Revised Interpretation of Clean Water Act Tribal Provision: Response to Public Comments

This document provides EPA's response to comments on the proposed interpretive rule, Revised Interpretation of Clean Water Act Tribal Provision, 80 FR 47430 (August 7, 2015). Section numbers identified in this document refer to the sections of the final interpretive rule, available at https://www.epa.gov/wqs-tech/revised-interpretation-clean-water-act-tribal-provision.

The brief synopses of comments in this document are provided for the convenience of the reader and are not meant to replace the full comments. In developing responses, EPA considered the full comments received, which are available individually in the docket for this rulemaking. To access the docket, go to www.regulations.gov, enter “EPA-HQ-OW-2014-0461” in the Search box, and click on “Open Docket Folder.” Individual comments are accessible by selecting “View All” next to “Comments.”
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**Comment ID** EPA-HQ-OW-2014-0461-0065  
**Author Name:** Gregory Miller, Tribal Vice President  
**Organization:** Stockbridge-Munsee Community

Supports the proposed rule. Congress’ inclusion of section 518 as upheld by the courts is a clear statement that Indian tribes have authority to administer Clean Water Act programs on their reservations. Supports section V.C addressing tribal trust lands, and presents justifying case law.

*Response:*  
EPA appreciates the comments supporting the proposal. See section IV.A of the final interpretive rule. EPA also appreciates the commenter’s support for the Agency’s approach to tribal trust lands, which, as explained in section V.C.2 of the final interpretive rule, is a longstanding approach that is well-settled and unaltered by the final interpretive rule.

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**Comment ID** EPA-HQ-OW-2014-0461-0066  
**Author Name:** Anonymous  
**Organization:** Unstated

Agrees that waters within Native American tribal boundaries should be subject to the provisions of the Clean Water Act, no different than any other waters under public trust. Provides views on the importance of scientific evaluation of aqueous resources and suggests the need for tribal training.

*Response:*  
EPA appreciates the comments. See section IV.A of the final interpretive rule. Although EPA may agree that scientifically designed sampling and analysis is important, these activities are beyond the scope of – and are not affected by – this interpretive rule.

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**Comment ID** EPA-HQ-OW-2014-0461-0067  
**Author Name:** Margaret E. Park, AICP, Director of Planning & Natural Resources  
**Organization:** Agua Caliente Band of Cahuilla Indians

Asserts that the proposed interpretation will be beneficial to tribes, and cites reduced costs and shortened timeframes. Asserts that tribes possess inherent authority to manage, protect, and regulate reservation waters, including on nonmember fee lands.

*Response:*  
EPA appreciates the comments supporting the proposal. See section IV.A of the final interpretive rule. With regard to inherent tribal authority, see EPA’s response in section V.C.5 of the rule.
Comment ID: EPA-HQ-OW-2014-0461-0068
Author Name: Janet T. Mills, Maine Attorney General
Organization: State of Maine, Office of the Attorney General

Asserts that legislation specifically applicable in Maine grants the State environmental regulatory jurisdiction throughout the State, including in Indian territories, and that such legislation precludes other statutes such as the Clean Water Act from affecting or preempting the State’s jurisdiction in such areas absent an express provision applying such statute in Maine. Concludes that the revised interpretation would be unlawful with respect to Maine.

Response:
EPA appreciates the Maine Attorney General’s comments, which are instructive regarding a type of special circumstance that can exist with regard to specific tribes and states and present unique jurisdictional arrangements that would need to be considered in assessing any potential application of the CWA tribal provision. EPA has generally addressed such special circumstances in sections V.C.4 and V.C.8 of the final interpretive rule. As explained there, 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 – the rule, and EPA takes no position in the 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. 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.

EPA notes, however, that the Agency is well aware of the unique apportionment of jurisdiction set forth in the Maine Indian Claims Settlement Act (MICSA, 25 U.S.C. §§ 1721, et seq.), which ratifies the Maine Implementing Act (30 M.R.S. §§ 6201, et seq.), and the Aroostook Band of Micmacs Settlement Act (25 U.S.C. § 1721), which ratifies the Micmac Settlement Act (30 M.R.S. §§ 7201, et seq.). Based on the grant of environmental regulatory authority provided in these statutes, EPA has previously approved the State to administer CWA programs (i.e., National Pollutant Discharge Elimination System permitting and Water Quality Standards) in tribal territories in Maine. Today’s interpretive rule does not affect such EPA-approved programs administered by Maine or otherwise alter the apportionment of jurisdiction established in the federal settlement statutes enacted in connection with Maine and the four federally recognized tribes located in that state.

EPA is also aware of sections 1725(h) and 1735(b) of MICSA, which address applicability of federal laws that accord special rights or status to Indian tribes. These provisions generally preclude application of such federal laws to the extent such application would affect or preempt Maine’s jurisdiction or the application of Maine’s laws as provided for in MICSA. As the Maine Attorney General’s comment notes, legislative history associated with the enactment of MICSA and separate legislative history associated with the enactment of CWA section 518 include statements expressing a general understanding that tribal regulation under the federal Clean Air Act (CAA) and CWA, respectively, that interferes with
Maine’s jurisdiction would be impermissible. Although the intersection of the CAA or CWA tribal provision and the Maine Indian settlement acts would only become ripe for a final EPA decision in the context of a specific tribal application to administer an environmental regulatory program, EPA recognizes that the settlement acts’ apportionment of jurisdiction and savings provisions raise significant questions about tribal environmental regulation under EPA’s statutes in Maine and that these questions would need to be addressed – with an opportunity for comment by Maine and other potentially interested entities – in the context of any such tribal application.

To date, EPA has not approved any of the tribes in Maine to regulate under the federal environmental laws administered by the Agency (none of which expressly applies the respective tribal provisions in Maine) and has not had occasion to address the effect of the settlement acts on the tribes’ eligibility to regulate to implement a federal environmental program in a final Agency decision. This does not mean that EPA’s interpretation that CWA section 518 delegates authority to eligible Indian tribes to regulate their reservations – or EPA’s prior and well-settled similar interpretation of the CAA tribal provision – is unlawful. As explained in the final interpretive rule, it simply means that the congressional delegation of authority must be assessed in connection with separate federal law (in this case, the Maine settlement acts), that grants jurisdiction to administer regulatory programs to a state and that may preclude tribal regulation. A situation where a separate federal law specifically apportions jurisdiction among a particular state and the tribe(s) located in such state is an example of a special circumstance relevant to effectuation of the congressional delegation of authority that would need to be addressed in any tribal application for eligibility to regulate under the CWA. 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.

Comment ID EPA-HQ-OW-2014-0461-0069
Author Name: Virgil A. Siow, Governor
Organization: Pueblo of Laguna

Supports the proposed reinterpretation. Cites the inherent authority demonstration as the most time-consuming portion of the Pueblo’s own TAS application. Supports the proposal’s legal analysis.

Response:
EPA appreciates the comments supporting the proposal. See section IV.A of the final interpretive rule.
Comment ID EPA-HQ-OW-2014-0461-0070
Author Name: Isaac Lujan, Governor
Organization: Pueblo of Sandia

Supports the proposed reinterpretation. Also supports the view expressed in EPA’s proposal that tribal trust land should be treated as reservation land. The Pueblo is concerned that the “SAFETEA” law that is applicable to Oklahoma tribes, discussed by EPA in section V.E of the proposal, infringes on tribal sovereignty, and should have been “reinterpreted” by EPA.

Response:
EPA appreciates the comments supporting the proposal. See section IV.A of the final interpretive rule. EPA also appreciates the commenter’s support for the Agency’s approach to tribal trust lands, which, as explained in section V.C.2 of the final interpretive rule, is a longstanding approach that is well-settled and unaltered by the final interpretive rule. With regard to the “SAFETEA” provision, see EPA’s discussion in section V.C.4 of the interpretive rule. As EPA explained, the SAFETEA provisions affecting Oklahoma tribes are unaffected by the final interpretive rule. Any interpretation of those provisions would be beyond the scope of this interpretive rule.

Comment ID EPA-HQ-OW-2014-0461-0071
Author Name: Anonymous
Organization: Unknown

Believes the Agency should go forward with the proposed rule.

Response:
EPA appreciates the comments supporting the proposal. See section IV.A of the final interpretive rule.

Comment ID EPA-HQ-OW-2014-0461-0072
Author Name: Andrew J. Vickers, Hobart Village Administrator
Organization: Village of Hobart, Wisconsin

Expresses concern with tribal regulation of non-tribal members on Indian reservations and with TAS generally. Argues that TAS is redundant of state authority on reservations and opposes any additional delegation of authority to Indian tribes. Cites a 2013 U.S. Supreme Court decision (Tarrant Regional Water District v. Herrman, 133 S. Ct. 2120 (2013)) regarding state waters and provides several citations and descriptions addressing the commenter’s views regarding the Oneida Indian Reservation. States that the commenter is awaiting issuance of an EPA MS-4 permit and operates a municipal water sanitary sewer system and storm water management utility.

Response:
EPA appreciates the commenter’s concerns. EPA, however, does not agree that they present legal arguments inconsistent with the revised interpretation of CWA section 518 set forth in today’s final
interpretive rule. EPA recognizes that many Indian reservations are home to mixed populations of tribal and non-tribal members and that non-tribal members may own land on Indian reservations and in some cases may live in largely non-Indian communities or towns. However, the CWA expressly authorizes tribes to seek eligibility to administer regulatory programs over their entire reservations (inclusive of the activities of non-tribal members on their lands); and consistent with the geographic scope of the CWA tribal provision, EPA has previously approved tribes to regulate on their reservations under the statute. EPA disagrees that such tribal regulation is redundant of state authorities or activities under the federal CWA. As explained in section V.C.8 of the final interpretive rule, state programs under the CWA generally exclude Indian country and thus do not apply on Indian reservations in the absence of a separate federal authorization of state jurisdiction and express approval by EPA. There is thus no overlap between existing state regulatory programs under the CWA and potential tribal programs. EPA also notes – as explained in both the proposed and final interpretive rules – that it is Congress, not EPA, that has established TAS opportunities for, and expressly delegated its authority to, eligible Indian tribes. EPA also disagrees that the Supreme Court’s decision in Tarrant is inconsistent with the Agency’s revised interpretation of CWA section 518. That case involved a dispute between two states over water quantity rights that were apportioned pursuant to an interstate compact covering a shared river basin. It did not address the CWA, Indian tribes, or any interpretation of law relevant to Congress’ delegation of regulatory authority to eligible tribes for purposes of carrying out CWA water quality programs. EPA also notes that any permits or other regulatory actions associated with the commenter’s specific activities are outside the scope of the final interpretive rule.

EPA appreciates the various historical references and descriptions provided by the commenter with respect to the Oneida Indian Reservation. EPA notes that these references and the status of any specific Indian reservation are outside the scope of today’s interpretive rule. However, as explained in sections V.C.1 and V.C.6 of the interpretive rule, the status and boundaries of a reservation will continue to be a relevant issue in the context of a specific TAS application from a tribe seeking eligibility to regulate under the CWA. Under existing regulatory requirements, appropriate governmental entities (and, as matter of EPA policy, other interested stakeholders) will have an opportunity to comment on tribal assertions of authority and provide relevant information to EPA addressing the boundaries of the reservation identified in the tribal application. It would only be in that context that EPA would take a final action addressing the boundaries of any specific reservation.

Comment ID: EPA-HQ-OW-2014-0461-0073
Author Name: Anonymous
Organization: Unknown

Expresses concerns about poor water quality on the west side of Lake Sacajawea at New Town, ND, related to “oil booms.”

Response:
EPA appreciates the commenter’s concerns. This topic is beyond the scope of – and is not affected by – this interpretive rule.
Comment ID EPA-HQ-OW-2014-0461-0074
Author Name: Kay Rhoads, Principal Chief
Organization: Sac and Fox Nation

Supports the proposal, particularly as the Nation considers implementing its own CWA programs. Asserts that tribal authority has already been established, and that the reinterpretation will save effort and costs.

Response:
EPA appreciates the comments supporting the proposal. See section IV.A of the final interpretive rule. With regard to inherent tribal authority, see EPA’s response in section V.C.5 of the rule.

Comment ID EPA-HQ-OW-2014-0461-0075
Author Name: Walter E. Rusinek
Organization: Procopio, Cory, Hargreaves & Savitch LLP, on behalf of Pala Band of Mission Indians (Pala Band)

The Pala Band supports the proposal in general (citing cost and time savings). Disagrees, however, with the limitation on geographic scope of TAS, specifically with EPA’s approach to the term: “otherwise within the borders of an Indian reservation.” Cites case law and rights relating to in HOLDERS to justify that TAS should also apply to certain parcels of land that are within the exterior boundaries of the Pala Reservation, but which may not ever have been part of the Reservation.

Response:
EPA appreciates the comments supporting the proposal. See section IV.A of the final interpretive rule. EPA notes that the issue of non-reservation inholdings that are surrounded by reservation lands is generally beyond the scope of – and is not affected by – this interpretive rule. As explained in section V.C.1 of the interpretive rule, the rule does not affect, either by expanding or by contracting, the geographic scope of potential tribal TAS eligibility under the CWA. EPA’s longstanding approach is that TAS under the statute is limited to lands that qualify as reservation lands. That approach is based on the language of section 518 and has been stated, among other places, in the context of EPA’s promulgation of existing CWA TAS regulations.

Comment ID EPA-HQ-OW-2014-0461-0076
Author Name: Larry Wolk, Executive Director
Organization: Colorado Department of Public Health and Environment

Generally supportive of the proposal. Asserts that Public Law 98-290 establishes special circumstances that would limit or preclude the Southern Ute Tribe from obtaining TAS over fee lands within the exterior boundaries of the Tribe’s reservation.
Response:
EPA appreciates the comments supporting the proposal. See section IV.A of the final interpretive rule. With regard to special circumstances, see sections V.C.4 and V.C.8 of the rule. As EPA has explained, any special circumstances that are specific to a particular state or tribe and that may be relevant to effectuation of section 518’s congressional delegation of authority would be addressed solely in the context of EPA’s final decision on a particular tribe’s TAS application and upon a full record of information addressing the issue, and any judicial review of that decision would occur in that context. The substance of these specific situations is thus outside the scope of – and is not affected by – the final interpretive rule, and EPA takes no position in the 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. With regard to the Southern Ute Tribe, any final decision regarding P.L. 98-290 would thus need to occur in the context of an EPA decision on a TAS application by that Tribe. EPA notes that the Agency is familiar with P.L. 98-290 and has had occasion in the past to review certain aspects of that statute in the context of an application by the Southern Ute Tribe to administer a regulatory program under the federal Clean Air Act (a statute which, like the CWA, EPA interprets as including an express delegation of authority from Congress to eligible Indian tribes to regulate their entire reservations). In that instance and in light of P.L. 98-290, the Tribe and the State of Colorado entered into an agreement regarding administration of the subject air quality program that was affirmed in special legislation by Congress. Given those circumstances, any question regarding an effect of P.L. 98-290 on the Tribe’s ability to operate the program was not before EPA to address.

Comment ID EPA-HQ-OW-2014-0461-0077
Author Name: Timothy Andryk, Chief Counsel
Organization: Wisconsin Department of Natural Resources

Asserts that Wisconsin continues to respect and recognize tribal sovereignty, but disagrees that the legal authorities cited in the proposed interpretive rule support EPA’s revised interpretation. Argues that the cited legal authorities contain only dicta and that no court has held that the CWA constitutes a delegation of authority to tribes. Cites Tarrant Regional Water District v. Herrman, 133 S. Ct. 2120 (2013) as supporting states’ rights over navigable waters and the soils underlying such waters and asserts that Wisconsin obtained title to the navigable waters of the State and their beds under the equal footing doctrine. Asserts that EPA must use notice and comment legislative rulemaking to repeal the requirement that tribes demonstrate authority to regulate under the CWA.

Response:
EPA appreciates Wisconsin’s continuing respect for tribal sovereignty. EPA, however, disagrees with the State’s comment that the legal citations identified in the interpretive rule are insufficient to support the revised interpretation of CWA section 518. EPA provides a detailed response to comments regarding EPA’s legal citations in section IV.A of the final interpretive rule. EPA also notes that tribal regulation of water quality under the CWA is not dependent on ownership of the water or of the beds and banks underlying the water. Thus, irrespective of state ownership under the equal footing doctrine, eligible
tribes may assume the regulatory roles expressly envisioned for them by Congress in the CWA. Finally, EPA has responded to comments regarding the Agency’s use of an interpretive rule to announce the revised interpretation of CWA section 518 at section V.B of the final interpretive rule.

Comment ID EPA-HQ-OW-2014-0461-0078

Author Name: Anonymous

Organization: Unknown

Asserts that states have authorities over non-tribal members within Indian reservations and that the revised interpretation of CWA section 518 will affect states’ ability to protect state citizens residing on Indian reservations. Asserts that tribal constitutions provide no tribal authority over non-tribal persons, that federal agencies have expanded tribal authority using regulatory schemes such as Treatment As States, and that EPA is offering 300 Indian tribes its federal agency authority over non-members and non-member properties. Asserts that EPA overlooked the U.S. Supreme Court’s decisions in **Tarrant Regional Water District v. Herrman**, 133 S. Ct. 2120 (2013) and **Nevada v. Hicks**, 533 U.S. 353 (2001).

Response:

EPA disagrees with the comments. With regard to the comments addressing state authority to administer environmental regulatory programs in Indian country under EPA’s statutes, see section V.C.8 of the final interpretive rule. As explained there, state CWA programs are generally not approved by EPA in Indian country in the absence of an express congressional authorization of state jurisdiction and express approval by EPA. Such state programs would thus not be subject to displacement by tribal regulation in that they would generally not apply on reservations in the first instance. EPA also notes that tribal opportunities to apply for eligibility to administer CWA regulatory programs were established by Congress in the statute. They do not originate in “Executive Branch…regulatory schemes.” Although EPA also disagrees with the comment’s assertion that tribal constitutions preclude exercises of authority over non-tribal members as a general matter, EPA notes – as explained in section V.C.4 of the final interpretive rule – that any special circumstance relating to a particular tribe’s constitution that may affect that tribe’s ability to effectuate the congressional delegation of authority would be addressed in the context of a specific TAS application, subject to an opportunity for the relevant state and other interested entities to provide comment. Finally, EPA disagrees that the Supreme Court’s decisions in **Tarrant** and **Hicks** are inconsistent with the Agency’s revised interpretation of CWA section 518. **Tarrant** involved a dispute between two states over water quantity rights that were apportioned pursuant to an interstate compact covering a shared river basin. It did not address the CWA, Indian tribes, or any interpretation of law relevant to Congress’ delegation of regulatory authority to eligible tribes for purposes of carrying out CWA water quality programs. **Hicks** addressed an issue of tribal inherent jurisdiction, which is distinct from authority delegated to eligible tribes by Congress. By virtue of EPA’s revised interpretation of CWA section 518, tribal inherent authority is no longer relevant to tribal TAS applications to administer regulatory programs under the statute.
Comment ID EPA-HQ-OW-2014-0461-0079
Author Name: Robert T. Anderson, Professor of Law; Director, Native American Law Center
Organization: University of Washington School of Law

Supports the proposed reinterpretation. Asserts that the interpretive rule mechanism is consistent with applicable administrative law rules. Provides a copy of a 2015 law review article, which analyzes the issue of whether the statute should be construed as a delegation of federal authority and provides support for EPA’s proposal.

Response:
EPA appreciates the comments supporting the proposal. See section IV.A of the final interpretive rule. With regard to the use of the interpretive rule mechanism, see section V.B of the rule.

Comment ID EPA-HQ-OW-2014-0461-0080
Author Name: Gary Besaw, Chairman
Organization: Menominee Indian Tribe of Wisconsin

Supports the proposal, citing elimination of the need for a tribe to demonstrate inherent authority. The Tribe intends to submit an application for TAS, and urges EPA to publish the final rule in mid-2016.

Response:
EPA appreciates the comments supporting the proposal. See section IV.A of the final interpretive rule.

Comment ID EPA-HQ-OW-2014-0461-0081
Author Name: J.D. Strong, Executive Director and Scott Thompson, Executive Director
Organization: Oklahoma Water Resources Board and Oklahoma Department of Environmental Quality

Expresses appreciation for EPA’s recognition of the unique requirement under SAFETEA applicable to tribes in Oklahoma seeking TAS for regulatory programs. Requests additional clarification of the process that will be used to ensure the SAFETEA provision is satisfied.

Response:
EPA appreciates the commenters’ interest in the special circumstance in Oklahoma involving requirements of SAFETEA addressing tribal TAS for regulatory programs. EPA provides its response to the comments in section V.C.4 of the final interpretive rule.

Comment ID EPA-HQ-OW-2014-0461-0082
Author Name: M. E. Buck
Organization: Unknown

Supports enactment of the reinterpretation in the hope of gaining better environmental health of tribal water resources, and as an imperative first step to create a workable agreement between the tribes and
EPA. Provides a research paper supporting these views and asserting that revising the current application requirement, allowing congressional authority, will allow for better overall human and environmental health and a better tribal-EPA relationship.

Response:
EPA appreciates the comments supporting the proposal. See section IV.A of the final interpretive rule.

Comment ID EPA-HQ-OW-2014-0461-0083
Author Name: John Linc Stine, Commissioner
Organization: Minnesota Pollution Control Agency

Explains that the Minnesota Pollution Control Agency has supported tribes in Minnesota that have applied for TAS, and that where there have been disagreements over jurisdiction the agency has worked with tribes and EPA to find a cooperative resolution. Encourages EPA to continue to provide ample opportunity for states to weigh in on any tribal boundary questions as it moves forward with the proposed reinterpretation.

Response:
EPA appreciates the commenter’s support for TAS. See section IV.A of the final interpretive rule. With regard to EPA’s intent to continue to provide opportunities for states to comment on reservation boundaries in the context of TAS applications for CWA regulatory programs, see sections V.C.1 and V.C.6 of the final interpretive rule.

Comment ID EPA-HQ-OW-2014-0461-0084
Author Name: Reginia Gasco Bentley, Chairperson
Organization: Little Traverse Bay Band of Odawa Indians

Strongly supports EPA’s proposed reinterpretation as consistent with the express language in the CWA and an appropriate recognition of tribal sovereignty. Asserts that EPA’s reinterpretation would significantly reduce the Band’s administrative burden in pursuing a TAS application. Agrees with EPA’s rationale for the reinterpretation.

Response:
EPA appreciates the comments supporting the proposal. See section IV.A of the final interpretive rule.

Comment ID EPA-HQ-OW-2014-0461-0085
Author Name: Thomas P. O’Rourke, Sr., Tribal Chairman
Organization: Yurok Tribe

Encourages EPA to finalize the proposal, and consider providing additional funding for regulatory program implementation.
Response:
EPA appreciates the comments supporting the proposal. See section IV.A of the final interpretive rule. Concerning funding, 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. See section VIII.E of the final interpretive rule.

Comment ID EPA-HQ-OW-2014-0461-0086
Author Name: Barry Burnell, Water Quality Division Administrator
Organization: State of Idaho Department of Environmental Quality (IDEQ)

Disagrees that EPA’s analysis in the proposed interpretive rule is sufficient to justify the change in interpretation. Asserts that EPA is relying on dicta and that no court has definitively ruled on the question of whether section 518 delegates authority to Indian tribes. Requests clarification regarding lands subject to the revised interpretation. In particular, if there is a formally recognized reservation, are trust lands outside the borders of such a reservation included within the definition of Indian reservation under section 518(e)? Also requests clarification about whether, under the revised interpretation, states will be preempted from applying state water quality law to non-tribal members on non-tribal land within the borders of a reservation and if there is a preemption, whether the state is preempted prior to EPA approval of TAS status. Notes that where there are significant issues regarding the borders of a reservation, the revised interpretation will not reduce the burden or time involved in determining TAS status for a tribe.

Response:
EPA appreciates IDEQ’s comments. However, the Agency disagrees that the legal citations and analysis in the interpretive rule are insufficient to support the revised interpretation of CWA section 518. EPA provides a detailed response to comments regarding EPA’s legal analysis in section IV.A of the final interpretive rule. With regard to the geographic scope of TAS under the CWA and, in particular, tribal trust lands outside the borders of a formal Indian reservation, EPA provides a response to IDEQ’s comment and request for clarification in section V.C.2 of the final interpretive rule. As explained in that section, EPA’s longstanding approach, consistent with relevant judicial precedent, is that such tribal trust lands are informal reservations and thus have the same status as formal reservations for purposes of the Agency’s CWA programs. This approach is outside the scope of, and is unaltered by, the final interpretive rule.

With regard to IDEQ’s request for additional clarification relating to potential effects of the revised interpretation of section 518 on state water quality programs and authorities, EPA has provided additional information and explanation in section V.C.8 of the final interpretive rule. Finally, EPA agrees with IDEQ’s observation that geographic reservation boundaries will continue to be a relevant consideration for TAS under the CWA and that any significant issues regarding the borders of a reservation that are raised by a tribe’s TAS application will need to be addressed as part of EPA’s decision making. The need to address reservation boundary issues raised in a TAS application existed under EPA’s prior interpretation of section 518 and is unaltered by the final interpretive rule. EPA
provides additional explanation regarding this issue in sections V.C.1 and V.C.6 of the final interpretive rule. Among other things, those sections describe the current (and continuing) need for applicant tribes to identify the boundaries of the reservation area over which they seek TAS eligibility and the opportunity for appropriate governmental entities and others to comment and provide relevant information on the issue to EPA.

Comment ID EPA-HQ-OW-2014-0461-0087
Author Name: Steven M. Pirner, Secretary
Organization: South Dakota Department of Environment and Natural Resources (“South Dakota DENR”)

Notes EPA’s references in the proposed interpretive rule to TAS requirements under the Clean Air Act and asserts that airsheds are different from watersheds, which have defined beds and banks that cross lands of tribal members, non-members, and non-Indians. Notes that states with EPA-approved environmental programs are required to provide an Attorney General statement documenting the state’s authority to carry out the program, and asserts that tribes should be held to the same standard and that it is reasonable for EPA to require and review information about a tribe’s legal authority to ensure requirements established by U.S. Supreme Court decisions addressing tribal jurisdiction over non-members and non-Indians are met. Does not support EPA eliminating the opportunity to comment on factual findings justifying inherent tribal authority for TAS. Asserts that the proposal will impact South Dakota and anticipates that the South Dakota Attorney General will work with other state Attorneys General on a response if the reinterpretation is finalized.

Response:
EPA appreciates South Dakota DENR’s comments. EPA, however, disagrees with the statements opposing the relevance of Clean Air Act precedent and asserting that tribes would be held to a lesser standard than states under the revised interpretation of CWA section 518. EPA continues to believe that the Agency’s experience implementing the Clean Air Act tribal provision provides relevant precedent to guide EPA’s interpretation of the similar congressional approach to tribal regulation under the CWA and that air and water quality regulation are substantially analogous for purposes of analyzing Congress’ intent. EPA responded to this comment in section IV.A of the final interpretive rule. EPA also notes that the revised approach to tribal authority under the CWA would not hold tribes to a lesser standard than states. Where TAS-eligible tribes submit regulatory programs for EPA review under the CWA, such programs must meet all applicable requirements in the same manner as states (apart from certain requirements relating to the exercise of criminal enforcement authority, which are addressed under existing EPA regulations). For instance, in certain cases, EPA’s regulations require states seeking approval of a CWA regulatory program to provide a statement from the Attorney General that the state’s laws provide adequate authority to carry out the program. That requirement would similarly apply to a TAS-eligible tribe submitting a program for EPA’s review. The final interpretive rule relates solely to the manner in which tribes demonstrate underlying authority to regulate as a matter of establishing their eligibility for TAS. This is a process and requirement that has no direct analog in the context of states. In that sense, the need for tribes to establish TAS eligibility imposes additional requirements that are not applicable to states. EPA also believes that the final interpretive rule creates
no tension with established U.S. Supreme Court precedent regarding tribal jurisdiction. EPA addressed this comment in section IV.A of the final interpretive rule. Among other things, EPA notes that congressional delegation of regulatory authority to Indian tribes is well-established in federal law, including in decisions of the U.S. Supreme Court. With regard to the prior process pursuant to which EPA had solicited comments on proposed findings of fact relating to tribal assertions of inherent regulatory authority over nonmember activities, see section VI of the final interpretive rule. As explained there, this process – which originated in EPA guidance – related solely to tribal assertions of inherent regulatory authority and served no other purpose. Because, under the revised interpretation of CWA section 518, tribes will no longer be required to demonstrate inherent authority to regulate, that particular process is no longer needed or relevant.

Comment ID EPA-HQ-OW-2014-0461-0088
Author Name: Thomas Siyuja, Sr., Director, Havasupai Environmental Programs Department
Organization: Havasupai Tribal Council

Supports the interpretive rule and looks forward to working with EPA Region 9 to implement the approach confirmed by the rule.

Response:
EPA appreciates the comments supporting the proposal. See section IV.A of the final interpretive rule.

Comment ID EPA-HQ-OW-2014-0461-0089
Author Name: Clement J. Frost, Chairman
Organization: Southern Ute Indian Tribal Council

Strongly supports EPA’s proposed revised interpretation, which will reduce efforts for EPA and tribes, and benefit tribes, states, and regulated parties. Notes that the Tribe has applied for TAS for WQS, and requests that the proposal not delay the review or approval of the Tribe's pending application. Points to provisions concerning the Tribe’s reservation in P.L. 98-290 and asserts that the reinterpretation should prevent some potential conflicts concerning the lawful assertion of Tribal authority.

Response:
EPA appreciates the comments supporting the proposal. See section IV.A of the final interpretive rule. With regard to any special circumstances relating to P.L. 98-280, see sections V.C.4 and V.C.8 of the rule. As EPA has explained, any special circumstances that are specific to a particular state or tribe and that may be relevant to effectuation of section 518’s congressional delegation of authority would be addressed solely in the context of EPA’s final decision on a particular tribe’s TAS application and upon a full record of information addressing the issue, and any judicial review of that decision would occur in that context. The substance of these specific situations is thus outside the scope of – and is not affected by – the final interpretive rule, and EPA takes no position in the 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. With regard to the Southern Ute Tribe, any final decision regarding P.L. 98-290 would thus need to occur in the context of an EPA decision on a TAS application by the Tribe. EPA notes that the Agency is familiar with P.L. 98-290 and has had occasion in the past to review certain aspects of that statute in the context of an application by the Southern Ute Tribe to administer a regulatory program under the federal Clean Air Act (a statute which, like the CWA, EPA interprets as including an express delegation of authority from Congress to eligible Indian tribes to regulate their entire reservations). In that instance and in light of P.L. 98-290, the Tribe and the State of Colorado entered into an agreement regarding administration of the subject air quality program that was affirmed in special legislation by Congress. Given those circumstances, any question regarding an effect of P.L. 98-290 on the Tribe’s ability to operate the program was not before EPA to address.

Comment ID: EPA-HQ-OW-2014-0461-0090
Author Name: Karen S. Gaylord, Jennings, Haug & Cunningham, Counsel for Salt River Project
Organization: Salt River Project Agricultural Improvement and Power District

(Incomplete copy of comments. See Comment ID No. EPA-HQ-OW-2014-0461-0106 below for response to complete comments.)

Comment ID: EPA-HQ-OW-2014-0461-0091
Author Name: Jennifer Mock Schaeffer, Government Affairs Director
Organization: Association of Fish & Wildlife Agencies

Expresses respect for tribal sovereignty and shares tribal interest in protecting clean water. Requests extension of 45 days to allow the Association and its members time to review and respond. Asserts that the proposal could impact the Association’s members’ ability to meet requirements to manage fish and wildlife.

Response:
EPA appreciates the commenter’s respect for tribal interests in clean water and environmental quality. EPA notes that the final interpretive rule relates solely to the manner in which Indian tribes demonstrate regulatory authority for the purpose of obtaining TAS eligibility under the CWA. It does not impose any substantive water quality requirements on any water or affect fish and wildlife management requirements. Such requirements, if administered by Indian tribes, would only arise by virtue of separate CWA submissions (e.g., submissions of water quality standards that the tribe proposed, made subject to public comment, and held a public hearing on) that would address the identical areas that are currently subject to tribal TAS under the CWA (i.e., Indian reservations). EPA did not extend the deadline for submitting comments on its proposed reinterpretation of the CWA tribal provision.
Comment ID EPA-HQ-OW-2014-0461-0092  
Author Name: On letterhead of Mark N. Fox, Office of the Chairman  
Organization: Mandan, Hidatsa & Arikara Nation, Three Affiliated Tribes, Fort Berthold Indian Reservation Tribal Business Council  
Strongly supports the proposal, and asserts that EPA should never have required tribes to demonstrate specific authority as part of the TAS application process. Provides an analysis of statutory and judicial history to support the reinterpretation consistent with EPA’s proposal.  
Response:  
EPA appreciates the comments supporting the proposal. See section IV.A of the final interpretive rule.

Comment ID EPA-HQ-OW-2014-0461-0093  
Author Name: Ann C. Becker, Vice President, Environmental and Chief Sustainability Officer  
Organization: Arizona Public Service Company (APS)  
Expresses an understanding of the importance of sovereignty to Indian tribes. Describes role as operating agent for the Four Corners Power Plant (FCPP), which is located on a right-of-way within the Navajo Nation. Describes lease agreements reflecting the Navajo Nation's waiver of regulatory authority over FCPP and the Secretary of the Interior's agreement to enforce this waiver. Supports comments submitted by Salt River Project, which is similarly situated. Asserts that the proposed reinterpretation is unnecessary and unreasonable. Requests, at a minimum that EPA acknowledge that the revised interpretation does not apply to the Navajo Nation's CWA authority over FCPP, which constitutes a special circumstance.  
Response:  
EPA appreciates APS’ recognition of the importance of sovereignty to Indian tribal governments. With regard to EPA’s justification for the revised interpretation of CWA section 518 and to review EPA’s detailed responses to comments raised on the issue, see section IV.A of the final interpretive rule.  
EPA also appreciates APS’ comments providing information regarding the location of FCPP on the Navajo Nation and the lease agreements, rights-of-way, and other instruments granting APS authority to operate FCPP. These comments are instructive regarding a type of special circumstance that can exist with regard to a specific tribe and that may present unique jurisdictional arrangements that would need to be considered in assessing the applicability of the CWA tribal provision. EPA has generally addressed such special circumstances in sections V.C.4 and V.C.8 of the final interpretive rule. As explained there, the precise outcome of any such circumstance could only be determined in the context of a particular tribe’s (in this case the Navajo Nation) TAS application and upon consideration of the full record of information addressing the issue. The substance of these specific situations is thus outside the scope of – and is not affected by – the final interpretive rule, and EPA takes no position in the 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. 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.

EPA notes that the Agency is familiar with the lease agreements and rights-of-way pursuant to which APS operates FCPP on the Navajo Nation. EPA has previously approved the Navajo Nation to administer several regulatory programs under the CWA and Safe Drinking Water Act. In each case, the Agency has received information regarding FCPP’s circumstances and has reserved taking final action on the Tribe’s eligibility to operate the environmental program over this facility. In one case, EPA has delegated to the Navajo Nation the administration, pursuant to EPA’s authority, of a federal operating permit program under the Clean Air Act, including over FCPP. Even in that case, the Tribe and APS entered into an agreement addressing the special jurisdictional circumstance originating in the lease agreements and rights-of-way. In those circumstances, there was no need for EPA to address the effect of the lease agreements and rights-of-way.

Comment ID EPA-HQ-OW-2014-0461-0094
Author Name: Ron Winterton, Chairman, Board of County Commissioners, Duchesne County; Michael J. McKee, Chair, Board of County Commissioners, Uintah County; and Michael K. Davis, Manager, Wasatch County
Organization: Duchesne County, Utah; Uintah County, Utah; and Wasatch County, Utah

Requests clarification of what constitutes fee land within Indian reservations, that portions of the rule that reject the Montana test be stricken, and that the new process not facilitate assertions of tribal CWA jurisdiction over lands within the exterior or former boundaries of a reservation that are outside of federal supervision. Expresses concern with application of the rule to surplus lands that lie within former/historic boundaries of reservations. Provides background information regarding the Counties and the Uintah Valley and Uncompahgre Reservations. Asserts that CWA section 518 does not apply to land that has lost its reservation status even if it is encompassed by reservation lands. Asserts that case law does not support the reinterpretation and that EPA should ensure local governments can comment on the TAS process and that the TAS process does not interfere with ongoing litigation regarding reservation boundaries or tribal jurisdiction.

Response:
EPA appreciates the Counties’ comments. With regard to EPA’s justification for the revised interpretation of CWA section 518 and to review EPA’s detailed responses to comments raised on the issue, see section IV.A of the final interpretive rule. With regard to the Counties’ concerns about lands that have been diminished from Indian reservations, see section V.C.1 of the final interpretive rule. As noted there, EPA agrees with the Counties that each surplus lands act must be considered individually and addressed on a reservation-specific basis and that any lands that have lost their reservation status would be outside the scope of TAS for purposes of a CWA regulatory program. With regard to the TAS process for soliciting comment on an applicant tribe’s assertion of authority, see section V.C.6 of the final interpretive rule. As explained there, EPA has proposed no change to the notice-and-comment...
process as established in existing EPA CWA regulations. The issue is thus beyond the scope of – and is not affected by – the final interpretive rule. EPA notes that the existing procedures have proven effective in providing broad notice of tribal assertions of authority and ensuring that EPA’s decision making is well-informed.

Comment ID EPA-HQ-OW-2014-0461-0095
Author Name: Doug Goehring, Commissioner
Organization: North Dakota Department of Agriculture

Expresses recognition of, and respect for, tribes as sovereign entities, but asserts that authorizing another sovereign to administer and enforce CWA provisions is unnecessary as the State already regulates private land within its jurisdiction. Seeks to avoid overlapping or uncertain authority over private landowners in agriculture production on tribal lands. Requests extension of 56 days to provide comment on the proposal.

Response:
EPA appreciates the commenter’s expression of respect for tribes as sovereign entities. With regard to the concerns about potential overlapping CWA authorities on privately owned land on Indian reservations, see section V.C.8 of the final interpretive rule, which addresses the status of state CWA programs in Indian country. As explained there, states are generally not approved by EPA to administer CWA programs in Indian country – including Indian reservation lands owned in fee by non-members of a tribe – in the absence of an express grant of authority from Congress and express approval by EPA. EPA did not extend the deadline for submitting comments on its proposed reinterpretation of the CWA tribal provision.

Comment ID EPA-HQ-OW-2014-0461-0096
Author Name: Silas C. Whitman, Chairman
Organization: Nez Perce Tribe

Strongly supports the proposal, and agrees that the reinterpretation is supported by the plain language of the CWA and case law. Resubmits pre-proposal comments already in the docket for this rulemaking (EPA-HQ-OW-2014-0461-0044).

Response:
EPA appreciates the comments supporting the proposal. See section IV.A of the final interpretive rule.
Supports the proposal because it facilitates the TAS application process and reduces administrative and financial burdens associated with pursuing CWA authorization. The current interpretation has been burdensome to tribes seeking to administer CWA programs, resulting in waste of limited resources. EPA should consider other factors that slow tribal adoption of CWA programs. EPA could improve the WQS approval process by more expeditious evaluation and clear expectations (e.g., set timeline) for when EPA will respond to tribal proposals.

Response:
EPA appreciates the comments supporting the proposal. See section IV.A of the final interpretive rule. EPA also appreciates the suggestions for improving the process for approving new and revised WQS. These activities are beyond the scope of – and are not affected by – this interpretive rule. However, EPA will continue to look for ways to improve its procedures in the appropriate context.

Fully supports EPA conclusion that section 518 includes an express congressional delegation of authority to eligible tribes. Notes that the Tribe has been concerned about potential water quality impacts from a neighboring nuclear plant, and has been monitoring both ground and surface waters since the 1990s, with the goal of establishing WQS, but the existing TAS process deterred them. Asserts that having to demonstrate inherent authority over its own waters and lands seemed like asking it to demonstrate its sovereignty, which states are not required to do. Asserts that the proposal should not be a concern to states, and should be finalized.

Response:
EPA appreciates the comments supporting the proposal. See section IV.A of the final interpretive rule.

Supports the proposal. Asserts that the proposal would help tribes protect their natural resources and provide regulatory consistency (i.e., CWA v. CAA); and potentially increase tribal participation in CWA programs. Notes that the Tribes submitted their 433-page TAS application in December 2013, which is still awaiting approval. Also notes that the Tribes provide a review of jurisdiction cases under the CAA and CWA to show that the proposal is legally sound.
Response:
EPA appreciates the comments supporting the proposal. See section IV.A of the final interpretive rule.

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Comment ID EPA-HQ-OW-2014-0461-0100
Author Name: RoJean Rowley, Mayor, City of Duchesne; Vaun D. Ryan, Mayor, City of Roosevelt; and Kathleen Cooper, Mayor, City of Myton
Organization: Cities of Duchesne, Myton, and Roosevelt, Utah

Requests clarification of what constitutes fee land within Indian reservations and that the new process not facilitate assertions of tribal CWA jurisdiction over lands within the exterior boundaries of a reservation that are not subject to federal jurisdiction. Expresses concern with application of the rule to lands allotted to non-members of a tribe pursuant to surplus lands acts. Provides background information regarding the Cities and the Uintah Valley Reservation. Asserts that CWA section 518 does not apply to land that has lost its reservation status. Asserts that EPA should continue to require tribes to demonstrate inherent authority over surplus lands. States that EPA’s reliance on Brendale is misplaced. Asserts that case law does not support the reinterpretation and that EPA should ensure that local governments can comment on the TAS process and that the TAS process does not interfere with ongoing litigation regarding reservation boundaries or tribal jurisdiction.

Response:
EPA appreciates the Cities’ comments. With regard to EPA’s justification for the revised interpretation of CWA section 518 and to review EPA’s detailed responses to comments raised on the issue, see section IV.A of the final interpretive rule. With regard to the Cities’ concerns about lands that have been diminished from Indian reservations, see section V.C.1 of the final interpretive rule. As noted there, EPA agrees with the Cities that each surplus lands act must be considered individually and addressed on a reservation-specific basis and that any lands that have lost their reservation status would be outside the scope of TAS for purposes of a CWA regulatory program. With regard to the TAS process for soliciting comment on an applicant tribe’s assertion of authority, see section V.C.6 of the final interpretive rule. As explained there, EPA has proposed no change to the notice-and-comment process as established in existing EPA CWA regulations. The issue is thus beyond the scope of – and is not affected by – the final interpretive rule. EPA notes that the existing procedures have proven effective in providing broad notice of tribal assertions of authority and ensuring that EPA’s decision making is well-informed.

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Comment ID EPA-HQ-OW-2014-0461-0101
Author Name: Kathleen Clarke, Director, Office of the Governor, Public Lands Policy Coordinating Office
Organization: State of Utah

Contends that no court has decided the issue of how to interpret CWA section 518, and Congress has not acted to amend or expound upon the meaning of that section. The State asserts that the case law cited in the proposal does not support the reinterpretation and that the cited judicial statements are dicta. Asserts that the reinterpretation is contrary to U.S. Supreme Court decisions limiting tribal
inherent authority over non-tribal members and that tribes should be held to the same standard as states, which are required to demonstrate adequate legal authority to carry out environmental program activities. Illustrates its concern regarding tribal jurisdiction over state and private lands with a description and map of the Uncompahgre reservation in eastern Utah.

Response:
EPA appreciates Utah’s comments. EPA, however, disagrees that the rationale and supporting citations in the interpretive rule are insufficient to justify the revised interpretation of CWA section 518. See section IV.A of the final interpretive rule for a detailed discussion of EPA’s rationale and response to comments on the issue. EPA also believes that the final interpretive rule creates no tension with established U.S. Supreme Court precedent regarding tribal jurisdiction. EPA addressed this comment in section IV.A of the final interpretive rule. Among other things, EPA notes that congressional delegation of regulatory authority to Indian tribes is well-established in federal law, including in decisions of the U.S. Supreme Court.

EPA also notes that the revised approach to tribal authority under the CWA would not hold tribes to a lesser standard than states. Where TAS-eligible tribes submit programs for EPA review under the CWA, such programs must meet all applicable requirements in the same manner as states (apart from certain requirements relating to the exercise of criminal enforcement authority, which are addressed under existing EPA regulations). For instance, in certain cases, EPA’s regulations require states seeking approval of a CWA regulatory program to provide a statement from the Attorney General that the state’s laws provide adequate authority to carry out the program. That requirement would similarly apply to a TAS-eligible tribe submitting a program for EPA’s review. The final interpretive rule relates solely to the manner in which tribes demonstrate underlying authority to regulate under the CWA as a matter of establishing their eligibility for TAS. This is a process and requirement that has no direct analog in the context of states. In that sense, the need for tribes to establish TAS eligibility imposes additional requirements that are not applicable to states.

EPA appreciates the State’s provision of information relating to the Uncompahgre Reservation and notes that any issues relating to a specific assertion by the Ute Indian Tribe of CWA regulatory authority over that Reservation are outside the scope of the interpretive rule and would only be addressed in the context of a final EPA decision on a TAS application by the Tribe. The State of Utah would, in that context, have an opportunity to comment to EPA and provide any relevant information relating to the Tribe’s assertion of authority.

Comment ID EPA-HQ-OW-2014-0461-0102
Author Name: Frances G. Charles, Chairwoman
Organization: Lower Elwha Klallam Tribe, Port Angeles, Washington

Supports the proposal. Notes that the Tribe is currently preparing a TAS application for WQS, and is confident it could demonstrate its inherent authority, but views the proposal as the correct interpretation of section 518. Provides background on the Tribe’s water and fish resources, and efforts
to restore the Elwha River, and asserts that it needs TAS status and a robust water quality standards program to ensure that their water resources remain healthy.

Response:
EPA appreciates the comments supporting the proposal. See section IV.A of the final interpretive rule.

Comment ID EPA-HQ-OW-2014-0461-0103
Author Name: Bill Schuette, Attorney General; and Dan Wyant, Director, Michigan Department of Environmental Quality (MDEQ)
Organization: State of Michigan

Asserts that EPA has no legal basis for finding congressional delegation of authority to tribes in section 518(e). Cites lack of congressional action to clarify that section 518 is a delegation of authority, notwithstanding many other amendments to the CWA and one revision of section 518. Asserts that case law does not support reinterpretation and that judicial statements relied upon by EPA are dicta. Asserts that the Clean Air Act tribal provision is distinguishable. Expresses concern with the rule’s impact on disputed reservation lands and lands owned by nonmembers within reservations; with possible displacement of state programs; and with possible resulting approvals of tribal CWA programs without proper findings that tribes have authority to enforce the programs. Suggests that recognizing state authority in these areas will lead to more effective decisions for water resources and will avoid conflicts. Asserts that there will be no significant benefits from reinterpretation and that any added efficiencies do not speak to congressional intent. Expresses concern that applicants will need to obtain permits from both the state and a tribe or EPA.

Response:
EPA appreciates the comments from the Michigan Attorney General and MDEQ. EPA, however, disagrees that the rationale and supporting citations in the interpretive rule are insufficient to justify the revised interpretation of CWA section 518. See section IV.A of the final interpretive rule for a detailed discussion of EPA’s rationale and response to comments on the issue.

With regard to disputed reservation lands, EPA notes – as explained in sections V.C.1 and V.C.6 of the final interpretive rule – that under existing CWA requirements, TAS for CWA regulatory programs is limited to lands that qualify as reservation land, and existing TAS regulations provide for applicant tribes to demonstrate the boundaries of the reservation area over which they seek to administer a CWA regulatory program. Under those regulations, states and other entities will have an opportunity to comment and raise any concerns to EPA regarding the reservation status of land that is included in a TAS application, and EPA would only approve a tribe’s TAS status with respect to land that is determined to be reservation land. Further, with regard to any potential displacement of state programs, see section V.C.8 of the final interpretive rule. As explained there, state CWA programs are generally not approved by EPA in Indian country in the absence of an express congressional authorization of state jurisdiction and express approval by EPA. Such state programs would thus not be subject to displacement by tribal
regulation in that they would generally not apply on reservations in the first instance. There should thus be no issue with potential requirements for dual CWA permitting by approved states and tribes.

Michigan also expresses concern that the revised interpretation may result in approvals of tribal programs without an adequate demonstration of tribal authority and that questions regarding the sufficiency of tribal authority could wind up being raised later, e.g., during implementation and enforcement of an approved program. EPA disagrees that regulated entities would be able to challenge a tribe’s EPA-approved CWA regulatory program by disputing the tribe’s underlying authority to implement or enforce the program. Consistent with the final interpretive rule, Congress, in section 518, has delegated its authority to eligible tribes to implement and enforce CWA regulatory programs on their reservations. The same congressional delegation of civil authority that supports a tribe’s eligibility for TAS would also support its implementation and enforcement of the approved program. The same approach is already in place under the Clean Air Act (CAA), which EPA has long interpreted as including a delegation from Congress to eligible Indian tribes to administer regulatory programs under that statute over their entire reservations. Tribes implementing such CAA programs are not subject to challenge based on an alleged absence of inherent authority to implement or enforce an EPA-approved program.

Michigan also asserts that recognizing state authority over disputed reservations and non-member reservation lands would lead to more effective CWA decisions. EPA disagrees. Like eligible tribes, states must have authority to implement and enforce CWA programs to receive approval from EPA. The Agency cannot recognize state authority – or approve a state regulatory program – where such jurisdiction does not exist or has not been demonstrated. Any such approval of a state program in the absence of a demonstration of authority and an express approval by EPA would create the very problem Michigan is concerned about – i.e., approval of a CWA regulatory program in the potential absence of underlying jurisdiction to implement and enforce.

Michigan also questions the benefits that may be achieved by the revised interpretation and asserts that simplifying the TAS process is not relevant to Congress’ intent. As explained in detail in sections IV.A and IV.B of the final interpretive rule, EPA’s revised interpretation of section 518 is based on the plain language of the statute itself as properly informed by consideration of relevant judicial and congressional guidance. The fact that the revised interpretation results in lifting unintended administrative burdens and that EPA describes such streamlining effects in the interpretive rule does not diminish the Agency’s legal justification. Such benefits are appropriately described as providing a policy basis for EPA to take a careful look at section 518 and issue a revised interpretation that some commenters have stated is long overdue.

Comment ID EPA-HQ-OW-2014-0461-0104
Author Name: Harold Bennett, Tribal Chairman
Organization: Quartz Valley Indian Reservation

Strongly supports the proposal. Notes that the Tribes of the Klamath Basin have been working to restore fisheries and water quality within the Klamath River and its tributaries. Asserts that legally enforceable
WQS would greatly support these efforts, but the TAS approval is currently so difficult that only one of the Tribes has achieved it.

Response:
EPA appreciates the comments supporting the proposal. See section IV.A of the final interpretive rule.

Comment ID: EPA-HQ-OW-2014-0461-0105
Author Name: William (Billy) J. Maines, Co-chair
Organization: Tribal Caucus of EPA Region 10 Regional Tribal Operations Committee (RTOC)

Notes that the Tribal Caucus consists solely of the tribal government representatives of the RTOC. Supports moving forward in the reinterpretation process, asserting that the reinterpretation is well grounded in the law and is a wise step in advancing goals of the CWA as well as EPA’s trust responsibility to assist in the protection of tribal health and the environment.

Response:
EPA appreciates the comments supporting the proposal. See section IV.A of the final interpretive rule.

Comment ID: EPA-HQ-OW-2014-0461-0106
Author Name: Karen S. Gaylord, Jennings, Haug & Cunningham, Counsel for Salt River Project
Organization: Salt River Project Agricultural Improvement and Power District (SRP)

Submits comments on behalf of SRP, the operating agent for the Navajo Generating Station (NGS), which is located on a right-of-way within the exterior boundaries of the Navajo Nation reservation. Expresses respect for the sovereignty of the Navajo Nation and describes agreements reflecting the Navajo Nation’s waiver of regulatory authority over NGS and the Secretary of the Interior’s agreement to enforce this waiver. Asserts that the reinterpretation is unnecessary and unreasonable and is not supported by the legal authorities cited in the proposal, which are dicta. States that EPA also failed to address the limitations on tribal criminal authority over non-members. Asserts that the fact that Congress did not include provisions relating to tribal criminal authority indicates an absence of intent to expand tribal jurisdiction over non-members. Requests at a minimum that EPA acknowledge that the revised interpretation does not apply to the Navajo Nation’s CWA authority over NGS, which constitutes a special circumstance. Asserts that section 518 cannot retroactively overcome the Tribe’s waiver of regulatory authority over NGS and that even in the absence of the waiver, the Navajo Nation would lack inherent authority to regulate NGS under principles relating to tribal authority over non-tribal members. Asserts that the interpretive rule will eliminate opportunity for meaningful comment on TAS applications. Notes that under the prior approach, there were incentives for tribes and states (with assistance from EPA) to work together to resolve jurisdictional disputes before a TAS application is submitted, but that under the revised interpretation, such disputes will simply be pushed to later adversarial proceedings resulting in less cooperation. Cites a Voluntary Compliance Agreement regarding Clean Air Act regulation of NGS as a novel solution to a complex jurisdictional issue.
Response:
EPA appreciates SRP’s expression of respect for the sovereignty of the Navajo Nation. With regard to EPA’s justification for the revised interpretation of CWA section 518 and to review EPA’s detailed responses to comments raised on the issue, see section IV.A of the final interpretive rule. With regard to limitations on tribal criminal enforcement authority and to review EPA’s detailed responses to comments on the issue, see section V.C.3 of the final interpretive rule.

EPA also appreciates SRP’s comments providing information regarding the location of NGS on the Navajo Nation and the lease agreements, rights-of-way, and other instruments granting SRP authority to operate NGS. These comments are instructive regarding a type of special circumstance that can exist with regard to a specific tribe and that may present unique jurisdictional arrangements that would need to be considered in assessing application of the CWA tribal provision. EPA has generally addressed such special circumstances in sections V.C.4 and V.C.8 of the final interpretive rule. As explained there, the precise outcome of any such circumstance could only be determined in the context of a particular tribe’s (in this case the Navajo Nation) TAS application and upon consideration of the full record of information addressing the issue. The substance of these specific situations is thus outside the scope of – and is not affected by – the final interpretive rule, and EPA takes no position in the 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. 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.

EPA notes that the Agency is familiar with the lease agreements and rights-of-way pursuant to which SRP operates NGS on the Navajo Nation. EPA has previously approved the Navajo Nation to administer several regulatory programs under the CWA and Safe Drinking Water Act. In each case, the Agency has received information regarding NGS’ circumstances and has reserved taking final action on the Tribe’s eligibility to operate the environmental program over this facility. In one case, EPA has delegated to the Navajo Nation the administration, pursuant to EPA’s authority, of a federal operating permit program under the Clean Air Act, including over NGS. Even in that case, the Tribe and SRP entered into an agreement addressing the special jurisdictional circumstance originating in the lease agreements and rights-of-way. In those circumstances, there was no need for EPA to address the effect of the lease agreements and rights-of-way. SRP cites this “Voluntary Compliance Agreement” in its comments as an example of a novel solution to a jurisdictional issue. EPA agrees and continues to support efforts by tribes, states, and industry to develop cooperative approaches, consistent with EPA’s programmatic requirements, to address environmental regulation in a manner that avoids dispute or litigation. EPA does not agree, however, that the revised interpretation of CWA section 518 will serve as a disincentive to such efforts. The Voluntary Compliance Agreement cited by SRP is, in fact, a useful example of a cooperative approach that was developed in the context of regulation under the Clean Air Act (as well as a program that continued to be operated under federal authority), which is a statute that EPA has long interpreted as including a congressional delegation of regulatory authority to eligible Indian tribes.
EPA also disagrees that the revised approach to CWA section 518 will eliminate meaningful opportunities for comment on tribal assertions of authority in TAS applications. As explained in section V.C.6 of the final interpretive rule, EPA’s existing TAS regulations continue to provide for applicant tribes to demonstrate the geographic boundaries of the reservation area over which they are seeking TAS. This important issue remains subject to comment from states and other interested entities under existing regulatory procedures and EPA policy. Further, as described in section V.C.4 of the final interpretive rule, EPA recognizes that special circumstances may exist that could affect an applicant tribe’s ability to effectuate the congressional delegation of authority. Such circumstances – which may include the precise issue SRP raises relating to its lease agreements and rights-of-way – would also be subject to existing comment protocols. In all relevant respects, this is the same opportunity that interested entities have to comment on TAS applications under the Clean Air Act, and these procedures have proven both meaningful and helpful to ensure that EPA’s decision making is well-informed.

Comment ID EPA-HQ-OW-2014-0461-0107
Author Name: Leonard Forsman, Chairman
Organization: The Suquamish Tribe

Supports the proposal because it facilitates the TAS application process and reduces administrative and financial burden associated with pursuing CWA delegation. Asks EPA to consider the financial and resource requirements necessary for tribes to successfully implement these programs.

Response:
EPA appreciates the comments supporting the proposal. See section IV.A of the final interpretive rule. Concerning funding, 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. See section VIII.E of the final interpretive rule.

Comment ID EPA-HQ-OW-2014-0461-0108
Author Name: Brian Patterson, President; and Kitcki A. Carroll, Executive Director
Organization: United South and Eastern Tribes, Inc.

Strongly supports the proposal. Asserts that the revised interpretation will streamline the TAS application process, could significantly reduce time and effort for tribes to develop applications, and could encourage more tribes to apply for TAS for CWA programs.

Response:
EPA appreciates the comments supporting the proposal. See section IV.A of the final interpretive rule.