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Recent EPA Actions to Protect Tribal Water Quality

The U.S. Environmental Protection Agency (EPA) has recently taken several actions intended to strengthen water quality protection within Indian reservations. Three actions—(1) issuance of an interpretive rule in May 2016, (2) promulgation of another rule in September, and (3) request for comment on another possible rule also in September—are described by EPA as part of a broad effort to narrow gaps in water quality protection in Indian country. While these initiatives are widely supported by tribal interests, they raise concerns with some states, local governments, and industries. States have primary responsibility for protecting water quality within their borders except in Indian country where civil regulatory authority generally lies with the federal government and the relevant tribe, not with the states.

Recognizing Indian Tribes in a Similar Manner as a State

Section 518(e) of the Clean Water Act (CWA) (33 U.S.C. 1377(e)) authorizes EPA to treat eligible federally recognized Indian tribes in a similar manner as a state (i.e., "treatment as a state," or TAS) for the purposes of receiving grants under several funding authorities and administering certain regulatory programs of the act. Section 518(h) defines "Indian tribe" to mean any Indian tribe, band, group, or community recognized by the Secretary of the Interior and exercising governmental authority over a federal Indian reservation. It also defines "federal Indian reservation" to mean all land within the limits of any reservation under the jurisdiction of the U.S. government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation (33 U.S.C. 1377(h)). According to EPA, tribes can seek TAS with respect to water resources over all land within a reservation, including, for example, land held in trust by the United States for a tribe, land owned by or held in trust for a member of the tribe, and land owned by non-tribal members.

The federal government has recognized 567 tribes. Over 300 of these tribes have reservation lands such as formal reservations, Pueblos, and informal reservations (i.e., lands held in trust by the United States for tribal governments that are not designated as formal reservations), but less than 25% have sought TAS status.

CWA Section 518(e) establishes eligibility criteria for TAS, including that the tribe has a governing body carrying out substantial governmental duties and powers and that it has jurisdiction over the media or objects sought to be regulated. EPA promulgated several rules establishing TAS criteria and procedures for Indian tribes interested in administering CWA programs, beginning in 1991. According to EPA, since that time, it has taken what it characterizes as a cautious approach to approving TAS applications by requiring tribes to demonstrate on a case-by-case basis their inherent authority under principles of Indian law that the tribe has jurisdiction to regulate under the CWA, especially inherent tribal authority over non-member activities within a reservation. Inherent authority, or sovereignty, refers to the principle that powers lawfully vested in tribes, such as self-government, are not in general delegated powers granted by express acts of Congress.

In May 2016 EPA issued an interpretive rule that revised its long-standing interpretation requiring TAS applicants to demonstrate their inherent authority to regulate under the CWA (see U.S. Environmental Protection Agency, "Revised Interpretation of Clean Water Act Tribal Provision," 81 *Federal Register* 30183-30198, May 16, 2016). Under its reinterpretation, EPA concluded that CWA Section 518 includes an express delegation of authority by Congress to Indian tribes to administer CWA regulatory programs over their entire reservations, subject to the eligibility requirements in Section 518, and that a demonstration of inherent authority is not required.

EPA had concluded that demonstrating inherent authority over non-member activities on a reservation creates an unintended administrative burden on applicant tribes and requires substantial commitments of tribal and federal resources. The agency has long viewed Section 518(e) as expressing Congress's preference for tribal regulation of reservation waters. EPA believes that the May 2016 interpretive rule will streamline the process of applying for TAS status, and it estimates that 12 tribes per year would apply under the rule. The rule was based in part on the agency's interpretation of similar Clean Air Act provisions (42 U.S.C. 4201(d)) that, according to EPA, federal courts have held provide an express congressional delegation of authority to eligible tribes to protect environmental resources (see 81 *Federal Register* 30186-30187).

TAS for Purposes of TMDLs

As described previously, EPA has issued rules establishing a process for federally recognized tribes that have TAS status to then obtain TAS for regulatory provisions of the CWA, such as developing water quality standards (40 C.F.R. 131.8), issuing water quality certification (40 C.F.R. 131.4(c)), and issuing discharge permits (40 C.F.R. 123.31-34). In September 2016, EPA finalized a companion to these procedural rules with a regulation enabling eligible tribes to obtain authority to identify impaired waters on their reservations and to establish total maximum daily loads (TMDLs), as states routinely do for non-Indian land waters (See U.S. Environmental Protection Agency, "Treatment of Indian Tribes in a Similar Manner as States for Purposes of Section 303(d) of the Clean Water Act," 81 *Federal Register* 65901-65917, September 26, 2016.)

CWA Section 303(d) requires states and approved tribes to identify waters that are impaired by pollution, even after application of technology-based controls (33 U.S.C. 1313(d)). For those waters, states and approved tribes must establish a TMDL to ensure that water quality standards can be attained. A TMDL is both a quantitative assessment of pollution sources and pollutant reductions needed to restore and protect U.S. waters and a planning process for attaining water quality standards. A TMDL can result in imposition of additional pollutant discharge limits on sources. (For information, see CRS Report R42752, *Clean Water Act and Pollutant Total Maximum Daily Loads (TMDLs)*). By obtaining TAS status for Section 303(d), tribes can take the lead role in identifying impaired waters on their reservations and in establishing TMDLs. In the absence of TAS approval under this rule, EPA or a state would have this responsibility for such waters.

The 2016 rule does not require anything of tribes that are not interested in seeking TAS status for the 303(d) program, and EPA acknowledges that not all tribes will be interested in doing so. The rule also does not require tribes seeking TAS eligibility for the 303(d) program to have previously obtained EPA approval for TAS to develop water quality standards or require tribes to have EPA-approved standards for their reservation waters in place.

Federal Baseline Water Quality Standards for Indian Reservations

Water quality standards are the fundamental building blocks of the CWA. Established by states or authorized tribes and approved by EPA, they define a state's water quality goals and are the basis of enforceable discharge permits. They also provide the benchmark against which impaired waters are identified and TMDLs are developed. Water quality standards consist of designated uses or goals for protection of the waterbody (such as fishing, swimming, or public water supply), narrative and numeric limits on pollutants, and antidegradation policy to maintain and protect existing uses and high-quality waters.

Since Congress enacted Section 518(e) in 1987, EPA has authorized 53 of the over 300 tribes with reservation lands to administer a water quality standards program. Of the 53 approved tribes, 42 tribes have had their standards approved by EPA. One Washington State tribe has EPA-promulgated standards, and EPA has approved Washington, South Carolina, and Maine to administer state water quality standards on reservations or parts of reservations of six tribes. In the absence of applicable state or federal standards, the main mechanism for establishing water quality standards on Indian reservations has been through the TAS authority of CWA Section 518. Further, it is EPA policy that, in the absence of approved standards for reservation waters, state water quality standards are used as a reference point for EPA-issued discharge permit limits. EPA says that for reasons such as lack of resources or governmental infrastructure to implement environmental programs, many tribes with reservation lands have been unable to apply or have chosen not to apply for TAS to administer a water quality standards program.

EPA contends that there is a gap in water quality protection under the CWA for waters on Indian reservations. Thus, in a September 2016 *Federal Register* Notice, the agency sought the public's views on whether and how it should initiate a rulemaking to establish federal baseline water quality standards for Indian reservation waters that do not have EPA-approved standards. (See U.S. Environmental Protection Agency, "Federal Baseline Water Quality Standards for Indian Reservations, Advance notice of proposed rulemaking," 81 *Federal Register* 66900-66911, September 29, 2016.) The Notice did not provide details of a proposed rule. Rather, EPA requested comment on questions such as (1) should EPA establish one set of water quality standards that apply universally to reservation waters or offer limited tailoring opportunities; (2) what designated uses should be established in any federal baseline standards; and (3) what pollutant criteria limits should be included to protect aquatic life and human health? The comment deadline is December 28, 2016. EPA will then decide whether to proceed with a rulemaking.

Concerns of States, Localities, Industries

EPA's recent actions and announcements concerning tribal water quality protection likely intensify long-standing jurisdictional tensions and conflicts between some tribes and states, local governments, and industries. When tribes obtain TAS status, they can adopt more protective water quality standards than states may have set for adjacent waters, potentially affecting common waterbodies and non-members with activities on reservation lands. Further, because the CWA allows states to adopt water quality requirements such as discharge permit limits more stringent than federal rules, a tribe that has TAS status for permitting could similarly do so (however, no tribe has such authority now; EPA issues CWA permits in Indian country).

These situations can create challenges for industry, by expanding tribal control over non-tribal persons and lands, and raise concerns regarding impact on state CWA programs. But tribes say that some states strongly oppose tribal authority as an infringement on state sovereignty. Several states, localities, and industries did oppose the May 2016 interpretive rule and the September TMDL regulation described above. For example, several states disagreed with EPA's position in the TMDL rule that tribes need not have applicable water quality standards as a prerequisite for administering the 303(d) program; they asserted that standards should be required because lists of impaired waters must be based on applicable standards. EPA responded that doing so would establish an unnecessary burden for tribes seeking TAS eligibility for the program.

EPA's view is that the best way to protect water quality in Indian country is for tribes to obtain TAS authority, and its recent actions are intended to encourage tribes to do so. Nevertheless, tensions between tribes and others over water quality protection on reservation lands are likely to persist.

Claudia Copeland, Specialist in Resources and Environmental Policy

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