



## **Frequently Asked Questions and Answers: TAS Approval under the Clean Water Act for Water Quality Standards and Certification Programs for the Shoshone-Bannock Tribes of the Fort Hall Reservation**

On September 5, 2008, the U.S. Environmental Protection Agency (EPA) Region 10 approved the Shoshone-Bannock Tribes for treatment in a similar manner as a State ("TAS") under Section 518 of the Federal Clean Water Act (CWA). The TAS decision means that the Shoshone-Bannock Tribes are eligible to adopt, review, and revise water quality standards pursuant to Section 303(c) of the CWA for all surface waters within the exterior boundaries of the Fort Hall Reservation. They also can issue water quality certifications under Section 401 of the CWA for National Pollutant Discharge Elimination System (NPDES) wastewater discharge permits and any other federal permit or license where there is a discharge to Reservation waters. This authority covers all of the water bodies within the Fort Hall Indian Reservation.

This document provides answers to frequently asked questions about TAS for Indian tribes under the Clean Water Act for water quality standards (WQS) and certification programs. It also provides information on how WQS and certifications are implemented through other CWA programs. More detailed information is available at [INSERT URL HERE](#).

### **1. What does it mean now that the Shoshone-Bannock Tribes received TAS for WQS and 401 certification under the CWA?**

**Answer:** Once EPA approves a tribe's TAS status for a particular program under the CWA, the tribe is generally eligible to administer that program as a state would, with TAS status limited to the specific program covered by EPA's TAS decision. In this case, since the Tribes applied for TAS requesting CWA authority under Section 303(c) and Section 401, EPA's approval of the TAS application concerns only to those programs, and only to the reservation waters.

### **2. Why do the Tribes want to establish water quality standards?**

**Answer:** The Clean Water Act expressly authorizes EPA to approve eligible tribes to set water quality standards for reservation water resources. In this case, the Tribes wish to exercise the sovereign authority of a federally recognized Indian tribe, as recognized by Congress, to establish water quality standards and goals for waters of the Fort Hall Reservation.

### **3. Can the Tribes issue National Pollutant Discharge Eliminations System (NPDES) Permits?**

**Answer:** No. EPA will continue to issue NPDES permits for the Reservation. The Tribes' TAS for WQS applies only to the Tribes' authority to establish WQS under Section 303(c) of the CWA for Reservation waters covered by the application and to issue water quality certifications under Section 401 of the CWA for federal permits and licenses for activities that discharge to those waters. A tribe must qualify for

TAS status for each program of the CWA that it seeks to implement. At this time, no tribe has been approved for TAS status to administer the NPDES or any other CWA permit program on its reservation. An NPDES permit issued by EPA would need to contain any limits necessary to ensure compliance with the EPA-approved tribal WQS. At this time, EPA has not issued any NPDES permits for discharges to waters of the Fort Hall Reservation.

For a discharge upstream of the reservation, an NPDES permit must include conditions that ensure compliance with the applicable water quality requirements of the downstream waters covered by a TAS approval. See 40 CFR 122.4(d); 40 CFR 122.44(d)(3) and (4). In this case, after the EPA approves the Tribes' WQS, the State and EPA will work with all upstream dischargers to achieve compliance with WQS in effect on the Fort Hall Reservation.

**4. Now that the Tribes have been approved for TAS for Sections 303(c) and 401 of the CWA, can the tribe prepare Section 401 Water Quality Certifications?**

**Answer:** Once a tribe with TAS designates a certifying agency, see 40 CFR 121.1(e), that tribal agency becomes authorized to prepare water quality certifications for federal permits and licenses for activities that may result in any discharge to the reservation waters covered by the TAS approval. Where EPA approves a tribe for TAS for purposes of WQS, the tribe likewise is eligible to the same extent as a state for purposes of certifications conducted under Section 401 of the CWA. EPA regulations (40 CFR part 121) address the issuance of water quality certifications by states and tribes with TAS.

This means that the Tribes can evaluate whether a discharge under a federal license or permit would be consistent with the Tribes' WQS and decide whether to grant, deny, or condition a water quality certification under Section 401 of the CWA. Thus, a federally-issued NPDES permit for a facility (or activity) discharging into Reservation waters covered by the TAS approval could not be issued without a Tribal CWA Section 401 certification or waiver. Similarly, a federally-issued CWA Section 404 permit, such as to dredge or fill wetlands on the Reservation, or a Federal Energy Regulatory Commission (FERC) license, could not be issued without a Tribal CWA Section 401 certification or waiver. The CWA also provides a tribe with TAS a formal role in reviewing the effects of discharges from federal licenses or permits for discharges upstream from or adjacent to tribal waters.

**5. Does TAS approval for Sections 303(c) and 401 of the CWA give the Tribes enforcement authority for WQS under the CWA?**

**Answer:** No. EPA's approval of a tribe's TAS application does not provide any enforcement authority to the tribe under the CWA. WQS help protect and improve water quality, but do not impose any directly enforceable requirements on any party. They do serve as a basis for specific control actions, such as effluent limitations in permits, that are enforceable, but the tribe's TAS approval to establish WQS and provide water quality certifications does not provide the tribe with any authority to enforce the standards. EPA would remain the entity with enforcement authority under the CWA. Unless and until a tribe is federally-approved to implement a federal permitting program, if a tribe chooses to establish any regulations or enforcement measures to enforce the standards, it must do so under tribal law pursuant to the tribe's inherent authority as a sovereign government.

Under the CWA, a tribe's WQS would serve as benchmarks for water quality when EPA issues NPDES permits to facilities, or when the U.S. Army Corps of Engineers issues Section 404 permits for activities that discharge to the reservation waters covered by the TAS approval, or when FERC issues a license. EPA, the Corps of Engineers, or FERC is responsible for both issuing and enforcing the permit or license, which would include any conditions based on a tribe's Section 401 certification.

**6. Is EPA's approval of a TAS application for Sections 303(c) and 401 of the CWA the same as EPA approval of the Tribes' Water Quality Standards?**

**Answer:** No. TAS approval is not the same as EPA approval of tribal WQS. TAS makes a tribe eligible to administer a WQS program. A tribe with TAS must still obtain federal approval of the WQS it submits to EPA before those standards can become effective under the CWA.

WQS consist of designated uses for water bodies, water quality criteria to protect those uses, and an antidegradation policy consistent with 40 CFR 131.12 to maintain and protect water quality. A tribe's WQS would set goals for how clean reservation waters covered by the TAS approval should be and establish benchmarks for how activities that affect those waters can maintain acceptable water quality. In this case, EPA approval of the Tribes' standards would enable the standards to serve as a basis for limitations in permits and licenses for discharges into reservation waters, and would enable reservation waters to be protected by federally-approved tribal CWA standards just as waters outside Indian country are protected by federally-approved State CWA standards.

**7. What is the process for development and EPA review of the Tribes' WQS?**

**Answer:** Like states, the Shoshone-Bannock Tribes will follow the procedures for developing EPA-approved standards set forth at 40 CFR 131.20. Thus, the Tribes develop proposed standards, make them available to the public, hold a public hearing regarding the proposed standards, and submit the standards to EPA for approval. A tribe with TAS that has previously developed and adopted WQS under tribal law may use this process to seek EPA approval for its existing standards, or, where necessary, may modify its standards to comply with the CWA. Or a tribe may develop new standards and seek EPA approval of such standards. But in every case, a tribe with TAS must obtain EPA approval of its standards following the same process a state must follow before the standards take effect under the CWA.

**8. Will the public be able to comment on the Tribes' WQS?**

**Answer:** Yes. The Shoshone-Bannock Tribes must provide for public comment and participation in accordance with the same requirements as a state must follow. In addition, the Shoshone-Bannock Tribes have an established law known as the Administrative Procedures Act (APA), which requires all Tribal environmental agencies, including the Tribal Water Resources Department, to 1) give proper public notice and opportunity to submit comments or information, 2) offer a public hearing, 3) prepare reasoned decision-making, and 4) provide judicial review of the agency's action in the Tribal Court. The Clean Water Act and EPA regulations also establish certain requirements for public participation by the Tribes prior to adoption of the water quality standards. The Tribes and EPA have developed a fact sheet that is available to more fully describe the process the Tribes will follow for adopting the Tribes' water quality standards.

Prior to submitting the Tribes' water quality standards to EPA for approval, the Tribes' Water Resource Department will publish a notice in the Sho-Ban News and local newspapers in Bannock, Bingham, Caribou and Power counties. The Notice will state the substance of the water quality standards, and the date, time, place and manner for submitting comments. Under EPA's public participation rules, the Notice will include the timetable in which a decision will be reached, the issues and alternatives under consideration, a listing of applicable laws, regulations, and guidance, and the location where relevant documents and supporting analyses may be reviewed or obtained. The Notice will describe the time, date, and location of a public hearing that the Tribes will hold for the purpose of reviewing the Tribes' water quality standards, as provided in EPA's rules. In addition to newspaper notices, the Tribes will mail the Notice to interested and affected parties and organizations. The Tribes would then evaluate the public's comments, adopt any appropriate revisions, and submit the final WQS to EPA for review.

The Tribes expect to initiate public participation on the standards in Spring 2009. EPA will review the Tribes' standards following the same process it uses to review WQS submitted by a state. The Tribes' WQS would be in effect under the CWA only after EPA approval.

**9. Do federally-approved State WQS apply to waters in the Fort Hall Reservation?**

**Answer:** No. EPA has not approved the Idaho water quality standards within the Fort Hall Reservation. State standards generally do not apply to waters within an Indian reservation under the CWA unless the state has demonstrated authority to set such standards and EPA has expressly found state authority and approved state standards for Indian country.

**10. Are State and Tribal WQS expected to be compatible?**

**Answer:** Tribal WQS should be developed considering the quality and designated uses of waters entering and leaving reservations. EPA's regulations require that a state or tribe ensure that its WQS provide for the attainment and maintenance of the WQS of downstream waters. See 40 CFR 131.10. Thus, it is important that a tribe recognize what the surrounding state's (or another Indian reservation's) WQS are even though there is no requirement to match those standards.

EPA has consistently recommended to tribes that they use the standards of the adjacent states as a starting point for developing tribal standards. In most cases, state standards are based on EPA's recommendations for narrative and numeric criteria. EPA's experience has been that tribes often set standards that are based on, or similar to, standards set by an adjacent state. Often, even if there are differences between a tribe's and a state's use designations, the water quality criteria used by each jurisdiction to protect those uses are largely the same. Approved tribes, as well as states, often adopt water quality criteria that are the same as EPA's current national recommendations. Where differences exist in numeric criteria for a particular substance, it may simply be due to the timing of the state's and tribe's WQS revisions.

To the extent that differences do exist between state and tribal standards, a tribe and state may work together to resolve differences on a case-by-case basis, just as neighboring states work out differences. EPA regulations also provide for a mechanism to address disputes between states and tribes arising as a result of

differing WQS adopted on common bodies of water where the difference in WQS results in unreasonable consequences. See 40 CFR 131.7.

The Tribes have been working together with EPA and the Idaho Department of Environmental Quality to develop water quality standards. The standards will set goals for how clean the reservation waters within the Fort Hall Indian Reservation should be. At this point, the draft water quality standards that the Tribes are developing are very similar to those of the State. The Tribes, IDEQ and EPA have signed an intergovernmental Memorandum of Understanding (MOU) that establishes a process for the three governments to work together for any future revisions to the water quality standards.

**11. How would Tribal water quality standards affect Total Maximum Daily Loads (TMDLs)?**

**Answer:** A TMDL is a “pollution budget” for a water body that is failing to meet applicable WQS. A TMDL includes (1) a calculation of the maximum amount of a pollutant that a water body can receive and still meet WQS, and (2) allocations of that total pollutant load to its point and nonpoint sources.

If a water body on the Reservation is listed under Section 303(d) of the CWA as not meeting the applicable WQS, the CWA requires development of a TMDL that will attain those WQS with seasonal variations and a margin of safety. For Reservation waters, EPA would establish any needed TMDLs until and if the Tribes are approved for TAS to administer the TMDL program. TAS approval for TMDLs under Section 303(d) requires a separate approval beyond a TAS approval for Section 303(c) and Section 401 of the CWA. TMDLs for water bodies that enter a reservation are developed so as to attain tribal water quality standards that are in effect under the CWA.

The Shoshone-Bannock Tribes, IDEQ, and EPA have been working collaboratively for several years under an intergovernmental Memorandum of Understanding for development of TMDLs for surface water that affect Reservation waters. The governments have worked together on the TMDL for the American Falls Reservoir, and continue to coordinate and cooperate in the development and implementation of TMDLs for portions of the Blackfoot River and the Portneuf River. After Tribal WQS for the Reservation waters are in effect under the CWA, the parties will evaluate whether the TMDLs for waters on- and off-Reservation achieve the Tribal WQS.

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