

Fact Sheet: Proposed Reinterpretation of Clean Water Act Tribal Provision

Summary

Waters on the majority of Indian reservations do not have water quality standards under the Clean Water Act to protect human health and the environment. Only 40 of the more than 300 federally recognized tribes with reservations have completed the process of obtaining EPA's approval to be treated in a manner similar to a state (TAS), and adopting standards for their waters that EPA has approved.

EPA proposes to streamline how tribes apply for TAS for the water quality standards program and other Clean Water Act regulatory programs. The proposal would reduce the burden on applicant tribes and advance cooperative federalism by facilitating tribal involvement in the protection of reservation water quality as intended by Congress.

Background

Since 1991, EPA has followed a cautious approach that requires applicant tribes to demonstrate inherent authority to regulate waters and activities on their reservations under principles of federal Indian common law.

The agency has consistently stated that its approach was subject to change in the event of further congressional or judicial guidance addressing tribal authority under section 518 of the Clean Water Act.

Having received such guidance, EPA proposes to conclude definitively that section 518 includes an express delegation of authority by Congress to Indian tribes to administer regulatory programs over their entire reservations, subject to the eligibility requirements in section 518.

As a streamlining step, the proposal would have no significant cost.

What would the reinterpretation do?

This reinterpretation would eliminate the need for applicant tribes to demonstrate inherent authority to regulate under the Clean Water Act, thus allowing tribes to implement the congressional delegation of authority unhindered by requirements not specified in the statute.

The reinterpretation would also bring EPA's treatment of tribes under the Clean Water Act in line with EPA's treatment of tribes under the Clean Air Act, which has similar statutory language addressing tribal regulation of Indian reservation areas.

What would not change under the proposal?

This proposal would not revise any regulatory text.

Regulatory provisions would remain in effect requiring tribes to identify the boundaries of the reservation areas over which they seek to exercise authority, as would provisions allowing the adjacent state(s) to comment to EPA on an applicant tribe's assertion of authority.

Would the proposal affect the geographic scope of TAS?

No. The proposal would neither expand nor contract the geographic scope of potential tribal TAS eligibility. Under the Clean Water Act, tribes can only obtain TAS status over waters within the borders of their reservations. (Tribal trust lands are reservation

lands even if they are not within a formal reservation.)

Would the proposal affect any existing limitations on tribal criminal enforcement authority?

No. The proposal relates solely to civil regulatory authority.

What if my tribe or state has special circumstances affecting CWA regulatory authority?

There could be instances where special circumstances limit or preclude a particular tribe's ability to accept or effectuate the congressional delegation of authority over its reservation. For example, there could be a separate federal statute establishing unique jurisdictional arrangements for a specific state or reservation. EPA takes no position in the proposal regarding whether any particular tribe or Indian reservation is subject to any such circumstances. Any such issue would be addressed on a case-by-case basis and with the benefit of a full record of relevant information that would be developed during the processing of a particular tribe's application for eligibility to regulate under the Clean Water Act.

Who would be potentially affected by or interested in the proposed reinterpretation?

Federally recognized Indian tribes with reservations that could potentially seek eligibility to administer CWA regulatory programs, and other interested tribes.

States adjacent to potential applicant tribes.

Industries or municipalities discharging pollutants to waters within or adjacent to reservations of potential applicant tribes.

Would the proposal affect previous EPA approvals of TAS for water quality standards?

No. It would not affect the 50 previous EPA approvals of tribal TAS for water quality standards.

Would the proposal affect the scope of existing state regulatory programs approved by EPA under the Clean Water Act?

No. The proposal does not affect the scope of existing EPA-approved state regulatory programs under the CWA.

Will EPA provide additional funding for tribes with TAS for regulatory programs?

EPA will continue to consider tribal resource issues in its budgeting and planning process. However, EPA cannot assure tribes that additional funding will be available for a tribe to develop or implement the Clean Water Act regulatory program it seeks. A tribe choosing to administer such programs will need to carefully weigh its priorities and any available EPA assistance.

To Provide Comments or Participate in Consultation

Public comments on the proposal are being accepted through October 6, 2015, at <http://www.regulations.gov> using Docket ID No. EPA-HQ-OW-2014-0461.

EPA will host a webinar to explain the proposal and answer questions on September 10, 2015, at 2:00 – 3:00 p.m. EDT. See EPA's website at <http://water.epa.gov/scitech/swguidance/standards/wqslibrary/tribal.cfm> for instructions on how to register and participate.

EPA will contact tribal governments, tribal organizations, states, and state and intergovernmental associations to provide opportunities for consultation and coordination before the rule is finalized.

Where can I find more information?

Contact Fred Leutner by email at Leutner.Fred@epa.gov or by phone at (202) 566-0378, or visit EPA's website at:

<http://water.epa.gov/scitech/swguidance/standards/wqslibrary/tribal.cfm>
