

**INFORMATION COLLECTION REQUEST
FOR
REVISED INTERPRETATION OF CLEAN WATER ACT TRIBAL PROVISION
(FINAL INTERPRETIVE RULE)**

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**U.S. Environmental Protection Agency
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1. IDENTIFICATION OF THE INFORMATION COLLECTION

1.1 TITLE OF THE INFORMATION COLLECTION

The title of this Information Collection Request (ICR) is *Revised Interpretation of Clean Water Act Tribal Provision (Final Interpretive Rule)*.

1.2 SHORT CHARACTERIZATION/ABSTRACT

The U.S. Environmental Protection Agency (EPA) developed this ICR to evaluate how the final interpretive rule, *Revised Interpretation of Clean Water Act Tribal Provision*, would affect the paperwork burden on tribal applicants.

The reinterpretation streamlines how tribes apply for treatment in a similar manner as a state (TAS) for the water quality standards (WQS) program and other Clean Water Act (CWA) regulatory programs. In the reinterpretation EPA concludes definitively that section 518 includes an express delegation of authority by Congress to eligible Indian tribes to administer regulatory programs over their entire reservations. This reinterpretation eliminates the need for applicant tribes to demonstrate inherent authority to regulate under the CWA, thus allowing tribes to implement the congressional delegation of authority unhindered by requirements not specified in the statute. The reinterpretation reduces the burden on applicant tribes and facilitates tribal involvement in the protection of reservation water quality as intended by Congress.

Based on input from eight tribes with relevant TAS experience, EPA developed burden and cost estimates for the tribes to develop their TAS applications. The results discussed in this ICR show that the reinterpretation would reduce the burden by an estimated 583 staff hours (27%) for a typical tribe, and reduce the cost to a typical tribe for salaries and contractor support by an estimated \$70,956 (39%).

These estimates may overstate actual burden because (a) EPA used a liberal estimate of the number of tribal applications, (b) EPA used a simplifying steady-state assumption in estimating annualized costs, and (c) EPA included all costs associated with a TAS application even if some costs might not be strictly information collection costs. EPA and the eight tribes were unable to differentiate the information collection costs consistently and reliably from other costs such as program development costs.

As described in section 6 and the Appendix, EPA has assumed that all tribal costs and burden associated with the rule are information collection burden. Therefore, EPA has not conducted a separate Economic Analysis.

2. NEED FOR AND USE OF THE COLLECTION

2.1 NEED AND AUTHORITY FOR THE COLLECTION

In 1987, through the Water Quality Act (P. L. 100-4), Congress made substantial additions to the CWA. The Water Quality Act added section 518 which requires EPA to promulgate regulations specifying how Indian tribes would qualify to administer certain specified CWA programs. EPA published such regulations for CWA regulatory programs from 1991 through 1994 in 40 CFR sections 131.4(c), 131.8, 123.31-34, 223.60-62, and related sections.

The CWA does not require tribes to administer these programs. However, tribes seeking to be authorized must apply for and be found eligible for TAS through the procedures described in the regulations. The information a tribe submits represents a collection of information that is necessary to demonstrate that the tribe meets each of the statutory and regulatory qualifications for TAS, and to enable EPA to fulfill its responsibilities under CWA section 518(e) to review and approve or disapprove in a reasonable and timely manner.

The statute and regulations specify four criteria for an Indian tribe to qualify to administer a CWA regulatory program: (a) the tribe must be federally recognized, (b) the tribe must have a governing body carrying out substantial governmental duties and powers, (c) the functions to be administered by the tribe pertain to water resources within the borders of an Indian reservation or legal equivalent, and (d) the tribe must be reasonably expected to be capable of carrying out the functions to be exercised consistent with the terms and purposes of the CWA and all applicable regulations.

The regulations cited above specify the information a tribe must submit in order for EPA to review and approve the tribe for TAS. The required information is summarized in section 4.2 below.

2.2 PRACTICAL UTILITY/USERS OF THE DATA

EPA uses the information supplied by an interested tribe to determine whether it qualifies to administer the CWA program which it seeks. EPA must assess the tribe's information to determine whether the tribe meets the requirements specified in section 518(e) of the CWA and EPA's implementing regulations listed in section 2.1 above.

If these information collection activities were not carried out, interested and otherwise qualified tribes would be unable to administer CWA regulatory programs, such as WQS, water quality certifications, and the National Pollutant Discharge Elimination System permit program. This would not be consistent with the CWA or federal Indian policy.

3. NON-DUPLICATION, CONSULTATIONS, AND OTHER COLLECTION CRITERIA

3.1 NON-DUPLICATION

Under EPA's regulations, a tribe must submit a separate TAS application for each program it wishes to administer. To avoid requiring tribes to submit duplicate information, EPA's regulations specify that a tribe need only provide the required information which has not been submitted in a previous application. For example, in evaluating whether a tribe qualifies to administer WQS, EPA does not require a tribe to resubmit information from its previously-approved TAS application under section 106.

3.2 PUBLIC NOTICE REQUIRED PRIOR TO ICR SUBMISSION TO OMB

In compliance with the 1995 Paperwork Reduction Act, EPA solicited comments on the January 2015 draft of this ICR for a 60-day period concurrently with the comment period for the proposed rule, *Revised Interpretation of Clean Water Act Tribal Provision*. No comments were received. This final ICR incorporates minor technical revisions.

3.3 CONSULTATIONS

In developing the interpretive rule, EPA made a substantial effort to involve key stakeholders. In multiple meetings, EPA consulted and coordinated with tribes, states, and organizations representing tribes and states.

To help develop the burden estimate for this ICR, EPA identified eight tribes that were willing to provide quantitative information about the resources they expended in obtaining approval for TAS to administer the WQS program. The tribes and the year in which their TAS approval occurred are:

- Hoopa Valley Tribe (CA) (1996)
- Hualapai Indian Tribe (AZ) (2004)
- Ute Mountain Ute (CO) (2005)
- Navajo Nation (AZ, NM, UT) (2006)
- Northern Cheyenne (MT) (2006)
- Lac du Flambeau Band of Chippewa (WI) (2008)
- Bad River Band of the Lake Superior Tribe of Chippewa Indians of the Bad River Reservation (WI) (2009)
- Blackfeet Tribe (MT) (2012)

The tribes provided the resource information in interviews conducted by EPA staff members in the respective regional offices.

3.4 EFFECTS OF LESS FREQUENT COLLECTION

Application by Indian tribes to obtain TAS to administer a CWA regulatory program is a one-time collection of information per respondent, initiated voluntarily by interested tribes.

3.5 GENERAL GUIDELINES

EPA reviewed this ICR for compliance with OMB's information collection guidelines in 5 CFR 1320.5(d)(2)(iv) and concluded it is in compliance.

3.6 CONFIDENTIALITY AND SENSITIVE QUESTIONS

Tribal program applications under this ICR will contain no confidential or sensitive information.

4. THE RESPONDENTS AND THE INFORMATION REQUESTED

4.1 RESPONDENTS/NAICS CODES

The following describes the universe of potential respondents. The number of annual respondents is estimated in section 6.

Any federally recognized tribe with a reservation may apply to administer a regulatory program under the CWA, unless prohibited by another federal law. Over 300 tribes have reservation lands. From 1991 through March 2016, over 70 tribes have submitted such an application, all of which are for the WQS program. Of these, EPA has approved TAS for 51 tribes; the remaining applications are in various stages of development.

The respondents affected by this collection activity are in NAICS code 92411 "Administration of Air and Water Resources and Solid Waste Management Programs."

4.2 INFORMATION REQUESTED

EPA's regulations listed in section 2.1 specify the information a tribe must provide in its application to administer a CWA regulatory program. Specifically, an interested tribe must submit:

- (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;
- (3) A descriptive statement of the Indian tribe's authority to regulate water quality, including a map or legal description of the area over which the Indian tribe asserts

authority; a statement by the tribe's legal counsel (or equivalent official) which describes the basis for the tribe's assertion of authority; a copy of documents that support the tribe's assertion of authority; and an identification of the surface waters for which the tribe proposes to administer the program;

(4) A narrative statement describing the capability of the Indian tribe to administer an effective program; and

(5) Any additional documentation required by the Regional Administrator to support the application.

Approvals for tribes to administer a CWA regulatory program are valid unless rescinded. Therefore, an interested tribe usually needs to apply only once for a program. Where a tribe has previously qualified for TAS under another program, the tribe need only provide the required information which has not been submitted in a previous application.

EPA's regulations at 40 CFR 131.8(a) and (b), issued in 1991 and amended in 1994, provide specific requirements and guidance concerning the content of a tribal application. In addition, EPA issued guidance in its 2008 TAS Strategy¹ to further assist tribes (see particularly Attachment B). EPA Regions actively engage applicant tribes and offer the regulations and Strategy to assist them.

In addition, in June 2016 EPA began pilot testing a draft template designed to simplify and streamline the tribe's application.² The draft template is a starting point to reduce the burden estimated in section 6 below. It is intended to give tribes a better idea of the minimum details they need to provide in their applications. Many tribes have been submitting far more detail in the past, not only for the inherent authority demonstrations which are no longer needed, but also because they did not capitalize on a regulatory provision that tribes do not need to resubmit information already provided to EPA in previous TAS applications.³ Previous guidance has not emphasized this feature. EPA will modify the template as appropriate based on experience gathered during usage by tribes in the coming months.

1 *Strategy for Reviewing Tribal Eligibility Applications to Administer EPA Regulatory Programs*, memorandum from the EPA Deputy Administrator, January 23, 2008. Available at <https://www.epa.gov/tribal/strategy-reviewing-tribal-eligibility-applications-administer-epa-regulatory-programs>.

2 *Draft TAS Application Template for Water Quality Standards and Water Quality Certifications*, EPA Office of Science and Technology, June 2016.

3 40 CFR 131.8(c)(6) specifies that tribes need only provide the required information that has not been submitted to EPA in a previous successful TAS application.

4.3 RESPONDENT ACTIVITIES

Respondent activities include reading the regulatory requirements and EPA guidance, obtaining any necessary background understanding, obtaining clarifications from EPA, assembling information required for the application, analyzing the assembled information, analyzing any issues identified by the tribe or EPA, writing the application and transmittal documents, responding to comments from EPA or others, and transmitting the draft and final application to EPA. The activities also include establishing a permanent file of the TAS application that can be referenced when applying for other CWA programs at a later date.

These activities are generally carried out by tribal staff members, with support in some instances from contractors and consultants hired by the tribe.

5. THE INFORMATION COLLECTED – AGENCY ACTIVITIES, COLLECTION METHODOLOGY, AND INFORMATION MANAGEMENT

5.1 AGENCY ACTIVITIES

After a tribe submits an application to administer a CWA regulatory program, EPA reviews the application and uses the submitted information to determine whether the tribe meets the criteria under CWA section 518(e) and EPA’s regulations to administer the program. Under the regulations, EPA also provides an opportunity for appropriate governmental entities and the public to comment on the application. EPA considers any comments received when it makes a decision concerning the tribe’s TAS eligibility.

5.2 COLLECTION METHODOLOGY AND MANAGEMENT

An interested tribe submits its application in hardcopy and/or electronic form to the EPA regional office. EPA has delegated to Regions the responsibility to review and approve tribal TAS eligibility; EPA headquarters must concur on the first application submitted to each Region. Regional office staff members work closely with the tribes in this process. EPA headquarters staff members provide support to the regional offices in the reviews.

5.3 SMALL ENTITY FLEXIBILITY

The reporting requirements discussed in this ICR do not place a burden on any small entities.

5.4 COLLECTION SCHEDULE

There are no scheduling requirements for Indian tribes to apply for authorization to administer CWA regulatory programs.

6. ESTIMATING THE BURDEN AND COST OF THE COLLECTION

6.1 ESTIMATING RESPONDENT BURDEN

In order to develop the burden estimates in this section, EPA assembled and evaluated information collected from eight tribes with experience in developing TAS applications for CWA regulatory programs, as described in section 3.3. EPA's methodology and results are described in detail in Appendix A, Derivation of Burden Estimates.

Pre-rule tribal burden: EPA estimates that a typical tribe expends 2,190 staff hours and \$90,000 on contractor costs to develop a TAS application. Based on the past ten years, there have been approximately 4 new tribal TAS applications for CWA regulatory programs per year. Thus the pre-rule baseline burden comprises (4 tribes) * (2,190 hours) = **8,760 staff hours**, and (4 tribes) * (\$90,000) = **\$360,000 in contractor costs**.

Post-rule tribal burden: EPA estimates that a typical tribe would expend 1,607 staff hours and \$43,920 on contract costs to develop a TAS application pursuant to the reinterpretation. Further, EPA estimates that an average of 6 tribes would for TAS to administer CWA regulatory programs per year, a 50% increase that is expected to continue for the first few years. Thus the post-rule burden would comprise (6 tribes) * (1,607 hours) = **9,642 staff hours** and (6 tribes) * (\$43,920) = **\$263,520 in contractor costs**. The pace of applications could increase as tribes become more familiar with the new post-rule process.

6.2 ESTIMATING RESPONDENT COSTS

The above burden estimates have been converted to dollar cost estimates using the following assumption:

Tribal employee costs were estimated assuming an average hourly salary of \$26.67, which is equivalent to the salary of a GS-9, Step 10 federal employee.⁴ Overhead costs for tribal employees are expected to be 60 percent, or \$16.00 per hour, yielding a total hourly rate of \$42.67.

Pre-rule annual tribal costs: Cost per application = (2,190 hours/application) * (\$42.67/hour) + \$90,000 contractor costs = \$183,447. Total annual cost = (4 tribes) * (\$183,447/application) = **\$733,788**.

Post-rule annual tribal costs: Cost per application = (1,607 hours/application) * (\$42.67/hour) + \$43,920 contractor costs = \$112,491. Total annual cost = (6 tribes) * (\$112,491/application) = **\$674,946**.

⁴General Schedule rate, effective January 2016, assuming base pay rate with no locality adjustment.

6.3 ESTIMATING AGENCY BURDEN AND COST

Annual burden and costs to the federal government are detailed below. EPA employee costs were estimated assuming a GS-12 Step 1 federal employee earning \$29.76 per hour. Overhead costs for federal employees are expected to be 60 percent, or \$17.86 per hour, yielding a total hourly rate of \$47.62.

Pre-rule agency burden: EPA estimates that reviewing a typical application requires approximately 348 agency staff hours from regional and headquarters offices. The pre-rule agency cost is 348 staff hours * \$47.62 = \$16,572 per application reviewed. Thus the total pre-rule Agency burden is 4 * 348 = 1,392 staff hours or 4 * \$16,572 = \$66,288.

Post-rule agency burden: EPA estimates that the agency staff burden would reduce by 41% to 205 staff hours or 205 * \$47.62 = \$9,762 per application reviewed. Thus the total post-rule agency burden would be 6 * 205 = 1,230 staff hours or 6 * \$9,762 = \$58,572.

There are no Capital Expenses and no O&M costs associated with this ICR.

6.4 REASONS FOR CHANGE IN BURDEN

The programmatic changes associated with the interpretive rule would result in a reduction in total burden and cost to tribes and EPA for developing and processing TAS applications.

6.5 BURDEN STATEMENT

The annual public reporting and recordkeeping burden for this collection of information is estimated to average 1,607 hours for a typical applicant tribe.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

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 are listed in 40 CFR part 9 and 48 CFR chapter 15.

To comment on the Agency's need for this information, the accuracy of the provided burden estimates, and any suggested methods for minimizing respondent burden, including the use of automated collection techniques, EPA has established a public docket for this ICR under

Docket ID No. EPA-HQ-OW-2014-0461, which is available for online viewing at <http://www.regulations.gov>, or in person viewing at the Water Docket in the EPA Docket Center (EPA/DC), EPA West, Room 3334, 1301 Constitution Ave., NW, Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is (202) 566-1744, and the telephone number for the Water Docket is (202) 566-2426. An electronic version of the public docket is available online for viewing at <http://www.regulations.gov>. This site can be used to submit or view public comments, access the index listing of the contents of the public docket, and to access those documents in the public docket that are available electronically. When in the system, select "search," then key in the docket ID number identified above. Also, you can send comments to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street, NW, Washington, DC 20503, Attention: Desk Officer for EPA. Please include the EPA Docket ID (EPA-HQ-OW-2014-0461) and OMB Control Number (2040-NEW) in any correspondence.

Derivation of Burden Estimates

Methodology

In order to evaluate the burden under this interpretive rule, EPA obtained quantitative resource information from the eight tribes listed in section 3.3 that have experience in applying for TAS for the WQS program. From interviews with tribal staff members, EPA obtained tribal estimates of the staff hours and contractor funds the tribes actually expended in preparing their TAS applications, and an estimate of the portion of this burden that would be eliminated under the rule.

Utility and Limitations

The estimates based on tribal input reflect the best available information. EPA selected the tribes because of their knowledge of the TAS process and willingness to participate. The staff members interviewed were either direct participants or observers at the time the applications were developed. They were knowledgeable about how their tribes demonstrated inherent authority and were able to discern how the level of effort would have differed if such a demonstration had not been required.

The information obtained from the tribes has certain limitations. First, some of the information may lack precision and accuracy because it depends largely on personal recollections of events from 3 to 20 years ago, depending on the tribe.

Second, in many cases it was difficult to distinguish which tribal efforts represented solely information collection activities – that is, “reporting and recordkeeping” as these terms are defined and used under the Paperwork Reduction Act. In many cases, such efforts could not be distinguished from program development costs, program implementation costs, management oversight, or other costs that are not strictly “reporting and recordkeeping.”

Because of this inherent limitation, EPA has chosen to include all costs identified by the tribal staff members as associated with the TAS application as ICR “burden,” regardless of whether the costs meet a strict definition of “reporting and recordkeeping.” The estimates of burden in this document therefore likely overstate the actual ICR burden by an unknown amount, but provide a reasonable estimate of the total costs. Because of the interview process used, EPA has confidence that the tribes’ estimates of the relative proportion of work that the rule would eliminate are fairly accurate.

Finally, the sample of eight tribes is small relative to the number of tribes with approved TAS for the WQS program (51) from which they were drawn, or the total number of tribes with reservations (over 300). As a result, there is inherent variability in the data.

Assumptions for estimates

This analysis assumes that all post-rule applications would be first-time applications for a CWA regulatory program, thus unable to rely on materials from previous applications for different regulatory programs. Therefore, to the extent that some tribes that have applied previously for one CWA regulatory program seek a subsequent approval for a different regulatory program, the post-rule estimates of burden in this document will likely overstate the actual burden.

ICR burdens are stated as annualized burdens. In the analysis below, EPA has used a steady-state assumption to simplify the calculations of annual burden. Specifically, the analysis assumes that the rates of new tribal applications for CWA regulatory programs are steady at the same number from one year to the next. This assumption enables EPA to assume that the entire burden for a tribe occurs within the first year when calculating annual burden rates, even though in reality all applications by the eight participating tribes have required multiple years. This is because in a steady-state situation, assuming all burden occurs within one year is mathematically equivalent to, say, a two-year application process with one-half of the burden occurring in each year, or a three-year process with one-third burden each year. To the extent that the rate of applications rises from year to year (thereby deviating from steady state) and any tribes' application processes take more than one year, the post-rule estimates of burden in this document will likely overstate the actual burden.

Estimates of total pre-rule burden

Table 1 shows the estimates provided by the tribes for the work done to prepare TAS applications, including providing additional information EPA requested in the course of the application process. Based on this information, EPA estimates that the pre-rule burden for a typical tribe would be 2,190 burden hours and \$90,000 of contractor support.

Table 1: Per-tribe burden estimates, pre-rule

Tribe	Staff hours	Contractor support
A	1,295	\$90,000
B	1,611	\$102,000
C	1,640	\$10,000
D	2,190	\$8,100
E	3,605	\$96,300
F	9,736	\$90,000
G	12,298	\$2,700
H	20,800	\$270,000
Median*	2,190	\$90,000

*Excluding Tribe H, considered an outlier because of unique processes used in developing its TAS application.

EPA data for the past 10 years shows that between one and five tribes have been applying for TAS for a CWA regulatory program each year, with a 75th percentile of 4.0. EPA chose to use the 75th percentile value to ensure the ICR does not underestimate the total burden to tribes. Therefore, EPA’s estimate of the pre-rule rate of new applications submitted is four tribes per year, resulting in a total pre-rule burden estimate of 4 x 2,190 = 8,760 total burden hours and 4 x \$90,000 = \$360,000 contractor support costs.

Estimates of total post-rule burden

Table 2 shows the estimates provided by the tribes for the percentage of the work done to prepare TAS applications that would be eliminated by the interpretive rule. Based on this information, EPA estimates that the effect of the rule would be to reduce tribal staff hours to prepare TAS application by an average of 26.6%, and to reduce contractor support costs by an average of 51.2%.

Table 2: Percentage of burden eliminated by the interpretive rule

Tribe	% of Staff hours	% of Contractor support
A	5.5%	33.3%
B	33.3%	29.4%
C	15.9%	32.5%
D	14.7%	37.1%
E	11.5%	44.1%
F	15.6%	33.3%
G	50.0%	100.0%
H	66.7%	100.0%
Average	26.6%	51.2%

Table 3 shows the estimated post-rule burden per tribe, developed by applying the average percentage reductions in Table 2 to the typical tribal pre-rule burden estimates in Table 1. From this information, EPA estimates the rule would **eliminate 583 staff burden hours and \$46,080 contractor support costs for the typical tribe** applying for TAS for a CWA regulatory program.

Table 3: Estimated post-rule burden per tribe

	Staff hours	Contractor support
(a) Pre-rule burden estimates (from Table 1)	2,190	\$90,000
(b) Percentage eliminated by the proposed rule (from Table 2)	26.6%	51.2%
(c) Amount eliminated by the proposed rule [(a)*(b)]	583	\$46,080
(d) Post rule burden [(a) – (c)]	1,608	\$43,920

Also from Table 3, EPA estimates that the post-rule burden to develop TAS applications would be 1,607 staff hours and \$43,920 contractor support costs for a typical tribe. This may not necessarily result in a similar reduction in the total annual burden, however, because the lower per-tribe burden could encourage more tribes to apply for TAS than in the past. Taking this into consideration, EPA estimates that in the first three years the proposed rule could increase the rate of new applications from the previous rate of 4 per year to a new rate of approximately 6 per year. Based on these factors, EPA estimates that the total annual post-rule burden for the next few years would comprise (6 tribes) * (1,607 hours) = **9,642 staff hours** and (6 tribes) * (\$43,920) = **\$263,520 in contractor costs**. After that time, EPA expects the pace of applications could increase as tribes become more familiar with the post-rule process.