

Consultation and Coordination on Potential EPA Actions to Increase Tribal Capacity to Maintain and Expand Nonpoint Source Management Programs

Summary of Comment Period 1

Background:

On March 29, 2022, the U.S. Environmental Protection Agency (EPA) initiated consultation and coordination with federally recognized Indian Tribes¹ to inform potential EPA actions the Clean Water Act section (§) 319 national Nonpoint Source (NPS) program could take to better support §319-eligible Tribes in their efforts to manage NPS pollution. This consultation and coordination period is a key part of the national NPS program's work to identify and implement actions to advance equity in the program. The consultation period will include two 60-day comment periods.

Concurrent with this consultation, EPA engaged Tribal CWA §319 grantees by hosting four Tribal CWA §319 grantee listening sessions (January – February 2022) and convening an EPA/Tribal CWA §319 grantee workgroup (spring 2022) that provided suggestions for EPA's consideration to address key challenges facing Tribal NPS programs. Notes from the listening session and the final workgroup report can be found [here](#).

Comment Period 1 Summary:

During the first 60-day comment period, held from March 29, 2022 to May 27, 2022, EPA sought input from Tribes on their experiences, including successes and challenges, building and sustaining Tribal NPS program capacity. EPA held two informational webinars for Tribes on April 19 and April 27 to provide Tribal representatives an opportunity to ask questions and learn more about this consultation opportunity and potential EPA actions to advance equity in the national NPS program. A total of 44 Tribal participants attended the two information session webinars.

EPA held individual staff-level meetings with three Tribes who were interested in learning more about the consultation: Red Lake Band of Chippewa (Region 5), Yakama Indian Nation (Region 10), and Squaxin Island Tribe (Region 10). In total, EPA received comments from three Tribes/Nations during Comment Period #1: Seneca Nation (Region 2), Elk Valley Rancheria (Region 9), and Yakama Indian Nation (Region 10). A request from Ute Mountain is pending and EPA anticipates including their feedback in the second comment period.

See [Appendix A](#) for comments submitted through the webform; and [Appendix B](#) for the submitted formal consultation letters.

Comment Period 1 Questions:

EPA invited Tribal input on the following Comment Period #1 questions via email (to Tribal319grants@epa.gov) or by completing EPA's [webform](#):

1. What are the main challenges you face in working to manage NPS pollution and its potential impacts to human health? Please prioritize among the following potential needs [listed in plan].
2. What change(s) would you recommend EPA's §319 program make to better support Tribes in addressing these challenges?

¹ For the purposes of this summary, Tribe is used as a collective term encompassing Tribes, Nations, Pueblos, and other entities.

3. What EPA §319 program requirements feel confusing, unclear, duplicative, or onerous?
4. How can EPA better support Tribes in building partnerships and securing assistance beyond §319 grants to address NPS pollution?
5. Should EPA consider changes to its current approach of allocating §319 grants to Tribes via base grants and competitive grants? [Sub-part questions listed in plan].

EPA HQ outreach during Comment Period #1:

- Presented on EPA Regional Tribal Program Managers meeting (4.7.22)
- Presented on National Tribal Water Council monthly call (4.13.22)
- Featured in April EPA Office of Water National Tribal Water Program Updates E-Newsletter

Consultation Information Session Webinars:

EPA hosted two 1-hour information session webinars to provide an overview of the consultation opportunity, answer any questions, and provide an opportunity for Tribes to provide comments.

Webinar 1 April 19th, 2022: 38 attendees, 30 self-identified Tribal attendees. Questions/comments received on this webinar:

- **How does this apply to states that provide NPS funding?**

EPA Response: The changes we are soliciting input on are related to the Tribal 319 set aside. Specifically, the factors that go into base grants or competitive funds and how they are allocated. There wouldn't be an impact to how states allocate their 319 funding. One potential action is for EPA to take a look at Tribal 319 amount \$8M or 5% (which is ever greater). Changes to this could impact state funding available. Work is underway to advance equity in the NPS program via workgroup conversations with states to look at approaches how funding is allocated to local partners. These workgroups fall out of the scope of this consultation.

- **Are there stipulations that states have when they receive 319 funding since Tribal lands (even when Tribes have TAS) are included in their awards?**

EPA Response: State and territories 319 grants are subject to 319 grant guidelines which are different than the Tribal 319 program. Those guidelines require that state watershed project funding is at least 50% of funds and must be used in a watershed with an approved watershed-based plan (WBP) or alternative plan. EPA's current state 319 grant guidance does not set any requirements/expectations on states using 319 funds to support Tribes.

- **Where can we find a description/explanation of the current EPA allocation formula?**

EPA Response: The easiest place is in the supplement of the Consultation package. There is also a description in the grant guidelines. Refer to resource links provided at the top of these meeting notes.

- **In many cases, as I know with us there are lands where the state is completely excluded. And so, those 319 funds are given to them with consideration of lands that they have no say over whatsoever. This is something that should be taken into consideration at a state level and not just within Tribes. I feel like the 5% that we've been allocated doesn't take into consideration those types of discrepancies.**

- Follow up on this comment was included in Yakama Nation's written comments submitted (5.27.22)

Webinar 2 April 27th, 2022: 20 attendees, 14 self-identified Tribal attendees. Questions/comments received on this webinar:

- **Are project officers aware of questions and concerns? If not, is it appropriate to include them since they approve our end of the year reports?**

EPA Response: EPA HQ team leading consultation webinar work is closely with regional offices. All regional folks are aware of equity work and consultations in the program. We will share what we are hearing in the consultation. It also can be helpful to share thoughts directly with the EPA Region.

EPA HQ Engagements with Individual Tribes (See Appendix A for full list of participating Tribes):

- **Red Lake Band of Chippewa, Region 5 (5.15.22):** This was a staff-to-staff requested meeting between the Red Lake Band of Chippewa Department of Natural Resources and the EPA HQ NPS staff. Topics covered in this 1-hour meeting included: funding for base, competitive, and project implementation. The staff members highlighted constraints of staff time being split between programs, and challenges with hiring and retaining staff to implement projects.
- **Squaxin Island Tribe, Region 10 (8.19.22):** This was a staff-to-staff requested meeting between the Squaxin Island Tribe Department of Natural Resources and EPA HQ NPS Staff. Topics covered in this 1-hour meeting included: base grant funding, potential coordination between state and Tribal programs, program planning between CWA §319 and other CWA programs, needs for operations, maintenance, and training, and the value of compiling resources of successful Tribal projects and approaches.
- **Yakama Indian Nation, Region 10 (5.24.2022):** EPA R10 staff met with Yakama Indian Nation on 4.14.2022 to discuss the consultation. As a follow-up, EPA HQ answered the following questions via email:

1. When was the 30,000 and 50,000 base funding decided on?

The \$30K and \$50K funding levels were established beginning in fiscal year 2002. Here is the Tribal 319 guidance document from that year:

<https://www.federalregister.gov/documents/2002/01/22/02-1499/guidelines-on-awarding-section-319-grants-to-indian-Tribes-in-fy-2002>.

2. How were those amounts decided upon?

From the 2001 guidance (linked above): “As in FY 2000, the grants issuance process for FY 2001 is designed to balance the needs to (1) provide at least some minimum “base” funding to all approved Tribes to help them implement their NPS programs, and (2) provide sufficient funding to support a significant number of watershed projects that can make a substantial additional improvement to water quality...EPA considered whether other factors such as population and water resources should be used [for base funding levels], in addition to or instead of land area, to distinguish Tribes with the greatest needs from other Tribes. EPA recognizes that each of these factors is relevant and in some circumstances significant. EPA ultimately chose land area as the deciding factor for a cutoff because nonpoint source pollution is strongly related to land use; thus land area is a reasonable criterion that generally is highly relevant to identifying Tribes with the greatest needs (recognizing that Tribes have needs that significantly exceed available resources).”

3. What makes up the funding formula for states?

See Appendix D of the current state 319 grant guidelines

(<https://www.epa.gov/sites/default/files/2015-09/documents/319-guidelines-fy14.pdf>) for the% of state 319 funds awarded to each state. These percentages are calculated using an EPA allocation formula, based on several factors that attempt to account for the extent of NPS pollution risk present in each state. The six factors are: wetland, wellhead protection, mining, forestry, agriculture, and urban population. See below for a longer description of the state formula. Happy to follow-up to discuss more, if you'd like.

State 319 Allocation Formula Description:

There are six calculation factors and a base apportionment factor used in the section 319 allocation formula to calculate individual state, DC, and territory section 319-allocated funding and percentage amounts. States and DC use all factors in calculations, while territories only include a base apportionment factor and calculated wellhead protection factor proportions.

Calculated factors include a wetlands factor, a wellhead protection factor, an urban population factor, an agriculture factor, a mining factor, and a forestry factor. The agriculture, mining, and forestry factors are combined into one "non-urban" factor, as these three factors contribute to non-urban NPS pollution.

All six calculation factors (wetland, wellhead protection, mining, forestry, agriculture, and urban population) are given weighting proportions that attempt to account for the risk that the factor contributes to NPS issues. The original guidance document for the 319 allocation formula (USEPA 1990) explains that the weighting proportion assigned to each factor is "necessarily subjective and must be derived by the exercise of reasonable judgement. USEPA selected weightings that, in its judgment, appropriately gave affect to the distribution of surface and ground waters to be protected, prevalence of nonpoint sources that may impact those waters, and the populations that use the waters and are thereby adversely affected by use impairments."

Three of the factors (mining, forestry, and agriculture) are combined into one "non-urban" factor, due to these factors contributing to non-urban NPS pollution. Each individual factor is calculated separately and is then added together with the other two non-urban factors to get a total non-urban factor proportion. The non-urban factor has its own weighting proportion (0.28611), and each factor within the non-urban factor has its own weighting proportion as well.

4. Are Tribal lands and populations taken out of (subtracted from) the state calculation or are they included?

Tribal land area and population data are not subtracted from state formula calculations.

Appendix A: Webform Submissions

Tribe	Elk Valley Rancheria	Seneca Nation
Region	9	2
Question 1: What are the main challenges you face in working to manage NPS pollution and its potential impacts to human health? Please prioritize among the following potential needs [listed in form].	Improper funding to develop comprehensive Stormwater Management Programs that include prevention of discharging of Non-Point Source pollution, which is supposed to be the goal of this national attention to Non-Point Source pollution.	As they're listed above, a, b, c and d ((a) Additional funding for Tribal NPS staff, (b) Additional funding to support NPS project implementation, (c) Training for Tribal NPS staff, (d) NPS technical assistance)
Question 2: What change(s) would you recommend EPA's §319 program make to better support Tribes in addressing these challenges?	Include trainings to comprehensive development of Stormwater Management Programs.	Funding for personnel and then training and support.
Question 3:	There seems to no support for the maintenance of the established programs.	How and who can apply.
Question 4:	Provide program funding that actually recognized Tribal Sovereignty and the ability to protect their	Outreach
Question 5a:	Yes. The formula needs to be skewed to favor the smaller Tribes that have less than 250 members.	Yes, absolutely! This is a hurdle for Tribes that are short staffed and at the ground floor of their programs.
Question 5b:	Yes. Competitive grants have a bias that favor the larger Tribal communities.	Yes
Question 5c:	The EPA should make the awards of the grants based on the lands that have been extremely degraded and help the Tribes to ensure the Tribes receive the technical needed to successfully clean-up/protect/prevent further negative impacts.	Yes, this correlates with response for Question 5a.
Question 5d:	Eliminate the competitive aspect of the grant, and modify the scoring criteria. And remind the Federal government to enforce the laws that are	Yes.

	already on the books, so that the clean-ups do not fall onto the people who did not put the toxic waste there in the first place.	

Appendix B: Formal Consultation Letters

1. Yakama Nation, submitted 5/24/22



Confederated Tribes and Bands
of the Yakama Nation

Established by the
Treaty of June 9, 1855

May 24, 2022

Sent via Electronic Mail

Michael Regan
Administrator
United States Environmental Protection Agency
1200 Pennsylvania Ave. NW
Washington, D.C. 20460

RE: POTENTIAL EPA ACTIONS TO INCREASE TRIBAL CAPACITY TO MAINTAIN AND EXPAND
NONPOINT SOURCE MANAGEMENT PROGRAM

Dear Administrator Regan:

I write on behalf of the Confederated Tribes and Bands of the Yakama Nation (“Yakama Nation”) in response to the Environmental Protection Agency’s (“EPA”) request for comments on strategies to improve the Clean Water Act § 319 national nonpoint source program. The Yakama Nation requests that the EPA improve the § 319 funding allocation scheme by addressing inequities which limit the success of tribal nonpoint source pollution programs.

Since time immemorial, the original, free, and independent tribes and bands that later confederated as the Yakama Nation have depended on water resources for cultural, spiritual, and economic wellbeing. In Article III of the Treaty with the Yakamas, U.S. – Yakama Nation, June 9, 1855, 12 Stat. 951 (“Treaty of 1855”), the Yakama Nation expressly reserved the right to fish at “usual and accustomed places.” The Yakama Nation’s Treaty negotiators knew that securing this right was crucial to guaranteeing the vitality of their people. For the Yakama Nation people, the exercise of fishing rights was “not much less necessary...than the atmosphere they breathed.”¹

The Yakama Nation’s Treaty-reserved rights must be “understood as bearing the meaning that the Yakamas understood [them] to have in 1855.”² Rather than securing a mere “equal opportunity” to catch fish, the Treaty of 1855 guarantees to the Yakama Nation a portion of the harvest.³ This guarantee is “worthless without harvestable fish.”⁴ To that end, the Treaty of 1855 also reserved a right to protection of the habitat

¹ *U.S. v. Winans*, 198 U.S. 371, 381 (1905).

² *Wash. State Dept. of Licensing v. Cougar Den, Inc.* 139 S. Ct. 1000, 1011 (2019).

³ *Washington v. Washington State Commercial Passenger Fishing Vessel*, 443 U.S. 658, 681-82 (1979).

⁴ *See United States v. Washington*, 827 F.3d 836, 852 (9th Cir. 2016) (*aff’d by an equally divided court*,

necessary to sustain the fish resource.⁵ Nonpoint source pollution, including but not limited to agricultural runoff, threatens the Yakama Nation's Treaty reserved rights by negatively affecting water quality in the streams and rivers where the Yakama Nation's "usual and accustomed" fishing sites are located.

The federal government, including the EPA, has a fiduciary trust obligation to the Yakama Nation.⁶ The federal government's trust obligation is distinct from but related to its responsibilities stemming from the Treaty of 1855. Where a tribe has reserved treaty rights, the federal government has a duty to protect those rights.⁷ Therefore, "in carrying out its fiduciary duty, it is the [federal government's]... responsibility to ensure that Indian rights are given full effect."⁸ Here, the EPA's trust obligation requires the agency to ensure that the Yakama Nation has the resources to adequately identify and address nonpoint source pollution in ground and surface waters affecting our Treaty-reserved rights and the health of our members.

The EPA's § 319 program is not meeting that standard. Unregulated nonpoint source pollution affects the vast majority of on-reservation waters and off-reservation waters where the Yakama Nation's "usual and accustomed" fishing sites are located. However, the Yakama Nation's current § 319 funding is not adequate to support even a single full-time staff position. This frustrates our ability to recruit, train, and retain staff. Without adequate § 319 funding to support staff and projects, the Yakama Nation is forced to either exhaust other funding sources or forego its nonpoint source pollution work. The lack of funding means that progress is slow and many issues can only be monitored with no change to the status quo.

There are EPA requirements that take considerable time resources to develop. One example is the § 319 Management Plan, which is expected to be very detailed and requires information that a single employee would struggle to produce and maintain. The § 319 Management Plan, when done correctly, is a valuable tool to facilitate action for on-reservation non-point source issues. Unfortunately, even when staff are able to complete a § 319 Management Plan, in addition to their other responsibilities, there are few experts on the contents of the plan limiting its usefulness in the incident of staff turnover. Furthermore, limited funding means that, even when § 319 issues are properly identified and assessed, those issues will likely continue to exist until staff can secure enough § 319 competitive funding or alternative funding to actually address them.

Washington v. United States, 138 S. Ct. 1832 (2018)).

⁵ *See id.* at 865.

⁶ *See U.S. v. Mitchell*, 463 U.S. 206, 225 (1983).

⁷ *Parravano v. Babbitt*, 70 F.3d 539, 547 (9th Cir. 1995) ("[T]he Tribes' federally reserved fishing rights are accompanied by a corresponding duty on the part of the government to preserve those rights.")

⁸ *Northwest Sea Farms v. United States Army Corps of Eng'rs*, 931 F. Supp. 1515, 1520 (W.D. Wash. 1996). (citing *Seminole Nation*, 316 U.S. 286, 296-97 (1942)).

To address these challenges, the EPA should consider the equity of the funding that tribes are currently receiving through § 319.⁹ The EPA has posed several questions to tribes regarding the current allocation of § 319 funding. In each of these questions, the EPA asks tribes for ideas on reallocating funds to make them more equitable. This ignores the fact that, in 2021, tribes were only allotted 5% (\$8,852,000) of the \$177,000,000 of the EPA's national § 319 funding. The EPA splits the other 95% between states and territories. In other words, tribes receive a disproportionately small percentage of the available federal funding to combat non-point source pollution relative to states and territories. The EPA should address this fundamental inequity first.

Tribal lands also seem to be included in the states' allocated funding calculation regardless of whether the relevant tribes have "treatment in a similar manner as a state" ("TAS") designation for purposes of § 319. This skews the funding allocation in favor of the states. For example, the state of Washington does not have jurisdiction to implement nonpoint source pollution programs on Yakama Nation lands and therefore the Yakama Nation sees very little direct benefit from state § 319 funded programs. If Yakama Nation lands are counted toward the state's funding allocation, then the state is receiving additional funding for lands that it does not and cannot implement programs on. The EPA should instead be allocating the additional funding for Yakama Nation programs, which would result in a direct benefit for the Yakama Nation.

Next, funding for tribes has been stagnant for two decades with a one-size fits all approach. Specifically, the EPA gives \$30,000 to tribes with a smaller land-base and \$50,000 to tribes with a larger land-base. Since 2002, when the EPA designated these funding amounts for § 319 TAS tribes, the cost of maintaining a tribal § 319 program has significantly increased. Furthermore, EPA funding for tribes has been locked at or near 5% despite the fact that the number of tribes applying for funding has increased every year. Asking tribes to redistribute current funding amongst themselves, whether that be base funding or competitive funding, is not the correct approach and does not suit the vastly different needs of tribes across the country.

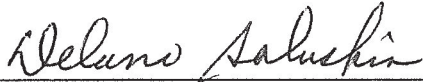
The inequities described in this letter are systemic environmental justice issues. Tribal communities are disproportionately affected by nonpoint source pollution issues because of inadequate funding, resources, and representation. Consistent with the EPA's Treaty and trust responsibilities, as well as President Biden's commitment to addressing environmental justice, the EPA must correct these inequities and more effectively support tribal § 319 programs.

The Yakama Nation appreciates the opportunity to provide these comments and looks forward to further engagement with the EPA regarding this important matter. If you

⁹ The following funding numbers and statistics are derived from the EPA's "Consultation and Coordination Plan: Potential EPA Actions to Increase Tribal Capacity to Maintain and Expand Nonpoint Source Management Programs," and "Guidelines on Awarding Section 319 Grants to Indian Tribes in FY 2001."

have any questions regarding this letter, please contact Mr. Phil Rigdon,
Superintendent of the Yakama Nation's Department of Natural Resources, at (509)
865-5121, ext. 4655, or phil_rigdon@yakama.com.¹⁰

Sincerely,



DELANO SALUSKIN, CHAIRMAN
YAKAMA NATION TRIBAL COUNCIL

¹⁰ In submitting this comment, the Yakama Nation does not waive its sovereign immunity from suit, nor does it waive, alter, or otherwise diminish its sovereign rights, privileges, or remedies guaranteed by the Treaty of 1855. Furthermore, submission of this comment does not substitute for formal government-to-government consultation on this matter.