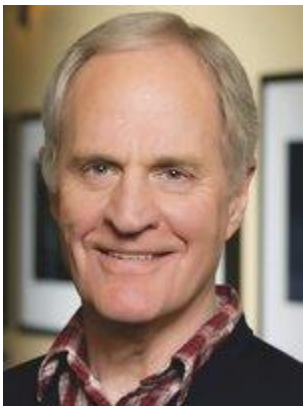
How Tribes Can Respond To Clean Water Act Review Limits

By **Lawrence Jensen, Sarah Walters and Bella Wolitz**



Lawrence Jensen

Sarah Walters

Bella Wolitz

Tribal governments may be looking for ways to enact new public health policies and assert their sovereignty in light of this summer's two pivotal events: the distress of the COVID-19 pandemic, with its disproportionate impact on Native American communities, and protests demanding social justice, with related calls to honor Native American sovereignty.

One way tribes can exercise their sovereignty to protect the health of their tribal communities and ecosystems is to obtain treatment-as-state, or TAS, authorization from the U.S. Environmental Protection Agency. Although the exact authorities provided under TAS programs vary depending on the statute being implemented, the concept is that tribes are treated in a way that is similar to states and, like states, are able to set their own standards subject to EPA approval, just as states do for state lands.

The EPA has formal procedures to approve tribes for TAS under a number of regulatory and administrative programs. TAS affords tribes an effective and forward-thinking mechanism to ensure appropriate tribal participation in environmental decisions that impact tribal lands.

These programs are rooted in the unique body of federal American Indian law, as well as in recognition by Congress that tribes, as sovereigns over tribal homelands, must be part of the legal framework for carrying out federal statutes like the Clean Air Act and the Clean Water Act. And, in light of the EPA's new rule limiting the scope and timing of tribes' review of permitting applications, it is doubly important for tribes to carve out their jurisdiction over the air and waterways within their homelands.

On June 1, the EPA released a new final rule implementing the Clean Water Act's Section 401. Under Section 401, no federal permit or license can be issued that may result in a discharge to waters of the U.S. unless the authorized tribe or state certifies that the discharge is consistent with its water quality requirements or waives certification.

The new rule issued by the EPA allows federal agencies to limit the time frame within which tribes or states are allowed to review, and issue conditions on, applicable federal permits to less than the one-year limit provided for under the Clean Water Act. The new rule also provides that under Section 401, tribes and states are only able to impose conditions

related to "water quality requirements."

Because the new rule limits tribes' participation in the larger permitting process under the Clean Water Act, it is critical that those tribes wanting to impact their environment assert their authority by applying for TAS.

Explicit provisions for tribal participation in these statutes reflect the success of tribes in working with Congress for recognition of their sovereign roles, and the need to provide for tribal participation in programs that are undertaken under a cooperative federalism model of partnership with states. The Clean Water Act's provisions on TAS were enacted in 1987 in Public Law 100-4, and the Clean Air Act's were enacted in 1990 in Public Law 101-549.

However, tribes have not fully exercised their abilities to set standards and implement environmental rules under these programs. At this writing, the EPA reports that over 300 federally recognized tribes with reservation land could qualify for TAS, but only 91 tribes have received approval to operate a regulatory program.[1]

While there could be multiple reasons for tribes to not take advantage of TAS, lack of financial resources to carry out programs and concern about potentially aggravating states likely play a role. Nevertheless, this is a missed opportunity for tribes: Obtaining TAS is a way to enable tribal governments to make decisions about environmental rules that affect their reservations, their environments, and the health and welfare of those living on their lands.

Air and water pollution do not stop at jurisdictional boundaries, and affect both tribal and nontribal communities. States may have questions or concerns about tribal TAS, but given the firm legal basis for the program, there is an argument that addressing those concerns in the context of a TAS application and then developing an improved working relationship and agreement on environmental goals could provide important benefits for tribes and states alike.

While in some cases tribal consultation requirements may afford tribes some ability to influence major projects involving federal approvals that could impact reservation lands, TAS status allows tribes to engage in planning and strategy for protecting resources, beyond a project-specific engagement.

TAS status is available for:

- Four programs under the Clean Air Act;
- Setting water quality standards and related Section 401 water quality certifications under the Clean Water Act;
- Two programs under the Safe Drinking Water Act; and
- The Lead Renovation, Repair and Painting Program under the Toxic Substances Control Act.[2]

There are several advantages for tribes that set their own water quality standards that are particularly relevant, given the importance of tribal water supplies. The COVID-19 pandemic has tragically illustrated that tribal areas without access to clean drinking water, which is critical for hand-washing and sanitation to help control the spread of disease, are

vulnerable.

More people have been infected with COVID-19 per capita on the Navajo and White Mountain Apache reservations than in any state in the country, and outbreaks on other reservations have also been dire. Although access to drinking water involves other considerations beyond the scope of TAS — e.g., treatment and distribution systems, and water rights to adequate quantities of water — some tribes may find that obtaining TAS authorization to set water quality standards under the Clean Water Act is an important step in protecting tribal waters.

Tribes that have obtained TAS for the water quality standards program under the Clean Water Act:

- Can establish water quality goals to protect reservation water resources;
- Can ensure that facilities within or upstream from reservation waters protect the tribe's EPA-approved water quality standards applicable to tribal waters; and
- Can designate uses of water bodies that may include cultural or traditional uses.

Tribes that establish TAS for the Clean Water Act Section 303(d) program can further issue lists of impaired waters, and establish total maximum daily load plans for the EPA's approval. Setting water quality standards is a critical way that tribes can protect water quality because, once approved by the EPA, these standards become the regulatory basis for establishing and implementing water quality-based treatment controls and strategies. This occurs under a variety of Clean Water Act mechanisms.

Notably, to control discharges to a tribe's waters, the EPA establishes enforceable effluent limits in National Pollutant Discharge Elimination System permits that must derive from and comply with that tribe's EPA-approved water quality standards. Further, tribes participating in the Clean Water Act Section 401 water certification program issue water quality certifications to ensure that discharges to reservation waters that are subject to federal permits and licenses will comply with the tribal water quality standards.[3]

Finally, while all tribes can monitor the quality of their waters to identify waters that pose threats to public health, under TAS, tribes can also identify waters that are out of compliance with their water quality standards, and develop pollutant reduction plans.

Attorneys with experience in federal American Indian law may wonder about the applicability of a 1981 U.S. Supreme Court case, Montana v. U.S.,[4] to tribal TAS authority. Montana and its progeny generally hold that a tribe seeking to exercise civil regulatory authority affecting nonmembers on non-American Indian fee lands must demonstrate that nonmember conduct threatens or has some direct effect on the political integrity, economic security, health or welfare of the tribe (sometimes called the Montana test).

However, the Montana test is applied when tribes are exercising inherent authority to regulate, and this authority has not been backstopped through congressional recognition or delegation. Section 518 of the Clean Water Act provides explicit congressional authorization for the EPA to "treat an Indian tribe as a state" for purposes of administering water quality standards, as long as the tribe:

- Is federally recognized;
- Has a governing body carrying out substantial powers and duties;
- Is reasonably expected to be capable of carrying out the program; and
- Has authority to manage and protect water resources within the border of an Indian reservation.

Until 2016, the EPA had conservatively interpreted Section 518 to require a tribal showing of inherent authority to administer Clean Water Act regulatory programs. However, two legal trends prompted a new interpretation.

First, case law applying the Montana test became more stringent. Second, the Supreme Court's 2004 decision in U.S. v. Lara[5] made clear that Congress has the authority to reinvest tribal authority by statute. Lara affirmed that Congress could, by statute, effectively reverse a decision by the Supreme Court that had limited tribal criminal authority over nonmember American Indians on a reservation, restoring this authority to tribes.

While federal courts had upheld the EPA's TAS programs, which have the clear health and welfare nexus that generally enable them to pass the Montana test, Lara affords added certainty that authority for tribes provided under the Section 518 of the Clean Water Act is valid — because even if a court were to hypothetically find that the Montana test would limit the ability of a tribe to set water quality standards for non-American Indians, Section 518 of the Clean Water Act affirms that Congress has delegated this authority to tribes.

Before 2016, the EPA considered the Clean Water Act to state that tribes could set water quality standards because of their inherent sovereignty. In 2016, the EPA issued a revised interpretation determining that Section 518 of the Clean Water Act includes an express congressional delegation of authority for tribes to administer regulatory programs.[6] This is consistent with the EPA's previous interpretation of similar language in the Clean Air Act, and also consistent with the holding of Lara that federal statutes can clarify — and even restore — inherent tribal legal authorities.

While the statutory requirements for tribes to be recognized for TAS remained the same, through the 2016 reinterpretation, the EPA changed its application procedures so that tribes no longer had to provide a legal memo regarding inherent authority and addressing the Montana test. This makes it easier for tribes to complete the application and receive TAS approval.

Realistically, preparing TAS applications, and then following through with implementation, requires financial resources that pose a barrier for many tribes. Federal or nonfederal funding could help tribes overcome this impediment, though at this time we are not aware of significant funding initiatives.

Tribes obtaining TAS status under statutes such as the Clean Water Act and the Clean Air Act secure opportunities to improve human health and well-being by making decisions and carrying out program responsibilities in concert with federal and state agencies. This is the kind of cooperative federalism that is needed going forward to obtain important benefits for all Americans. The disruptive events of 2020 can be a catalyst for positive change at all levels of government.

Lawrence J. Jensen is a shareholder at Brownstein Hyatt Farber Schreck LLP. He previously served as chief legal counsel to the U.S. Department of the Interior's Bureaus of Land Management, Reclamation and Indian Affairs, and as general counsel at the EPA.

Sarah Walters is a shareholder at the firm.

Bella Sewall Wolitz is of counsel at the firm.

[1] See 81 FR 30183 (300 tribes with reservations); https://www.epa.gov/tribal/tribes-approved-treatment-state-tas#:~:text=in%20Indian%20Country-,tribes%20Approved%20for%20Treatment%20as%20a%20State%20(TAS),functions%2C%20and%20for%20grant%20funding (reporting tribes approved for regulatory program TAS).

[2] See https://www.epa.gov/tribal/tribes-approved-treatment-state-tas#:~:text=in%20Indian%20Country-,tribes%20Approved%20for%20Treatment%20as%20a%20State%20(TAS),functions%2C%20and%20for%20grant%20funding.

[3] Note that the current administration has limited the applicability of Section 401 by executive order, but it is anticipated that these limitations will face challenges in courts. See https://www.law360.com/texas/articles/1287344/epa-limits-on-states-project-reviews-likely-to-face-lawsuits; https://www.jdsupra.com/legalnews/epa-s-new-clean-water-act-section-401-39932/.

[4] Montana v. U.S., 450 U.S. 544 (1981).

[5] U.S. v. Lara, 541 U.S. 193 (2004).

[6] 81 FR 30183 (May 16, 2016).