TAS Application Template for Water Quality Standards and Water Quality Certifications

This template is intended to assist interested tribes in applying to EPA for eligibility to be treated in a similar manner as a state (TAS) for the purpose of administering the Clean Water Act (CWA) section 303(c) water quality standards (WQS) and section 401 water quality certification programs. The template provides a simple explanation and organization of relevant language to address the eligibility requirements for TAS approval for these two programs.

The template describes relevant information needed in TAS applications for these programs in light of the May 16, 2016, final interpretive rule *Revised Interpretation of Clean Water Act Tribal Provision*.[1] EPA's issuance of the interpretive rule was a significant streamlining step that eliminated the previous need for a TAS applicant to demonstrate the tribe's inherent authority to regulate surface waters of its reservation. Instead, the revised interpretation described EPA's conclusion that in CWA section 518, Congress has delegated civil authority to eligible tribes to regulate waters throughout their reservations irrespective of who owns the reservation land. This template is principally designed to reflect that reinterpretation, and includes other streamlining features.

This template is a companion to EPA's 2008 TAS Strategy.[2] The 2016 final interpretive rule supersedes any elements of the Strategy that relied on EPA's previous interpretation of CWA section 518 that conflict with the revised interpretation. EPA will update the Strategy at an appropriate time to incorporate the 2016 reinterpretation and appropriate streamlining steps of this template.

Disclaimer

This document is designed to assist applicant tribes in complying with EPA regulations at 40 CFR part 131. It does not impose legally binding requirements on EPA, tribes, or other entities, nor does it confer legal rights or impose legal obligations or responsibilities upon any entity or member of the public. The CWA provisions and EPA regulations described in this document contain legally binding requirements. This document is not itself a regulation, however, nor does it change or substitute for any CWA provision or EPA regulation.

---

[1] See 81 FR 30183 and [HYPERLINK "https://www.epa.gov/wqs-tech/revised-interpretation-clean-water-act-tribal-provision"].

[2] *Strategy for Reviewing Tribal Eligibility Applications to Administer EPA Regulatory Programs,* memorandum from Deputy Administrator Marcus Peacock, January 23, 2008. See [HYPERLINK "https://www.epa.gov/tribal/strategy-reviewing-tribal-eligibility-applications-administer-epa-regulatory-programs-1"],

ED_013266A_00024690-00001

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

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

TEMPLATE FOR TAS APPLICATION – WQS AND WATER QUALITY CERTIFICATION PROGRAMS

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

APPLICATION FOR CLEAN WATER ACT ELIGIBILITY TO ADMINISTER A WATER QUALITY STANDARDS PROGRAM AND A WATER QUALITY CERTIFICATION PROGRAM

The **[enter name of Tribe]** hereby applies under section 518 of the Clean Water Act (CWA) to the U.S. Environmental Protection Agency to become eligible to be treated in a similar manner as a state (TAS) to administer a CWA section 303(c) water quality standards program and CWA section 401 water quality certification program.

1. BACKGROUND [Optional section]

[The Tribe may choose to include this section to provide background information, *e.g.*, Tribal history, Tribal water resources, why the Tribe is applying for TAS for WQS and certifications.]

2. FEDERAL RECOGNITION (40 CFR 131.8(a)(1) and (b)(1))

This Tribe is listed as "**[enter name of Tribe as shown on BIA list]**" in the Secretary of the Interior's list of federally recognized tribes at 81 FR 26826, May 4, 2016 **[check with Regional Office to ensure that this is the most recent citation to use]**.

3. AUTHORITY OVER A FEDERAL INDIAN RESERVATION (40 CFR 131.8(a)(1) and 131.3(l))

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

4. TRIBAL GOVERNANCE (40 CFR 131.8(a)(2) and (b)(2))

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

ED_013266A_00024690-00002

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

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

5. MANAGEMENT AND PROTECTION OF WATER RESOURCES OF THE RESERVATION (40 CFR 131.8(a)(3) and (b)(3))

The water quality standards and water quality certification programs to be administered by the Tribe will assist in managing and protecting water resources within the borders of the Tribe's reservation.

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

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

The surface waters for which the Tribe proposes to establish water quality standards are those surface waters that occur on the reservation areas described in the {map(s), legal description} provided above. **[The Tribe may choose to add the following.]** These include the following named waters {and their tributaries} that occur within those areas: **[Enter list of waters.] [Alternatively, the Tribe may refer to an identification of reservation surface waters submitted to EPA as part of a prior TAS application.]**

6. TRIBAL LEGAL COUNSEL STATEMENT (40 CFR 131.8(b)(3)(ii))

[Note: The Legal Counsel's statement should include any information needed to describe the basis for the Tribe's assertion of authority, pursuant to 40 CFR 131.8(b)(3)(ii). The following are recommended elements to be included.]

[Insert the following if the Tribe chooses to provide the statement in a separate document.] A statement by the Tribe's {legal counsel, or title of equivalent official} providing references to the documents that established the Tribe's reservation lands, and describing the basis of the Tribe's assertion of authority, is provided separately.

The Tribe's reservation areas described in section 5 of the application were established in the following document{s}: **[Insert a list or brief description of the documents – *e.g.*, treaties,**

ED_013266A_00024690-00003

federal statutes, Executive Orders, trust deeds, etc. – that established the reservation areas identified in the map(s) and/or legal description.] [Alternatively, the Tribe may cite this information submitted as part of a prior TAS application.]

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

The basis for the Tribe's assertion of authority under this application is the express congressional delegation of authority to eligible Indian tribes to administer regulatory programs over their reservation contained in section 518 of the Clean Water Act. This authority is described in the U.S. Environmental Protection Agency's final interpretive rule, *Revised Interpretation of Clean Water Act Tribal Provision*, 81 FR 30183, May 16, 2016.

[Insert either Option 6A or Option 6B here – see Instructions]

[Option 6A] There are no limitations or impediments to the Tribe's authority or ability to effectuate the delegation of authority from Congress as described in this application.

[Option 6B] The Tribe is aware of the following issues that {have been, potentially could be} raised concerning the Tribe's authority or ability to effectuate the delegation of authority requested in this application. **[Provide detailed description including relevant citations. As examples, issues might include potential disputes regarding the asserted boundaries of the Tribe's reservation areas and/or other issues that might be asserted to limit or affect the Tribe's ability to effectuate the delegation of authority.]** However, none of these issues will impede the Tribe's authority or ability to effectuate the delegation of authority for the following reasons. **[Provide complete legal analysis]**

7. TRIBAL CAPABILITY

The Tribe is capable of administering effective water quality standards and water quality certification programs, as described below.

The overall organization of the Tribe's government and experience in managing programs, such as environmental or public health programs, is described in **[enter citation/link to previous TAS application or other document(s)]**.

The responsibilities to establish, review, implement and revise water quality standards will be assigned to **[enter name of office, organizational location and brief description of its duties]**. **[See instructions for possible additional information to include.]**

The Tribal entity that will be responsible for conducting water quality certifications under CWA section 401 is **[enter name of office, organizational location and brief description of its duties]**.

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

ED_013266A_00024690-00004

[Option 7A] Experienced staff members are already on board in **[name of office]** and trained to administer the water quality standards and certification programs. This includes **[brief list of position title(s) of staff member(s) who will administer the WQS program]**. **[Provide any brief additional information about the office's or staff members' accomplishments that EPA could use to evaluate the Tribe's capacity for a WQS program.]**

[Option 7B] The Tribe plans to hire and train **[describe staff position(s)]** within the next **[number of months]** to administer the water quality standards and certification programs, using funds from **[identify source]**. **[Provide any brief additional information that EPA could use to evaluate this plan.]**

ED_013266A_00024690-00005

Instructions for Use of Template

COORDINATION WITH EPA

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

Depending on circumstances, more information may be needed than is shown explicitly in this template. EPA's regulation at 40 CFR 131.8(b)(5) provides that the Regional Administrator may require additional documentation to support the tribal application. EPA will be judicious in requesting additional information to avoid unnecessarily delaying the tribal application process.

The Regional Office can assist by verifying in its files the previous application information to which the tribe refers.

HOW TRIBES CAN USE THIS TEMPLATE

Any tribe can use this template to develop a TAS application to administer a CWA section 303(c) water quality standards program and/or a section 401 water quality certification program.[1]

The template will be of most use to tribes that have previously qualified for one or more other EPA programs and that wish to refer to information contained in those previous TAS applications in this new application.[2] The template generally assumes that such prior TAS applications and approvals exist and that certain information from the prior application(s) will be relevant and transferable to the current TAS application for WQS and certifications. If there have been no such prior TAS applications/ approvals, this template may be of limited value because the tribe will need to provide the full information specified in section 131.8.

HOW WILL EPA REVIEW THE TRIBE'S TAS APPLICATION

EPA will review and process a tribe's TAS application in accordance with the regulation at 40 CFR 131.8(c). EPA will consider the information that the tribe provides in its application, which may be based on the structure and information described in the template, and any information in previous TAS applications to which the application refers, in determining whether the tribe qualifies for TAS.

Before making its decision, EPA's regulations require the Regional Office to provide notice of a tribe's assertion of authority over waters included in its TAS application to appropriate governmental entities (states, tribes, and other federal entities located contiguous to the reservation of the tribe applying for TAS) for comment. Consistent with established Agency practice, EPA Regions also provide sufficiently wide notice of an applicant tribe's assertion of authority so as to notify local governments and the local public. See 56 FR 64876, 64884 (December 12, 1991). When requested, the Office of Science and Technology in EPA headquarters can assist the Regional Office by establishing a website on which to post the tribe's application and supporting material to assist with these notification procedures.

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

---

[1] This template is designed for tribes that apply for TAS for both WQS and section 401 programs at the same time, which is usually the case. Section 131.4(c) of EPA's regulations provides that tribes found eligible for TAS for WQS are automatically eligible for the section 401 water quality certification program. Tribes applying for only one of the two programs should consult with the Regional Office, which can assist in adapting use of the template for that purpose.

[2] Section 131.8(b)(6) provides that, in this situation, the tribe that has previously qualified for TAS need only provide the required information which has not been submitted in a previous application. Examples of information that may be transferable from a prior application include descriptions of the tribe's governmental functions, and information demonstrating the boundaries of a reservation and the relevant waters of the reservation.

ED_013266A_00024690-00006

SPECIFIC INSTRUCTIONS FOR USING THE TEMPLATE

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

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

TRIBAL NAME

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

1. BACKGROUND

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

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

2. FEDERAL RECOGNITION

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

The current BIA list, 81 FR 26826, May 4, 2016, is available at [HYPERLINK "https://www.federalregister.gov/articles/2016/05/04/2016-10408/indian-entities-recognized-and-eligible-to-receive-services-from-the-united-states-bureau-of-indian"].

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

3. AUTHORITY OVER A FEDERAL INDIAN RESERVATION

(No additional instructions)

4. TRIBAL GOVERNANCE

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

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

5. MANAGEMENT AND PROTECTION OF WATER RESOURCES

EPA's regulations require a descriptive statement of the applicant tribe's authority to regulate water quality, which should include a map or legal description of the reservation area covered by the application. 40 CFR 131.8(b)(3)(i). The map of the reservation area should be sufficiently detailed and annotated to identify the geographic area of the reservation area(s) over which the tribe asserts authority in the application. Some tribes provide maps based on an official survey by the U.S. Department of the Interior or an official reservation map prepared by the Bureau of Indian Affairs.

Where a written legal description is available, it can be very useful in confirming the legal boundaries of the reservation area(s) covered by the application. If

ED_013266A_00024690-00007

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

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

TAS applications for WQS and water quality certifications can only cover reservation lands. Tribes can seek TAS with respect to water resources pertaining to any type of on-reservation land, including, for example, reservation land held in trust by the United States for a tribe, reservation land owned by or held in trust for a member of the tribe, and reservation land owned by a non-tribal member. Because CWA section 518 delegates civil regulatory authority to eligible tribes over their entire reservations, the map and/or legal description need not distinguish between reservation lands based on land ownership status unless such information would assist in locating referenced landmarks or otherwise might be relevant to a potential issue regarding the tribe's effectuation of the congressional delegation of authority.

Tribes cannot obtain TAS under the CWA for water resources pertaining to any non-reservation land. In some cases, non-reservation land may be entirely surrounded by reservation land. Any such lands that may be physically surrounded by reservation lands, but which themselves are not reservation lands, should be clearly identified and expressly excluded from the application. In addition, lands within reservation areas that are subject to existing jurisdictional disputes should be identified in the map and/or legal description if the tribe is including such lands in its application. To the extent a tribe includes such disputed lands in a TAS application, the application (*e.g.*, the legal counsel statement) should address the dispute and explain why the area is part of the reservation and properly included in the application. EPA recommends discussing such areas with the appropriate EPA Regional office.

EPA's regulations also state that the tribe's descriptive statement of authority should include an identification of the surface waters for which the tribe proposes to establish WQS. 40 CFR 131.8(b)(3)(iii). If the tribe is developing water quality standards, the application may use information from that effort to list the waters.

Please consult with the EPA Regional Office about the appropriate level of detail to provide in maps, legal descriptions, and other relevant information identifying the boundaries of the geographic reservation area(s) and/or waters covered by a TAS application. Because EPA interprets section 518 of the CWA as including a congressional delegation of civil regulatory authority to eligible tribes to regulate water quality on their reservations, the boundaries of the reservation area(s) covered by a TAS application will be a principal jurisdictional issue associated with the tribe's assertion of authority. Providing a sufficiently detailed map and legal description can greatly assist in streamlining the processing of a TAS application and limiting or eliminating potential confusion or requests for additional information by appropriate governmental entities or other commenters. In some situations the level of detail provided may be particularly important in documenting boundaries to address a competing or conflicting claim.

6. TRIBAL LEGAL COUNSEL STATEMENT

General. The statement by the tribe's legal counsel or equivalent official should include any information needed to describe the basis for the Tribe's assertion of authority, pursuant to 40 CFR 131.8(b)(3)(ii). The template suggests specific elements to include. The legal counsel may choose to include any additional information identified in 131.8(b)(3)(ii) that might be

ED_013266A_00024690-00008

useful to EPA in reviewing the tribe's assertion of authority.

Reliance on congressional delegation of authority. Any EPA approval of a TAS application for WQS and certifications after May 16, 2016, must include a determination that the tribe is exercising the authority delegated from Congress in CWA section 518 as part of EPA's finding that the tribe meets the applicable TAS eligibility criteria. Therefore, all TAS applications will need to include the tribe's assertion that it is relying on such delegated authority – as shown in the template.

Selection of Option 6A or 6B. Applications must provide any information about any known or potential legal issues relevant to the exercise of such delegated authority.

- If the tribe is not aware of any issues that could limit or preclude the tribe's ability to accept or effectuate the delegated authority over its reservation, it should use **Option 6A**.
- If there are any such issues, those issues should be described and addressed in the template under **Option 6B**. 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, charters, or similar documents could limit a tribe's ability to exercise relevant authority.

Applications submitted prior to May 16, 2016. The tribe should coordinate with the appropriate EPA Regional Office if it already submitted its TAS application to EPA before May 16, 2016. In such cases, the application may need to be supplemented with an assertion of congressionally delegated authority. Language in the template is suggested for this purpose and may be included in a letter from the tribe supplementing its TAS application. To the extent the application already includes a sufficient assertion of congressionally delegated authority, including a description of any issues affecting the tribe's ability or authority to effectuate the delegated authority, a supplement may not be needed.

In cases where EPA already conducted the appropriate governmental agency (AGE) notice and comment process prior to May 16, 2016, and the tribe subsequently supplements its TAS application to assert congressionally-delegated authority, EPA will need to conduct an additional AGE process to provide notice and an opportunity to comment on the tribe's supplemented assertion of authority.

7. TRIBAL CAPABILITY

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

With regard to the WQS program, the tribe may add (or include a reference to) some history and background of the office or organizational location with the WQS responsibilities to help EPA make the tribal capability determination (e.g. date of creation, experience working with water systems and water quality issues, size and resources of the office).

With regard to CWA section 401 certifications, EPA's regulation at 40 CFR 121.1(e) requires that the "Governor of a State" (or tribal leader, in this case) designate the person or agency responsible for issuing water quality certifications under CWA section 401. For example, some tribes designate the tribal leader as the certifying authority after the environmental office reviews it, while other tribes designate the director of the environmental office as the certifying authority.

ED_013266A_00024690-00009