



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

OFFICE OF WETLANDS, OCEANS AND WATERSHEDS

January 19, 2016

Re: Notification of Consultation and Coordination on a Proposed Rule on Treatment of Indian Tribes in a Similar Manner as States for Purposes of Section 303(d) of the Clean Water Act

Dear Honorable Leader:

The U.S. Environmental Protection Agency (EPA) is continuing consultation and coordination with federally recognized Indian tribes on a proposed rulemaking to provide more opportunities for tribes to fully engage in the Clean Water Act (CWA) Section 303(d) Impaired Water Listing and Total Maximum Daily Load (TMDL) Program. EPA initiated early consultation with tribes in 2014 on this matter and received valuable input. We are resuming consultation because EPA has just issued a formal proposal for the action in the *Federal Register* for public comment. See 81 FR 2791, January 19, 2016.

In section 518(e) of the CWA, Congress authorized EPA to treat eligible federally recognized Indian tribes in a similar manner as states for purposes of administering section 303 and certain other provisions of the CWA, and directed the agency to promulgate regulations effectuating this authorization. In the 1990s, EPA 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; 50 tribes, for example, have since obtained TAS authority to issue water quality standards under CWA section 303(c). However, EPA has not yet promulgated regulations expressly establishing a process for such 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 (TMDLs) under CWA section 303(d). EPA is now proposing to establish such a process.

You may be interested in this proposed rule if your tribe:

- is one of the 50 tribes that is approved for TAS to administer the WQS Program under the CWA and is interested in submitting an application for TAS for the CWA Section 303(d) Impaired Water Listing and TMDL Program,
- is interested in submitting a joint application for TAS for the WQS and Impaired Water Listing and TMDL Programs, or
- is otherwise interested in submitting an application for TAS for the Impaired Water Listing and TMDL Program.

This consultation and coordination process will be conducted in accordance with the *EPA Policy on Consultation and Coordination with Indian Tribes* (<http://www.epa.gov/tribal/forms/consultation-and-coordination-tribes>). EPA invites you and your designated consultation representative(s) to participate in a “tribes only” webinar on Thursday, February 11, 2016 from 1:00 p.m. to 3:00 p.m. Eastern time. You may register for the webinar at <https://attendeegotowebinar.com/register/1322717258003760641>. The

webinar will consist of two segments. The first segment will be used to coordinate and share information, and provide an opportunity for clarifying questions on the proposal. The second segment, near the end of the webinar, will provide an opportunity for consultation comments from tribal consultation officials (tribal leaders and their authorized representatives).

If you cannot participate on February 11, you will be able to access an archived copy of the presentation slides at <http://www.epa.gov/tmdl/tribal-consultation-rulemaking-provide-more-opportunities-tribes-engage-clean-water-act> within two weeks after the webinar. Another option is to participate in the public information webinar on February 18: see <http://www.epa.gov/tmdl/tribal-consultation-rulemaking-provide-more-opportunities-tribes-engage-clean-water-act> for details.

EPA also extends an invitation for tribes to request government-to-government consultation during the consultation and coordination period. EPA's consultation and coordination process with tribes for this proposal is expected to extend from the date of this letter through March 21, 2016.

Enclosed is a consultation and coordination plan for this proposal that includes a description of the proposal and the process EPA intends to follow, including dates of key events and information on how you can provide input. EPA's consultation information for this action is also available on EPA's Tribal Consultation Opportunities Tracking System (TCOTS) (<http://tcots.epa.gov>).

Whether or not you participate in this consultation process, you have the opportunity to provide comment on the proposed rulemaking during the public comment period that ends March 21, 2016. The proposed rule has been published in the *Federal Register* and is accessible at <http://www.regulations.gov> by searching for the Docket ID No. EPA-HQ-OW-2014-0622.

The official EPA contact person for this consultation and coordination process is Sarah Furtak, Office of Water, (202) 566-1167, furtak.sarah@epa.gov. Please do not hesitate to contact her should you have any questions or if you would like to request alternate arrangements to the process outlined in the consultation plan.

We look forward to hearing from you on this important matter.

Sincerely,

/s/

Benita Best-Wong
Director
Office of Wetlands, Oceans and Watersheds

cc: Tribal Environmental Directors
Regional Indian Coordinators
Section 106 Tribal Coordinators
Felicia Wright, OW Tribal Coordinator

Enclosures: Consultation Plan; Fact Sheet

Consultation and Coordination Plan for the EPA's Proposed Rule on Treatment of Indian Tribes in a Similar Manner as States for Purposes of Section 303(d) of the Clean Water Act
January 2016

Information on the Proposal

In section 518(e) of the Clean Water Act (CWA), Congress authorized EPA to treat eligible federally recognized Indian tribes in a similar manner as states for purposes of administering section 303 and certain other provisions of the CWA, and directed the agency to promulgate regulations effectuating this authorization. In the 1990s, EPA 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; fifty tribes, for example, have since obtained TAS authority to issue water quality standards under CWA section 303(c). However, EPA has not yet promulgated regulations expressly establishing a process for such 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 (TMDLs) under CWA section 303(d).

EPA is now proposing to remedy this gap. By establishing regulatory procedures for eligible tribes to obtain TAS for the CWA Section 303(d) Impaired Water Listing and TMDL Program, the proposed rule would enable 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 proposal is comparable to similar regulations that EPA issued in the 1990s for the CWA Section 303(c) WQS and CWA Section 402 and 404 Permitting Programs, and includes features designed to minimize paperwork and unnecessary reviews. EPA requests comments on all aspects of the proposed rule.

Potential Impact to Tribes

All tribes, especially those that are interested in more fully engaging in the CWA Section 303(d) Impaired Water Listing and TMDL Program, are invited to participate. Your tribe may be interested in this rulemaking, for example, if your tribe:

- is one of the 50 tribes that is approved for TAS to administer the WQS Program under the CWA and is interested in submitting an application for TAS for the CWA Section 303(d) Impaired Water Listing and TMDL Program,
- is interested in submitting a joint application for TAS for the WQS and Impaired Water Listing and TMDL Programs, or
- is otherwise interested in submitting an application for TAS for the Impaired Water Listing and TMDL Program.

As described within the proposal's discussion about Executive Order 13175 on Consultation and Coordination with Indian Tribal Governments, 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 would neither impose substantial direct compliance costs on federally recognized tribal governments, nor preempt tribal law. Tribes are not required to administer a 303(d) program.

Where a tribe chooses to do so, the proposed rule will provide a regulatory process for the tribe to apply and for EPA to act on the tribe’s application.

We greatly appreciate any and all tribal views on the proposal. For example, EPA would be interested in input from the 50 tribes that have undergone the Water Quality Standards TAS process. EPA can draw on that experience as we work to clarify the TAS process for listing and TMDLs. Another example of valuable input from tribes includes experience that tribes have had in protecting, restoring, and maintaining water quality.

The preamble to the proposed rule requests comments on all aspects of the proposal, and also specifically request comments on some issues. For example, the preamble specifically requests comment (at the close of Section VIII “What is an Example of a Stepwise Approach for Tribes Applying for TAS Authority for CWA Programs?”) regarding whether a tribe applying for TAS for the 303(d) Program should be required to have already received EPA approval – or at least simultaneously apply – for TAS for CWA Section 303(c) WQS Program. Also, EPA specifically requests comment on whether EPA-approved or EPA-promulgated (i.e., applicable) WQS should be a prerequisite for obtaining TAS for the CWA Section 303(d) Impaired Water Listing and TMDL Program.

Tribal Consultation and Coordination Process and Time Frame

The following table lays out the process and timeline for consultation and coordination on this action. Tribes may access related consultation information on the EPA Tribal Portal under Tribal Consultation Opportunities, located at <http://tcots.epa.gov/oita/TConsultation.nsf/TC?OpenView>.

Tribal Consultation and Coordination Process and Timeline		
Date	Event	Contact Information
Date of this letter through March 21, 2016.	Consultation and coordination period following the January 19, 2016, proposal	EPA Contact: Sarah Furtak Phone: (202) 566-1167 E-mail: furtak.sarah@epa.gov
February 11, 2016	Tribal Information and Consultation Webinar ¹	Webinar time: 1:00 – 3:00 p.m. Eastern time Register online at https://attendee.gotowebinar.com/register/1322717258003760641 . You will receive an email confirmation after you submit your registration. A day before the webinar and again on the day of the webinar, you

¹ The webinar will include two segments: The first segment will be used to coordinate and share information, and provide an opportunity for clarifying questions on the proposal. The second segment will provide an opportunity for consultation comments from tribal consultation officials.

		<p>will receive reminder emails with information for accessing the webinar.</p> <p>A copy of the presentation will be available at http://www.epa.gov/tmdl/tribal-consultation-rulemaking-provide-more-opportunities-tribes-engage-clean-water-act and on TCOTS (http://tcots.epa.gov).</p>
March 21, 2016	Tribal consultation comments due	<p>Written to:</p> <p>Sarah Furtak 1200 Pennsylvania Avenue, NW Mail code: 4503T Washington, DC 20460</p> <p>Email to: TASTMDL@epa.gov</p>

Fact Sheet: Proposed Rule on Treatment of Indian Tribes in a Similar Manner as States for Purposes of Section 303(d) of the Clean Water Act

Summary

In section 518(e) of the Clean Water Act (CWA), Congress authorized EPA to treat eligible federally recognized Indian tribes in a similar manner as states for purposes of administering section 303 and certain other provisions of the CWA, and directed the agency to promulgate regulations effectuating this authorization. In the 1990s, EPA 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; 50 tribes, for example, have since obtained TAS authority to issue water quality standards under CWA section 303(c). However, EPA has not yet promulgated regulations expressly establishing a process for such 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 (TMDLs) under CWA section 303(d). EPA is now proposing to remedy this gap.

The proposal is comparable to similar regulations that EPA issued in the 1990s for the CWA Section 303(c) WQS and CWA Section 402 and 404 Permitting Programs. EPA requests comments on all aspects of the proposed rule before March 21, 2016.

Background

EPA conducted pre-proposal tribal consultation and coordination with intergovernmental associations and member states, and will engage in further consultation and coordination with tribes and states (see “To Provide Comments or Participate in Consultation,” below).

This proposal to establish a TAS process for the 303(d) Program is separate from the Agency’s proposal of a new approach to tribal jurisdiction to administer CWA regulatory programs, “Revised Interpretation of Clean Water Act Tribal Provision,” that was available for public comment August 7 – October 6, 2015 at <http://www.regulations.gov> (docket identification no. EPA-HQ-OW-2014-0462).

Highlights of the Proposal

Subjects addressed within the proposal include:

- The statutory and regulatory history of TAS under the CWA.

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

To Provide Comments or Participate in Consultation

Public comments on the proposal are being accepted through March 21, 2016 at <http://www.regulations.gov/> using docket identification no. EPA-HQ-OW-2014-0622.

EPA will host a webinar for the public to explain the proposal and answer questions on February 18, 2016 at 1:00-3:00 p.m. Eastern. See EPA's website at <http://www.epa.gov/tmdl/tribal-consultation-rulemaking-provide-more-opportunities-tribes-engage-clean-water-act> for instructions on how to register and participate.

EPA will provide opportunities for consultation and coordination with tribes and states before the rule is finalized.

For Further Information

Contact Sarah Furtak by email at Furtak.Sarah@epa.gov, by phone at (202) 566-1167, or write:

Sarah Furtak, Watershed Branch, (mail code 4503T), Assessment and Watershed Protection Division, Office of Water, U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, Washington, DC 20460.

Further information on this proposed rule is also available at <http://www.epa.gov/tmdl/tribal-consultation-rulemaking-provide-more-opportunities-tribes-engage-clean-water-act>.