number of respondents: Over 300 tribes with reservations could potentially apply for 303(d) TAS. Although there are 567 federally recognized Indian tribes in the United States as of this rule, the CWA allows only those tribes with reservations to apply for authority to administer programs. EPA estimates that an average of 12 tribes per year would apply under this rule, and an average of 12 tribes per year would implement the 303(d) Program over the three year period of the ICR.

Frequency of response: Application by a tribe to be eligible to administer the 303(d) Program is a one-time collection of information. Authorized tribes implementing the 303(d) Program would submit impaired water lists to EPA every two years, and submit TMDLs to EPA from time to time as described in section IV of this notice.

Total estimated burden: 89,904 tribal staff hours per year for TAS for 303(d) Program application activities and 303(d) Program implementation activities. Burden is defined at 5 CFR 1320.3(b).

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This estimate may overstate actual burden because EPA used a conservatively high estimate of the annual rate of tribal applications. This conservatively high estimate was used to ensure that the ICR does not underestimate tribal burden, given that EPA used a simplifying steady-state assumption in estimating annualized tribal application costs. Also, EPA used conservatively high estimates of 303(d) Program implementation burden (i.e., 303(d) listing and number of TMDLs that tribes would submit to EPA annually), as further described in the ICR number 2553.02.

Total estimated cost: \$4,185,264, including staff salaries and the cost of support contractors for an annual average of 12 tribes to apply for TAS and implement the 303(d) Program. This action does not include capital or operation and maintenance costs.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

*C. Regulatory Flexibility Act (RFA)*

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. This action will not impose any requirements on small entities. This action affects only Indian tribes that seek TAS for the CWA Section 303(d) Impaired Water Listing and TMDL Program.

*D. Unfunded Mandates Reform Act (UMRA)*

This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531-1538, and does not significantly or uniquely affect small governments. The action imposes no enforceable duty on any state, local or tribal governments or the private sector.

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*E. Executive Order 13132: Federalism*

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

This action only applies to tribal governments that seek eligibility to administer the 303(d) Program. Although it could be of interest to some state governments, it does not apply directly to any state government or to any other entity.

In the spirit of Executive Order 13132, and consistent with EPA policy to promote communications between EPA and state and local governments, EPA consulted with state associations and representatives of state governments to obtain meaningful and timely input for consideration in this rule. By letter dated September 19, 2014, EPA invited 10 national and regional state associations to an October 1, 2014, informational meeting at EPA in Washington, D.C.<sup>17</sup> As a result of this meeting and other outreach, EPA participated in two subsequent meetings with a subset of these associations and their members as well as certain individual states during October 2014. Records of these meetings and copies of written comments and questions submitted by states and state associations are included in the docket for this rule.

Some participants expressed interest in: (1) the nature of comments received from tribes during the pre-proposal tribal consultation and coordination (April 8 – June 6, 2014); (2) where they could find the list of tribes having TAS for the WQS Program; (3) whether the TAS process for CWA Section 303(d) Impaired Water Listing and TMDL Program would be consistent with other TAS processes; and (4) whether there is a process in place to consult with states where a

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<sup>17</sup> The ten associations were: the National Governors Association, the National Conference of State Legislatures, the Council of State Governments, the Western Governors' Association, the Southern Governors' Association, the Midwestern Governors Association, the Coalition of Northeastern Governors, the Environmental Council of the States, the Association of Clean Water Administrators, and the Western States Water Council.

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tribe applies for TAS for 303(d). Some states also had questions about issues unique to their situations. EPA considered this input in developing the rule, particularly in developing sections V to IX. EPA also consulted with state associations and state representatives during the public comment period, including a webinar for state representatives and informational communications with individual state representatives. In comments on the proposed rule, most states generally were neutral regarding the proposed rule overall. Some states cited special circumstances regarding applicability of the rule in their states, or provided comments objecting to EPA's proposed (now final) interpretive rule regarding tribal jurisdiction under the CWA. See *Revised Interpretation of Clean Water Act Tribal Provision*, 81 FR 30183 (May 16, 2016).

*F. Executive Order 13175: Tribal Consultation and Coordination*

This action has tribal implications because it will directly affect tribes interested in administering the CWA Section 303(d) Impaired Water Listing and TMDL Program. However, it will neither impose substantial direct compliance costs on federally recognized tribal governments, nor preempt tribal law. Thus, this action is not subject to consultation under Executive Order 13175. Tribes are not required to administer a 303(d) Program. Where a tribe chooses to do so, the rule provides a regulatory process for the tribe to apply and for EPA to act on the tribe's application.

EPA consulted and coordinated with tribal officials under the EPA Policy on Consultation and Coordination with Indian Tribes early in the process of developing this regulation to permit them to have meaningful and timely input into its development. A summary of that consultation and coordination follows.

EPA initiated a tribal consultation and coordination process for this action by sending a "Notification of Consultation and Coordination" letter on March 28, 2014, to all 566 federally-



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recognized tribes as of that date.<sup>18</sup> The letter invited tribal leaders and designated consultation representative(s) to participate in the tribal consultation and coordination process. EPA held a webinar concerning this matter for tribal representatives on April 29, 2014. A total of 46 tribal representatives participated. Additionally, tribes and tribal organizations sent five pre-proposal comment letters to EPA. Records of this webinar and copies of written comments and questions submitted by tribes and intertribal consortia are included in the docket for this rule. Tribal comments generally supported EPA's plan to propose a TAS rule for the 303(d) Program. Some comments expressed the need for additional financial and technical support as tribes obtain TAS for the CWA Section 303(d) Impaired Water Listing and TMDL Program.

During the 60-day public comment period on the proposed rule in 2016, EPA provided informational webinars for tribes and conducted further consultation and coordination with tribes. EPA initiated a tribal consultation and coordination process on the proposed rule by sending a "Notification and Coordination" letter on January 19, 2016, to the 566 federally-recognized tribes as of that date. Following the public comment period, EPA also participated in informational meetings with tribes. As noted in Section I, EPA received comments from nine tribes and tribal associations on the proposed rule. Tribal comments generally supported the proposed rule. Several comments re-iterated the need for additional funding and technical support as tribes begin to implement the 303(d) Program. EPA considered the tribal comments in developing this final rule, and intends to remain sensitive to tribal resource issues in its budgeting and planning process. However, EPA cannot assure or assume that additional funding will be available for a tribe developing or implementing the 303(d) Program. A tribe choosing to

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<sup>18</sup> There are now 567 federally recognized tribes. 81 FR 26826 (May 4, 2016).

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administer such programs will need to carefully weigh its priorities and any available EPA assistance as described in section IX above.

*G. Executive Order 13045: Protection of Children from Environmental Health Risks and Safety Risks*

EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that EPA has reason to think could disproportionately affect children, per the definition of “covered regulatory action” in section 2-202 of the Executive Order. This action is not subject to Executive Order 13045 because it does not concern an environmental health or safety risk.

*H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use*

This action is not subject to Executive Order 13211 because it is not a significant regulatory action under Executive Order 12866.

*I. National Technology Transfer and Advancement Act*

This rulemaking does not involve technical standards.

*J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*

The rule does not have potential to cause disproportionately high and adverse human health or environmental effects on minority, low-income, or indigenous populations. This rule would have no direct impacts on human health or the environment. The rule affects processes and information collection only. The rule puts in place the procedures interested tribes would follow to seek TAS for the CWA Section 303(d) Impaired Water Listing and TMDL Program. The action is likely to result in the collection of information or data that could be used to assess potential impacts on the health or environmental conditions in Indian country (see sections III

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and IV). As described in sections III and IV above, under CWA section 303(d), authorized tribes with applicable WQS would be required to develop lists of impaired waters, submit these lists to EPA, and develop TMDLs for pollutants causing impairments in the waters on the 303(d) lists. TAS for 303(d) would provide authorized tribes the opportunity to participate directly in protecting their reservation waters through the Section 303(d) Impaired Water Listing and TMDL Program, as Congress intended through CWA section 518(e). EPA also expects this rule will advance the goals of the CWA as interested tribes apply for TAS to administer the CWA Section 303(d) Impaired Water Listing and TMDL Program for reservation water bodies.

The action is likely to increase the availability of water quality information to indigenous populations as interested tribes obtain TAS for the CWA Section 303(d) Impaired Water Listing and TMDL Program and begin implementing the Program. In short, tribes with TAS assume *the primary role* under the CWA in deciding (1) what waters on their reservations are impaired and in need of restoration, (2) the priority ranking for TMDL development, and (3) what the TMDLs and pollutant source allocations for those waters should look like.

EPA provided meaningful participation opportunities for tribes in the development of this rule, as described in “*F. Executive Order 13175: Tribal Consultation and Coordination,*” above.

#### *K. Congressional Review Act*

This action is subject to the CRA, and the EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

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**Treatment of Indian Tribes in a Similar Manner as States for Purposes of Section 303(d) of the Clean Water Act (CWA)**

**Page 52 of 57**

**List of Subjects in 40 CFR Part 130**

Environmental protection, Grant programs-environmental protection, Indian lands, Intergovernmental relations, Reporting and recordkeeping requirements, Water pollution control, Water supply.

Dated: \_\_\_\_\_

\_\_\_\_\_

Gina McCarthy,

Administrator.

For the reasons stated in the preamble, the U.S. Environmental Protection Agency amends 40 CFR part 130 as follows:

## **PART 130 – WATER QUALITY PLANNING AND MANAGEMENT**

1. The authority citation for part 130 continues to read as follows:

**Authority:** 33 U.S.C. 1251 *et seq.*

2. Section 130.16 is added to read as follows:

### **§ 130.16 Treatment of Indian tribes in a similar manner as states for purposes of section 303(d) of the Clean Water Act.**

(a) The Regional Administrator may accept and approve a tribal application for purposes of administering the Clean Water Act (CWA) Section 303(d) Impaired Water Listing and Total Maximum Daily Load (TMDL) Program if the tribe meets the following criteria:

(1) The Indian tribe is recognized by the Secretary of the Interior and meets the definitions in §131.3 (k) and (l);

(2) The Indian tribe has a governing body carrying out substantial governmental duties and powers;

(3) The CWA section 303(d) Impaired Water Listing and TMDL Program to be administered by the Indian tribe pertains to the management and protection of water resources that are within the borders of the Indian reservation and held by the Indian tribe, within the borders of the Indian reservation and held by the United States in trust for Indians, within the borders of the Indian reservation and held by a member of the Indian tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of the Indian reservation; and

(4) The Indian tribe is reasonably expected to be capable, in the Regional Administrator's judgment, of carrying out the functions of an effective CWA Section 303(d) Impaired Water Listing and TMDL Program in a manner consistent with the terms and purposes of the Act and applicable regulations.

(b) Requests by Indian tribes for administration of the CWA Section 303(d) Impaired Water Listing and TMDL Program should be submitted to the appropriate EPA Regional Administrator. The application shall include the following information, provided that where the tribe has previously qualified for eligibility or "treatment as a state" (TAS) under another EPA-administered program, the tribe need only provide the required information that has not been submitted in a previous application:

(1) A statement that the tribe is recognized by the Secretary of the Interior.

(2) A descriptive statement demonstrating that the tribal governing body is currently carrying out substantial governmental duties and powers over a defined area. The statement should:

(i) Describe the form of the tribal government;

(ii) 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; and

(iii) Identify the source of the tribal government's authority to carry out the governmental functions currently being performed.

(3) A descriptive statement of the tribe's authority to regulate water quality. The statement should include:

(i) A map or legal description of the area over which the tribe asserts authority to regulate surface water quality;

(ii) A statement by the tribe's legal counsel (or equivalent official) that describes the basis for the tribe's assertion of authority and 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; and

(iii) An identification of the surface waters that the tribe proposes to assess for potential impaired water listing and TMDL development.

(4) A narrative statement describing the capability of the Indian tribe to administer an effective CWA Section 303(d) Impaired Water Listing and TMDL Program. The narrative statement should include:

(i) A description of the Indian tribe's previous management experience that 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);

(ii) A list of existing environmental or public health programs administered by the tribal governing body and copies of related tribal laws, policies, and regulations;

(iii) A description of the entity (or entities) that exercise the executive, legislative, and judicial functions of the tribal government;

(iv) A description of the existing, or proposed, agency of the Indian tribe that will assume primary responsibility for establishing, reviewing, implementing and revising impaired water lists and TMDLs; and

(v) A description of the technical and administrative capabilities of the staff to administer and manage an effective CWA Section 303(d) Impaired Water Listing and TMDL Program or a plan that proposes how the tribe will acquire the needed administrative and technical expertise. The plan must address how the tribe will obtain the funds to acquire the administrative and technical expertise.

(5) Additional documentation required by the Regional Administrator that, in the judgment of the Regional Administrator, is necessary to support a tribal application.

(c) Procedure for processing a tribe's application.

(1) The Regional Administrator shall process an application of a tribe submitted pursuant to § 130.16(b) in a timely manner. The Regional Administrator shall promptly notify the tribe of receipt of the application.

(2) Except as provided below in paragraph (c)(4) of this section, within 30 days after receipt of the tribe's application, the Regional Administrator shall provide appropriate notice. Notice shall:

(i) Include information on the substance and basis of the tribe's assertion of authority to regulate the quality of reservation waters;

(ii) Be provided to all appropriate governmental entities; and

(iii) Provide 30 days for comments to be submitted on the tribal application. Comments shall be limited to the tribe's assertion of authority.

(3) If a tribe's asserted authority is subject to a competing or conflicting claim, the Regional Administrator, after due consideration, and in consideration of other comments received, shall determine whether the tribe has adequately demonstrated that it meets the requirements of § 130.16(a)(3).



(4) Where, after the effective date of this rule, EPA has determined that a tribe qualifies for TAS for the CWA Section 303(c) Water Quality Standards Program, CWA Section 402 National Pollutant Discharge Elimination System Program, or CWA Section 404 Dredge and Fill Permit Program, and provided notice and an opportunity to comment on the tribe's assertion of authority to appropriate governmental entities as part of its review of the tribe's prior application, no further notice to governmental entities, as described in § 130.16(c)(2), shall be provided with regard to the same tribe's application for the CWA Section 303(d) Impaired Water Listing and TMDL Program, unless the application presents to the EPA Regional Administrator different jurisdictional issues or significant new factual or legal information relevant to jurisdiction.

(5) Where the Regional Administrator determines that a tribe meets the requirements of this section, he or she shall promptly provide written notification to the tribe that the tribe is authorized to administer the CWA Section 303(d) Impaired Water Listing and TMDL Program. Such tribe shall be considered a "State" for purposes of CWA section 303(d) and its implementing regulations. With respect to the timing requirement for submittal of an authorized tribe's first list of impaired waters pursuant to § 130.7(d)(1), the tribe's first list is due on the next listing cycle due date that is at least 24 months from the later of either (1) the date EPA approves the tribe's TAS application pursuant to this section or (2) the date EPA-approved or EPA-promulgated water quality standards become effective for the tribe's reservation waters.