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### **Tribal Implementation of the Clean Water Act**

The purpose of the Clean Water Act (CWA) is to “restore and maintain the chemical, physical, and biological integrity of the nation’s waters.”<sup>1</sup> The CWA was intended to be implemented through cooperative federalism.<sup>2</sup> The Environmental Protection Agency (EPA) establishes the minimum federal water quality standards for the nation’s waters and regulates the discharge of pollutants into navigable waters through the National Pollutant Discharge Elimination System (NPDES) permit program, and the states are the preferred delegated enforcers of those minimum water quality standards, although a state can establish more stringent standards, through water quality monitoring and the acquisition of NPDES permit program authority.<sup>3</sup> While nearly every state has acquired NPDES permit program authority, the EPA retains considerable oversight and enforcement authority nonetheless in the individual permitting process, and enforcement actions.<sup>4</sup>

While the CWA has defined persons to include tribes in imposing substantive requirements of the Act, the CWA did not clearly subject tribes to state regulation, nor did it waive tribal sovereign

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<sup>1</sup> 33 U.S.C. §1251(a).

<sup>2</sup> See Robin Kundis Craig, *THE CLEAN WATER ACT AND THE CONSTITUTION: LEGAL STRUCTURE AND THE PUBLIC’S RIGHT TO A CLEAN AND HEALTHY ENVIRONMENT* 22 (2004).

<sup>3</sup> *Id.* at 31-34.

<sup>4</sup> *Id.* at 34-35.

immunity to state regulation absent states with Public Law 280 authorization.<sup>5</sup> Meaning states lack the authority to regulate most Indian reservations under the CWA as well as the means of enforcement. Consequently, the EPA maintains presumptive authority of direct oversight over those Indian lands.<sup>6</sup> Congress recognized tribal immunity from state regulation and encouraged tribes to develop their own regulatory capacity under the CWA through §518, a 1987 amendment.<sup>7</sup>

This provision encourages federally recognized tribes to develop their own regulatory capacity within the limits of their Indian reservation, apart from lands that have been issued a patent including rights of way, by either entering into cooperative agreements with the state in which their lands are located in to jointly plan and administer the CWA, or applying for authorization of treatment as a state (TAS) status to administer the CWA directly as a state would.<sup>8</sup> However the tribe will only be approved for TAS status by the Administrator if it: has a government carrying out substantial governmental duties and powers; is seeking regulatory powers over waters that are held by the tribe, in trust for them by the U.S., by a member of the tribe subject to a restriction on alienation, or otherwise within the borders of the reservation; and can be reasonably expected to be capable of carrying out the functions of the CWA and accompanying regulations.<sup>9</sup>

The TAS provision affirms tribal sovereignty over Indian lands allowing tribes to administer the CWA partially or fully as states in setting water quality standards, administering permits, and being able to receive grants to develop their capacity to implement and monitor the provisions of the CWA.<sup>10</sup> It

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<sup>5</sup> *Id* at 86-87.

<sup>6</sup> See 40 C.F.R. 123.1(h) (1998).

<sup>7</sup> See 33 U.S.C. §1377 (2006).

<sup>8</sup> See 33 U.S.C. §1377(h) (definitions of Indian tribe and Federal Indian reservation); 33 U.S.C. §1377(d) (cooperative agreements between tribes and states encouraged to secure consistent implementation with administrator review and approval); §1377(e) (Administrator can authorize treatment of tribes as states).

<sup>9</sup> 33 U.S.C. §1377(e).

<sup>10</sup> See Jessica Owley, *Tribal Sovereignty Over Water Quality*, 20 J. Land Use & Envtl. L. 61, 77-78 (2004); U.S.EPA, FINAL GUIDANCE ON AWARDS OF GRANTS TO INDIAN TRIBES UNDER SECTION 106 OF THE CLEAN WATER ACT: FOR FISCAL YEARS 2007 AND BEYOND 1-1 (2006) (hereinafter Final Guidance).

also helps solve a problem in a regulatory gap on reservation lands as states often lacked the authority to regulate and the EPA only generally provides oversight of federally funded state programs, not direct administration.<sup>11</sup> In 2009 the EPA acknowledged that while 350 out of 562 federally recognized tribes could meet the criteria, only 252 have received TAS approval.<sup>12</sup> Currently only 40 tribes have taken advantage of the ability to administer water quality standards (WQS) on their territories.<sup>13</sup> No tribe has taken advantage of the full capacity under the CWA to acquire NPDES permit program authority, although they still can play a role being able to comment and appeal permit decisions and identifying sources of pollution discharge and bringing it to the attention of enforcement authorities.<sup>14</sup>

The disparity between the number of tribes that have received partial TAS status and those that have established water quality standards can be primarily accounted for funding granted under §106 of the CWA being dependent on TAS status.<sup>15</sup> Tribes receiving grants under §106 must submit a tribal assessment report detailing a description of the monitoring strategy, water quality assessment, and electronic copies of surface water quality data in the required format; the detail involved dependent upon the level of the tribal program's advancement.<sup>16</sup>

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<sup>11</sup> U.S. APA REGION 10, TRIBAL WATER QUALITY STANDARDS UNDER THE CLEAN WATER ACT 3, 4, *available at* <http://www.lawseminars.com/materials/07CLWA/clwa%20m%20mcallister%203-20.pdf>.

<sup>12</sup> U.S. EPA, TRIBAL WATER QUALITY PROGRAMS: USING CLEAN WATER ACT SECTION 106 FUNDING THE PROTECT WATER RESOURCES: 2009 STATUS REPORT, 3 (2010), *available at* [http://water.epa.gov/grants\\_funding/cwsrf/upload/2009\\_12\\_18\\_cwfinance\\_106status\\_report2009\\_508.pdf](http://water.epa.gov/grants_funding/cwsrf/upload/2009_12_18_cwfinance_106status_report2009_508.pdf).

<sup>13</sup> See EPA: STATE, TRIBAL, & TERRITORIAL STANDARDS: TRIBAL (May 14, 2013), [http://water.epa.gov/scitech/swguidance/standards/wqs\\_library/tribes.cfm#2](http://water.epa.gov/scitech/swguidance/standards/wqs_library/tribes.cfm#2).

<sup>14</sup> EPA: TRIBAL COMPLIANCE ASSISTANCE CENTER (May 14, 2013), <http://www.epa.gov/tribalcompliance/waterresources/wrwaterdrill.html> (tribes have the ability to participate in the public hearings and notice and comment period of permitting decisions, and appeal those decisions through 40 C.F.R. Part 122).

<sup>15</sup> See Final Guidance at 3-3 (tribes must meet requirements under §518 of the CWA, and 40 CFR 130.6(d) and 40 CFR 35.583 specifically to receive funding under §106 of the CWA).

<sup>16</sup> EPA: DATA ASSESSMENT AND REPORTING TEMPLATE: CLEAN WATER ACT SECTION 106 TRIBAL GUIDANCE 1-7 (2007), *available at* [http://yosemite.epa.gov/R10/TRIBAL.NSF/Programs/Section+106+Tribes/\\$FILE/monitoring\\_dataassessment\\_outline\\_draft.pdf](http://yosemite.epa.gov/R10/TRIBAL.NSF/Programs/Section+106+Tribes/$FILE/monitoring_dataassessment_outline_draft.pdf).

Furthermore only tribes that have a mature water quality programs are encouraged by the EPA to develop WQS under the CWA.<sup>17</sup> Otherwise, tribes can focus on a non-regulatory approach focused on non-point source management, set their own WQS under tribal laws that do not require EPA approval, or a combination of these strategies.<sup>18</sup> Whatever approach a tribe chooses to pursue, they should determine whether §106 funding is available to influence their decision whether to apply for TAS status, as funding is only available for some activities.<sup>19</sup>

However if the tribe chooses to regulate WQS under the CWA, they must meet TAS requirements and apply under 40 C.F.R. Part 131, involving a public notice and comment period and notification of all appropriate governmental entities.<sup>20</sup> If the application includes the assertion of authority over nonmember activities, the proposed findings of fact must include a specific determination that the tribe has adequate jurisdictional authority under *Montana v. United States*, principally under the prong that the nonmember conduct threatens or has a direct effect on the health and welfare of the tribe.<sup>21</sup> The EPA has interpreted this to require a tribe submit there are waters within the reservation used by the tribe, which are critical habitat subject to the CWA, and the impairment of which would have a serious and substantial effect on the health and welfare of the tribe.<sup>22</sup> However the reservation need not have anyone actually living on it to establish WQS.<sup>23</sup>

Importantly, once more stringent tribal WQS have been established under the CWA, courts have upheld the EPA's judgment to allow tribes to affect nonmember activities on the reservation and

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<sup>17</sup> See Final Guidance at 2-3.

<sup>18</sup> See Final Guidance at 2-1, 2-2, 2-3.

<sup>19</sup> *Id.*

<sup>20</sup> 40 C.F.R. Part 131 (1994).

<sup>21</sup> See U.S. APA REGION 10 at 12; Indian Tribes; Eligibility for Program Authorization, 59 Fed. Reg. 64,339, 64,340 (Dec. 14, 1994) (amending 40 C.F.R. Part 131); see generally *Montana v. United States*, 450 U.S. 544, 565-66 (1981).

<sup>22</sup> 40 C.F.R. Part 131.8.

<sup>23</sup> Mark Merchant, *EPA Delegates Clean Water Act Authority to Southern California Tribe*, EPA NEWS RELEASE, 10/31/2006, <http://yosemite.epa.gov/opa/admpress.nsf/0/27f8229178a6b0878525721800810396>.

upstream river standards under their TAS status.<sup>24</sup> The EPA may approve more stringent WQS that affect upstream standards to not only protect tribal members from drought, but allow for ceremonial uses involving the ingestion of water from the regulated water for furthering the purpose of the CWA, without violating the First Amendment.<sup>25</sup> Even where the EPA is entitled to no deference when the court is reviewing a question of law, the EPA has been upheld through a cautious interpretation of Supreme Court precedent in requiring the potential impact of the nonmember activities be serious and substantial in order for the tribe to regulate nonmember activities on fee land within the reservation.<sup>26</sup> Additionally, tribal regulation over waters within the reservation was upheld, even though the state owned the lake bed.<sup>27</sup> Furthermore, states and tribes must submit to dispute resolution, in the event an upstream discharger violates downstream river standards, or face possible EPA resolution if an acceptable solution cannot be reached by the parties.<sup>28</sup>

While more stringent tribal WQS have been granted by the EPA and upheld by courts, it still must be remembered that WQS approval is a long process and dependent on TAS status, and is not even recommended until the tribal water quality program reaches a certain maturity level. This reasoning may explain why no tribe has yet developed their own NPDES program, as requiring additional tribal capacity and approval from the EPA. Moreover states are resistant to follow more stringent tribal WQS, and continue to attack the EPA's approval of such without state involvement or approval in innovative

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<sup>24</sup> See Marren Sanders, *Indian Law: Clean Water in Indian Country: The Risks (And Rewards) of Being Treated in the Same Manner as a State*, 36 Wm. Mitchell L. Rev. 533, 544-545(2010).

<sup>25</sup> *Albuquerque v. Browner*, 97 F.3d 415, 426-428 (10th Cir. 1996).

<sup>26</sup> *Montana v. EPA*, 137 F.3d 1135, 1140-41 (9th Cir. 1998) (EPA's cautious interpretation of tribal regulatory ability over nonmember activity on fee lands within the reservation including the confusing plurality opinions in *Brendale v. Confederated Tribes and Bands of the Yakima Reservation*, 492 U.S. 408, 431, 447 (1989).

<sup>27</sup> See *Wisconsin v. EPA*, 266 F.3d 741, 750 (7th Cir. 2001), cert. denied, 535 U.S. 1121 (2002).

<sup>28</sup> 40 C.F.R. Part 131.7.

ways.<sup>29</sup> Accordingly while tribes may have an avenue to pursue implementation of the CWA, the pathway is not without peril or resistance.

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<sup>29</sup> See Safe, Accountable, Flexible, Efficient Transportation Equity Act of 2005, Pub. L. No. 109-59, 119 Stat. 1144, 1937 (2005) (rider mandating tribes within Oklahoma to obtain a cooperative agreement with Oklahoma prior to being able to obtain TAS status).