

DECISION DOCUMENT
FOR
THE U.S. ENVIRONMENTAL PROTECTION AGENCY'S APPROVAL OF
**THE CONFEDERATED TRIBES OF THE
GOSHUTE RESERVATION**
FOR TREATMENT IN A SIMILAR MANNER AS A STATE
UNDER CLEAN WATER ACT SECTION 518
FOR PURPOSES OF THE
WATER QUALITY STANDARDS AND CERTIFICATION PROGRAMS
UNDER
CLEAN WATER ACT SECTIONS 303(c) AND 401

TABLE OF CONTENTS

I. Background

- A. Introduction
- B. Application and Comments
- C. Statutory and Regulatory Provisions
- D. Policy Statements

II. Requirements for TAS Approval and EPA Findings

- A. Federal Recognition
- B. Substantial Governmental Duties and Powers
- C. Jurisdiction Over “Waters Within the Borders” of the Tribe’s Reservation
 - 1. Map or Legal Description
 - 2. Statement Describing the Basis for the Tribe’s Assertion of Authority
 - 3. Identification of the Surface Waters for which the Tribe Proposes to Establish Water Quality Standards
 - 4. EPA’s Findings on the Tribe’s Jurisdiction
- D. Capability

III. EPA’s TAS Determination is a Separate Process from an EPA Decision on a Tribe’s Submittal of Water Quality Standards

IV. Conclusion

Appendix I	Application (without Attachments)
Appendix II	List of Tribal Waters/Map
Appendix III	EPA Approval of Confederated Tribes of the Goshute Reservation’s CWA Section 106 TAS Application

I. BACKGROUND

A. Introduction

Section 303(c) of the Clean Water Act (CWA) requires states to develop, review and revise (as appropriate) water quality standards for surface waters of the United States. At a minimum, such standards must include designated water uses, in-stream criteria to protect such uses, and an antidegradation policy. 40 C.F.R. § 131.6. In addition, Section 401 of the CWA provides that states may grant, condition, or deny “certification” for federally permitted or licensed activities within their jurisdictions that may result in a discharge to the waters of the United States. The decision to grant or deny certification is based on the state’s determination regarding whether the proposed activity will comply with water quality standards it has adopted under Section 303(c). If a state denies certification, the federal permitting or licensing agency is prohibited from issuing a permit or license. *See* 40 C.F.R. § 131.4.

Section 518 of the CWA authorizes the Environmental Protection Agency (EPA) to treat an eligible Indian tribe as a state (treatment in a similar manner as a state or TAS) to manage and protect water resources “within the borders of an Indian reservation” for certain CWA programs, including Sections 303(c) and 401. EPA regulations establish the process by which EPA implements that authority and determines whether to approve a tribal application for TAS for purposes of administering Sections 303(c) and 401 of the CWA. *See* 56 Fed. Reg 64876 (Dec. 12, 1991), as amended by 59 Fed. Reg. 64339 (Dec. 14, 1994) (codified at 40 C.F.R. Part 131).

This Decision Document provides the basis and supporting information for EPA’s decision to approve, under Section 518 of the CWA and 40 C.F.R. Part 131, a TAS eligibility application (the Application) from the Confederated Tribes of the Goshute Reservation (Tribe) allowing the Tribe to establish water quality standards pursuant to Section 303(c) of the CWA and certify federally permitted or licensed activities pursuant to Section 401 of the CWA for areas within the border of the Tribe’s reservation. This approval applies to all surface waters that lie within the exterior borders of the Goshute’s reservation, as described in the Application and identified herein and in Appendix II. TAS approval does not constitute approval of water quality standards but rather the Tribe’s eligibility to submit water quality standards to EPA for approval under CWA Section 303.¹ Development of such standards would remain subject to all requirements of EPA’s regulations (including requirements for notice and comment) and such standards would still need to be submitted to EPA for review under Section 303(c) to ensure they meet applicable CWA and regulatory requirements.

B. Application and Comments

Selected materials and documents relevant to the decision are listed in Appendices I-III. Included in this list are the Tribe’s original application for TAS for purposes of the water quality standards and certification programs under Sections 303(c) and 401 of the CWA, dated November 30, 2016, and materials provided by the Tribe that amend and supplement the original

¹ EPA’s approval of the Tribe’s eligibility to administer CWA Sections 303(c) and 401 water quality and certification programs does not include approval of the tribal water quality standards submitted with the Tribe’s Application.

Application (supplemental materials) submitted on July 31, 2017, which together constitute and will be referred to as the Tribe's "Application".

As provided in 40 C.F.R. § 131.8(c)(2), the EPA Region IX Acting Regional Administrator at the time, Alexis Strauss, sent a letter dated June 26, 2017 notifying "appropriate governmental entities"² of the substance and basis of the Tribe's assertion of authority in its Application. The letter included the Region 9 Project Officer's contact information for members of the public to obtain a copy of the Application to review. The notice letter, including copies of the Application, were sent to the U.S. Bureau of Indian Affairs, U.S. Bureau of Land Management, the State of Nevada and the State of Utah. No comments from these governmental entities were received on the Application. In addition, consistent with Agency practice, EPA also provided notice to the general public and local governments with an opportunity to comment on the Tribe's assertion of authority. The public notice was published in *The Wendover Times* on June 15, 2017. EPA exercised its discretion and also conducted additional notice of the Tribe's Application to local governments. No comments were received from the public or local governments on the Application.

C. Statutory and Regulatory Provisions

The following are the statutory and regulatory provisions governing this TAS decision:

1. Section 518 of the Clean Water Act, 33 U.S.C. § 1377(e), authorizes EPA to treat an eligible Indian Tribe in a similar manner as a state if the tribe meets the specified eligibility criteria.
2. Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64876 (Dec. 12, 1991), as amended by 59 Fed. Reg. 64339 (Dec. 14, 1994) and clarified by 81 Fed. Reg. 30183 (May 16, 2016) (codified at 40 C.F.R. Part 131), establish the requirements for a tribe to obtain TAS approval and the procedures for EPA to process a tribe's TAS application.

D. Policy Statements

The following policy statements are also relevant to this TAS decision:

1. *EPA Policy for the Administration of Environmental Programs on Indian Reservations*, November 8, 1984.
2. Memorandum entitled "*EPA/State/Tribal Relations*," by EPA Administrator Reilly, July 10, 1991.

² EPA defines "appropriate governmental entities" to consist of "States, Tribes, and other Federal entities located contiguous to the reservation of the Tribe which is applying for treatment as a State." 56 Fed. Reg. 64876, 64884 (Dec. 12, 1991).

3. Memorandum entitled “*Adoption of the Recommendations from the EPA Workgroup on Tribal Eligibility Determinations*,” by EPA Assistant Administrator Robert Perciasepe and General Counsel Jonathan Cannon, March 19, 1998.
4. Memorandum entitled “*Strategy for Reviewing Tribal Eligibility Applications to Administer EPA Regulatory Programs*,” by EPA Deputy Administrator Marcus Peacock, January 23, 2008.

II. REQUIREMENTS FOR TAS APPROVAL AND EPA FINDINGS

Under CWA Section 518 and EPA’s implementing regulations at 40 C.F.R. § 131.8(a), four requirements must be satisfied before EPA can approve a tribe’s TAS application for treatment in a similar manner as a state for water quality standards under Section 303(c) and certifications under Section 401 of the CWA. For EPA to be able to approve a TAS application, it must meet the following criteria: (1) the Indian Tribe is recognized by the Secretary of the Interior and exercises authority over a reservation; (2) the Indian Tribe has a governing body carrying out substantial governmental duties and powers; (3) the water quality standards program to be administered by the Indian tribe pertains to the management and protection of water resources which are within the borders of the Indian reservation and held by the Indian tribe, within the borders of the Indian reservation and held by the United States in trust for Indians, within the borders of the Indian reservation and held by a member of the Indian tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of the Indian reservation; and (4) the Indian tribe is reasonably expected to be capable, in the Regional Administrator’s judgment, of carrying out the functions of an effective water quality standards program in a manner consistent with the terms and purposes of the Act and applicable regulations.

EPA’s regulation at 40 C.F.R. § 131.8(b) identifies what must be included in a tribe’s TAS application to administer the water quality standards program. After making a TAS determination, EPA then subsequently reviews tribal water quality standards under 40 C.F.R. § 131.21. As such, TAS approval does not constitute approval of water quality standards but rather the tribe’s ability to submit water quality standards to EPA for its approval under CWA Section 303. Approval of a tribe for TAS for purposes of water quality standards, however, immediately authorizes that tribe to issue certifications under CWA Section 401 (see 40 C.F.R. § 131.4(c)), provided the tribe designates a “certifying agency” as defined in 40 C.F.R. § 121.1(e). Tribes authorized to administer the CWA water quality standards program are also “affected states” under CWA Section 402(b)(3) and (5) and 40 C.F.R. § 122.4(d). As “affected states,” they receive notice and an opportunity to comment on certain permits issued under the National Pollutant Discharge Elimination System program.

A. Federal Recognition

The first requirement applicable to a tribal TAS application for water quality standards under Section 303(c) and certifications under Section 401 is that a tribe is recognized by the Secretary of the Interior and meets the definitions in 40 C.F.R. §§ 131.3 (k) and (l). 40 C.F.R. §131.8(a)(1); *see also* 40 C.F.R. §131.8(b)(1). In 40 C.F.R. § 131.3(l), the term “Indian Tribe” or

“Tribe” is defined as “any Indian Tribe, band, group, or community recognized by the Secretary of the Interior and exercising governmental authority over a Federal Indian reservation.” In 40 C.F.R. § 131.3(k), the term “Federal Indian reservation” is defined 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.” Therefore, a tribe must include in its application a statement that the tribe is recognized by the Secretary of the Interior.

The Application states that the Tribe is recognized by the Secretary of the Interior and EPA has confirmed that it is a federally recognized tribe listed in the current Department of the Interior published list of “Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs” as the “Confederated Tribes of the Goshute Reservation, Nevada and Utah”. *See* 84 Fed. Reg. 1200, 1201 (February 1, 2019). Therefore, the Confederated Tribes of the Goshute Reservation, whose Reservation is located in White Pine County in Nevada and Juab and Tooele Counties in Utah, is recognized by the Secretary of the Interior and meets the definition of an “Indian Tribe” in 40 C.F.R. § 131.3(l) with governmental authority over a “Federal Indian Reservation,” as defined in 40 C.F.R. § 131.3(k), and thus meets the requirements in 40 C.F.R. § 131.8(a)(1) and (b)(1) for TAS approval.

B. Substantial Governmental Duties and Powers

The second requirement applicable to a tribal TAS application for water quality standards under Section 303(c) and certifications under Section 401 is that a tribe has a governing body carrying out substantial governmental duties and powers. 40 C.F.R. § 131.8(a)(2). To show that it has a governing body currently carrying out substantial governmental duties and powers over a defined area, 40 C.F.R. § 131.8(b)(2) requires that the tribe submit a descriptive statement that should: (i) describe the form of the tribal government; (ii) describe the types of governmental functions currently performed by the tribal governing body; and (iii) identify the source of the tribal government’s authority to carry out the governmental functions currently being performed.

Consistent with 40 C.F.R. 131.8(b)(6), the Tribe’s Application relies on EPA’s prior approval of the Tribe’s TAS application for CWA Section 106 (Water Pollution Control Program) grant eligibility, which found the Tribe had adequately described the form of tribal government, its governmental functions, and the source of tribal authority to carry out those functions. The Tribe’s governance structure and its related governmental functions have not changed since the CWA Section 106 TAS approval in June 1999. As described in the Application, the Constitution and Bylaws of the Goshute Tribe recognize the Goshute Business Council as the tribal governmental entity for the Goshute Tribe’s inherent powers of self-government, including powers recognized by appropriate code, ordinance or resolution within the Goshute Reservation. The Goshute Business Council consists of a Chairperson, a Vice Chairperson and three council members. The Goshute Business Council is responsible for approving, promulgating, and enforcing resolutions and ordinances, such as tribal approval of water quality standards.

EPA has determined that the Tribe has described and demonstrated that the Tribal governing body is currently carrying out substantial governmental duties and powers for purposes of 40 C.F.R. § 131.8(a)(2) and (b)(2), (6).

C. Jurisdiction Over “Waters Within the Borders” of the Tribe’s Reservation

The third requirement applicable to tribal TAS applications for water quality standards under Section 303(c) and certifications under Section 401 is that the water quality standards program to be administered by the tribe pertains to the management and protection of water resources that are “within the borders of the Indian reservation and held by the Indian Tribe, within the borders of the Indian reservation and held by the United States in trust for Indians, within the borders of the Indian reservation and held by a member of the Indian Tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of the Indian reservation.” 40 C.F.R. § 131.8(a)(3). To demonstrate that this requirement is met, the regulations require that the Tribe submit a statement of its authority to regulate water quality. The statement should include: (i) a map or legal description of the area over which the tribe asserts authority over surface water quality; (ii) a statement by the tribe’s legal counsel (or equivalent official) that describes the basis for the tribe’s assertion of authority and which may include a copy of documents such as tribal constitutions, by-laws, charters, executive orders, codes, ordinances, and/or resolutions that support the tribe’s assertion of authority; and (iii) an identification of the surface waters for which the Tribe proposes to establish water quality standards. 40 C.F.R. § 131.8(b)(3).

1. Map or Legal Description

The Application contains a map and land description of the area over which the Tribe asserts authority with an identification of the surface waters that are covered. *See* Appendix II. The map shows that the Confederated Tribes of the Goshute Reservation, which was formally established by Presidential Executive Orders on May 20, 1912 and March 23, 1914, is located in White Pine County in eastern Nevada and Juab and Tooele Counties in western Utah. In 1998, the Tribe acquired additional lands in Utah pursuant to Public Law 103-93³ and subsequent land transfers from the State of Utah. The Goshute Reservation is comprised of two noncontiguous parcels totaling 119,659⁴ acres, of which approximately 77,000 acres are located in White Pine County, Nevada, approximately 40,000 acres are located in Juab County, Utah and approximately 2,500 acres are located in Tooele County, Utah.⁵

EPA has determined that the Tribe has satisfied 40 C.F.R. § 131.8(b)(3)(i) by providing an adequate map of the area over which the Tribe asserts authority to regulate surface water quality.

³ Public Law 103-93, as amended in 1996, provided additional lands within the state of Utah for the Goshute Indian Reservation.

⁴ In its previous CWA Section 106 TAS application from 1999, the Tribe stated the reservation comprised approximately 113,000 acres but in its current Application the Tribe references additional acreage acquired from the State of Utah for a total of 119,659 acres.

⁵ In its Application, the Tribe references a 17-acre parcel of land in Elko County, Nevada, that was deeded to the Tribe from the Nevada Department of Transportation. This parcel of land is not included in the approval since it is not tribal trust land.

2. Statement Describing the Basis for the Tribe's Assertion of Authority

The Tribe's original TAS Application for the CWA Section 303(c) and 401 programs included a Statement from the Tribe's Legal Counsel dated November 30, 2016 that describes and asserts the congressional delegation of authority under CWA Section 518 as the basis for the Tribe's authority to regulate reservation waters.

This authority is described in EPA's *Revised Interpretation of Clean Water Act Tribal Provision*, 81 Fed. Reg. 30183 (May 16, 2016) ("Interpretive Rule"), which construes Section 518 as an express congressional delegation of civil regulatory authority to eligible tribes. This reinterpretation of Section 518 eliminates the need for applicant tribes to demonstrate their inherent authority to regulate reservation waters under the CWA. Instead, tribes can rely on the congressional delegation of authority as the source of their authority to regulate reservation waters under the CWA. *Id.* at 30190, 30194. In light of the congressional delegation, the main focus in determining the extent of an applicant tribe's jurisdiction for CWA regulatory purposes is identifying the geographic boundaries of the Indian reservation area over which the congressionally delegated authority would apply. *Id.* at 30194. In the Interpretive Rule, EPA also recognized that there may be rare instances where special circumstances limit or preclude a particular tribe's ability to accept or effectuate the congressional delegation of authority over its reservation. *Id.* at 30192-193. Such special circumstance could arise, for instance, under a separate federal statute establishing unique jurisdictional arrangements for a specific state or reservation, or under the provisions of particular treaties or tribal constitutions that may limit a tribe's ability to exercise relevant authority. *Id.*

The Tribe's legal counsel confirmed that there are no limitations or impediments to the Tribe's ability to accept and effectuate the congressional delegation of authority under the CWA. EPA is aware of no impediment limiting the Tribe's ability to effectuate the congressionally delegated authority. We therefore conclude that the Tribe has properly asserted the congressional delegation of authority and has satisfied the application requirement of 40 C.F.R. § 131.8(b)(3)(ii).

3. Identification of the Surface Waters for which the Tribe Proposes to Establish Water Quality Standards

In its Application, the Confederated Tribes of the Goshute Reservation has identified surface waters within its Reservation for which it proposes to establish water quality standards, which include Spring Creek, Captain Bird Creek, Chicken Creek, Dads Creek, Deep Creek, Chokecherry Creek, Fifteen Mile Creek, Steves Creek, Sams Creek, Johnson Canyon Creek, North Fork of Birch Creek, and Trout Creek. In addition, there are three major ponds on the Reservation that rear the endangered Bonneville Cutthroat Trout (Nelms Pond, Orchard Pond, and Steves Pond) and a small pond is located behind the day school.

All of the aforementioned waters are identified in Appendix II and were identified on the map which was submitted by the Tribe in its Application. Therefore, EPA has determined that the Tribe has satisfied 40 C.F.R. § 131.8(b)(3)(iii) by identifying the surface waters over which it proposes to establish water quality standards.

4. EPA's Findings on the Tribe's Assertion of Jurisdiction

Based upon the information contained in the Application, EPA finds that the Confederated Tribes of the Goshute Reservation has established that the Tribe meets the requirements for TAS approval set forth in 40 C.F.R. § 131.8(a)(3) and (b)(3).

D. Capability

The fourth and final requirement to approve a TAS application for water quality standards under Section 303(c) and certifications under Section 401 of the CWA is that a tribe is reasonably expected to be capable, in the Regional Administrator's judgment, of carrying out the functions of an effective water quality standards program in a manner consistent with the terms and purposes of the CWA and applicable regulations. *See* 40 C.F.R. § 131.8(a)(4). To demonstrate that a tribe has the capability to administer an effective program, 40 C.F.R. § 131.8(b)(4) requires that the tribe's application include a narrative statement of the tribe's capability. The narrative statement should include: (i) a description of the tribe's previous management experience, which may include the administration of programs and services authorized by the Indian Self-Determination and Education Assistance Act, the Indian Mineral Development Act or the Indian Sanitation Facility Construction Activity Act; (ii) a list of existing environmental and public health programs administered by the tribal governing body and copies of related tribal laws, policies, and regulations; (iii) a description of the entity (or entities) that exercise the executive, legislative, and judicial functions of the tribal government; (iv) a description of the existing, or proposed, agency of the tribe that will assume primary responsibility for establishing, reviewing, implementing and revising water quality standards; and (v) a description of the technical and administrative capabilities of the staff to administer and manage an effective water quality standards program or a plan that proposes how the tribe will acquire additional administrative and technical expertise. *See* 40 C.F.R. §§ 131.8 (b)(4)(i)-(v).

As discussed above and in the Tribe's TAS Application for CWA Section 106, the Tribe described its governmental structure as the Business Council, consisting of five members, possessing executive, legislative and judicial powers. In response to the Section 106 application, EPA found that the Tribe possessed adequate general managerial experience, accounting system and governmental structure, in addition to significant experience managing a variety of environmental and public health programs. For example, the Goshute Environmental Protection Department (EPD) is the agency in charge of, and has served as the technical staff support for, the Tribe's environmental programs and a variety of community health programs. The staff are trained personnel with the capability to develop and administer an effective water pollution control program. Since EPA's approval of the Tribe's CWA Section 106 TAS application, the EPD staff has gained more experience in implementing its environmental programs, including its Water Pollution Control Program (CWA Section 106), and Nonpoint Source Pollution Prevention Program (CWA Section 319). In addition, the EPD staff has gained capacity through the Indian Environmental General Assistance Program (GAP), leading to the cleanup of twelve open dumps on the Goshute Reservation, including some dumps previously located along streams and adjacent to ponds. The Tribe has, in addition, highlighted its Tribal Hunting and Fishing on the Reservation Ordinances and its tribal water quality standards to illustrate the capability of the Tribe. Based on this information, EPA finds that the Tribe has satisfied the

criteria listed under 40 C.F.R. § 131.8(b)(4)(i)-(iii).

Consistent with 40 C.F.R. § 131.8(b)(4)(iv)-(v), EPA program staff also considered other criteria related to the capability of the Tribe to administer the CWA Section 303(c) water quality standards and Section 401 certification programs. The EPD is the entity that has been assigned the primary responsibility for establishing, reviewing, implementing and revising water quality standards and certifying permits. It will be responsible for administering the water quality standards program and for receiving and processing applications for certification of compliance with water quality requirements and standards for projects that are subject to federal permits or licenses and which may result in discharge to navigable waters or impacts to water quality within the Goshute Reservation. The Tribe will have a process for CWA Section 401 certifications; after a thorough analysis by the EPD staff, the EPD Director will be responsible for any final action regarding Section 401 certification applications. The Tribal Court has the authority to enforce tribal ordinances and policies, including enforcement of tribal water quality standards. Petitions for review of any final action, such as the denial of a Section 401 Certification application, will be presented to the Tribal Court.

The Tribe's Application contains a description of the agency and staff who will administer and manage the water quality standards and certification programs, as provided by 40 C.F.R. § 131.8(b)(4) (iv)-(v). The position descriptions and resumés of the program staff who will administer the water quality standards and certification programs were included as part of the Application. These resumés indicate that the Tribe possesses the administrative and technical capability to administer these programs.

Based upon EPA's program office review of the information in the Tribe's Application and discussions with the EPD staff, EPA finds that the Tribe has demonstrated that it has the capability to administer the CWA Sections 303(c) and 401 water quality standards and certification programs and has met the requirements of 40 C.F.R. §131.8(a)(4) and (b)(4).

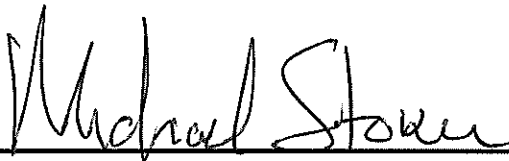
III. EPA's TAS Determination is a Separate Process from an EPA Decision on a Tribe's Submittal of Water Quality Standards

As described above, under EPA's TAS regulations, the EPA provides certain notices and an opportunity to comment on an applicant tribe's assertion of authority to regulate reservation water quality. The EPA reiterates here that this TAS decision does not constitute an approval of the Tribe's water quality standards. The EPA's review and approval or disapproval of new or revised water quality standards is a separate Agency action under the CWA, distinct from the EPA's decision on the Tribe's TAS application for eligibility to administer CWA Sections 303(c) and 401 program authority on reservation lands. Under the CWA, a tribe must first be approved for TAS before the EPA can approve a tribe's submitted water quality standards under CWA Section 303(c). If the EPA approves a tribe's water quality standards, those standards then become federally-applicable water quality standards for CWA purposes over the waters within the scope of the TAS approval. The EPA notes that any water quality standards adopted by the Tribe and submitted to the EPA for action under the CWA would need to satisfy all CWA and regulatory requirements, including requirements for public involvement in the adoption process. These requirements will ensure an appropriate opportunity for interested entities to provide input

on the Tribe's proposed water quality standards, and any concerns regarding the standards being proposed by the Tribe can be appropriately raised and addressed as part of that process.

IV. Conclusion

EPA has determined that the Confederated Tribes of the Goshute Reservation has met the requirements of CWA Section 518 and 40 C.F.R. § 131.8, and therefore approves the Tribe's Application for TAS to administer the water quality standards program of Section 303(c) of the CWA and its implementing regulations set forth at 40 C.F.R. § 131.6. Consistent with 40 C.F.R. § 131.4(c), the Tribe is also eligible to the same extent as a state for the purposes of certifications under Section 401 of the CWA and its implementing regulations set forth at 40 C.F.R. § 131.4 and will be treated in the same manner as an "affected state" under CWA Section 402(b)(3) and (5) and its implementing regulations at 40 C.F.R. § 122.4(d).



5-21-19

Michael Stoker
Regional Administrator, US EPA Region 9

Date