



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 130

[EPA-HQ-OW-2014-0622; FRL-9941-33-OW]

RIN 2040-AF52

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

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: In section 518(e) of the Clean Water Act (CWA), Congress authorized EPA to treat eligible federally recognized Indian tribes in a similar manner as states for purposes of administering section 303 and certain other provisions of the CWA, and directed the agency to promulgate regulations effectuating this authorization. EPA has issued regulations establishing a process for federally recognized tribes to obtain treatment in a similar manner as states (TAS) for several provisions of the CWA; 50 tribes, for example, have obtained TAS authority to issue water quality standards under CWA section 303(c). EPA, however, has not yet promulgated regulations expressly establishing a process for such tribes to obtain TAS authority to administer the water quality restoration provisions of CWA section 303(d), including issuing lists of impaired waters and developing total maximum daily loads (TMDLs) under CWA section 303(d), as states routinely do. EPA is now proposing to remedy this gap. By establishing regulatory procedures for eligible tribes to obtain TAS for the CWA Section 303(d) Impaired Water Listing and TMDL Program, the proposed rule would enable eligible tribes to obtain authority to identify impaired waters on their reservations and to establish TMDLs, which serve as plans for attaining and maintaining applicable water quality standards (WQS). The proposal is

comparable to similar regulations that EPA issued in the 1990s for the CWA Section 303(c) WQS and CWA Section 402 and 404 Permitting Programs, and includes features designed to minimize paperwork and unnecessary reviews. EPA requests comments on all aspects of the proposed rule.

DATES: EPA must receive comments on or before **[INSERT DATE 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]**. EPA will discuss this proposed rule and answer questions about it in one or more webinars during the above comment period. If you are interested, see EPA's website at <http://www2.epa.gov/tmdl/tribal-consultation-rulemaking-provide-more-opportunities-tribes-engage-clean-water-act> for the date and time of the webinar(s) and instructions on how to register and participate. Additionally, under the Paperwork Reduction Act (PRA), comments on the information collection provisions are best assured of consideration if the Office of Management and Budget (OMB) receives a copy of your comments on or before **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: Submit your comments, identified by Docket identification (ID) No. EPA-HQ-OW-2014-0622, at <http://www.regulations.gov>. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from Regulations.gov. EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (i.e. on the web,

cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <http://www2.epa.gov/dockets/commenting-epa-dockets>.

FOR FURTHER INFORMATION CONTACT: Sarah Furtak, Assessment and Watershed Protection Division, Office of Wetlands, Oceans and Watersheds (4503T), Environmental Protection Agency, 1200 Pennsylvania Ave., NW, Washington, DC 20460; telephone number: (202) 566-1167; fax number: (202) 566-1331; email address: TASTMDL@epa.gov.

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I. General Information

A. Does This Action Apply to Me?

This proposed rule applies to federally recognized tribal governments with reservations interested in seeking TAS eligibility to administer the CWA Section 303(d) Impaired Water Listing and TMDL Program. Although this proposed rule would not apply directly to any other entity, state and local governments or other Indian tribes, as well as other entities, may be interested to the extent they are adjacent to the Indian reservation¹ lands of TAS applicant tribes, share water bodies with such tribes, and/or discharge pollutants to waters of the United States located within or adjacent to such reservations. The table below provides examples of entities that could be affected by this action or have an interest in it.

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

Category	Examples of potentially affected or interested entities
Tribes	Federally recognized tribes with reservations that are interested in applying for TAS for CWA Section 303(d) Impaired Water Listing and TMDL Program, and other interested tribes.
States	States adjacent to reservations of potential applicant tribes.
Industry dischargers	Industrial and other commercial entities discharging pollutants to waters within or adjacent to reservations of potential applicant tribes.
Municipal dischargers....	Publicly owned treatment works or other facilities discharging pollutants to waters within or adjacent to reservations of potential applicant tribes.

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

B. Over What Area May Tribes Apply for TAS for the CWA Section 303(d) Impaired Water Listing and TMDL Program?

Under section 518(e) of the CWA, 33 U.S.C. 1377(e), Indian tribes may seek TAS authorization to administer certain CWA programs pertaining to water resources of their reservations. Tribes are not eligible to administer CWA programs pertaining to any non-reservation Indian country² or any other type of non-reservation land. The term “federal Indian reservation” is defined at CWA section 518(h)(1) to include all land within the limits of any Indian reservation under the jurisdiction of the United States Government notwithstanding the issuance of any patent, and including rights-of-way running through the reservation. See CWA sections 518(e)(2), (h)(1); see also 40 CFR 131.3(k). EPA’s longstanding position is that reservations include both formal reservations (*e.g.*, named reservations established through

² The term Indian country is defined at 18 U.S.C. section 1151.

federal treaties with tribes, federal statutes, or Executive Orders of the President) as well as tribal trust lands that may not be formally designated as reservations, but that qualify as informal reservations. *See, e.g.*, 56 FR 64876, 64881 (December 12, 1991); *Arizona Public Service Co. v. EPA*, 211 F.3d 1280, 1292-1294 (D.C. Cir. 2000), *cert. denied sub nom.*, *Michigan v. EPA*, 532 U.S. 970 (2001). Tribes may seek TAS authorization for both formal and informal reservations, and both types of lands are referred to herein as “reservations.”

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

C. What Should I Consider as I Prepare My Comments for EPA?

1. *Resubmitting Relevant Comments from Consultations and Listening Sessions.* EPA held multiple consultations and listening sessions with tribes and states concerning TAS for CWA section 303(d) lists and TMDLs, and considered views and comments received from these sessions in developing this proposal. This proposed rule has evolved from the materials EPA shared at the time. Therefore, if you submitted comments based on these sessions and want EPA to consider them as part of the public comment opportunity for this proposed action, you must resubmit your comments to EPA in accordance with the instructions outlined in this document.

2. *Submitting CBI.* Do not submit CBI to EPA through <http://www.regulations.gov> or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disc that you mail to EPA, mark the outside of the disc as CBI and then identify electronically within the disc the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public

docket. EPA will not disclose information so marked except in accordance with procedures set forth in 40 Code of Federal Regulations (CFR) part 2.

3. Tips for Preparing Your Comments. When submitting comments, remember to:

- Identify the proposed action by docket number and other identifying information (subject heading, **Federal Register** date and page number).
- Explain why you agree or disagree, suggest alternatives, substitute language for your requested changes.
- Describe any assumptions and provide any technical information and/or data that you used.
- If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
- Provide specific examples that help to illustrate your concerns.
- Explain your views as clearly as possible.
- Submit your comments consistent with the **DATES** section of this document.

II. What Is the Statutory and Regulatory History of TAS under the CWA?

A. Statutory History

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

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

B. Regulatory History

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

- 40 CFR 131.8 for section 303(c) water quality standards, published at 56 FR 64876 (December 12, 1991) (final rule);
- 40 CFR 131.4(c) for CWA section 401 water quality certification, published at 56 FR 64876 (December 12, 1991);
- 40 CFR 123.31-34 for CWA section 402 National Pollutant Discharge Elimination System (NPDES) permits and other provisions, and 40 CFR 501.22-25 for the sewage sludge management program. Final rule published December 22, 1993 (58 FR 67966); and
- 40 CFR 233.60-62 for CWA section 404 dredge or fill permits. Final rule published February 11, 1993 (58 FR 8172).

In 1994, EPA amended the above regulations to simplify the TAS process and eliminate unnecessary and duplicative procedural requirements. See 59 FR 64339 (December 14, 1994) (the “Simplification Rule”). For example, the Simplification Rule eliminated the need for a tribe to prequalify for TAS before applying to administer the section 402 and section 404 permit

programs. Instead, the rule provided that a tribe would seek to establish its TAS eligibility at the program approval stage (subject to notice and comment procedures in the *Federal Register*). However, the rule retained the separate TAS prequalification requirement (including local notice and comment procedures) for section 303(c) water quality standards and section 401 water quality certifications. *Id.*; *see also*, 40 CFR 131.8(c)(2), (3).³ The TAS regulations for CWA regulatory programs have remained intact since promulgation of the Simplification Rule. EPA is now proposing to address a gap in its current TAS regulations, by proposing regulations that would specify how tribes may seek TAS for the Section 303(d) Impaired Water Listing and TMDL Program.

III. Why Might a Tribe Be Interested in Seeking TAS Authority for the CWA

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

TAS for the CWA Section 303(d) Impaired Water Listing and TMDL Program would provide a tribe with the opportunity to participate directly in restoring and protecting its reservation waters through implementing the Program, as Congress authorized under CWA section 518(e). In the rest of this document, EPA refers to the functions identified in CWA section 303(d) regarding listing of impaired waters and establishment of TMDLs as the “Section 303(d) Impaired Water Listing and TMDL Program” or “303(d) Program.” Section 303(d) provides for states and authorized tribes to: (1) develop lists of impaired waters (and establish priority rankings for waters on the lists) and (2) establish TMDLs for these waters. By listing impaired waters, a state or authorized tribe identifies those waters in its territory that are not

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

currently meeting EPA-approved or EPA-promulgated WQS (collectively referred to as “applicable WQS”). A TMDL is a planning document intended to address impairment of waters, including the calculation and allocation to point and nonpoint sources of the maximum amount of a pollutant that a water body can receive and still meet applicable WQS, with a margin of safety.

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

TMDLs must allocate the total pollutant load among contributing point sources (“waste load allocations” or “WLAs”) and nonpoint sources (“load allocations” or “LAs”) (40 CFR 130.2). Point source WLAs are addressed through the inclusion of water quality-based effluent limits in national pollutant discharge elimination system (NPDES) permits issued to such sources. Under EPA’s regulations, NPDES permitting authorities shall ensure that “[e]ffluent limits developed to protect a narrative water quality criterion, a numeric water quality criterion, or both, are consistent with the assumptions and requirements of any available wasteload allocation for the discharge prepared by the State and approved by EPA pursuant to 40 CFR 130.7.” 40 CFR 122.44(d)(1)(vii)(B). WLAs under 40 CFR 122.44(d)(1)(vii)(B) would include WLAs developed by a tribe with TAS authorization and approved by EPA pursuant to 40 CFR 130.7. For water bodies impaired by pollutants from nonpoint sources, authorized tribes would not acquire new or additional implementation authorities when listing such impaired water bodies and establishing TMDLs. Instead, the mechanisms for implementing the nonpoint source pollutant reductions

(LAs) identified in any tribal TMDLs would include existing tribal authorities, other federal agencies' policies and procedures, as well as voluntary and incentive-based programs.

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

IV. What Program Responsibilities Would Tribes Have upon Obtaining TAS for the CWA Section 303(d) Impaired Water Listing and TMDL Program?

The goal of the CWA is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." CWA section 101(a). Identification of impaired waters and TMDLs are important tools for achieving that goal. After a tribe receives EPA approval of its eligibility to implement a CWA Section 303(d) Impaired Water Listing and TMDL Program, it is treated in a manner similar to a state and, for purposes of list and TMDL development, it would become an "authorized tribe." Generally, the federal statutory and regulatory requirements for state 303(d) programs would be applicable to authorized tribes (see proposed § 130.16(c)(5)). The following paragraphs identify important 303(d) Program responsibilities that tribes with TAS would assume and implement.

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

Under section 303(d) of the CWA, every two years authorized tribes would be required to develop lists of waters not meeting, or not expected to meet, applicable water quality standards.

⁴ See *Handbook for Developing and Managing Tribal Nonpoint Source Pollution Programs under Section 319 of the Clean Water Act*, February 2010, available at http://www2.epa.gov/sites/production/files/2015-09/documents/2010_02_19_nps_tribal_pdf_tribal_handbook2010.pdf.

40 CFR 130.7(d). These lists are commonly called “impaired waters lists” or “303(d) lists.”

Impaired waters are waters for which technology-based limitations and other required controls are not stringent enough to meet applicable CWA water quality standards. Threatened waters are waters that currently attain applicable WQS, but for which existing and readily available data and information indicate that applicable WQS will likely not be met by the time the next list of impaired or threatened waters is due to EPA.⁵ The authorized tribe’s section 303(d) list would include all impaired and threatened waters. In this document, EPA uses the term “impaired waters” to refer to both impaired and threatened waters.⁶ The authorized tribe would be required to “assemble and evaluate all existing and readily available information” in developing its section 303(d) list. 40 CFR 130.7(b)(5). EPA’s regulations include a non-exhaustive list of water quality-related data and information to be considered. *Id.* The tribe would establish priorities for development of TMDLs for waters on its section 303(d) list based on the severity of the pollution and the uses to be made of the waters. 40 CFR 130.7(b)(4). The tribe would then submit its list of impaired waters to EPA for review and approval.

Like states, authorized tribes would be required to submit their "303(d) lists" to EPA for approval every two years on April 1 (lists are due April 1 of even-numbered years). As indicated in §130.16(c)(5) of the proposed rule, a tribe gaining TAS status would be provided at least 24 months to submit its first impaired waters list to EPA. The tribe’s first impaired waters list would be due to EPA the next listing cycle due date that is at least 24-months from the later of (1) the date the tribe’s TAS application for 303(d) is approved, or (2) the date EPA-

⁵ *Guidance for 2006 Assessment, Listing and Reporting Requirements Pursuant to Sections 303(d), 305(b) and 314 of the Clean Water Act*, July 29, 2005, available at <http://water.epa.gov/lawsregs/lawsguidance/cwa/tmdl/upload/2006irg-report.pdf>.

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

approved/promulgated WQS for the tribe's waters are effective. (See section VII for the procedure EPA would follow in reviewing a tribe's TAS application.). Thus, for example, if EPA approves a tribe's TAS application on March 15, 2016, and the tribe's WQS on June 30, 2016, the tribe's first list would be due on April 1, 2020. The tribe could submit its list to EPA prior to that date, if it chooses.

Most tribes that would be eligible for TAS authorization under today's proposed rule are likely to be recipients of CWA section 106 grants and would thus be required to submit section 106 grant work plans annually. If a tribe's CWA section 106 grant work plan includes ambient water quality monitoring activities, the tribe is also required to develop an assessment report pursuant to the CWA section 106 grant reporting requirements.⁷ EPA encourages tribes that obtain TAS for the CWA Section 303(d) Program and also develop CWA section 106 assessment reports to combine their CWA section 303(d) impaired waters list with their CWA section 106 assessment report, and submit the combined report electronically through the Assessment TMDL Tracking and Implementation System (ATTAINS).⁸ In this way such tribes could create a combined CWA 303(d)/106 report that is similar to a state's CWA 303(d)/305(b)⁹ "Integrated Report."¹⁰

B. Establishment and Submission of TMDLs

Under the CWA, each state and authorized tribe must, "from time to time," establish and

⁷ See *Final Guidance on Awards of Grants to Indian Tribes under Section 106 of the Clean Water Act* (<http://www2.epa.gov/sites/production/files/2014-09/documents/final-tribal-guidance.pdf>) at page 8-1.

⁸ See "Water Quality Assessment and TMDL Information," available at http://ofmpub.epa.gov/waters10/attains_index.home.

⁹ CWA section 305(b) requires states to provide every two years an assessment of the quality of all their waters. EPA explicitly exempted tribes from the section 305(b) reporting requirement. See 40 CFR 130.4(a); 54 FR 14354, 14357 (April 11, 1989).

¹⁰ See *Guidance for 2006 Assessment, Listing and Reporting Requirements Pursuant to Sections 303(d), 305(b) and 314 of the Clean Water Act*, July 29, 2005, (available at <http://water.epa.gov/lawsregs/lawguidance/cwa/tmdl/upload/2006irg-report.pdf>) for more information on the Integrated Report.

submit TMDLs for pollutants causing impairments in all the waters on its 303(d) list. CWA sections 303(d)(1)(C) and 303(d)(2). States and authorized tribes set priorities for developing TMDLs for their impaired and listed waters.

TMDLs must be established “at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.” CWA section 303(d)(1)(C). Where a TMDL makes allocation tradeoffs between point and nonpoint sources, the TMDL record must also demonstrate “reasonable assurance” that the nonpoint source allocations will be achieved. 40 CFR 130.2(i). Calculations to establish TMDLs must be subject to public review. 40 CFR 130.7(c)(1)(ii). Once established, the state or authorized tribe submits the TMDL to EPA for review.

C. EPA Review of Lists and TMDLs

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

V. What Are EPA’s Proposed Procedures for a Tribe to Seek TAS for the CWA Section 303(d) Impaired Water Listing and TMDL Program?

Consistent with the statutory requirement in section 518 of the CWA, the proposed rule would establish the procedures by which an Indian tribe may apply and qualify for TAS for purposes of the CWA Section 303(d) Impaired Water Listing and TMDL Program. Such procedures would be codified in a new section 130.16 of the water quality planning and management regulation. Section 130.16 would identify (1) the criteria an applicant tribe would be required to meet to be treated in a similar manner as states, (2) the information the tribe would be required to provide in its application to EPA, and (3) the procedure EPA would use to review

the tribal application. Proposed section 130.16 is intended to ensure that tribes treated in a similar manner as states for the purposes of the CWA Section 303(d) Impaired Water Listing and TMDL Program are qualified, consistent with CWA requirements, to conduct a Listing and TMDL Program. The procedures are meant to provide more opportunities for tribes to engage fully in the Program and are not intended to act as a barrier to tribal assumption of the 303(d) Program.

The TAS procedures in this proposed rule are closely based on the existing TAS regulation at 40 CFR 131.8, which establishes the TAS process for the CWA Section 303(c) WQS Program. EPA established the TAS process for WQS in 1991, and that program has been the focus of the great majority of TAS activity for regulatory programs under the CWA as well as all of the other environmental statutes administered by the Agency. The WQS TAS rule has proven very effective in ensuring that applicant tribes satisfy statutory TAS criteria and are prepared to administer WQS programs under the Act. It thus served as a useful model for this proposed TAS rule.

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

The first criterion for TAS would require the tribe to be federally recognized by the U.S. Department of the Interior (DOI) and meet the definitions in §131.3(k) and (l). The tribe may

address the recognition requirement either by stating that it is included on the list of federally recognized tribes published periodically by DOI, or by submitting other appropriate documentation (*e.g.*, if the tribe is federally recognized but is not yet included on the DOI list). The definition of “tribe” in §131.3(l), along with requiring federal recognition, additionally requires that the tribe is exercising governmental authority over a Federal Indian reservation. “Federal Indian reservation” is defined in §131.3(k) as “all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation.” (See further discussion of the term “reservation” in section I B. of this preamble.). The governmental authority and reservation aspects of these definitions would be addressed in the tribe’s application, including as part of its descriptive statements that it currently carries out substantial governmental duties and powers over a defined area, and that it has authority to regulate water quality over a reservation.

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

To address the second criterion, the tribe would be required to submit a descriptive statement demonstrating that the tribal governing body is currently carrying out substantial

governmental duties and powers over a defined area. The descriptive statement should: (1) describe the form of tribal government; (2) describe the types of essential governmental functions currently performed, such as those listed above; and (3) identify the sources of authorities to perform these functions (*e.g.*, tribal constitutions and codes).

The third criterion, concerning tribal authority, means that a tribe seeking TAS for purposes of the CWA Section 303(d) Impaired Water Listing and TMDL Program must adequately demonstrate authority to manage and protect water resources within the borders of the tribe's reservation. To verify authority and satisfy the third criterion of the proposed rule, a tribe would be required to include a statement signed by the tribal legal counsel, or an equivalent official, explaining the legal basis for the tribe's regulatory authority, and appropriate additional documentation (*e.g.*, maps, tribal codes and ordinances).

In promulgating prior CWA TAS regulations, EPA took an initial cautious approach that required tribes applying for eligibility to administer regulatory programs under the statute to demonstrate their inherent tribal authority over the relevant regulated activities on their reservations. *See, e.g.*, 56 FR at 64877-81. This included a demonstration of inherent regulatory authority over the activities of non-tribal members on lands they own in fee within a reservation under the principles of *Montana v. United States*, 450 U.S. 544 (1981), and its progeny. *Montana* held that, absent a federal grant of authority, tribes generally lack inherent jurisdiction over nonmember activities on nonmember fee land, but retain inherent civil jurisdiction over nonmember activities within the reservation where (i) nonmembers enter into "consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements" or (ii) "... [nonmember] conduct threatens or has some direct effect on the

political integrity, the economic security, or the health or welfare of the tribe.” *Montana*, 450 U.S. at 565-66.

In addressing the second exception of *Montana* regarding the effects of nonmember conduct, EPA has previously described the Agency’s operating approach to require a showing that the potential impacts of regulated activities on the tribe are serious and substantial. 56 FR at 64878. EPA also explained that the activities regulated under the various environmental statutes, including the CWA, generally have serious and substantial potential impacts on human health and welfare. *Id.* EPA described the Agency’s expert assessment regarding the critical importance of water quality management to self-government and also explained that because of the mobile nature of pollutants in surface waters and the relatively small size of water bodies on reservations, it would be very likely that any water quality impairment on non-Indian fee land within a reservation would also impair water quality on tribal lands. *Id.* at 64878-79. EPA stated that its generalized findings regarding the relationship of water quality to tribal health and welfare would supplement the factual showing tribes would make in applying for TAS. *Id.* EPA reiterates the generalized statutory and factual findings set forth in those prior TAS rulemakings and believes they apply equally to TAS applications for the CWA Section 303(d) Program. As discussed below, EPA has also separately proposed to revise its interpretation of the CWA tribal provision by conclusively determining that Congress intended to delegate authority to eligible tribes to regulate their entire reservations under the CWA irrespective of land ownership. If and when this revised interpretation is finalized, it will be applied in reviewing any TAS application submitted under the regulations proposed today. Unless and until that revised interpretation is finalized, however, EPA will continue to evaluate TAS applications consistent with the Agency’s current approach and will continue to apply the generalized findings set forth in prior CWA TAS

rulemakings in making case-by-case determinations regarding tribes' inherent regulatory authority.

In prior CWA TAS promulgations, EPA recognized that there was significant support for the view that Congress had intended to delegate authority to eligible Indian tribes to administer CWA regulatory programs over their entire reservations, irrespective of land ownership, and EPA expressly stated that the issue of tribal authority under the CWA remained open for further consideration in light of additional congressional or judicial guidance. *See, e.g.*, 56 FR at 64878-81. On August 7, 2015, EPA published in the *Federal Register* a proposed rule to reinterpret the CWA tribal provision as including such an express delegation of authority by Congress. 80 FR 47430. If EPA finalizes that reinterpretation, applicant Indian tribes would no longer be required to demonstrate inherent authority to regulate their reservation waters under the CWA. Among other things, tribes would thus no longer be required to meet the test established in *Montana v. United States*, 450 U.S. 544 (1981), and its progeny with regard to exercises of inherent tribal regulatory authority over nonmember activity. *Id.* Instead, a tribe would be able to rely on the congressional delegation of authority included in section 518 of the statute as the source of authority to administer CWA regulatory programs over its entire reservation as part of its legal statement.

The proposed TAS rule for the CWA Section 303(d) Impaired Water Listing and TMDL Program is intended to provide appropriate TAS application and review procedures irrespective of which interpretation of tribal authority under the Act applies. As explained in EPA's proposed reinterpretation, EPA's existing TAS regulations – including 40 CFR 131.8, upon which this proposed rule is modeled – accommodate either interpretation of tribal authority under the CWA and provide appropriate application procedures to ensure that relevant jurisdictional information

is provided to EPA and made available for comment. 80 FR 47430. EPA thus proposes to establish the basic TAS application and review procedures proposed today notwithstanding that the proposed reinterpretation remains pending. Once these rules are finalized, EPA will review any TAS applications for the CWA Section 303(d) Program in accordance with the interpretation of CWA tribal jurisdiction that applies at the time.

The fourth criterion would require that the tribe, in the Regional Administrator's judgment, be reasonably expected to be capable of administering an effective CWA Section 303(d) Impaired Water Listing and TMDL Program. To meet this requirement, tribes would either: (1) show that they have the necessary management and technical skills, or (2) submit a plan detailing steps for acquiring the necessary management and technical skills. When considering tribal capability, EPA 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.

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

Consistent with EPA's other TAS regulations, the proposed rule also provides that where a tribe has previously qualified for TAS for purposes of a different EPA program, the tribe is only required to provide information that has not been submitted as part of a prior TAS application.

To facilitate review of tribal applications, EPA would request that a tribal application inform EPA whether the tribe has been approved for TAS or deemed eligible to receive authorization for any other EPA program. See 59 FR at 64340.

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

VI. What Special Circumstances May Exist Regarding Qualification for TAS for the CWA Section 303(d) Impaired Water Listing and TMDL Program?

There could be rare instances where special circumstances limit or preclude a particular tribe's ability to be authorized to administer the 303(d) Program over its reservation. For example, there could be a separate federal statute establishing unique jurisdictional arrangements for a specific state or a specific reservation that could affect a tribe's ability to exercise authority under the CWA. It is also possible that provisions in particular treaties or tribal constitutions could limit a tribe's ability to exercise relevant authority.¹¹

¹¹ EPA takes no position in this proposal regarding whether any particular tribe or Indian reservation is subject to any potential impediment relating to authority to take on the 303(d) Program. Any such issue would need to be addressed on a case-by-case basis and with the benefit of a full record of relevant information that would be developed during the processing of a particular TAS application. To the extent EPA is ever called upon to make a decision regarding this type of issue, such a decision would be rendered in the context of EPA's final action on a specific TAS application, and any judicial review of that decision would occur in that context.

The application requirements of §130.16 (a) and (b) would require tribes to submit a statement of their legal counsel (or equivalent official) describing the basis for their assertion of authority. The statement can include copies of documents such as tribal constitutions, by-laws, charters, executive orders, codes, ordinances, and resolutions. If EPA finalizes this proposed action, the requirement for a legal counsel's statement would ensure that applicant tribes appropriately describe the bases of their authority and address any special circumstances regarding their assertion of authority to administer the 303(d) Program. The proposed rule would provide an appropriate opportunity for "appropriate governmental entities" (*i.e.*, states, tribes and other federal entities located contiguous to the reservation of the applicant tribe) to comment on an applicant tribe's assertion of authority and, among other things, inform EPA of any special circumstances that they believe could affect a tribe's ability to administer the 303(d) Program.

EPA is also aware that section 10211(b) of the Safe, Accountable, Flexible, Efficient Transportation Equity Act of 2005 ("SAFETEA"), Public Law 109-59, 119 Stat. 1144 (August 10, 2005) established a unique TAS requirement with respect to Indian tribes located in the State of Oklahoma. Under section 10211(b) of SAFETEA, tribes in Oklahoma seeking TAS under a statute administered by EPA for the purpose of administering an environmental regulatory program must, in addition to meeting applicable TAS requirements under the relevant EPA-administered environmental statute, enter into a cooperative agreement with the state that is subject to EPA approval and that provides for the tribe and state to jointly plan and administer program requirements. This requirement of SAFETEA applies apart from, and in addition to, existing TAS criteria, including the TAS criteria set forth in section 518 of the CWA. EPA's proposal relates solely to the CWA TAS requirement; it would thus have no effect on the separate requirement of section 10211(b) of SAFETEA.

VII. What Procedure Would EPA Follow in Reviewing a Tribe's TAS Application?

A. Notice to Appropriate Governmental Entities

The proposed EPA review procedure, included in §130.16(c), specifies that the Regional Administrator, following receipt of tribal applications, would process such applications in a timely manner. EPA would promptly notify the tribe that the complete application has been received. Within 30 days after receipt of a tribe's complete TAS application for 303(d), EPA would provide notice to appropriate governmental entities (*i.e.*, states, tribes, and other federal entities located contiguous to the reservation of the applicant tribe) of the complete application and the substance of and basis for the tribe's assertion of authority over reservation waters, and would provide a 30 day opportunity to comment to EPA on the tribe's assertion of authority. *See, e.g.*, 56 FR at 64844. EPA would also provide, consistent with prior practice, sufficiently broad notice (*e.g.*, through local newspapers, electronic media, or other appropriate media) to inform other potentially interested entities of the applicant tribe's complete application and of the opportunity to provide relevant information regarding the tribe's assertion of authority. As described below, this aspect of EPA's review procedure would apply unless such process would be duplicative of a notice and comment process already performed in connection with the same tribe's prior application for TAS for another CWA regulatory program.

B. Avoidance of Duplicative Notice and Comment Procedures

EPA is proposing to include provisions intended to help avoid unnecessary and wasteful duplication of the notice and comment procedures described in VII A. Specifically, EPA proposes that, where a tribe has previously qualified for TAS for a CWA regulatory program¹²

¹² Specifically, the CWA Section 303(c) WQS Program, CWA Section 402 NPDES Program or Sewage Sludge Management Program, or CWA Section 404 Dredge and Fill Permit Program.

and EPA has provided notice and an opportunity to comment on the tribe's assertion of authority as part of its review of the prior application, no further notice would be provided with regard to the same tribe's application for the 303(d) Program, unless the section 303(d) TAS application presents different jurisdictional issues or significant new factual or legal information relevant to jurisdiction to the Regional Administrator. Proposed §130.16(c)(4). This proposed approach would apply to all tribes that have previously obtained TAS for the CWA Section 303(c) WQS Program, CWA Section 402 NPDES Program or Sewage Sludge Management Program, or CWA Section 404 Dredge and Fill Permit Program.

Where different jurisdictional issues or information are not present, additional notice and comment are likely to be duplicative of the process already undertaken during EPA's review of the prior TAS application. Under these circumstances, the proposed rule would avoid such duplication of efforts by authorizing the relevant EPA Regional Administrator to process a TAS application for the 303(d) Program without a second notice and comment process.

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

EPA requests comment on its proposed approach or alternative approaches. In addition, we request comment on whether the §130.16(c)(4) notice and comment exemption should instead be available only prospectively – *i.e.*, only where the applicant tribe obtains TAS for the CWA Section 303(c) WQS Program, CWA Section 402 NPDES Program or Sewage Sludge Management Program, or CWA section 404 Dredge and Fill Permit Program *after* this proposed rule is finalized (and, again, only if different jurisdictional issues or significant new factual or legal information relevant to jurisdiction are not present in the tribe’s 303(d) TAS application). One practical result of this alternative approach would be that if one of the 50 tribes that has previously obtained TAS for the CWA Section 303(c) WQS Program were to apply for TAS for the 303(d) Program after this proposed rule is finalized, the notice and comment process would be required.

C. Treatment of Competing or Conflicting Claims

Where a tribe’s assertion of authority is subject to a competing or conflicting claim, the proposed procedures provide that the Regional Administrator, after due consideration and in consideration of any other comments received, would determine whether the tribe has adequately demonstrated authority to regulate water quality on the reservation for purposes of the 303(d) Program. Where the Regional Administrator concludes that a tribe has not adequately demonstrated its authority with respect to an area in dispute, then tribal assumption of the CWA Section 303(d) Impaired Water Listing and TMDL Program may be restricted accordingly. If a dispute is focused on a limited area, this would not necessarily delay EPA’s decision to treat the tribe in a similar manner as a state for non-disputed areas.

This proposed procedure does not imply that states, tribes, other federal agencies, or any other entity have veto power over tribal TAS applications. Rather, it is intended to assist EPA in

gathering information that may be relevant to the Agency's determination whether the applicant tribe has the necessary authority to administer the CWA Section 303(d) Impaired Water Listing and TMDL Program. EPA would not rely solely on the assertions of a commenter who challenges a tribe's assertion of authority, but rather make an independent evaluation of the tribal showing.

D. EPA's Decision Process

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

Where the Regional Administrator determines that a tribal TAS application satisfies the requirements of proposed §130.16(a) and (b), the Regional Administrator would promptly notify the tribe that the tribe has qualified for TAS for the CWA Section 303(d) Impaired Water Listing and TMDL Program. A decision by the Regional Administrator that a tribe does not meet the requirements for TAS for purposes of the CWA Section 303(d) Impaired Water Listing and TMDL Program would not preclude the tribe from resubmitting the application at a future date. If the Regional Administrator determines that a tribal application is deficient or incomplete, EPA will identify such deficiencies and gaps so the tribe can make changes as appropriate or necessary.

VIII. What is an Example of a Stepwise Approach for Tribes Applying for TAS Authority for CWA Programs?

EPA expects that the tribes most likely to be interested in applying for TAS for the 303(d) Program will be those that also have TAS for CWA section 303(c) and have applicable WQS for their reservation waters. EPA has taken final action approving TAS for WQS for 50 tribes. Forty-two of those tribes have EPA-approved WQS, and one tribe without TAS for WQS has federally promulgated WQS.¹³ By virtue of their involvement in the WQS Program, these tribes will already have demonstrated an interest in directly administering certain fundamental elements of the CWA as well as the resources and capacity to do so. Since applicable WQS are a foundation of the approach to protecting water quality under the CWA, establishing EPA-approved/EPA-promulgated WQS for reservation water bodies will be an important first step for tribes interested in protecting and restoring their reservation waters. As tribes gain experience developing and administering applicable WQS on their reservations, they may become interested in greater involvement in additional programs – such as the 303(d) Program – designed to ensure that applicable WQS are achieved. Obtaining TAS to implement a CWA Section 303(d) Impaired Water Listing and TMDL Program for its reservation waters is one potential next step for interested tribes. Under section 303(d), a tribe would use applicable WQS as the basis for identifying impaired waters and calculating TMDLs, which quantify the maximum amount of a pollutant that a water body can receive and still meet the WQS.

Table 1, below, is an example of one step-wise approach that tribes may follow in developing their water quality programs under the CWA and ultimately seeking TAS for the CWA Section 303(d) Impaired Water Listing and TMDL Program. This is only one possible

¹³ A chart listing EPA approvals for tribes to administer a WQS program, and EPA's approvals of tribes' WQS is available at <http://water.epa.gov/scitech/swguidance/standards/wqslibrary/approvable.cfm>.

approach, and, under this approach, not all the identified steps would need to be taken sequentially (*e.g.*, some could be completed in parallel).

Table 1. Example of a Step-Wise Approach to Regulatory Activities for Tribes Interested in Applying for TAS Authority to Implement the CWA Section 303(d) Impaired Water Listing and TMDL Program	
Step 1: Tribe seeks TAS for CWA 303(c): WQS	<ul style="list-style-type: none"> • Tribe decides to evaluate and address water quality within its reservation by establishing WQS under the CWA • Tribe identifies and inventories reservation water bodies • Tribe applies for TAS for WQS
Step 2: Tribe Adopts WQS	<ul style="list-style-type: none"> • Tribe develops its water quality goals • Tribe drafts WQS for EPA approval • EPA approves tribal WQS
Step 3: Tribe seeks TAS for CWA Section 303(d): Impaired Water Listing and TMDL Program	<ul style="list-style-type: none"> • Tribe decides to assess water quality conditions (<i>i.e.</i>, comparing water quality monitoring data and information against applicable WQS), identify impaired waters, and develop TMDLs • Tribe applies for TAS to implement a 303(d) program under the CWA • EPA approves TAS for 303(d)
Step 4: Tribe implements the CWA Section 303(d) Impaired Water Listing and TMDL Program	<p>Tribe conducts activities required by 40 CFR 130.7, including but not limited to:</p> <ul style="list-style-type: none"> • Assembles and evaluates all existing and readily available water quality-related data and information on reservation water bodies (data may have been gathered by an established, comprehensive monitoring program) • Develops section 303(d) list of impaired waters (that is, reservation water bodies that do not meet or are not likely to meet applicable WQS) • Prioritizes list of impaired water bodies for TMDL development • Submits section 303(d) list to EPA for approval • Develops TMDLs for listed waters • Submits TMDLs to EPA for approval
Step 5: Tribe implements TMDLs (not required by 40 CFR	<ul style="list-style-type: none"> • Carry out watershed-specific plans to implement TMDLs • Monitors TMDL implementation and effectiveness

130.7)	
Step 6: Tribe seeks other CWA regulatory programs	Possibilities include: <ul style="list-style-type: none"> • CWA Section 402 NPDES Program • CWA Section 405 Sewage Sludge Management Program • CWA Section 404 Dredge and Fill Permit Program

The proposed rule does not require tribes to have applicable WQS in place on their reservations prior to applying for TAS eligibility for the 303(d) Program. Under section 303(d), however, states and authorized tribes must develop lists of impaired waters and TMDLs based on applicable WQS. CWA sections 303(d)(1) and (2). Although EPA expects that the tribes most likely to be interested in administering the 303(d) Program are those that do have such WQS, the proposed rule would not preclude other tribes from obtaining TAS status for section 303(d) purposes and thus ensuring that TAS eligibility requirements are satisfactorily addressed prior to expending resources on developing WQS. This approach would also allow tribes, at their discretion, to streamline and minimize expenditures on TAS procedures by combining TAS requests for sections 303(c) and 303(d) into a single application. Since authorized tribes must list waters and develop TMDLs based on applicable WQS, however, EPA also specifically invites public comment on whether applicable WQS should instead be a prerequisite for obtaining TAS for the CWA Section 303(d) Impaired Water Listing and TMDL Program.

The proposed rule also does not require tribes seeking TAS eligibility for the 303(d) Program to have previously obtained EPA approval for TAS for the WQS Program. EPA specifically invites public comment on whether a tribe applying for TAS for the 303(d) Program should instead be required to have already received EPA approval – or at least simultaneously apply – for TAS for CWA Section 303(c) WQS Program.

IX. What Financial and Technical Support Is Available from EPA to Tribes as They Choose to Develop and Implement a CWA Section 303(d) Impaired Water Listing and TMDL Program?

Pre-proposal input from tribes indicates that resources and funding available for TMDL development will be important considerations for tribes in deciding whether to apply for TAS for CWA section 303(d) purposes. The Impaired Water Listing and TMDL Program is not a grant program, and no federal grant funds are available directly from the Impaired Water Listing and TMDL Program. A tribe may be able to use its General Assistance Program (GAP) Grant under the Indian Environmental General Assistance Program Act to support development of a section 303(d) program and capacity to implement such a program, but GAP funds are not available for ongoing program implementation. Tribes interested in this approach would need to contact their Regional GAP Program coordinator. In addition, existing sources of tribal funding such as CWA section 319 grants and section 106 grants are already tightly constrained and may not be available to support additional work under section 303(d). Some tribes that receive CWA funding may be able to identify program activities that could also support 303(d) activities (*e.g.*, assessing water quality to develop impaired water lists, developing a nonpoint source watershed plan that would also implement the nonpoint source portions of a TMDL), but the availability of such opportunities is uncertain.

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

that funding will be available for a tribe developing or implementing the 303(d) Program, and a tribe considering whether to apply to administer the Program will need to carefully assess its priorities and the availability of EPA assistance or other resources.

X. Statutory and Executive Order Reviews

Additional information about these statutes and Executive Orders can be found at <http://www2.epa.gov/laws-regulations/laws-and-executive-orders>.

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

This action is not a significant regulatory action and was, therefore, not submitted to the Office of Management and Budget for review.

B. Paperwork Reduction Act (PRA)

EPA has submitted the information collection requirements in this proposed legislative rule to OMB for approval under the PRA. The Information Collection Request (ICR) document that EPA prepared has been assigned EPA ICR number 2515.01. You can find a copy of the ICR in the docket for this proposed rule, and it is briefly summarized here. If EPA finalizes the proposed rule, this ICR would supplement the current information collection requirements in EPA ICR number 1560.10 (National Water Quality Inventory Reports (Renewal)) and address the tribes' CWA Section 303(d) Impaired Water Listing and TMDL TAS application and 303(d) Program implementation burden, as well as EPA's burden for reviewing the tribes' applications and 303(d) Program submittals. OMB approved the existing ICR number 1560.10 in December 2012.

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

Tribes that receive TAS approval would then need to implement the requirements of section 303(d) to list impaired waters, set TMDL priorities, and develop TMDLs. EPA estimates that such 303(d) Program implementation burden would entail 86,664 staff hours for the estimated 12 tribes. ICR 1560.10 already includes the estimated burden for states to implement section 303(d), but does not include estimates for tribes. Therefore, the ICR for this proposed rule includes tribal section 303(d) implementation burden as well as the TAS application burden described in the previous paragraph.

As discussed in section V, EPA's regulations require that a tribe seeking to administer a CWA regulatory program must submit information to EPA demonstrating that the tribe meets the statutory criteria described in section V. EPA requires this information in order to determine that the tribe is eligible to administer the program. Similarly, EPA requires the information – in this case, the lists of impaired waters and the TMDLs – from the authorized tribes once they begin implementing the program.

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

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

Estimated number of respondents: The total potential pool of respondents is the over 300 tribes with reservations. Although there are 566 federally recognized Indian tribes in the United States, the CWA allows only those tribes with reservations to apply for authority to administer

programs. EPA estimates that an average of 12 tribes per year would apply under this proposed rule, and an average of 12 tribes per year would implement the 303(d) Program over the three year period of the ICR.

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

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

This estimate may overstate actual burden because EPA used a conservatively high estimate of the annual rate of tribal applications. This estimate was used to ensure that the ICR does not underestimate tribal burden, given that EPA used a simplifying steady-state assumption in estimating annualized tribal application costs. Also, EPA used conservatively high estimates of 303(d) implementation burden (i.e., 303(d) listing and number of TMDLs that tribes would submit to EPA annually), as further described in the draft ICR number 2515.01.

Total estimated cost: \$4,185,269, including staff salaries and the cost of support contractors for an annual average of 12 tribes to apply for TAS and implement the 303(d) Program. This action does not entail capital or operation and maintenance costs.

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

Submit your comments on the Agency's need for this information, the accuracy of the provided burden estimates and any suggested methods for minimizing respondent burden to EPA using the docket identified in the **ADDRESSES** section at the beginning of this proposed rule. You may also send your ICR-related comments to OMB's Office of Information and Regulatory Affairs via email to oir-submissions@omb.eop.gov, Attention: Desk Officer for EPA. Since OMB is required to make a decision concerning the ICR between 30 and 60 days after receipt, OMB must receive comments no later than **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. EPA will respond to any ICR-related comments in the final rule.

C. Regulatory Flexibility Act (RFA)

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

D. Unfunded Mandates Reform Act (UMRA)

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

E. Executive Order 13132: Federalism

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

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

In the spirit of Executive Order 13132, and consistent with EPA policy to promote communications between EPA and state and local governments, EPA consulted with state associations and representatives of state governments to obtain meaningful and timely input for consideration in this proposal. By letter dated September 19, 2014, EPA invited 10 national and regional state associations to an October 1, 2014, informational meeting at EPA in Washington, D.C.¹⁴ As a result of this meeting and other outreach, EPA participated in two follow-on meetings with a subset of these associations and their members as well as certain individual states during the month of October 2014. Records of these meetings and copies of written comments and questions submitted by states and state associations are included in the docket for this proposed rule.

Some participants expressed interest in: (1) the nature of comments received from tribes during the pre-proposal tribal consultation and coordination (April 8 – June 6, 2014); (2) where they could find the list of tribes having TAS for the WQS Program; (3) whether the TAS process for CWA Section 303(d) Impaired Water Listing and TMDL Program would be consistent with other TAS processes; and (4) whether there is a process in place to consult with states where a tribe applies for TAS for 303(d). Some states also had questions about issues unique to their situations. EPA considered this input in developing the proposed rule, particularly in developing

¹⁴ The ten associations were: the National Governors Association, the National Conference of State Legislatures, the Council of State Governments, the Western Governors' Association, the Southern Governors' Association, the Midwestern Governors Association, the Coalition of Northeastern Governors, the Environmental Council of the States, the Association of Clean Water Administrators, and the Western States Water Council.

sections V to IX. EPA specifically solicits additional comment on this proposed action from state officials.

F. Executive Order 13175: Tribal Consultation and Coordination

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

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

EPA initiated a tribal consultation and coordination process for this action by sending a "Notification of Consultation and Coordination" letter on March 28, 2014, to all 566 federally-recognized tribes. The letter invited tribal leaders and designated consultation representative(s) to participate in the tribal consultation and coordination process. EPA held a webinar concerning this matter for tribal representatives on April 29, 2014. A total of 46 tribal representatives participated. Additionally, tribes and tribal organizations sent five comment letters to EPA. Records of this webinar and copies of written comments and questions submitted by tribes and intertribal consortia are included in the docket for this proposed rule.

Tribal comments generally supported EPA's plan to propose a TAS rule for the 303(d) Program. Some comments expressed the need for additional financial and technical support as tribes obtain TAS for the CWA Section 303(d) Impaired Water Listing and TMDL Program.

EPA considered the tribal comments in developing this proposal, and intends to remain sensitive to tribal resource issues in its budgeting and planning process. However, EPA cannot assure or assume that additional funding will be available for a tribe developing or implementing the 303(d) Program. A tribe choosing to administer such programs will need to carefully weigh its priorities and any available EPA assistance as described in section IX above.

EPA specifically solicits additional comment on this proposed action from tribal officials.

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

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

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

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

I. National Technology Transfer and Advancement Act

This rulemaking does not involve technical standards.

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

The proposed rule would not have potential to cause disproportionately high and adverse human health or environmental effects on minority, low-income, or indigenous populations. This proposed rule would have no direct impacts on human health or the environment. The proposed

rule would affect processes and information collection only. The proposed rule would put in place the procedures interested tribes would follow to seek TAS for the CWA Section 303(d) Impaired Water Listing and TMDL Program. The action is likely to result in the collection of information or data that could be used to assess potential impacts on the health or environmental conditions in Indian country (see sections III and IV). As described in sections III and IV, above, under CWA section 303(d), authorized tribes would be required to develop lists of impaired waters, submit these lists to EPA, and develop TMDLs for pollutants causing impairments in the waters on the 303(d) lists. TAS for 303(d) would provide authorized tribes the opportunity to participate directly in protecting their reservation waters through the Section 303(d) Impaired Water Listing and TMDL Program, as Congress intended through CWA section 518(e). EPA also expects this proposed rule would advance the goals of the CWA as interested tribes apply for TAS to administer the CWA Section 303(d) Impaired Water Listing and TMDL Program for reservation water bodies.

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

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

List of Subjects in 40 CFR Part 130

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

Dated: January 6, 2016.

Gina McCarthy,
Administrator.

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

PART 130 – WATER QUALITY PLANNING AND MANAGEMENT

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

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

2. Add §130.16 to read as follows:

§130.16 Treatment of Indian Tribes in a similar manner as States for purposes of section 303(d) of the Clean Water Act.

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

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

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

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

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

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

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

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

(i) Describe the form of the tribal government;

(ii) Describe the types of governmental functions currently performed by the tribal governing body such as, but not limited to, the exercise of police powers affecting (or relating to) the health, safety, and welfare of the affected population, taxation, and the exercise of the power of eminent domain; and

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

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

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

(ii) A statement by the tribe's legal counsel (or equivalent official) that describes the basis for the tribe's assertion of authority and may include a copy of documents such as tribal constitutions, by-laws, charters, executive orders, codes, ordinances, and/or resolutions that support the tribe's assertion of authority; and

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

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

(i) A description of the Indian tribe's previous management experience that may include the administration of programs and services authorized by the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450, *et seq.*), the Indian Mineral Development Act (25 U.S.C. 2101, *et seq.*), or the Indian Sanitation Facility Construction Activity Act (42 U.S.C. 2004a);

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

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

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

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

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

(c) Procedure for processing a tribe's application. (1) The Regional Administrator shall process an application of a tribe submitted pursuant to paragraph (b) of this section in a timely manner. The Regional Administrator shall promptly notify the tribe of receipt of the application.

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

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

(ii) Be provided to all appropriate governmental entities.

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

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

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

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

- (i) The date EPA approves the tribe's TAS application pursuant to this section or
- (ii) The date EPA-approved or EPA-promulgated water quality standards become effective for the tribe's reservation waters.

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