



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 123, 131, 233 and 501

[EPA-HQ-OW-2014-0461; FRL-9946-33-OW]

Revised Interpretation of Clean Water Act Tribal Provision

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final interpretive rule.

SUMMARY: Section 518 of the Clean Water Act (CWA), enacted as part of the 1987 amendments to the statute, authorizes EPA to treat eligible Indian tribes with reservations in a manner similar to states (TAS) for a variety of purposes, including administering each of the principal CWA regulatory programs and receiving grants under several CWA authorities. Since 1991, EPA has followed a cautious interpretation that has required tribes, as a condition of receiving TAS regulatory authority under section 518, to demonstrate inherent authority to regulate waters and activities on their reservations under principles of federal Indian common law. The Agency has consistently stated, however, that its approach was subject to change in the event of further congressional or judicial guidance addressing tribal authority under CWA section 518. Based on such guidance, EPA in the interpretive rule we are finalizing today concludes definitively that section 518 includes an express delegation of authority by Congress to Indian tribes to administer regulatory programs over their entire reservations, subject to the eligibility requirements in section 518. This reinterpretation streamlines the process for applying for TAS, eliminating the need for applicant tribes to demonstrate inherent authority to regulate under the Act and allowing eligible tribes to implement the congressional delegation of authority.

The reinterpretation also brings EPA's treatment of tribes under the CWA in line with EPA's treatment of tribes under the Clean Air Act, which has similar statutory language addressing tribal regulation of Indian reservation areas. This interpretive rule does not revise any regulatory text. Regulatory provisions remain in effect requiring tribes to identify the boundaries of the reservation areas over which they seek to exercise authority and allowing the adjacent state(s) to comment to EPA on an applicant tribe's assertion of authority. This rule will reduce burdens on applicants associated with the existing TAS process and has no significant cost.

DATES: This final interpretive rule is effective on **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: EPA has established a docket for this rule under Docket ID No. EPA-HQ-OW-2014-0461. All documents in the docket are listed on the <http://www.regulations.gov> web site.

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I. General Information

A. Does this interpretive rule apply to me?

This rule applies to tribal governments that seek eligibility to administer regulatory programs under the Clean Water Act (CWA, or the Act). The table below provides examples of entities that could be affected by this rule or have an interest in it.

Category	Examples of potentially affected or interested entities
Tribes	Federally recognized tribes with reservations that could potentially seek eligibility to administer CWA regulatory programs, and other interested tribes.
States	States adjacent to potential applicant tribes.
Industry	Industries discharging pollutants to waters within or adjacent to reservations of potential applicant tribes.
Municipalities	Publicly owned treatment works or other facilities discharging pollutants to waters within or adjacent to reservations of potential applicant tribes.

If you have questions regarding the effect of this interpretive rule on a particular entity, please consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

B. What interpretation is the Agency making?

Today’s interpretive rule streamlines how tribes apply for TAS under CWA section 518 for CWA regulatory programs including the water quality standards program. It eliminates the need for applicant tribes to demonstrate inherent authority to regulate under the Act, thus allowing tribes to implement a delegation of authority by Congress. Specifically, EPA revises its existing interpretation of CWA section 518 to conclude definitively that this provision includes an express delegation of authority by Congress to Indian tribes to administer regulatory programs over their entire reservations, subject to the eligibility requirements in section 518.

C. How was this rule developed?

EPA conducted consultation and coordination with tribes and states before proposing the reinterpretation in the **Federal Register** on August 7, 2015. See 80 FR 47430 (August 7, 2015) (“proposed rule,” “EPA’s proposal,” “proposed reinterpretation”), available in the docket for this rule. During the 60-day public comment period, EPA provided informational webinars for the public and conducted further consultation and coordination with tribes and states.

EPA received a total of 44 comments from the public on the proposed interpretive rule. A majority (27) of the comments expressed support for the rule, including unanimous support from tribes and tribal organizations that responded. Sections IV and V address issues and questions about the proposal that commenters raised.

Today’s rule finalizes the proposal, reflecting EPA’s consideration of the comments and other input received. The comments, EPA’s responses to the comments, and meeting notes are available in the public docket at <http://www.regulations.gov>.

D. What is the Agency’s authority for issuing this reinterpretation?

The CWA, 33 U.S.C. 1251, *et seq.*, including section 518 (33 U.S.C. 1377).

E. What are the incremental costs and benefits of this interpretive rule?

This rule entails no significant cost. Its only effect will be to reduce the administrative burden for a tribe applying in the future to administer a CWA regulatory program, and to potentially increase the pace at which tribes seek such programs. See the discussion of administrative burden and cost in sections VII and VIII.B.

F. Judicial review

This interpretive rule, which sets forth EPA’s revised interpretation of CWA section 518, is not a final agency action subject to immediate judicial review. This interpretive rule is not

determinative of any tribe's eligibility for TAS status. Rather, it notifies prospective applicant Indian tribes and others of EPA's revised interpretation. Today's interpretive rule would be subject to judicial review only in the context of a final action by EPA on a TAS application from an Indian tribe for the purpose of administering a CWA regulatory program based on the revised interpretation.

II. Background

A. Statutory history

Congress added CWA section 518 as part of amendments made to the statute in 1987. Section 518(e) authorizes EPA to treat eligible Indian tribes in a similar manner as states for a variety of purposes, including administering each of the principal CWA regulatory programs and receiving grants under several CWA funding authorities. Section 518(e) is commonly known as the "TAS" provision, for treatment in a manner similar to a state.

Section 518(e) establishes eligibility criteria for TAS, including requirements that the tribe have a governing body carrying out substantial governmental duties and powers; that the functions to be exercised by the tribe pertain to the management and protection of water resources within the borders of an Indian reservation; and that the tribe be reasonably expected to be capable of carrying out the functions to be exercised in a manner consistent with the terms and purposes of the Act and applicable regulations. Section 518(e) also requires EPA to promulgate regulations specifying the TAS process for applicant tribes. See section II.B.

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 United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation.

B. Regulatory history

Pursuant to section 518(e), EPA promulgated several final regulations establishing TAS criteria and procedures for Indian tribes interested in administering programs under the Act. The relevant regulations addressing TAS requirements for the principal CWA regulatory programs are:¹

- 40 CFR 131.8 for section 303(c) water quality standards (WQS). Final rule published December 12, 1991 (56 FR 64876); proposed rule published September 22, 1989 (54 FR 39098). Referred to hereafter as the “1991 WQS TAS rule” or “1991 TAS rule”;
- 40 CFR 131.4(c) for section 401 water quality certification, published in the 1991 WQS TAS rule;
- 40 CFR 123.31-123.34 for section 402 National Pollutant Discharge Elimination System (NPDES) permitting and other provisions, and 40 CFR 501.22-501.25 for the state section 405 sewage sludge management program. Final rule published December 22, 1993 (58 FR 67966); proposed rule published March 10, 1992 (57 FR 8522); and
- 40 CFR 233.60-233.62 for section 404 dredge or fill permitting. Final rule published February 11, 1993 (58 FR 8172); proposed rule published November 29, 1989 (54 FR 49180).

¹ In early 2016 EPA proposed to add criteria and procedures for tribes to obtain TAS to administer the CWA Section 303(d) Impaired Water Listing and Total Maximum Daily Load (TMDL) Program. 80 FR 2791, Jan. 19, 2016. The proposal has not yet been finalized and thus is not in effect at this time.

In 1994, EPA amended the above regulations to simplify the TAS process and eliminate unnecessary and duplicative procedural requirements. *See* 59 FR 64339 (December 14, 1994) (the “Simplification Rule”). For example, the Simplification Rule eliminated the need for a tribe to prequalify for TAS before applying for sections 402, 404 and 405 permitting programs. Instead, the rule provided that a tribe would establish its TAS eligibility at the program approval stage, subject to EPA’s notice and comment procedures already established for state program approvals in 40 CFR parts 123 and 233. The rule retained the prequalification requirements (including local notice and comment procedures) for section 303(c) WQS and section 401 water quality certifications. *Id.*; *see also*, 40 CFR 131.8(c)(2), (3).² The TAS regulations for CWA regulatory programs have remained intact since promulgation of the Simplification Rule.

Today’s interpretive rule does not address or affect the TAS requirements or review process for tribes to receive grants.³ The receipt of grant funding does not involve any exercise of regulatory authority. Therefore, a determination of TAS eligibility solely for funding purposes does not, under existing regulations, require an analysis or determination regarding an applicant tribe’s regulatory authority.

III. How did EPA interpret the CWA TAS provision in 1991 when establishing TAS regulations for CWA regulatory programs?

The TAS eligibility criteria in section 518(e) make no reference to any demonstration of an applicant tribe’s regulatory authority to obtain TAS. Rather, the relevant part of section 518(e) –

² Under the CWA and EPA’s regulations, tribes can apply for TAS under CWA section 518 for the purpose of administering WQS and simultaneously submit actual standards for EPA review under section 303(c). Although they can proceed together, a determination of TAS eligibility and an approval of actual water quality standards are two distinct actions.

³ EPA has promulgated regulations governing the TAS application and review requirements for CWA grant funding programs. *See, e.g.*, 40 CFR 35.580-588 (CWA section 106 water pollution control funding); 40 CFR 35.600-615 (CWA section 104 water quality cooperative agreements and wetlands development funding); 40 CFR 35.630-638 (CWA section 319 nonpoint source management grants).

which is section 518(e)(2) – requires only that the functions to be exercised by the tribe pertain to the management and protection of reservation water resources. As noted above, section 518(h)(1) also defines Indian reservations to include all reservation land irrespective of who owns the land. EPA nonetheless took a cautious approach when it issued the 1991 WQS TAS rule and subsequent regulations described in section II.B above. The 1991 approach required each tribe seeking TAS for the purpose of administering a CWA regulatory program to demonstrate its inherent authority under principles of federal Indian law, including gathering and analyzing factual information to demonstrate the tribe’s inherent authority over the activities of nonmembers of the tribe on nonmember-owned fee lands within a reservation.⁴

EPA recognized at the time that there was significant support for the proposition that Congress had intended to delegate authority to otherwise eligible tribes to regulate their entire reservations under the Act. Notably, in a plurality opinion in *Brendale v. Confederated Tribes and Bands of the Yakima Nation*, 492 U.S. 408 (1989), Justice White had even cited section 518 as an example of a congressional delegation of authority to Indian tribes.⁵ EPA also stated the Agency’s interpretation that in section 518, Congress had expressed a preference for tribal regulation of surface water quality on reservations to assure compliance with the goals of the CWA. 56 FR at 64878-79. Nonetheless, in an abundance of caution, EPA opted at the time to require tribes to demonstrate, on a case-by-case basis, their inherent jurisdiction to regulate under the CWA. EPA was clear, however, that this approach was subject to change in light of further judicial or congressional guidance. *Id.*

⁴ Under principles of federal Indian law, demonstrations of inherent tribal authority over such non-member activities are guided by the principles expressed in *Montana v. United States*, 450 U.S. 544 (1981), and its progeny.

⁵ *Brendale v. Confederated Tribes and Bands of the Yakima Nation*, 492 U.S. 408, 428 (1989). Although highly instructive, EPA recognized that the statement regarding section 518 was not necessary to the plurality’s decision. See 56 FR at 64880. The five Justices not joining Justice White’s opinion did not discuss the CWA provision.

For further details about EPA's 1991 interpretation of the CWA TAS provision, see section III of EPA's proposal. 80 FR at 47433-34.

IV. What developments support EPA's revised statutory interpretation?

A. Relevant congressional, judicial and administrative developments

Since 1991, EPA has taken final action approving TAS for CWA regulatory programs for 53 tribes.⁶ Three of those decisions were challenged in judicial actions. The last challenge concluded in 2002. In each of the cases, the reviewing court upheld EPA's determination with respect to the applicant tribe's inherent authority to regulate under the CWA. *Wisconsin v. EPA*, Case No. 96-C-90 (E.D. Wis. 1999), *aff'd*, 266 F.3d 741 (7th Cir. 2001), *cert. denied*, 535 U.S. 1121 (2002) (Sokaogon Chippewa Community); *Montana v. EPA*, 941 F. Supp. 945 (D. Mont. 1996), *aff'd*, 137 F.3d 1135 (9th Cir.), *cert. denied*, 525 U.S. 921 (1998) (Confederated Salish and Kootenai Tribes of the Flathead Reservation); *Montana v. EPA*, 141 F.Supp.2d 1259 (D. Mont. 1998) (Assiniboine and Sioux Tribes of the Fort Peck Reservation).⁷

Notably, the first court to review a challenge to an EPA CWA TAS approval expressed the view that the statutory language of section 518 indicated plainly that Congress intended to delegate authority to Indian tribes to regulate water resources on their entire reservations, including regulation of non-Indians on fee lands within a reservation. *Montana v. EPA*, 941 F. Supp. at 951-52. In that case, the applicant tribe, participating as amicus, argued that the definition of "Federal Indian reservation" in CWA section 518(h)(1) – which expressly includes all land within the limits of a reservation notwithstanding the issuance of any patent – combined

⁶ The site <http://www.epa.gov/wqs-tech/epa-approvals-tribal-water-quality-standards> provides a list of tribes with TAS eligibility for the section 303(c) water quality standards and section 401 water quality certification programs. To date, EPA has not approved TAS for any tribe for CWA section 402 or section 404 permitting.

⁷ EPA was also upheld in the only case challenging the Agency's approval of actual tribal water quality standards under CWA section 303(c) (which is a distinct action from EPA's approval of tribal TAS eligibility under section 518). *City of Albuquerque v. Browner*, 97 F.3d 415 (10th Cir. 1996), *cert. denied*, 522 U.S. 965 (1997) (water quality standards of Isleta Pueblo).

with the bare requirement of section 518(e) that the functions to be exercised by the applicant tribe pertain to reservation water resources, demonstrates that section 518 provides tribes with delegated regulatory authority over their entire reservations, including over non-Indian reservation lands. *Id.* Because EPA had premised its approval of the TAS application at issue upon a showing of tribal inherent authority, it was unnecessary for the district court to reach the delegation issue as part of its holding in the case. Nonetheless, the court readily acknowledged that section 518 is properly interpreted as an express congressional delegation of authority to Indian tribes over their entire reservations. The court noted that the legislative history might be ambiguous, although only tangentially so, since the bulk of the legislative history relates to the entirely separate issue of whether section 518(e) pertains to non-Indian water quantity rights, which it does not. *Id.* The court observed the established principle that Congress may delegate authority to Indian tribes – per *United States v. Mazurie*, 419 U.S. 544 (1975) – and commented favorably on Justice White’s statement regarding section 518 in *Brendale*. *Id.* The court also noted that a congressional delegation of authority to tribes over their entire reservations “comports with common sense” to avoid a result where an interspersed mixing of tribal and state WQS could apply on a reservation depending on whether the waters traverse or bound tribal or non-Indian reservation land. *Id.* Having thus analyzed CWA section 518, the court concluded – albeit in dicta – that Congress had intended to delegate such authority to Indian tribes over their entire reservations.

The TAS provision of a separate statute – the Clean Air Act (CAA) – and the review of that provision in court provide additional relevant guidance (both congressional and judicial) regarding legislative intent to treat Indian reservations holistically for purposes of environmental regulation by delegating authority over such areas to eligible Indian tribes. Congress added the

CAA TAS provision – section 301(d) – to the statute in 1990, only three years after it enacted CWA section 518. Although CAA section 301(d) pre-dates EPA’s 1991 CWA TAS rule, it was not until 1998 that EPA promulgated its regulations interpreting the CAA TAS provision as an express congressional delegation of authority to eligible Indian tribes. 40 CFR part 49; 63 FR 7254 (February 12, 1998) (the “CAA Tribal Authority Rule”). The U.S. Court of Appeals for the D.C. Circuit upheld that interpretation two years later. *Arizona Public Service Co. v. EPA*, 211 F.3d 1280 (D.C. Cir. 2000) (“*APS*”), *cert. denied*, 532 U.S. 970 (2001). As described below, in the preamble to the CAA Tribal Authority Rule and in *APS*, EPA and the D.C. Circuit considered significant similarities between the CWA and CAA tribal provisions. With the benefit of the court’s careful review in *APS*, EPA believes that enactment of the CAA TAS provision in 1990 provides useful guidance from Congress regarding its similar intent in 1987 to provide for uniform tribal regulation of mobile environmental pollutants within reservations. Relevant aspects and treatment of the CAA TAS provision are described below.

EPA finalized its regulations implementing CAA section 301(d) in 1998. The CAA TAS provision, combined with the definition of Indian tribe in CAA section 302(r), established the same basic TAS eligibility criteria for CAA purposes that apply under the CWA: *i.e.*, federal recognition, tribal government carrying out substantial duties and powers, jurisdiction, and capability. With regard to jurisdiction, EPA carefully analyzed the language and legislative history of the relevant portion of the CAA TAS provision, CAA section 301(d)(2)(B), and concluded that Congress had intended to delegate authority to eligible Indian tribes to administer CAA regulatory programs over their entire reservations irrespective of land ownership – *e.g.*, including over nonmember fee lands within the reservation. 63 FR at 7254-57. EPA determined that the language of the provision distinguished between reservation and non-reservation areas

over which tribes could seek TAS eligibility and plainly indicated Congress' intent that reservations will be under tribal jurisdiction. *Id.* By contrast, for non-reservation areas, tribes would need to demonstrate their inherent authority to regulate under principles of federal Indian law. *Id.*

EPA noted at that time important similarities between the CAA and CWA TAS provisions. Most notably, the tribal provisions of both statutes expressly provide eligibility for tribal programs that pertain to the management and protection of environmental resources (*i.e.*, air and water, respectively) located on Indian reservations. *Id.* at 7256. For instance, CAA section 301(d) provides for tribal regulation of air resources “within the exterior boundaries of the reservation” without any requirement for a demonstration by applicant tribes of separate authority over such reservation areas. CAA section 301(d)(2)(B). Similarly, CWA section 518 provides eligibility for tribal programs covering water resources “within the borders of an Indian reservation” and expressly defines Indian reservations to include all land within the reservation notwithstanding the issuance of any patent and including rights-of-way. CWA sections 518(e)(2), (h)(1). By their plain terms, both statutes thus treat reservation lands and resources the same way and set such areas aside for tribal programs. At the time EPA promulgated the CAA Tribal Authority Rule, however, EPA viewed the CAA – which also contained other provisions addressing tribal roles – and its legislative history as more conclusively demonstrating congressional intent to delegate authority to eligible tribes over their reservations. *Id.* EPA recognized that this resulted in different approaches to two similar TAS provisions and reiterated that the question remained open as to whether the CWA provision is also an express delegation of authority to eligible tribes. *Id.* EPA also cited to the district court decision in *Montana v. EPA*, which, as noted above, concluded that CWA section 518 plainly appears to delegate such authority to Indian tribes. *Id.*

Several parties petitioned for judicial review of the CAA Tribal Authority Rule and challenged whether CAA section 301(d) could be properly interpreted as a delegation of authority by Congress to eligible Indian tribes. *APS*, 211 F.3d at 1287-92. The D.C. Circuit carefully analyzed CAA section 301(d), the relevant legislative history, and the judicial precedent on delegations of authority to Indian tribes and concluded that EPA's interpretation comported with congressional intent. *Id.* The court acknowledged the similarities between the CAA and CWA TAS provisions, as well as EPA's different approach under the CWA. *Id.* at 1291-92. However, the court also noted with significance that EPA's approach under the CWA had not been subjected to judicial review and observed favorably the district court's statements in *Montana v. EPA* that section 518 plainly indicates congressional intent to delegate authority to Indian tribes. *Id.* Ultimately, the D.C. Circuit recognized that EPA had taken a cautious approach under the CWA but that there was no reason EPA must do so again under the CAA. *Id.*

A dissenting judge in the *APS* case disagreed that CAA section 301(d)(2)(B) expressed congressional intent to delegate authority to tribes over their reservations. *Id.* at 1301-05. Notably, the dissent's view was predicated largely on the absence in section 301(d)(2)(B) of language explicitly describing the reservation areas over which tribes would exercise CAA jurisdiction as including *all* reservation lands *notwithstanding the issuance of any patent and including rights-of-way running through the reservation* (emphasis added). *Id.* The dissent viewed this language as critical to an expression of congressional intent that tribes are to exercise delegated authority over all reservation lands, including lands owned by nonmembers of the tribes. *Id.* And in the absence of such language – which the dissent referred to as “the gold standard for such delegations” – the dissent did not view CAA section 301(d)(2)(B) as expressing Congress' intent to relieve tribes of the need to demonstrate their inherent authority to

regulate under the CAA, including a demonstration of inherent authority over nonmember activities on fee lands under the Supreme Court’s *Montana* test. *Id.* at 1303-04.⁸ Notably, the dissent observed that the key “notwithstanding” language is, in fact, included in the relevant tribal provisions of the CWA – *i.e.*, in the definition of “federal Indian reservation” in CWA section 518(h)(1). *Id.* at 1302 (referencing *Brendale*, 492 U.S. at 428). The dissent noted that in spite of the statement in *Brendale*, EPA had determined not to treat CWA section 518 as a congressional delegation; however, the dissent also observed that no court had yet resolved the issue. *Id.*

As the D.C. Circuit stated in *APS*, no court has yet reviewed EPA’s interpretation of tribal regulation under the CWA on the question of whether CWA section 518 constitutes an express delegation of authority from Congress to eligible Indian tribes to regulate water resources throughout their reservations. Importantly, members of the three courts that have considered the issue have favorably viewed such an interpretation: The U.S. Supreme Court in *Brendale*, the federal district court in *Montana v. EPA*, and the D.C. Circuit in *APS*.

In light of these developments, as well as EPA’s experience administratively interpreting and implementing the CAA TAS provision, it is appropriate to revisit and revise EPA’s approach to TAS under the CWA. In the preambles to the CWA TAS regulations from the 1990s, EPA discussed the possibility of reinterpreting CWA section 518 as an express congressional delegation of authority to tribes based on subsequent congressional or judicial guidance.

Additionally, in 2011 EPA discussed the possible reinterpretation of section 518 in a review of

⁸ The dissent in *APS* also concluded that a separate provision of the CAA – section 110(o) – expressly delegates authority to eligible Indian tribes over their entire reservations for the specific CAA program addressed in that provision. *Id.* at 1301-02. Section 110(o) includes the key language cited by the dissent as indicative of express congressional delegations of authority to tribes over their reservations. *Id.*

EPA's legal authorities that could help advance environmental justice.⁹ Today's rule accomplishes such a reinterpretation.

Consideration of Comments

EPA received numerous comments on the proposed rule addressing the Agency's rationale for revising its interpretation of section 518. All eighteen Indian tribes and the three tribal organizations that commented expressed strong support for the rule. Two states also expressed support for tribal opportunities to obtain TAS. Several members of the public also supported the rule, including a member of the Indian law academic community. Supportive commenters agreed that the plain language of section 518 indicates Congress' intent to delegate authority to tribes to regulate their entire reservations under the CWA and that the cited case law developments provide additional support for the revised interpretation and a solid basis for EPA to finalize the rule. Commenters noted the similarities between the CWA and CAA tribal provisions and supported EPA's effort to harmonize the treatment of Indian reservations under both statutes. Some comments asserted that EPA should have treated section 518 as a congressional delegation all along and argued that requiring tribes to demonstrate inherent authority to regulate under the CWA had imposed requirements not included in the statute and may have exceeded EPA's authority. EPA appreciates the commenters' support for the rule.

EPA also received comments from several other states, a local government, a local government association, two operating agents of industrial facilities, and one member of the public disagreeing with, or questioning, in whole or in part EPA's rationale for the revised interpretation of section 518. These comments assert that EPA's legal analysis does not support the change in statutory interpretation; that there has been no definitive court ruling on the proper

⁹ *Plan EJ 2014: Legal Tools*, Office of General Counsel, EPA, December 2011. See <http://www3.epa.gov/environmentaljustice/plan-ej/index.html>.

interpretation of section 518; and that the judicial statements regarding section 518 that EPA cited in the proposal represent dicta and not actual court holdings on the CWA question. The comments also argue that the relevant CWA legislative history does not support the revised interpretation and note that Congress has been aware of EPA's prior interpretation since 1991 but has taken no action to correct it, notwithstanding that Congress amended section 518 in 2000. Commenters also point to a backdrop of U.S. Supreme Court case law addressing limitations on inherent tribal authority with regard to the activities of non-tribal members and assert that the revised interpretation would run counter to that line of jurisprudence. The comments also assert that differences between the CWA and CAA and between water and air quality issues support treating reservations differently under the two statutes.

EPA appreciates but disagrees with these comments. EPA recognizes that the various judicial statements supporting the Agency's interpretation of section 518 as a congressional delegation were not central to the holdings of the relevant cases. This is not surprising in light of the fact that EPA has not previously approved a TAS application based on this interpretation of section 518. Because EPA has premised its prior TAS approvals on demonstrations of inherent tribal regulatory authority, there would be no opportunity in the ordinary course of judicial review to join the open question regarding the proper interpretation of the statute. Nonetheless, the commenters undervalue the significance of the cited judicial statements. For instance, although the district court in *Montana v. EPA* did not need to decide the issue to uphold EPA's approval of the Salish and Kootenai Tribes' TAS application, the question of whether section 518 delegates authority to tribes was squarely presented and subjected to the court's careful analysis. The court reviewed the statutory language and legislative history and clearly articulated its view (albeit not its holding) that section 518 is properly interpreted as a delegation of

authority to tribes. The D.C. Circuit also expressly considered section 518 during its review of the CAA tribal provision in *APS*, with the dissenting judge going so far as to cite the CWA as including the gold standard of statutory language to delegate authority to tribes over their reservations. EPA continues to view these statements as significant judicial guidance. EPA also continues to view the reference to section 518 in Justice White's opinion in *Brendale* as an important observation from the highest federal court that the CWA reflects congressional intent to delegate authority to tribes. EPA recognizes that the reference was not necessary to the plurality's opinion and that the opinion does not include an analysis of section 518. For these and other reasons, EPA opted to proceed cautiously in 1991 and await further guidance. But EPA's deliberate approach in no way discounts or diminishes the value of Justice White's statement toward a proper interpretation of section 518. Viewed as a whole, the various judicial statements regarding section 518 provide ample support for EPA's revised interpretation.

EPA is also aware of the separate Supreme Court jurisprudence addressing inherent tribal authority over nonmembers on Indian reservations. This is, of course, the same line of authority that EPA has previously applied when tribes sought to regulate the activities of nonmembers under the CWA. Retained inherent authority is, however, only one of the means by which tribes may exercise authority over their reservations and, in particular, over the activities of nonmembers. The Supreme Court has long recognized Congress' broad power to delegate authority to Indian tribes, including the authority to regulate the conduct of nonmembers of the tribes. *See, e.g., United States v. Mazurie*, 419 U.S. 544 (1975). Such delegations are neither inconsistent with, nor in opposition to, any limitations on retained tribal inherent authority. Instead, they are a proper exercise of Congress' plenary power under the U.S. Constitution with respect to Indian tribes. As with the CAA tribal provision, such delegations may be appropriately

designed to address situations where Congress views coherent management of reservation resources by tribal governments as an appropriate means to carry out the purposes of a federal statute on Indian reservations. As noted above, EPA has long viewed the CWA tribal provision as expressing a congressional preference for tribal regulation of reservation water resources. EPA has now taken the related step of reconsidering and revising its interpretation of section 518 to reflect Congress' intent to delegate the requisite authority to tribes to effectuate such regulation.

EPA also acknowledges that the legislative history of section 518 is inconclusive regarding congressional intent to delegate authority to tribes. The commenters, however, overstate the degree to which the legislative record indicates an absence of such intent. EPA carefully analyzed this legislative history in the preamble to the 1991 WQS TAS rule and found that the record includes statements that can be interpreted to support either view. The absence of clarity in the record was among the reasons EPA opted to proceed initially with a high degree of caution and impose a requirement not otherwise reflected in the CWA that tribes demonstrate inherent authority to regulate under the statute. Notably, in 1996 the district court in *Montana v. EPA* also reviewed this legislative history and, while observing that the record may be ambiguous, reasoned that it was only arguably so because the bulk of the congressional statements were actually collateral to the issue and addressed the separate question of whether section 518 affected tribal water quantity rights (which it does not). More importantly, the key to a congressional delegation of authority is found in the express language of the statute, and not between the lines of recorded statements of particular congressional members. In relevant part, section 518(e) requires only that the CWA functions to be exercised by an applicant tribe pertain to reservation water resources, and section 518(h)(1) then uses the "gold standard" language to

define such reservations to include all reservation lands irrespective of ownership. This language expresses clear congressional intent to delegate authority without any separate requirement that applicant tribes meet an additional jurisdictional test.

EPA also finds the absence of any action by Congress to correct EPA's prior cautious approach to be unpersuasive on the issue of congressional intent. No amendment to the statute was needed to reflect Congress' intent, since the language of section 518 already expressly delegates authority to tribes. EPA is also unaware of any request considered by Congress to revise section 518 with regard to this question or otherwise apprise EPA of its intent to delegate authority. Further, although EPA's prior interpretation has resulted in some additional burdens and delays in processing TAS applications, EPA has never disapproved a CWA TAS application based on an absence of tribal regulatory authority (or for any other reason), and thus has never taken an action directly inconsistent with Congress' intent to delegate authority to tribes. In these circumstances, it would be inappropriate to interpret congressional inaction as a ratification of EPA's prior approach to section 518.

Further, the fact that Congress in 2000 enacted a separate targeted amendment to section 518 to make a newly created program available to tribes without also addressing tribal regulatory authority sheds no light on the question. In 2000, Congress enacted the coastal recreation water quality monitoring and notification provision at section 406 of the CWA and also provided that tribes should be able to obtain TAS for that program. The fact that Congress did not further amend the statute at that time to address tribal regulatory authority is unrevealing regarding its prior intent in 1987 to delegate authority to tribes. For the reasons described above, there was no substantial cause for Congress to address tribal jurisdiction at that time. In addition, the legislative history of the 2000 amendment is consistent with Congress' narrow purpose to insert

section 406 into the list of programs identified in section 518 for potential TAS. It does not indicate any consideration of the issue of tribal regulatory authority. Further, CWA section 406 establishes a funding and monitoring program. It does not entail the exercise of any regulatory authority by states or tribes. It would have been highly anomalous for Congress to address tribal regulatory authority as an adjunct to establishing a TAS opportunity for a non-regulatory program. In these circumstances, EPA declines to interpret congressional inaction as a tacit approval or adoption of EPA's prior approach to tribal authority.

Finally, EPA continues to view the analogy between CWA and CAA regulation, and between the tribal provisions of the two statutes, as supportive of today's rule. Although there are differences between the two statutes and their relevant histories, both evince a clear congressional intent (only three years apart) to treat Indian reservations holistically and to provide for tribal regulation of mobile pollutants on reservations irrespective of land ownership. The CAA, which authorizes TAS over both reservation and non-reservation lands, expresses the delegation of authority by distinguishing between those two categories and clearly placing reservations within tribal jurisdiction. The CWA authorizes TAS solely for reservations. The statute is thus somewhat more limited in the geographic scope of potential TAS, but, as a result, it more directly expresses the delegation of authority over the covered reservation areas. Section 518(e)(2) requires only that the tribal program pertain to reservation water resources, and section 518(h)(1) unambiguously defines reservations to include all reservation land notwithstanding ownership. EPA also disagrees with a comment suggesting that differences between airsheds and watersheds within Indian reservations support treating the two statutes' tribal provisions differently. In particular, the comment notes that watersheds can have defined beds and banks that cross lands with disparate ownership patterns. EPA notes that the same is essentially true of

airsheds, which cover reservation lands without regard to ownership. As noted by the district court in *Montana v. EPA*, the congressional delegation of authority to tribes thus comports with common sense by avoiding checkerboarded regulation within a reservation based on land ownership. *Montana v. EPA*, 941 F. Supp. At 951-52.

B. EPA and tribal experience in processing TAS applications for CWA regulatory programs.

Based on EPA's experience to date, the TAS application process has become significantly more burdensome than EPA anticipated in 1991. Many authorized tribes have informed EPA that the demonstration of inherent tribal authority, including application of the test established in *Montana v. U.S.* regarding tribal inherent authority over the activities of non-tribal members on nonmember fee lands, constituted the single greatest administrative burden in their application processes.

In the 1991 TAS rule, EPA expressed its expert view that given the importance of surface water to tribes and their members, the serious nature of water pollution impacts, and the mobility of pollutants in water, applicant Indian tribes would generally be able to demonstrate inherent regulatory authority to set WQS for reservation waters, including as applied to nonmembers on fee lands under federal Indian law principles. *Id.* at 64877-79. In light of the Agency's generalized findings regarding the relationship of water quality to tribal health and welfare, EPA noted that a tribe could likely meet the *Montana* test by making a relatively simple factual showing that (1) there are waters within the subject reservation used by the tribe or its members, (2) the waters are subject to protection under the CWA, and (3) impairment of the waters by nonmember activities on fee lands would have serious and substantial effects on tribal health and welfare. *Id.* at 64879. EPA thus anticipated in the early 1990s that applicant tribes would face a relatively simple initial burden of supplying basic facts to demonstrate that they retain requisite

inherent authority to regulate under the CWA – including regulation of nonmember activities on fee lands – under established federal Indian law principles. *Id.*

Unfortunately, EPA's expectations have not, as a general matter, been realized. Although each TAS application has varied according to the particular facts and circumstances of the applicant tribe and its reservation, the general experience confirms that demonstrations of inherent regulatory authority continue to impose unintended administrative burden on applicant tribes and to require substantial commitments of limited tribal and federal resources. In particular, the demonstration of inherent authority over nonmember activities on the reservation under the so-called *Montana* test has created the most significant and widespread burden and at the same time provides no information necessary for EPA's oversight of the regulatory program. Tribes have repeatedly expressed their concern that the demonstration of inherent authority on a case-by-case basis is challenging, time consuming and costly. EPA's information about the tribes that it has found eligible to administer WQS and section 401 certifications indicates that tribal applications for reservations with nonmember fee lands, which require an analysis of tribal inherent authority under *Montana*, took 1.6 years longer to be approved, on average, than applications for reservations without such lands.

The elimination of such unintended administrative burdens does not, in itself, provide a legal rationale to alter EPA's interpretation of section 518. However, streamlining a TAS process that has become unnecessarily restrictive and burdensome does offer a strong policy basis for the Agency to take a careful second look at that provision and to consider – as it contemplated as early as 1991 – whether intervening events have shed additional light on the appropriate statutory interpretation. Eliminating such unnecessary burdens is consistent with longstanding EPA and Executive policy to support tribal self-determination and promote and streamline tribal

involvement in managing and regulating their lands and environments. *See, e.g.*, Executive Order 13175 (65 FR 67249, November 9, 2000); Presidential Memorandum: Government-to-Government Relations with Native American Tribal Governments (59 FR 22951, April 29, 1994); EPA Policy for the Administration of Environmental Programs on Indian Reservations (November 8, 1984).

As explained in section III, EPA has long interpreted the CWA as expressing Congress' preference for tribal regulation of reservation surface water quality. *See, e.g.*, 56 FR at 64878. As explained in section IV.A, relevant developments definitively confirm that section 518 includes an express delegation of authority by Congress to eligible tribes to regulate water resources under the CWA throughout their entire reservations.

V. EPA's revised statutory interpretation

A. What does today's revised interpretation provide and why?

EPA today revises its interpretation of CWA section 518 and concludes definitively that Congress expressly delegated authority to Indian tribes to administer CWA regulatory programs over their entire reservations, including over nonmember activities on fee lands within the reservation of the applicant tribe, subject to the eligibility requirements in section 518. In doing so, EPA thus exercises the authority entrusted to it by Congress to implement the CWA TAS provision.

The effect of this interpretive rule is to relieve a tribe of the need to demonstrate its inherent authority when it applies for TAS to administer a CWA regulatory program. An applicant tribe still needs to meet all other eligibility requirements specified in CWA section 518 and EPA's implementing regulations. Nonetheless, this rule eliminates any need to demonstrate that the applicant tribe retains inherent authority to regulate the conduct of nonmembers of the tribe on

fee lands under the test established by the Supreme Court in *Montana v. U.S.* Instead, an applicant tribe can generally rely on the congressional delegation of authority in section 518 as the source of its authority to regulate its entire reservation under the CWA without distinguishing among various categories of on-reservation land. The tribe may, however, need to supply additional information to address any potential impediments to the tribe's ability to effectuate the delegation of authority.

EPA bases its revised interpretation of CWA section 518 on its analysis in section IV above and a careful consideration of comments received. Most importantly, EPA's revised interpretation is based on the plain text of section 518 itself. Section 518(e)(2) requires only that the functions to be exercised by the applicant Indian tribe pertain to the management and protection of water resources "within the borders of an Indian reservation." Section 518(h)(1) then defines the term "federal Indian reservation" to include all lands within the limits of any Indian reservation notwithstanding the issuance of any patent, and including rights-of-way running through the reservation. That definition is precisely the same language that the dissent in *APS* stated is the "gold standard" for an express congressional delegation of regulatory authority to tribes over their entire reservations. *APS*, 211 F.3d at 1302-03. It is also the language that the U.S. Supreme Court reviewed in finding congressional delegations to tribes in other cases. *United States v. Mazurie*, 419 U.S. 544 (1975) (delegation of authority to tribes regarding regulation of liquor); *Rice v. Rehner*, 463 U.S. 713 (1983) (same). Although the legislative history of section 518 has, of course, remained unaltered since 1987, the plain language of the statute and the above-described developments provide ample support for the revised interpretation.

As EPA explained in section IV.A in connection with the CAA, such a territorial approach that treats Indian reservations uniformly promotes rational, sound management of environmental resources that might be subjected to mobile pollutants that disperse over wide areas without regard to land ownership. *See* 59 FR at 43959. As specifically recognized by the district court in *Montana v. EPA*, the same holds true for regulation under the CWA. *Montana*, 941 F. Supp. at 952.

B. What other approaches did EPA consider?

EPA considered not revising its 1991 interpretation of section 518. EPA did not choose this option because it would continue to impose an unnecessary requirement on applicant tribes not specified in the CWA to demonstrate inherent authority, including meeting the *Montana* test regarding activities of nonmembers on their reservation fee lands, when they apply to regulate under the statute.

EPA also considered revising the text of existing TAS regulations for CWA regulatory programs to alter tribal application requirements in light of the revised interpretation. In particular, EPA considered revising the requirements relating to tribal submissions of statements addressing jurisdiction as well as the procedures for states and other appropriate entities to comment on tribal assertions of authority. Had EPA decided to revise its regulations, EPA would have issued a legislative rule revising the TAS application provisions in the Code of Federal Regulations. However, EPA rejected this approach as both unnecessary and counterproductive. As described in section V.C.6, EPA concludes that the existing regulations are appropriately structured to accommodate the revised interpretation and that the procedures requiring tribal legal statements and providing opportunities for notice and comment continue to serve important purposes. Among other things, such procedures ensure that applicant tribes will continue to

adequately address the reservation boundaries within which they seek to regulate under the CWA as well as any potential impediments that may in some cases exist to their ability to accept or effectuate the congressional delegation of authority. Retaining the notice and comment requirements will also ensure that states and other appropriate entities continue to have an opportunity to interact with EPA on these issues and that EPA's decision making on individual TAS applications is well informed.

Because today's interpretive rule merely explains EPA's revised interpretation of existing statutory requirements established in the CWA tribal provision – and does not make any changes to the existing regulations – an interpretive rule is the appropriate vehicle to announce EPA's revised approach.

Consideration of Comments

One state commented that EPA must use a legislative rulemaking process because the revised interpretation will eliminate the existing regulatory requirement that applicant tribes submit a statement addressing their jurisdiction and will affect states' opportunity under the regulations to comment on tribal jurisdiction. A local government also expressed concern with EPA's statement in the proposal that the interpretive rule is not subject to notice and comment requirements of the Administrative Procedure Act.

EPA disagrees that a legislative rulemaking is required to issue the revised interpretation. As noted above, EPA has decided not to revise any existing TAS application regulations published in the Code of Federal Regulations. Contrary to the state commenter's assertion, EPA specifically decided to retain the regulatory requirements relating to tribal jurisdictional statements and states' opportunity to comment on such assertions. Although EPA could reasonably have chosen to revise or eliminate aspects of these regulations, EPA has concluded

that requiring applicant tribes to submit relevant jurisdictional information and allowing states and other appropriate entities to comment on such submissions will continue to ensure that any reservation boundary or other relevant jurisdictional issues are raised during a well-informed decision making process.

Importantly, although this interpretive rule is not subject to notice and comment requirements of the Administrative Procedure Act, EPA decided to provide notice and an opportunity for comment – in addition to other pre- and post-proposal outreach to tribes, states, and the public – to increase transparency and to allow interested parties to provide their views. EPA received comments on the proposal and has considered them in developing today’s rule. A member of the academic community expressly supported EPA’s use of an interpretive rule as the appropriate administrative mechanism to publish the revised interpretation. EPA appreciates that support.

C. What is EPA’s position on certain public comments and tribal and state input?

In this section, EPA responds to several specific topics that were raised in public comments on EPA’s proposal and in earlier input received from tribes and states during pre-proposal and post-proposal outreach.

1. Geographic scope of TAS for regulatory programs

EPA’s final rule does not affect – either by expanding or contracting – the geographic scope of potential tribal TAS eligibility under the CWA. Under section 518, tribes can only obtain TAS status over waters within the borders of their reservations. *See, e.g.*, 56 FR at 64881-82. Thus, under any approach to tribal regulatory authority under the CWA, tribal TAS eligibility under the CWA is limited to managing and protecting water resources within Indian reservations. Tribes can seek TAS with respect to water resources pertaining to any type of on-reservation land,

including, for example, reservation land held in trust by the United States for a tribe, reservation land owned by or held in trust for a member of the tribe, and reservation land owned by non-tribal members. Conversely, tribes cannot obtain TAS under the CWA for water resources pertaining to any non-reservation Indian country¹⁰ or any other type of non-reservation land.¹¹ Today's rule does not alter that basic limitation of TAS under the CWA.

Consideration of Comments

EPA received comments from several local governments seeking clarification of the geographic scope of TAS for CWA regulatory purposes and in particular noting that some reservations have complex histories of congressional treatment, including the opening of reservations to non-Indian settlement through surplus land acts. The commenters assert that each surplus land statute must be analyzed individually to determine whether it has altered the land status of the subject reservation and note that in some cases such statutes may result in situations where certain lands are taken out of reservation status, even though they remain surrounded by the original exterior boundaries of a reservation. The commenters request that EPA define the fee-owned lands that may be covered by a TAS application to exclude lands settled by non-tribal members pursuant to a federal surplus land act. One tribal commenter noted that there may be non-reservation inholdings that are surrounded by reservation lands and disagreed with EPA's approach of requiring that all lands subject to TAS for CWA regulatory purposes qualify as

¹⁰ Indian country is defined at 18 U.S.C. 1151 as: (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation; (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state; and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same. Indian reservations are thus a subset of the broader geographic area that comprises Indian country as a whole.

¹¹ Many tribes have rights to hunt, fish, gather resources, or perform other activities in areas outside of their reservations. To the extent the lands on which these rights are exercised are not Indian reservation lands as defined at 18 U.S.C. 1151(a), tribes cannot obtain TAS under the CWA for water resources pertaining to such lands.

Indian reservation land. A state commenter agreed with EPA that reservation boundaries remain a relevant issue for tribal TAS applications and noted that EPA's revised interpretation would not reduce any burdens associated with resolving such issues.

EPA notes that any issues regarding the geographic scope of TAS under the CWA are outside the scope of this interpretive rule. As noted above and in the proposal, the revised interpretation does not alter in any way EPA's longstanding approach to the limitation of TAS in CWA section 518 to lands that qualify as reservation lands. This basic geographic land status limitation exists irrespective of whether tribes must demonstrate inherent authority to regulate under the CWA or whether they may rely on the congressional delegation of authority in section 518.

EPA appreciates the local governmental commenters' questions and understands that some Indian reservations may have complicated histories and that reservation boundaries may be altered by congressional act. EPA agrees that any such issue would need to be addressed on a reservation-specific basis and that each relevant surplus lands statute would need to be evaluated individually. Such issues would thus be raised and addressed only in the context of a particular TAS application from a specific tribe. To provide additional clarity, however, EPA reiterates as a general matter that any land subject to TAS approval for CWA regulatory purposes must qualify as Indian reservation land as defined in CWA section 518(h)(1). Thus, consistent with EPA's longstanding approach, any non-reservation land could not be included in a CWA TAS approval even if it is surrounded by other land that does qualify as reservation. Any land located within the original exterior boundaries of a reservation that has lost its reservation status by virtue of an act of Congress could thus not be included in a CWA TAS approval. EPA has never approved CWA TAS over such non-reservation land, and would have no authority to do so. EPA thus

disagrees with the tribal commenter that non-reservation inholdings may be included in a TAS approval under the CWA. This limitation is imposed in the statute, and nothing in today's final rule alters or affects EPA's approach on this issue. EPA does not believe, however, that the Agency should establish a separate definition for "fee lands" that may be included in a CWA TAS application. Section 518(h)(1) of the CWA already provides the applicable definition of federal Indian reservations for purposes of the statute, and there is no need for an additional definition. Further, as noted by the commenters, each surplus land act must be viewed on its own terms and in light of its own history and treatment. It would thus be inappropriate to establish a single one-size-fits-all approach to lands that have passed to non-tribal members pursuant to such a statute. Only where such lands are determined to have lost their reservation status would they be outside the scope of TAS under the CWA. EPA also agrees with the state commenter that any issues relating to reservation boundaries will remain relevant to the TAS application process. Although today's rule does not reduce any burdens associated with resolving such issues, it also does not increase any such burdens. The need for tribes to demonstrate their reservation boundaries as part of a TAS application is beyond the scope of – and is not affected by – today's rule.

2. Treatment of tribal trust lands

Today's revised interpretation does not alter EPA's longstanding approach to tribal trust lands. Indian reservations include trust lands validly set aside for Indian tribes even if such lands have not formally been designated as an Indian reservation. Many named Indian reservations were established through federal treaties with tribes, federal statutes, or Executive Orders of the President. Such reservations are often referred to as formal Indian reservations. Many tribes have lands that the United States holds in trust for the tribes, but that have not been formally

designated as reservations. Under EPA's longstanding approach, and consistent with relevant judicial precedent, such tribal trust lands are informal reservations and thus have the same status as formal reservations for purposes of the Agency's programs. *See, e.g.*, 56 FR at 64881; 63 FR at 7257-58; *APS*, 211 F.3d at 1292-94. Tribes have always been able to seek TAS over such tribal trust lands for CWA purposes (several tribes have done so previously), and nothing in today's revised interpretation alters or affects their ability to do so.

Consideration of Comments

One state commenter requested additional clarification regarding the treatment of tribal trust lands for CWA TAS purposes, and in particular inquired whether tribal trust lands outside the borders of a tribe's formal reservation would be included in the statute's definition of reservation. Although this issue is outside the scope of – and is not affected by – today's interpretive rule, EPA welcomes the opportunity to provide further clarity. EPA notes that some tribes may have tribal trust lands in addition to, and separate from, a formal reservation. For other tribes, such tribal trust lands may constitute the tribe's entire reservation land base. In either case, the tribal trust lands qualify as reservation lands for CWA TAS purposes. All such lands are thus within the borders of an Indian reservation for purposes of the statute.

3. Tribal criminal enforcement authority

EPA's revised statutory interpretation does not affect any existing limitations on tribal criminal enforcement authority. This interpretive rule relates solely to applicant Indian tribes' civil regulatory authority to administer CWA regulatory programs on their reservations; it does not address or in any way alter the scope of tribal criminal enforcement jurisdiction. EPA is aware that federal law imposes certain significant limitations on Indian tribes' ability to exercise criminal enforcement authority, particularly with regard to non-Indians. EPA has previously

established regulations addressing implementation of criminal enforcement authority on Indian reservations for those CWA programs that include potential exercises of such authority. *See, e.g.*, 40 CFR 123.34, 233.41(f). These regulations provide that the federal government will retain primary criminal enforcement responsibility in those situations where eligible tribes do not assert or are precluded from exercising such authority.

Consideration of Comments

Two industry commenters asserted that the limitations on a tribe's authority to impose the criminal sanctions that are specified as potential penalties in the CWA render the tribe unable to demonstrate that it is capable of carrying out required program functions for purposes of TAS eligibility. This issue is outside the scope of – and is not affected by – today's interpretive rule. As noted above, this rule addresses only the civil regulatory authority of applicant tribes. The rule also does not address the capability element of TAS eligibility under the CWA. Nonetheless, EPA notes that it disagrees with the commenters' assertion – which, if correct, would presumably preclude any tribe from demonstrating TAS eligibility for a CWA regulatory program that includes a criminal enforcement component. As described above, EPA's existing TAS regulations provide that the federal government will exercise primary criminal enforcement authority where tribal authority is limited or precluded. These regulations were promulgated to avoid precisely the outcome asserted by the commenters. The regulations have been in place for decades, and they are unaffected by today's interpretive rule.

EPA also disagrees with the commenters' assertion that the absence of any statutory language in section 518 addressing the limitations on tribal criminal authority is an indication that Congress did not intend to delegate authority to Indian tribes. EPA notes that the limitations on tribal criminal enforcement originate in legal principles established separate and apart from

the CWA. Therefore, if the commenters were correct, Indian tribes could never demonstrate authority – whether inherent or congressionally delegated – to administer a CWA program that includes a criminal enforcement component without some statement in the statute affirming or otherwise addressing the exercise of criminal authority. Because the statute contains no such statement, this would render TAS impossible even under EPA’s prior interpretation, and would thus make the CWA TAS provision internally inconsistent and in significant part a nullity. Under the commenters’ approach, section 518 would, on the one hand, authorize TAS for programs that include criminal enforcement, while simultaneously precluding such TAS by virtue of an absence of congressional explanation of how criminal enforcement will be exercised. EPA disagrees that this could reflect Congress’ intent. EPA also notes that the Agency has already interpreted the CAA tribal provision as including a congressional delegation of civil regulatory authority to tribes over their entire reservations, and that interpretation has been upheld in court. Like the CWA, the CAA authorizes TAS for programs that include a criminal enforcement component without separately addressing the exercise of such authority during program implementation. Under both statutes, EPA has exercised its authority to address this programmatic issue through long-established regulations that retain primary criminal enforcement with the federal government.

4. Special circumstances

There could be rare instances where special circumstances limit or preclude a particular tribe’s ability to accept or effectuate the congressional delegation of authority over its reservation. For example, there could be a separate federal statute establishing unique jurisdictional arrangements for a specific state or a specific reservation that could affect a tribe’s

ability to exercise authority under the CWA. It is also possible that provisions in particular treaties or tribal constitutions could limit a tribe's ability to exercise relevant authority.¹²

The application requirements of existing CWA TAS regulations already provide for tribes to submit a statement of their legal counsel (or equivalent official) describing the basis for their assertion of authority. The statement can include copies of documents such as tribal constitutions, by-laws, charters, executive orders, codes, ordinances, resolutions, etc. *See* 40 CFR 131.8(b)(3)(ii); 123.32(c); 233.61(c)(2). Under today's rule, the requirement for a legal counsel's statement continues to apply and ensures that applicant tribes appropriately rely on the congressional delegation of authority and provide any additional information that could be relevant to their ability to accept or effectuate the delegated authority. As described below in section V.C.6, existing CWA TAS and program regulations also continue to provide appropriate opportunities for other potentially interested entities – such as states or other Indian tribes adjacent to an applicant tribe – to comment on an applicant tribe's assertion of authority and, among other things, inform EPA of any special circumstances that they believe could affect a tribe's ability to regulate under the CWA.

Consideration of Comments

EPA received several comments asserting that special circumstances limit particular tribes' ability to obtain TAS to regulate under the CWA. For instance, one state asserted that the tribes located within the state are precluded under federal laws specific to those tribes from obtaining TAS for CWA regulatory programs. Another state asserted that a tribe located within the state is

¹² EPA takes no position in this interpretive rule regarding whether any particular tribe or Indian reservation is subject to any potential impediment relating to effectuation of the congressional delegation of regulatory authority or how the CWA can be interpreted vis-à-vis the alleged source of any such impediment. Any such issue would need to be addressed on a case-by-case basis and with the benefit of a full record of relevant information that would be developed during the processing of a particular TAS application. To the extent EPA is ever called upon to make a decision regarding this type of issue, such a decision would be rendered in the context of EPA's final action on a specific TAS application, and any judicial review of that decision would occur in that context.

precluded by a federal statute specific to that tribe from regulating reservation land that is owned in fee by nonmembers of the tribe. The state noted that if that tribe applied to regulate such fee lands, the state would avail itself of the opportunity under EPA's regulations to submit comments and would assert that the cited federal law affects the tribe's ability to exercise such authority. One local government commented that the geographic extent of a tribe's governing authority does not include the local government and provided historical information intended to support its position. And two industry commenters asserted that the tribe upon whose reservation they are located has entered into binding agreements waiving the tribe's right to regulate the commenters' facilities, thus rendering the tribe unable to obtain TAS for CWA regulatory programs over those facilities.

EPA appreciates the information about special circumstances provided in these comments. Importantly, the precise outcome of any such circumstance could only be determined in the context of a particular tribe's TAS application and upon a full record of information addressing the issue. The substance of these specific situations is thus outside the scope of – and is not affected by – today's rule. However, the comments are both illustrative and instructive regarding the types of special circumstances and jurisdictional issues that may affect a tribe's ability to carry out the congressional delegation of authority in the CWA tribal provision. Other federal statutes may, for instance, limit a particular tribe's or group of tribes' ability to participate, in whole or in part, in CWA regulation through the TAS process. In addition, before approving a tribe's TAS eligibility, EPA would carefully consider whether any binding contractual arrangements or other legal documents such as tribal charters or constitutions might affect the tribe's regulatory authority generally, or with regard to any specific members of the regulated community. Finally, the geographic scope of the reservation boundaries over which a tribe

asserts authority would continue to be a relevant and appropriate issue for consideration in the TAS process. As explained elsewhere, EPA's existing TAS regulations require applicant tribes to address these types of issues in their jurisdictional statements and provide states and other appropriate entities the opportunity to comment and inform EPA of any potential impediments to tribal regulatory authority. These comment opportunities help ensure that EPA's decision making is well informed. Additional available information regarding certain of these special circumstances is provided in EPA's Response to Comments document included in the docket for this rule.

During pre-proposal outreach and again following proposal of the rule, EPA received comments from the State of Oklahoma regarding section 10211(b) of the Safe, Accountable, Flexible, Efficient Transportation Equity Act of 2005 ("SAFETEA"), Public Law 109-59, 119 Stat. 1144 (August 10, 2005). Because this provision of federal law expressly addresses TAS under EPA's statutes, including the CWA, EPA explained in the proposal that section 10211(b) established a unique TAS requirement with respect to Indian tribes located in the State of Oklahoma. Under section 10211(b), tribes in Oklahoma seeking TAS under a statute administered by EPA for the purpose of administering an environmental regulatory program must, in addition to meeting applicable TAS requirements under the EPA statute, enter into a cooperative agreement with the state that is subject to EPA approval and that provides for the tribe and state to jointly plan and administer program requirements. This requirement of SAFETEA exists apart from, and in addition to, existing TAS criteria, including the TAS criteria set forth in section 518 of the CWA. Today's rule relates solely to the interpretation of an existing CWA TAS requirement; it thus has no effect on the separate TAS requirement of section 10211(b) of SAFETEA. In its comments on the proposal, the State of Oklahoma requested

additional information regarding the process or sequence of events that will be used to ensure that this provision of SAFETEA is satisfied in the context of particular tribal TAS applications that may be submitted following finalization of today's interpretive rule. EPA notes that section 10211(b) expressly contains certain procedural requirements – *i.e.*, the state/tribal cooperative agreement must be subject to EPA review and approval after notice and an opportunity for public hearing. Nothing in today's rule alters or affects those requirements. Further, because the SAFETEA requirement must be satisfied for a tribe in Oklahoma to obtain TAS to regulate under an EPA statute, the final cooperative agreement must be fully executed and approved by EPA before EPA can approve a regulatory TAS application. Because the State of Oklahoma is a required signatory to the agreement, this sequence of events ensures that the State will have a full opportunity to participate in the TAS process – separate and apart from opportunities that states have through EPA's existing TAS notice and comment procedures. Nothing in today's interpretive rule alters or affects Oklahoma's participation in the SAFETEA cooperative agreement or the requirement that the agreement be in place as a prerequisite to TAS for a regulatory program. EPA notes that there are no regulations establishing procedures for the State and applicant tribes to negotiate SAFETEA cooperative agreements or for tribes to submit, and EPA to review, such agreements. There is thus flexibility for the State and applicant tribes in Oklahoma to work together to develop these agreements as they deem appropriate.

5. Tribal inherent regulatory authority

With today's rule, EPA is not intending to assess the extent of tribal inherent regulatory authority. As the Agency clearly articulated in the TAS rules identified in section II.B, the importance of water resources to tribes, the serious potential impacts of water pollution on tribes' uses of their waters, and the mobility of pollutants in water all strongly support tribes' ability to

demonstrate their inherent authority to regulate surface water quality on their reservations, including the authority to regulate nonmember conduct on fee lands under the Supreme Court's test established in *Montana*. Consistent with its 1991 interpretation of section 518, EPA concluded that each of the tribes it has approved for TAS for CWA regulatory programs has demonstrated its inherent regulatory authority and has demonstrated that the functions it sought to exercise pertain to the management and protection of reservation water resources. All Agency CWA TAS determinations challenged in court have been upheld.

Today's rule does not affect these prior TAS approvals. The rule does, however, modify EPA's approach going forward to be consistent with Congress' intent to delegate civil regulatory authority to eligible tribes. It relieves tribes of the administrative burden associated with demonstrating their inherent regulatory authority in the TAS application process. It does not, however, alter EPA's prior views regarding the extent of tribal inherent regulatory authority.¹³

Consideration of Comments

All of the tribal commenters fully support EPA's interpretive rule. Several tribes also noted their view that tribes possess inherent authority to regulate the quality of their reservation waters. EPA appreciates these comments and reiterates that today's revised interpretation of the CWA tribal provision is intended solely to effectuate the plain intent of Congress to delegate civil authority to tribes to regulate water resources on their entire reservations under the CWA. Today's rule is not intended as an assessment of the scope of retained tribal inherent authority.

Several state, local government, and industry commenters asserted that under federal law, tribal inherent regulatory authority over nonmembers of the tribe is limited and that the U.S.

¹³ In promulgating the CAA Tribal Authority Rule, EPA similarly noted its view that even absent a direct delegation of authority from Congress, tribes would very likely have inherent authority over all activities within Indian reservation boundaries that are subject to CAA regulation. 59 FR at 43958 n.5.

Supreme Court has consistently recognized and affirmed such limitations. The commenters appear to assert that such limitations argue against EPA's revised interpretation of the CWA tribal provision. EPA disagrees. EPA is aware of Supreme Court jurisprudence addressing retained tribal inherent regulatory authority, particularly with regard to such authority as applied to non-tribal members. However, as described above in sections IV and V.A, federal law also recognizes Congress' authority to delegate jurisdiction to tribes to regulate throughout their reservations, including regulation of the activities of non-tribal members. A relevant reviewing federal court has already upheld EPA's interpretation that the Clean Air Act includes such a delegation, and the plain language of CWA section 518 supports the same approach. Issues regarding tribal inherent authority are distinct from EPA's interpretation of the express statutory language in section 518.

6. Existing regulatory requirements

Because today's revised statutory interpretation is consistent with existing CWA TAS regulatory requirements, EPA has not revised any regulatory text in the Code of Federal Regulations.

a. TAS requirements

Consistent with today's rule, tribes will rely on the congressional delegation of authority in section 518 as the source of their authority to regulate water quality on their reservations. Under the TAS regulations identified in section II.B, tribes would still need to address and overcome any special circumstances that might affect their ability to obtain TAS for a CWA regulatory program (see section V.C.4), and the existing TAS application regulations require submission of a legal statement that would cover such issues. Apart from such special circumstances, the main focus in determining the extent of an applicant tribe's jurisdiction for

CWA regulatory purposes will likely be identifying the geographic boundaries of the Indian reservation area (whether a formal or informal reservation) over which the congressionally delegated authority would apply.¹⁴ EPA's existing CWA TAS regulations already provide for applicant tribes to submit a map or legal description of the reservation area that is the subject of the TAS application. *See* 40 CFR 131.8(b)(3)(i); 123.32(c); 233.61(c)(1); 501.23(c). These provisions continue to apply and ensure that each tribe applying for a CWA regulatory program submits information adequate to demonstrate the location and boundaries of the subject reservation.

The existing regulations also provide appropriate opportunities for potentially interested entities to comment to EPA regarding any jurisdictional issues associated with a tribe's TAS application. As mentioned in section II.B above, EPA's TAS regulations for the CWA section 303(c) WQS program include a process for notice to appropriate governmental entities – states, tribes and other federal entities located contiguous to the reservation of the applicant tribe – and provide an opportunity for such entities to provide comment on the applicant tribe's assertion of authority. EPA makes such notice broad enough that other potentially interested entities can participate in the process. 56 FR at 64884. For example, EPA routinely publishes notice of tribal TAS applications for the WQS program in relevant local newspapers covering the area of the subject reservation and in electronic media.

¹⁴ The jurisdictional inquiry into the geographic scope of a tribe's TAS application – *i.e.*, the boundary of the reservation area that a tribe seeks to regulate – imposes no additional burden on entities that wish to comment on an applicant tribe's assertion of authority. Under any approach to tribal regulatory authority, the geographic scope of the TAS application is a relevant jurisdictional consideration and thus an appropriate issue for potential comment during the TAS process. Commenters have, at times, raised such geographic issues in the context of previous TAS applications; EPA's rule does not alter the opportunity to do so for future applications, or any burden attendant to preparing and submitting such comments.

Consideration of Comments

EPA received comments from local governments requesting that EPA ensure direct notice to such governments of tribal TAS applications for the CWA WQS program. EPA appreciates that certain local governments may wish to comment on tribal assertions of authority to administer CWA WQS. However, any issues regarding the notice and comment process in EPA's TAS regulations for that program are beyond the scope of this interpretive rule, which addresses solely EPA's interpretation of section 518 as a congressional delegation of authority. EPA has retained the regulations governing the notice and comment process in their entirety and believes that the process provides appropriate notice to potentially interested entities in the area of an applicant Indian tribe's reservation. The process has proven to be effective in ensuring that relevant issues regarding tribal jurisdiction are raised to EPA during the TAS decision making process.

b. Relationship to program approvals

The existing TAS regulations and this rule relate solely to the applications of Indian tribes for TAS eligibility for the purpose of administering CWA regulatory programs. They do not provide substantive approval of an authorized tribe's actual CWA regulatory program. Each program has its own regulations specifying how states and authorized tribes are to apply for and administer the program.

EPA's TAS regulations for the CWA section 402, 404 and 405 permitting programs require an analysis of tribal jurisdiction as part of the program approval process under 40 CFR parts 123, 233 and 501 that are described in section II.B. As described in the Simplification Rule, EPA makes its decisions to approve or disapprove those programs as part of a public notice and comment process conducted in the Federal Register. 59 FR at 64340.

7. Effects on tribal TAS applications

Today's interpretive rule streamlines the TAS application and review process for tribes seeking eligibility to administer CWA regulatory programs. The rule significantly reduces the expected time and effort for tribes to develop and EPA to review TAS applications and could encourage more tribes to apply for TAS for CWA regulatory programs. As stated above (sections V.C.4 and V.C.6), applicant tribes would still need to identify their reservation boundaries and address any special circumstances potentially affecting their ability to effectuate the congressional delegation of authority and obtain TAS to regulate under the CWA.

Any EPA approval of a TAS application for a CWA regulatory program after [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER] will be based on the delegation of authority from Congress as the relevant source of authority supporting the tribe's eligibility. Any new tribal TAS application for a CWA regulatory program submitted after [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER] will need to be consistent with the interpretation of section 518 expressed in this rule. For any pending TAS application for CWA regulatory programs as of [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER], EPA will consult with the applicant tribe to assist it in amending its application if necessary to be consistent with this rule and to address any process issues.

8. Effects on EPA-approved state programs

EPA's rule has no effect on the scope of existing state regulatory programs approved by EPA under the CWA. Generally speaking, civil regulatory jurisdiction in Indian country lies with the federal government and the relevant Indian tribe, not with the states. *See, e.g., Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 527 n.1 (1998). Therefore, in the absence of an express demonstration of authority by a state for such areas, and an EPA finding of that

state authority for those Indian country waters, EPA has generally excluded Indian country from its approvals of state regulatory programs under the CWA.

The revised reinterpretation of section 518 relates solely to the exercise of jurisdiction by Indian tribes on their reservations; it has no effect on the scope of existing CWA regulatory programs administered by states outside of Indian country. It neither diminishes nor enlarges the scope of such approved state programs.

There are uncommon situations where a federal statute other than the CWA grants a state jurisdiction to regulate in areas of Indian country. For example, in a few cases EPA has approved states to operate CWA regulatory programs in areas of Indian country where the states demonstrated jurisdiction based on such a separate federal statute. This rule does not address or affect such jurisdiction that other federal statutes provide to states.

Regulations already exist to address circumstances where a state or tribe believes that unreasonable consequences could arise or have arisen as a result of differing WQS set by states and eligible Indian tribes on common bodies of water. Section 518(e) of the CWA required EPA to provide a mechanism to address such situations. The Agency did so at 40 CFR 131.7, which establishes a detailed dispute resolution mechanism. Today's rule does not affect that process; the process remains available as needed to address potential state/tribal issues.

Consideration of Comments

EPA received comments from several states, a local government, and a local government association regarding potential effects of the rule on state water quality programs. Some comments asserted that the rule would improperly displace existing state authority to protect water quality in certain Indian reservation areas – *e.g.*, lands owned in fee by nonmembers of a tribe, or submerged lands owned by the states. Related comments argued that the rule is

unnecessary because the states are already implementing clean water programs over such areas. One state commenter also questioned whether the rule would preempt states' ability to apply state water quality laws, particularly with respect to non-tribal members on non-tribal land. Another state commenter cited separate federal statutes that grant the state environmental regulatory authority, including authority to administer CWA programs, in Indian territories, and asserted that the rule would therefore be unlawful in that state to the extent it could alter the jurisdictional arrangement of those other federal laws.

EPA appreciates these comments and wishes to further clarify the Agency's view that the revised interpretation announced today would not affect existing EPA-approved state programs or other state authorities. Importantly, it is EPA's position that the congressional delegation of jurisdiction in CWA section 518 relates solely to the authority of tribes to administer regulatory programs under the CWA. It does not address or affect (by enlarging or diminishing) the authority of any entity – tribe or state – to apply any water quality or other program established under its laws outside the scope of the federal CWA. Any question regarding whether a state has sufficient authority to apply such state laws to non-tribal members on their reservation fee lands (or to otherwise apply such laws on an Indian reservation), is outside the scope of today's rule and would be unaffected by the rule. EPA does not, for instance, view Congress' decision to delegate to tribes the authority to regulate their reservations under the CWA as increasing or altering tribal authority to implement any other tribal law or program – including non-CWA tribal water quality laws. Nor does EPA take the position that the congressional delegation of CWA jurisdiction to tribes serves to preempt application of any state law on an Indian reservation to the extent such state law is premised on authority found outside the CWA. EPA notes that the Agency has similarly taken no position that the congressional delegation of

authority in the CAA tribal provision acts as a preemption of state authority to apply state air quality laws on Indian reservations to the extent such laws are outside the purview of the federal CAA. Issues regarding a state's authority to implement environmental quality programs on reservation fee (or other) lands where such programs are outside the scope of the federal statutes EPA administers are beyond the scope of EPA's oversight and are unaffected by today's rule.

With regard to state water quality programs approved by EPA under the CWA, EPA disagrees with the commenters' assertion that today's rule could affect or displace existing state authorities. As noted above, under principles of federal law, states generally lack authority to regulate on Indian reservations. EPA has thus generally excluded such lands from the Agency's approval of state programs submitted to EPA under the CWA (and other environmental laws administered by EPA). It is thus generally the case that states are not approved by EPA in the first instance to administer CWA regulatory programs on reservations. In most cases, therefore, there are no existing EPA-approved state CWA programs on reservations that could be affected or displaced by a congressional delegation of authority to Indian tribes.

States may apply to EPA for CWA program approval over reservation areas. In such cases, the state would need to demonstrate a source of regulatory authority premised in federal law. Such a demonstration would be needed irrespective of whether the reservation land at issue is owned by non-tribal members or by the state itself. In rare circumstances, EPA has in the past approved certain state CWA regulatory programs on Indian reservations. In each case, the relevant state's authority has been based on a separate federal statute expressly granting the state jurisdiction to regulate on the reservation. Today's rule does not affect such EPA-approved state programs or otherwise alter the apportionment of jurisdiction established in those other federal laws. Although each case must be assessed in light of its own statutory arrangement, EPA

generally believes that CWA section 518 would not affect a separate statutory scheme that is specifically applicable to a particular state or tribe and that expressly provides for state environmental regulatory jurisdiction on Indian reservation lands and/or expressly precludes tribes from asserting such authority. This does not mean, as asserted by one state commenter, that today's rule would be unlawful in such a state. It simply means that the congressional delegation of authority in section 518 may be precluded by a separate federal law, with jurisdiction to administer CWA regulatory programs being granted to the state under that law. As described above in section V.C.4, EPA recognizes that such unusual circumstances may affect certain tribes' ability to effectuate the congressional delegation of authority or otherwise obtain TAS to regulate under the CWA. A situation where a separate federal law specifically apportions jurisdiction among a particular state and the tribe(s) located in such state could be one example of such a circumstance.

VI. How does the rule affect existing EPA guidance to tribes seeking to administer CWA regulatory programs?

As noted in section V.C.6, today's rule does not revise any regulatory text. However, it does render some of EPA's existing guidance obsolete. For example, parts of a 1998 memorandum to EPA staff (the "Cannon-Perciasepe Memorandum"¹⁵) provided guidance for EPA's reviews of tribal assertions of inherent authority to administer CWA regulatory programs. Among other things, the memorandum established a case-by-case process for EPA to seek comments from appropriate governmental entities and the public on EPA's proposed factual findings relating to an applicant tribe's assertion of inherent authority over nonmember activities on reservation fee

¹⁵ "Adoption of the Recommendations from the EPA Workgroup on Tribal Eligibility Determinations," memorandum from Assistant Administrator for Water Robert Perciasepe and General Counsel Jonathan Z. Cannon to EPA Assistant Administrators and Regional Administrators, March 19, 1998.

lands. Cannon-Perciasepe Memorandum, p. 6. The memorandum also provided detailed guidance for implementing the *Montana* test, which, as described above, relates to inherent tribal jurisdiction over nonmember activity. Cannon-Perciasepe Memorandum, Attachment C.¹⁶

Because applicant tribes will no longer need to demonstrate inherent jurisdiction, these parts of the guidance are no longer relevant for TAS applications for CWA regulatory programs, and there is no further utility for EPA to develop or seek comment on factual findings relating to tribal inherent authority.

EPA intends to update its internal procedures and its training and guidance for applicant tribes to reflect these changes consistent with the express congressional delegation of authority to eligible tribes.

VII. Economic analysis

This rule entails no significant cost. Its only effect will be to reduce the administrative burden for a tribe applying in the future to administer a CWA regulatory program, and to potentially increase the pace at which tribes seek such programs. See the discussion of administrative burden and cost in section VIII.B (Paperwork Reduction Act).

VIII. Statutory and Executive Order reviews

Additional information about these statutes and Executive Orders can be found at <http://www.epa.gov/laws-regulations/laws-and-executive-orders>.

¹⁶ The “Cannon-Perciasepe” approach and related guidance to tribes are also reflected in subsequent EPA materials, including portions of the “Strategy for Reviewing Tribal Eligibility Applications to Administer EPA Regulatory Programs,” memorandum from Deputy Administrator Marcus Peacock, January 23, 2008.

A. *Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review*

This interpretive rule is not a significant regulatory action and was therefore not submitted to the Office of Management and Budget (OMB) for review.

B. *Paperwork Reduction Act (PRA)*

The information collection activities in this interpretive rule have been submitted for approval to OMB under the PRA. The Information Collection Request (ICR) document that EPA prepared has been assigned EPA ICR number 2515.02. You can find a copy of the ICR in the docket for this rule, and it is briefly summarized here. The information collection requirements are not enforceable until OMB approves them.

As discussed in section II.B, EPA's regulations require that a tribe seeking to administer a CWA regulatory program must submit information to EPA demonstrating that the tribe meets the statutory criteria described in section II.A. EPA requires this information in order to determine that the tribe is eligible to administer the program.

This rule streamlines the application by revising EPA's interpretation of section 518 to eliminate the need for an applicant tribe to demonstrate its inherent regulatory authority – including demonstrating that it meets the *Montana* test where relevant – which had been an element of TAS applications not included in the statute. As described in the ICR, this rule reduces the burden by an estimated 583 staff hours for a typical tribe, or 27 percent, and reduces the cost of an application to a typical tribe for salaries and contractor support by an estimated \$70,554 per tribe, or 39 percent.

Respondents/affected entities: Any federally recognized tribe with a reservation can potentially apply to administer a regulatory program under the CWA.

Respondent's obligation to respond: The information discussed in this rule is required from a tribe only if the tribe seeks to administer a CWA regulatory program. See EPA's regulations cited in section II.B of this rule.

Estimated number of respondents: The total potential pool of respondents is over 300 tribes with reservations. Although there are 567 federally recognized Indian tribes in the United States, the CWA allows only those tribes with reservations to apply for authority to administer programs. EPA estimates that about six tribes per year will apply for TAS for a CWA regulatory program following this rule, an increase from the existing rate of about four tribes per year. The pace of applications could increase after the first few years as tribes become more familiar with the post-rule process.

Frequency of response: Application by a tribe to be eligible to administer a CWA regulatory program is a one-time collection of information.

Total estimated burden: 9,642 tribal staff hours per year. Burden is defined at 5 CFR 1320.3(b). EPA's ICR analysis included all administrative costs associated with TAS applications even if some of the costs are not strictly information collection costs. EPA was unable to differentiate the information collection costs consistently and reliably from other administrative costs such as program development costs.

This estimate could overstate actual burden because (a) EPA assumed that all applications are first-time applications for CWA regulatory programs, and thus the tribes submitting them would be unable to rely on materials from previous applications for different regulatory programs; (b) EPA used a liberal estimate of the annual rate of tribal applications to ensure that the ICR does not underestimate tribal burden; and (c) EPA used a simplifying steady-state assumption in estimating annualized costs.

Total estimated cost: \$674,946, including tribal staff salaries and the cost of contractors supporting tribal applicants. This rule does not entail capital or operation and maintenance costs.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9. When OMB approves this ICR, the Agency will announce that approval in the *Federal Register* and publish a technical amendment to 40 CFR part 9 to display the OMB control number for the approved information collection activities contained in this final rule.

C. Regulatory Flexibility Act (RFA)

I certify that this interpretive rule will not have a significant economic impact on a substantial number of small entities under the RFA. This rule will not impose any requirements on small entities. This rule affects only Indian tribes that seek to administer CWA regulatory programs.

D. Unfunded Mandates Reform Act (UMRA)

This interpretive rule does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531-1538, and does not significantly or uniquely affect small governments. The rule imposes no enforceable duty on any state, local or tribal governments or the private sector.

E. Executive Order 13132: Federalism

This interpretive rule does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

This rule applies only to tribal governments that seek eligibility to administer CWA regulatory programs. Although it could be of interest to some state governments, it does not

apply directly to any state government or to any other entity. As discussed in section V.C.8, the rule has no effect on the scope of existing state regulatory programs approved by EPA under the CWA.

In the spirit of Executive Order 13132, and consistent with EPA policy to promote communications between EPA and state and local governments, EPA consulted with representatives of state governments to obtain meaningful and timely input before and after proposal for consideration in this rulemaking. By letter dated June 18, 2014, EPA invited ten national and regional state associations¹⁷ to a July 8, 2014, informational meeting at EPA in Washington, D.C. As a result of this meeting and other outreach, EPA participated in several follow-up meetings with interested associations and their members as well as certain individual states during the months of June – September, 2014. By letter dated August 7, 2015, to the same groups, EPA resumed consultation after the proposal, including conducting a webinar on September 3, 2015. Records of these meetings and copies of written comments and questions submitted by states and state associations are included in the docket for this rule.

In the public comments, two states expressed support for tribal opportunities to obtain TAS. Some participants disagreed with or questioned in whole or in part the Agency's rationale for the reinterpretation. Others questioned whether the proposal would affect the geographic scope of tribal authority under the CWA and how the proposal would affect a state's ability to challenge a tribe's application. Some states also had questions about issues unique to their situations.

¹⁷ The National Governors Association, the National Conference of State Legislatures, the Council of State Governments, the Western Governors Association, the Southern Governors Association, the Midwestern Governors Association, the Coalition of Northeastern Governors, the Environmental Council of the States, the Association of Clean Water Administrators, and the Western States Water Council. In May and June 2015, EPA held additional informational meetings with the state environmental chiefs of the National Association of Attorneys General, members of the legal network of the Environmental Council of the States, and member states of the Western Governors' Association.

EPA considered all of the state comments in developing this final interpretive rule. EPA's responses are included in sections IV and V of this rule and in the Response to Comments document in the docket for this rulemaking.

F. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments

This interpretive rule has tribal implications because it will directly affect tribes applying in the future to administer CWA regulatory programs. However, because it neither imposes substantial direct compliance costs on federally recognized tribal governments, nor preempts tribal law, tribal consultation was not required by Executive Order 13175. In any event, EPA consulted and coordinated with tribal officials under the EPA Policy on Consultation and Coordination with Indian Tribes early in the process of developing this rule, and again after its proposal, to permit them to have meaningful and timely input into its development. A summary of that consultation and coordination follows.

EPA initiated a tribal consultation and coordination process before proposing this rule by sending a "Notification of Consultation and Coordination" letter on April 18, 2014, to all of the 566 then federally recognized tribes. EPA contacted all federally recognized tribes, even though only tribes with reservations can apply for TAS under the CWA, because it is possible that additional tribes could acquire reservation lands in the future. The letter invited tribal leaders and designated consultation representatives to participate in the tribal consultation and coordination process. EPA held two identical webinars concerning this matter for tribal representatives on May 22 and May 28, 2014. A total of 70 tribal representatives participated in the two webinars, and tribes and tribal organizations sent 20 pre-proposal comment letters to EPA. On August 7, 2015, EPA resumed the consultation and coordination process with tribes. A total of 44 tribal representatives participated in webinars in September 2015.

EPA received 21 comment letters from tribes and tribal associations during the public comment period. All tribal comments supported the proposal. Some tribes had questions about how EPA would handle reservation land status and boundary matters. Some comments urged EPA to help find solutions to tribal funding limitations. EPA will continue to consider tribal resource issues in its budgeting and planning process. However, EPA cannot assure tribes that additional funding will be available for a tribe to develop or implement a CWA regulatory program.

EPA considered all of the tribal comments in developing this interpretive rule. EPA's responses are included in sections IV and V of this rule and in the Response to Comments document in the docket for this rulemaking,

G. Executive Order 13045: Protection of Children from Environmental Health Risks and Safety Risks

EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that EPA has reason to believe may disproportionately affect children, per the definition of "covered regulatory action" in section 2-202 of the Executive Order. This interpretive rule is not subject to Executive Order 13045 because it does not concern an environmental health or safety risk.

H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This interpretive rule is not subject to Executive Order 13211 because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act (NTTAA)

This rulemaking does not involve technical standards.

J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations

The human health or environmental risks addressed by this action will not have potential disproportionately high and adverse human health or environmental effects on minority, low-income, or indigenous populations. This rule affects the procedures tribes must follow to seek TAS for CWA regulatory purposes and does not directly affect the level of environmental protection.

K. Congressional Review Act (CRA)

This interpretive rule is exempt from the CRA because it is a rule of agency organization, procedure or practice that does not substantially affect the rights or obligations of non-agency parties.

Dated: May 5, 2016.

Gina McCarthy,

Administrator.

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