



January 9, 2020

W.C. McIntosh, Assistant Administrator  
Office of International and Tribal Affairs, U.S. Environmental Protection Agency  
1200 Pennsylvania AVE., NW  
Washington, DC 20460  
**Transmitted via email to [McIntosh.William@epa.gov](mailto:McIntosh.William@epa.gov)**

**RE: National Tribal Water Council's Response to OITA's Memorandum titled "Update on OITA Review of Treatment as a State Applications" (8/13/2019)**

Dear Mr. McIntosh:

In OITA's August 13, 2019 Memorandum titled "Update on OITA Review of Treatment as a State Applications" ("Memo"), you briefly explain OITA's role in reporting on and tracking tribal applications for "treatment as a state" ("TAS") to administer certain federal environmental programs. You then assert that EPA's "new focus" is "to ensure that local governments that are located within *or contiguous to the areas of Indian country* covered by a regulatory TAS application are notified of the application and have an opportunity to provide any appropriate input as EPA develops its decision." Memo at 2 (emphasis in original). The National Tribal Water Council ("NTWC") has significant concerns with OITA's new focus, which is the centerpiece of the Memo.

First, despite the actual words that Congress inserted into the relevant statutes, which explicitly direct EPA to "treat an Indian tribe as a State" for various purposes, *see* Clean Water Act ("CWA") § 518(e), EPA treats tribes differently from states when reviewing their eligibility to carry out certain federal environmental regulatory programs.<sup>1</sup> In particular, EPA's TAS

---

<sup>1</sup> In accordance with CWA § 518(e), EPA promulgated regulations at 40 C.F.R. § 131.8 that describe the process for TAS approval for water quality standards, and the same process applies to the water quality certification program. *See* 40 C.F.R. § 131.4(c). Similarly, the Safe Drinking Water Act § 1451 provides for TAS, as does the Clean Air Act § 301(d), and EPA has promulgated regulations under these provisions as well but they do not contain the same process, as discussed further below.



Office of Native American Initiatives

Northern Arizona University  
PO Box 15004  
Flagstaff, AZ 86011-5004  
Elaine H. Wilson, NTWC Project  
Manager

928-523-9555 office  
928-523-1266 fax  
[nau.edu/itep](http://nau.edu/itep)  
[Elaine.Wilson@nau.edu](mailto:Elaine.Wilson@nau.edu)  
480-340-2306 cell



regulations for water quality standards and the water quality certification program require tribes to go through a separate, additional step before they can obtain program approval; that step includes a process under which “appropriate governmental entities” and other stakeholders can provide input during EPA’s review of the tribe’s TAS application. The NTWC objects to the heightened scrutiny that EPA applies to TAS applications for water quality standard programs. Congress was explicit in defining TAS eligibility under Section 518(e) of the CWA, and did not include any language providing for heightened scrutiny of water quality standards TAS applications.

Second, even when EPA limited “appropriate governmental entities” to states,<sup>2</sup> the TAS approval process was cumbersome and promoted delay, as EPA itself recognized in its 2008 Strategy for Reviewing TAS applications.<sup>3</sup> The 2008 Strategy was prompted by a Government Accountability Office Report that found “some lengthy delays in [EPA’s TAS approval] processes.”<sup>4</sup> EPA’s 2008 Strategy set clear timeframes for TAS application review actions including outreach to AGEs. OITA’s “new focus” of expanding outreach to local government entities during the TAS approval process makes no reference to those timeframes or specified actions, adding confusion to the process that will likely exacerbate TAS review delays rather than ameliorate them.

It is important to remember that local governments are subdivisions of states and as such already have a clear opportunity to submit comments on pending TAS applications. Although NTWC agrees that additional outreach can be beneficial and appropriate when it facilitates timely TAS approvals, there are circumstances when it can have the opposite effect. The 2008 Strategy discusses the benefits that can occur from reaching out to governmental entities and the public but specifically notes that EPA “should consult” with the tribe as to whether particular outreach activities would be beneficial and appropriate, and “should tailor” outreach activities to the specific circumstances.<sup>5</sup> OITA’s new local outreach policy is being applied broadly, however, without tribal input and regardless of whether the application is deemed controversial, instead of on a case-by-case basis.

As a result, EPA’s enhanced local outreach policy has already created needless delays in the approval of pending TAS applications and gives too much weight to local entities. For example, on February 27, 2015 the Navajo Nation submitted a supplemental TAS application to extend its existing eligibility for water quality standards under CWA § 303 and a CWA § 401 certification program to additional areas within its reservation. Once EPA issued its reinterpretation of CWA § 518(e) as a Congressional delegation of authority to tribes over water resources within their reservations, which EPA did on May 16, 2016, 81 Fed. Reg. 30183, it should have been easy and quick for EPA to approve the application. Instead, it took three more years and much discussion

---

<sup>2</sup> Amendments to the Water Quality Standards Regulation That Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64876, 64884 (Dec. 12, 1991).

<sup>3</sup> Strategy for Reviewing Tribal Eligibility Applications to Administer EPA Regulatory Programs 1-2 (Jan. 23, 2008), available at <https://www.epa.gov/tribal/strategy-reviewing-tribal-eligibility-applications-administer-epa-regulatory-programs-1>.

<sup>4</sup> Indian Tribes: EPA Should Reduce the Review Time for Tribal Requests to Manage Environmental Programs 5, (Oct. 2005) (GAO-06-95), available at <https://www.gao.gov/new.items/d0695.pdf>

<sup>5</sup> 2008 Strategy for Reviewing Tribal Eligibility Applications, at 6.

before the application was approved, in large part due to EPA's solicitation of comments from governmental and other entities.

The Seneca Nation submitted its CWA §§ 303 and 401 application on March 28, 2018, two years after EPA issued its reinterpretation of CWA § 518(e). Approval of the Seneca Nation's application also should have been quick because it was limited to the Seneca Nation's Territories, which are equivalent to reservation land, yet they are still awaiting EPA's approval. They were informed approval was delayed because of the need for local government outreach, which EPA insisted upon conducting even though no comments were received during the comment period provided under EPA's former procedures.

Third, there is absolutely no reason for EPA to solicit local government comments when a TAS application is limited to a tribe's reservation.<sup>6</sup> Comments on TAS applications must be confined to the tribe's jurisdiction.<sup>7</sup> As noted above, EPA interprets CWA § 518(e) to be a Congressional delegation of authority to tribes over water resources "within the borders of an Indian reservation," *id.*, just as the D.C. Circuit found that similar language in Clean Air Act ("CAA") § 301(d)(2)(B) is a Congressional delegation of authority to tribes. *Arizona Public Service Co. v. EPA*, 211 F.3d 1280 (D.C. Cir. 2000), *cert. denied sub nom.*, 532 U.S. 970 (2001).<sup>8</sup> The tribe's jurisdiction therefore should be automatically approved in those circumstances, regardless of any comments to the contrary.

In fact, soliciting comments in the above situation could serve no other purpose than to delay the TAS approval, contrary to EPA's previously stated goals discussed above. OITA should revise its Memo and, moreover, EPA should revise its regulations to reflect the Congressional delegation of authority in CWA § 303(c) to eligible federally recognized tribes for all water resources within a reservation. As with TAS applications under the Clean Air Act for areas within a reservation, the Regional Administrator should determine the tribe's jurisdiction, with no further notice to local governmental entities or the public.<sup>9</sup> Including this procedure in EPA's review of TAS applications for CWA regulatory programs would streamline the existing process, resulting in more tribes seeking TAS water quality standards programs and approval of more applications in an efficient and timely manner. This is exactly what EPA's current Strategic Plan seeks: to "streamline [EPA's] oversight of state and tribal programs ... and streamline those processes by which EPA reviews and approves state and tribal actions."<sup>10</sup> The "new focus"

---

<sup>6</sup> The term "reservation" includes tribal trust land as well as formal reservation and a few other unique categories, such as the Seneca Nation Territories referenced above and Pueblo land.

<sup>7</sup> See 40 C.F.R. § 131.8(c)(3) ("Comments shall be limited to the Tribe's assertion of authority."); 40 C.F.R. § 130.16(c)(2)(iii) (same). *See also* 40 C.F.R. § 49.9(d) (for Clean Air Act applications, "In all cases, comment must be ... limited to the scope of the tribe's jurisdictional assertion").

<sup>8</sup> CAA § 301(d)(2)(B) delegates authority to tribes for air resources "within the exterior boundaries of the reservation."

<sup>9</sup> If the EPA Regional Administrator determines that a tribe meets the requirements of 40 C.F.R. § 49.6 for purposes of a CAA provision, the tribe is eligible to be treated in the same manner as a state with respect to that provision. "The eligibility will extend to all areas within the exterior boundaries of the tribe's reservation, as determined by the EPA Regional Administrator, and any other areas the EPA regional Administrator has determined to be within the tribe's jurisdiction." 40 C.F.R. § 49.9(g).

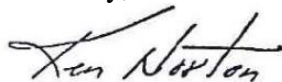
<sup>10</sup> Working Together: FY 2018-2020 U.S. EPA Strategic Plan 27 (Feb. 2019) (Goal 2 More Effective Partnerships).

essentially does the opposite, overlooking an opportunity to streamline and enhance the TAS process.

In sum, the NTWC considers EPA's "new focus" on providing supplemental outreach to local governments to be discriminatory. This policy is not required by the CWA (or any of the other TAS statutes) and places an unnecessary burden on tribes. EPA recognized "the TAS application process has become significantly more burdensome than anticipated."<sup>11</sup> We see tribes waiting for approvals of their applications well beyond reasonable time periods, including when TAS applications are limited to reservation land, meaning that the tribe is exercising congressionally delegated authority and no supplemental outreach should be provided at all. The agency's discretion to provide notice to additional stakeholders should be applied on a case-by-case basis, in consultation with the tribe, not as a blanket policy that runs the danger of being inappropriately applied.

EPA's new policy not only undermines prior EPA efforts to expedite the TAS approval process but also is contrary to EPA's cornerstone 1984 Indian policy. That policy, which ironically is referenced in the Memo (at 2), provides for "remov[ing] existing legal and procedural impediments to working directly and effectively with tribal governments on reservation programs." Policy at 3. It promises that EPA will "assure that tribal concerns and interests are considered whenever EPA's actions and/or decisions may affect reservation environments," *id.*, and it "recognize[s] tribal governments as the primary parties for . . . making environmental policy decisions and managing programs for reservations," *id.* at 2. EPA's current Strategic Plan reaffirms the 1984 Indian Policy's core goal in stating the agency "will work on a government-to-government basis to build tribal capacity to implement federal programs through delegations, authorizations and primacy designations."<sup>12</sup> We urge OITA to stay the course set boldly 35 years ago and drop the "new focus" on local governmental outreach.

Sincerely,



Ken Norton, Chairman  
National Tribal Water Council

Cc: Andrew Byrne, EPA Office of International and Tribal Affairs  
Karen Gude, EPA Office of Water

---

<sup>11</sup> Revised Interpretation of Clean Water Act Tribal Provision, 80 Fed. Reg. 47430, 47436 (Aug. 6, 2015).

<sup>12</sup> FY 2018-2020 U.S. EPA Strategic Plan, at 28.