

## TAS Application Template for Participating in the Section 401(a)(2) Process as a Neighboring Jurisdiction

This template is intended to assist interested tribes in applying to EPA for eligibility to be treated in a similar manner as a state (TAS) for the purpose of participating in the section 401(a)(2) neighboring jurisdictions process. The template provides a simple explanation and organization of relevant language to address the eligibility requirements for TAS approval for this non-regulatory program. This template does not apply to applications for TAS for section 303(c)<sup>1</sup> or for the entire section 401<sup>2</sup> certification program.

### Overview

Water quality certification is a powerful tool to protect Tribal 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 or state with jurisdiction over where the discharge will originate provides a section 401 water quality certification or waiver of section 401 water quality certification.

Once a certifying authority issues a section 401 water quality certification or waiver, a neighboring jurisdiction (which includes authorized Tribes and states) has the opportunity to provide input on the issuance of the federal license or permit if EPA determines that a discharge from the certified or waived project may affect the water quality of a neighboring jurisdiction (Figure 1). A federal license or permit may not be issued until the neighboring jurisdictions process concludes. 33 U.S.C. 1341(a)(2); 40 CFR 121.13(d).



**Figure 1.** Treatment in a similar manner as a state (TAS) for the section 401(a)(2) process starts with the interest of a Tribe to participate in the certification process as a neighboring jurisdiction. Those

<sup>1</sup> Tribes may continue to use the separate template available at <https://www.epa.gov/wqs-tech/water-quality-standards-tools-tribes> to apply for TAS for section 303(c) and section 401 concurrently if the Tribe is also interested in administering a section 303(c) water quality standards (WQS) program.

<sup>2</sup> Tribes may also use the separate template (see <https://www.epa.gov/cwa-401>) for TAS for the purpose of administering the section 401 certification program. Please note that if the Tribe is applying to administer the section 401 water quality certification program, this includes carrying out the responsibilities of a neighboring jurisdiction under section 401(a)(2). If a Tribe is only applying for TAS for the section 401(a)(2) process, the Tribe will not receive eligibility under section 401(a)(1) to issue certification decisions.

interested may fill out a TAS application, which includes four main requirements (see below). Once a Tribe receives TAS for section 401(a)(2), they should conduct the responsibilities required of a neighboring jurisdiction if notified by EPA of any may affect findings.

### Obtaining TAS

Section 401(a)(2) TAS provides Tribes with the opportunity to protect their water quality through participating in the section 401 certification process without needing to assume all of the authorities and responsibilities of section 401. Tribes should consider TAS for the section 401(a)(2) program if they are interested in participating in informing the federal licensing or permitting process for projects with discharges than may affect the water quality on their reservation, but do not desire or have the resources to apply for TAS for the section 401 certification program.



Once a Tribe receives TAS for Section 401(a)(2) neighboring jurisdictions process, the Tribe becomes the neighboring jurisdiction immediately upon authorization. That Tribe has the authority to object to the issuance of a federal license or permit whose discharges will violate the Tribe's water quality requirements on their reservation and request a public hearing.

### Application Checklist

Consistent with the requirements provided in CWA section 518, the final rule requires that four criteria must be met for Tribes to obtain TAS for section 401(a)(2). First, the Tribe must be federally recognized by the U.S. Department of the Interior and meet the definitions finalized in sections 121.1(d) and (e). Second, the Tribe must have a governing body that carries out "substantial governmental duties and powers" over a defined area. Third, the neighboring jurisdiction functions to be carried out by the Tribe must pertain to the management and protection of water resources within the borders of the Tribe's reservation area included in the application. Lastly, the Tribe must be reasonably expected, in the EPA Regional Administrator's judgment, to be capable of participating as a neighboring jurisdiction under section 401(a)(2).



The Tribe may satisfy the *first criterion* by stating that it is included on the list of federally recognized Tribes that is published periodically by the U.S. Department of the Interior. Alternatively, the Tribe may submit other appropriate documentation (*e.g.*, if the Tribe is not yet included on the U.S. Department of the Interior list but is federally recognized).

To meet the *second criterion*, the Tribe would show that it conducts "substantial governmental duties and powers," which the Agency views as performing governmental functions to promote the health, safety, and welfare of the affected population within a defined geographical area. *See* 54 FR 39101; 81 FR 65906. This requires a descriptive statement that should 1) describe the form of Tribal government, 2) describe the types of essential governmental functions currently performed by the Tribal governing body, including but not limited to, the exercise of the power of eminent domain, taxation, and police power, and 3) identify the sources of authorities to carry out these functions.

To meet the *third criterion*, the Tribe would submit a descriptive statement that should be comprised of two components: (1) a map or legal description of the area over which the Tribe is seeking to administer the CWA Section 401(a)(2) function, and (2) a statement signed by the Tribe's legal counsel or

equivalent addressing relevant legal issues, if any, relating to the Tribe's carrying out neighboring jurisdiction functions on its reservation.

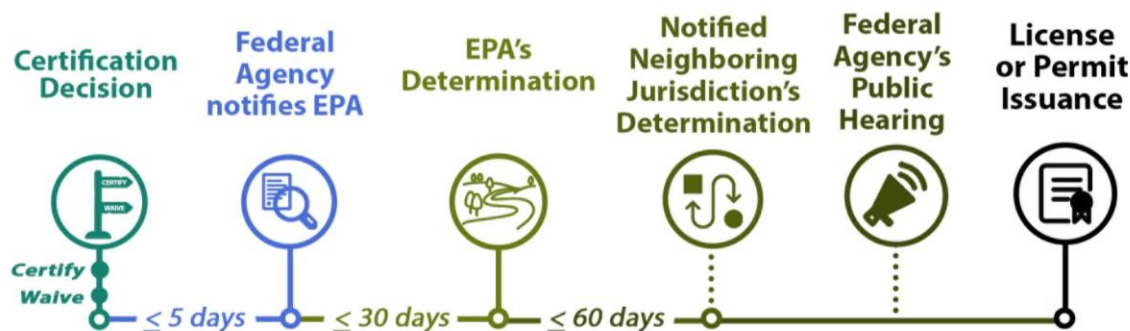
A Tribe may satisfy the *fourth criterion* regarding its capability by either (1) providing a description of the Tribe's technical and management skills to administer a water quality certification program or (2) providing a plan that proposes how the Tribe will acquire such skills. Additionally, when considering Tribal capability, EPA would 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.

### Responsibilities

After a certifying authority issues a certification or waiver of certification, the federal licensing or permitting agency must notify EPA within five days of receiving both the application for the license or permit and a certification or waiver under the neighboring jurisdictions process set forth in CWA Section 401(a)(2). 33 U.S.C. 1341(a)(2); 40 CFR 121.12(a). Whenever EPA determines, after receiving such notification, that the discharge may affect the water quality of a neighboring jurisdiction (authorized Tribe or state), it must provide notice to the neighboring jurisdiction, the licensing or permitting agency, and the project proponent within thirty (30) days of the notification from the federal agency. 33 U.S.C. 1341(a)(2); 40 CFR 121.13.



If EPA sends such notification, then the notified neighboring jurisdiction has 60 days to determine if the discharge will violate their water quality requirements. Water quality requirements means any limitation, standard, or other requirement under CWA sections 301, 302, 303, 306, and 307, any federal and state or Tribal laws or regulations implementing those CWA sections, and any other water quality-related requirement of state or Tribal law. 40 CFR 121.1(j). For example, water quality requirements could include Tribal ordinances or other Tribal laws related to water quality.



**Figure 2.** When a certifying authority issues a certification or a waiver of certification, the neighboring jurisdictions process begins.

The neighboring jurisdiction must notify EPA and the federal licensing or permitting agency, in writing, of the objection within the 60-day period. 33 U.S.C. 1341(a)(2); 40 CFR 121.14. The notification must include 1) a statement that the notified neighboring jurisdiction objects to the issuance of the federal license or permit, 2) an explanation of the reasons supporting its determination that the discharge from the project will violate its water quality requirements (e.g., identification of those water quality

requirements that will be violated), and 3) a request for a public hearing from the federal agency on the objection. 40 CFR 121.14(b).

If the neighboring jurisdiction provides such notice of objection and requests a public hearing within the 60-day period, the federal licensing or permitting agency must hold a public hearing. 33 U.S.C. 1341(a)(2); 40 CFR 121.15(a). At the public hearing, EPA will provide its evaluation and recommendations on the objection to the federal licensing or permitting agency. 33 U.S.C. 1341(a)(2); 40 CFR 121.15. After the public hearing, 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. 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); 40 CFR 121.15.

### Processing Procedure

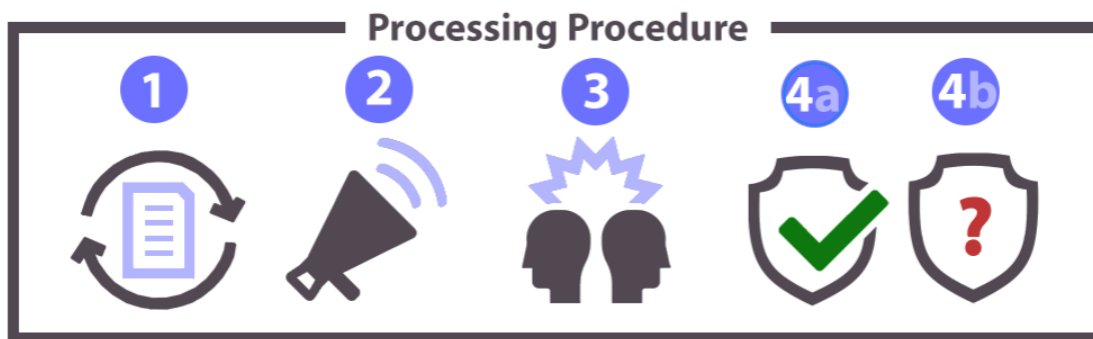
Once a Tribe submits its TAS application to EPA, the procedure for processing a Tribe's application consists of four main components (Figure 2) as discussed below. 40 CFR 121.12(c).

- **Step 1: Starting the Process** – The Regional Administrator (RA) begins processing the application, and the Tribe is promptly notified of receipt of application.
- **Step 2: AGE Notice and Public Notice** – Within 30 days of receiving the application, the RA provides notice to all appropriate governmental entities and a 30-day period to comment on the Tribe's assertion of authority.<sup>3</sup> As a matter of practice, the RA provides a 30-day period for public notice and comments (limited to the Tribe's assertion of authority) to be submitted on the Tribal application.<sup>4</sup>
- **Step 3: Addressing Competing or Conflicting Claims** – If a Tribe's asserted authority is subject to a competing or conflicting claim, the RA shall determine whether the Tribe has adequately demonstrated that it meets the requirements of paragraph (a)(3) of section 121.11.
- **Step 4a: Authorization** – Where the RA determines that a Tribe meets the requirements of section 121.11, they shall promptly provide written notification to the Tribe that the Tribe is authorized to participate as a neighboring jurisdiction under section 401(a)(2), effective immediately.
- **Step 4b: Identifying Deficiencies** – If the RA determines that a Tribal application is deficient or incomplete, EPA will identify such deficiencies and gaps so the Tribe can make changes as appropriate and necessary.

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<sup>3</sup> "Appropriate governmental entities" are "States, tribes, and other Federal entities located contiguous to the reservation of the tribe which is applying for treatment as a State." 56 FR 64876, 64884 (December 12, 1991).

<sup>4</sup> Since participating as a neighboring jurisdiction under section 401(a)(2) does not involve any exercise of regulatory authority by the applicant Tribe, issues relating to the Tribe's regulatory authority are not expected to be relevant to the public notice and AGE process for applications from Tribes seeking TAS for section 401(a)(2).



**Figure 3.** Four main components of the procedure for processing a Tribe’s application include (1) starting the process, (2) AGE notice and public notice within 30 days of receiving the application and 30-day comment period, (3) addressing competing/conflicting claims, and (4a) authorization and (4b) identifying deficiencies.

### Funding Opportunities

**CWA Section 106 (Water Pollution Control) Grants:** 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 Section 401. Tribes can also use Section 106 funds to review permits and conduct the certification process. See <https://www.epa.gov/water-pollution-control-section-106-grants> for more information.

**Indian Environmental General Assistance Program (GAP):** GAP was created to assist Tribes with building the capacity to develop and manage their own environmental programs, like section 401. Generally, GAP funds can be used to plan, develop, establish, and maintain capacity to implement programs under statutes administered by EPA and/or meaningfully participate in environmental programs. See <https://www.epa.gov/tribal/indian-environmental-general-assistance-program-gap> for more information.

### Additional Resources

EPA’s Section 401 of the Clean Water Act Web page: <https://www.epa.gov/cwa-401>

### Disclaimer

This document is designed to assist applicant Tribes in complying with EPA regulations at 40 CFR part 121 for TAS for section 401(a)(2). It does not impose legally binding requirements on EPA, Tribes, or other entities, nor does it confer legal rights or impose legal obligations or responsibilities upon any entity or member of the public. The CWA provisions and EPA regulations described in this document contain legally binding requirements. This document is not itself a regulation, however, nor does it change or substitute for any CWA provision or EPA regulation.

EPA and Tribes may adopt approaches on a case-by-case basis that differ from those in the template as appropriate. EPA may revise this template at any time based on experience with its use or as additional information becomes available.

Please read the accompanying instructions and coordinate with the appropriate EPA Regional Office before using this template.

## TEMPLATE FOR TAS APPLICATION – CWA SECTION 401(a)(2) NEIGHBORING JURISDICTIONS PROCESS

[Enter Full Name of Tribe or use the Tribe's letterhead]

### APPLICATION FOR CLEAN WATER ACT ELIGIBILITY TO BE A NEIGHBORING JURISDICTION FOR THE PURPOSES OF SECTION 401(a)(2)<sup>5</sup>

The [enter name of Tribe] hereby applies under section 518 of the Clean Water Act (CWA) to the U.S. Environmental Protection Agency to become eligible to be treated in a similar manner as a state (TAS) to be a neighboring jurisdiction for the purposes of section 401(a)(2).

#### 1. BACKGROUND [Optional section]

[The Tribe may choose to include this section to provide background information, e.g., Tribal history, Tribal water resources, why the Tribe is applying for TAS for section 401(a)(2).]

#### 2. FEDERAL RECOGNITION (40 CFR 121.11(a)(1) and (b)(1))

The Tribe is listed as “[enter name of Tribe as shown on BIA list]” in the Secretary of the Interior’s list of federally recognized tribes at 88 FR 2112, January 12, 2023 [check with Regional Office to ensure that this is the most recent citation to use].

#### 3. AUTHORITY OVER A FEDERAL INDIAN RESERVATION (40 CFR 121.11(a)(1) and 121.1(e))

The Tribe exercises governmental authority over a federal Indian reservation. [If applicable, include the following sentence] This includes lands held by the United States in trust for the tribal government that are not located within the boundaries of a formal reservation. See section 5 of this application for more information about the description of the Tribe’s reservation lands.

#### 4. TRIBAL GOVERNANCE (40 CFR 121.11(a)(2) and (b)(2))

The [enter name of Tribe] has a governing body carrying out substantial governmental duties and powers. [If applicable, include the following sentence] See the Tribe’s previous TAS

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<sup>5</sup> Note that if the Tribe is only applying to be a neighboring jurisdiction for the purposes of section 401(a)(2), this does not include the responsibilities for a certifying authority under section 401(a)(1).

application for the [enter name of program] program submitted to EPA on [enter date] and approved by EPA on [enter date].

[If applicable, include the following] There have been the following significant changes since that previous application, including [enter a brief list of any significant changes relating to the form of the tribal government and/or the functions carried out by the tribal government].

## **5. MANAGEMENT AND PROTECTION OF WATER RESOURCES OF THE RESERVATION (40 CFR 121.11(a)(3) and (b)(3))**

The section 401(a)(2) neighboring jurisdiction responsibilities to be administered by the Tribe will assist in managing and protecting water resources within the borders of the Tribe's reservation.

The boundaries of the Indian reservation areas for which the Tribe is seeking authority to administer the section 401(a)(2) neighboring jurisdiction responsibilities are identified in the attached {map(s), legal description}. [If applicable and if there have been no relevant changes, the Tribe may refer to a map/legal description submitted to EPA as part of a prior TAS application.]

[Please consult with the EPA Regional Office about the appropriate level of detail to provide in maps and legal descriptions. Please also see the attached instructions concerning appropriate information to provide concerning tribal trust lands not located within formal reservation boundaries.]

## **6. TRIBAL LEGAL COUNSEL STATEMENT (40 CFR 121.11(b)(3)(ii))**

[Note: The Legal Counsel's statement should include any information needed to describe the basis for the Tribe's assertion of authority, pursuant to 40 CFR 121.11(b)(3)(ii). Because participation as a neighboring jurisdiction under Section 401(a)(2) does not involve the exercise by an eligible Tribe of regulatory authority under the CWA, the legal counsel statement would generally focus on information relating to the establishment of the reservation areas covered by the application and the Tribe's general authority to administer governmental functions over that area.<sup>6</sup> The following are recommended elements to be included.]

[Insert the following if the Tribe chooses to provide the statement in a separate document.] A statement by the Tribe's {legal counsel, or title of equivalent official} providing references to

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<sup>6</sup> Because eligibility for the limited purpose of participating as a neighboring jurisdiction under Section 401(a)(2) would not involve any exercise of regulatory authority under the CWA, there is no need for the legal statement or application to reference the express congressional delegation of authority to eligible Indian tribes to administer regulatory programs over their reservations contained in Section 518 of the CWA. That authority would be relevant only for an application that seeks to administer the entire Section 401 certification program over the Tribe's reservation.



the documents that established the Tribe's reservation lands and describing the basis of the Tribe's assertion of authority, is provided separately.

The Tribe's reservation areas described in section 5 of the application were established in the following document{s}: **[Insert a list or brief description of the documents – e.g., treaties, federal statutes, Executive Orders, trust deeds, etc. – that established the reservation areas identified in the map(s) and/or legal description.] [Alternatively, the Tribe may cite this information submitted as part of a prior TAS application.]**

The Tribe's {constitution, chartering documents, other} demonstrate the Tribe's exercise of authority in general over the reservation. See **[insert citation/link to appropriate documents/sections in previous TAS application]**.

## **7. TRIBAL CAPABILITY**

The Tribe is capable of effectively carrying out the responsibilities of a neighboring jurisdiction under section 401(a)(2), as described below.

The overall organization of the Tribe's government and experience in managing programs, such as environmental or public health programs, is described in **[enter citation/link to previous TAS application or other document(s)]**. **[See instructions for possible additional information to include, such as descriptions and citations for any existing water quality requirements.<sup>7</sup>]**

The Tribal entity that will be responsible for carrying out the responsibilities of a neighboring jurisdiction under section 401(a)(2) is **[enter name of office, organizational location, and brief description of its duties]**.

**[Insert either Option 7A or Option 7B here]**

**[Option 7A]** Experienced staff members are already on board in **[name of office]** and trained to carry out the responsibilities of a neighboring jurisdiction under section 401(a)(2). This includes **[brief list of position title(s) of staff member(s) who will administer the program]**. **[Provide any brief additional information about the office's or staff members' accomplishments that EPA could use to evaluate the Tribe's capacity for a section 401(a)(2) program.]**

**[Option 7B]** The Tribe plans to hire and train<sup>8</sup> **[describe staff position(s)]** within the next **[number of months]** to carry out the responsibilities of a neighboring jurisdiction under section

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<sup>7</sup> See 40 CFR 121.1(j). (*Water quality requirements* means any limitation, standard, or other requirement under sections 301, 302, 303, 306 and 307 of the Clean Water Act, any Federal and state or Tribal laws or regulations implementing those sections, and any other water quality-related requirement of state or Tribal law.)

<sup>8</sup> Consider the section 401 training resources available on EPA's website (<https://www.epa.gov/cwa-401>) and coordinate with the appropriate EPA Regional Office to set up any additional trainings.



401(a)(2), using funds from [identify source]. [Provide any brief additional information that EPA could use to evaluate this plan.]

## Instructions for Use of Template

### COORDINATION WITH EPA

**EPA recommends that the applicant Tribe coordinate with the appropriate EPA Regional Office in using this template.**

Depending on circumstances, more information may be needed than is shown explicitly in this template. EPA's regulation at 40 CFR 121.11(b)(5) provides that the Regional Administrator may require additional documentation to support the tribal application. EPA will be judicious in requesting additional information to avoid unnecessarily delaying the Tribal application process.

If a Tribe plans to refer to previous application information in its application package, the Regional Office can assist by verifying in its files the previous application information to which the Tribe refers.

### HOW TRIBES CAN USE THIS TEMPLATE

Any Tribe can use this template to develop a TAS application to participate as a neighboring jurisdiction under CWA section 401(a)(2).<sup>1</sup>

The template will be of most use to Tribes that have previously qualified for one or more other EPA programs and that wish to refer to information contained in those previous TAS applications in this new application.<sup>2</sup> The template generally assumes that such prior TAS applications and approvals exist and that certain information from the prior application(s) will be relevant and transferable to the current TAS application for section 401(a)(2). If there

have been no such prior TAS applications/approvals, this template may be of limited value because the Tribe will need to provide the full information specified in 40 CFR 121.11.

### HOW WILL EPA REVIEW THE TRIBE'S TAS APPLICATION

EPA will review and process a Tribe's TAS application in accordance with the regulation at [40 CFR 121.11\(c\)](#). EPA will consider the information that the Tribe provides in its application, which may be based on the structure and information described in the template, and any information in previous TAS applications to which the application refers, in determining whether the Tribe qualifies for TAS.

Before making its decision, EPA's regulations require the Regional Office to provide notice of a Tribe's assertion of authority over waters included in its TAS application to appropriate governmental entities (states, Tribes, and other federal entities located contiguous to the reservation of the Tribe applying for TAS) for comment. Consistent with established Agency practice, EPA Regions also provide sufficiently wide notice of an applicant tribe's assertion of authority so as to notify local governments and the local public. See [88 FR 66558]. When requested, the Office of Wetlands, Oceans and Watersheds in EPA headquarters can assist the Regional Office by establishing a website on which to post the Tribe's application and supporting material to assist with these notification procedures.

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<sup>1</sup> This template is designed for Tribes that apply for TAS for the section 401(a)(2) role. If the Tribe is interested in administering the entire section 401 program, the Tribe is encouraged to use EPA's separate application template for TAS for a section 401 certification program. If the Tribe is interested in administering the section 303(c) water quality standards program and section 401 program, the Tribe encouraged to use EPA's separate joint application template for TAS for a section 303(c) water quality standards program and TAS for a section 401 program. Tribes applying for only one of these programs or both the CWA section 303(c) and 401 programs should consult with the Regional Office, which can assist in providing the appropriate template for that purpose.

<sup>2</sup> Section 121.11(b) provides that, in this situation, the Tribe that has previously qualified for TAS need only provide the required information which has not been submitted in a previous application. Examples of information that may be transferable from a prior application include descriptions of the Tribe's governmental functions, and information demonstrating the boundaries of a reservation and the relevant waters of the reservation.

Through the above notices, EPA makes available the Tribe's complete application and any supporting information previously provided to EPA.

## **SPECIFIC INSTRUCTIONS FOR USING THE TEMPLATE**

The text in the template that appears in regular font and black ink like this may be edited if necessary and inserted into the tribal application document. Specific instructions on what to insert appear within the template as **[bolded blue text in square brackets like this]**. Black text that appears within blue brackets {like this} is either optional or provides a choice of text to include.

**Once you insert the appropriate text, please remove the brackets, instructions and color.**

### **TRIBAL NAME**

The template throughout uses "the Tribe" to refer to the tribal applicant. The Tribe may substitute its full name or descriptor (e.g., "Nation," "Band," "Community") in place of "Tribe."

### **1. BACKGROUND**

This section may be included at the Tribe's discretion and can be limited to a few paragraphs. The Tribe may decide that a longer description is appropriate.

This section is not necessary to the application, since all of the information EPA needs to act on the application is contained in sections 2 through 7. However, the Tribe may see value in providing this background information to non-EPA readers who will see the application – for example, states, other Tribes, and the local public who will be given an opportunity to comment upon the applicant Tribe's assertion of authority.

### **2. FEDERAL RECOGNITION**

The Tribe need only cite the current Bureau of Indian Affairs (BIA) list of federally recognized tribes (or a prior TAS application and EPA decision finding that the Tribe is federally recognized). The Tribe need not submit a copy of the BIA list, nor any other documents supporting the listing.

The current BIA list, 88 FR 2112, January 2023, is available at

<https://www.govinfo.gov/content/pkg/FR-2023-01-12/pdf/2023-00504.pdf>

In the unusual event that the applicant Tribe is not identical to the federally recognized Tribal entity included on the BIA list (e.g., the applicant is only one band of several bands comprising the Tribe included in the list), the application should describe and explain the distinction and how the applicant meets the TAS eligibility criterion that it be a federally recognized Tribe.

### **3. AUTHORITY OVER A FEDERAL INDIAN RESERVATION**

(No additional instructions)

### **4. TRIBAL GOVERNANCE**

Typically, Tribes applying for TAS section 401(a)(2) will have obtained TAS already for a CWA grant program, such as section 106 or section 319. Tribes may cite such prior applications and EPA TAS approvals, or any other prior TAS application and EPA approval under the CWA, Safe Drinking Water Act, or Clean Air Act, to establish that they are carrying out substantial governmental duties and powers.

Where a Tribe cites a prior TAS application and EPA decision, the Tribe should also describe any significant changes in Tribal governance that have occurred. When considering "significant changes," the application should focus on changes that could potentially affect whether the Tribe meets this statutory and regulatory eligibility criterion. Descriptions of minor changes are not needed.

### **5. MANAGEMENT AND PROTECTION OF WATER RESOURCES**

EPA's regulations require a descriptive statement of the applicant Tribe's authority to regulate water quality, which should include a map or legal description of the reservation area covered by the application. See 40 CFR 121.11(b)(3)(i). The map of the reservation area should be sufficiently detailed and annotated to identify the geographic area of the reservation area(s) over which the Tribe asserts authority in the application. Some Tribes provide

maps based on an official survey by the U.S. Department of the Interior or an official reservation map prepared by the Bureau of Indian Affairs.

Where a written legal description is available, it can be very useful in confirming the legal boundaries of the reservation area(s) covered by the application. If included, the legal description should specify the locations of the boundaries of the reservation area(s) over which the Tribe asserts authority in its application. Where a water body is located at or forms a reservation boundary, the map and/or legal description should clearly express the extent of the water body that is included in the reservation area(s) covered by the application (*e.g.*, the entire water body, the water body to its mid-channel, etc.).

The map and legal description should also identify which lands are formal reservation areas, and which lands located outside formal reservation boundaries are held in trust by the United States for the Tribal government (informal reservation areas). Many named Indian reservations were established through federal treaties with Tribes, federal statutes, or Executive Orders of the President. Such reservations are often referred to as formal Indian reservations. Many Tribes also have lands that the United States holds in trust for the Tribes that are located outside of any formal reservation and that have not been formally designated as a reservation. Such Tribal trust lands are informal reservations and may properly be included in a TAS application for section 401(a)(2).

TAS applications for section 401(a)(2) can only cover reservation lands. Tribes can seek TAS with respect to water resources pertaining to any type of on-reservation land, including, for example, reservation land held in trust by the United States for a Tribe, reservation land owned by or held in trust for a member of the tribe, and reservation land owned by a non-tribal member. The map and/or legal description need not distinguish between reservation lands based on land ownership status unless such information would assist in locating referenced landmarks.

Tribes cannot obtain TAS under the CWA for water resources pertaining to any non-reservation land. In some cases, non-reservation land may be entirely surrounded by reservation land. Any such lands that

may be physically surrounded by reservation lands, but which themselves are not reservation lands, should be clearly identified and expressly excluded from the application. In addition, lands within reservation areas that are subject to existing jurisdictional disputes should be identified in the map and/or legal description if the Tribe is including such lands in its application. To the extent a Tribe includes such disputed lands in a TAS application, the application (*e.g.*, the legal counsel statement) should address the dispute and explain why the area is part of the reservation and properly included in the application. EPA recommends discussing such areas with the appropriate EPA Regional office.

Please consult with the EPA Regional Office about the appropriate level of detail to provide in maps, legal descriptions, and other relevant information identifying the boundaries of the geographic reservation area(s) and/or waters covered by a TAS application. Providing a sufficiently detailed map and legal description can greatly assist in streamlining the processing of a TAS application and limiting or eliminating potential confusion or requests for additional information by appropriate governmental entities or other commenters. In some situations the level of detail provided may be particularly important in documenting boundaries to address a competing or conflicting claim.

## **6. TRIBAL LEGAL COUNSEL STATEMENT**

The statement by the Tribe's legal counsel or equivalent official should include any information needed to describe the basis for the Tribe's assertion of authority, pursuant to 40 CFR 121.11(b)(3)(ii). The template suggests specific elements to include. The legal counsel may choose to include any additional information identified in 40 CFR 121.11(b)(3)(ii) that might be useful to EPA in reviewing the Tribe's assertion of authority.

Because eligibility for the limited purpose of participating as a neighboring jurisdiction under Section 401(a)(2) would not involve any exercise of regulatory authority under the CWA, there is no need for the legal statement or application to reference the express congressional delegation of authority to

eligible Indian tribes to administer regulatory programs over their reservations contained in Section 518 of the CWA. That authority would be relevant only for an application that seeks to administer the entire Section 401 certification program over the Tribe's reservation.

## **7. TRIBAL CAPABILITY**

Position descriptions for key personnel in the environmental office can be included (or referenced) as additional documentation but are not required. Although resumes of individuals currently filling such positions can also be included, the Tribe may want to consider the possibility that these could be viewed publicly – *e.g.*, during the appropriate governmental entity notice process or otherwise. The Tribe may also cite any contractual assistance that it uses or plans to use as a source of technical assistance in administering the program.

The Tribe may add (or include a reference to) some history and background of the office or organizational location with responsibilities for developing and/or implementing the water quality requirements (*e.g.*, Tribal ordinances or codes related to water quality) to help EPA make the Tribal capability determination (*e.g.*, date of creation, experience working with water systems and water quality issues, size and resources of the office).