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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

OFFICE OF  
WATER

DEC 31 1991

**MEMORANDUM**

**SUBJECT:** Guidance on Water Quality Standards and 401 Certification Programs Administered by Indian Tribes

**FROM:** Tudor Davies, Director *Shirley G. Farrell*  
Office of Science and Technology *for*

**TO:** Water Management Division Directors  
Regions I - X

**PURPOSE**

Section 518 of the Clean Water Act (CWA) authorized EPA to treat Indian Tribes as States for the purposes of sections 303 and 401. This guidance provides procedures for determining Tribal eligibility and supplements the final rule "Amendments to the Water Quality Standards Regulation That Pertain to Standards on Indian Reservations," published in the Federal Register on December 12, 1991.

To develop and administer a water quality standards program and 401 certification program, an Indian Tribe must submit an application for eligibility to be "treated as a State." The attached checklist provides a simplified list of actions required for EPA to determine this eligibility.

**BACKGROUND**

The 1987 amendments to the Clean Water Act (CWA) authorized the Administrator to treat Indian Tribes as "States" for purposes of the provisions of the Act identified under section 518(e), and required EPA to issue regulations to implement this provision. Under these regulations, Indian Tribes may become eligible for the section 303 water quality standards program and the section 401 certification program. This regulation also establishes a mechanism to resolve unreasonable consequences that may arise from Indian Tribes and States adopting differing water quality standards on common bodies of water.

## **TREATMENT OF INDIAN TRIBES AS STATES**

Section 518 of the CWA requires that to be treated as a State a Tribe must: (1) be Federally recognized; and (2) meet three broad eligibility criteria.

### **Federal Recognition**

The Secretary of the Interior periodically publishes a list of Federally recognized Tribes which can be used to determine which Tribes meet this requirement. If a Tribe has only recently been "recognized," but does not appear in the Federal Register listing of recognized Tribes, the Tribe should provide copies of the appropriate documentation to EPA demonstrating recognition by the Secretary of the Interior.

### **Section 518 Eligibility Criteria**

The three eligibility criteria under section 518 include:

"(1) the Indian Tribe has a governing body carrying out substantial governmental duties and powers;

(2) the functions to be exercised by the Indian Tribe pertain to the management and protection of water resources which are held by an Indian Tribe, held by the United States 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, and

(3) the Indian Tribe is reasonably expected to be capable, in the Administrator's judgment, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of this Act and of all applicable regulations."

Tribes should respond to these criteria as follows:

#### **(1) Substantial Duties and Powers**

Each application for treatment as a State must be reviewed on a case-by-case basis to determine if the Tribe exercises substantial governmental duties. Examples of governmental duties and powers may include, but are not limited to: the power to tax; the power of eminent domain; and police powers (i.e. the power to provide for the public health, safety and general welfare of Tribal members). Indian Tribes should provide a narrative statement and appropriate documentation describing: (1) the form of Tribal government, including how their governing body is organized; (2) the essential governmental functions currently performed; and (3) the sources of authorities to perform these functions. A summary listing of the Tribe's constitution or currently effective

Tribal codes, ordinances, and/or Tribal resolutions, will generally satisfy item #3. The EPA Regional Office, however, may request additional information or documentation in reviewing each "treatment as a State" application.

## **(2) Tribal Authority**

In most cases, we anticipate that a Tribe will have the necessary authority to administer Clean Water Act programs within reservation boundaries. In order to meet this section 518(e)(2) requirement, however, the Tribe should submit a statement signed by the Tribal Attorney General, or equivalent official, explaining the legal basis (including references to appropriate codes, ordinances, maps, etc.) for the Tribe's regulatory authority over its water resources.

Upon receipt of an adequate statement from the Tribe, EPA will notify (within thirty days) all appropriate governmental entities (e.g., neighboring Tribes and States) and provide information on the substance of, and basis for, the Tribe's assertion of authority. This information should include that portion of a Tribe's "treatment as a State" application which discusses its claim of authority and identifies the areas over which the Tribe claims such authority. We recommend that a map of the Tribal boundaries be submitted as a part of this review.

These agencies will have thirty days to comment on a Tribe's assertion of authority over the water resources in question. Comments from these governmental entities are limited only to a Tribe's assertion of authority over the water resources held by the Tribe.

If during the review period the Tribe's authority over a particular water resource is challenged, the Regional Administrator will consult with the Department of Interior before making a determination as to the authority. The Agency may also, as appropriate, work with the Tribe and the governmental entity challenging the Tribe's assertion toward a cooperative resolution of the challenge. After consultation with the Secretary of the Interior and in consideration of other comments received, the Regional Administrator shall determine whether the Tribe has adequately demonstrated that it meets the requirements.

## **(3) Tribal Capability**

Once the Regional Administrator determines that a Tribe is Federally recognized and carrying out substantial governmental duties and powers, he must also determine that the Tribe is "reasonably expected to be capable" of carrying out the functions to be exercised, either currently, or based on a plan to develop the necessary capabilities in the future. In describing the Tribe's capability to

administer an effective water quality standards program, the applicant should submit to the Regional Administrator the following information:

- A description of the Indian Tribe's previous management experience;
- A list of existing environmental or public health programs administered by the Tribal governing body and copies of related Tribal laws, policies, and regulations;
- A description of the entity (or entities) which exercise the executive, legislative, and judicial functions of the Tribal government;
- A description of the existing, or proposed, agency of the Indian Tribe which will assume primary responsibility for establishing, reviewing, implementing and revising water quality standards;
- A description of the technical and administrative capabilities of the staff to administer and manage an effective water quality standards program or a plan which proposes how the Tribe will acquire additional administrative and technical expertise. The plan must address how the Tribe will obtain the funds to acquire the administrative and technical expertise; and
- Any additional documentation required by the Regional Administrator.

Where the Tribe has previously qualified for treatment as a State under a Clean Water Act or Safe Drinking Water Act program, the Tribe need only provide the required information which has not been submitted in a previous treatment as a State application.

#### Treatment as a State Review Procedures

In reviewing "treatment as a State" submissions, EPA Regional Water Management Division staff should first be certain that the application is complete (i.e., contains sufficient information to adequately respond to the eligibility criteria), and that the Tribe submitting the application is included on the Department of Interior's list of Federally recognized Tribes. In addition, it is recommended that the Regional Counsel and the Regional Indian Affairs Coordinator be involved in reviewing each submittal, with appropriate comments and concurrences. After the initial applications are reviewed in Headquarters, the Regional Administrators will be responsible for making the final determinations for a Tribe to be treated as a State for each program involved.

Prior to approving the first "treatment as a State" application in each Region, and for each program, the Agency's "Delegation of Authority" procedures require that

Headquarters review and concur prior to approval. This requirement necessitates that the Region forward the complete "treatment as a State" application, with Regional comments and findings to the EPA Headquarters, Office of Water, Standards and Applied Science Division (Attn: Patti Morris, WH-585). Headquarters program staff will make every effort to review and concur on each application in a timely manner. Headquarters' concurrence on the Region's first "treatment as a State" determination will be from the Assistant Administrator for the Office of Water to the Regional Administrator. The Headquarters' concurrence decision will be developed in coordination with the Office of General Counsel and the Office of Wetlands, Oceans and Watersheds. Again, this Headquarters review and concurrence requirement applies only to the first "treatment as a State" application for each new program submitted to EPA.

### **OVERSIGHT AND EVALUATION**

EPA Regional Offices will review new or revised Tribal water quality standards to determine whether those standards meet the requirements of the Clean Water Act. If EPA disapproves a Tribe's water quality standards, or determines that a new or revised water quality standard is necessary to meet the requirements of the Act, EPA may promulgate water quality standards. EPA Regional Offices will also provide technical guidance and assistance to the Tribe to help them carry out the requirements of the program.

Following adoption of water quality standards, the Tribal Chairman, or his designee, submits the officially adopted standards to the appropriate EPA Regional Administrator for review. The Regional Administrator reviews the Tribe's standards to determine compliance with the CWA and implementing regulations. The Regional Administrator may approve or disapprove water quality standards based on that review.

Where disputes between States and Indian Tribes arise as a result of differing water quality standards on common bodies of water, the Regional Administrator will be responsible for acting in accordance with the provisions of Section 131.7 of the regulation.

**INDIAN TRIBES**

**CHECKLIST FOR TREATMENT AS A STATE**

**FOR WATER QUALITY STANDARDS AND 401 CERTIFICATION**

| <b>Treatment as a State Criteria</b>             |  | <b>Yes</b> | <b>No</b> |
|--|--|------------|-----------|
| 1. Federal Recognition                           | <i>Is Tribe on DOI Listing?</i>                              | ___        | ___       |
| 2. Substantial Duties and powers                 | <i>a. narrative statement or equivalent</i>                  | ___        | ___       |
|  | <i>b. constitution (summary)</i>                             | ___        | ___       |
|  | <i>c. organizational chart</i>                               | ___        | ___       |
|  | <i>d. list of codes &amp; laws</i>                           | ___        | ___       |
| 3. Tribal Authority                              | <i>a. Tribal AG's Statement</i>                              | ___        | ___       |
|  | <i>b. Define Tribal Boundaries<br/>(include map)</i>         | ___        | ___       |
|  | <i>c. Staff (current/planned)</i>                            | ___        | ___       |
|  | <i>d. Management experience</i>                              | ___        | ___       |
|  | <i>e. Funding plan</i>                                       | ___        | ___       |
| <b>EPA Responsibilities</b>                      |  |            |           |
| 1. Notify Government Entities within 30 days     |  | ___        | ___       |
| 2. Receipt of Government Entities within 30 days |  | ___        | ___       |
| 3. Treatment as A State                          | <i>Office of Regional Counsel<br/>recommendations letter</i> | ___        | ___       |
|  | <i>Indian Affairs Coordinator<br/>recommendation letter</i>  | ___        | ___       |
|  | <i>WMDD or RA recommendation<br/>letter</i>                  | ___        | ___       |
|  | <i>EPA Headquarters signoff<br/>(for first action only)</i>  | ___        | ___       |

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