TRIBAL ENVIRONMENTAL REGULATIONS

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INHERENT ENVIRONMENTAL AUTHORITY

Tribal nations are often described as extra constitutional because they predate the U.S. Constitution, and their powers are not defined by the Constitution. Because of this, Tribes retain authority similar to other sovereigns unless divested of it in one of three ways: (1) voluntarily through treaty, (2) through explicit Congressional action, or (3) due to inconsistency with a Tribe’s status as a domestic dependent nation within the United States.

Conflict often arises over a Tribe’s authority where non-Tribal members who own land within a reservation challenge Tribal regulatory authority. A general principle is that the inherent sovereign powers of a Tribe do not extend to the activities of non-members. However, there are two exceptions in which Tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians within their reservations, even on non-Tribal fee lands:

1. Where nonmembers enter consensual relationships with the Tribe or its members, through commercial dealing, contracts, leases, or other arrangements.
2. Where nonmember conduct threatens or has some direct effect on the political integrity, economic security, or health or welfare of the Tribe. This second exception is often the basis for a Tribe’s environmental regulatory authority across its reservation.

NON-TAS ENVIRONMENTAL REGULATIONS

Many Tribes in Wisconsin have environmental regulations rooted in each Tribe’s inherent authority. These cover water quality, discharge of pollutants, radioactive material, and many other environmental concerns. Below are a few select examples:

- **Menominee Indian Tribe of Wisconsin** has extensive groundwater and surface water quality standards.
- **Oneida Nation of Wisconsin** has set out a structure for promulgating and enforcing water quality standards through the Oneida Environmental Department.
- **Red Cliff Band of Lake Superior Chippewa** has established a comprehensive statutory chapter for pollution and environmental protection.
- **Stockbridge-Munsee Band of Mohican Indians** has an extensive water pollution control law.

* The Native American Rights Fund maintains a robust online library of Tribal laws, available here: [https://narf.org/nill/triballaw/index.html](https://narf.org/nill/triballaw/index.html)
In addition to Tribes setting regulations through their own authority, they can apply for authorization from the U.S. Environmental Protection Agency (EPA) to administer many federal environmental programs, such as the Clean Air and Clean Water Acts, under what is called Treatment in a Similar Manner as a State (TAS). This is similar to the way that many states receive EPA authority to administer such programs. Some statutes, such as the Clean Air Act, are viewed as delegating federal environmental regulatory authority to Tribes. Where delegated authority exists, a Tribe does not need to show inherent authority by demonstrating it satisfies one of the exceptions in *Montana*.

Delegated authority is not as clear for the Clean Water Act (CWA). For 25 years, the EPA interpreted the CWA as requiring a Tribe to show authority over the waters it sought to regulate. However, in 2016 EPA issued a new interpretation, finding that the CWA did in fact delegate authority to Tribes to administer CWA programs such as setting water quality standards and issuing pollution discharge and wetland fill permits.

### Rule Changes & Jurisdictional Uncertainty

Disagreements in recent decades over which waters are within federal jurisdiction—known as Waters of the United States—have implications for Tribes administering the CWA under delegated authority. The most recent Supreme Court case dealing with this issue, *Rapanos v. United States* (2006), lacked a clear resolution. EPA has since issued two conflicting rules, in 2015 and 2020, drawing on opinions written by different justices in *Rapanos*. This matters for Tribes because if a Tribe is acting under delegated federal authority, it can only regulate waters within federal jurisdiction.

Where a Tribe does not administer a federal environmental program, federal agencies carry out these programs rather than states. This is because reservation lands are held by the federal government on behalf of Tribes. These federal agencies, such as the EPA or Army Corps of Engineers, are similarly limited by federal jurisdiction.
Federal law and regulations require Tribes demonstrate:

1. the Tribe is federally recognized;
2. the Tribe has a governing body carrying out substantial governmental duties and powers;
3. the air, lands, or waters to be managed and protected are held by an Indian tribe or otherwise within the borders of an Indian reservation, or the Tribe can demonstrate a basis for jurisdiction; and
4. the Indian tribe is reasonably expected to be capable, in the EPA Administrator's judgment, of carrying out the program in a manner consistent with federal law and all applicable regulations.

Wisconsin v. EPA (2001)

Decided by the federal Seventh Circuit Court of Appeals, this case concerned the EPA’s decision to grant the Sokaogon Chippewa Community TAS authority to set water quality standards. Wisconsin opposed the Tribes’ application, arguing that only Wisconsin could regulate water bodies in the state. Despite Wisconsin’s opposition, the EPA found that the Tribe demonstrated inherent authority over the water resources within its reservation, noting that “the inherent authority question did not turn on who had title to the land underneath the waters.” The Seventh Circuit upheld the decision to grant TAS status, finding that the Tribe adequately demonstrated the importance of the bodies of water “to the Band’s economic and physical existence.”