



WATER QUALITY STANDARDS FOR TRIBAL WATERS

SOUTHWEST TRIBAL CWA TRAINING

MARCH 2024

DISCLAIMER

This Presentation does not:

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

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OVERVIEW

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

DEFINITIONS

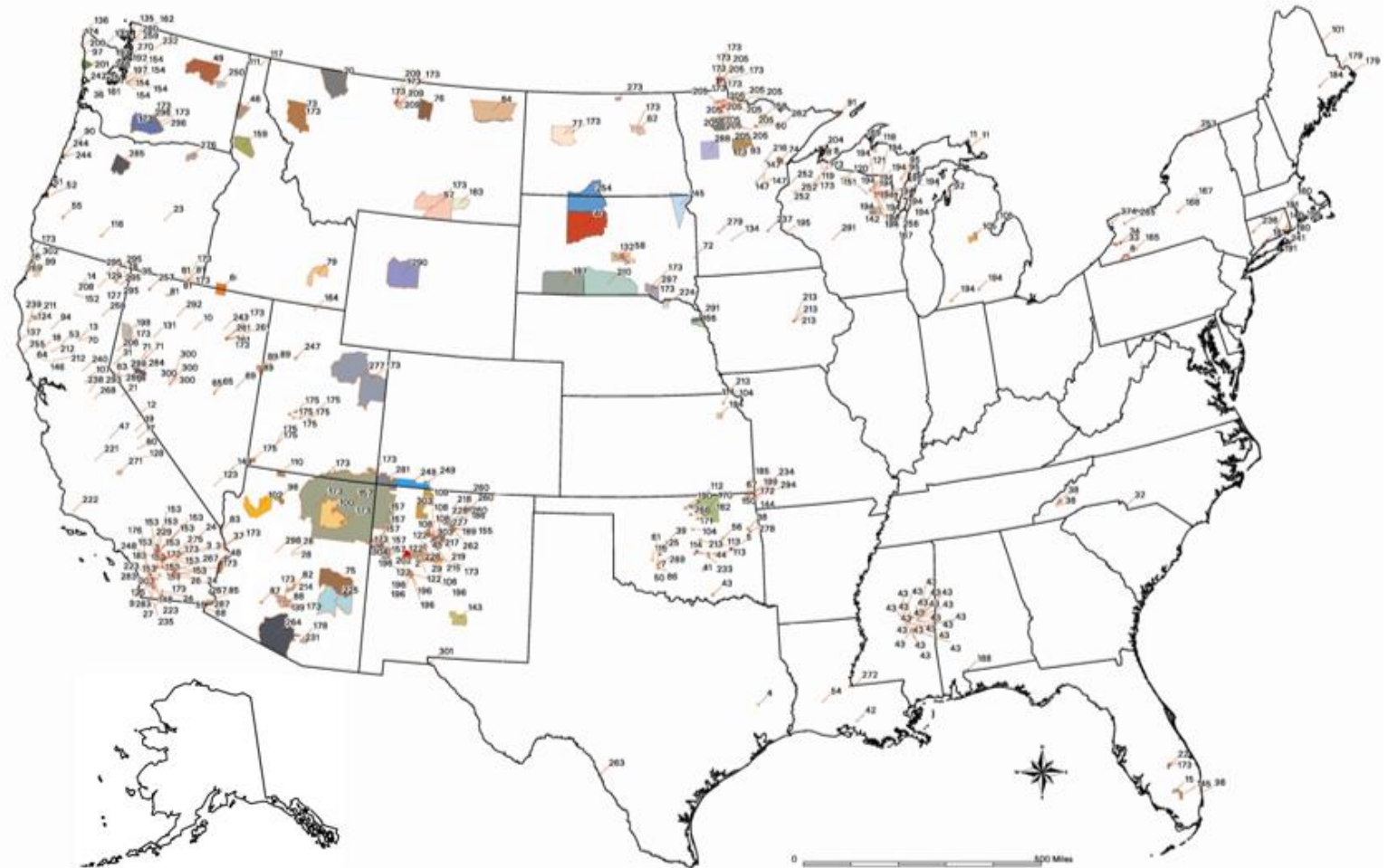
- **Tribe** – One of the 574 entities (e.g. ,Tribe, Band, Nation, Rancheria, Community, Pueblo) federally recognized by the Secretary of the Interior
- **TAS** – Treatment of tribes in a similar manner as states for the purposes of administering EPA programs under CWA Section 518
- **Reservation** –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



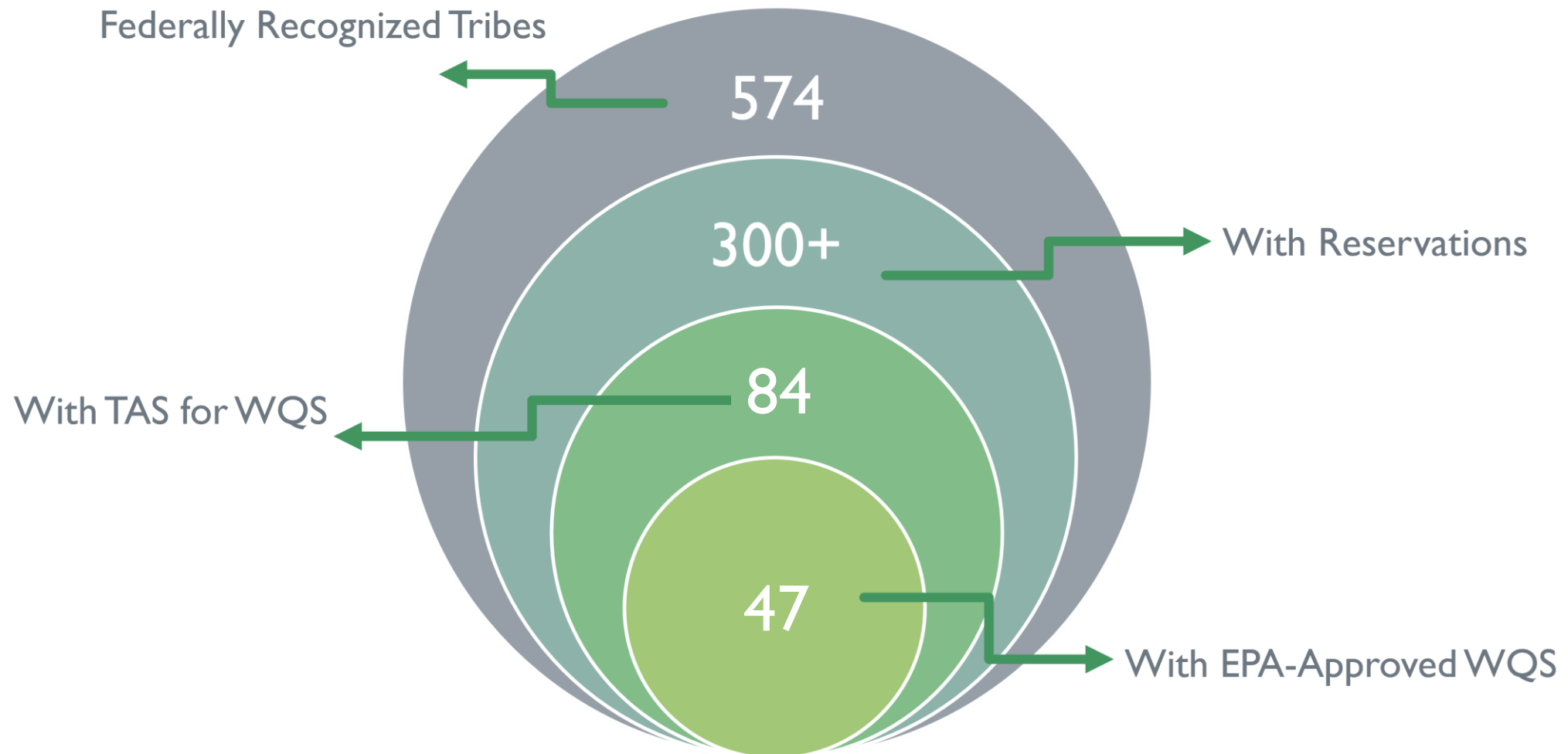
TRIBAL WATERS AND CWA COVERAGE

TRIBAL LANDS

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



WQS IN INDIAN COUNTRY





WQS EXAMPLES

SECTION 303(C) WATER QUALITY STANDARDS

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

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

Three main components of WQS:

- Designated Uses
- Criteria
- Antidegradation

DESIGNATED USES

■ 101(a)(2) Uses

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

■ Examples of Unique Designated Uses

- Protection of Wild Rice
- Frogging
- Air Boating

HUMAN HEALTH CRITERIA

$$= \frac{\text{Toxicity factors} \times \text{Exposure}}{\text{Ingestion} + \left(\text{Fish} \times \text{Bioaccumulation factors} \right)}$$

The diagram illustrates the formula for Human Health Criteria. The numerator consists of 'Toxicity factors' multiplied by an 'Exposure' icon (a grey protective suit). The denominator consists of 'Ingestion' (represented by a glass of water) plus a term in parentheses: 'Fish' (represented by a fish icon in a red box) multiplied by 'Bioaccumulation factors'.

HUMAN HEALTH CRITERIA (CONT.)

Fish Consumption Rate

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



Photo: Lac du Flambeau Band of Lake Superior Chippewa Indians

HUMAN HEALTH CRITERIA (EXAMPLE)

Fish Consumption Rate

- National default for general population:

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142 grams per day

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865 grams per day

Example: Nickel Human Health Criteria Water + Organism

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

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

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

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

ANTIDEGRADATION POLICY

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

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



ADMINISTERING THE CWA 303(C) WQS PROGRAM

TREATMENT IN A SIMILAR MANNER AS STATES (TAS)

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

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

THINGS TO CONSIDER WHEN DECIDING ON TAS UNDER 303(C)

- Does your Tribe already have TAS for Section 106 and 319?
- Does your office plan to conduct any outreach to the Tribal community about the TAS process (before/during/after)?
- What types of questions do you anticipate Tribal leaders may have, as the TAS application was being developed?
- Do you know approximately how many 401 certification requests you may receive per year and does the Tribe have the capacity/funding to handle the anticipated amount of 401 certification requests?
- Are you planning on using a consultant to help you draft WQS?

STEPS TO ADMINISTER THE WQS PROGRAM: 40 CFR 131

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

[WQS Page : https://www.epa.gov/wqs-tech](https://www.epa.gov/wqs-tech)

STEPS TO ADMINISTER THE WQS PROGRAM: 40 CFR 131.8

■ **Step 1:** Tribe applies for TAS

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

STEPS TO ADMINISTER THE WQS PROGRAM: 40 CFR 131.8

■ **Step I:** Tribe applies for TAS

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

STEPS TO ADMINISTER THE WQS PROGRAM: 40 CFR 131.8

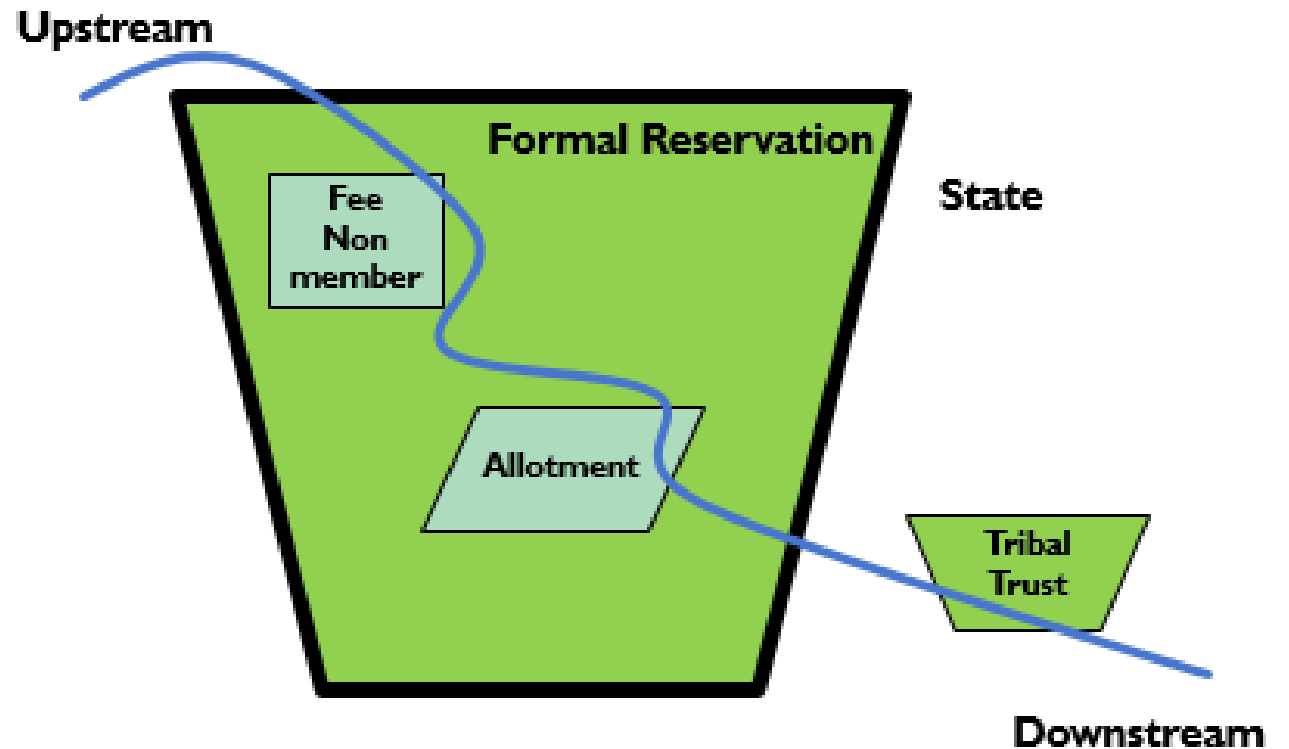
■ **Step 1: Tribe applies for TAS**

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

TRIBAL LANDS ELIGIBLE FOR TAS

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

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



TAS APPLICATION REVIEW: 40 CFR 131.8(C)

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



STEPS TO ADMINISTER THE WQS PROGRAM: 40 CFR 131

- **Step 3:** Tribe develops WQS
 - Public comment
 - Adopts WQS
 - Submits WQS to EPA

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TOOLS AND RESOURCES

WQS TOOLS

Water Quality Standards Tools for Tribes website:

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

WQS RESOURCES

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



QUESTIONS?



WATER QUALITY STANDARDS DEVELOPMENT AND REVIEW

OVERVIEW

- Water Quality Standards (WQS) Review and Revision Process
 - Public Participation
 - Minimum Requirements for WQS Packages
- EPA's Review of a Tribe's WQS
 - Actions if a Tribe's WQS Do Not Meet Clean Water Act (CWA) Requirements
- Communication Strategies

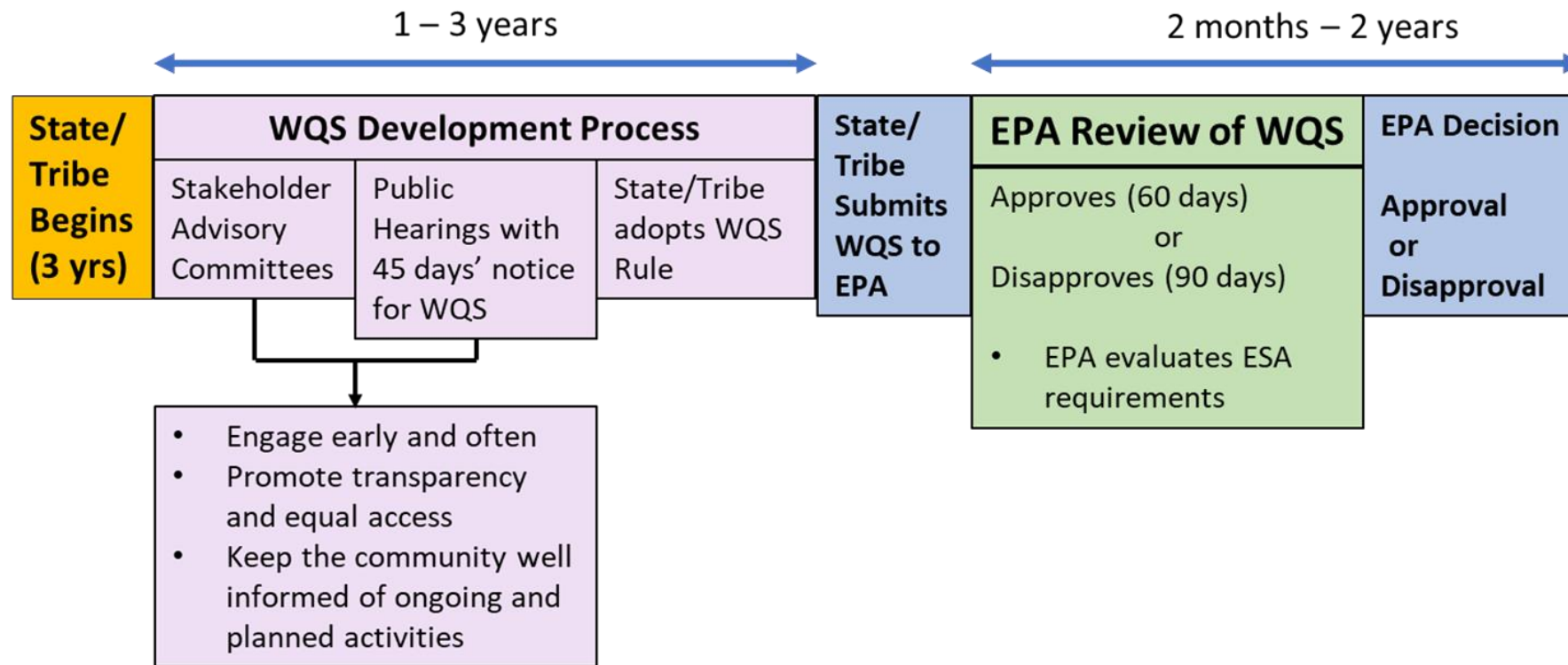
TRIENNIAL REVIEW



At least once every 3 years authorized tribes must conduct a triennial review.

- Hold a public hearing with at least 45 days' notice for the purpose of reviewing applicable WQS. [CWA 303(c)(1); 40 CFR 131.20]
 - Public hearing with 45 days' notice is also required if revising or adopting WQS.
- Re-examine and revise, as appropriate, any waterbody segments with uses less than specified in CWA 101(a)(2).
- Provide an explanation if not adopting criteria for pollutants for which EPA has published new or updated 304(a) recommendations.
- Submit review results and supporting analyses to the EPA Regional Administrator.

WQS DEVELOPMENT AND REVIEW PROCESS



TYPICAL WQS REVISION PROCESS FOR AN AUTHORIZED TRIBE

1. Engage stakeholders, EPA, and the public.
2. Review Designated Uses / classifications, criteria, antidegradation requirements, and general provisions.
 - Hold at least 1 public hearing with 45 days notice during WQS review.
3. Identify and discuss any revisions with EPA.
4. Draft and publish proposed rulemaking.
 - Hold at least 1 public hearing with 45 days notice on proposed new or revised WQS.
5. Consider comments, finalize, and adopt revisions.
6. Submit Package to EPA Region for review.

PUBLIC PARTICIPATION

40 CFR § 25.3(B)

- “Public participation is that part of the decision-making process through which responsible officials become aware of public attitudes by providing ample opportunity for interested and affected parties to communicate their views.”
- It includes:
 - Seeking input and dialogue with the public.
 - Assimilating public views and preferences.
 - Providing access to decision-making processes.
 - Demonstrating that public views have been considered.

EARLY AND MEANINGFUL INVOLVEMENT



Engage the Public Early and Often

- EPA encourages states, and authorized tribes to reach out to the local communities and learn how they use their waterbody and to keep those communities informed of.
- By engaging early and often, WQS decisions will best reflect the variables and needs of a local community which will benefit the public and implementing agency.

EARLY AND MEANINGFUL INVOLVEMENT



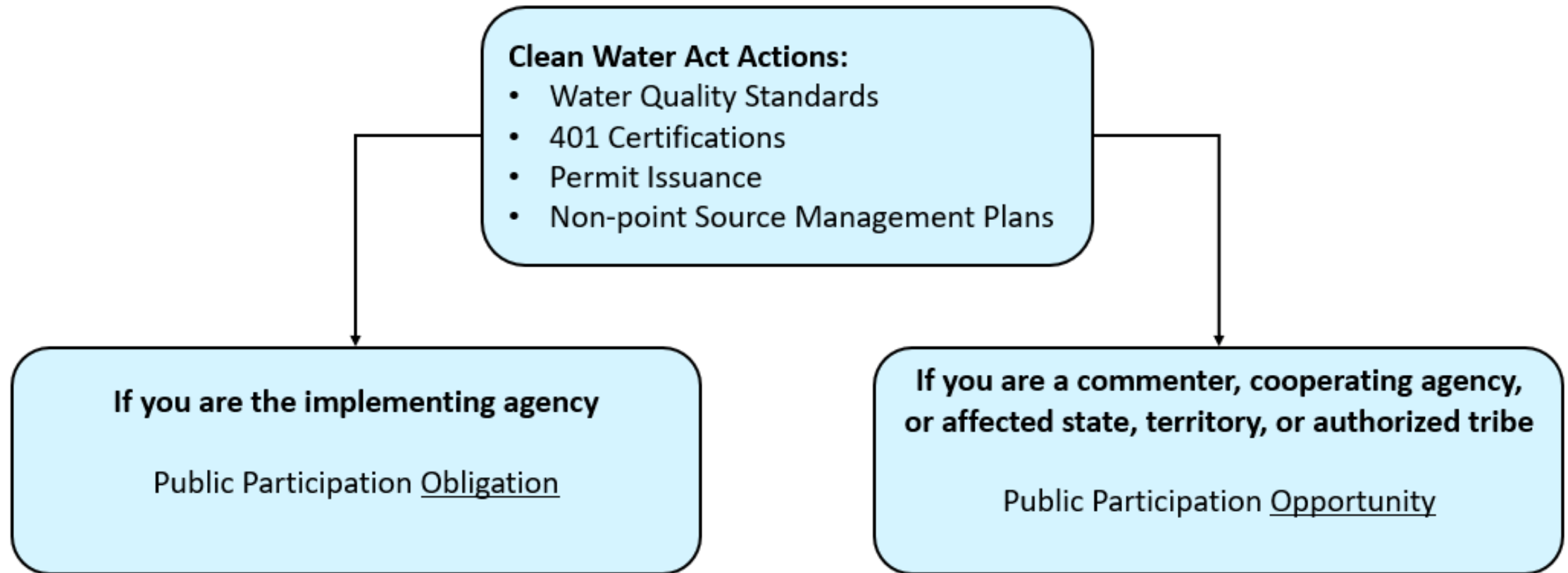
Engage the Public Early and Often

- Community members should be engaged meaningfully throughout the decision-making process through public meetings, webinars, and public hearings as necessary.

Consider the Unique Characteristics of Each Community.

- Each community has unique considerations, and outreach should be tailored to meet those needs.

PUBLIC PARTICIPATION – OBLIGATIONS AND OPPORTUNITIES



SPECIFIC PUBLIC PARTICIPATION REQUIREMENTS FOR NEW & REVISED WQS

- **40 CFR § 131.20** requires public hearing:
 - In accordance with public hearing requirements at **40 CFR part 25** and state or tribal law.
 - Before the hearing, agency makes available:
 - Proposed WQS.
 - Supporting analyses/background information.
- Same minimum requirements apply to adopting new WQS and to WQS revisions.

MINIMUM REQUIREMENTS FOR PUBLIC HEARINGS (40 CFR 25.5)

- **Public Notice:**

- “Well publicized” and mailed to interested/affected parties at least 45 days before the hearing
- Identifies topics and list of relevant materials.

- **Location and Time:**

- Facilitates attendance by the public (e.g., accessible by public transportation, evening and weekend hearings, online participation).

MINIMUM REQUIREMENTS FOR PUBLIC HEARINGS (40 CFR 25.5)

- **Testimony / Scheduling Presentations:**
 - Both scheduled and unscheduled.
- **Conduct of Hearing:**
 - Provide information regarding issues/decisions, information needed from public.
 - Consider Q&A. “Procedures shall not unduly inhibit free expression of views.”
- **Record:**
 - Provide transcript or recording of proceedings at no more than cost.

MINIMUM REQUIREMENTS FOR WQS SUBMISSIONS TO EPA

Whenever a state or tribe submits new or revised WQS, the submission will include one or more of the following:

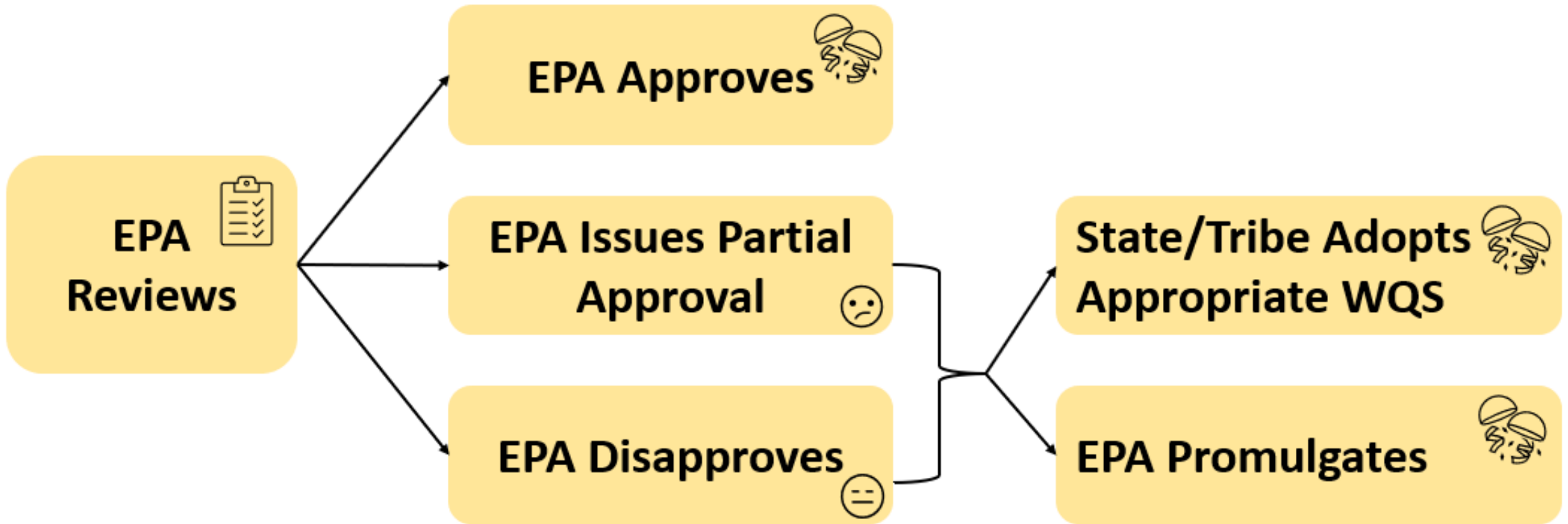
- **Use Designations:** Consistent with 101(a)(2) and/or supported by a use attainability analysis (UAA).
- **Criteria:** Sufficient to protect designated uses and based on sound science.
- **Antidegradation Requirements:** Consistent with 40 CFR 131.12.
- **General Policies (*If Applicable*):** Mixing Zones (131.13), Variances (131.14), Compliance Schedule Authorizing Provisions (131.15).

MINIMUM REQUIREMENTS FOR WQS SUBMISSIONS TO EPA: SUPPORTING INFORMATION

- **Methods used and analyses conducted** to support the WQS provisions.
- **Certification** by the state attorney general, tribal legal authority, or other appropriate legal authority within the state or tribe that the WQS were duly adopted pursuant to state or tribal law.
- **Supporting information for use designations** where relevant, including UAAs and information on existing uses.
- **Information on general policies** applicable to state and tribal WQS that may affect their application and implementation.

EPA REVIEW AND ACTION

40 CFR 131.21



EPA REVIEW AND ACTION TIMELINE

After Submission, EPA has:

- **60 days to approve** the WQS
 - 40 CFR 131.21(a)(1)
- **90 days to disapprove** the WQS
 - 40 CFR 131.21(a)(2)

EPA'S KEY QUESTIONS FOR APPROVAL / DISAPPROVAL DECISIONS

1. Is this a new or revised WQS under **CWA 303(c)(3)** upon which EPA must act?

Four-part test:

1. Is it legally binding?
 2. Does it address uses, criteria, and/or antidegradation?
 3. Does it establish desired condition or instream level of protection?
 4. Is it new or revised?
2. Do the submitted standards meet the requirements of the Clean Water Act and the implementing regulations at **40 CFR 131**?

ENDANGERED SPECIES ACT (ESA) AND NATIONAL ENVIRONMENTAL POLICY ACT (NEPA)

- **ESA Requirements**
 - **7(a)(2)**: Federal agencies shall “consult” with U.S. Fish and Wildlife Service (FWS) and/or the National Marine Fisheries Service (NMFS) to ensure actions are not likely to jeopardize listed species or adversely modify designated critical habitat.
 - Approving WQS considered to be a federal action.
 - Thus, for aquatic life or wildlife criteria and other standards that may affect listed species or critical habitat, EPA consults with FWS and/or NMFS.
- **National Environmental Policy Act (NEPA) Requirements**
 - **CWA Section 511(c)(1)** excludes most EPA activities under the CWA from NEPA, including standards approvals/ disapprovals.

WHEN WQS ARE APPLICABLE

- WQS submitted to EPA do not become the “applicable” WQS for CWA purposes until approved by EPA.
- Approved WQS remain the CWA-effective WQS until EPA approves revisions or promulgates more stringent replacement WQS.

REQUIREMENTS FOR STATE ADOPTION / EPA PROMULGATION AFTER DISAPPROVAL

- States or authorized tribes must adopt the changes specified by EPA in its disapproval letter within 90 days after notification of EPA's disapproval.
- Otherwise, EPA shall promptly propose and promulgate the changes specified by EPA.
- EPA has 90 days to finalize the promulgations.
- Reference: [40 CFR 131.22\(a\)](#) and [CWA section 303\(c\)\(4\)](#).

QUESTIONS?

Contact Information

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Policy, Guidance and Reference



- [Priorities for Water Quality Criteria and Standards Programs FY 2017-2018](#)
- [Water Quality Standards Handbook](#)
- [Reference Library of Policy and Guidance Documents](#)
- [Guidance for Conducting Fish Consumption Surveys](#)
- [Use Attainability Analysis \(UAA\) Process Diagram with Tips for Combined Sewer Overflow \(CSO\) Receiving Waters](#)

Resources for Tribes

Related Information

EPA Regional Water Quality Standards Contacts

If you have questions or comments about the Water Quality Standards (WQS) for water bodies where you live (e.g., lakes, rivers, streams, etc.), contact your EPA Regional WQS Coordinator.

- [More Water Contacts and Information \(e.g., drinking, tap, and well water; and the Water Quality Standards Academy\)](#)

Search:

Region	Contact
Region 01	Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont and Tribal Nations Dan Arsenault (617-918-1562)
Region 02	New Jersey, New York, Puerto Rico, the U.S. Virgin Islands and Tribal Nations Wayne Jackson (212-637-3807)
Region 03	Delaware, the District of Columbia, Maryland, Pennsylvania, Virginia and West Virginia and Tribal Nations Denise Hakowski (215-814-5726)
Region 04	Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, Tennessee and Tribal Nations Joel Hansel (404-562-9274)

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