CHAPTER 1

GENERAL PROVISIONS

(40 CFR 131 - Subpart A)

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CHAPTER 1
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1.1 Scope - 40 CFR 131.1

The Water Quality Standards Regulation (40 CFR 131) describes State requirements and procedures for developing, reviewing, revising, and adopting water quality standards (WQS), and EPA requirements and procedures for reviewing, approving, disapproving, and promulgating water quality standards as authorized by section 303(c) of the Clean Water Act. This Handbook serves as guidance for implementing the Water Quality Standards Regulation and its provisions.

CLEAN WATER ACT GOALS

- Achieve a level of water quality that provides for the protection and propagation of fish, shellfish, and wildlife, and for recreation in and on the water, where attainable.
- Restore and maintain the chemical, physical, and biological integrity of the Nation's waters.

1.2 Purpose - 40 CFR 131.2

A water quality standard defines the water quality goals for a water body, or portion thereof, by designating the use or uses to be made of the water, by setting criteria necessary to protect the uses, and by protecting water quality through antidegradation provisions. States adopt water quality standards to protect public health or welfare, enhance the quality of water, and serve the purposes of the Clean Water Act (the Act). "Serve the purposes of the Act" means that water quality standards should:

- wherever attainable, achieve a level of water quality that provides for the protection and propagation of fish, shellfish, and wildlife, and for recreation in and on the water, and take into consideration the use and value of public water supplies, and agricultural, industrial, and other purposes, including navigation (sections 101(a)(2) and 303(c) of the Act); and
- restore and maintain the chemical, physical, and biological integrity of the Nation's waters (section 101(a)).

These standards serve dual purposes: They establish the water quality goals for a specific water body, and they serve as the regulatory basis for establishing water quality-based treatment controls and strategies beyond the technology-based levels of treatment required by sections 301(b) and 306 of the Act.

1.3 Definitions - 40 CFR 131.3

Terms used in the Water Quality Standards Regulation are defined in section 131.3 of the regulation. These definitions, as well as others appropriate to the water quality standards program, are contained in the glossary of this Handbook. No additional guidance is necessary to explain the definitions; however, some background information on the definitions of "States" and "waters of the United States" may be helpful.

1.3.1 States

Indian Tribes may now qualify for the water quality standards and 401 certification programs. The February 4, 1987, Amendments to the Act

added a new section 518 requiring EPA to promulgate regulations specifying how the Agency will treat qualified Indian Tribes as States for the purposes of, the section 303 (water quality standards) programs, the section 401 (certification) programs, and other programs. On December 12, 1991, the EPA promulgated amendments to Subpart A of the Water Quality Standards Regulation in response to the CWA section 518 requirements (see 56 F.R. 64893). These amendments modified the definition of States by adding the phrase ". . . and Indian Tribes that EPA determines qualify for treatment as States for purposes of water quality standards."

1.3.2 Waters of the United States

Section 303(c) of the CWA requires States to adopt water quality standards for "navigable waters," which are defined at section 502(7) of the Act as "waters of the United States." The Water Quality Standards Regulation contains no definition of "waters of the United States," although this term is used in the definition of "water quality standards." The phrase "waters of the United States" has been defined elsewhere in Federal regulations (e.g., in regulations governing the National Pollutant Discharge Elimination System (NPDES) and section 404 programs (40 CFR sections 122.2, 230.3, and 232.3, respectively). This definition appears in the glossary of this Handbook and is used in interpreting the phrase "water quality standards."

The definition of "waters of the United States" emphasizes protection of a broad range of waters, including interstate and intrastate lakes, streams, wetlands, other surface waters, impoundments, tributaries of waters, and the territorial seas.

EPA believes that some States may not be providing the same protection to wetlands that they provide to other surface waters. Therefore, EPA wishes to emphasize that wetlands deserve the same protection under water quality standards. For more information on the application of water quality standards to wetlands, see Appendix D of this Handbook.

WATERS OF THE UNITED STATES

- Interstate/intrastate lakes
- Streams
- Wetlands
- Other surface waters
- Impoundments
- Tributaries of waters
- Territorial seas

Concerns have been raised regarding applicability of water quality standards to riparian areas other than riparian wetlands. "Riparian areas" are areas in a stream's floodplain with life characteristic of a floodplain. Wetlands are often found in portions of riparian areas. The Clean Water Act requires States to adopt water quality standards only for "waters of the United States," such as wetland portions of riparian areas that meet the regulatory definition. Of course, States may, at their discretion, choose to adopt water quality standards or other mechanisms to protect other riparian areas.

1.4 State Authority - 40 CFR 131.4

States (including Indian Tribes qualified for the purposes of water quality standards) are responsible for reviewing, establishing, and revising water quality standards. Under section 510 of the Act, States may develop water quality standards more stringent than required by the Water Quality Standards Regulation.

Under section 401 of the Act, States also have authority to issue water quality certifications for federally permitted or licensed activities. This authority is granted because States have jurisdiction over their waters and can influence the design and operation of projects affecting those waters. Section 401 is intended to ensure that Federal permits and licenses comply with applicable water quality requirements, including State water quality standards, and applies to all

Federal agencies that grant a license or permit. (For example, EPA-issued permits for point source discharges under section 402 and discharges of dredged and fill material under section 404 of the Clean Water Act; permits for activities in navigable waters that may affect navigation under sections 9 and 10 of the Rivers and Harbors Act (RHA); and licenses required for hydroelectric projects issued under the Federal Power Act). Section 401 certifications are normally issued by the State in which the discharge originates.

States may deny certification, approve certification, or approve certification with conditions. If the State denies certification, the Federal permitting or licensing agency is prohibited from issuing the permit or license. Certifications are subject to objection by downstream States where the downstream State determines that the proposed activity would violate its water quality standards. [For more information on the 401 certification process, refer to *Wetlands and 401 Certification: Opportunities for States and Eligible Indian Tribes* (USEPA, 1989a).]

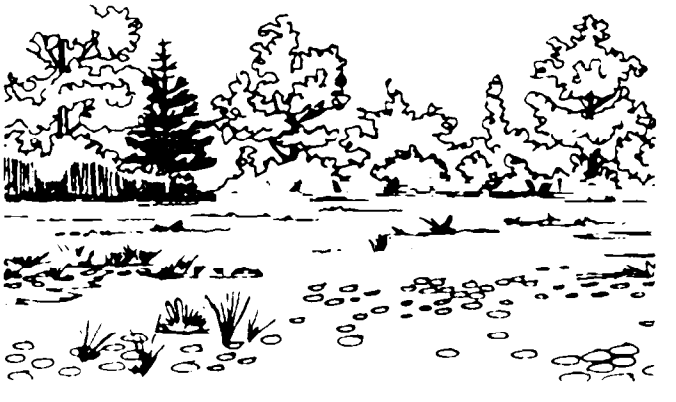
1.5 EPA Authority - 40 CFR 131.5

Under section 303(c) of the Act, EPA is to review and to approve or disapprove State-adopted water quality standards. This review involves a determination of whether:

- the State has adopted water uses consistent with the requirements of the Clean Water Act;
- the State has adopted criteria that protect the designated water uses;
- the State has followed its legal procedures for revising or adopting standards;
- the State standards that do not include the uses specified in section 101(a)(2) of the Act are based upon appropriate technical and scientific data and analyses; and
- the State submission meets the requirements included in section 131.6 of the Water Quality Standards Regulation.

EPA reviews State water quality standards to ensure that the standards meet the requirements of the Clean Water Act. If EPA determines that State water quality standards are consistent with the five factors listed above, EPA approves the standards. EPA disapproves the State water quality standards and may promulgate Federal standards under section 303(c)(4) of the Act if State-adopted standards are not consistent with the factors listed above. Section 510 of the Act provides that the States are not precluded from adopting requirements regarding control or abatement of pollution as long as such requirements are not less stringent than the requirements of the Clean Water Act. The Agency is not authorized to disapprove a State water quality standard on the basis that EPA considers the standard to be too stringent. EPA may also promulgate a new or revised standard where necessary to meet the requirements of the Act. In certain cases, EPA may conditionally approve a State's standards. A conditional approval is appropriate only:

- to correct minor deficiencies in a State's standards; and
- when a State agrees to a specific time schedule to make the corrections in as short a time as possible. Section 6.2 provides guidance on conditional approvals.



EPA also has the authority to issue section 401 certification where a State or interstate agency has no authority to do so.

1.6 Requirements for Water Quality Standards Submission - 40 CFR 131.6

The following elements must be included in each State's water quality standards submittal to EPA for review:

- use designations consistent with the provisions of sections 101(a)(2) and 303(c)(2) of the Act;
- methods used and analyses conducted to support water quality standards revisions;
- water quality criteria sufficient to protect the designated uses, including criteria for priority toxic pollutants and biological criteria;
- an antidegradation policy and implementation methods consistent with section 131.12 of the Water Quality Standards Regulation;
- certification by the State Attorney General or other appropriate legal authority within the State that the water quality standards were duly adopted pursuant to State law; and
- general information to aid the Agency in determining the adequacy of the scientific bases of the standards that do not include the uses specified in section 101(a)(2) of the Act as well as information on general policies applicable to State standards that may affect their application and implementation.

EPA may also request additional information from the State to aid in determining the adequacy of the standards.

1.7 Dispute Resolution Mechanism - 40 CFR 131.7

Section 518 of the Act requires EPA to establish a "mechanism for the resolution of any unreasonable consequences that may arise as a result of differing water quality standards that may be set by States and Indian Tribes located on common bodies of water." EPA's primary responsibility in response to this requirement is to establish a practical procedure to address and, where possible, resolve such disputes as they arise. However, the Agency's authority is limited.

For example, EPA does not believe that section 518 grants EPA authority to override section 510 of the Act. EPA believes that the provisions of section 510 would apply to Indian Tribes that qualify for treatment as States. Section 518(e) and its accompanying legislative history suggest that Congress intended for section 510 to apply to Tribes as well as States. Were Tribes prohibited from establishing standards more stringent than minimally approvable by EPA, there would be little need for the dispute resolution mechanism required by section 518(e)(2). Therefore, EPA does not believe that section 518 authorizes the Agency to disapprove a State or Tribe water quality standard and promulgate a less stringent standard as a means of resolving a State/Tribe dispute.

EPA also believes there are strong policy reasons to allow Tribes to set any water quality standards consistent with the Water Quality Standards Regulation. First, it puts Tribes and States on equal footing with respect to standards setting. There is no indication that Congress intended to treat Tribes as "second class" States under the Act. Second, treating Tribes as essentially equivalent to States is consistent with EPA's 1984 Indian Policy. Third, EPA believes it would be unfeasible to require Tribes to adopt "minimum" standards allowed under Federal law. EPA has no procedures in place for defining a "minimum" level of standards for Indian Tribes. EPA evaluates only whether the standards are stringent enough, not how much more stringent than any Federal minimum.

1.7.1 Responsibility Is With Lead EPA Regional Administrator

EPA's role in dispute resolution is to work with all parties to the dispute in an effort to reach an agreement that resolves the dispute. The Agency does not automatically support the Indian position in all disputes over water quality standards. Rather, EPA employees serving as mediators or arbitrators will serve outside the normal Agency chain of command and are expected to act in a neutral fashion.

The lead EPA Regional Administrator will be determined using OMB Circular A-95. The lead Region is expected to enlist the aid of other affected Regions in routine dispute resolution. EPA Headquarters will also oversee the process to ensure that the interests of all affected Regions are represented. Designation as the lead Region for resolving a dispute or programmatic issues within EPA does not mean that the lead Region has a license to act unilaterally. Rather, designation as lead Region assigns the responsibility to ensure that the process leading to a decision is fair to all parties.

The Regional Administrator may include other parties besides Tribes and States in the dispute resolution process. In some cases, the inclusion of permittees or landowners subject to nonpoint source restrictions may be needed to arrive at a meaningful resolution of the dispute. However, only the Tribe and State are in a position to implement a change in water quality standards and are, thus, the only "necessary" parties in the dispute resolution.

1.7.2 When Dispute Resolution May Be Initiated

The regulation establishes conditions under which the Regional Administrator would be responsible for initiating a dispute resolution action. Such actions would be initiated where, in the judgment of the Regional Administrator:

- there are unreasonable consequences;
- the dispute is between a State and a Tribe (i.e., not between a Tribe and another Tribe or a State and another State);
- a reasonable effort has been made to resolve the dispute before requesting EPA involvement;
- the requested relief is within the authority of the Act (i.e., not a request to replace State or Tribe standards that comply with the Act with less stringent Federal standards);
- the differing standards have been adopted pursuant to State or Tribe law and approved by EPA;
- a valid written request for EPA involvement has been submitted to the Regional Administrator by the State or Tribe.

Although the Regional Administrator may decline to initiate a dispute resolution action based on any of the above factors, EPA is willing to discuss specific situations. EPA is also willing to informally mediate disputes between Tribes consistent with the procedures for mediating disputes between States (see 48 F.R. 51412).

The regulation does not define "unreasonable consequences" because:

- it would be a presumptuous and unjustified Federal intrusion into local and State concerns for EPA to define what an unreasonable consequence might be as a basis for a national rule;
- EPA does not want to unnecessarily narrow the scope of problems to be addressed by the dispute resolution mechanism; and
- the possibilities of what might constitute an unreasonable consequence are so numerous as to defy a logical regulatory requirement.

Also, the occurrence of such "unreasonable" consequences is dependent on the unique

circumstances associated with the dispute. For example, what might be viewed as an unreasonable consequence on a stream segment in a large, relatively unpopulated, water-poor area with a single discharge would likely be viewed quite differently in or near an area characterized by numerous discharges and/or large water resources. The Regional Administrator has discretion to determine when consequences warrant initiating a dispute resolution action.

1.7.3 Who May Request Dispute Resolution and How

Either the State or the Tribe may request EPA involvement in the dispute. The requesting party must include the following items in its written request:

- a statement describing the unreasonable consequences;
- description of the actions taken to resolve the dispute before requesting EPA involvement;
- a statement describing the water quality standards provision (such as the particular criterion) that has resulted in the unreasonable consequences;
- factual data substantiating the claim of unreasonable consequences; and
- a statement of relief sought (that is, the desired outcome of the dispute resolution action).

1.7.4 EPA Procedures in Response to Request

When the Regional Administrator decides that EPA involvement is appropriate (based on the factors discussed in section 1.7.2, above), the Regional Administrator will notify the parties in writing that EPA dispute resolution action is being initiated and will solicit their written response. The Regional Administrator will also make reasonable efforts to ensure that other interested individuals or groups have notice of this action. These "reasonable efforts" will include, and are not limited to, the following:

- written notice to responsible Indian and State Agencies and other affected Federal Agencies;
- notice to the specific individual or entity that is claiming that an unreasonable consequence is resulting from differing standards having been adopted for a common water body;
- public notice in local newspapers, radio, and television, as appropriate;
- publication in trade journal newsletters; and
- other appropriate means.

1.7.5 When Tribe and State Agree to a Resolution

EPA encourages Tribes and States to resolve the differences without EPA involvement and to consider jointly establishing a mechanism to resolve disputes before such disputes arise. The Regional Administrator has responsibility to review and either approve or disapprove the Tribe-State agreement. Section 518(d) provides that Tribe-State agreements in general for water quality management are to be approved by EPA. As a general rule, EPA will defer to the procedure for resolving disputed jointly established by the Tribe and State so long as the procedure and the end result are consistent with the provisions of the CWA and Water Quality Standards Regulation.

1.7.6 EPA Options for Resolving the Dispute

The dispute resolution mechanism included in the final "Indian Rule" provides EPA Regional Administrators with several alternative courses of action. The alternatives are mediation, non-binding arbitration, and a default procedure.

The first technique, mediation, would allow the Regional Administrator to appoint a mediator whose primary function would be to facilitate discussions between the parties with the objective of arriving at a State/Tribe agreement or other resolution acceptable to the parties. The mediated negotiations could be informal or formal, public or private. The mediator could also establish an advisory group, consisting of representatives from the affected parties, to study the problem and recommend an appropriate resolution.

The second technique, non-binding arbitration, would require the Regional Administrator to appoint an arbitrator (or arbitration panel) whose responsibilities would include gathering all information pertinent to the dispute, considering the factors listed in the Act, and recommending an appropriate solution. The parties would not be obligated, however, to abide by the arbitrator's or arbitration panel's decision. The arbitrator or arbitration panel would be responsible for issuing a written recommendation to all parties and the Regional Administrator. Arbitrators or arbitration panel members who are EPA employees would be allowed to operate independently from the normal chain of commend within the Agency while conducting the arbitration process. Arbitrators or arbitration panel members would not be allowed to have *ex parte* communication pertaining to the dispute, except that they would be allowed to contact EPA's Office of the General Counsel for legal advise.

EPA has also provided for a dispute resolution default procedure to be used where one or more parties refuse to participate in mediation or arbitration. The default procedure will be used only as a last resort, after all other avenues of resolving the dispute have been exhausted. This dispute resolution technique would be similar to arbitration, but has been included as a separate Regional Administrator option because arbitration generally refers to a process whereby all parties participate voluntarily.

The default procedure simply provides for the Agency to review available information and to issue a recommendation for resolving the dispute. EPA's recommendation in this situation would have no enforceable impact. The Agency hopes that public presentation of its position will result in either public pressure or reconsideration by either affected party to continue resolution negotiations. Any written recommendation resulting from this procedure would be provided to all parties involved in the dispute.

EPA envisions a number of possible outcomes that, individually or in combination, would likely resolve most of the disputes that would arise. These actions might include, but are not limited to, the following:

- a State or Tribe agrees to revise the limits of a permit to ensure that downstream water quality standards are met;
- a State or Tribe agrees to permanently remove a use (consistent with 40 CFR 131.10(g));
- a State or Tribe issues a variance from water quality standards for a particular discharge;
- a permittee or landowner agrees to provide additional water pollution control;
- EPA assumes permit-issuing authority for a State or Tribe and re-issues a permit to ensure that downstream water quality standards are met; or
- EPA promulgates Federal water quality standards where a State or Tribe standard does not meet the requirements of the Act.

In some cases (last example, above), EPA recognizes that the Agency will have to act to

resolve the dispute. An example would be where a National Pollutant Discharge Elimination System (NPDES) permit for an upstream discharger does not provide for the attainment of the water quality standards for a downstream jurisdiction. The existing NPDES permitting and certification processes under the Act may be used by the downstream jurisdiction to prevent such situations. Today's rule does not alter or minimize the role of these processes in establishing appropriate permit limits to ensure attainment of water quality standards. States and Tribes are encouraged to participate in these permitting and certification processes rather than wait for unreasonable consequences to occur.

In these cases, EPA believes that the Agency has authority to object to the upstream NPDES permit and, if necessary, to assume permitting authority. This authority was upheld in a case in which EPA assumed authority to issue a permit for a North Carolina discharge that, among other factors, did not meet Tennessee's downstream water quality standards.[1]

Mediators and arbitrators may be EPA employees, employees of other Federal agencies, or other individuals with appropriate qualifications. Because of resource constraints, EPA anticipates that mediators and arbitrators will generally be EPA employees rather than consultants. Employees from other Federal agencies would be selected where appropriate, subject to their availability. EPA intends for mediators and arbitrators to conduct the dispute resolution mechanism in a fair and impartial manner, and will select individuals who have not been involved with the particular dispute. Members of arbitration panels will be selected by the Regional Administrator in consultation with the parties. In some cases, such panels may consist of one representative from each party to the dispute plus one neutral panel member. Implicit in the regulation is the sense that mediators and arbitrators will act fairly and impartially. Although not specifically covered in the regulation, EPA believes it is well within the Regional Administrator's power to remove any mediator or arbitrator for any reason (including showing bias or unfairness or taking illegal or unethical actions).

Arbitrators and arbitration panel members shall be selected to include only individuals who are agreeable to all affected parties, are knowledgeable concerning the water quality standards program requirements, have a basic understanding of the political and economic interests of Tribes, and will fulfill the duties fairly and impartially. These requirements are not applicable to mediators. EPA did not provide for State or Tribe approval of mediators because EPA believes that such an approval process would provide too great an opportunity to delay the initiation of the mediation process and because the role of the mediator is limited to acting as a neutral facilitator. There is no prohibition against the Regional Administrator consulting with the parties regarding a mediator; there is just no requirement to do so.

Where one of the parties to the dispute believes that an arbitrator has recommended an action to resolve the dispute which is not authorized by the Act, the regulation allows the party to appeal the arbitrator's decision to the Regional Administrator. Such requests must be in writing and must include a statement of the statutory basis for altering the arbitrator's recommendation.

1.7.7 Time Frame for Dispute Resolution

The regulation does not include a fixed time frame for resolving disputes. While EPA intends to proceed as quickly as possible and to encourage parties to the dispute to resolve it quickly and to establish informal time frames, the variety of potential disputes to be resolved would appear to preclude EPA from specifying a single regulatory time limit. EPA believes it is better to obtain a reasonable agreement or decision than to arbitrarily establish a time frame within which an agreement or decision must be made.

1.8 Requirements for Indian Tribes To Qualify for the WQS Program - 40 CFR 131.8

Consistent with the statutory requirement of section 518 of the Act, the Water Quality Standards Regulation establishes procedures by which an Indian Tribe may qualify for the water quality standards and section 401 certification programs. Section 131.8 of the Water Quality Standards Regulation is intended to ensure that Tribes treated as States for standards are qualified, consistent with Clean Water Act requirements, to conduct a standards program protective of public health and the environment. The procedures are not intended to act as a barrier to tribal program assumption. For the section 401 certification program, 131.4(c) establishes that where EPA determines that a Tribe is qualified for the water quality standards program, that Tribe would, without further effort or submission of information, also qualify for the section 401 certification program.

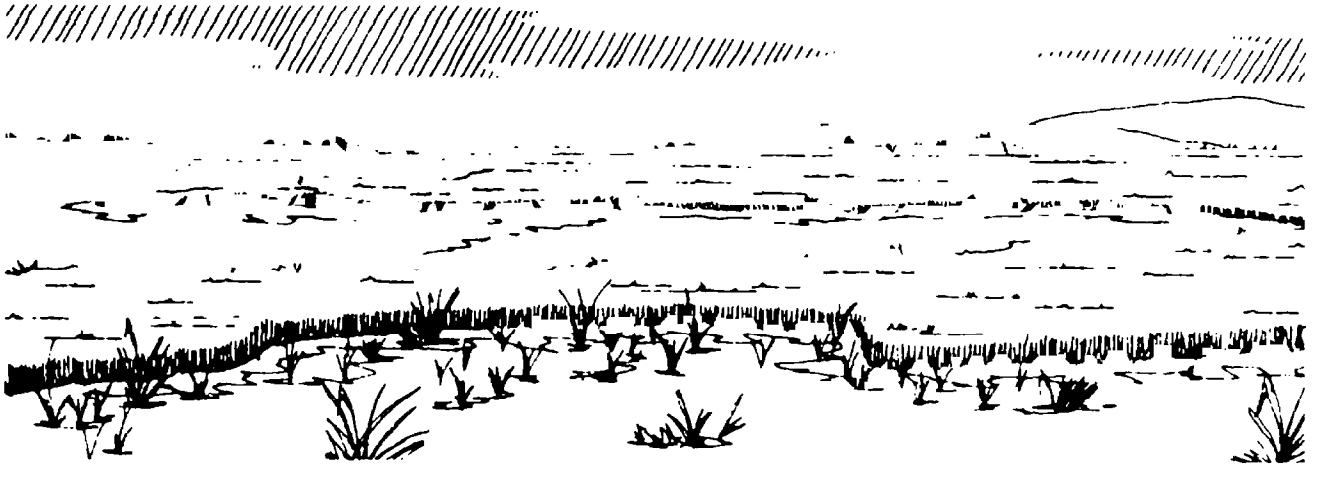
Section 518 authorizes EPA to qualify a Tribe for programs involving water resources that are:

> . . . held by an Indian Tribe, held by the U.S. in trust for Indians, held by a member of an Indian Tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of an Indian reservation . . . .

Tribes are limited to obtaining program authorization only for water resources within the borders of the reservation over which they possess authority to regulate water quality. The meaning of the term "reservation" must, of course, be determined in light of statutory law and with reference to relevant case law. EPA considers trust lands formally set apart for the use of Indians to be "within a reservation" for purposes of section 518 (e)(2), even if they have not been formally designated as "reservations."[2] This means it is the status and use of the land that determines if it is to be considered "within a reservation" rather than the label attached to it. EPA believes that it was the intent of Congress to limit Tribes authority to lands within the reservation. EPA bases this conclusion, in part, on the definition of "Indian Tribe" found in CWA section 518(h)(2). EPA also does not believe that section 518(e)(2) prevents EPA from recognizing tribal authority over non-Indian water resources located within the reservation if the Tribe can demonstrate (1) the requisite authority over such water resources, and (2) the authority to regulate as necessary to protect the public health, safety, and welfare of its tribal members.

1.8.1 Criteria Tribes Must Meet

New section 131.8 of the Water Quality Standards Regulation includes the criteria Tribes are required to meet to be authorized to administer the water quality standards and 401 certification programs. These criteria are provided in section 518 of the Act. The Tribe must:



- be federally recognized;
- carry out substantial governmental duties and powers over a Federal Indian reservation;
- have appropriate authority to regulate the quality of reservation waters; and
- be reasonably expected to be capable of administering the standards program.

The first criterion requires the Tribe to be recognized by the Department of the Interior. The Tribe may address this requirement by stating that it is included on the list of federally recognized Tribes published periodically by the Department of the Interior, or by submitting other appropriate documentation (e.g., the Tribe is federally recognized but not yet included on the Department of the Interior list).

The second criterion requires the Tribe to have a governing body that is carrying out substantial governmental duties and powers. EPA defines "substantial governmental duties and powers" to mean that the Tribe is currently performing governmental functions to promote the health, safety, and welfare of the affected population within a defined geographical area. Examples of such functions include, but are not limited to, the power to tax, the power of eminent domain, and police power. Federal recognition by the Department of the Interior does not, in and of itself, satisfy this criterion. Tribes must submit a narrative statement describing the form of tribal government, describing the types of essential governmental functions currently performed, and identifying the sources of authorities to perform these functions (e.g., tribal constitutions, codes).

The third criterion, concerning tribal authority, means that EPA may authorize an Indian Tribe to administer the water quality standards program only where the Tribe already possesses and can adequately demonstrate authority to manage and protect water resources within the reservation borders. The Clean Water Act authorizes use of existing tribal regulatory authority for managing EPA programs, but the Act does not grant additional authority to Tribes. EPA recognizes that, in general, Tribes possess the authority to regulate activities affecting water quality on the reservation. The Agency does not believe, however, that it is appropriate to recognize tribal authority and approve tribal administration of the water quality standards program in the absence of verifying documentation. EPA will not delegate water quality standards program authority to a Tribe unless the Tribe adequately shows that it possesses the requisite authority.

EPA does not read the Supreme Court's decision in *Brendale*[3] as preventing EPA from recognizing Tribes' authority to regulate water quality on fee lands within the reservation, even if section 518 is not an express delegation of authority. The primary significance of *Brendale* is its result, fully consistent with *Montana* v. *United States,*[4] which previously had held:

> To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate . . . the activities of non-members who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. . . . A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

The ultimate decision regarding tribal authority must be made on a Tribe-by-Tribe basis, and EPA has finalized the proposed process for making those determinations. EPA sees no reason in light of *Brendale* to assume that Tribes would be *per se* unable to demonstrate authority over water quality management on fee lands within reservation borders. EPA believes that as a general matter there are substantial legal and factual reasons to

assume that Tribes ordinarily have the legal authority to regulate surface water quality within a reservation.

In evaluating whether a Tribe has authority to regulate a particular activity on land owned in fee by nonmembers but located within a reservation, EPA will examine the Tribe's authority in light of the evolving case law as reflected in *Montana* and *Brendale*. The extent of such tribal authority depends on the effect of that activity on the Tribe. As discussed above, in the absence of a contrary statutory policy, a Tribe may regulate the activities of non-Indians on fee lands within its reservation when those activities threaten or have a direct effect on the political integrity, the economic security, or the health or welfare of the Tribe.

The Supreme Court, in recent cases, has explored several options to ensure that the impacts upon Tribes of the activities of non-Indians on fee land, under the *Montana* test, are more than *de minimis*, although to date the Court has not agreed, in a case on point, on any one reformulation of the test. In response to this uncertainty, the Agency will apply, as an interim operating rule, a formulation of the standard that will require a showing that the potential impacts of regulated activities on the Tribe are serious and substantial.

The choice of an Agency operating rule containing this standard is taken solely as a matter of prudence in light of judicial uncertainty and does not reflect an Agency endorsement of this standard *per se*. Moreover, as discussed below, the Agency believes that the activities regulated under the various environmental statutes generally have serious and substantial impacts on human health and welfare. As a result, the Agency believes that Tribes usually will be able to meet the Agency's operating rule, and that use of such a rule by the Agency should not create an improper burden of proof on Tribes or create the administratively undesirable result of checker-boarding reservations.

Whether a Tribe has jurisdiction over activities by nonmembers will be determined case by case, based on factual findings. The determination as to whether the required effect is present in a particular case depends on the circumstances.

Nonetheless, the Agency may also take into account the provisions of environmental statutes, and any legislative findings that the effects of the activity are serious, in making a generalized finding that Tribes are likely to possess sufficient inherent authority to control reservation environmental quality.[5] As a result, in making the required factual findings as to the impact of a water-related activity on a particular Tribe, it may not be necessary to develop an extensive and detailed record in each case. The Agency may also rely on its special expertise and practical experience regarding the importance of water management, recognizing that clean water, including critical habitat (e.g., wetlands, bottom sediments, spawning beds), is absolutely crucial to the survival of many Indian reservations.

The Agency believes that congressional enactment of the Clean Water Act establishes a strong Federal interest in effective management of water quality. Indeed, the primary objective of the CWA "is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" (section 101(a)), and to achieve that objective, the Act establishes the goal of eliminating all discharges of pollutants into the navigable waters of the United States and attaining a level of water quality that is fishable and swimmable (sections 101(a)(1) and (2)). Thus the statute itself constitutes, in effect, a legislative determination that activities affecting surface water and critical habitat quality may have serious and substantial impacts.

EPA also notes that, because of the mobile nature of pollutants in surface waters and the relatively small length or size of stream segments or other water bodies on reservations, it would be very difficult to separate the effects of water quality impairment on non-Indian fee land within a reservation as compared with those on tribal

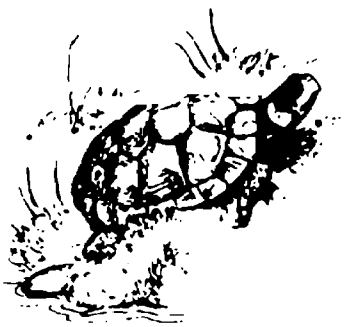
portions. In other words, any impairment that occurs on, or as a result of, activities on non-Indian fee lands is very likely to impair the water and critical habitat quality of the tribal lands. This also suggests that the serious and substantial effects of water quality impairment within the non-Indian portions of a reservation are very likely to affect the tribal interest in water quality. EPA believes that a "checkerboard" system of regulation, whereby the Tribe and State split up regulation of surface water quality on the reservation, would ignore the difficulties of assuring compliance with water quality standards when two different sovereign entities are establishing standards for the same small stream segments.

EPA also believes that Congress has expressed a preference for tribal regulation of surface water quality to ensure compliance with CWA goals. This is confirmed by the text and legislative history of section 518 itself. The CWA establishes a policy of "recogniz[ing], preserv[ing], and protect[ing] the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use (including restoration, preservation, and enhancement) of land and water resources" (section 101(b)). By extension, the treatment of Indian Tribes as States means that Tribes are to be primarily responsible for the protection of reservation water resources. As Senator Burdick, floor manager of the 1987 CWA Amendments, explained, the purpose of section 518 was to "provide clean water for the people of this Nation" (133 Congressional Record S1018, daily ed., Jan. 21, 1987). This goal was to be accomplished, he asserted, by giving "tribes . . . the primary authority to set water quality standards to assure fishable and swimmable water and to satisfy all beneficial uses."[6]

In light of the Agency's statutory responsibility for implementing the environmental statutes, its interpretations of the intent of Congress in allowing for tribal management of water quality within the reservation are entitled to substantial deference.[7]

The Agency also believes that the effects on tribal health and welfare necessary to support tribal regulation of non-Indian activities on the reservation may be easier to establish in the context of water quality management than with regard to zoning, which was at issue in ***Brendale***. There is a significant distinction between land use planning and water quality management. The Supreme Court has explicitly recognized such a distinction: "Land use planning in essence chooses particular uses for the land; environmental regulation . . . does not mandate particular uses of the land but requires only that, however the land is used, damage to the environment is kept within prescribed limits."[8] The Court has relied on this distinction to support a finding that States retain authority to carry out environmental regulation even in cases where their ability to carry out general land use regulation is preempted by Federal law.[9]

Further, water quality management serves the purpose of protecting public health and safety, which is a core governmental function whose exercise is critical to self-government. The special status of governmental actions to protect public health and safety is well established. By contrast, the power to zone can be exercised to achieve purposes that have little or no direct nexus to public health and safety.[10] Moreover, water pollution is by nature highly mobile, freely migrating from one local jurisdiction to another, sometimes over large distances. By contrast, zoning regulates the uses of particular properties with impacts that are much more likely to be contained within a given local jurisdiction.



Operationally, EPA's generalized findings regarding the relationship of water quality to tribal health and welfare will affect the legal analysis of a tribal submission by, in effect, supplementing the factual showing a Tribe makes in applying for authority to administer the water quality standards program. Thus, a tribal submission meeting the requirements of section 131.8 of this regulation will need to make a relatively simple showing of facts that there are waters within the reservation used by the Tribe or tribal members (and thus that the Tribe or tribal members could be subject to exposure to pollutants present in, or introduced into, those waters), and that the waters and critical habitat are subject to protection under the Clean Water Act. The Tribe must also explicitly assert that impairment of such waters by the activities of non-Indians would have a serious and substantial effect on the health and welfare of the Tribe. Once the Tribe meets this initial burden, EPA will, in light of the facts presented by the Tribe and the generalized statutory and factual findings regarding the importance of reservation water quality discussed above, presume that there has been an adequate showing of tribal jurisdiction on fee lands, unless an appropriate governmental entity (e.g., an adjacent Tribe or State) demonstrates a lack of jurisdiction on the part of the Tribe.

The Agency recognizes that jurisdictional disputes between Tribes and States can be complex and difficult and that it will, in some circumstances, be forced to address such disputes. However, EPA's ultimate responsibility is protection of the environment. In view of the mobility of environmental problems, and the interdependence of various jurisdictions, it is imperative that all affected sovereigns work cooperatively for environmental protection rather than engage in confrontations over jurisdiction.

To verify authority, the Tribe is required to include a statement signed by the tribal legal counsel, or an equivalent official, explaining the legal basis for the Tribe's regulatory authority. Tribe also is required to provide appropriate additional documentation (e.g., maps, tribal codes, and ordinances).

The fourth criterion requires that the Tribe, in the Regional Administrator's judgment, should be reasonably capable of administering an effective standards program. The Agency recognizes that certain Tribes have not had substantial experience in administering surface water quality programs. For this reason, the Agency requires that Tribes either show that they have the necessary management and technical skills or submit a plan detailing steps for acquiring the necessary management and technical skills. The plan must also address how the Tribe will obtain the funds to acquire the administrative and technical expertise. When considering tribal capability, the Agency will also consider whether the Tribe can demonstrate the existence of institutions that exercise executive, legislative, and judicial functions, and whether the Tribe has a history of successful managerial performance of public health or environmental programs.

1.8.2 Application for Authority To Administer the Water Quality Standards Program

The specific information required for tribal applications to EPA is described in 40 CFR. The application is required, in general, to include a statement on tribal recognition by the Department of the Interior, documentation that the tribal governing body has substantial duties and powers, documentation of tribal authority to regulate water quality on the federally recognized reservation, a narrative statement of tribal capability to administer water quality standards programs, and any other information requested by the Regional Administrator.

When evaluating tribal experience in public health and environmental programs (under paragraph 131.8(b)(4)(ii), EPA will look for indications that the Tribe has participated in such programs, whether the programs are administered by EPA, other Federal agencies, or Tribes. For example, several Tribes are known to have participated in developing areawide water management plans or

tribal water quality standards. EPA will also look for evidence of historical budget allocations dealing with public health or environmental programs along with any experience in monitoring related programs.

The regulation allows a Tribe to describe either how it presently has the capability to manage an effective water quality standards program or how it proposes to acquire the additional administrative and technical expertise to manage such a program. EPA will carefully review for reasonableness any plans that propose to acquire expertise. EPA will not approve tribal capability demonstrations where such plans do not include reasonable provisions for acquisition of needed personnel as well as reliable funding sources. This requirement is consistent with other Clean Water Act programs. Tribes may wish to apply for section 106 funds to support their water quality standards programs and may include this source in any discussion of obtaining necessary funds.

If the Tribe has qualified to administer other Clean Water Act or Safe Drinking Water Act programs, then the Tribe need only provide the information that has not been submitted previously.

Qualifying for administration of the water quality standards program is optional for Indian Tribes and there is no time frame limiting when such application may be made. As a general policy, EPA will not deny a tribal application. Rather than formally deny the Tribe's request, EPA will continue to work cooperatively with the Tribe in a continuing effort to resolve deficiencies in the application or the tribal program so that tribal authorization may occur. EPA also concurs with the view that the intent of Congress and the EPA Indian Policy is to support tribal governments in assuming authority to manage various water programs. Authority exists for EPA to re-assert control over certain water programs due to the failure of the State or Tribe to execute the programs properly. Specifically, in the water quality standards program, the Administrator has authority to promulgate Federal standards.

1.8.3 Procedure Regional Administrator Will Apply

The review procedure established in section 131.8 is the same procedure applicable to all water programs. Although experience with the initial application in other programs indicated some delay in the process, EPA believes that as EPA and the Tribes gain experience with the procedures, delays will be minimal.

The EPA review procedure in paragraph 131.8(c) specifies that following receipt of tribal applications, the Regional Administrator will process such applications in a timely manner. The procedure calls for prompt notification to the Tribe that the application has been received, notification within 30 days to appropriate governmental entities (e.g., States and other governmental entities located contiguous to the reservation and that possess authority to regulate water quality under section 303 of the Act) of the application and the substance and basis for the Tribe's assertion of authority over reservation waters, and allowance of 30 days for review of the Tribe's assertion of authority.

EPA recognizes that city and county governments which may be subject to or affected by tribal standards may also want to comment on the Tribe's assertion of authority. Although EPA believes that the responsibility to coordinate with local governments falls primarily on the State, the Agency will make an effort to provide notice to local governments by placing an announcement in appropriate newspapers. Because the rule limits EPA to considering comments from governmental entities with Clean Water Act section 303 authority, such newspaper announcements will advise interested parties to direct comments on tribal authority to appropriate State governments.

Where a Tribe's assertion of authority is challenged, the Regional Administrator, in consultation with the Tribe, the governmental entity challenging the Tribe's assertion of authority, and the Secretary of the Interior, will determine whether the Tribe has adequately

demonstrated authority to regulate water quality on the reservation. Where the Regional Administrator concludes that the Tribe has not adequately demonstrated its authority with respect to an area in dispute, then tribal assumption of the standards program would be restricted accordingly. If the authority in dispute were focused on a limited area, this would not necessarily delay the Agency's decision to authorize the Tribe to administer the program for the nondisputed areas.

The procedure allowing participation by other governmental entities in EPA's review of tribal authority does not imply that States or Federal agencies (other than EPA) have veto power over tribal applications for treatment as a State. Rather, the procedure is simply intended to identify any competing jurisdictional claim and thereby ensure that the Tribe has the necessary authority to administer the standards program. EPA will not rely solely on the assertions of a commenter who challenges the Tribe's authority; EPA will make an independent evaluation of the tribal showing and all available information.

When evaluating tribal assertions of authority, EPA will apply the test from *Montana* v. *United States*, 450 U.S. 544 (1981), and will consider the following:

- all information submitted with the Tribe's assertion of authority;
- all information submitted during the required 30-day comment period by the governmental entities identified in 40 CFR 131.8(c)(2); and
- all information obtained by the Agency via consultation with the Department of the Interior (such consultation is required where the Tribe's assertion of authority is challenged).

EPA and the Department of the Interior have agreed to procedures for conducting consultations between the agencies. The procedure established as the Secretary of the Interior's designees the Associate Solicitor, Division of Indian Affairs, and the Deputy Assistant Secretary - Indian Affairs (Trust and Economic Development). EPA will forward a copy of the application and any documents asserting a competing or conflicting claim of authority to such designees as soon as possible. For most applications, an EPA-DOI conference will be scheduled from 1 to 3 weeks after the date the Associate Solicitor receives the application. Comments from the Interior Department will discuss primarily the law applicable to the issue to assist EPA in its own deliberations. Responsibility for legal advice to the EPA Administrator or other EPA decision makers will remain with the EPA General Counsel. EPA does not believe that the consultation process with the Department of the Interior should involve notice and opportunity for States and Tribes because such parties are elsewhere provided appropriate opportunities to participate in EPA's review of tribal authority.

EPA will take all reasonable means to advise interested parties of the decision reached regarding challenges of tribal assertions of authority. At least, written notice will be provided to State(s) and other governmental entities sent notice of the tribal application. In addition, the Water Quality Standards Regulation requires EPA to publish an annual list of standards approval actions taken within the preceding year. EPA will expand that listing to include Indian Tribes qualifying for treatment as States in the preceding year.

Comments on tribal compliance with criteria necessary for assuming the program is limited to the criterion for tribal authority. The Clean Water Act does not require EPA to provide public comment on the entire tribal application, nor does EPA believe that public comment will assist with EPA's decision- making regarding the other criteria. (The other criteria are the recognition of the Tribe by the Department of the Interior, a description of the tribal governing body, and the capability of the Tribe to administer an effective standards program.) EPA believes that providing public comment on these three criteria would

unnecessarily complicate and potentially delay the process.

1.8.4 Time Frame for Review of Tribal Application

EPA has not specified a time frame for review of tribal application. The Agency believes it is impossible to approve or disapprove all applications within a designated time frame. Because EPA has no reasonable way to predetermine how complete initial applications might be, what challenges might arise, or how numerous or complex the issues might be, the Agency deems it inappropriate to attempt to establish time frames that might not allow sufficient time for resolution. Similarly, EPA's experience with States applying for various EPA programs indicates that, at times, meetings and discussions between EPA and the States are necessary before all requirements are met. The Agency believes that the same communication with Tribes will be important to ensure expeditious processing of tribal applications.

1.8.5 Effect of Regional Administrator's Decision

A decision by the Regional Administrator that a Tribe does not meet the requirements for administering the water quality standards program does not preclude the Tribe from resubmitting the application at a future date. Rather than formally deny the Tribe's request, EPA will continue to work cooperatively with the Tribe in a continuing effort to resolve deficiencies in the application or the tribal program so that tribal authorization may occur. EPA believes that the intent of Congress and of EPA's Indian Policy is to support tribal governments in assuming authority to manage various water programs.

Where the Regional Administrator determines that the tribal application satisfies all of the requirements of section 131.8, the Regional Administrator will promptly notify the Tribe that the Tribe has qualified to administer the water quality standards program.

1.8.6 Establishing Water Quality Standards on Indian Lands

Where Tribes qualify to be treated as States for the purposes of water quality standards, EPA has the responsibility to assist the Tribe in establishing standards that are appropriate for the reservation and consistent with the Clean Water Act. EPA recognizes that Tribes have limited resources for development of water quality standards.

EPA considers the following three options acceptable to complete the task of establishing water quality standards on Indian lands:

- the Tribe may negotiate a cooperative agreement with an adjoining State to apply the State's standards to the Indian lands;

- the Tribe may incorporate the standards from an adjacent State as the Tribe's own; or

- the Tribe may independently develop and adopt standards that account for unique site-specific conditions and water body uses.

The first two options would be the quickest and least costly ways for establishing tribal water quality standards. Under option 1, the negotiated agreement could also cover requirements such as monitoring, permitting, certifications, and enforcement of water quality standards on the reservation. Option 2 would make full use of information and data developed by the State which may apply to the reservation. Tribes, as sovereign governments, have the legal authority to negotiate cooperative agreements with a State to apply that State's standards to waters on the reservation or to use State standards as the basis for tribal standards. These options do not suggest that the Tribe relinquishes its sovereign powers or enforcement authority or that the State can unilaterally apply its standards to reservation waters.

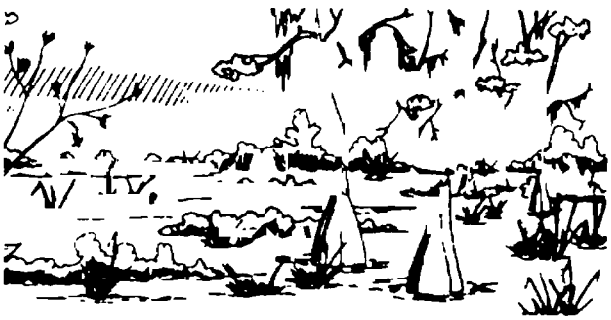
Option 3 would require more time and resources to implement because it would require the Tribe to create an entire set of standards "from

scratch." EPA does not intend to discourage this approach, but notes that Indian Tribes may want to make full use, where appropriate, of programs of adjacent States. Tribes should use this Handbook as guidance when developing standards.

EPA emphasizes that the development of tribal water quality standards is an iterative process, and that the standards development option initially selected by the Tribe can change in subsequent years. For example, a Tribe may want to use option 1 or 2 to get the standards program started. This does not preclude the Tribe from developing its own water quality standards in subsequent years.

Tribes establishing standards for the first time should carefully consider which water body uses are appropriate. Once designated uses are adopted, removing the use or adopting a subcategory of use would be subject to the requirements of section 131.10 of the Water Quality Standards Regulation.

EPA expects that, where Tribes qualify to be treated as States for the purposes of water quality standards, standards will be adopted and submitted to EPA for review within 3 years (a triennium) from the date that the Tribe is notified that it is qualified to administer the standards program. This time frame corresponds to that provided to States under the provisions of the 1965 Federal Water Pollution Control Act, when the water quality standards program was created. EPA believes that this is an equitable arrangement, and that the Tribes should be allowed sufficient time to develop their programs and adopt appropriate standards for reservation waters.



Once EPA determines that a Tribe qualifies to administer the standards program, tribal development, review, and adoption of water quality standards are subject to the same requirements that States are subject to under the Clean Water Act and EPA's implementing regulations.

Until Tribes qualify for the standards program and adopt standards under the Clean Water Act, EPA will, when possible, assume that existing water quality standards remain applicable. EPA's position on this issue was expressed in a September 9, 1988, letter from EPA's then General Counsel, Lawrence Jensen, to Dave Frohnmayer, Attorney General for the State of Oregon. This letter states: "if States have established standards that purport to apply to Indian reservations, EPA will assume without deciding that those standards remain applicable until a Tribe is authorized to establish its own standards or until EPA otherwise determines in consultation with a State and Tribe that the State lacks jurisdiction . . . ." This policy is not an assertion that State standards apply on reservations as a matter of law, but the policy merely recognizes that fully implementing a role for Tribes under the Act will require a transition period. EPA may apply State standards in this case because (1) there are no Federal standards that apply generally, and (2) to ignore previously developed State standards would be a regulatory void that EPA believes would not be beneficial to the reservation water quality. However, EPA will give serious consideration to Federal promulgation of water quality standards on Indian lands where EPA finds a particular need.

Where a State asserts authority to establish future water quality standards for a reservation, EPA policy is to ensure that the affected Tribe is made aware of the assertion so that any issues the Tribe may wish to raise can be reviewed as part of the normal standards setting process. EPA also encourages State-Tribe communication on

standards issues, with one possible outcome being the establishment of short-term cooperative working agreements pertaining to standards and NPDES permits on reservations.

1.8.7 EPA Promulgation of Standards for Reservations

If EPA determines that a Tribe possesses authority to regulate water quality on a reservation but the Tribe declines to seek authority to administer the water quality standards program, EPA has the authority under section 303 of the Act to promulgate Federal water quality standards. EPA's responsibility stems from the Act's directive to establish water quality standards for all "navigable waters." Depending on the circumstances, EPA may use the standards of an adjacent State as a starting point for such a promulgation. EPA will prioritize the promulgations based on various factors, not the least of which is availability of Agency resources to undertake the Federal rulemaking process. Because the Federal promulgation process is slow and complex, EPA may promulgate water quality standards in conjunction with re-issuing permits on the reservations.

The intent of the Clean Water Act is for States and Tribes qualifying for treatment as States to have the first opportunity to set standards. Thus, EPA prefers to work cooperatively with States and Tribes on water quality standards issues and to initiate Federal promulgation actions only where absolutely necessary.

EPA's entire policy with respect to Federal promulgation is straightforward. EPA much prefers to work with the States and have them adopt standards that comply with CWA requirements. Where Federal promulgation is necessary to achieve CWA compliance, however, EPA will act. This same philosophy will apply to Indian Tribes authorized to administer the program.

1.9 Adoption of Standards for Indian Reservation Waters

This guidance recognizes that Tribes have varying abilities to develop water quality standards. Some Tribes have more technical capability and experience in drafting implementable regulations than other Tribes and may be capable of adopting more complex standards. However, most Tribes may not have access to sufficient resources, either in personnel or in contractor funds, to pursue this course. Moreover, EPA does not have the resources to provide substantial technical assistance to individual Tribes to develop other than basic water quality standards.

1.9.1 EPA's Expectations for Tribal Water Quality Standards

Tribal water quality standards, initially at least, should focus on basic contents and reflect existing uses and existing water quality. The standards must be established for an inventory of "waters of the United States," including wetlands. The Tribes should focus on the basic structure of a water quality standards system: designated uses for identified water segments, appropriate narrative and numeric criteria, an antidegradation policy, and other general implementation policies. How complex or sophisticated these elements need to be depends upon the abilities of the Tribe and the environmental concerns affected by tribal standards.

EPA has consistently recommended to Tribes that they use directly, or with slight modification, the standards of the adjacent States as a beginning for tribal standards. Tribal water quality standards should be developed considering the quality and designated uses of waters entering and leaving reservations. It is important that the Tribes recognize what the surrounding State (or another Indian reservation) water quality standards are even though there is no requirement to match those standards, although the water quality standards regulation does require consideration of downstream water quality standards (see section 2.2, this Handbook).

At a minimum, tribal water quality standards should be established upstream and downstream from point sources where NPDES permits are applicable. It is also desirable that water quality standards be applied to waters where significant nonpoint sources enter so that the effectiveness of best management practices on the reservation's waters can be evaluated.

Water quality criteria should be carefully selected recognizing that making criteria more stringent in subsequent water quality standards reviews is more feasible than attempting relaxation of stringent criteria. While there is no mandatory list of criteria, the following should be considered the minimum:

- narrative "free froms";
- dissolved oxygen;
- pH;
- temperature;
- bacteriological criteria (for recreational and ceremonial uses); and
- toxics (including nonconventionals, e.g., ammonia and chlorine). [Use of option 1, section 2.1.3, is recommended.]

1.9.2 Optional Policies

The Tribes must also specify which optional policies they wish to use pursuant to 40 CFR 131.13 (see chapter 6, this Handbook). These include the following:

- mixing zones for point sources;
- variances for point sources;
- design low-flow specification for the application of numeric criteria; and
- schedules of compliance for criteria in NPDES, and permits.

Guidance for applying these policies are generally available in either this Handbook or in the *Technical Support Document for Water Quality-based Toxics Control* (USEPA, 1991a).

1.9.3 Tribal Submission and EPA Review

The initial submission of the tribal water quality standards must contain the items listed in 40 CFR 131.6 plus use attainability analyses for all waters not classified "fishable/swimmable" (see section 2.9, this Handbook). In addition, it should contain identification of endangered or threatened aquatic species or wildlife subject to protection by water quality standards. There should also be included a record containing information on the regulatory and public participation aspects of the water quality standards, public comments made, and the Tribe's responses to those comments and other relevant material required by 40 CFR 131.20.

1.9.4 Regional Reviews

The Regions should carefully coordinate the reviews within the Water Management Divisions to ensure:

- that the required items in section 131.6 are included;
- that all waters with NPDES permits have water quality standards; and
- that the tribal rulemaking meets the requirements of 40 CFR 131.20.

In commenting on tribal water quality standards, the Regions should identify situations where the dispute resolution mechanism in 40 CFR 131.7 may ultimately be called into play and should attempt to de-fuse such situations as early as possible in the standards adoption process. One possibility is to encourage Tribes and States to establish review procedures before any specific problem develops as suggested in section 131.7(e) of the regulation.

Where NPDES permits exist, the downstream jurisdiction and the Region should determine if total maximum daily loads or waste load allocations will be needed. Where this burden falls on the Tribe, EPA may need to assist the Tribe in these assessments or perform the necessary modeling for the Tribe. The Region also should assess the scope of any section 401 procedures needed in future NPDES permit renewals. The interstate nature of tribal water quality standards may become important to EPA because of the recent *Arkansas* v. *Oklahoma* U.S. Supreme Court case (112 section 1046, February 26, 1992), especially when EPA is the permit writing authority.

NOTE: Additional discussion supporting the Agency's rulemaking with respect to Indian Tribes and EPA's views on related questions may be found in the preamble discussion to the final rule (56 F.R. 64893, December 12, 1991).

Endnotes

1. *Champion International Corp. v. EPA*, 850 F.2d 182 (4th Cir. 1988)

2. *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 111 S.Ct. 905, 910 (1991).

3. *Brendale v. Confederated Tribes and Bands of the Yakima Nation*, 492 U.S. 408, (1989)

4. *Montana v. United States*, 450 U.S. at 565-66 (citations omitted).

5. See, *e.g.*, *Keystone Bituminous Coal Assoc. v. DeBenedictis*, 480 U.S. 470, 476-77 and notes 6, 7 (1987).

6. *Id.*

7. *Washington Dept. of Ecology v. EPA*, 752 F.2d 1465, 1469 (9th Cir. 1985); see generally *Chevron, USA v. NRDC*, 467 U.S. 837, 843-45 (1984).

8. *California Coastal Commission v. Granite Rock Co.*, 480 U.S. 572, 587 (1987).

9. *Id.* at 587-89.

10. See *e.g. Brendale*, 492 U.S. at 420 n.5 (White, J.) (listing broad range of consequences of state zoning decision).

CHAPTER 2

DESIGNATION OF USES

(40 CFR 131.10)

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