

Potential Reinterpretation of Clean Water Act TAS Provisions

USEPA Office of Science and Technology

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Staff Draft

Issue

- EPA's 1991 interpretation that each tribe seeking TAS must demonstrate its own inherent regulatory authority was a very cautious approach.
- The demonstration has proven to be the most challenging and resource-intensive element of a TAS application, and may be one cause of a slowdown in TAS applications and approvals for CWA regulatory programs.

Purpose of This Presentation

- To describe a potential reinterpretation of the CWA's TAS provisions that EPA is considering. The reinterpretation could significantly reduce the burden on individual tribes applying for TAS.

Basics of TAS under the Clean Water Act

- Section 518 authorizes EPA to treat a tribe in the same manner as a state for purposes of specific CWA regulatory programs if it:

1. Is federally recognized and has a reservation.

2. Has a governing body carrying out substantial governmental duties and powers.
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3. Has appropriate authority to regulate the quality of reservation waters.

4. Is reasonably expected to be capable of carrying out the functions of the program.

- EPA has issued program-by-program regulations specifying:
 - The information a tribe must submit when applying for TAS
 - The process to be followed by EPA in acting on a TAS application

EPA's Current Interpretation of CWA TAS

In 1991,* EPA interpreted the CWA TAS provisions to mean:

- ❑ A tribe must demonstrate its inherent regulatory authority to be eligible for TAS for a regulatory program.
- ❑ A tribe with nonmember-owned fee lands needs to meet the "Montana" test:

Generally includes a factual demonstration that nonmember activities on nonmember-owned fee lands could have a substantial, direct effect on the tribe's health or welfare. See *Montana v. U.S.*, 450 U.S. 544 (1981)

*The interpretation appeared in a CWA TAS rule preamble, 56 FR 64895, 12-12-1991. At the time, EPA recognized that other interpretations were available, but chose a cautious approach pending subsequent developments that could warrant reconsideration.

EPA's Potential Reinterpretation of CWA TAS

- EPA is considering reinterpreting CWA section 518 as a 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 a tribe must demonstrate its inherent regulatory 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
 - Relevant judicial cases since 1991
 - EPA's experience since 1991

EPA's Potential Reinterpretation of CWA TAS

EPA would accomplish the reinterpretation by issuing an interpretive rule after soliciting and considering public comments.

- The reinterpretation would replace EPA's 1991 interpretation.
- The interpretive rule would provide revised guidance for tribal applications.
- Neither the CWA statutory language nor EPA's 40 CFR 131.8 implementing regulations will need to be revised; all existing regulatory requirements will remain.

What Would Change

EPA regulations require the tribe to demonstrate that it...	Current Interpretation	After Reinterpretation
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"> • Tribe must provide a map or legal description of reservation boundaries 	✓	✓
<ul style="list-style-type: none"> • Legal counsel must describe the basis of the tribe's authority by... 	Demonstrating inherent authority*	Confirming willing and able to accept delegation
<ul style="list-style-type: none"> • Tribe must identify the surface waters to be regulated 	✓	✓
4. Show that tribe has (or has a plan for developing) the capability to administer the program	✓	✓

EPA solicits comments from appropriate governmental entities and local public...

<ul style="list-style-type: none"> • On tribal application's assertion of authority 	✓	✓
<ul style="list-style-type: none"> • On EPA's findings concerning tribal authority 	✓	(Not needed)

*As specified in EPA's 1991 preamble

EPA's Potential Reinterpretation of CWA TAS

One effect could be a significant reduction in the time and effort for tribes to apply for TAS:

- The inherent authority demonstration has been challenging and resource-intensive.
 - *Montana* tests alone have added an average 2.3 years to a tribe's TAS application process for the water quality standards program.
- Under the Congressional delegation approach, the process would be simplified:
 - A tribe would only need to confirm its willingness and ability to receive and exercise the delegation of authority.
 - EPA would no longer need to take comment on its factual findings concerning the tribe's inherent jurisdiction prior to a TAS decision.

Working Schedule

SUBJECT TO CHANGE

- Letter initiating tribal consultation/coordination.....Apr 18
- Tribes-only consultation/coordination webinars.....May 22, 28
- Pre-proposal tribal consultation/coordination.....ends June 20

If EPA decides to proceed:

- Proposal of interpretive rule in Federal Register.....Fall 2014
- Public comment period (60 days).....starts Fall 2014
- Post-proposal tribal consultation/coordination.....TBD
- Issue final interpretive rule in Federal Register.....Fall 2015

For More Information

- Two tribes-only webinars (identical sessions)

May 22, 2014 2:00-4:00 pm EDT

May 28, 2014 1:00-3:00 pm EDT

To register: www.horsleywitten.com/TribalConsultation
or call Erin Cabral 508-833-6600

- For more information please visit TAS reinterpretation web site: COMING SOON
http://water.epa.gov/scitech/swguidance/standards/wqslibrary/tribes_index.cfm
- To ask questions or provide comments, please email: COMING SOON
TASreinterpretation@epa.gov
- For questions about tribal consultation, please contact:
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Definitions of Key Terms in This Presentation

- **TAS** means treatment of tribes in the same manner as a state, for the purposes of administering EPA programs.
- **Tribe** means one of the 566 Indian tribes that are federally recognized, of which over 300 have reservations.
- **Reservation** means either a formal reservation or tribal trust land outside of a formal reservation.
- **Nonmember fee lands** means lands within a reservation that are owned outright (“in fee simple”) by nonmembers of the tribe.
- **Regulatory program** means one of the following CWA programs:

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|---|-----------------------------------|
| • Sec. 303(c) water quality standards | • Sec. 402 NPDES permits |
| • Sec. 303(d) listings and TMDLs | • Sec. 404 dredge or fill permits |
| • Sec. 401 water quality certifications | |

TAS approvals under the Clean Water Act

Results to date:

- Regulatory programs
 - ✓ 303(c) WQ standards and 401 certifications.....48 tribes approved
 - ✓ 303(d) listings/TMDLs.....TAS process under consideration
 - ✓ 402 NPDES.....some interest, no tribes approved
 - ✓ 404 dredge or fill.....limited interest, no tribes approved

- Grant programs*
 - ✓ 106 management programs.....266 tribes approved
 - ✓ 319 nonpoint source management.....180 tribes approved

*Not discussed further in this presentation. Tribal grant applicants do not need to demonstrate regulatory jurisdiction.