Revised Interpretation of Clean Water Act Tribal Provision – Final Interpretive Rule (820-F-16-005)

Frequently Asked Questions

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

   Obtaining treatment in a manner similar to 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 EPA's website at http://www.epa.gov/wqs-tech/case-studies-video-and-publications-tribal-water-quality-standards

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 over 50

tribes for a water quality standards program; 42 of these have successfully adopted standards that EPA has approved. A list of these tribes is available at http://www.epa.gov/wqs-tech/epa-approvals-tribal-water-quality-standards.

Similarly, a tribe seeking TAS for a *section 402 or 404 permit program* would need to 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 does this reinterpretation change a tribe's application for TAS for a Clean Water Act regulatory program?

All of the requirements in EPA's regulations 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.

This interpretive rule removes the need for tribes to demonstrate their inherent authority to administer Clean Water Act regulatory programs. In particular, this rule eliminates 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 now are 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, this revised interpretation does not affect how the tribe ultimately implements that authority. Tribes implementing EPA-approved Clean Water Act regulatory programs 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 derived 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 required an applicant tribe to demonstrate its inherent authority, including showing how it met the *Montana* test where necessary.

EPA's 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 must generally submit a map or legal description of the reservation as part of its TAS application.

EPA also considers 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 carefully considers 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 reinterpretation does not alter the opportunity for appropriate

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

governmental entities and the public to provide such comments on future applications, or increase any burden attendant to preparing and submitting such comments.

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

EPA estimates that the reinterpretation will 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 rule at http://www.regulations.gov. Search for Docket ID No. EPA-HQ-OW-2014-0461.

8. Will the reinterpretation 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 will likely be reduced, especially for tribes with nonmember fee lands within the reservation. EPA's information on the 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 required 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.

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

Any EPA approval of a TAS application for a CWA regulatory program from now on will be based on the delegation of authority from Congress as the relevant source of authority supporting the tribe's eligibility. Any new tribal TAS application for a CWA regulatory program submitted from now on will need to be consistent with the interpretation of section 518 expressed in this rule. For any pending TAS application for CWA regulatory programs already submitted, EPA will consult with the applicant tribe to assist it in amending its application if necessary to be consistent with this rule and to address any process issues.

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 reinterpretation?

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

EPA conducted tribal consultation and coordination both before proposal (April-July 2014) and after (August-October 2015). A total of 70 tribal representatives participated in two webinars in May 2014, and 44 participated in webinars in September 2015. The Office of Water received 23 pre-proposal comment letters from tribes and tribal associations, and 21 letters during the public comment period. All tribal comments supported the proposal.

EPA consulted and coordinated with 10 national and regional state associations and representatives of state governments both before and after the proposal. EPA received eight pre-proposal comment letters from states and state associations, and 10 letters during the public comment period. Two states expressed support for tribal opportunities to obtain TAS. Some participants disagreed with or questioned in whole or in part the agency's rationale for the reinterpretation. Others questioned whether the proposal would affect the geographic scope of tribal authority under the CWA and how the proposal would affect a state's ability to challenge a tribe's application. Some states also had questions about issues unique to their situations.

The Office of Water considered this input and responded to all issues in the final rule.

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