

Revised Interpretation of Clean Water Act Tribal Provision – Proposed Rule (820-F-15-006)

Frequently Asked Questions
August 7, 2015

1. What are the environmental benefits of a tribe getting TAS?

Obtaining treatment in a similar manner as a state (TAS) for Clean Water Act regulatory programs enables tribal governments to make decisions and carry out program responsibilities affecting their reservations, their environments, and the health and welfare of the reservation populace.

Tribes with TAS for the water quality standards program can:

- Establish water quality goals to protect reservation water resources.
- Ensure that facilities within or upstream from the reservation protect the tribe's EPA-approved water quality standards applicable to tribal waters.
- Designate uses of water bodies that may include cultural or traditional purposes.

Tribes with TAS for the section 402 or 404 programs can issue permits themselves, and no longer need to rely on the federal government to issue the permits.

EPA and tribal partners have collaborated to develop materials describing how tribes can obtain TAS and operate successful water quality standards programs. See such topics as "Training," "Publications and Videos" and "Case Studies" on our website about EPA's partnership with tribes at http://water.epa.gov/scitech/swguidance/standards/wqslibrary/tribes_index.cfm.

2. Once EPA approves a tribe as eligible to administer a regulatory program, what responsibilities does the tribe have?

The tribe would generally assume the same responsibilities that a state assumes in administering the same program.

For the *water quality standards* program, an authorized tribe must establish water quality standards for its waters. In administering the program, the tribe must comply with 40 CFR part 131, the same regulation that applies to state standards. For example, the regulation requires an authorized tribe to adopt its standards under tribal law after providing for public participation and to submit the standards to EPA for review and approval or disapproval. Every three years thereafter, an authorized tribe must review its standards and revise them as necessary. To date, EPA has approved TAS for 50 tribes

for a water quality standards program; 40 of these have successfully adopted EPA-approved standards. A list of these tribes is available at <http://water.epa.gov/scitech/swguidance/standards/wqslibrary/approvtable.cfm>.

Similarly, when a tribe receives TAS for a *section 402 or 404 permit program*, it must comply with EPA regulations in 40 CFR part 123 or 233 respectively. No tribes have yet been approved by EPA to administer either of these programs.

3. Does EPA's approval of a tribe's TAS application concurrently approve the tribe's water quality standards?

No. EPA's approval of a tribe's TAS application is not an approval or disapproval of the tribe's water quality standards. EPA review and approval or disapproval of the tribe's water quality standards is a separate Agency action. A tribe's TAS application must be approved for the tribe to be eligible to administer water quality standards and water quality certification programs and for EPA to act on any submitted tribal water quality standards. Although tribes can submit a TAS application and their actual water quality standards simultaneously, EPA takes separate actions on the distinct submissions.

4. How would this rule change a tribe's application for TAS for a Clean Water Act regulatory program?

Much of the requirements would remain unchanged: demonstrating that the tribe is federally recognized and has a reservation; that the tribe has a governing body carrying out substantial governmental duties and powers; that the functions to be exercised by the tribe pertain to the management and protection of water resources within the borders of the reservation; and that the tribe be reasonably expected to be capable of carrying out the functions to be exercised in a manner consistent with the terms and purposes of the Act and applicable regulations.

The effect of this proposal would be to relieve tribes of the need to demonstrate their inherent authority to administer Clean Water Act regulatory programs. In particular, this proposal would eliminate any need to demonstrate that the applicant tribe retains inherent authority to regulate the conduct of nonmembers of the tribe on nonmember fee lands under the "*Montana test*" established by the Supreme Court in 1981. Instead, applicant tribes would be able to rely on the congressional delegation of authority in section 518 as the source of their authority to regulate their entire reservations under the Act, without distinguishing among various categories of on-reservation land.

5. What is inherent regulatory authority? How does it differ from congressional delegation of authority?

These terms describe two possible sources of tribes' regulatory authority, which for purposes of the rule refers to authority to administer Clean Water Act regulatory

programs pursuant to section 518. Although the source of authority is important in establishing a foundation for a tribe's actions under the Clean Water Act, the revised interpretation would not affect how the tribe would ultimately implement that authority. Tribes implementing EPA-approved Clean Water Act regulatory programs would continue to be subject to the same basic programmatic requirements as states.

Under EPA's 1991 cautious interpretation of section 518, the source of an otherwise eligible tribe's authority to regulate under the Clean Water Act derives from the tribe's retained inherent governmental authority, consistent with principles of federal Indian common law. Under such principles, tribes generally have the inherent authority to regulate activities of their own members and territories. To regulate activities of nonmembers on nonmember-owned fee lands within a reservation, under a 1981 Supreme Court Indian law case, *Montana v. United States*¹ and its progeny, a tribe would generally need to demonstrate that nonmember conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. This is termed the "*Montana* test." Thus, under the 1991 interpretation EPA requires an applicant tribe to demonstrate its inherent authority, including showing how it meets the *Montana* test where necessary.

EPA's proposed revised interpretation that the Clean Water Act includes an express congressional delegation of authority for tribes to administer regulatory programs under the Act means that the otherwise eligible tribe can generally rely on the delegation as its source of authority.

6. How are reservation boundaries determined?

A tribe applying for a Clean Water Act regulatory program must identify the reservation area it seeks to regulate. To do so, the tribe would generally submit a map or legal description of the reservation as part of its TAS application.

EPA would consider the tribe's submission in light of any information EPA may already have or may receive from a state, another tribe or other potential commenters (as well as the applicant tribe's responses to any such comments) concerning the reservation's boundaries. In reaching a decision on an applicant tribe's TAS eligibility, EPA would carefully consider any issues or conflicting claims concerning the geographic scope of the TAS application, and may coordinate with other federal agencies such as the Department of the Interior if appropriate.

Commenters have, at times, raised such geographic issues in the context of previous TAS applications. EPA's proposal would not alter the opportunity for appropriate governmental entities and the public to provide such comments on future applications, or increase any burden attendant to preparing and submitting such comments.

¹ *Montana v. United States*, 450 U.S. 544 (1981).

7. Would the rule save tribes money and staff time in preparing TAS applications for Clean Water Act programs?

EPA estimates that the proposed rule would reduce the staff time for a typical applicant tribe by 27% and the overall costs (for salaries and contractor support) by 39%. These estimates are explained in the Information Collection Request in the docket for the proposed rule at <http://www.regulations.gov>, Docket ID No. EPA-HQ-OW-2014-0461.

8. Would the rule reduce the time it takes for a tribe to get TAS?

The time to develop and process a TAS application for a Clean Water Act regulatory program would likely be reduced, especially for tribes with nonmember fee lands within the reservation. EPA's information on the 50 tribes that it has found eligible to administer water quality standards and section 401 water quality certifications indicates that tribal applications for reservations with nonmember fee lands, which require an analysis of tribal inherent authority under *Montana*, took 1.6 years longer to be developed and approved, on average, than applications for reservations without such lands. See

9. How would the rule affect any tribes that may be currently applying for TAS?

EPA advises tribes that have already initiated TAS applications for CWA regulatory programs that the reinterpretation proposed in this action has not yet taken effect. The earliest it could take effect would be 30 days after EPA issues a final interpretive rule (which would occur after reviewing and considering all comments received during the public comment period on the proposal). All TAS applications will be processed under the existing statutory interpretation and the current regulations and guidance noted above, unless and until EPA issues a final interpretive rule. Such tribes can, at their option, ask EPA to suspend action on their current CWA applications for regulatory programs pending a potential final interpretive rule, but EPA cannot guarantee whether or when this proposal will be finalized.

10. If a tribe receives TAS for one Clean Water Act regulatory program, is it automatically eligible to administer other such programs?

No. If EPA approves a tribe's TAS status for a particular program under the Act, the tribe is generally eligible to administer that program in a manner similar to a state. However, an EPA TAS approval is limited to the specific program(s) and lands covered by that decision. Tribes must receive TAS approval for each regulatory program they wish to administer.

Nevertheless, to avoid duplicative TAS application requirements, EPA's existing regulations provide that if a tribe has previously qualified for eligibility to administer

another program, the tribe need only provide the required information that has not been submitted in a previous application. For example, if a tribe has previously demonstrated that it is federally recognized and has a government carrying out substantial duties and powers (and if there is no change regarding those issues), then such information need not be resubmitted. Generally speaking, certain issues, such as the demonstration of capability might be needed for each application because the program's requirements may differ from the previous program.

11. Did EPA consult with any parties outside the federal government in preparing this proposal?

Yes. EPA consulted and coordinated with tribes, tribal organizations, states, and state associations before proposing the rule.

Consistent with Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments), EPA initiated a tribal consultation and coordination process for this action by sending a "Notification of Consultation and Coordination" letter on April 18, 2014, to all 566 federally recognized tribes. EPA received input from tribes in two webinars and 23 comment letters.

In the spirit of Executive Order 13132 (Federalism), EPA consulted with representatives of state governments. EPA invited 10 national and regional state associations by letter to a July 8, 2014, informational meeting; participated in eight follow-up meetings with interested state associations and their members as well as certain individual states; and received written input from six states.

EPA held additional informational meetings in May and June 2015 with state and tribal representatives, including members of the Western Governors' Association, the Environmental Council of the States, the National Tribal Water Council, and the National Tribal Operations Committee.

Records of these meetings and copies of written comments and questions submitted by states and tribes are included in the docket for this rule.