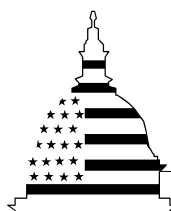


October 2005

INDIAN TRIBES

EPA Should Reduce the Review Time for Tribal Requests to Manage Environmental Programs



G A O

Accountability * Integrity * Reliability

Highlights of **GAO-06-95**, a report to congressional requesters

Why GAO Did This Study

The Clean Water, Safe Drinking Water, and Clean Air Acts authorize the Environmental Protection Agency (EPA) to treat eligible Indian tribes in the same manner as a state (referred to as TAS) for implementing and managing environmental programs on Indian lands. Some states are concerned that tribes receiving authority to manage these programs may set standards that exceed the state standards and hinder states' economic development. GAO was asked to report on the (1) extent to which EPA has followed its processes for reviewing and approving tribal applications for TAS and program authorization under the three acts, (2) programs EPA uses to fund tribal environmental activities and the amount of funds provided to tribes between fiscal years 2002 and 2004, and (3) types of disagreements between parties over EPA's approval of TAS status and program authorization and methods used to address these disagreements.

What GAO Recommends

GAO recommends EPA develop a written strategy, including estimated time frames, for reviewing tribes' TAS applications for program authority and updating the tribes on the review status. In commenting on a draft of this report, EPA agreed with GAO's findings and emphasized its commitment to addressing the issues raised in the report.

www.gao.gov/cgi-bin/getrpt?GAO-06-95.

To view the full product, including the scope and methodology, click on the link above. For more information, contact John B. Stephenson at (202) 512-3841 or stephensonj@gao.gov.

INDIAN TRIBES

EPA Should Reduce the Review Time for Tribal Requests to Manage Environmental Programs

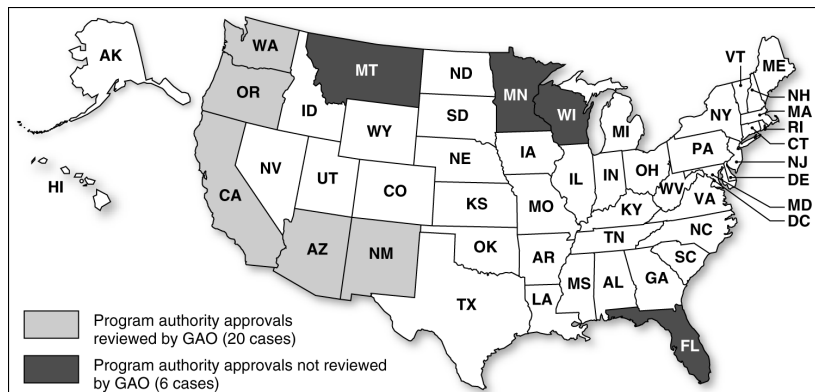
What GAO Found

EPA generally followed its established processes for reviewing and approving tribal requests for TAS and program authority under the three acts, according to GAO's analysis of approved requests. However, the review time for approving these requests generally took from about 1 year to more than 4 years. In addition, nearly all of the requests currently under review were submitted more than 1 year ago. Key factors contributing to the lengthy reviews include the multiple reviews required by the agency's regional and headquarters offices, a lack of emphasis within the agency to complete the reviews in a timely manner, and turnover of tribal and EPA staff. Moreover, EPA has not developed a written strategy that establishes overall time frames for reviewing requests. EPA officials agreed that more could be done to improve the timeliness of the review process but said that complex issues—including evolving Indian case law and jurisdictional issues—may have contributed to the lengthy reviews. Furthermore, EPA's review process is not always transparent on the status of tribes' TAS requests. Lack of transparency limits tribes' understanding of what issues may be delaying EPA's approval and what actions, if any, may be needed to address the issues.

EPA provided Indian tribes about \$360 million in grants to fund a broad range of tribal environmental activities from fiscal years 2002 through 2004. About half of these funds were distributed through two acts: the Indian Environmental General Assistance Program Act (about \$114 million)—to help build capacity to administer environmental programs—and the Clean Water Act (about \$66 million)—to help prevent and reduce water pollution.

Since 1986, when Congress began amending the three environmental acts to allow TAS for tribes, disagreements over land boundaries and environmental standards have arisen between tribes, states, and others. Disagreements have been addressed through litigation, collaboration, and federal laws.

States Where Tribes Are Approved for Program Authority, as of June 2005



Source: GAO presentation based on EPA data.

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United States Government Accountability Office
Washington, D.C. 20548

October 31, 2005

The Honorable James M. Inhofe
Chairman, Committee on Environment
and Public Works
United States Senate

The Honorable John McCain
Chairman, Committee on Indian Affairs
United States Senate

The Clean Water Act, Safe Drinking Water Act, and Clean Air Act authorize the Environmental Protection Agency (EPA) to treat Indian tribes in the same manner as it does states,¹ referred to as TAS,² for the purposes of implementing these laws on tribal lands. Recent lawsuits and disagreements between parties over EPA's approval of tribes' TAS status and authority to implement and enforce a given environmental program (program authority) highlight the sensitivities associated with TAS approval. On the one hand, tribes want to be treated as states and assume program responsibilities to protect their environmental resources because they are sovereign governments and have specific knowledge of their environmental needs.³ Tribes also generally believe that TAS status and program authority are important steps in addressing the potential impacts of economic development affecting their land. On the other hand, in some cases, states are concerned that tribes with program authority may impose standards that are more stringent than the state's, resulting in a patchwork of standards within the state and potentially hindering the state's economic development plans. In addition, conflicts sometimes arise between states and tribes over the extent of tribal jurisdiction in cases where Indian lands are no longer located within formal reservations or in cases in which nontribe members live within reservation areas.

¹Under these laws, EPA may authorize states to establish their own standards and carry out a state program in lieu of the federal program. State standards must meet or exceed federal requirements.

²The acts generally use the term "treat as states." EPA and most Indian tribes prefer to use the term "treatment in the same manner as a state."

³As sovereign governments, Indian tribes have inherent authority to establish tribal environmental programs under their own laws. However, to administer federal environmental programs on their land, tribes must obtain approval from EPA.

EPA's Indian policy, established in 1984, states, among other things, that EPA "will take affirmative steps to encourage and assist tribes in assuming regulatory and program management responsibilities... within the constraints of its authority and resources." As such, EPA offers several financial assistance programs to tribes.⁴ For example, the Indian General Assistance Program, established under the Indian Environmental General Assistance Program Act of 1992, supports tribes' efforts to develop their capability to implement environmental programs. In addition, grants under the Clean Water, Safe Drinking Water, and Clean Air Acts help tribes to develop water quality programs, create drinking water protection programs, and plan and manage air quality activities. Some of these grants require TAS status, others do not.

To be approved for TAS, which is a prerequisite for obtaining program authority under the three environmental acts, a tribe must demonstrate its eligibility by showing that it (1) is officially recognized by the Secretary of the Interior, (2) has a governing body that is currently carrying out substantial governmental duties and powers over a defined area, (3) has jurisdiction over the land where the resources are located,⁵ and (4) is capable of administering the program. Once EPA receives a tribe's application for TAS, it has 30 days to notify appropriate governmental entities of the tribe's request.

After EPA approves a tribe's TAS request, the tribe needs to obtain EPA authorization to implement and enforce a given program. EPA generally recommends that tribes adopt the standards of the adjacent states when first setting tribal standards. However, EPA does not track the extent to which tribes adopt adjacent state standards. Under its regulations for implementing the Clean Water Act, EPA requires a tribe to hold a public hearing so that interested parties can review and comment on the tribe's

⁴EPA also provides financial assistance to other entities such as state and local governments, educational institutions, and not-for-profit organizations.

⁵The specific language pertaining to jurisdiction under the Clean Water Act states that "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...or otherwise within the borders of an Indian reservation." 33 U.S.C. § 1377(e)(2). The specific language pertaining to jurisdiction under the Safe Drinking Water Act states that "the functions to be exercised by the Indian Tribe are within the area of the Tribal government's jurisdiction." 42 U.S.C. § 300j-11(b)(1)(B). The specific language pertaining to jurisdiction under the Clean Air Act states that "the functions to be exercised by the Indian tribe pertain to the management and protection of air resources within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction." 42 U.S.C. §7601(d)(2)(B).

proposed water quality standards before EPA approves them.⁶ EPA's regulations under the Safe Drinking Water Act require the agency to announce in the *Federal Register* that the tribe has the authority to administer a program and allow 30 days to request a public hearing. Under its regulations for implementing the Clean Air Act's operating permits program,⁷ EPA must also announce its approval for a tribe to administer a program in the *Federal Register*; however, the notice is not subject to public comment.

There are 562 federally recognized tribes.⁸ Fifty-seven tribal entities have requested TAS in order to obtain program authority under at least one of the three acts, and some for multiple programs, for a total of 61 requests.⁹ EPA has approved 32 of these requests and is still reviewing 29. Thirty of the approved TAS requests were to implement a clean water program, 1 was for a safe drinking water program, and 1 was for a clean air program. For 26 of the 32 approved TAS requests, tribes have also received EPA approval of water quality standards, or authorization to administer public water systems or issue and enforce federal air permits.

You asked us to report on the (1) extent to which EPA has followed its processes for reviewing and approving tribal requests for treatment as a state and program authorization under the Clean Water, the Safe Drinking Water, and the Clean Air Acts; (2) programs EPA uses to fund tribal environmental activities and the amount of funding it has provided to tribes between fiscal years 2002 and 2004; and (3) types of disagreements that have occurred between parties over EPA's approval of tribes' TAS status

⁶The regulations discussed in this paragraph also apply to states.

⁷For the purposes of our report, we only looked at TAS requests for Part 71—operating permits under the Clean Air Act. Indian tribes have also been approved for treatment as an affected state under title V of the Clean Air Act, which allows them to review and comment on permits issued by neighboring states to facilities having the potential to impact tribal lands.

⁸68 *Fed. Reg.* 68180 (Dec. 5, 2003).

⁹Tribal entities may include tribes as well as bands or Indian communities within a tribe. For example, the Chippewa tribe in Minnesota includes the Grand Portage Band, the Fond du Lac Band, the Bois Forte Band, the Mille Lacs Band, the Leech Lake Band, and the White Earth Band. For purposes of this report, we refer to these entities as tribes. The tribes referred to in these analyses are tribes that have submitted TAS applications for program authority. The analyses do not include tribes that have requested TAS status to secure certain grants.

and program authorization and the methods that have been used to address these disagreements.

To address these issues, we met with selected officials from EPA and the Department of the Interior's Bureau of Indian Affairs in Washington, D.C., and three EPA regions—in Region 6 (Dallas), Region 9 (San Francisco), and Region 10 (Seattle). We chose these regions because they had the largest number of approvals for program authority—18 approvals under the Clean Water Act, and 1 each under the Safe Drinking Water and Clean Air Acts. We reviewed a total of 20 case files in detail in these three regions—accounting for 77 percent of all approved tribal requests (20 of 26) for program authorization under the three acts—to determine whether EPA had followed established TAS and program authorization processes. Our case file review included, among other things, an assessment of whether EPA met its requirements to notify appropriate governmental entities of a tribe's request within 30 days of receipt.¹⁰ We also reviewed data provided by EPA on another 12 TAS and/or program authority approvals, bringing the total number of TAS approvals reviewed to 32. We focused primarily on the Clean Water Act because most activity has occurred under the act. However, we also reviewed EPA's process for reviewing and approving tribal requests under the Safe Drinking Water and Clean Air Acts. In addition, we met with state officials and representatives of Indian tribes in Arizona, New Mexico, Oklahoma, and Washington. To address the second objective, we analyzed EPA's Integrated Grants Management System grants data for tribes that have received financial assistance for environmental programs for fiscal years 2002 through 2004.¹¹ We assessed the reliability of EPA's grants data system and found it sufficiently reliable for the purposes of our report. Finally, we interviewed selected EPA, state, and tribal officials to discuss the methods used to address issues associated with areas of possible disagreements, such as jurisdictional boundaries, that interested parties may raise. A more detailed description of our scope and methodology is presented in appendix I. We performed our work between November 2004 and October 2005, in accordance with generally accepted government auditing standards.

¹⁰See 40 C.F.R. §131.8 for the Clean Water Act and 40 C.F.R. §49.9 for the Clean Air Act.

¹¹We obtained the data from EPA's Integrated Grants Management System, a computer database used by the agency to manage and report on information about grants.

Results in Brief

EPA followed its processes in most respects for approving tribal requests for TAS status and program authorization for the 20 cases we reviewed, but we found some lengthy delays in these processes. Specifically, for these 20 cases, EPA verified that the tribe is federally recognized, has authority within its tribal boundaries, and is technically capable of carrying out the requested environmental program. However, in 17 of the 20 cases, EPA did not notify affected governmental entities within its established 30 day time frame of a tribe's TAS request, but instead took about 5 months, on average. Moreover, EPA has not established overall time frames for reviewing requests, and for the 20 cases, 10 took more than 1 year for approval and 2 took more than 4 years. Furthermore, the lack of transparency of EPA's review process may hinder a tribe's understanding of the status of its request and what actions, if any, may be needed. Multiple reviews, a lack of emphasis within EPA about the timeliness of the TAS review, and turnover in EPA and tribal staffs contributed to delays in the approval process. EPA officials agreed that more could be done to improve the timeliness of its review process and stated that several complex issues, including evolving Indian case law and jurisdictional issues, contributed to the length of some reviews. Delays in the approval process may hinder a tribe's efforts to control its environmental resources. Tribal officials in one state told us that they have not submitted a TAS request because of EPA's lengthy review process. EPA has recently begun working with its regions to update the status of pending TAS requests and to address how best to expedite reviews. To improve EPA's process for reviewing tribal requests for TAS for program authorization, we are recommending that the Administrator of EPA develop a written strategy with estimated time frames for reviewing and approving tribal requests for TAS for program authorization under the three acts and periodically provide status reports to affected tribes.

For fiscal years 2002 through 2004, EPA provided Indian tribes about \$360 million in grants to fund a broad range of environmental activities. Half of the funds were distributed through two specific programs: (1) the Indian General Assistance Program to help tribes build capacity to administer environmental programs, including planning, developing, and establishing environmental protection programs—approximately \$114 million and (2) the Clean Water Act to help tribes prevent, reduce, and eliminate water pollution—approximately \$66 million. In addition, EPA provided funds through a variety of other programs, including the Safe Drinking Water Act, the Clean Air Act, the Toxic Substances Control Act, and the Comprehensive Environmental Response, Compensation, and Liability Act.

Nearly all tribal requests for grants are reviewed and funded at the regional level.

Since 1986, when Congress amended the first of the three environmental laws to allow TAS status for tribes, a number of disagreements between tribes, states, and municipalities have arisen, concerning land boundaries, environmental standards, and other issues. The disagreements have been addressed in various ways, including litigation, collaborative efforts, and changes to federal laws. In terms of litigation, for example, in *City of Albuquerque v. Browner*,¹² the city challenged EPA's approval of the Pueblo of Isleta tribe's water quality standards, which are more stringent than those of New Mexico, where the Pueblo of Isleta tribe is located, but EPA's approval was upheld. In other situations, some tribes and states have addressed issues more collaboratively. For example, the Navajo Nation and the Arizona Department of Environmental Quality entered into a cooperative agreement that, among other things, recognizes the jurisdiction of the Navajo Nation's lands within its reservation and establishes a plan to share the cost of pilot projects. In some cases, EPA facilitates resolution of disagreements between states and tribes during the review process. Regarding federal legislation, a federal statute enacted in August 2005, requires Indian tribes in Oklahoma to enter into a cooperative agreement with the state before EPA can approve a tribe's TAS request.¹³ Currently, the Pawnee Nation is the only Oklahoma tribe that has been awarded TAS status to set its own water quality standards. In addition, EPA has established a dispute resolution mechanism under the Clean Water Act to address disagreements between tribes and states but no parties have yet used this mechanism to address such disagreements.

We provided EPA with a draft of this report for its review and comment. In commenting on the draft report, EPA agreed with our findings and stated that it was currently engaged in addressing many of the issues we raised. EPA also provided technical comments, which we have incorporated into this report as appropriate. Appendix V contains the full text of the agency's comments.

¹²97 F.3d 415 (10th Cir. 1996), *cert. denied*, 522 U.S. 965 (1997).

¹³Pub. L. No. 109-59, § 10211 (2005).

Background

The Clean Water, Safe Drinking Water, and Clean Air Acts emphasize the importance of state involvement in protecting the environment and public health and allow EPA to authorize states to implement their own programs in lieu of the federal program—referred to as program authorization. From 1986 to 1990, Congress amended these three acts to authorize EPA to treat Indian tribes in the same manner as states for purposes of program authorization.

Under EPA's implementation of the Clean Water Act, a tribe may submit a request to EPA for TAS status and then submit a request for approval of its adopted water quality standards, or submit both the TAS request and the water quality standards approval request at the same time. Section 518 of the Clean Water Act lists the eligibility criteria EPA will use to approve TAS status and to authorize Indian tribes to administer Clean Water Act programs.

In applying for TAS under the Clean Water Act, a tribe, among other things, submits a descriptive statement that includes a map or legal description of the area over which the tribe intends to assert jurisdiction. For purposes of this discussion, Indian lands can be separated into three general categories: (1) lands within the exterior boundaries of a formal reservation, (2) tribal trust lands lying outside formal reservation boundaries, and (3) individual allotments lying outside reservation boundaries.¹⁴ EPA considers lands within the boundaries of a formal reservation and tribal trust lands lying outside of formal boundaries to be reservations for purposes of section 518 of the Clean Water Act. For the third category—individual allotments—EPA has not historically considered the Clean Water Act to cover allotments outside of reservations.

EPA follows similar processes for TAS under the Clean Water, Safe Drinking Water, and Clean Air Acts. EPA's approval process for tribal requests for TAS begins in its regional offices, where officials verify that the requests meet eligibility requirements. EPA also requires its headquarters staff to review the first TAS request received and approved in each region

¹⁴Allotments are parcels of land held in trust by the United States for the benefit of individual Indians.

under the Clean Water and Safe Drinking Water Acts¹⁵ and to review all other TAS requests, that appear to be nationally significant because, for example, of new legal issues. Where practical, regional and headquarters reviews are conducted concurrently, according to EPA officials. Except for specific tasks, such as the 30-day public comment period, EPA has not established time frames or goals for the length of its review process.

In addition to relevant statutory and regulatory guidance, EPA may refer to federal case law concerning Indian tribes when reviewing a tribe's TAS request, which we refer to as Indian case law in this report. For example, EPA uses Indian case law to determine whether a tribe has the authority to regulate an activity on land owned by nonmembers but located within a reservation. In particular, in 1981, the Supreme Court held that, as a general rule, absent delegation by federal statute or treaty, Indian tribes lack authority to regulate the conduct of nonmembers on non-Indian land within reservation boundaries, except when (1) nonmembers enter into a consensual relationship with the tribe or (2) activities by nonmembers on lands within the reservation threaten or have a direct effect on the political integrity, economic security, or health or welfare of the tribe. This ruling is known as the Montana test.¹⁶

With respect to program authorization, EPA's review process is generally the same for tribes and states. Specifically:

- For the Clean Water Act, EPA determines, for example, whether the (1) water uses are consistent with the requirements of the act, (2) adopted criteria protect the designated water uses, and (3) appropriate technical and scientific data and analyses have been used. The Clean Water Act allows states and tribes to establish water quality standards that are more stringent than federal requirements.
- Under the Safe Drinking Water Act, EPA requires states and tribes to demonstrate the capability to administer primary enforcement

¹⁵According to EPA officials, the agency has no similar requirement for TAS applications under the Clean Air Act, although they are reviewed in headquarters for national significance.

¹⁶*Montana v. United States*, 450 U.S. 544 (1981). Other Supreme Court cases concerning tribal authority include *Brendale v. Confederated Tribes and Bands of the Yakima Nation*, 492 U.S. 408 (1989), *Nevada v. Hicks*, 533 U.S. 353 (2001), and *Atkinson Trading Company, Inc. v. Shirley*, 532 U.S. 645 (2001).

responsibility in a number of key areas. Among other things, EPA determines whether the state or tribe has (1) adopted drinking water regulations that meet or exceed EPA's national primary drinking water regulations; (2) adopted and is implementing adequate procedures for enforcing its regulations, including demonstrating authority to assess penalties for violations; and (3) adopted and can implement an adequate plan to provide safe drinking water under emergency circumstances, such as hurricanes and other natural disasters.

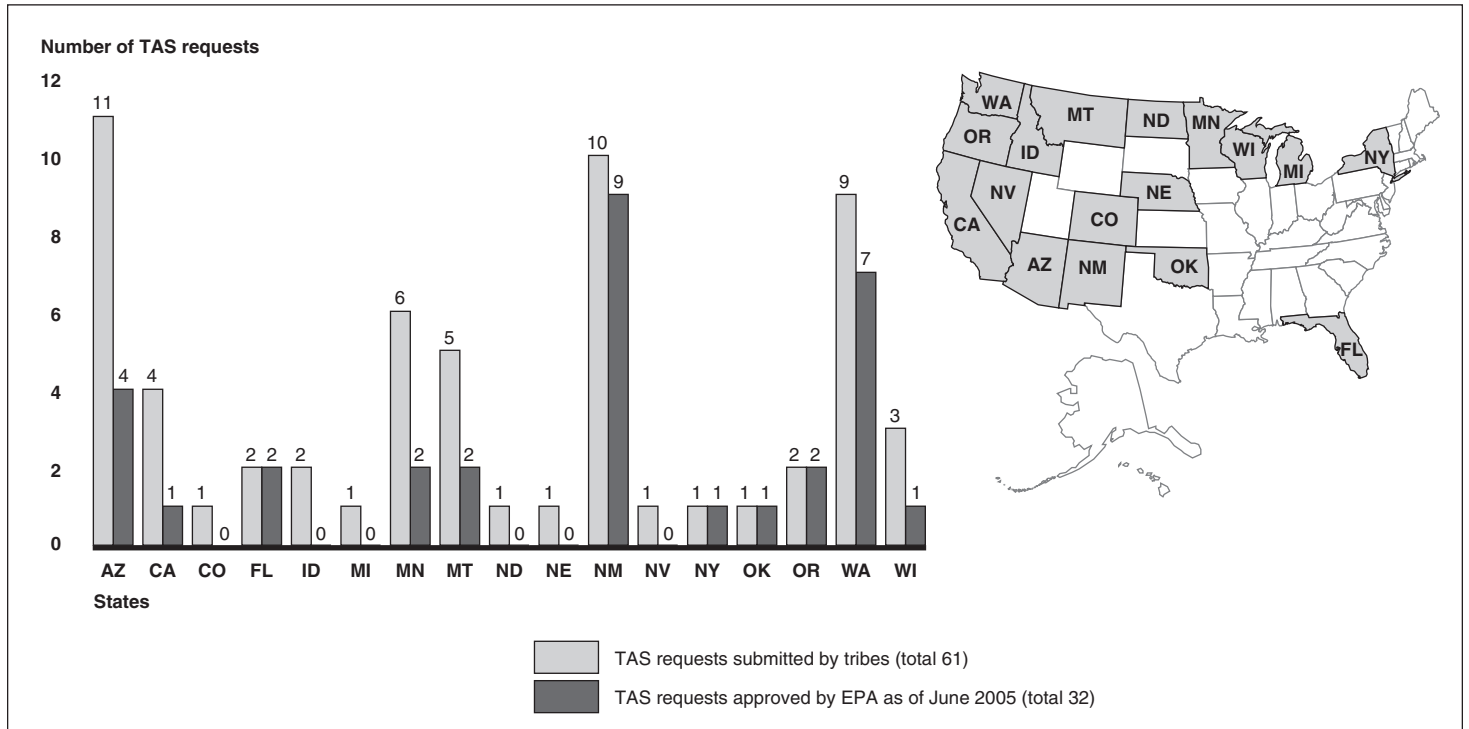
- Under the Clean Air Act, EPA can authorize states and tribes to issue and enforce federal air permits. For this authority, the tribe must, among other things, submit a legal opinion, stating that the laws of the Indian tribe provide adequate authority to carry out all aspects of the delegated program. EPA and the eligible tribe then sign a Delegation of Authority Agreement, which specifies the provisions that the tribe is authorized to implement on behalf of EPA. EPA is responsible for announcing this delegation in the *Federal Register*.

Since 1988, 57 of the 562 federally recognized tribal entities in the United States have submitted 61 requests seeking TAS for program authority under the three acts;¹⁷ these entities are from 17 states. Of the 61 TAS requests, EPA has approved 32: 30 under the Clean Water Act, 1 under the Safe Drinking Water Act, and 1 under the Clean Air Act. The remainder are under review. Of the 32 approved TAS requests, 26 have also been approved for program authority—24 for Clean Water, 1 for Safe Drinking Water, and 1 for Clean Air.¹⁸ Figure 1 shows the states where tribes have submitted and been approved for TAS status under the three environmental acts, the number of TAS submittals, and the number of TAS approvals in each state.

¹⁷Of the 57 tribal entities, 1 has submitted applications under two of the acts (Clean Water and Safe Drinking Water) and 1 has submitted four applications under the three acts.

¹⁸Technically, the term “program authorization” does not apply to the water quality standards program under the Clean Water Act; rather EPA approves the tribe’s water quality standards. However, for the purposes of our report, we are using the term to represent program authority under the three acts.

Figure 1: States Where Tribes Have Submitted and Been Approved for TAS under the Three Environmental Acts, as of June 2005



Source: GAO presentation based on EPA data.

EPA relies on grants as one of its primary ways to carry out its mission of protecting human health and safeguarding the environment. Each fiscal year, EPA awards approximately \$4 billion in grants to state and local governments, tribes, educational, nonprofit organizations, and other entities for projects that range from conducting environmental research to constructing wastewater treatment facilities to developing regulatory programs. The funds are generally based on formulas laid out under each law or regulation. To be eligible for most EPA grant programs, a tribe must be federally recognized.¹⁹ In addition, for some grant programs, such as section 106—for the prevention, reduction, and elimination of water pollution—under the Clean Water Act, a tribe must also have obtained TAS status to be eligible. For other grants, such as section 105—to develop and administer programs that prevent and control air pollution or implement national air quality standards—under the Clean Air Act, a tribe is not required to have TAS status, but TAS status has a substantially lower matching contribution requirement (from 5 percent with TAS status to 40 percent without). The grants' TAS criteria are less demanding and thus the review process is less rigorous than the review process for TAS for program authority. In addition, the grant decision is based solely on EPA's expertise, and EPA does not generally get public comments on whether the tribe has jurisdiction.²⁰ Approval for TAS for grant purposes does not qualify tribes for TAS for program authority purposes; however, tribes may use their TAS grant status to help demonstrate capability to administer a program when applying for program authority TAS. Finally, for other grant programs, such as the Indian General Assistance Program, no TAS requirement exists.

Financial assistance for tribal environmental programs is funded under EPA's State and Tribal Assistance Grants appropriation. The funds are generally based on specific formulas laid out in law or regulation, and regions that have the largest number of tribes receive the largest proportion of grant awards and grant dollars. The five states receiving the most tribal grants—Alaska, Arizona, California, New Mexico, and

¹⁹Specifically, grants under the Clean Water, Safe Drinking Water, Clean Air, and Indian Environmental General Assistance Program Acts require federal recognition. Tribes that are not federally recognized may receive grants through other programs.

²⁰Specifically, EPA does not obtain public comments on grants under the Clean Water or Safe Drinking Water Acts. However, for TAS determinations under the Clean Air Act, EPA seeks comments from appropriate governmental entities on the tribe's reservation boundaries or jurisdictional claims.

Oklahoma—are located in EPA’s Regions 6, 9, and 10. Of the 1,343 grants awarded to Indian tribes under the Clean Water, Safe Drinking Water, Clean Air, and Indian General Assistance Program Acts between fiscal years 2002 through 2004, about 99 percent were awarded by EPA’s regions.

Each grant program has its own request and award process and grant opportunities are based on funding availability. As a result, a tribe may receive a grant in one year and not in another. While funding of tribal grants has remained relatively constant, according to EPA officials, the agency’s outreach to tribes and the growing awareness of environmental issues among tribes, has led to steadily increasing numbers of requests and grants being awarded.

EPA’s Approval Process for TAS and Program Authorization Was Generally Followed, but Some TAS Approvals Were Delayed by Lengthy Reviews

For the 20 cases we examined in detail, EPA followed its processes for approving tribal requests for TAS and for program authorization, except for adhering to the 30-day time frame for notifying governmental entities. However, for these 20 cases, as well as for another 12 tribal requests for TAS that EPA approved,²¹ the TAS review process was often lengthy.²² In addition to those 32 TAS approvals, EPA is currently reviewing 29 TAS requests, 27 of which were submitted more than a year ago. EPA officials agreed that more could be done to improve the timeliness of the review process, and the agency has recently begun working with its regions to determine the status of outstanding requests and how best to expedite reviews. The officials stated that evolving Indian case law and complexities associated with some jurisdictional issues sometimes required them to spend more time evaluating tribal TAS requests. Delays in the approval process may hinder a tribe’s efforts to control its environmental resources. Furthermore, as we learned during our review, lengthy delays and a lack of transparency in the review process may discourage tribes from even submitting requests for TAS status. In terms of tribal requests for approval of water quality standards, EPA approved most tribal requests in less than 1 year but the agency generally did not meet its own standard for approval within 60 days.

²¹Our analysis of these 12 requests, which we did not review in detail, is based on EPA-provided data.

²²According to EPA, 6 of these 12 TAS requests have been approved for program authorization.

EPA Followed Its Procedures for Reviewing and Approving Tribal Requests, except for Timely Notification to Affected Governmental Entities

According to our review of 20 approved cases in Regions 6, 9, and 10, EPA generally followed its established processes for reviewing and approving TAS requests. For example, EPA's files included the required documentation to support its decision to approve a TAS request. First, EPA always ensured that the tribe included a statement that the tribe is recognized by the Secretary of the Interior.

Second, we found that EPA always ensured that tribes provided a statement that their governing body is carrying out substantial governmental duties and powers. To meet this requirement, tribes (1) described the form of tribal government; (2) described the types of governmental functions currently performed by the tribal governing body; and (3) identified the source of the tribal government's authority to carry out these governmental functions. Among other things, tribes provided tribal constitutions, by-laws, and treaties to demonstrate that they were carrying out substantial governmental duties and powers.

Third, the cases we reviewed showed that EPA always ensured that the tribe documented its jurisdiction. Specifically, the files showed that EPA collected a map or legal description of the area over which the tribe intended to regulate—surface water quality, drinking water, or air quality; a statement by the tribe's legal counsel describing the basis for the tribe's assertion of authority; and documentation identifying the resources for which the tribe proposed to establish environmental standards. Some cases indicated that EPA followed up with a tribe when the request lacked adequate documentation to meet this requirement.

Finally, EPA ensured that tribes submitted a narrative statement describing their capability to administer the program to which they were applying. For example, EPA ensured that tribes submitted a description of

- their previous management experience;
- existing environmental or public health programs administered by the tribal governing body and copies of related tribal laws, policies, and regulations;
- the entity that exercises the executive, legislative, and judicial functions of the government;
- the existing, or proposed, agency that will assume primary responsibility for the environmental standards; and

-
- the staffs' technical and administrative capabilities for managing an effective program, and a plan for how the tribe will acquire and fund additional expertise.

Additionally, EPA is required to promptly notify the tribe when the agency has received the TAS request. In three cases, EPA did not have evidence showing that it had notified the tribe that it had received the tribe's request. In these cases, an EPA regional official told us, the agency may have telephoned the tribe to acknowledge receipt of the tribe's request, and this information would not necessarily be documented.

The only two time frames EPA has established require the agency to provide (1) appropriate notice to affected governmental entities within 30 days of receipt of a tribe's request for TAS and (2) interested parties with 30 days to comment on the tribe's request.²³ For the 20 cases we reviewed, EPA always provided affected governmental entities and interested parties 30 days to comment. However, in 17 of the 20 cases, EPA did not notify affected governmental entities within its established 30-day time frame of a tribe's TAS request, but instead took about 5 months, on average.²⁴ EPA officials told us that, in most cases, they worked with Indian tribes to develop their TAS applications prior to the tribe's submission of its application. However, they said that in some cases, applications were still not complete when they were received, resulting in delays in providing notification to governmental entities. EPA said it does not like to notify affected governmental entities of a tribal request until EPA agrees with the tribe that the application is complete.

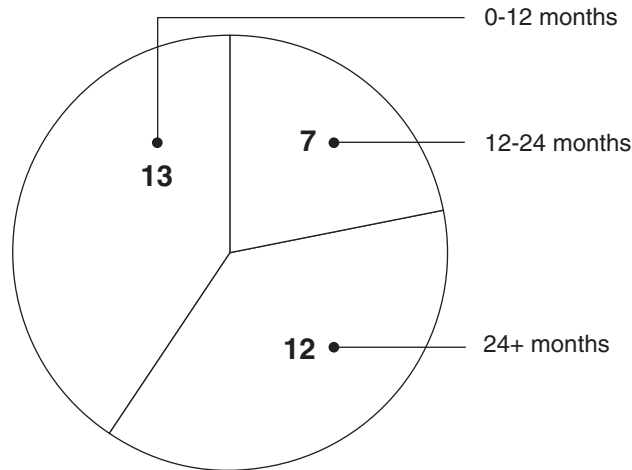
EPA's Process for Approving TAS Requests Was Often Lengthy and Not Guided by Clear Time Frames

Figure 2 shows the review times for the 32 TAS requests approved from 1991 through June 2005. Appendix II provides additional details on the 32 tribal entities that were approved for TAS as of June 2005, the dates that the requests were submitted, and the date EPA approved them.

²³Although EPA has established a 30-day comment period, the agency has extended this time period when requested.

²⁴Under its regulations implementing the Safe Drinking Water Act, EPA is not specifically required to obtain comments from governmental entities concerning a tribe's jurisdiction on its TAS request. Thus, EPA did not have to meet the 30-day requirement on the one approved application under the Safe Drinking Water Act.

Figure 2: Review Times for the 32 Requests Approved for TAS, 1991-2005



Source: GAO analysis of EPA data.

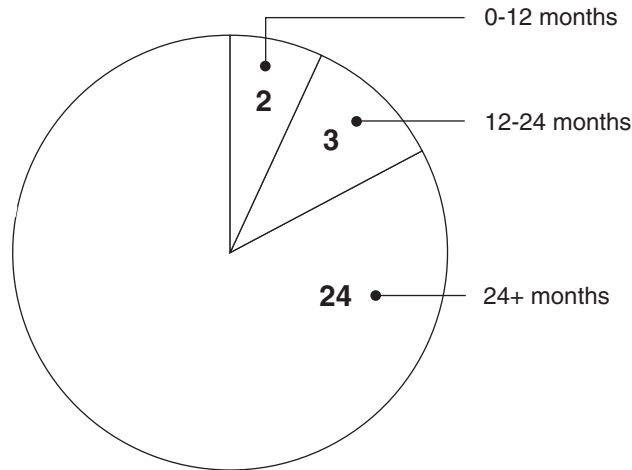
Note: Of the 32 cases, 30 were approved under the Clean Water Act, 1 under the Safe Drinking Water Act, and 1 under the Clean Air Act. Of the 32 cases, 26 were approved for program authority.

Review times for the 32 requests ranged from 3 months to nearly 7 years. As figure 2 shows, 19 of the TAS reviews took 1 year or more for approval. Specifically, for the 20 cases we examined, 10 took more than 1 year for approval, with 2 taking more than 4 years. EPA regulations require that the agency process TAS requests in a “timely” manner and internal guidance issued in 1998 emphasizes the importance of an efficient review process. However, EPA has never developed a written strategy that clarifies what it means by timeliness, including performance goals, and does not routinely track the time it takes to complete its review of these requests.

Reviews for Pending TAS Requests Continue to Be Lengthy

Figure 3 shows the 29 TAS requests under review as of June 2005 and the time elapsed between the request and June 2005. As the figure shows, the time required for reviewing these TAS requests is generally taking 1 or more years, with 24 of the TAS requests under review for more than 2 years; 2 of the 24 requests have been under review for over 10 years. See appendix III for the details on the dates that requests were submitted.

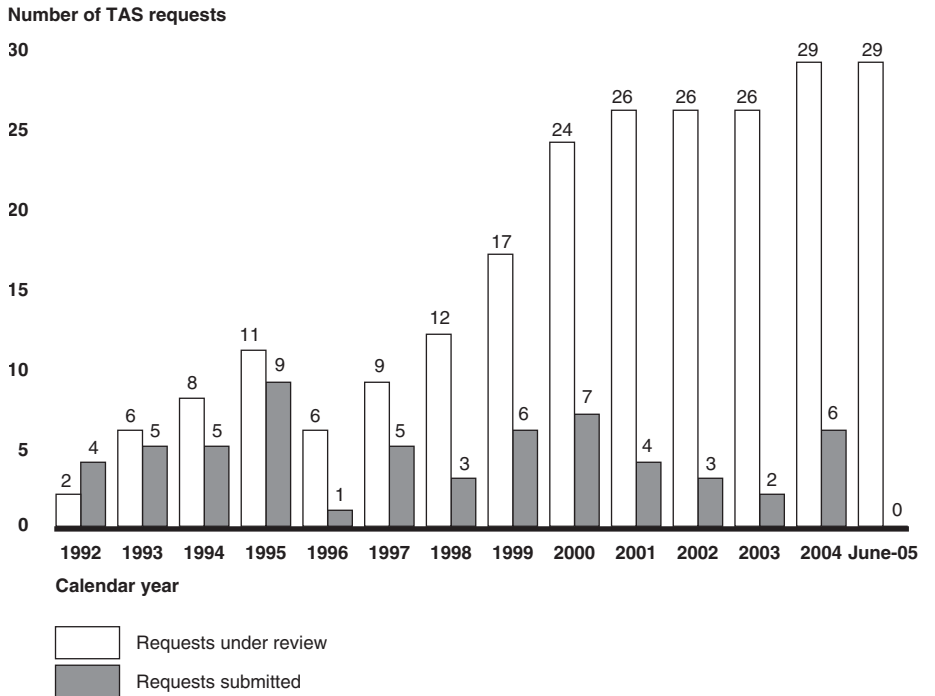
Figure 3: Review Time for TAS Requests under Review, 1994-June 2005



Source: GAO analysis of EPA data.

The number of TAS requests awaiting EPA approval has increased along with the average review time. Specifically, as of 1998, 12 requests were under review, and by June 2005, this number had increased to 29. In addition, the average review time for TAS requests approved as of 1998 was 12 months and the average review time for TAS requests approved between 1998 and June 2005 was 28 months. The average review time for the 29 TAS requests pending as of June 2005 was about 63 months (or over 5 years). Figure 4 shows the number of requests submitted and the number that remained under review at the end of each year, from 1992 through June 2005.

Figure 4: Number of TAS Requests Submitted and under Review, 1992-June 2005



Source: GAO analysis of EPA data.

Note: One TAS request was submitted in 1988. The total number of TAS requests submitted for program authority between 1988 and June 2005 was 61.

According to EPA officials, 15 of the 29 TAS requests currently awaiting approval require some type of action on the part of the tribe, such as providing additional documentation on the tribe's jurisdiction. The other 14 requests are awaiting EPA action, such as analysis and discussion with the tribe, consideration of comments received, and final regional and headquarters review.

Several Factors Cited for Delays in the TAS Approval Process

According to EPA officials, several factors contribute to lengthy TAS reviews. First, both regional offices and headquarters often review the requests. Regional offices have primary responsibility for reviewing and approving TAS requests, but EPA headquarters may repeat the review to ensure that the regional review fully addressed all legal requirements. EPA's policy is for headquarters to review the first TAS request received and approved in each region under the Clean Water and Safe Drinking Water Acts²⁵ and to review all other TAS requests, that appear to be nationally significant because, for example, of new legal issues. In this regard, officials cited evolving Indian case law and complexities associated with some jurisdictional issues as significant contributing factors to added review time. In some cases, EPA officials explained, multiple reviews occur because, for example, a tribe may assert jurisdiction over lands outside of its recognized boundaries. These assertions have led to disagreements among the states and tribes, contributing to delays in EPA's review process. Moreover, EPA has never disapproved a tribe's TAS request. Rather than disapprove a tribe's request, EPA continues working with the tribe until it meets all the eligibility requirements, which could contribute to delays. EPA officials explained that to the extent possible, it conducts its regional and headquarters reviews concurrently.

Second, EPA did not emphasize timely review of TAS requests for some of the 20 cases we reviewed. For example:

- In one case, 20 months after receiving a tribe's TAS request, EPA asked for necessary information on the tribe's water bodies, water uses, and land status. This information should have been included in the original request and followed up on at the time. EPA provided a variety of reasons for delays in this tribe's review, including a lack of timely communication between the tribe and EPA. Based on the problems experienced in this case, EPA's responsible regional office reported that it has taken steps to increase its tribal outreach activities.
- In another case, 23 months after receiving supportive comments from governmental entities and over 1 year after regional counsel agreed that the tribe met all the legal requirements, EPA continued to request additional information regarding the tribe's jurisdiction. According to

²⁵According to EPA officials, the agency has no similar requirement for TAS applications under the Clean Air Act, although they are reviewed in headquarters for national significance.

EPA officials, the agency inadvertently misfiled part of the tribe's application paperwork and was waiting for the tribe to provide a replacement copy of the jurisdictional map so EPA could complete its review.

- Finally, in one case under review for more than 4 years, the tribe amended its request in response to public comments. However, EPA was still requesting basic documentation that should have been included in the original request—2 years into the process. Furthermore, more than 1 year before approving the tribe's TAS request, EPA determined that the request raised no nationally significant issues and stated that the tribal boundaries were clear. EPA officials agreed that there was a delay, but stated that they were not requesting basic documentation, such as the tribal constitution and codes, for the first time after the case had been in review for 2 years. Rather, the region had misplaced the original information provided by the tribe, and EPA was requesting that the tribe provide replacement copies of important information.

In addition, according to EPA and tribal officials, some of the delays during the review process occurred because of turnover in tribal or EPA staffing. Specifically, we were told that some tribes have experienced staff turnover in their environmental departments that affected their capability to administer the environmental program. For example, in one region, EPA officials cited tribal turnover as a cause for delay in 3 of the 10 requests under review. Furthermore, some tribal officials said that changes in their leadership sometimes shift their priorities away from following through with their TAS request. Finally, some EPA regional offices have experienced staff turnover, which caused some delay in reviewing requests because the new staff needed time to become acquainted with the tribes and to establish a relationship. For example, in one regional office, officials said that certain staff positions—those that deal directly with tribes—have changed about every 2 years. According to tribal officials, changes in both tribal and EPA regional staff have made it difficult to keep the continuity that the tribes believe they need to successfully administer a federal environmental program.

According to EPA headquarters officials, in response to renewed concerns from tribes and within EPA, the agency has held management-level discussions with its regions to determine the status of outstanding requests and to determine how best to address the growing backlog. In October 2005, EPA headquarters officials stated that they had completed

discussions with its regions and was analyzing the results to determine whether there are any systemic reasons for the lengthy review times.

Delays and Lack of Transparency in the TAS Process Have Discouraged TAS Requests in One State

Some tribal officials told us that they have not submitted TAS requests because the process has become so lengthy. These officials, who represented five tribes in one western state, have observed the delays that other tribes in the state have experienced. They questioned the value of spending time and resources for such a lengthy process.

Moreover, tribes cannot always determine the status of a particular request, the aspect of the review that may be delaying its approval, or the length of time it will take EPA to complete its review. This lack of transparency may hinder a tribe's understanding of what issues are delaying EPA's approval and what actions, if any, may be needed to address these issues. In one case, the regional office approved the request and sent it to headquarters for concurrence. While the request was in headquarters for about 2 years, regional officials told us they could not determine the status of the request and could not provide the tribe with adequate updates regarding their request. Tribal officials said that, even when asked, EPA could not provide the tribe with a comprehensive list of documents needed to complete the review. The request was under review at the time we completed our work—6 years after it was submitted.

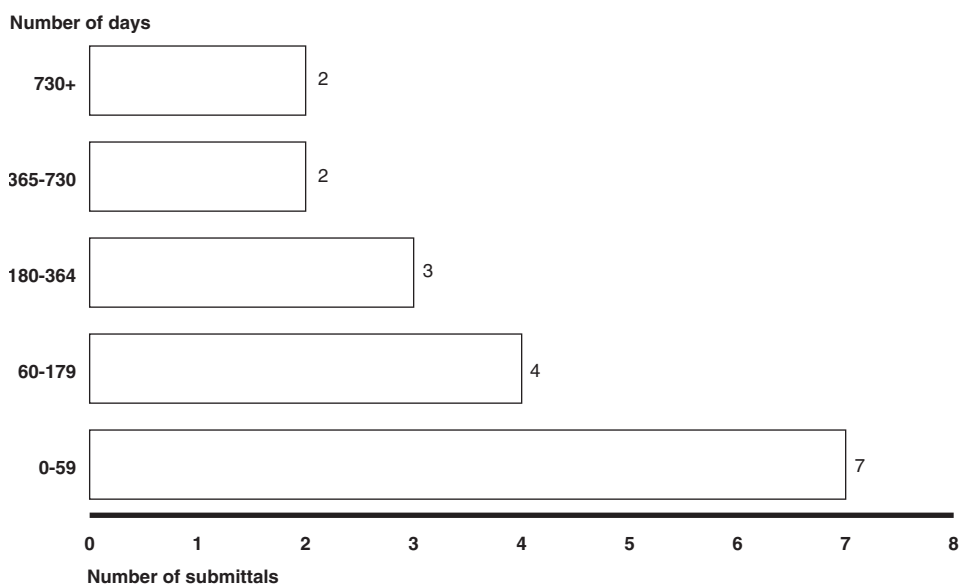
Approvals for Program Authorization Often Do Not Meet Established Time Frames

As specified in the regulations for the Clean Water Act, a tribe must provide appropriate notice to governmental entities and hold a public hearing to discuss its proposed water quality standards. The standards may change in response to hearing comments. Thirty days after the tribe approves the proposed water quality standards, it must provide the regional office with a transcript of the hearing, responses to comments, the tribal-approved standards, and a certificate from a responsible legal authority documenting that the water quality standards have been adopted in accordance with tribal law. Following approval of a tribe's TAS application, EPA's guidelines call for it to approve a tribe's water quality standards within 60 days of the tribe's official submission of its water quality standards.

For the 18 cases we reviewed under the Clean Water Act, EPA met its 60-day requirement for approving water quality standards for 7 of the submissions. However, it did not meet its requirement for the other 11 cases. Figure 5 shows the review times for the 18 tribes submitting water quality standards from 1992 through June 2005. See appendix IV for the

details on the dates that tribes submitted their water quality standards and EPA approved the standards.

Figure 5: Elapsed Time for EPA's Approval of Tribes' Water Quality Standards for 18 Clean Water Act Cases Reviewed



Source: GAO analysis of EPA data.

As figure 5 shows, 11 of the reviews for water quality standards took 60 days or more, with 4 taking 1 year or more for approval.

EPA Provides a Variety of Grants to Help Tribes Manage Their Environmental Programs

For fiscal years 2002 through 2004, EPA provided Indian tribes about \$360 million in grants for a broad range of environmental activities. Of this total, 1,343 grants totaling approximately \$253 million went to 461 Indian tribes under four major acts including the Indian General Assistance Program—which helps tribes develop their capacity to administer environmental programs—and three environmental acts—the Clean Water, Safe Drinking Water, and Clean Air Acts—which help tribes manage their environmental

programs.²⁶ Furthermore, during these three fiscal years, EPA awarded an additional \$106 million under other statutory authorities, including the Toxic Substances Control Act, the National Environmental Education Act, and the Comprehensive Environmental Response, Compensation, and Liability Act. Half of the \$360 million was distributed through two specific programs: (1) the Indian General Assistance Program to help tribes to plan, develop, and establish environmental protection programs—approximately \$114 million and (2) the Clean Water Act to help tribes prevent, reduce, and eliminate water pollution—approximately \$66 million.

Funds provided under the Clean Water, Safe Drinking Water, and Clean Air Acts may be used for such things as research, construction, and the development of regulatory programs. However, according to EPA officials, only a small part of the grant funds are used by tribes to apply for and develop regulatory programs under the various statutes. Although some, but not all, grants require TAS status, the standards of evidence EPA requires for TAS for grants are not as stringent as the standards for TAS for program authority. For example, the TAS grant decision is based on EPA's knowledge of the tribe and the tribe's area of jurisdiction. These decisions do not require EPA to seek comment from affected states and generally do not require a public comment period.

Table 1 shows the amount of grant funding awarded under the Indian General Assistance Program and the three environmental acts for fiscal years 2002 through 2004.

²⁶Under these four acts, our analysis includes grants where EPA has designated the recipient type as an Indian tribe in the agency's Integrated Grants Management System database. Other recipient types include state and local governments, educational institutions, and not-for-profit organizations. EPA also awards grants under other acts, including the Toxic Substances Control Act and the Federal Insecticide, Fungicide, and Rodenticide Act. EPA's administrative requirements for environmental program grants for Indian tribes, and the environmental programs covered, are set out at 40 C.F.R. Part 35, Subpart B.

Table 1: Grant Dollars Provided to Tribes under Four EPA Acts for Fiscal Years 2002 through 2004

Dollars in millions	
Statutory authority	FY 2002 – 2004 grants
Clean Water	\$65.8
Safe Drinking Water	42.8
Clean Air	26.3
Indian General Assistance Program	114.3
Multiple statutory authorities ^a	3.7
Total	\$252.9

Source: GAO analysis of EPA's Integrated Grants Management System data.

^aOf the \$252.9 million in total grants for fiscal years 2002 through 2004, approximately \$3.7 million was awarded under more than one statutory authority. Although the multiple authorities included one of the four acts shown above, these grants may also have included other statutory authorities such as the Solid Waste Disposal Act or the National Environmental Policy Act. EPA could not provide the specific dollar amounts under each authority for these types of grants.

In general, tribes initially apply for funding under EPA's Indian General Assistance Program before applying for funds under the agency's environmental programs. The Indian General Assistance Program provides financial assistance to help tribes build capacity in order to administer their environmental programs. The Indian General Assistance Program grant does not require a tribe to have TAS status. The duration of these grants (up to 4 years) provides tribes with a stable funding source, which is useful to tribes without tax revenues. The tribes have used these grants to, for example, hire, train, and maintain their own environmental experts, and to plan, develop, and establish environmental protection programs.

Grants for some environmental programs, such as section 106 of the Clean Water Act and section 1443 of the Safe Drinking Water Act,²⁷ have special provisions for TAS status. For example, EPA requires that tribes receive TAS status for section 1443 grants, while EPA regulations provide that tribes with TAS status contribute less in matching funds for section 106 grants. The four TAS criteria for grants are similar to those for program authority under the three acts—specifically, a tribe must be federally recognized, have a governing body carrying out substantial duties and powers, have adequate jurisdiction, and have reasonable capabilities to

²⁷Grants awarded under section 1443 of the Safe Drinking Water Act help tribes to carry out public water system programs, including implementation and enforcement of the act.

carry out the proposed activities. The primary difference between TAS for grants and TAS for program authority is that EPA does not generally seek public comments on tribal requests for grants. In addition, there is generally no need to determine tribal regulatory jurisdiction for TAS eligibility for grants.

To encourage tribes to apply for these funds, EPA provides fact sheets about the various financial assistance programs, sends them grant solicitations, and provides training to help them develop their grant requests. Nearly all tribal requests are reviewed and funded at the regional level.

Differences between Tribes and States over Environmental Issues Have Been Addressed in Various Ways

Since the three environmental acts were amended to allow tribes to receive TAS status and to implement EPA programs, some tribes, states, and municipalities have disagreed over tribal land boundaries and environmental standards that may differ from state standards. However, neither EPA nor any of the entities we contacted could identify the number of disagreements that have arisen between tribes, states, and municipalities over environmental issues.²⁸ Generally, the disagreements have been addressed through litigation, cooperative agreements, or legislation.

In terms of litigation, for example:

- In *City of Albuquerque v. Browner*,²⁹ the city challenged EPA's approval of the Pueblo of Isleta's water quality standards, which are more stringent than New Mexico's. The city asserted that EPA lacked the authority under the Clean Water Act to either (1) approve tribal water quality standards that are more stringent than required by the statute or (2) require upstream users such as the city to comply with the standards set by the Pueblo of Isleta, which is downstream from Albuquerque. A federal appellate court upheld EPA's authority to approve the Pueblo's standards. Among other things, the court noted that EPA is authorized to require upstream dischargers to comply with downstream standards.

²⁸EPA provided some examples of cases where the agency facilitated discussions and cooperative agreements between tribes and states in which water quality standards were involved.

²⁹97 F.3d 415 (10th Cir. 1996), *cert. denied*, 522 U.S. 965 (1997).

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- In *Montana v. EPA*,³⁰ the state challenged EPA regulations allowing tribes with TAS authority to issue water quality standards applicable to all dischargers within a reservation, even those on land owned by nonmembers of the tribe. Montana argued that the regulations permit tribes to exercise authority over nonmembers that are broader than the inherent tribal powers recognized by the Supreme Court as necessary to self-governance. A federal appellate court held that EPA's regulations properly delineated the scope of inherent tribal authority. It noted that the Supreme Court had held that a tribe could regulate the conduct of nonmembers when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. EPA had found that pollution of tribal water resources by nontribal members posed such serious and substantial threats to tribal health and welfare that tribal regulation was essential. In this case, the court held that EPA's regulations are a valid application of inherent tribal authority over nonconsenting nonmembers.

Some tribes and states have addressed issues more collaboratively. For example:

- The Navajo Nation's Environmental Protection Administration and the Arizona Department of Environmental Quality entered into a cooperative agreement in which, among other things, the state recognizes the jurisdiction of the Navajo Environmental Protection Administration over all lands within the Navajo Reservation and does not assert authority over those lands. In addition, Arizona and the Navajo Environmental Protection Administration agreed to share in the cost of pilot projects, including in-kind contributions and technical assistance. As a result of this collaborative effort, the tribe and state have been able to, among other things, share staff for training and assist one another with permit violations. In one instance, the tribe and the state investigated and found several areas of potential contamination of illegal petroleum leaks and spills. EPA ordered the company to stop its illegal actions and prepare an environmental cleanup plan.

³⁰137 F.3d 1135 (9th Cir.), *cert. denied*, 525 U.S. 921 (1998).

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- Many different parties, including tribal, federal, state, and local environmental groups, collaborated in an air toxics study, begun in 1999, to help assess the impacts of hazardous air pollutants in the Phoenix metropolitan area.³¹ The study, which is still ongoing, will review the status of air toxics studies nationally and identify potential approaches that may be useful in the Phoenix area.

In some cases, EPA facilitates a resolution of disagreements between states and tribes during the review process. In these cases, EPA works collaboratively with the tribe to facilitate a resolution. For example, in one case, after discussing its application with EPA, a tribe amended its TAS submission by clarifying that it was not seeking approval to administer Clean Water Act programs on a portion of an adjacent river where jurisdictional issues had been raised and stated that it would continue its efforts to work cooperatively with the affected parties.

Legislatively, a statute enacted in August 2005 addressed some of the jurisdictional concerns in Oklahoma over TAS for program authority.³² Specifically, to be approved for TAS, the law requires Indian tribes and the state to enter into a cooperative agreement in which they agree to TAS status and develop a plan to jointly administer program requirements. This agreement is subject to the review and approval of EPA's Administrator after notice and an opportunity for a public hearing. The only tribe in Oklahoma that currently has TAS status for administering programs is the Pawnee Nation.

According to EPA officials, tribes and states have not used the dispute resolution mechanism EPA established under the Clean Water Act in 1987 to address disagreements over water quality standards.³³ Under this mechanism, EPA can attempt to resolve disputes when, for example, (1) differing water quality standards have been adopted pursuant to tribal and state law and approved by EPA; (2) a reasonable effort to resolve the dispute without EPA involvement has been made; and (3) a valid written

³¹Currently, the State of Arizona Department of Environmental Quality, Maricopa County, Pinal County, the Gila River Indian Community, the Ft. McDowell Yavapai Nation, the Salt River Pima-Maricopa Indian Community, the U.S. Institute for Tribal Environmental Professionals at Northern Arizona University, and the EPA are working together to complete the Joint Air Toxics Assessment Project.

³²Pub. L. No. 109-59, § 10211 (2005).

³³This mechanism is not available to cities and other governmental entities.

request for dispute resolution has been submitted by either the tribe or the state. We could not determine why states and tribes have not used this mechanism to resolve disagreements.

According to a U.S. Institute for Environmental Conflict Resolution official, states and tribes have not used the Institute to resolve disagreements over the Clean Water, Safe Drinking Water, or Clean Air Acts. Congress established this institute in 1998 to help parties resolve environmental, natural resource, and public lands conflicts.³⁴ The U.S. Institute serves as an impartial, nonpartisan entity that provides professional expertise, services, and resources to all parties to a dispute. The U.S. Institute helps parties determine (1) whether collaborative problem solving is appropriate for specific environmental conflicts, (2) how and when to negotiate, and (3) whether a third-party facilitator or mediator may be helpful in assisting parties in their efforts to reach consensus or to resolve conflict. The U.S. Institute also established the Native Dispute Resolution Network to provide an alternative for American Indians, Alaska Natives, and Native Hawaiians facing environmental conflicts. In commenting on a draft of this report, EPA advised us that they had recently contacted the Institute for assistance in discussions between tribal and state officials in Idaho on revising a lake management plan.

Conclusion

We recognize that a tribe's initial request for TAS may not include all required documentation and that EPA's analysis of critical components of that request, such as the tribe's jurisdiction over its land, water, and air, may take some time. However, EPA has generally not laid out a written strategy, including an estimated time frame, for the TAS review process. Such a written strategy would help better focus EPA's efforts and provide greater transparency for the tribes, on the status of EPA's review. We note that EPA has established time frames for completing some of its TAS processes, such as those for seeking public comment. We also note that, without a written strategy, the average approval time for TAS requests has increased from 12 months in 1998 to over 2 years as of June 2005. Moreover, in some cases, neither EPA regional officials nor the tribe know the status of the tribe's TAS request. Without time frames or transparency

³⁴The Environmental Policy and Conflict Resolution Act of 1988 (Pub. L. No. 105-156) created the U.S. Institute for Environmental Conflict Resolution to assist parties in resolving environmental disputes that involve federal agencies or instrumentalities.

in the review process, Indian tribes may be discouraged from even applying for TAS and program authority.

Recommendation for Executive Action

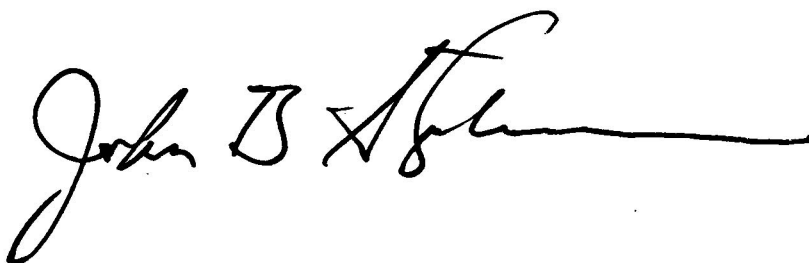
To better facilitate the timely review of tribal requests for TAS status for program authorization and to increase the transparency of the process to tribes, we recommend that the Administrator of EPA develop a written strategy, including estimated time frames, for its tribal request review process and for providing periodic updates to the tribes on the status of their requests.

Agency Comments

We provided EPA with a draft of this report for its review and comment. In commenting on the draft report, EPA agreed with our findings and emphasized their commitment to carefully considering these issues. EPA also provided technical comments, which we have incorporated into this report as appropriate. Appendix V contains the full text of the agency's comments in a letter dated October 19, 2005.

We are sending copies of this report to appropriate congressional committees; the Administrator, EPA; and other interested parties. In addition, the report will be available at no charge on the GAO Web site at <http://www.gao.gov>.

If you or your staff have any questions about this report, please contact me at (202) 512-3841 or stephensonj@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. GAO staff who made major contributions to this report are listed in appendix VI.

A handwritten signature in black ink, reading "John B. Stephenson". The signature is written in a cursive style with a long horizontal flourish at the end.

John B. Stephenson
Director, Natural Resources
and Environment

Objectives, Scope, and Methodology

The Chairman of the Senate Committee on Environment and Public Works and the Chairman of the Senate Committee on Indian Affairs asked us to report on (1) the extent to which the Environmental Protection Agency (EPA) has followed its processes for reviewing and approving tribal requests for treatment in the same manner as a state (TAS) and program authorization under the Clean Water, the Safe Drinking Water, and the Clean Air Acts, (2) EPA's programs for funding tribes' environmental programs and the amount of dollars provided to tribes in fiscal years 2002 through 2004, and (3) types of disagreements that have occurred between parties over EPA's approval for granting tribes TAS status and program authorization and the methods that have been used to address these disagreements. Although our review focused primarily on the Clean Water Act, we also reviewed EPA's process for reviewing and approving tribal requests under the Safe Drinking Water and Clean Air Acts. In addressing these issues, we collected information through case file reviews and interviews.

To determine the extent to which EPA followed its processes for reviewing and approving TAS and program authorization requests, we reviewed EPA's statutory and regulatory authorities, and guidance. Based upon this review, we developed a structured review guide for our case file reviews—a total of 20 reviews. We selected EPA's regions 6 (Dallas), 9 (San Francisco), and 10 (Seattle) for our case file review because, collectively, these regions had 77 percent of all approved tribal requests for program authorization under the three acts (20 of 26). These regions also had the largest number of approvals for program authority—18 approvals under the Clean Water Act, and 1 each under the Safe Drinking Water and Clean Air Acts. We reviewed in detail EPA's TAS and program authorization process under the Clean Water Act because most activity has occurred under the act. We also reviewed EPA's process for reviewing and approving tribal requests under the Safe Drinking Water and Clean Air Acts.¹ Furthermore, we reviewed data provided by EPA on another 12 TAS and/or program authority approvals, bringing the total number of TAS approvals to 32. In reviewing the case files, we ensured that documentation existed to fulfill the statutory and regulatory requirements, compared length of reviews with statutory deadlines, and examined the cause of delays. With EPA officials in

¹For the purposes of our report, we only looked at TAS requests for Part 71—operating permits under the Clean Air Act. Among other things, Indian tribes have also been approved for treatment as an affected state under title V of the Clean Air Act, which allows them to review and comment on permits issued by neighboring states to facilities having the potential to impact tribal lands.

headquarters and in regions 6, 9, and 10, we used semistructured interviews to obtain their understanding of the TAS and program authorization processes under the three environmental acts. EPA also provided data on the 57 tribes that had applied for TAS status and/or program authorization, and the dates of request and approval (when applicable). We cross-checked this information with the case file documents for the 20 cases we reviewed. We also conducted interviews with selected officials from the Department of the Interior's Bureau of Indian Affairs, affected states, and representatives of Indian tribes in Arizona, New Mexico, Oklahoma, and Washington to discuss their knowledge of, and concerns about, EPA's processes for reviewing and approving tribal requests for TAS status and program authorization.

To examine EPA's programs for funding tribes, we obtained data from EPA's Integrated Grants Management System, a computer database used by the agency to manage and report on information about grants, to determine the number of federally recognized Indian tribes receiving funding for fiscal years 2002 through 2004.² Specifically, we analyzed information on the number of grants and the dollars awarded under specific statutory authorities for cases where the recipient type was listed as "Indian tribe." This recipient type only applies to grants awarded to federally recognized tribes or intertribal consortia. According to EPA officials familiar with the data, tribes that are not federally recognized can receive grants, however, only federally recognized tribes are categorized as "Indian tribes" in the data element "recipient type." We assessed the reliability of EPA's Integrated Grants Management System data by (1) performing electronic testing of required data elements, (2) reviewing existing information about the data, including past GAO reports and workpapers on the system, and (3) interviewing agency officials knowledgeable about the data. We determined that the data were sufficiently reliable for the purposes of this report. In addition, we reviewed and documented the various programs available to Indian tribes under the Indian Environmental General Assistance Program Act of 1992 and the Clean Water, Safe Drinking Water, and Clean Air Acts for fiscal years 2002 through 2004; and EPA's guidelines for providing funding to tribes through these programs.

To examine the types of disagreements that have occurred between parties over EPA's approval for granting tribes TAS status and program

²The data were obtained from EPA's Office of Grants and Debarment, which among other things, compiles grant information for the agency.

authorization and the methods that have been used to address these disagreements, we reviewed EPA's statutory and regulatory processes for resolving disputes between different parties under the Clean Water Act. Although the dispute resolution provision specified in the Clean Water Act regulations has not been officially used, EPA staff provided us with other examples of tribes and outside parties creating collaborative agreements and resolving disputes. We also interviewed selected EPA, state, and tribal officials. In addition, we interviewed an official from the U.S. Institute for Environmental Conflict and Resolution to gain an understanding of the entity's objectives, roles, and responsibilities.

We performed our work between November 2004 and October 2005, in accordance with generally accepted government auditing standards.

Tribal Entities and Dates Requests Were Submitted and Approved for TAS, as of June 2005

Cases GAO reviewed in detail (20)	Date submitted ^a	Date approved	Time elapsed (months)
Pueblo of Nambe (NM)	5/11/1995	8/18/1995	3.2
Pueblo of Picuris (NM)	5/1/1995	8/7/1995	3.2
Pueblo of Pojoaque (NM)	12/15/1995	3/21/1996	3.2
Pueblo of Tesuque (NM)	1/8/1997	4/29/1997	3.7
Navajo Nation (AZ) ^b	6/17/2004	10/13/2004	3.9
Pueblo of Santa Clara (NM)	3/13/1995	7/19/1995	4.2
Pueblo of San Juan (NM)	9/28/1992	5/12/1993	7.5
Pueblo of Isleta (NM)	2/13/1992	10/13/1992	8.0
Pueblo of Sandia (NM)	4/21/1992	12/24/1992	8.1
Puyallup Tribe of Indians (WA)	6/24/1993	5/25/1994	11.0
Confederated Tribes of the Chehalis Reservation (WA)	2/16/1994	3/7/1995	12.7
Confederated Tribes of the Warm Springs Reservation (OR)	2/20/1998	5/25/1999	15.2
White Mountain Apache Tribe (AZ)	8/2/1995	2/3/1997	18.0
Confederated Tribes of Umatilla (OR)	10/20/1999	4/30/2001	18.3
Kalispel Indian Community (WA)	11/17/2000	11/4/2002	23.6
Pueblo of Acoma (NM)	12/15/1998	4/17/2001	28.1
Hoopla Valley Tribe (CA)	5/21/1993	5/17/1996	35.9
Navajo Nation (AZ) ^c	4/4/1988	8/9/1991	40.2
Hualapai Indian Tribe (AZ)	3/1/2000	7/22/2004	52.7
Spokane Tribe of Indians (WA)	12/11/1997	7/23/2002	55.4
Other tribal entities receiving TAS approval GAO did not review in detail (12)			
Port Gamble S'Klallam (WA)	3/6/2003	9/24/2003	6.6
Miccosukee Tribe (FL)	5/27/1994	12/20/1994	6.8
Fond du Lac Band of Chippewa (MN)	6/14/1995	5/16/1996	11.1
Seminole Tribe (FL)	5/19/1993	6/1/1994	12.4
Mole Lake Band of the Lake Superior Tribe of Chippewa Indians, Sokaogon Chippewa Community (WI)	8/13/1994	9/29/1995	13.5
Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation (MT)	3/24/1994	8/29/1996	29.2
Makah Indian Nation (WA)	6/27/2001	12/23/2003	29.9
St. Regis Band of Mohawk Indians (NY)	2/1/2000	10/16/2002	32.5
Tulalip Tribes (WA)	8/11/1993	5/9/1996	32.9

**Appendix II
Tribal Entities and Dates Requests Were
Submitted and Approved for TAS, as of June
2005**

(Continued From Previous Page)

Cases GAO reviewed in detail (20)	Date submitted ^a	Date approved	Time elapsed (months)
Grand Portage Band of Chippewa (MN)	10/13/1993	7/16/1996	33.1
Confederated Salish and Kootenai Tribes of the Flathead Reservation (MT)	4/22/1992	3/1/1995	34.3
Pawnee Nation (OK)	3/2/1998	11/4/2004	80.1

Source: GAO analysis of EPA data.

Note: Of the 32 cases, 30 were approved under the Clean Water Act, 1 under the Safe Drinking Water Act, and 1 under the Clean Air Act.

^aOur analysis uses the date the tribe's application was recorded as received in EPA's official case file. According to EPA, that date may not necessarily be the date the agency accepted the tribe's request as complete. Even though, in most cases, EPA works with the tribe to develop its application prior to submission, according to EPA, some applications present complex legal issues that need to be discussed before EPA will accept them.

^bThe Navajo Nation's TAS request was submitted under the Clean Air Act.

^cThe Navajo Nation's TAS request was submitted for the public water systems program under the Safe Drinking Water Act.

TAS Requests under Review, as of June 2005

Tribal entities	Date submitted^a	Time under review (months)
Shoshone-Bannock (ID)	12/27/2004	6.1
Blackfeet Tribe (MT)	10/6/2004	8.8
Pyramid Lake Paiute (NV)	6/18/2004	12.4
Big Pine Band of Owens Valley (CA)	6/1/2004	13.0
Santee Sioux (NE)	4/4/2004	14.9
Pueblo of Taos (NM)	6/10/2003	24.7
Northern Cheyenne Tribe (MT)	4/29/2002	38.0
Cocopah Tribe (AZ)	2/14/2002	40.5
Ak Chin Indian Community of the Maricopa (Ak Chin) Indian Reservation (AZ)	2/3/2002	40.9
Navajo Nation (AZ) ^b	10/18/2001	44.4
Yavapai-Prescott Nation (AZ)	1/23/2001	53.2
Agua Caliente Band of Cahuilla Indians (CA)	1/7/2001	53.8
Ute Mountain Ute (CO)	6/29/2000	60.0
Hopi Tribe (AZ)	6/20/2000	60.3
Paiute-Shoshone Indians of the Bishop Community (CA)	6/8/2000	60.7
Red Cliff Band of Chippewa (WI)	3/8/2000	63.7
Lac du Flambeau Band of Chippewa (WI)	11/22/1999	67.3
Navajo Nation (AZ)	11/22/1999	67.3
Assiniboine-Sioux of Ft. Peck Indian Reservation (MT)	7/27/1999	71.1
Salt River Pima-Maricopa Indian Community (AZ)	6/24/1999	72.2
Coeur D'Alene Tribe (ID) ^c	3/18/1999	75.4
Mille Lacs Band of Chippewa (MN)	12/30/1997	90.0
Leech Lake Band of Chippewa (MN)	11/15/1997	91.5
Bois Forte Band of Chippewa (MN)	7/18/1997	95.4
Three Affiliated Tribes of the Fort Berthold Reservation (ND)	12/30/1996	102.0
Red Lake Band of Chippewa (MN)	11/7/1995	115.8
Keweenaw Bay Indian Community (MI)	8/10/1995	118.7
Lummi Tribe (WA)	3/8/1995	123.7
Confederated Tribes and Bands of the Yakama Indian Nation (WA)	11/4/1994	127.9

Source: GAO analysis of EPA data.

^aOur analysis uses the date the tribe's application was recorded as received in EPA's official case file. According to EPA, that date may not necessarily be the date the agency accepted the tribe's request as complete. Even though, in most cases, EPA works with the tribe to develop its application prior to submission, according to EPA, some applications present complex legal issues that need to be discussed before EPA will accept them.

Appendix III
TAS Requests under Review, as of June 2005

^bThe Navajo Nation's TAS request was submitted for the underground injection control program under the Safe Drinking Water Act.

^cAccording to EPA, the Coeur D'Alene tribe was approved for TAS in August 2005.

Elapsed Time for EPA's Approval of Tribes' Water Quality Standards for 18 Clean Water Act Cases Reviewed

Tribal entities	Date submitted	Date approved	Elapsed time (days) ^a
Pueblo of Picuris (NM)	8/7/1995	8/7/1995	0.0
Pueblo of Pojoaque (NM)	3/21/1996	3/21/1996	0.0
Pueblo of Nambe (NM)	8/18/1995	8/18/1995	0.0
Pueblo of Santa Clara (NM)	7/19/1995	7/19/1995	0.0
Pueblo of Acoma (NM)	4/17/2001	4/17/2001	0.0
Pueblo of Tesuque (NM)	4/29/1997	4/29/1997	0.0
Hualapai Indian Tribe (AZ)	7/22/2004	9/12/2004	50.0
Puyallup Tribe of Indians (WA)	8/22/1994	10/31/1994	69.0
Pueblo of Isleta (NM)	10/13/1992	12/24/1992	71.0
Pueblo of San Juan (NM)	5/12/1993	9/16/1993	124.0
Confederated Tribes of Umatilla (OR)	4/30/2001	10/18/2001	168.0
Pueblo of Sandia (NM)	12/24/1992	8/10/1993	226.0
Spokane Tribe of Indians (WA)	7/23/2002	4/22/2003	269.0
Confederated Tribes of the Chehalis Reservation (WA)	3/11/1996	2/3/1997	322.0
Kalispel Indian Community (WA)	3/24/2003	6/24/2004	450.0
White Mountain Apache Tribe (AZ)	3/27/2000	9/27/2001	540.0
Hoop Valley Tribe (CA)	7/10/2000	9/11/2002	781.0
Confederated Tribes of the Warm Springs Reservation (OR)	5/25/1999	9/28/2001	843.0

Source: GAO analysis of EPA data.

^aTAS approval is a prerequisite for obtaining program authority to set water quality standards. The date submitted reflects a tribe's TAS approval date or the date the tribe submitted its water quality standards following TAS approval. Thus, in those cases where the tribe submitted its water quality standards after receiving TAS approval, the elapsed time calculation is based on the date the water quality standards were submitted.

Comments from the Environmental Protection Agency



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

OCT 19 2005

OFFICE OF
WATER

Mr. John B. Stephenson, Director
Natural Resources and Environment
U.S. Government Accountability Office
Washington, DC 20548

Dear Mr. Stephenson:

Thank you for the opportunity to comment on your October 2005 draft report, "EPA Should Reduce the Review Time for Tribal Requests to Manage Environmental Programs." Our support to Tribes, as we implement the Agency's Indian Policy, is very important to us.

Your report is coming at a good time, since we are currently engaged in addressing many of the same issues. We are firmly committed to reviewing Tribal requests in a timely fashion. We are equally committed to assuring that the reviews are correctly done and adequately documented. The issues we and Tribes face are complex. EPA has committed to Tribes to carefully consider these issues, particularly in light of the Federal trust responsibility to Tribes.

I would call your attention to the sections of the report dealing with grants. The aggregate grant figures cited include a wide variety of grants. The reader needs to be cautioned that only a part of the grant funds are used by Tribes to apply for and develop regulatory programs under the various statutes.

EPA staff members have provided you detailed technical comments on this draft. I look forward to seeing the final report.

Sincerely,

A handwritten signature in black ink, appearing to read "B. H. Grumbles".

Benjamin H. Grumbles
Assistant Administrator

GAO Contact and Staff Acknowledgments

GAO Contact

John B. Stephenson, (202) 512-3841, stephensonj@gao.gov

Staff Acknowledgments

In addition to the individual named above, Ronald E. Maxon, Jr., Assistant Director; Tyra DiPalma-Vigil; Chad Factor; Doreen Feldman; Richard Johnson; Crystal Jones; Jeff Malcolm; Rebecca Shea; and Carol Herrnstadt Shulman made key contributions to this report.

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