

Chapter 8: Program Expansion – Regulatory Authorities

Read this chapter...

- To learn how CWA regulatory programs expand water quality protection efforts: CWA Sections 303(c), 401, 303(d), 402, and 404.
- To obtain information about TAS requirements for each CWA regulatory program.
- To identify tools and resources to develop CWA regulatory programs.

Chapter highlights:

- Developing WQS under Section 303(c).
- Conducting the certification process under Section 401.
- Listing impaired waters and developing TMDLs under Section 303(d).
- NPDES permits under Section 402.
- Permits for the discharge of dredged or fill material into “waters of the United States” under Section 404(g).

Once Tribes have established their water quality programs, they can consider options to expand their water quality programs to include additional CWA regulatory authorities using their Section 106 funding. These CWA authorities help restore and maintain the chemical, physical, and biological integrity of waters by focusing on water quality and protection of aquatic resources. Many Tribes grapple with water quality challenges ranging from climate change, drought, population growth, aging infrastructure, and other factors. EPA collaborates with Tribes and other partners, including states and municipalities, to identify how existing CWA programs can support their water quality needs.

Information collected as part of the monitoring program can help Tribes understand the status and variability of water quality on the reservation, make informed management decisions, and identify sources of impairment from point source and nonpoint source (NPS) pollution. Additionally, monitoring results provide information to identify specific parameters of concern for waterbodies (such as high levels of toxic chemicals) and support effective water quality management. This information also helps Tribes that want to develop and implement a water quality standards (WQS) program.

The sections in this chapter provide information on the following CWA regulatory programs:

- Section 303(c): the WQS program.
- Section 401: the water quality certification program.
- Section 303(d): listing of impaired waters and development of total maximum daily loads (TMDLs).
- Section 402: the National Pollutant Discharge Elimination System (NPDES) permitting program.
- Section 404: the permitting program for discharges of dredged or fill material.

This chapter provides informational resources that help Tribes determine which CWA regulatory programs to consider in order to meet their water quality goals. Tribes exploring the CWA authority approach to water quality management often consider developing and submitting WQS for EPA approval as a first step. EPA strongly recommends that Tribes also collaborate with their EPA regional office when considering which CWA approaches best address their water quality needs.

Eligibility for Treatment in a Similar Manner as a State (TAS)

Consistent with Section 518, Tribes may apply for TAS to administer specific programs in the CWA. General statutory requirements for TAS in Section 518(e):

1. The Tribe is recognized by the Secretary of the Interior.
2. The Tribe has a governing body carrying out substantial governmental duties and powers.
3. The functions to be exercised by the Tribe pertain to the management and protection of water resources that are held by an Indian Tribe, held by the United States in trust for Indians, held by a member of an Indian Tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of an Indian reservation.
4. The Tribe is reasonably expected to be capable, in EPA's judgment, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of the CWA and all applicable regulations.

Where the Tribe has previously qualified for eligibility or "TAS" under a CWA program, the Tribe need only provide the required information which has not been submitted in a previous TAS application. Each of the CWA regulatory programs may have regulations that further define the specific TAS requirements for each CWA program. The statute and regulations provide complete statements of the TAS requirements. Tribes should also work with their Project Officer to identify specific needs for their TAS application.

Section 303(c) WQS

Section 303(c) WQS are central to the CWA regulatory programs. WQS establish a foundation for measuring the success of water quality programs and serve as the regulatory basis for controlling pollutants entering the "waters of the United States." Tribes and EPA consider WQS when evaluating Section 401 certifications. Tribes and EPA also rely on WQS for listing impaired waters and developing TMDLs under Section 303(d). Permitting programs use WQS to calculate water quality-based effluent limits (WQBELs) for discharges to waters. Those effluent limits must also ensure compliance with any downstream WQS. Setting clear WQS is also important for watershed planning, protection, and restoration.

Tribes can develop WQS solely for their own use under tribal law, or they can obtain authority to adopt and administer WQS under the CWA. Both approaches are eligible uses for Section 106 grant funding.

Tribes establish WQS to meet the following objectives set forth in CWA Section 101(a):

- Restore and maintain the chemical, physical, and biological integrity of the Nation's waters.
- Wherever attainable, achieve a level of water quality that provides for the protection and propagation of fish, shellfish, and wildlife and recreation in and on the water.

WQS consist of the following elements:

- Designated uses such as water recreation, aquatic life, and public water supply.
- Water quality criteria necessary to protect the designated uses, both numeric and narrative.

Clean Water Act Section 106 Tribal Guidance

- Antidegradation requirements to maintain and protect existing uses, protect high-quality waters, and maintain water quality in waterbodies designated as Outstanding National Resource Waters.
- General WQS policies, such as to allow mixing zones, issue WQS variances, or issue compliance schedules.

When establishing WQS, the Tribe considers the water's use and value for public water supply, agriculture, industry, navigation, and other purposes.

Developing WQS

When developing WQS, some Tribes may decide that WQS effective under tribal law are sufficient to meet their WQS goals, while others may wish to develop WQS with the intention of submitting them to EPA for approval under the CWA. Relying on the tools and resources described in this section can help ensure a Tribe's WQS are protective of their water resources in either case.

Some Tribes have used WQS to achieve the following goals:

- Assess existing water quality.
- Protect aquatic life.
- Protect fish consumers.
- Define allowable levels and types of discharges.
- Establish priorities for the allocation of treatment resources and cleanup efforts.
- Ensure additional protection for source water.

Table 11 provides information on some of the differences between WQS under tribal law and CWA authority.

Table 11. WQS under tribal law and under CWA authority

Action	WQS under Tribal Law	WQS under CWA Authority
Designate water uses	Tribal choice of uses.	Include aquatic life, human health, and recreation uses unless justified as unattainable.
Set water quality criteria	Tribal choice of criteria.	Protect designated uses.
Protect against degradation of water quality	Tribal choice to protect.	Have an antidegradation policy and implementation methods.
Involve public	Tribal choice.	Include holding public hearings and addressing public comments.
Adopt WQS formally by tribal government	*Tribal choice.	Adopt under tribal law and submit to EPA for approval.
Regulate discharges based on complying with WQS	Under tribal law.	EPA can enforce through CWA permits (tribal and upstream waters).
Keep WQS up to date with new scientific information	Tribal choice.	Conduct public review every three years (triennial review).

**If Tribes adopt WQS formally under tribal law they may apply under certain circumstances for regulatory purposes.*

EPA has developed several tools and resources to help Tribes develop WQS. EPA's [Model WQS Template for Waters on Indian Reservations](#) can serve as a foundation for Tribes seeking to develop their own WQS. This template provides basic language covering the primary elements of WQS that a Tribe can adopt directly, while allowing a Tribe to add or modify language to align with their own water quality goals. Given that each Tribe's situation and local conditions are unique, coordinating with their EPA regional office is important to ensure successful use of the template.

The template draws information from various WQS resources available on EPA's website. This includes numeric water quality criteria for human health and aquatic life, which EPA periodically updates in the template to reflect its latest national recommendations. EPA's [Water Quality Criteria](#) website provides more information about these criteria, including information about how to adjust criteria values to best reflect local conditions and ensure protection of designated uses.

EPA's [Tribal/State Human Health Criteria Calculator](#) generates a customized numeric human health criteria table. The table is based on EPA's national recommended human health water quality criteria, adjusting for a selected fish consumption rate (FCR) and cancer risk level (CRL). EPA's default subsistence FCR may lead to human health criteria values that are more protective of human health. Tribes can adjust these inputs to generate criteria specific to their waters. For example, Tribes with supporting documentation, such as a FCR survey, can enter their own FCR. EPA encourages Tribes to work with their EPA regional office to determine the appropriate FCR.

EPA's [Water Quality Standards Handbook](#) has additional WQS-related information and is a compilation of EPA's WQS program guidance. The handbook includes recommendations for reviewing, revising, and implementing WQS.

Drafting Tribal Code Based on WQS

Once the Tribe has drafted their WQS standards, they should pursue a mechanism to incorporate them into law or regulation on their reservation (for example, by amending their tribal code). Tribes may wish to work with their legal department during this process. The department can help with the structure and language of the WQS, and with acquiring the appropriate approvals and signatures. Tribes may want to share a draft of their tribal code with others for informal review (including their tribal council, EPA, and neighboring Tribes and states) to identify any potential problems or additional topics to address, and to confirm that the WQS will help meet their program goals.

Obtaining TAS

Many Tribes consider it an expression of tribal sovereignty to have TAS to administer regulatory programs, such as WQS, over their reservations. Tribes seeking the authority to adopt and use WQS under the CWA must apply to EPA for TAS. Tribes should reference EPA's [TAS for the Water Quality Standards Program: Overview](#) for a general summary of the TAS process and some of its benefits. EPA's [TAS for the Water Quality Standards Program: Frequently Asked Questions](#) provides answers to questions regarding the TAS for WQS application process, such as why a Tribe might seek TAS for WQS, and eligibility requirements.

EPA's [TAS for the Water Quality Standards Program: Procedural Steps for Tribal TAS Applications](#) resource outlines the steps for tribal TAS applications. These steps include the application submission

process, comment period, EPA's review, and the final stage when EPA conveys to the Tribe its decision regarding an application.

EPA's [Water Quality Standards Tools for Tribes](#) website includes a TAS application template that provides an explanation and organization of the information Tribes must submit to demonstrate they meet the eligibility requirements for TAS approval for the WQS program.

EPA's [Actions on Tribal Water Quality Standards and Contacts](#) website has a complete list of Tribes that have been approved for TAS and the subset of Tribes that have EPA-approved WQS. This website contains links to pages associated with each Tribe. These pages each have the decision document outlining EPA's TAS for WQS decision and a copy of the Tribe's EPA-approved WQS.

Tribes should submit complete TAS applications to the appropriate EPA regional office in accordance with EPA's regulations at 40 CFR 131.8. Tribes that receive TAS for WQS are also granted TAS for Section 401 certification. See 40 CFR 131.4(c). More detail on Section 401 is below. In addition, Tribes with TAS for WQS are also "affected states" under the Section 402 NPDES program (CWA Sections 402(b)(3) and (5); 40 CFR 122.4(d)). As affected states, the Tribes receive notice and an opportunity to comment on certain permits, including upstream state permits, issued under the CWA NPDES program.

Submitting WQS for EPA Approval

EPA recommends that Tribes with TAS for the WQS program (hereafter authorized Tribes within this Section 303(c) WQS section) work closely with EPA to develop a WQS package for submission and approval. EPA reviews all new and revised WQS that authorized Tribes submit to ensure that they comply with the CWA and EPA's WQS regulation. Upon EPA approval, the tribal WQS become effective under the CWA. EPA has authority to propose and promulgate federal WQS, if necessary, to replace or augment tribal WQS. Federally promulgated WQS are also effective under the CWA.

Under the CWA, the public must have an opportunity to participate in developing and reviewing WQS. Authorized Tribes accomplish this by holding a public hearing and public comment on their proposed WQS before the WQS become effective, and on existing WQS at least once every three years thereafter (triennial review). For authorized Tribes that wish to conduct online public hearings in lieu of in-person public hearings, EPA's [Options for Modernizing Public Hearings for Water Quality Standard Decisions Consistent with 40 CFR 25.5](#) may be useful.

EPA can help resolve disputes concerning WQS. EPA generally recommends that authorized Tribes and states work together to ensure their WQS consider neighboring authorized Tribes' and states' WQS, and downstream WQS. EPA has a mechanism to resolve any unreasonable consequences caused by differing WQS set by authorized Tribes and states for common bodies of water. According to EPA's [Tribal-State WQS Dispute Resolution Mechanism](#) resource, an authorized Tribe or state may request EPA involvement in a dispute. If appropriate, the EPA Regional Administrator will work with the parties to reach an agreement.

Connection to Section 106

Tribes can use their Section 106 funds to support developing TAS packages and developing and implementing WQS for use under tribal law or use under the CWA. Chapter 9: Other Funding Options provides information on how Tribes can also use General Assistance Program (GAP) funds for capacity development activities including to develop TAS packages and developing WQS.

Participation Opportunities for Tribes without Assuming the WQS Program

There are many reasons a Tribe might not seek TAS for Section 303(c) WQS. For example, Tribes might have limited funding or staff resources, or might prioritize other environmental needs. Without TAS, Tribes can participate in other ways. For instance, when a Tribe elects to develop WQS under tribal law, the Tribe can seek informal review and suggestions from EPA staff to help the Tribe build capacity for administering CWA WQS in the future. See Developing WQS section above.

A Tribe can also participate by providing comments on the WQS of neighboring authorized Tribes or states for waterbodies that are shared with or upstream from the Tribe. For example, the CWA requires authorized Tribes and states to hold public hearings and seek public comments on all of their WQS at least once every three years and whenever they adopt new or revised WQS. A Tribe could provide comments and data in those situations to help the neighboring authorized Tribe or state provide adequate protection for the shared or upstream waters.

Finally, if EPA has promulgated federal WQS for the Tribe's waters, the Tribe can provide water quality monitoring data, data on tribal FCRs, or other information to assist EPA in adjusting or applying the federal water quality criteria to reflect local circumstances.

Additional Resources

For the regulations underlying the WQS program, visit the [Code of Federal Regulations Part 131](#). EPA's [Tribes and Water Quality Standards](#) and [Water Quality Standards Tools for Tribes](#) websites contain many of the resources mentioned above, in addition to other documentation that may help Tribes navigate the TAS application and WQS development processes. EPA encourages Tribes to work with their EPA regional office when using these resources but does not require use of these resources. EPA also encourages tribal staff members responsible for WQS to participate in EPA's intensive one-week training course, the [Water Quality Standards Academy](#).

Section 401 Certification

Section 401 gives authorized Tribes the authority to grant, deny, or waive certification of proposed federal licenses or permits which may result in a discharge into "waters of the United States," including the territorial seas. Water quality certification is a powerful tool to protect reservation water quality from adverse impacts from federally licensed or permitted projects. Under Section 401, a federal agency may not issue a license or permit to conduct any activity that may result in any discharge into "waters of the United States" unless the authorized Tribe, state, or interstate water pollution control agency (interstate agency) with jurisdiction over where the discharge will originate does one of the following:

- Issues Section 401 water quality certification finding "that any such discharge will comply with the applicable provisions of Sections 301, 302, 303, 306, and 307" of the CWA.
- Waives Section 401 water quality certification (33 U.S.C. 1341(a)(1)).

An authorized Tribe, state, or interstate agency may issue a Section 401 water quality certification with conditions. Section 401(d) provides that the certification include "any effluent limitations and other limitations, and monitoring requirements" necessary to assure the applicant for a federal license or permit will comply with the applicable provisions of CWA Sections 301, 302, 306, and 307. Conditions also include any other appropriate requirement of tribal or state law set forth in the certification (33 U.S.C. 1341(d)).

Some of the major federal licenses and permits subject to Section 401 include:

- Section 402 and 404 permits issued by EPA or the U.S. Army Corps of Engineers (the Corps).
- Federal Energy Regulatory Commission (FERC) licenses for hydropower facilities and natural gas pipelines.
- Rivers and Harbors Act Section 9 and 10 permits.

Certification Process

Federal license or permit applicants must seek certification from a certifying authority if their activity may result in a discharge into “waters of the United States.” The appropriate Section 401 certifying authority is the authorized Tribe, state, or interstate agency that has jurisdiction over where the discharge originates or will originate (33 U.S.C. 1341(a)(1)). In cases where no authorized Tribe, state, or interstate agency has authority to issue Section 401 certification, EPA is responsible for issuing certification.

A certifying authority must act on a request for certification within “a reasonable period of time (which shall not exceed one year) after receipt of such request” (33 U.S.C. 1341(a)(1)). The federal licensing or permitting agency determines the reasonable period of time. Within that period of time, the certifying authority may grant, grant with conditions, deny, or explicitly waive certification. If the certifying authority fails or refuses to act on a request for certification in that period of time, the certification requirement for the federal license or permit shall be deemed waived (33 U.S.C. 1341(a)(1)).

When evaluating a Section 401 request, certifying authorities must determine whether the potential discharge would comply with the following:

- Effluent limitations for conventional and non-conventional pollutants.
- WQS.
- New source performance standards.
- Toxic pollutant limitations.
- Other appropriate requirements of tribal law or state law.

Once the federal licensing or permitting agency receives both the application for the license or permit and a certification, they must immediately notify EPA under the neighboring jurisdiction process set forth in CWA Section 401(a)(2) (33 U.S.C. 1341(a)(2)).

Whenever EPA determines, upon receiving such notification, that the discharge from the certified activity may affect the water quality of a neighboring jurisdiction (authorized Tribe or state), the CWA Section 401(a)(2) process is as follows (33 U.S.C. 1341(a)(2)).

- EPA must provide notice to the neighboring jurisdiction, the licensing or permitting agency, and the license or permit applicant within 30 days of the notification from the federal agency.
- The neighboring jurisdiction has 60 days to determine if the discharge will violate their water quality requirements.
 - The neighboring jurisdiction must notify EPA and the federal licensing or permitting agency, in writing, of the objection within the 60-day period.
 - The neighboring jurisdiction can request a public hearing within the 60-day period.

- The federal licensing or permitting agency must hold a public hearing. At the public hearing, EPA will provide its evaluation and recommendations on the objection to the federal licensing or permitting agency.

The federal licensing or permitting agency, based on the recommendations of the neighboring jurisdiction and EPA, and any additional evidence presented at the hearing, must condition the license or permit to ensure compliance with the neighboring jurisdiction's water quality requirements. However, if the federal licensing or permitting agency cannot condition the license or permit to ensure compliance with the neighboring jurisdiction's water quality requirements, then they shall not issue the license or permit. Ultimately, the federal licensing or permitting agency cannot issue a federal license or permit until the CWA Section 401(a)(2) process is complete (33 U.S.C. 1341(a)(2)).

Obtaining TAS

Tribes have the opportunity to participate directly in the certification process by obtaining TAS for Section 401. Tribes that receive TAS for WQS are also granted TAS for purposes of Section 401 (40 CFR 131.4(c)). Tribes should consider TAS if they are interested in issuing certification decisions for their reservation (CWA Section 401(a)(1)) or participating in the neighboring jurisdiction process (CWA Section 401(a)(2)).

Once a Tribe receives TAS for Section 401 certification, the Tribe becomes the certifying authority. That Tribe has the authority to issue water quality certifications for federal licenses or permits that may result in any discharge to "waters of the United States" on their reservation.

Connection to Section 106

Tribes may use Section 106 funding to develop and implement water quality ordinances and tribal WQS. Additionally, Tribes may use Section 106 funds to support capacity building for a Section 401 certification program and apply for TAS for WQS and for Section 401 in a single application. Tribes can also use Section 106 funds to review permits and conduct the certification process.

Participation Opportunities for Tribes without the Section 401 Program

There are many reasons a Tribe might not seek TAS for Section 401 certification. For example, the Tribe might have limited funding or staff resources, or might prioritize other environmental needs. Without TAS, Tribes can still participate in Section 401 certification in other ways. For instance, EPA as the certifying authority on behalf of non-TAS Tribes can consider the Tribe's water quality requirements, even if the Tribe does not have EPA-approved WQS, when reviewing requests for certification.

When EPA acts as a certifying authority on behalf of a Tribe without TAS, EPA will provide public notice on the certification request, and will conduct a public hearing if necessary or appropriate (33 U.S.C. 1341(a)(1)). During the public notice process, a Tribe may submit public comment regarding the request for certification.

Additional Resources

EPA's [Section 401 of the Clean Water Act](#) website.

EPA recently announced that it intends to revise the 2020 CWA Section 401 Certification Rule at 40 CFR part 121 (Notice of Intention to Reconsider and Revise the CWA Section 401 Certification Rule, 86 FR 29541, June 2, 2021).

Section 303(d) Impaired Waters and TMDLs

Tribes with TAS for Section 303(d) develop lists of impaired waters, establish priority rankings for those waters, and develop TMDLs for those waters. A TMDL includes a calculation of the maximum amount of a pollutant that a waterbody can receive and still meet applicable WQS, and an allocation of that amount to the pollutant's sources.

Requirements under Section 303(d) do not apply to Tribes until the Tribe has chosen to apply for, and has received, TAS to administer the program (authorized Tribes). Tribes can begin developing capacity to receive TAS for Section 303(d) by creating assessment methodologies and voluntarily publishing their water quality reports to the Assessment and TMDL Tracking and Implementation System (ATTAINS). Once Tribes have TAS for Section 303(d) and EPA-approved WQS in place, impaired waters lists will be required. For more information on assessment methodologies and ATTAINS, see Chapter 5: Development and Implementation of a Monitoring Program.

Listing Impaired Waters

Every two years, Tribes with Section 303(d) TAS must develop lists of waters not meeting, or expected not to meet, applicable WQS. 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 WQS. In developing their Section 303(d) list, authorized Tribes must assemble and evaluate all existing and readily available information (40 CFR 130.7(b)(5)). EPA's regulations include a non-exhaustive list of water quality-related data and information to consider. Tribes establish priorities for developing TMDLs for waters on the Section 303(d) list based on the severity of the pollution and the target uses for the waters.

EPA's [Overview of Listing Impaired Waters under CWA Section 303\(d\)](#) website includes additional information about listing impaired waters.

Developing TMDLs

Each authorized Tribe must, from time to time, establish and submit TMDLs for pollutants causing impairments in all waters on their 303(d) list (CWA Section 303(d)(2)). A TMDL is the calculation of the maximum amount of a pollutant that can enter a waterbody so that the waterbody will meet and continue to meet WQS for that particular pollutant. A TMDL determines a pollutant reduction target and allocates load reductions necessary to the source(s) of the pollutant. Expressed mathematically, the TMDL equation is:

$$\text{TMDL} = \Sigma\text{WLA} + \Sigma\text{LA} + \text{MOS}$$

WLA is the sum of wasteload allocations (point sources), LA is the sum of load allocations (NPS and background), and MOS is the margin of safety.

Authorized Tribes and states generally implement TMDL wasteload allocations through Section 402 NPDES permits. WQBELs in NPDES permits must be "consistent with the assumptions and requirements" of wasteload allocations in EPA-approved or established TMDLs.

A wide variety of state-, local-, and federal-level programs implement NPS load allocations. These programs may be regulatory, nonregulatory, or incentive based. Additionally, voluntary actions on the part of citizen and environmental groups can assist with waterbody restoration. Section 319 provides

grant money for specific projects that reduce NPS pollution. Section 303(d) does not establish any new or additional implementation authorities for controlling NPS pollutants.

EPA's [Overview of Total Maximum Daily Loads \(TMDLs\)](#) website includes additional general information about TMDLs.

Obtaining TAS

EPA regulations (40 CFR 130.16) establish a process for Tribes to obtain TAS authority to administer the water quality restoration provisions of Section 303(d), including the issuing of lists of impaired waters and developing TMDLs. Key information on EPA's [Final Rule - Treatment of Indian Tribes in a Similar Manner as States for Purposes of Section 303\(d\) of the Clean Water Act](#) website includes:

- Responsibilities Tribes would have under Section 303(d).
- Regulatory procedures for a Tribe to apply for Section 303(d) TAS.
- Regulatory procedures for EPA to review a TAS application.
- Expectations regarding WQS and WQS TAS for Tribes seeking Section 303(d) TAS.
- Availability of EPA support for Tribes seeking Section 303(d) TAS.
- Special circumstances regarding qualification for Section 303(d) TAS.

Authorized Tribes must submit their 303(d) lists to EPA for approval every two years on April 1 of even-numbered years. A Tribe gaining TAS status would have at least 24 months to submit their first impaired waters list to EPA (40 CFR 130.16(c)(5)). The list is due to EPA in the next listing cycle that is at least 24 months from the date the Tribe's TAS application is approved or the date that EPA approved or promulgated WQS for the Tribe's waters become effective, whichever is later (40 CFR 130.16(c)(5)).

By obtaining TAS authorization for the Section 303(d) program, Tribes would have the opportunity to take the lead role under the CWA in restoring and protecting their reservation waters. Tribes would assume the primary responsibility in deciding what waters on their reservations are impaired and in need of TMDLs, the priority ranking for TMDL development, and the nature of TMDLs and pollutant source allocations for those waters.

EPA's [Treatment of Indian Tribes in a Similar Manner as States for Purposes of Section 303\(d\) of the Clean Water Act](#) "frequently asked questions" document provides additional information about tribal responsibilities under Section 303(d), benefits of assuming the program, and other questions related to Section 303(d) TAS. EPA developed a working-draft [TAS Application Template for the CWA Section 303\(d\) Impaired Water Listing and TMDL Program](#) to help streamline the TAS application process.

Connection to Section 106

Tribes can use their Section 106 funds to create assessment methodologies, voluntarily publish their water quality reports to ATTAINS, support the development of Section 303(d) TAS applications, develop 303(d) lists, and develop TMDLs. Chapter 9: Other Funding Options provides information on how Tribes can use GAP funds for capacity development activities (including to develop TAS packages) and can use Section 319 funds to support TMDL development and developing WQS.

Most Tribes with Section 303(d) TAS are likely to be recipients of Section 106 grants. EPA encourages Tribes with TAS for Section 303(d) to combine their Section 303(d) impaired waters list with their Section 106 assessment report. Tribes should submit the combined report electronically through

ATTAINS. EPA's [Get Data: Access Public ATTAINS Data](#) website includes data that entities report to EPA and links to the ATTAINS website.

A combined Section 303(d)/Section 106 report is similar to a state's Section 303(d)/Section 305(b) "Integrated Report." The Guidance for the 2006 Assessment, Listing, and Reporting Requirements Pursuant to CWA Sections 303(d), 305(b), and 314 on EPA's [Water Topics](#) website has more information on the Integrated Report.

Participation Opportunities for Tribes without Assuming the Section 303(d) Program

Tribes do not need Section 303(d) TAS to engage with EPA on state and federal Section 303(d) actions that are relevant to protecting and restoring waters of interest to them.

The Code of Federal Regulations requires states to evaluate all readily available water quality-related data and information in developing their Section 303(d) lists (40 CFR 130.7(b)(5)). Therefore, when Tribes provide their data to the Water Quality Exchange (WQX) the data are readily available for consideration in the Integrated Reports for their respective states and all other data reuse purposes.

The [EPA Policy on Consultation and Coordination with Indian Tribes](#) website states EPA's commitment to consult on a government-to-government basis with federally recognized governments when EPA actions and decisions may affect tribal interests. This applies to EPA actions regarding impaired waters lists and TMDLs when such action may impact a Tribe's interest.

In addition to government-to-government consultation between EPA and Tribes, Tribes may provide comment during states' public notice periods. States describe in their Continuing Planning Processes (CPP) the process for involving the public and other stakeholders in the development of the Section 303(d) list and TMDL calculations (40 CFR 130.7(a) and 130.7(c)(ii)). EPA encourages the state to provide opportunities for public participation in the development of the Integrated Report and demonstrate how they considered public comments in their final decisions. EPA has 30 days to approve or disapprove a TMDL or impaired waters list that a state submits. Where EPA disapproves a submittal, EPA must identify waters and loadings necessary to implement the applicable WQS within 30 days and then issue public notice seeking comment.

Additional Resources

- EPA's [Clean Water Act Section 303\(d\): Impaired Waters and Total Maximum Daily Loads](#) website has general information about Section 303(d).
- EPA's [Contact Us About Impaired Waters and TMDLs](#) website lists the EPA regional 303(d) program offices for Tribes to contact for additional information or questions related to Section 303(d) activities.
- EPA's [Final Rule - Treatment of Indian Tribes in a Similar Manner as States for Purposes of Section 303\(d\) of the Clean Water Act](#) website has more information about the final TAS rule for Section 303(d).
- EPA's [TAS Application Template for the CWA Section 303\(d\) Impaired Water Listing and TMDL Program - Working Draft](#) website has a TAS application template.

Section 402 NPDES Permitting Program

The NPDES permitting program is a cornerstone of the CWA. The program regulates the point source discharge of pollutants into "waters of the United States." Point source discharges include discharges

from publicly owned treatment works (POTWs), industrial process wastewater discharges, runoff conveyed through a storm sewer system, and discharges from concentrated animal feeding operations (CAFOs), among others. Until a Tribe, state, or territory has authority to administer their own NPDES permitting program, EPA issues all permits, conducts all compliance and monitoring activities, and enforces all program requirements. Currently, EPA issues and enforces NPDES permits in all of Indian Country.

EPA's [NPDES and Sewage Sludge Program Authority Handbook for Federally Recognized Indian Tribes](#) contains more information on the NPDES program for Tribes. EPA's [National Pollutant Discharge Elimination System](#) website has general information and links to guidance, regulations, and training information.

Issuing NPDES Permits

Pollutant discharges may come from direct and indirect sources. Direct sources discharge wastewater directly to a receiving waterbody; indirect sources discharge wastewater to a POTW that discharges to the receiving waterbody. The primary focus of the NPDES permitting program is permit issuance for municipal and industrial direct discharges. The NPDES program has other components, such as pretreatment programs, the industrial stormwater program, the construction stormwater program, CAFOs, and biosolids. EPA's [National Pollutant Discharge Elimination System](#) website has more information on these components.

The NPDES program regulates different types of sources. Municipal sources are POTWs that receive primarily domestic sewage from residential and commercial customers. Larger POTWs also typically receive and treat wastewater from industrial facilities (indirect dischargers) connected to the POTW sewage system. The types of pollutants treated by a POTW always include conventional pollutants (for example, human wastes, ground-up food from sink disposals, laundry and bath waters) and may also include toxic pollutants (such as pesticides, solvents, dioxin, lead, silver, mercury, copper) or nonconventional pollutants (all other pollutants, including nutrients such as nitrogen and phosphorus) depending on the characteristics of the commercial and industrial sources discharging to the POTW. Some older POTWs have the additional concern of combined sewer overflow (CSO) systems that can release untreated effluent during storms that can reach "waters of the United States." CSOs were an economical way for municipalities to collect both sanitary sewage and stormwater and are controlled under the NPDES program. A number of municipalities have municipal separate storm sewer systems (MS4s) that are also subject to NPDES requirements.

Nonmunicipal sources, which include industrial and commercial facilities, have unique products and processes. At industrial facilities, the types of raw materials, production processes, treatment technologies, and pollutants discharged vary widely and depend on industry and facility characteristics. Industrial facilities generally operate within a clearly defined plant area; thus, the collection systems are typically less complex than those for POTWs. Examples of nonmunicipal commercial sources include CAFOs, which must obtain NPDES permits to control runoff of nutrients and manure, and the construction stormwater program.

Permit Overview

An NPDES permit authorizes a facility to discharge a specific amount of a pollutant to a receiving waterbody, subject to certain conditions. Permits may also authorize facilities to process, incinerate, send to a landfill, or beneficially use sewage sludge.

The two basic types of permits that the NPDES program can issue are individual permits and general permits.

- An individual permit is tailored to an individual facility based on information from the permit application and other sources (such as from previous permit requirements, discharge monitoring reports, technology and WQS, TMDLs, ambient water quality data (from WQX), special studies). The permitting authority then issues the permit to the facility for a specific period, not to exceed five years, with a requirement to reapply before the expiration date. The largest category of dischargers requiring individual NPDES permits are POTWs owned by a state or municipality.
- A general permit is a permit for multiple facilities in a single category of discharges, sludge use, or disposal practices. General permits can be a cost-effective option for agencies because of the large number of facilities that they can cover. The permitting authority can write general permits to cover stormwater point sources or other categories of point sources that (40 CFR 122.28(a)(2)):
 - Involve the same or substantially similar types of operations.
 - Discharge the same types of wastes or engage in the same types of sludge use or disposal.
 - Require the same effluent limitations or operating conditions, or standards for sewage sludge use or disposal.
 - Require the same monitoring where tiered conditions may be used for minor differences within a class (such as size or seasonal activity).
 - Are more appropriately regulated by a general permit.

While these permit types share the same components, the permitting authority uses them under different circumstances, and they involve different permit issuance processes.

Permit Sections

At a minimum, all NPDES permits consist of the following five sections:

1. **Cover Page:** Contains the name and location of the permittee, a statement authorizing the discharge, and a listing of the specific locations for which a discharge is authorized.
2. **Effluent Limitations:** The primary mechanism for controlling discharges of pollutants to receiving waters. When drafting a permit, permit writers spend most of their time deriving appropriate effluent limitations based on applicable technology and WQS.
3. **Monitoring and Reporting Requirements:** Used to characterize waste streams and receiving waters, evaluate wastewater treatment efficiency, and determine compliance with permit conditions.
4. **Special Conditions:** Conditions developed to supplement numeric effluent limitations. Examples include additional monitoring activities, special studies, best management practices (BMPs), and compliance schedules.
5. **Standard Conditions:** Pre-established conditions that apply to all NPDES permits and delineate the legal, administrative, and procedural requirements of the NPDES permit.

In addition to the five sections, the supporting documentation for the draft permit also includes a factsheet or statement of basis explaining the rationale for permit conditions.

Although these five sections are part of all permits, the contents of some sections vary depending on the nature of the discharge.

Effluent Limitations

The first major step in the permit development process is deriving technology-based effluent limitations (TBELs). Following that step, the permit writer derives WQBELs as needed, which are effluent limitations that are protective of state WQS.

Technology-Based Limitations

TBELs aim to prevent pollution by requiring a minimum level of effluent quality that is attainable using demonstrated technologies for reducing discharges of pollutants or pollution into “waters of the United States.” NPDES permit writers develop TBELs independently of the potential impact of a discharge on the receiving water, which WQS and WQBELs address. NPDES permit writers must develop technology-based treatment requirements that represent the minimum level of control that a permit must impose (40 CFR 125.3(a)). Permit writers must also include in permits additional or more stringent effluent limitations and conditions, including those necessary to protect water quality.

When developing TBELs for industrial (non-POTW) facilities, the permit writer must consider all applicable technology standards and requirements for all pollutants discharged. If there are no applicable effluent guidelines for the discharge or pollutant, permit writers must identify any needed TBELs on a case-by-case basis, in accordance with the factors detailed in CWA Sections 301(b)(2) and 304(b). The permit writer also should consider whether state laws or regulations govern TBELs and might require more stringent performance standards than those required by federal regulations. In some cases, a single permit could have TBELs based on effluent guidelines, best professional judgement, and state law, as well as WQBELs based on WQS.

Water Quality Based Limitations

By analyzing the effect of a discharge on the receiving water, a permit writer could find that TBELs alone will not achieve the applicable WQS. In such cases, the CWA and its implementing regulations require permit writers to develop WQBELs. WQBELs protect water quality by ensuring that receiving waters meet WQS. WQBELs help meet the CWA objective of restoring and maintaining the chemical, physical, and biological integrity of the nation's waters and the goal of protecting water quality for the propagation of fish, shellfish, and wildlife and for recreation in and on the water (fishable and swimmable). A Tribe's WQS serve as a basis for establishing WQBELs for facilities with NPDES permits that discharge to waters on their reservation. EPA's [NPDES Permit Writers' Manual](#) has more information about NPDES permits.

NPDES Program Authorization

EPA may authorize a tribal government, state, or territorial agency to implement all or parts of the NPDES program. EPA approves Tribes, states, or territories through a process detailed in CWA Section 402(b) and in 40 CFR Part 123 of the NPDES regulations.

Obtaining TAS

As with obtaining TAS for other CWA authorities, Tribes must meet basic requirements found at Section 518 of the CWA and in the regulations at 40 CFR 123.32. Tribes do not need TAS for any other CWA regulatory program to demonstrate that they meet the TAS requirements for Section 402.

If the Administrator or their delegate has previously determined that a Tribe has met the TAS prerequisites under the Safe Drinking Water Act, the CWA, or the Clean Air Act, then that Tribe only needs to provide the information that is unique to the NPDES program which is requested by the Regional Administrator.

In evaluating whether a Tribe is capable of implementing an NPDES program in a way that is consistent with the CWA and applicable regulations, EPA will consider:

- The Tribe's previous management experience.
- Environmental or public health programs that the Tribe currently administers.
- Existing mechanisms to carry out the executive, legislative, and judicial functions of tribal government.
- The relationship between the entities they will regulate and the agency of the tribal government that is designated as the primacy agency.
- The technical and administrative capabilities of the staff responsible for administering and managing the program.

Considering NPDES Program Authorization

Before deciding to pursue NPDES program authorization, Tribes should consider all the benefits and costs associated with it, such as:

- Tribal interest in furthering autonomy and self-determination.
- Whether the program has the organizational ability to develop and maintain a permitting authority.
- New tribal statutes or regulations that a Tribe needs to manage an NPDES program.
- Costs associated with expanding the Tribe's regulatory role and ability to protect public health and the environment.
- The infrastructure necessary to implement the program.
- The ability to support this type of program for many years.

Tribes planning to seek NPDES program authorization should contact their EPA regional office to discuss the process. EPA regional offices can help guide Tribes through the process and can provide technical assistance as Tribes develop their application materials.

Preparing for NPDES Program Authorization

Tribes must have the ability to implement all portions of an NPDES program, including the ability to write permits, track compliance, and enforce permit conditions at the time of program authorization (40 CFR 123.23(a)). To help meet this requirement, Tribes should consider training engineers and permit writers. The extent to which permit writers participate in monitoring, compliance, and enforcement activities will depend on the size of the Tribe's water quality program. In smaller programs, an individual or a small group of individuals may be responsible for all activities. In larger programs, individuals may specialize in different functions. For example, in a large program, the permit writer may be aware of the general activities of the permittee but not as involved with monitoring, compliance, and enforcement.

Developing Tribal Code and Obtaining Approval from the Tribal Government

Tribes will need to follow their tribal mechanisms to develop any necessary legal authorities to administer the NPDES program. Tribes should work with their tribal attorney general or equivalent office during this process to produce a tribal code that meets tribal and NPDES program requirements. Tribes should also work with their tribal council to make sure they cover all applicable tribal requirements when adopting the NPDES program.

Inventorying Existing Point Sources

Point sources are defined in the CWA and in the NPDES regulations. Point sources include POTWs and industrial facilities. Tribes should coordinate with the existing (state or federal) permitting authority on or near their reservation to make sure they have a complete list of all point source dischargers currently regulated by NPDES permits.

Establishing Sources of Funding to Run the NPDES Program

Prior to seeking authorization for an NPDES program, each Tribe should consider if they can commit to the long-term financial support of the program. The Tribe must determine whether they have, or can obtain, the revenue to hire and train staff to run the NPDES program. The Tribe might be able to collect some funding through program and permit fees but might also need additional dedicated tribal

appropriations or other sources of EPA funding to fully fund the program. EPA regional offices may be able to help locate additional sources of funding.

Connection to Section 106

Tribes can use Section 106 funds to develop their TAS application, develop training and capacity for permit writers, establish the necessary tribal code, inventory existing point sources, and implement a NPDES program. Chapter 9: Other Funding Options provides information on how Tribes can use GAP funds for capacity development activities including to develop TAS packages.

Participation Opportunities for Tribes without Assuming the Section 402 Program

In accordance with EPA's Consultation and Coordination Policy, EPA regions coordinate with Tribes and provide for consultation opportunities when issuing or reissuing permits that may affect Tribes.

Tribes can also participate in the public comment processes required by the NPDES regulations. When states and EPA are considering whether to issue or reissue an NPDES permit, they must provide notice to the public and an opportunity to provide comments. The regulations also require permitting authorities to hold public hearings if they determine that there is "significant public interest." Hearings can also be held at the permitting authority's discretion.

States and EPA must develop and maintain a mailing list of the members of the public who are interested in permit actions. They must provide notice to those on their mailing list when a permitting authority takes an action requiring public notice. Tribes can join those mailing lists (by submitting a request in writing or by responding to a notification from the permitting authority) to learn about permitting actions under consideration in their geographic area.

The NPDES regulations require that permitting authorities provide notice to "affected states," which includes Tribes with TAS. Tribes with TAS thus would receive notice when the NPDES permitting authority is taking a permitting action that requires public notice.

Additional Resources

EPA provides a range of training opportunities focused on various aspects of the NPDES program. EPA has also issued a number of guidance documents and technical resources, for permit writers that contain information on developing, issuing, ensuring compliance with, and enforcing NPDES permits. The links to the following websites have more information about these opportunities, documents, and resources.

- EPA's [All NPDES Program Areas](#) website.
- EPA's [NPDES Recorded Training and Webinars](#) website.
- EPA's [NPDES Training](#) website.
- EPA's [NPDES Technical Resources](#) website.
- EPA's [Small and Rural Wastewater Systems](#) website.
- EPA's [Water Enforcement Policy, Guidance, and Publications](#) website.

Section 404(g) Permitting Program for Dredged or Fill Material

Section 404 establishes a program to regulate discharges of dredged or fill material into "waters of the United States," as described on EPA's [Statutory and Regulatory Requirements for Assumption under CWA Section 404](#) website. Activities that Section 404 regulates include dredged or fill material for

development purposes, water resource projects (such as docks, dams, and levees), infrastructure development (such as highways, bridges, and airports), and dredging and mining projects. Section 404 requires a permit to discharge dredged or fill material from these activities to “waters of the United States,” unless Section 404 exempts the activity (for example, certain farming and forestry activities).

Administering the 404 Permitting Program

The Corps is the permitting authority for Section 404 discharges of dredged or fill material into “waters of the United States” where no Tribe or state has assumed responsibility for administering the program. (Tribes and states may place conditions on or deny certification on Corps permits, see discussion on Section 401 Certification). EPA jointly administers the federal permitting program with the Corps and EPA is responsible for approval and oversight of tribal and state Section 404 programs.

Section 404(g) provides Tribes and states the option to assume administration of the Section 404 permit and enforcement program for certain waters within their jurisdiction (CWA Section 404(a), (g)-(i)).

Prior to issuing a Section 404 permit, the permitting authority (Tribe, Corps, or state) reviews the application to ensure the permit complies with the requirements at 40 CFR 230, commonly called the “Section 404(b)(1) Guidelines.” The Section 404(b)(1) Guidelines are the environmental review criteria for permits allowing for the discharge of dredged or fill material into “waters of the United States.”

An applicant must show that they have taken steps to avoid impacts to wetlands, streams, and other aquatic resources; that they have minimized potential impacts; and that they will provide compensation for all remaining unavoidable impacts (40 CFR 230.10(a)-(d)).

A particular discharge of dredged or fill material may be subject to other laws such as the Endangered Species Act as well as other procedural or substantive requirements established by the permitting authority. As such, a discharge request complying with the Section 404(b)(1) Guidelines will not automatically receive a permit.

Assumption allows a Tribe to operate a program that is consistent with national environmental standards, while adapting the program to best address the Tribe’s resources, issues, and needs. A Tribe may choose to assume the Section 404 permitting program to increase their role in management of tribal resources, reduce duplication between tribal and federal programs, or streamline the regulatory program. Tribes can use assumption as a way to carry out a fully integrated and comprehensive program addressing the full range of tribal and Section 404 authorities.

EPA’s [State or Tribal Assumption of the CWA Section 404 Permit Program](#) website has more information.

Obtaining TAS

A Tribe must demonstrate that it meets the TAS requirements for Section 404 to assume and administer a Section 404(g) program. A Tribe would generally make that demonstration as part of their request to assume the Section 404 program. Tribes do not need TAS for any other CWA regulatory programs to demonstrate that they meet the TAS requirements for Section 404 or to assume the Section 404 program. The criteria for TAS for Section 404 can be found at 40 CFR 233.60-61.

The regulations are available on EPA’s website, [40 CFR Part 233: CWA Section 404 State Program Regulations](#).

Program Approval

Tribal programs must be consistent with and no less stringent than the CWA and EPA's regulations at 40 CFR Part 233. In general, a tribal program must:

- Have an equivalent scope of jurisdiction.
- Regulate at least the same activities as the federal program.
- Provide for sufficient public participation.
- Ensure compliance with the Section 404(b)(1) Guidelines.
- Have an enforcement program that abates violations and ensures compliance. Enforcement responsibilities are to be laid out in the Tribal-EPA Memorandum of Understanding, to ensure consistency with the Tribe's authorities.

Program Scope

- Geographic Scope.
 - A tribal Section 404 program must cover all "waters of the United States" within its jurisdiction not retained by the Corps.
 - A Tribe's program can cover additional waters; however, the scope of the approved program and EPA oversight is limited to "assumed" waters which are "waters of the United States" within their jurisdiction and not retained by the Corps.
 - Tribal waters are generally not assumable under a state Section 404 program.
- Programmatic Scope.
 - A Tribe's Section 404 program must regulate all discharges of dredged and fill material into "waters of the United States" as the federal program.
 - A Tribe may regulate additional activities than those covered by the federal program.
 - A Tribe may choose to regulate, and not exempt, activities listed in Section 404(f).
 - EPA oversight of the tribal program is limited to activities within the scope of Section 404.

Assumption does not affect the scope of CWA jurisdiction, rather it shifts responsibility for administering the Section 404 program for certain waters from the Corps to the authorized Tribe. Tribes should reference the U.S. Army's [*Army Issues Memorandum to Empower States & Tribes in their Permitting Authority*](#) to learn how the Corps will identify "waters of the United States" for which they will retain Section 404 permitting authority. The memo directs the Corps to work with the Tribe to identify an administrative line to determine the extent of adjacent wetlands that the Corps will retain.

Preparing for Program Assumption

EPA encourages Tribes that are seeking to assume Section 404 permitting authority to contact the applicable EPA Regional Administrator and Corps District. EPA also encourages Tribes to:

- Confer with EPA regional and Headquarters staff on the assumption process substantive requirements.
- Identify program modifications and legislative needs by reviewing existing tribal programs, laws, and resources.
- Conduct outreach with the public and regulated community.
- Obtain from the Corps the list of waters that they will retain and work to identify an administrative line associated with adjacent wetlands.

Once the Tribe has established statutory authorities, developed the program, and secured funding, staffing, and resources, the tribal leader will submit the program request package to the appropriate EPA Regional Administrator for review.

The CWA and implementing regulations provide EPA 120 days to review and either approve or deny a tribal program request unless the Tribe and EPA agree to an extension. If EPA fails to make a decision on the program request within this timeframe, the program request is statutorily approved. During the 120-day review, EPA must determine if the proposed program meets the requirements of the Act and regulations. EPA accomplishes this by performing its own review, seeking comment from other federal agencies (such as the Corps and the U.S. Fish and Wildlife Service), holding public hearings, soliciting public comment, consulting with tribal governments as appropriate, documenting its review and decision, and undertaking consultations on the program approval if applicable to the program request. The procedures EPA will follow, and the criteria EPA will apply in approving, reviewing, and withdrawing approval of a tribal program under Section 404, are specified in 40 CFR 233.1.

Connection to Section 106

Tribes can use Section 106 grants to assume and administer an approved Section 404 program. Funding can be used to receive TAS for Section 404, develop a Section 404 assumption package, and implement the program upon EPA approval. Additionally, Tribes can use Section 106 funds to review and staff mapping programs, identify impaired waters, clarify what waters they have assumed, and identify the pollution abatement requirements for those waters. Tribes may also use the funds to help staff in permitting and enforcement positions ensure compliance with the assumed programs.

Chapter 9: Other Funding Options provides information on how Tribes can use GAP funds for capacity development activities including to develop TAS packages and apply for funding through EPA's [Wetland Program Development Grants](#) (WPDGs) to develop a dredged or fill permitting program. However, WPDGs are competitively awarded and may only be used for program development including to seek TAS authority.

Participation Opportunities for Tribes without Assuming the Section 404 Program

If a Tribe does not have TAS for Section 404, the Tribe can still participate in the following ways:

- **Consultation on program assumption request:** EPA will reach out to Tribes and offer government-to-government consultation on Section 404 program requests.
- **Comment on permits:** Section 404 programs must provide the opportunity for states and eligible Tribes to comment on permits if the permit may adversely affect their waters. When the permitting state or Tribe does not address these comments, the permit is sent to EPA for review.
- **Public comment on permits:** Tribes and individual tribal members may provide comments during the public comment period on tribal or state Section 404 permits.

Additional Resources

- EPA's [State and Tribal Assumption of Section 404 of the Clean Water Act](#) website.
- EPA's [Statutory and Regulatory Requirements for Assumption under CWA Section 404](#) website.
- EPA's [Assumption Request Package under CWA Section 404](#) website.
- [40 CFR Part 233: 404 State Program Regulations](#).

Clean Water Act Section 106 Tribal Guidance

EPA conducts consultations on program requests as appropriate. Policies on consultations include:

- EPA's [Consultation and Coordination with Tribes](#) website.
- EPA's [Consultation on CWA Section 404 Program Requests: Endangered Species Act and National Historic Preservation Act](#) website, which includes Section 7 of the Endangered Species Act and Section 106 of the National Historic Preservation Act.

For an overview of the Section 404(g) permitting process, see slide 9 in EPA's presentation on [CWA Section 404 Assumption: Background and EPA's Efforts](#).