

Clean Water Act Section 303(d): Impaired Waters and Total Maximum Daily Loads

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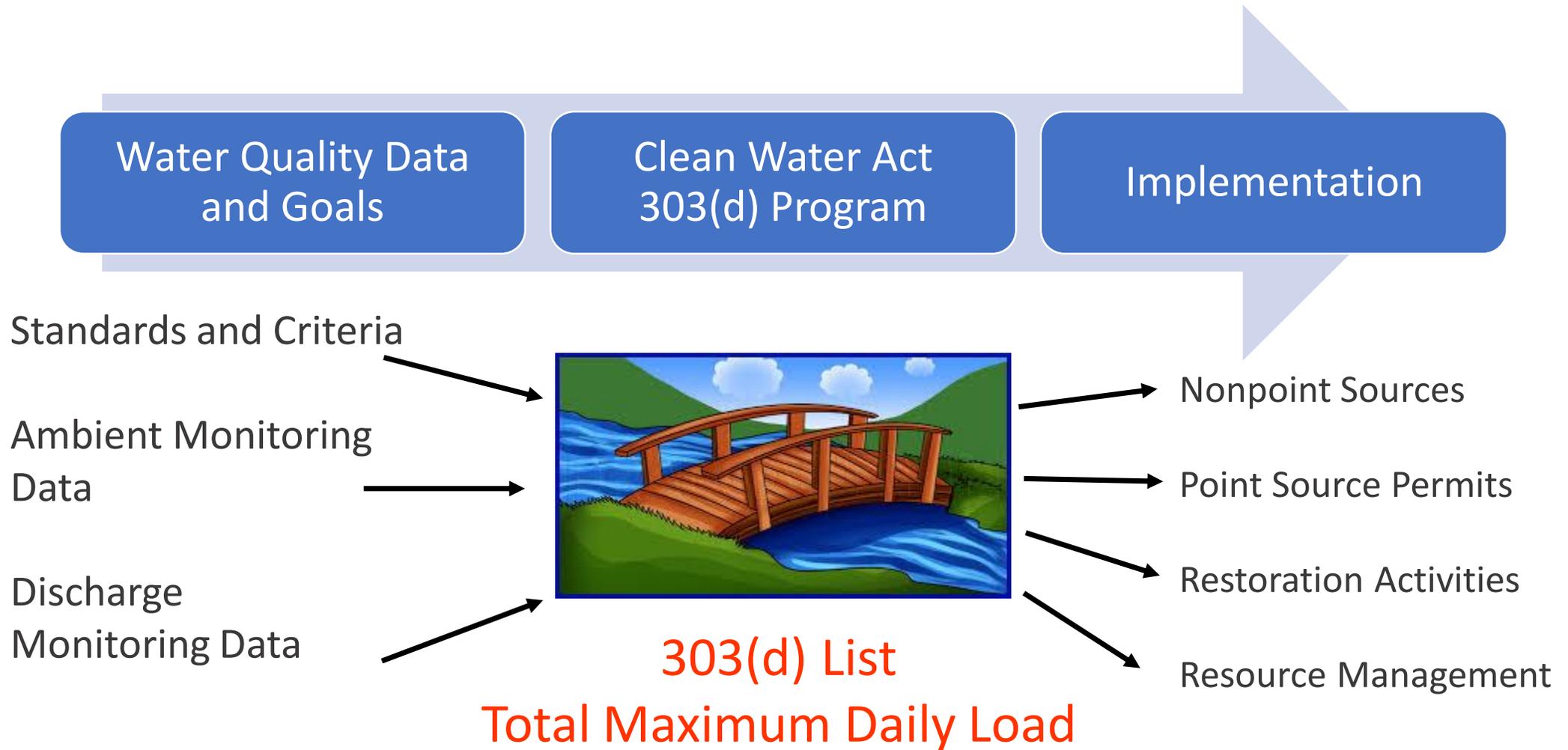
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Presentation Overview

- Introduction to CWA section 303(d):
 - 303(d) impaired waters “list”
 - Total Maximum Daily Loads (TMDL)
- Treatment in a similar manner as States (TAS)
 - Overview
 - Application Process
 - Funding/technical assistance
- Resources

Bridging Water Quality Goals and the Actions needed for Restoration

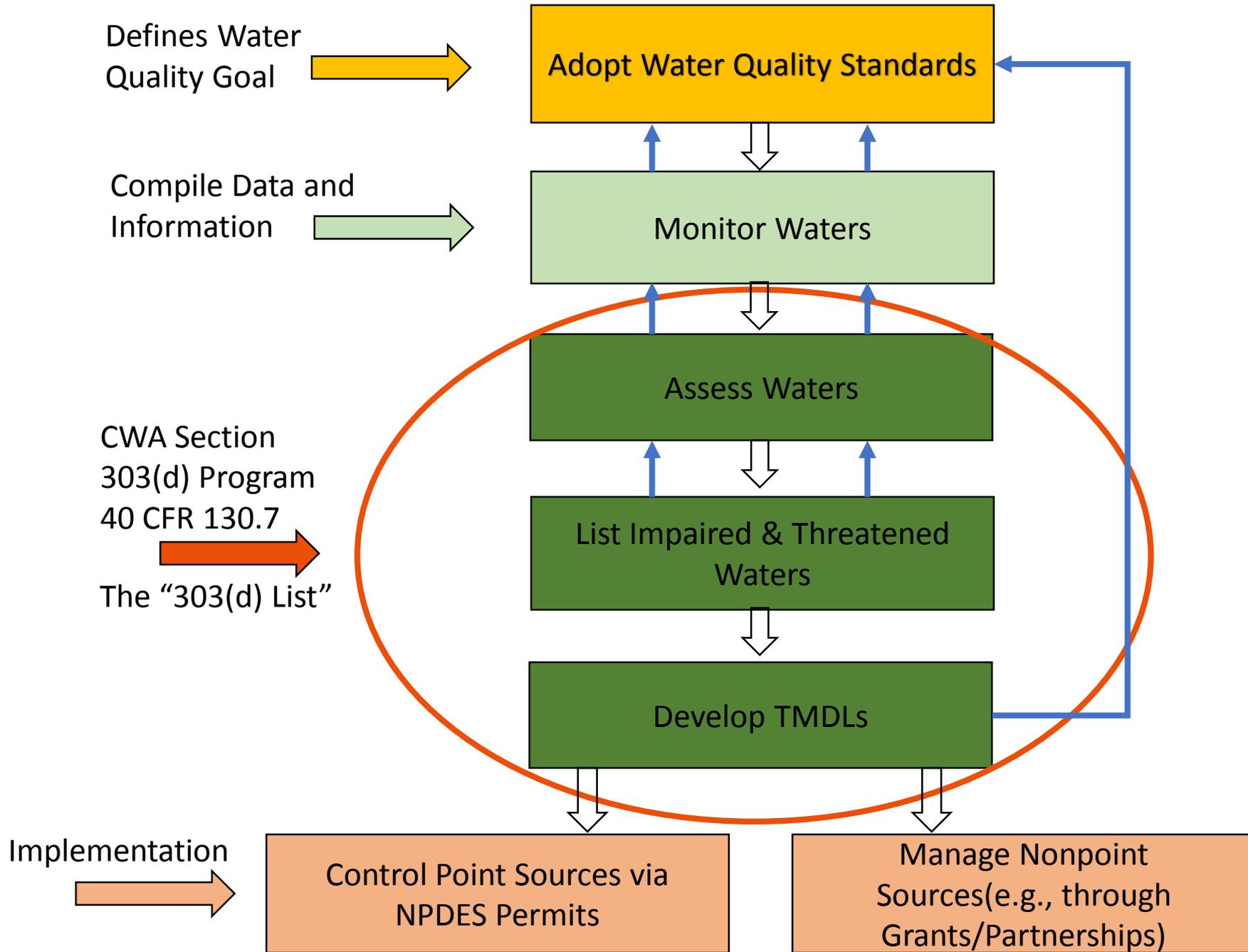


303(d) Lists and TMDLs

What is the 303(d) List?

- The 303(d) list generally consists of waters that:
 - Do not meet water quality standards even after the implementation of technology-based limitations or other pollution control requirements, often referred to as “impaired waters.”
 - Are not expected to attain water quality standards in the next listing cycle (2 years), referred to as “threatened waters.”
- The 303(d) List is due to EPA on April 1 of even number years

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 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.

303(d) TAS

303(d) TAS

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

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

Authorized Tribes:

- **Identify waters** not meeting WQS **generally** 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.

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.

When 303(d) Requirements kick-in

- ▶ The tribe's first impaired waters list would be due to EPA the next listing cycle due date that is at least 24-months from the later of:
 - ▶ (1) the date the tribe's TAS application for 303(d) is approved, or
 - ▶ (2) the date EPA-approved/promulgated WQS for the tribe's waters are effective.
- ▶ Earliest year a list could be due if these conditions were met NOW would be April 1st, 2026.
- ▶ TMDLs from "time to time" in accordance with the tribe's priorities

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.

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 continues to assess additional tribal training and technical assistance needs, and how to best provide such resources.
- ATTAINS Pilot Program
- Annual CWA Section 303(d) Training Workshops
- [TAS Application template](#) available for CWA section 303(d)

Resources

- General information about CWA section 303(d) can be found on EPA's website: <https://www.epa.gov/tmdl>
- EPA 303(d) program Regional contacts: <https://www.epa.gov/tmdl/forms/contact-us-about-impaired-waters-and-tmdls>
- For more information about the final TAS rule for CWA section 303(d): <https://www.epa.gov/tmdl/final-rule-treatment-indian-tribes-similar-manner-states-purposes-section-303d-clean-water-act>.
- TAS Application Template: <https://www.epa.gov/tmdl/tas-application-template-cwa-section-303d-impaired-water-listing-and-tmdl-program-working>
- [How tribes can use the CWA to protect water resources](#) (presentation)

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