



STATE OF IDAHO
DEPARTMENT OF
ENVIRONMENTAL QUALITY

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Water Docket
Environmental Protection Agency
Mail Code 2822T
1200 W Pennsylvania Avenue N.W.
Washington, DC 20460
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RE: ***Docket ID No. EPA-HQ-OW-2014-0461***

To whom it may concern:

The Idaho Department of Environmental Quality (IDEQ) submits the following comments on EPA's proposed revised interpretation of the tribal provisions in section 518 (e) of the Clean Water Act (CWA). IDEQ is the agency in Idaho authorized to implement CWA programs, including adopting and applying Water Quality Standards, developing section 303(d) lists of impaired waters and TMDLs for such waters. IDEQ is also in the process of obtaining approval to implement the NPDES program in Idaho. IDEQ has the following comments and questions regarding EPA's proposed new interpretation.

1. IDEQ asserts that the analysis in Sections III and IV of the proposal does not justify a change in EPA's interpretation. As EPA admits in its analysis, a court has yet to definitively rule on whether Congress, in enacting Section 518 of the CWA, intended to provide an express delegation of authority to Tribes to regulate non-Indian fee lands within the exterior boundaries of an Indian Reservation. The analysis is built upon dicta. When EPA promulgated the current regulations in 1991, EPA itself noted that Justice White's comments regarding 518 in *Brendale v. Confederated Tribes*, 492 U.S. 408 (1990), should not be relied upon because Justice's White's opinion was not the majority opinion and the 518 comments were not necessary to the opinion. Similarly, the Court in *Montana v. EPA*, 941 F.Supp. 945 (D. Montana 1996), did not have before it the issue of whether 518 provides an express delegation. Finally, the court in *Arizona Public Service Company v. EPA*, 211 F.3d 1280 (D.C. Cir. 2000) reviewed the tribal provisions in the Clean Air Act (CAA), and found the ambiguous legislative history and different language

in the CWA as support for EPA's position that the CAA provides express delegation while the CWA does not. EPA's reliance upon dicta to make this major shift in policy is particularly troublesome given the fact it is well established under federal law that, with limited exceptions, tribes cannot regulate non-tribal members on non-tribal land within an Indian reservation. Rather such jurisdiction lies with the States. Thus, Idaho respectfully requests that EPA decline to revise its prior interpretation.

2. Should EPA nonetheless proceed with the proposal, IDEQ requests clarification regarding what lands are subject to the revised interpretation. Section 518(e) provides the authority to EPA to treat an Indian tribe as a State pertaining to water resources within the borders of an Indian reservation. Indian reservation is then defined in section 518(h)(1) as all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation. EPA states that, under this language, tribes can only obtain TAS status over waters within the borders of their reservations, and conversely, tribes cannot obtain TAS under the CWA for water resources pertaining to any non-reservation Indian country. 80 Federal Register at page 47437. EPA then states, however, that Indian reservation as used in section 518(e) includes trust lands validly set aside for Indian tribes even if such lands have not formally been designated as an Indian reservation. These two statements appear to be, at least in part, inconsistent. On the one hand, EPA states that TAS status will only apply to waters within the borders of a reservation, but on the other hand, appears to state that waters on trust lands, even if outside reservation borders, may be included within the definition of Indian reservation.

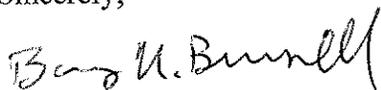
In order to provide more clarity regarding lands subject to the reinterpretation, IDEQ requests EPA address the following situation: If there is a formally recognized reservation, are trust lands outside the borders of such a reservation included within the definition of Indian reservation under section 518(e)?

3. IDEQ questions whether EPA is correct in its assertion that the revised interpretation will have no effect on existing state CWA programs and requests clarification on whether States will be preempted from applying State water quality law. 80 Federal Register at page 47439. Under EPA's current interpretation, there is no express delegation of authority to tribes. Thus, prior to EPA approving TAS status for a tribe, tribal authority is limited to the tribes' inherent authority to regulate non-tribal members. With certain exceptions, tribes cannot regulate non-tribal members on non-tribal land within an Indian reservation. States, on the other hand, generally have the authority to regulate non-tribal members on such land. And, even when a tribe has the inherent authority to regulate non-tribal members on non-tribal land, States may have concurrent jurisdiction to apply state water quality law.

Under EPA's revised interpretation, section 518(e) provides an express delegation to Indian tribes to regulate all water resources within the borders of a reservation, even those waters on non-tribal member lands. IDEQ is concerned that, under EPA's revised interpretation, IDEQ will be preempted from applying state water quality law to non-members on non-tribal land, even prior to the approval of TAS status for a tribe. If this is true, then EPA's revised interpretation will certainly have an impact on existing state CWA programs. IDEQ requests EPA clarify whether under the revised interpretation, States will be preempted from applying state water quality law to non-tribal members on non-tribal land within the borders of a reservation and if there is a preemption, whether the state is preempted prior to EPA approval of TAS status.

4. IDEQ agrees with EPA that the revised interpretation does not foreclose debate over the borders of Indian reservations. 80 federal register 47438. Section 518(e) only applies to water resources within the borders of Indian reservations. EPA correctly notes, however, that there may still be significant disagreement over the borders of a reservation. See, e.g., *South Dakota v. Yankton Sioux Tribe*, 118 S.Ct. 789 (1998) (This case involved a dispute over the borders of a reservation in which the court found that, for purposes of regulatory jurisdiction over a landfill, the borders of a tribal reservation had been diminished.); *In Re SRBA, Consolidated Subcase 03-10022 (Nez Perce Tribe Instream Flow Claims)* (Fifth District State of Idaho 1999). When significant issues regarding the borders are outstanding, EPA's revised interpretation will do nothing to reduce the burden or time involved in determining TAS status for a tribe.

Sincerely,



Barry Burnell
Water Quality Division Administrator