



# WATER QUALITY STANDARDS FOR TRIBAL WATERS

VIRTUAL WQS ACADEMY

DECEMBER 2023

# DISCLAIMER

## **This Presentation does not:**

- Impose any binding requirements
- Determine the obligations of the regulated community
- Change or substitute for any statutory provision or regulatory requirement
- Change or substitute for any Agency policy or guidance
- Control in any case of conflict between this discussion and statute, regulation, policy, or guidance

The views expressed in this presentation are those of the author[s] and do not necessarily represent the views or policies of the U.S. Environmental Protection Agency.

# OVERVIEW

- Tribal Waters and CWA Coverage
- WQS Examples
- Administering the CWA 303(c) WQS Program
- Tools and Resources
- Tribal Reserved Rights

# DEFINITIONS

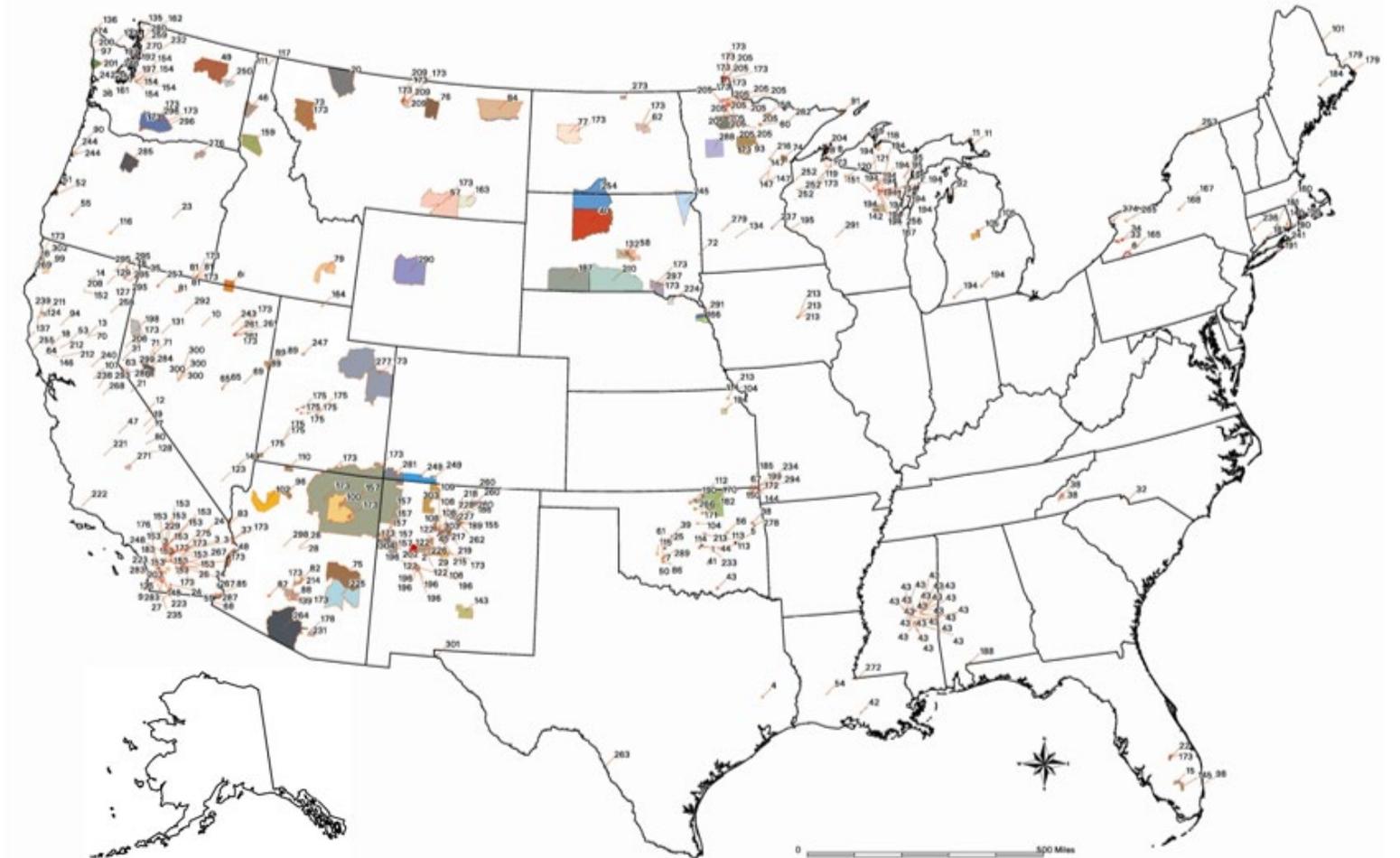
- **Tribe** – One of the 574 entities (e.g. ,Tribe, Band, Nation, Rancheria, Community, Pueblo) federally recognized by the Secretary of the Interior
- **TAS** – Treatment of tribes in a similar manner as states for the purposes of administering EPA programs under CWA Section 518
- **Reservation** – All land within the limits of any Indian reservation under the jurisdiction of the United States government
- **Tribal Trust Land** – Land held in trust by the United States for the tribal government (also referred to as “informal reservations”)



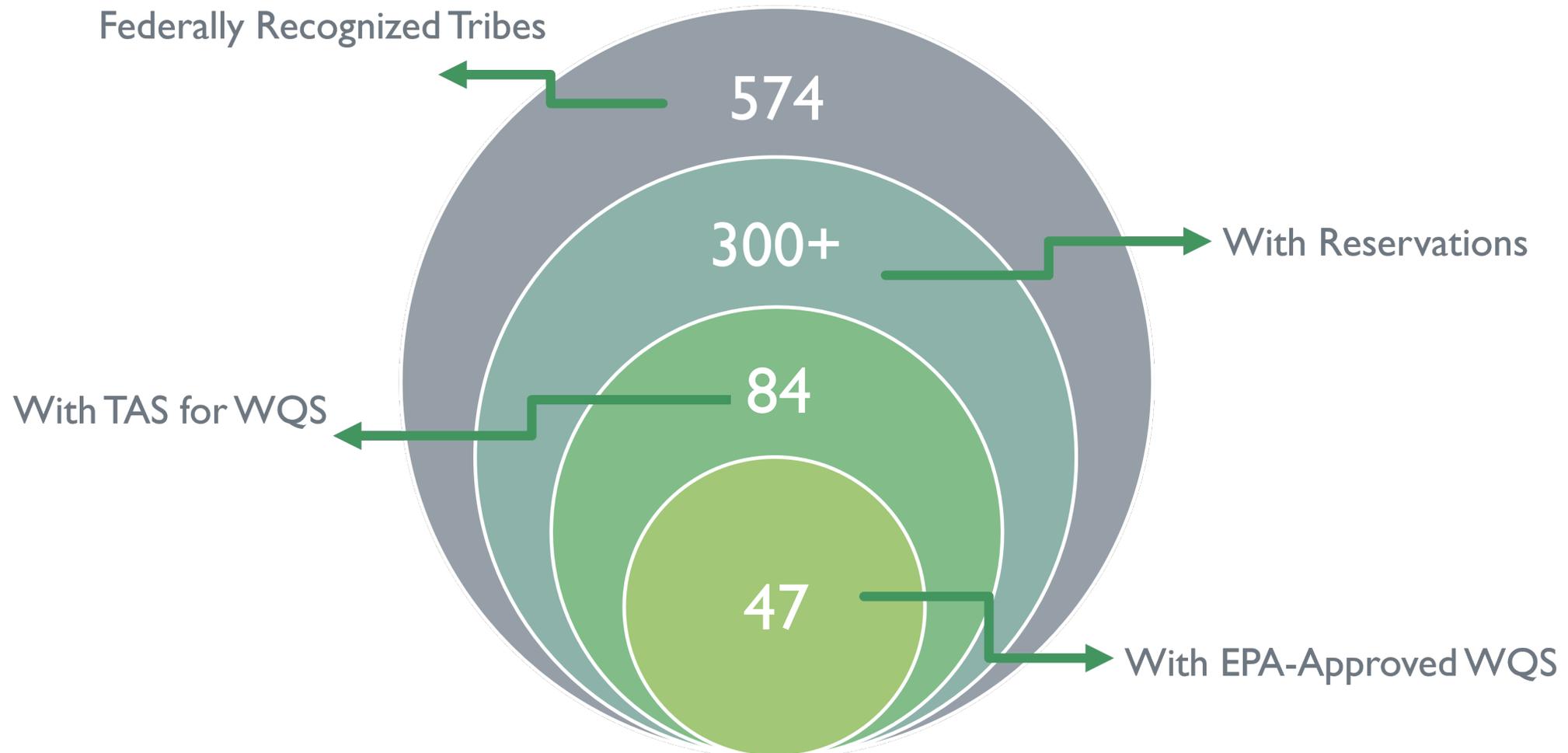
# TRIBAL WATERS AND CWA COVERAGE

# TRIBAL LANDS

This map is intended to provide a general understanding of the location of federally recognized reservations but is not intended as a legal representation.



# WQS IN INDIAN COUNTRY





# WQS EXAMPLES

# SECTION 303(C) WATER QUALITY STANDARDS

## Why might a tribe want to adopt CWA-effective WQS?

- Provide protection of designated water uses (e.g., traditional, cultural, way of life) that are unique to tribes
- Provide legal basis to protect waters that may be impacted from uses upstream of reservation land
- Provide tools to improve water quality where it is already degraded

## Three main components of WQS:

- Designated Uses
- Criteria
- Antidegradation

# DESIGNATED USES

## ■ 101(a)(2) Uses

- Protection of Fish and Wildlife (can include fishing, hunting, gathering activities)
- Recreation (can include traditional and cultural practices)

## ■ Examples of Unique Designated Uses

- Protection of Wild Rice
- Frogging
- Air Boating

# HUMAN HEALTH CRITERIA

$$= \frac{\text{Toxicity factors} \times \text{Toxicity factors icon}}{\left( \text{Glass of water} + \left( \text{Fish icon} \times \text{Bioaccumulation factors} \right) \right)}$$

The diagram illustrates a formula for Human Health Criteria. The numerator consists of 'Toxicity factors' multiplied by a 'Toxicity factors icon' (a grey container with a gauge). The denominator is enclosed in large parentheses and contains a plus sign followed by a 'Glass of water' icon, another plus sign, a 'Fish icon' (highlighted with a red square), and 'Bioaccumulation factors' multiplied by 'Bioaccumulation factors'.

# HUMAN HEALTH CRITERIA (CONT.)

## Fish Consumption Rate

- In EPA's recommended criteria
  - National default for general population: 22 grams per day
  - Default for subsistence fishers: 142 grams per day
- Tribal Subsistence Fishing
  - Oregon state WQS: 175 grams per day
  - Spokane Tribe of Indians WQS: 865 grams per day



*Photo: Lac du Flambeau Band of Lake Superior Chippewa Indians*

# HUMAN HEALTH CRITERIA (EXAMPLE)

## Fish Consumption Rate

- National default for general population:

22 grams per day

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142 grams per day

- Oregon state WQS:

175 grams per day

- Spokane Tribe of Indians:

865 grams per day

## Example: Nickel Human Health Criteria Water + Organism

470  $\mu\text{g/L}$

180  $\mu\text{g/L}$

150  $\mu\text{g/L}$

37  $\mu\text{g/L}$

# ANTIDEGRADATION POLICY

Antidegradation requirements provide a framework for maintaining and protecting water quality that has already been achieved, including three tiers of maintenance and protection.

The highest tier of protection is for Outstanding National Resource Waters (ONRWs).



# ADMINISTERING THE CWA 303(C) WQS PROGRAM

# TREATMENT IN A SIMILAR MANNER AS STATES (TAS)

Clean Water Act Section 518 establishes TAS for certain **CWA** programs:

- 303(c) WQS, and 401 water quality certification
- 106 and 319 grants
- 303(d) listings and TMDLs
- 402 NPDES permits
- 404 dredge and fill permits

# STEPS TO ADMINISTER THE WQS PROGRAM: 40 CFR 131

- **Step 1:** Tribe applies for TAS
- **Step 2:** EPA finds tribe eligible for TAS
- **Step 3:** Tribe develops WQS
- **Step 4:** EPA reviews and approves tribe's WQS if tribe meets same requirements for WQS as states

# STEPS TO ADMINISTER THE WQS PROGRAM: 40 CFR 131.8

## ■ **Step 1:** Tribe applies for TAS

- Recognized by DOI and has reservation lands (formal reservation and off-reservation trust lands)
- Governing body
- Authority to regulate water quality (note: different procedures apply within certain states, e.g., Oklahoma)
- Capability

# STEPS TO ADMINISTER THE WQS PROGRAM: 40 CFR 131.8

## ■ **Step 1:** Tribe applies for TAS

- Recognized by DOI and has reservation lands (formal reservation and off-reservation trust lands)
  - The Department of the Interior maintains a list of all federally recognized tribes
- Governing body
  - Describe the governing body and what substantial duties and powers they carry out
- Authority to regulate water quality (note: different procedures apply within certain states, e.g., Oklahoma)
- Capability

# STEPS TO ADMINISTER THE WQS PROGRAM: 40 CFR 131.8

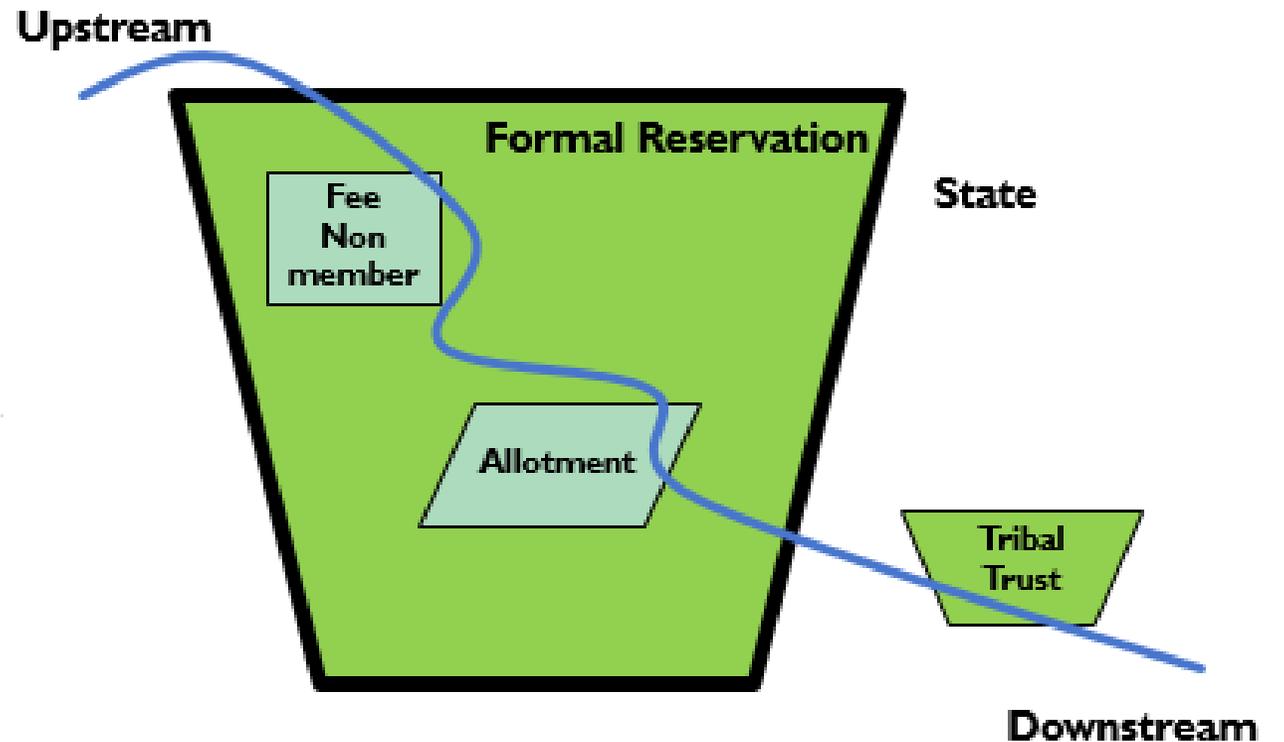
## ■ **Step 1: Tribe applies for TAS**

- Recognized by DOI and has reservation lands (formal reservation and off-reservation trust lands)
- Governing body
- Authority to regulate water quality (note: different procedures apply within certain states, e.g., Oklahoma)
  - Provide legal counsel's statement identifying basis of authority (can generally rely on congressional delegation of authority)
  - Provide a map or legal description of the area over which the tribe asserts authority
- Capability
  - Can describe successful grant applications, appropriate technical and management staff, **OR** a plan for acquiring capability

# TRIBAL LANDS ELIGIBLE FOR TAS

Tribes can be authorized to establish water quality standards only for reservation areas, including waters:

- Within the exterior boundaries of the reservation, including allotments and nonmember-owned fee lands
- Tribal trust lands not located within the boundaries of a formal reservation



# TAS APPLICATION REVIEW: 40 CFR 131.8(C)

- **Step 2:** EPA finds the Tribe eligible for TAS



# STEPS TO ADMINISTER THE WQS PROGRAM: 40 CFR 131

- **Step 1:** Tribe applies for TAS
- **Step 2:** EPA finds tribe eligible for TAS
- **Step 3:** Tribe develops WQS
  - Public comment
  - Adopts WQS
  - Submits WQS to EPA
- **Step 4:** EPA reviews and approves tribe's WQS if tribe meets same requirements for WQS as states



# TOOLS AND RESOURCES

# WQS TOOLS

## **Water Quality Standards Tools for Tribes website:**

- Streamlined TAS Application
- Model WQS Template
- Tribal/State Human Health Criteria Calculator

# WQS RESOURCES

- **Contact the Tribal WQS Coordinator in the EPA Regional Office:** <https://www.epa.gov/wqs-tech/epa-actions-tribal-water-quality-standards-and-contacts>
  - More Information
  - Technical Support

# BASELINE WQS

- In April 2023, Administrator Regan signed a proposed rule titled *Federal Baseline Water Quality Standards for Indian Reservations*.
- Shortly thereafter, the proposed rule was published in the Federal Register for a 90-day public comment period.
- To learn more about the proposed rule, please visit the following website: <https://www.epa.gov/wqs-tech/promulgation-tribal-baseline-water-quality-standards-under-clean-water-act>.



# TRIBAL RESERVED RIGHTS

# TRIBAL RESERVED RIGHTS IN WQS

- Many tribes have rights reserved through treaties, federal statutes, and executive orders to aquatic and aquatic-dependent natural resources (e.g., the right to fish) in waters where states establish WQS.
- The U.S. Constitution defines treaties as part of the supreme law of the land, with the same legal force as federal statutes.
- EPA consults with tribes prior to acting on state WQS when tribal reserved rights may be affected by EPA's action.
- On November 28, 2022, EPA Administrator Regan signed a proposed rule to revise the federal WQS regulation to clarify and prescribe how states and EPA must ensure protection of tribal reserved rights in WQS. The public comment period for the proposed rule closed on March 6, 2023. EPA is currently reviewing public comments and input received through tribal consultation. For more information, visit EPA's website for this rulemaking: <https://www.epa.gov/wqs-tech/protecting-tribal-reserved-rights-in-WQS>.



# REVIEW QUESTIONS

# REVIEW QUESTION #1

- Which of the following is not a requirement for a tribe applying to administer the water quality standards program?
  - A. Recognition by the Department of the Interior
  - B. Documentation of the tribe's own inherent regulatory authority
  - C. A governing body that carries out substantial governmental duties and powers
  - D. None of these (A-C) is a requirement
  - E. All of these (A-C) are requirements

# REVIEW QUESTION #1

**ANSWER: B** – Documentation of the tribe’s own inherent regulatory authority

- The May 2016 *Revised Interpretation of Clean Water Act Tribal Provision* removed the requirement to demonstrate inherent authority, including meeting the Montana Test. Tribes applying for TAS now must refer to congressional delegation as the source of authority in their application, and in special circumstances, need only address any impediments to effectuating the delegation.

## REVIEW QUESTION #2

- True or False. A tribal application for the water quality standards program should include a listing of surface waters for which water quality standards will be proposed.

## REVIEW QUESTION #2

### **ANSWER: TRUE**

- The application must include a descriptive statement of the tribe's authority to regulate surface water quality and should identify the surface waters for which the tribe proposes to establish water quality standards.

## REVIEW QUESTION #3

- True or False. A tribe must have managed comparable programs before it is eligible to administer a water quality standards program.

## REVIEW QUESTION #3

### **ANSWER: FALSE**

- EPA looks for indications that the tribe is capable of administering a water quality standards program. This could include the tribe's experience in helping run other federal programs. Or, the tribe can show that it has a plan for gaining capability.

## REVIEW QUESTION #4

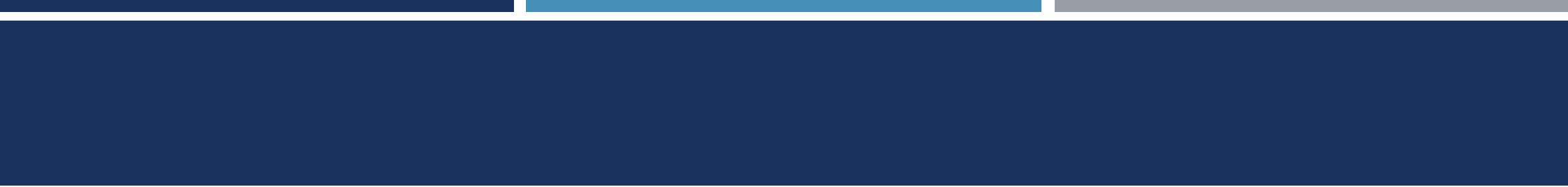
- Where can tribes be authorized to establish water quality standards?
  - A. Within the boundaries of the reservation
  - B. Nonmember-owned fee lands within a reservation
  - C. Allotments within a reservation
  - D. Tribal trust lands, wherever located
  - E. All of the above

## REVIEW QUESTION #4

### **ANSWER: E – All of the Above\***

- Tribes can be authorized through the TAS process to establish WQS only for reservation areas, including those mentioned.

\*Fee lands and allotments not within the external boundary of the reservation cannot be included.



# CONTACT INFORMATION

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