

US EPA ARCHIVE DOCUMENT



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

JUN 18 2014

OFFICE OF  
WATER

Dear Intergovernmental Association Colleague:

The U.S. Environmental Protection Agency is considering a potential reinterpretation of the Clean Water Act provision regarding treatment of tribes in a manner similar to a state ("TAS"). The purpose of this letter is to seek your input on this potential action at this early stage, prior to a formal proposal.

Specifically, EPA is considering reinterpreting section 518 as a delegation by Congress of authority to eligible tribes to administer Clean Water Act regulatory programs over their reservations, regardless of land ownership. This reinterpretation would replace EPA's current interpretation that applicant tribes need to demonstrate their inherent regulatory authority.

All other tribal eligibility requirements established in the Act and EPA's regulations would remain in place. Each interested tribe will continue to apply individually for TAS, and to specify the boundaries of the reservation areas and the waters for which it seeks regulatory authority. EPA will continue to provide the adjacent state, other appropriate governmental entities, and the public with notice of a tribe's TAS application as well as an opportunity to comment on the tribe's assertion of authority before EPA approves or disapproves TAS for a Clean Water Act regulatory program.

I would like to invite you to a meeting to discuss this potential reinterpretation of TAS under the Clean Water Act. The meeting will be held on July 8, 2014, at 1:00 – 2:30 PM, in room 1117A of the William Jefferson Clinton Building (formerly "EPA East" Building). You may enter this building at 1201 Constitution Avenue. Please be sure to arrive at least 15 minutes in advance of the meeting time, and to bring a photo ID for entry. The Point of Contact for escort into the building is Beth LeaMond, who can be reached at 202-566-0444. Staff members of your association who are not able to attend in person may participate by audio conference by dialing 1-866-299-3188, and entering code 202 566 0444# at the prompt.

The purpose of this meeting is for EPA to (1) provide background information and outline its plans for the action, (2) solicit initial feedback from association representatives, and (3) discuss approaches for conducting outreach to and obtaining input from State members.

I am enclosing a three-page description of the action for your information. At the meeting, we will discuss this description in more detail. We would be delighted to hear your comments and views during the meeting. The enclosure provides points of contact and addresses if you choose to follow up with written input.

We are inviting the following intergovernmental associations to participate in this meeting: the National Governors Association, the National Conference of State Legislatures, the Council of State Governments, the Western Governors Association, the Southern Governors Association, the Midwestern Governors Association, the Coalition of Northeastern Governors, the Environmental Council of the States, the Association of Clean Water Administrators, and the Western States Water Council.

Please let us know if you will be able to participate in this meeting by contacting Andrew Hanson in the EPA's Office of Congressional and Intergovernmental Relations at [hanson.andrew@epa.gov](mailto:hanson.andrew@epa.gov) or (202) 564-3664.

If you have any questions regarding the potential reinterpretation, you may contact Fred Leutner at [Leutner.fred@epa.gov](mailto:Leutner.fred@epa.gov) or (202) 566-0378.

Sincerely,

A handwritten signature in blue ink, appearing to read "Elizabeth Southerland".

Elizabeth Southerland, Director  
Office of Science and Technology

Enclosure

# Potential Reinterpretation of a Clean Water Act Provision Regarding Tribal Eligibility to Administer Regulatory Programs

Prepared by the EPA Office of Science and Technology  
May 2014

EPA took a cautious approach in 1991 when it interpreted a Clean Water Act (CWA) provision to mean that each tribe seeking to administer a regulatory program must demonstrate its own inherent regulatory authority. The demonstration has proven to be the most challenging and resource-intensive element of a tribe's application to be treated in a manner similar to a state ("TAS"). Based on EPA's experience and developments in the case law since 1991, EPA is considering a potential reinterpretation that could significantly reduce the burden on individual tribes applying for TAS.

## **I. CURRENT INTERPRETATION OF TAS PROVISION IN CWA**

In the preamble to a 1991 TAS regulation,<sup>1</sup> EPA interpreted the CWA TAS provision at section 518 to mean that a tribe must demonstrate its inherent regulatory authority to be eligible to administer a regulatory program under the CWA. Further, where the tribe's reservation includes nonmember-owned fee lands, the tribe generally must demonstrate that nonmember activities on nonmember-owned fee lands could have a substantial, direct effect on the tribe's health or welfare – commonly known as the "Montana test."<sup>2</sup> EPA has issued guidance to tribes for complying with this interpretation when applying for the water quality standards program and section 401 certifications; a similar approach would be used for section 402 or 404 permit program applications.<sup>3</sup>

## **II. POTENTIAL REINTERPRETATION OF TAS PROVISION IN CWA**

EPA is considering reinterpreting CWA section 518 as an express delegation by Congress to eligible tribes to administer CWA regulatory programs over their entire reservations irrespective of who owns the land. This would replace EPA's current interpretation that an applicant tribe must demonstrate its inherent authority. The potential reinterpretation is supported by: the plain language of section 518; a similar approach applied in implementing the Clean Air Act TAS provisions; and relevant judicial cases and EPA's experience since 1991. One effect could be a significant reduction in the time and effort for tribes to apply for and receive TAS.

EPA would accomplish the reinterpretation by issuing an interpretive rule after soliciting and considering public comments. The interpretive rule would be accompanied by a revision to EPA's current guidance for tribal applications. Neither the CWA statutory language nor EPA's implementing regulations would be revised, since the language of both supports the proposed reinterpretation. A tribe would still need to identify the boundaries of the reservation areas for which it seeks TAS eligibility to administer a regulatory program, and EPA will still provide states, other appropriate governmental entities, and the public the opportunity to comment on the tribe's assertion of authority before EPA approves or

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<sup>1</sup> *Amendments to the Water Quality Standards Regulation That Pertain to Standards on Indian Reservations*, Final Rule, 56 FR 64895, Dec. 12, 1991.

<sup>2</sup> See *Montana v. U.S.*, 450 U.S. 544 (1981).

<sup>3</sup> See *Strategy for Reviewing Tribal Eligibility Applications to Administer EPA Regulatory Programs*, EPA, 2008, <http://www.epa.gov/indian/laws/tas.htm>, Attachments B and C

disapproves TAS for the tribe. As with states, EPA will maintain oversight of any authorized tribal regulatory programs. EPA regulations also require states and authorized tribes to consider public comments before they act, such as when adopting water quality standards or issuing discharge permits.

### III. STATUS OF THIS ACTION AND NEXT STEPS

During April-July, 2014, EPA is conducting pre-proposal consultation and coordination with tribes and states, consistent with relevant EPA and other federal policies. EPA welcomes the views of tribes and states at this early stage, and is open to requests for further consultation opportunities.

EPA will fully consider all comments and views received during this consultation and coordination. If EPA decides to proceed, the interpretive rule could be proposed in the Federal Register in Fall 2014 with a comment period of 60 days to follow. The reinterpretation would not become effective until all comments are considered and the interpretive rule is finalized, likely not before Fall 2015. In the meantime, EPA will continue to implement the current interpretation of the CWA TAS provision.

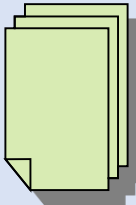
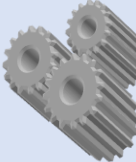
### IV. FOR FURTHER INFORMATION

- Further information on this potential action is available at [http://water.epa.gov/scitech/swguidance/standards/wqslibrary/tribes\\_index.cfm](http://water.epa.gov/scitech/swguidance/standards/wqslibrary/tribes_index.cfm).
- To ask questions or provide comments, please email Fred Leutner at [TASreinterpretation@epa.gov](mailto:TASreinterpretation@epa.gov) or write: Corey Buffo, Chief, Regional, State, and Tribal Standards Support Branch (mail code 4305T), Office of Water, U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, Washington, DC 20460.



## Potential TAS Reinterpretation

Changes to Expect (shaded areas)

		<i>Current Interpretation</i>	<i>After Reinterpretation</i>
<b>Eligibility Criteria for TAS in CWA Sec. 518 and EPA regulations<sup>4</sup> -- the tribe must demonstrate that it...</b>			
	1. Is federally recognized and has a reservation.	✓	✓
	2. Has a governing body carrying out substantial governmental duties and powers	✓	✓
	3. Has appropriate authority to regulate the quality of reservation waters. <ul style="list-style-type: none"> <li>• Tribe must provide a map or legal description of reservation boundaries</li> </ul>	✓	✓
	<ul style="list-style-type: none"> <li>• Legal counsel must describe the basis of the tribe’s authority by...</li> </ul>	Demonstrating inherent authority and, if fee lands on reservation, meeting the <i>Montana</i> test	Relying on the Congressional delegation of authority
	<ul style="list-style-type: none"> <li>• Tribe must identify the surface waters to be regulated</li> </ul>	✓	✓
4. Has (or has a plan for developing) the capability to administer the program	✓	✓	
<b>Review Processes – for a tribal Water Quality Standards program</b>			
	<ul style="list-style-type: none"> <li>• EPA seeks comments on tribal TAS application’s assertion of authority – from appropriate governmental entities, local parties (per § 131.8(c))</li> </ul>	✓	✓
	<ul style="list-style-type: none"> <li>• EPA seeks comments on EPA’s factual findings concerning inherent tribal authority for TAS – from appropriate governmental entities, local parties (per EPA guidance)</li> </ul>	✓	Not needed
	<ul style="list-style-type: none"> <li>• Tribe seeks comments on its water quality standards before submitting to EPA for approval – from the public (per § 131.20)</li> </ul>	✓	✓

<sup>4</sup> The numbered elements are paraphrased from CWA section 518. The bulleted elements are paraphrased from selected provisions of EPA’s TAS regulations for regulatory programs: 40 CFR §§ 131.8 (water quality standards), 131.4(c) (water quality certifications), 123.31-34 (section 402 permitting), and 233.60-62 (section 404 permitting).