

US EPA ARCHIVE DOCUMENT



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

April 18, 2014

OFFICE OF
WATER

Re: Notification of Consultation and Coordination on Potential Reinterpretation of Clean Water Act TAS Provisions

Dear Honorable Leader:

The U.S. Environmental Protection Agency (EPA) is initiating consultation and coordination with federally-recognized Indian tribes concerning a potential reinterpretation of Clean Water Act provisions regarding treatment of tribes in the same manner as a state (TAS). The reinterpretation could reduce some of the time and effort for tribes submitting applications for TAS for regulatory programs under the Clean Water Act. Specifically, EPA is considering reinterpreting section 518(e) as a delegation by Congress of authority to eligible tribes to administer Clean Water Act regulatory programs over their entire reservations. 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.

You may be interested in this rulemaking if:

- your tribe has submitted – or is considering submitting – an application for TAS for the purpose of administering a CWA regulatory program, *or*
- your tribe is one of the 48 tribes that are already approved for TAS to administer the water quality standards program, and might seek TAS for other CWA regulatory programs in the future, *or*
- you have a general interest in tribal administration of Clean Water Act regulatory programs.

The consultation and coordination process will be conducted in accordance with the *EPA Policy on Consultation and Coordination with Indian Tribes* (www.epa.gov/tribal/consultation/consult-policy.htm). EPA invites you and your designated consultation representative(s) to participate in this process. The current phase of this process will extend from the date of this letter until June 20, 2014. If we decide to proceed with the reinterpretation, we expect to offer a second phase later this year after the reinterpretation is proposed in the Federal Register.

The EPA will hold two identical consultation and coordination webinars concerning this matter, as listed below. Each webinar will consist of two parts. The first part will provide tribes an opportunity to learn more and ask questions about the proposed reinterpretation. The last part of the webinar will be reserved for consultation comments from tribal leaders or their consultation designees.

Tribes-only Consultation and Coordination Webinars: "Potential Reinterpretation of Clean Water Act TAS Provisions"

- Thursday, May 22, 2:00 – 4:00 pm EDT
- Wednesday, May 28, 1:00 – 3:00 pm EDT

The webinars will be held using Adobe Connect. To register for the webinar, please visit: <http://www.horsleywitten.com/TribalConsultation>, or to register by phone, please call: Erin Cabral at 508-833-6600. You will receive an email confirmation after your registration has been submitted. Following registration and within one week of the webinar, you will receive an email with information for accessing the webinar on the day of the event. An archived copy of the Webinar presentation and an audio recording of the webinar will be posted at: http://water.epa.gov/scitech/swguidance/standards/wqslibrary/tribes_index.cfm within 2 weeks after the Webinar. EPA also extends an invitation for tribes to request formal government-to-government consultation during the consultation and coordination period.

Enclosed is the consultation and coordination plan that includes a description of the matter under consultation and the process EPA intends to follow, including dates of key events and information on how you can provide input on this matter. *This information is also available on EPA's Tribal Portal* <http://www.epa.gov/tribal/consultation>

The official EPA contact person for this consultation and coordination process is Beth Leamond, Office of Water, (202) 566-0444, Leamond.Beth@epa.gov. Please do not hesitate to contact her should you have any questions or if you would like to request alternate arrangements to the process outlined in the consultation plan.

Whether or not you participate in this consultation process, you would also have the opportunity to provide input on the reinterpretation during the public comment period if EPA decides to move forward with this matter. In that event, the proposed reinterpretation of Clean Water Act TAS provisions would be published in the *Federal Register* and would be accessible at regulations.gov. The EPA would accept public comments for 60 days after the proposed rule is published in the *Federal Register*.

We look forward to hearing from you on this important matter.

Sincerely,



Elizabeth Southerland
Director, Office of Science and Technology

Enclosure

**Consultation and Coordination Plan for the
EPA's Potential Reinterpretation of Clean Water Act TAS Provisions
April 2014**

Background Information

The U.S. Environmental Protection Agency (EPA) is initiating consultation and coordination with federally-recognized Indian tribes concerning a potential reinterpretation of Clean Water Act provisions regarding treatment of tribes in the same manner as a state (TAS). The reinterpretation could reduce some of the time and effort for tribes submitting applications for TAS for regulatory programs under the Clean Water Act.

Specifically, EPA is considering reinterpreting section 518(e) as a delegation by Congress of authority to eligible tribes to administer Clean Water Act regulatory programs over their entire reservations, thereby removing the requirement for applicant tribes to demonstrate their inherent regulatory authority. This reinterpretation would be supported by, among other things, an analysis of events occurring since 1991 when EPA originally interpreted the Act's TAS provisions in the context of a regulatory program. These events include the approach EPA used in implementing the Clean Air Act's TAS provision in 1998, and certain judicial cases.

To accomplish this streamlining, EPA would not need to amend any regulatory text. Instead, EPA would revise its TAS guidance to remove provisions relating to the demonstration of inherent authority, including provisions relating to the so-called *Montana* test, which addresses tribal inherent regulatory authority over non-member activities.¹ Instead, applicant tribes would simply confirm their willingness and ability to receive and exercise a delegation of Congressional authority within the identified exterior boundaries of their reservation.

This action will not modify any other TAS eligibility requirements, such as the need for a tribe to demonstrate its capability for running the Clean Water Act program and to identify the exterior reservation boundaries of the area for which it seeks eligibility. Pursuant to existing regulations, EPA would continue to provide an opportunity for comment to EPA on the tribe's TAS application and/or program submission before EPA makes a decision.

The EPA is committed to working with tribes to enable eligible tribes' full use of CWA regulatory programs to protect waters on their reservations. The proposed approach is consistent with suggestions made by the National Tribal Water Council to EPA's Office of Water in March 2013.

Tribal Consultation and Coordination Process and Time Frame

The following table lays out the process and timeline for consultation and coordination on this action. Tribes may access this letter, and related consultation information on the EPA Tribal Portal under Tribal Consultation Opportunities, located at <http://tcots.epa.gov/oita/TConsultation.nsf/TC?OpenView>.

¹ This element of the current process derives from the Supreme Court's decision in *Montana v. U.S.*, 450 U.S. 544 (1981) and may include, among other things, a demonstration by the tribe that activities on nonmember-owned fee lands within the reservation could have substantial direct effects on the tribe's health or welfare.

Date	Event	Contact Information
Date of this letter through June 20, 2014	Consultation and Coordination period before proposal of the reinterpretation	EPA Contact: Beth LeaMond, U.S. EPA, Mail Code 4305T, 1200 Pennsylvania Avenue, NW, Washington, DC 20460 Phone: (202) 566-0444 E-mail: Leamond.beth@epa.gov
April 22, 2014	National Tribal Water Council Meeting with EPA: TAS discussion session	For NTWC members only
May 22, 2014, 2:00 pm-4:00 pm Eastern Time	Tribes-Only Consultation and Coordination Webinar, "Potential Reinterpretation of CWA TAS Provisions"	To register: http://www.horsleywitten.com/TribalConsultation or call Erin Cabral at 508-833-6600. EPA Contact: Beth LeaMond, U.S. EPA, Mail Code 4305T, 1200 Pennsylvania Avenue, NW, Washington, DC 20460 Phone: (202) 566-0444 Email: Leamond.beth@epa.gov
May 28, 2014, 1:00 pm -3:00 pm Eastern Time	Tribes-Only Consultation and Coordination Webinar, "Potential Reinterpretation of CWA TAS Provisions"	To register: http://www.horsleywitten.com/TribalConsultation or call Erin Cabral at 508-833-6600.. EPA Contact: Same as above
Date to be determined (expected in Fall 2014)	Proposed reinterpretation published in Federal Register	
Extending for 60 days after date of publication	Public comment period (Tribes may submit written comments)	Address and instructions will be provided in the Federal Register notice
Extending up to 60 days after date of publication	Expected phase 2 of consultation and coordination	Details to be provided at a later date

Tribes may also provide consultation and coordination comments at any time by email to TASreinterpretation@epa.gov or by mail to Beth LeaMond at the address shown above.