

Tribal Treatment in a Similar Manner
as States (TAS) for the CWA 303(d)
Program
Presentation at the National 303(d)
Training Workshop - May 2019

Jim Havard, Chief
Watershed Branch
EPA Office of Water
havard.james@epa.gov

Overview of Presentation

- Summary of the final Clean Water Act section 303(d) TAS Rule

- Background on the 303(d) Program
 - Impaired waters listing
 - Total Maximum Daily Loads (TMDLs)

- Elements of CWA 303(d) TAS
 - Procedures for Tribes to apply for 303(d) TAS
 - EPA procedures for reviewing 303(d) TAS applications

- EPA post-rule Activities

- Discussion/Questions

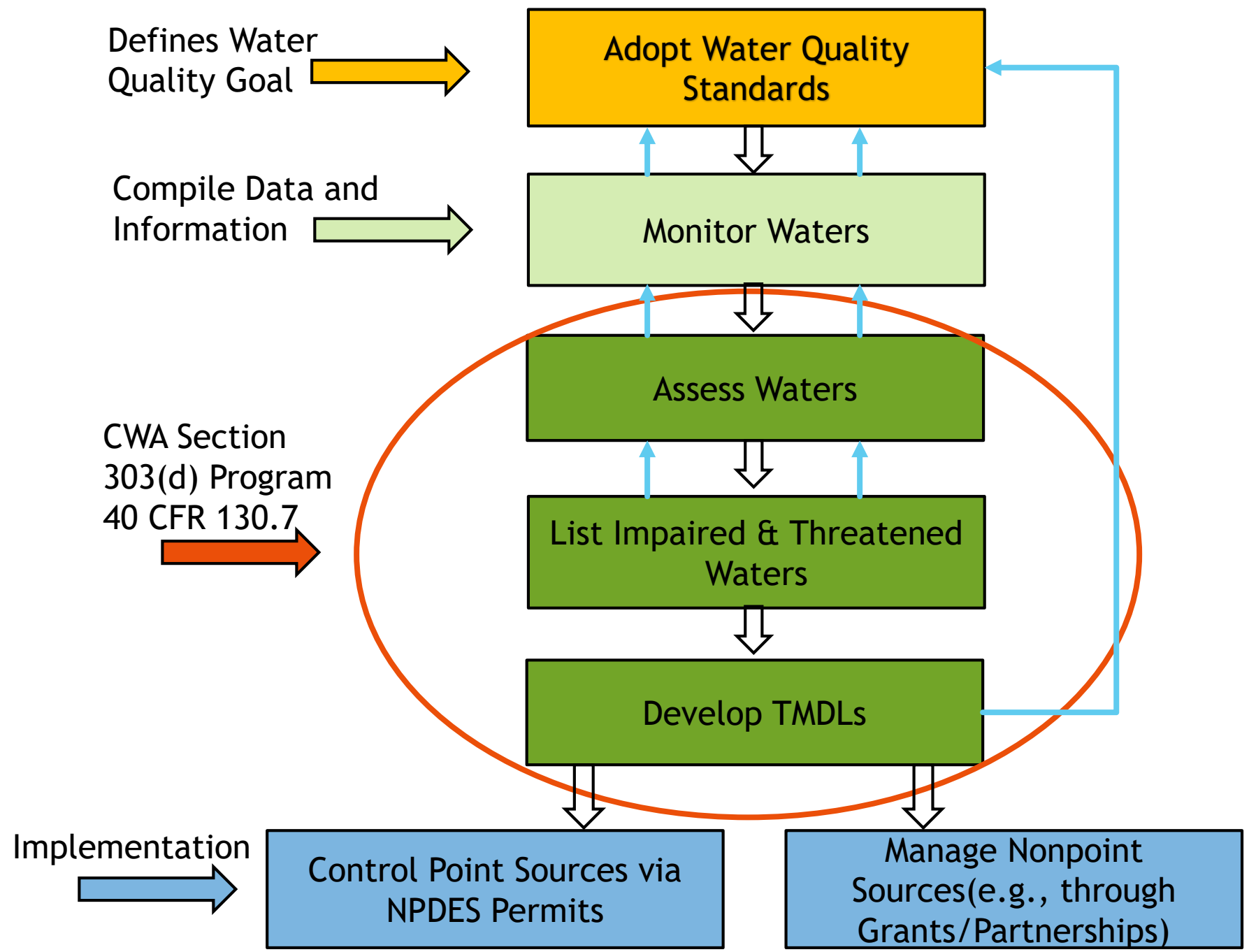
303(d) TAS Rule Overview

On September 26, 2016, EPA published a final rule to establish a process for tribes to apply to EPA for authority to establish lists of impaired waters and TMDLs pursuant to section 303(d) of the CWA. See 81 FR 2791. Key elements in rule and preamble:

- Responsibilities tribes would have under CWA 303(d)
- Regulatory procedures for a tribe to apply for 303(d) TAS
- Regulatory procedures for EPA to review a TAS application
- Expectations regarding water quality standards (WQS) and WQS TAS for tribes seeking 303(d) TAS
- Availability of EPA support for tribes seeking 303(d) TAS
- Special circumstances regarding qualification for TAS for the 303(d) Program

Before I talk in more detail about 303(d) TAS, here are key points about the CWA 303(d) Program

Water Quality Based Approach of the Clean Water Act



How are waters placed on a 303(d) list?

Listing Process

Monitoring

- Collect and evaluate monitoring data to determine condition of the waterbody.
- Assemble all readily available water quality data and information.

Assessment

- Use assessment methodologies and procedures to determine whether waters are impaired.
- Tribes with TAS for 303(d) would use (or develop) assessment methodologies consistent with their WQS.

Listing

- Develop a list of impaired waters every two years, solicit public comment on draft lists, and submit final lists to EPA.
- A tribe's first list is due to EPA the next listing cycle that is at least 24 months from the later of (1) the date the tribe's TAS application is approved or (2) the date EPA approved or EPA promulgated WQS for the tribe's waters are effective.

What are the roles for 303(d)-authorized tribes and EPA in listing?

Authorized Tribes:

- **Identify waters** not meeting WQS based on “*all existing and readily available information.*”
- **Establish priorities** for TMDL development.
- **Develop schedule** of TMDLs to be developed within 2 years.
- **Request and respond** to public comments on their draft 303(d) list.
- **Submit** their final 303(d) list to EPA on April 1st of each even year for review and action.

EPA has 30 days to approve or disapprove the 303(d) list.

- If EPA disapproves a tribe’s list, EPA has 30 days to develop list for the tribe.

Five Integrated Report Categories*

Category	Description
1	All designated uses (DU) met
2	Some, but not all, DUs met
3	Can not determine if any DUs met
4	<u>Impaired/threatened</u> -TMDL not needed
4a	TMDL completed
4b	TMDL alternative
4c	Non-pollutant causes
5	<u>Impaired/threatened</u> by pollutant -TMDL needed

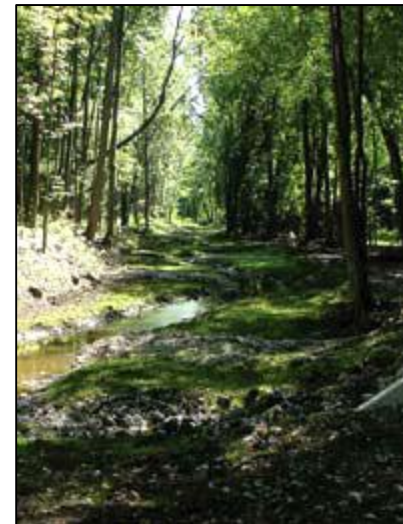
Section 303(d) List

* States may combine their CWA 305(b) and 303(d) reports into a combined or Integrated Report. Tribes are exempt from section 305(b) reporting. However, if a tribe's CWA 106 workplan includes ambient monitoring, EPA encourages those tribes to combine their 106 tribal assessment reports (TAR) and 303(d) lists.

What is a TMDL?

A calculation of the maximum amount of a pollutant that a waterbody can receive and still meet applicable water quality standards, and an allocation of that amount to the pollutant's sources.

The TMDL provides the math and the path for waterbody restoration



TMDL Calculation

$$\text{TMDL} = \sum \text{WLA}_i + \sum \text{LA}_i + \text{MOS}$$

$\sum \text{WLA}_i$: Sum of waste load allocations (point sources)

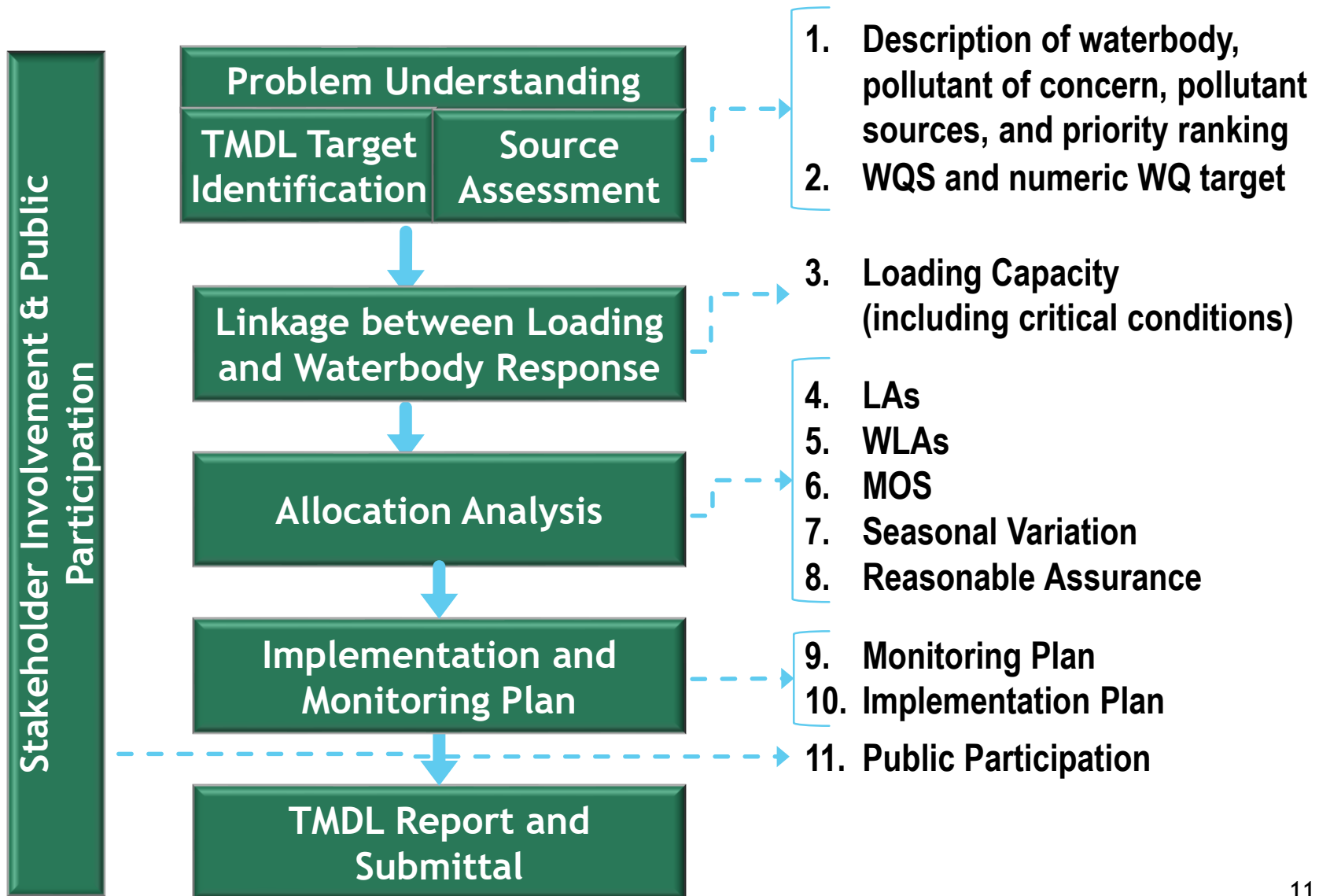
$\sum \text{LA}_i$: Sum of load allocations (nonpoint sources)

MOS: Margin of Safety

Completed for each waterbody/pollutant combination

The TMDL calculation is included in a broader planning document intended to address impairment of waters. TMDL documents often address multiple impairments within a watershed.

TMDL Process



What are the roles for 303(d)-authorized tribes and EPA in TMDLs?

Authorized Tribes:

- **Establish TMDLs** for waters identified in the 303(d) list, in accordance with the priority ranking.
- **Request and respond** to public comments on the TMDL.
- **Submit** the TMDL to EPA for review and action.

EPA has 30 days to approve or disapprove TMDL.

- If EPA disapproves the TMDL, EPA has 30 days to develop the TMDL for the tribe.

Practical benefits of doing TMDLs

- TMDLs identify what sources of a pollutant need to be addressed in order to achieve water quality standards.
- TMDLs also quantify the relative pollutant loadings from various sources needed in order to restore water quality.
- TMDLs allocate pollutant reductions among the sources, taking into account factors such as controllability, regulatory authority, impact on water quality, cost, reasonable assurance, and stakeholder objectives.
- TMDLs provide the waste load allocation for point source discharge permits within the reservation.

In summary, the TMDL helps you understand the water quality problem and chart a path to restore the waterbody.

Additional TMDL Benefits, Examples

- While often time and resource-intensive, TMDL development can provide valuable **information** about the state of a waterbody, sources of impairment, and approaches for allocating loadings
- Initiating the development of a TMDL can also **bring stakeholders together** to discuss the issues, prompt the creation of new tools, innovative thinking and **collaborative** approaches for restoration; this process can even result in addressing the impairment even before the TMDL is finalized
- TMDLs can also allow **cooperation** among governments -- multiple cities, municipalities, States, federal agencies -- to address impairments together in a way that they would not be able to solve independently
- Most importantly, TMDLs can lead to **reducing pollution and meeting water quality uses**

How is a TMDL Used to Reduce Water Pollution?

- National Pollutant Discharge Elimination System (NPDES) permits must include limits consistent with a TMDL's WLA.
- Nonpoint sources are not directly regulated under the CWA. TMDL LAs for nonpoint sources provide guidance to inform actions implemented through a wide variety of programs at the state, tribal, and federal levels.



Vision: A New Framework to Manage the CWA 303(d) Listing and TMDL Program

Key Principles:

- **Flexibility for states & tribes** to set program priorities in the context of their overall water program goals
- **Accountability focused on state/tribal priority waters** addressed with TMDLs, alternative restoration approaches and protection plans, reflecting a state's or tribe's strategic choices
- **Focus on environmental results** through TMDLs, alternative restoration approaches and protection plans
 - Recognition that there are various effective approaches to restore waters
- **Integration** across CWA and other federal/state/tribal programs to achieve results
- **Engagement of public** on priorities and implementation
- **Assessment of water quality**; alignment with **innovations in data systems** to track plans and water quality improvements

Overview for Clean Water Act Section 303(d) TAS

Why Might Tribes Be Interested in TAS for the CWA 303(d) Program?

With TAS for CWA 303(d), tribes would have the opportunity to take the lead role under the CWA in restoring and protecting their reservation waters.

- Authorized tribes would have the lead responsibility for 1) developing lists of impaired waters and establishing priority rankings for waters on the lists (required to be submitted every two years); and 2) establishing TMDLs for those waters.

Tribes would have the lead in setting program priorities in the context of their overall water program goals.

- Consistent with their priorities, tribes could identify waters to be addressed with TMDLs, alternative restoration approaches and protection plans, reflecting a tribe's strategic choices.

Procedures for a 303(d) TAS application:

Four criteria

- 1 • Tribe federally recognized by DOI
- 2 • Governing body carrying out governmental duties and power
- 3 • Authority to manage & protect water resources within reservation borders
- 4 • Be reasonably capable of administering the 303(d) program

Streamlined application: Where a tribe has previously qualified for TAS for a different EPA program, the tribe need only provide the required information not submitted as part of the prior TAS application.

What documentation would a tribe include in its 303(d) TAS application?

1. The tribe is on DOI's list of federally recognized tribes, or other appropriate documentation.
2. Form of tribal government, the types of essential government functions performed, and the sources of authorities to perform those functions (*e.g.*, tribal constitutions and codes).
3. Tribe's authority to regulate water quality, including a statement by the tribe's legal counsel or an equivalent official explaining the legal basis for the tribes regulatory authority.*
4. The tribe has the necessary management and technical skills to administer an effective CWA 303(d) program, or submit a plan detailing steps for acquiring the necessary management and technical skills.

Note: Under EPA's interpretive rule published May 16, 2016, a tribe is able to rely on the Congressional delegation of authority included in CWA section 518 as the source of authority to administer CWA regulatory programs over its entire reservation as part of its legal statement.

What are the expectations regarding Water Quality Standards (WQS) and WQS TAS for 303(d) TAS?

- Tribes are not required to have EPA-approved or EPA-promulgated (*i.e.*, applicable) WQS in place on their reservations in order to obtain TAS eligibility for the 303(d) program.
- WQS are required in order to implement the 303(d) program, *i.e.*, to develop 303(d) lists and TMDLs.
- Tribes may wish to follow a stepwise approach - obtain 303(c) TAS and WQS first - or they may apply concurrently for 303(d) and 303(c) TAS.
- EPA expects that most tribes initially interested in 303(d) TAS will have applicable WQS.

Note that the rule does not require anything of tribes who do not seek 303(d) TAS, and tribes are not required to seek 303(d) TAS.

Example of a Step-Wise Approach for Tribes Interested in Applying for CWA 303(d) TAS



What procedures will EPA follow in reviewing a tribe's 303(d) TAS application?

Application submitted:

- The Regional Administrator (RA) shall notify a tribe of receipt of a completed application.
- The RA shall provide appropriate governmental entities (AGEs) 30 days to comment on the tribe's assertion of authority.

Timing and Engagement with tribe:

- EPA will process TAS applications in a timely manner.
- Each application will present its own legal and factual issues. Thus, there is no specified timeframe for completing EPA's review of a TAS application.
- Additional engagement between the applicant and EPA may be helpful and necessary.

Qualification for 303(d) TAS:

Where the RA determines that a tribe's application satisfies the requirements in the rule, the RA will notify the tribe that it has qualified for TAS for the 303(d) program.

Note: A tribe may re-submit an application if the RA determines that an application is deficient. EPA will seek to identify any deficiencies and gaps so that the tribe may make the appropriate changes.

What is the AGE Notice and Comment Process?

➤ Basic process:

1. Within 30 days of a completed application, EPA will provide notice to AGE's of the tribe's assertion of authority over reservation waters.
2. AGEs will have a 30-day opportunity to comment to EPA on the tribe's assertion of authority.
3. EPA will consider competing or conflicting claims, and any other comments.
4. EPA will determine whether the tribe has adequately demonstrated authority to regulate water quality on the reservation for purposes of the 303(d) Program.

- Streamlined process: Where a tribe obtains TAS for another CWA regulatory program after the effective date of the rule, and the tribe subsequently seeks TAS for the 303(d) Program, no further notice would be required as part of the 303(d) application unless the application presents new or different facts or issues relating to the tribe's jurisdiction.

What funding and technical assistance is available for tribes seeking 303(d) TAS?

The Impaired Waters Listing and TMDL Program is not a grant program. The rule does not provide any specific funding assistance for 303(d) TAS applications or implementation.

- General Assistance Program (GAP) grants may be used to support development of a 303(d) Program and capacity to implement the program, but not for ongoing 303(d) Program implementation.
- CWA section 319 and 106 grants may be used to support 303(d) Program implementation; however, they are already tightly constrained and may not be available to support additional work under 303(d).
- EPA will continue to consider resources for tribes in its budgeting and planning processes.
- EPA encourages tribes that may seek TAS 303(d) authority to contact the EPA Regional office to determine technical assistance needs. EPA is currently assessing tribal training needs, and how to best provide such training.

What Comments did Tribal Governments Submit on the Proposed Rule?

- Comments expressed wide support for proposed rule.
- If a tribe has qualified for TAS for a CWA regulatory program, no further notice of the tribe's assertion of authority should be required for subsequent applications related to 303(d).
- Applicable WQS should/should not be a prerequisite for obtaining TAS for 303(d) (both viewpoints expressed).
- More implementation funds should be made available to tribes.
- EPA should find ways for states and tribes to coordinate in addressing shared waterbodies.

What other issues does the preamble discuss?

- Special Circumstances
 - Certain Federal or state-specific legislation could limit or preclude a particular tribe's ability to be authorized to administer the 303(d) Program over its reservation.
- Impact on/duplication of state and local authority
 - The rule has no effect on the scope of existing CWA programs administered by states; it relates solely to the process for tribes to seek TAS to administer CWA section 303(d) over their reservations.
- Relationship to the 518(e) interpretive rule
 - EPA's revised approach to jurisdiction under section 518 that was announced in the interpretive rule will apply to TAS applications for the 303(d) program. Application of the approach to tribal jurisdiction would occur in the context of EPA's final decision on a particular tribe's TAS application.

EPA Post-Rule Activities in 303(d) area - selected examples

- ▶ EPA TAS Application template (working draft available)
- ▶ Tribal participation at national 303(d) training
- ▶ Attains/assessment tribal pilot
- ▶ CWA Tribal Forum
- ▶ Other Technical assistance

Discussion Topics/Questions

- ▶ Applying for TAS - application template
- ▶ Multijurisdictional issues
- ▶ Assessment/ATTAINS pilot
- ▶ Why would a tribe want to apply for 303(d)?
- ▶ Details on what would be required for a tribe with 303(d)
- ▶ What tools/technical assistance are/will be available/can be developed?
- ▶ Others?