

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

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## This Presentation Covers...

- Key Terms
- Issue & Purpose
- TAS Provision of the Clean Water Act
- Current Interpretation of TAS
- Potential Reinterpretation of TAS
- Working Schedule
- For More Information

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## Key Terms

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

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## Key Terms

- **Regulatory program** – one of the following CWA programs:

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

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## Issue

- EPA took a cautious approach in 1991 when it interpreted a CWA provision to mean that each tribe seeking TAS must demonstrate its own inherent regulatory authority.

## Purpose

- To describe a potential reinterpretation of the CWA's TAS provision that EPA is considering.

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## TAS Provision of the CWA

- Section 518 of the Clean Water Act authorizes EPA to treat a tribe in a similar manner as a state for purposes of a regulatory program if the tribe:

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.
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 EPA must follow in acting on a TAS application

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## TAS Provision of the CWA

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

\*Grant programs are not discussed further in this presentation. Tribal grant applicants do not need to demonstrate regulatory jurisdiction.

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## Current Interpretation of TAS

In 1991,\* EPA interpreted the CWA TAS provision 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.

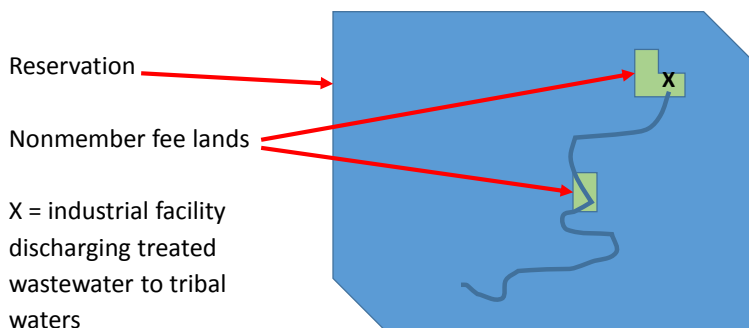
Generally includes a factual demonstration that nonmember activities on nonmember-owned fee lands could have a substantial, direct effect on the tribe's health or welfare. See *Montana v. U.S.*, 450 U.S. 544 (1981)

\*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 further Congressional or judicial guidance.

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## Current Interpretation of TAS

Example of “nonmember activities on nonmember-owned fee lands that could have a substantial, direct effect on the tribe’s health or welfare”



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## Potential Reinterpretation of TAS

- EPA is considering reinterpreting CWA section 518 as an express delegation by Congress to eligible tribes to administer CWA regulatory programs over their reservations irrespective of who owns the land.
- This would replace EPA’s current interpretation that a tribe must demonstrate its inherent regulatory authority.

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## Potential Reinterpretation of TAS

The potential reinterpretation is supported by:

- The plain language of Clean Water Act section 518
- A similar approach applied in implementing the Clean Air Act TAS provisions
- Relevant judicial cases since 1991
- EPA's experience since 1991

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## Potential Reinterpretation of 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 include a revision to EPA's current guidance for tribal applications.\*
- Neither the CWA statutory language nor EPA's implementing regulations would be revised; all existing regulatory requirements will remain.

\*Current guidance: *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

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## Potential Reinterpretation of TAS

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"> <li>Tribe must provide a map or legal description of reservation boundaries</li> </ul>	✓	✓
<ul style="list-style-type: none"> <li><b>Legal counsel must describe the basis of the tribe's authority by...</b></li> </ul>	<b>Demonstrating inherent authority* and, if fee lands on reservation, meeting the <i>Montana</i> Test</b>	<b>Relying on the Congressional delegation of authority</b>
<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	✓	✓

\*As specified in EPA's 1991 preamble and current guidance

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## Potential Reinterpretation of TAS

Comment rounds for tribes to set Water Quality Standards:	Comments from	Current Interpretation	After Reinterpretation
<ul style="list-style-type: none"> <li>EPA seeks comments on tribal application's assertion of authority</li> </ul>	Appropriate govt. entities, local parties	✓	✓
<ul style="list-style-type: none"> <li><b>EPA seeks comments on EPA's factual findings concerning inherent tribal authority</b></li> </ul>	Appropriate govt. entities, local parties	✓	<b>(Not needed)</b>
<ul style="list-style-type: none"> <li>Tribe seeks comments on its water quality standards before submitting to EPA for approval</li> </ul>	Public	✓	✓

### Comment round for tribes to issue Sec. 402 or 404 Permits:

<ul style="list-style-type: none"> <li>EPA seeks comments on tribe's permit program application (including TAS elements)</li> </ul>	Public	✓	✓
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## Potential Reinterpretation of TAS

Recap of potential **changes**:

- Replace demonstration of inherent regulatory authority with reliance on the Congressional delegation of authority
- Remove one of three rounds of comments for tribes to set WQS

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## Potential Reinterpretation of TAS

Recap of what would **stay the same**:

- All other TAS eligibility requirements established in the Act and EPA's regulations
- All other opportunities for comment before final EPA action
  - The only comment process being eliminated is a secondary process that would be obsolete since it addressed solely issues of inherent authority
- Limitation to Indian reservations
  - Reservation land status issues can be raised during comment process
- No effect on tribal criminal enforcement authority
  - Federal government will continue to generally take the lead on appropriate criminal enforcement

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## Working Schedule

- Tribal consultation/coordination .....April 18 – July 7, 2014
- State association meeting .....July 8, 2014

*If EPA decides to proceed:*

SUBJECT TO CHANGE

- Proposal of interpretive rule in Federal Register .....Fall 2014
- Public comment period (60 days) .....Fall 2014
- Issue final interpretive rule in Federal Register.....Fall 2015

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## For More Information

- To view background materials:  
[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/views, please email:  
[TASreinterpretation@epa.gov](mailto:TASreinterpretation@epa.gov)

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Any Questions?



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