

DECISION DOCUMENT
FOR
THE U.S. ENVIRONMENTAL PROTECTION AGENCY'S APPROVAL OF
**CHEMEHUEVI INDIAN TRIBE OF THE
CHEMEHUEVI RESERVATION,
CALIFORNIA**

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 and Findings for TAS Approval

- A. Federal Recognition
- B. Substantial Governmental Duties and Powers
- C. Jurisdiction Over Waters Within the Borders of the Tribe's Reservation
 - 1. Map and/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 Assertion of Jurisdiction Over "Waters Within the Borders" of the Reservation
 - 5. Capability

III. Conclusion

Appendix I: Application and Attorney Letter

Appendix II: Maps of the Reservation and Reservation Waters

Appendix III: EPA Approvals of Chemehuevi Indian Tribe's Previous TAS Applications

I. Background

A. Introduction

Section 303(c) of the Clean Water Act (CWA or Act) requires states to develop, review, and revise (as appropriate) water quality standards for surface waters of the United States. 33 U.S.C. § 1313(c). At a minimum, such standards must include designated water uses, water quality 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 that may result in a discharge to the waters of the United States. 33 U.S.C. § 1341.

Section 518 of the CWA authorizes the Environmental Protection Agency (EPA) to treat an eligible Indian tribe in a similar manner as a state (TAS) to manage and protect water resources “within the borders of an Indian reservation” for certain CWA programs, including Sections 303(c) water quality standards and 401 certification. 33 U.S.C. § 1377. 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 programs under Sections 303(c) and 401 of the CWA. *See* 40 C.F.R. §§ 131.4(c) and 131.8; 56 Fed. Reg. 64876 (Dec. 12, 1991), 59 Fed. Reg. 64339 (Dec. 14, 1994); 81 Fed. Reg. 30183 (May 16, 2016).

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, the TAS eligibility application from the Chemehuevi Indian Tribe (hereinafter, Tribe) allowing the Tribe to establish water quality standards pursuant to Section 303(c) of the CWA and to certify federally permitted or licensed activities pursuant to Section 401 of the CWA for areas within the Tribe’s Reservation. This approval applies to all surface waters that lie within the exterior borders of the Tribe’s Reservation, such as those 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(c). 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. However, approval of the Tribe for TAS authorization to administer water quality standards and certification programs under CWA Sections 303(c) and 401 does immediately authorize the Tribe to issue certifications under CWA Section 401 (*see* 40 C.F.R. § 131.4(c)), provided the Tribe designates a “certifying authority” as defined in 40 C.F.R. § 121.1(e). In addition, tribes authorized to administer the CWA water quality standards program are also “affected states” as the term is used under CWA Sections 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 CWA National Pollutant Discharge Elimination System program.

B. Application and Comments

Selected materials and documents relevant to EPA’s decision regarding the Application for TAS are attached as Appendices I-III. The Application includes 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 March 26, 2018, and the Tribe’s supplemental attorney letter to the final application submitted on December 30, 2020, which together constitute and will be referred to as the Tribe’s “Application.” Included also are a map of the Reservation, map of the waters of the Reservation, and prior TAS approvals for the Tribe.

As provided in 40 C.F.R. § 131.8(c)(2), EPA Acting Regional Administrator, Region IX, Deborah Jordan, sent letters dated May 7, 2021 and August 2, 2021 notifying “appropriate governmental entities”¹ of the substance and basis of the Tribe’s assertion of authority in its Application. The notice letters and copies of the Application were sent to Gavin Newsom, Governor of the State of California; Doug Ducey, Governor of the State of Arizona; U.S. Bureau of Land Management; U.S. Fish and Wildlife Service, Havasu National Wildlife Refuge; Bureau of Reclamation; and Bureau of Indian Affairs. In addition, consistent with Agency practice, EPA also provided the public with notice and an opportunity to comment on the Tribe’s assertion of authority. The public notice was published in *Today’s News-Herald* on March 31, 2021. EPA received no comments regarding the Tribe’s 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, 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 and guidance are also relevant to this TAS decision:

1. *EPA Policy for the Administration of Environmental Programs on Indian Reservations*, November 8, 1984.

¹ 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).

2. Memorandum entitled “*EPA/State/Tribal Relations*,” by EPA Administrator Reilly, July 10, 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 and Findings for TAS Approval

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 application for TAS for water quality standards under Section 303(c) and certifications under Section 401 of the CWA. The application 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. Under 40 C.F.R. § 131.8(b)(6), where a tribe has previously qualified for TAS for purposes of a different CWA or Safe Drinking Water Act program, the tribe need only provide the required information that has not been submitted in a previous application.

A. Federal Recognition

The first requirement for a tribal TAS application for water quality standards under CWA Section 303(c) and certification under CWA Section 401 is that the 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). A tribe must include a statement that it is recognized by the Secretary of the Interior. *See* 40 C.F.R. §131.8(b)(1). 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.” 40 C.F.R. § 131.3(l). 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.” 40 C.F.R. § 131.3(k).

The Application states that the Tribe is recognized by the Secretary of the Interior. EPA has verified that it is a federally recognized tribe, listed in the current Department of the Interior published list of “Indian Entities Recognized by and Eligible to Receive Services From the United States Bureau of Indian Affairs” as the “Chemehuevi Indian Tribe of the Chemehuevi Reservation, California.” *See* 87 Fed. Reg. 4636, 4638 (Jan. 28, 2022). Therefore, EPA has confirmed that the Chemehuevi Indian Tribe, whose Reservation is located in San Bernardino County, California, 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 for a TAS application for water quality standards under CWA Section 303(c) and certifications under CWA Section 401 is that a tribe has a governing body carrying out substantial governmental duties and powers over a defined area. 40 C.F.R. § 131.8(a)(2). To make this showing, 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, such as those exercising police powers affecting or relating to the health, safety, and welfare of the affected population, taxation, and the exercise of eminent domain; and (iii) identify the source of the tribal government’s authority to carry out the governmental functions currently being performed.

A tribe that has previously shown that it meets the “government functions” requirement for purposes of another EPA program generally does not need to make that showing again. *See* 59 Fed. Reg. 64339, 64340 (Dec. 14, 1994) (Simplification Rule). EPA granted approval of the Tribe’s TAS applications for CWA Section 106 (Water Pollution Control Program) grant eligibility on April 1, 1999, and CWA Section 319 (Nonpoint Source Pollution) grant eligibility on March 8, 2000. EPA found in each instance that the Tribe had adequately described the form of tribal government, its governmental functions, and the source of tribal authority to carry out those functions. *See* Appendix III. The Tribe’s governance structure and its related governmental functions have not changed since the prior TAS approvals.

Nevertheless, as background and for additional support, EPA briefly summarizes the Tribe’s governmental structure here. The Chemehuevi Indian Tribe governmental authorities are exercised by its Tribal Council, composed of nine elected officials including a Chairperson, a Vice Chairperson, a Secretary-Treasurer, and six Council Members. The Council exercises governmental functions and police powers through the passage of resolutions and the enactment of ordinances pursuant to the Tribe’s Constitution, which was adopted under the Tribe’s inherent sovereign authority and the Indian Reorganization Act of 1934 and most recently approved by the Secretary of the Interior on January 27, 1993. Article VI of the Constitution provides the Tribal Council with the power to conduct government relations, promote health, education and

welfare of Tribal members, enact codes and ordinances, and manage Tribal lands and business affairs, including tribal water quality standards.

EPA has determined, based upon the Tribe's Application and EPA's approvals of the Tribe's prior CWA TAS applications, that the Tribe has sufficiently 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 for tribal TAS applications for water quality standards under CWA Section 303(c) and certifications under CWA 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, 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 and/or Legal Description

The Application contains a map and a legal description of the area over which the Tribe asserts authority with an identification of the surface waters that are covered. The Reservation consists of approximately 32,487 acres of land located in San Bernardino County. The Tribe's Reservation border is set out in a submitted map of the Reservation. *See* Appendix II.

The Reservation was established by Order of the Secretary of the Interior on February 2, 1907, with the following legal description:

San Bernardino Meridian, California

Fractional townships T. 4 N., R. 25 E., T. 4 N., R. 26 E., T. 5 N., R. 25 E., T. 6 N., R. 25 E., the E/2 of T. 5. 5 N., R. 24 E., and secs. 25, 26, 35 and 36 of T. 6 N., R. 24 E.

On June 28, 2010, the Bureau of Land Management issued a trust patent which placed into trust certain lands within the boundaries of the Reservation as described in the 1907 Order. The Application covers the entire Reservation, including both trust and non-trust lands located within the Reservation's boundaries.

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

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

The Tribe’s TAS Application included a Statement from the Tribe’s legal counsel dated January 26, 2018, and a Supplemental Statement from the Tribe’s legal counsel dated December 31, 2020, that together describe and rely on the express congressional delegation of authority under CWA Section 518 as the basis for the Tribe’s authority to regulate water quality under the CWA.

When considering the congressional delegation of authority under the CWA, the main focus of EPA’s determination of 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. *See* 81 Fed. Reg. 30183, 30194 (May 16, 2016). As described in the previous section, the boundaries of the Tribe’s Reservation have been properly identified. Moreover, the Tribe asserts in its application that there are no limitations or impediments to its ability to accept and effectuate this congressional delegation of authority under the CWA over its Reservation. EPA is not otherwise aware of any impediment limiting the Tribe’s ability to effectuate the congressionally delegated authority. EPA therefore concludes that the Tribe has properly asserted the congressional delegation of authority to regulate surface water quality on its Reservation 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

The Tribe asserts authority over all surface waters within its Reservation and has identified the major surface waters within its Reservation for which it may propose to establish water quality standards, including Chemehuevi Wash, Slanted Rock Wash, Copper Canyon Wash, Whipple Wash, and portions of the Colorado River and Lake Havasu.

All of the aforementioned waters are identified in the Tribe’s Application and were identified on the maps which were submitted by the Tribe in its Application. *See*, Appendix II. 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 Over “Waters Within the Borders” of the Reservation

Based upon the information contained in the Application, EPA finds 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 for a TAS application for water quality standards under Section 303(c) and certifications under Section 401 of the CWA is that the 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 previous CWA Section 106 and CWA Section 319 TAS applications, the Tribe described its governmental structure as a Tribal Council, composed of elected officials. The Chemehuevi Environmental Department (ED) is the governmental agency that provides technical support for the Tribe's environmental programs. The ED has been in place since the Tribe received its first General Assistance Program grant. Article VI of the Constitution provides the Tribal Council with the power to conduct government relations, promote health, education and welfare of Tribal members, enact codes and ordinances, and manage Tribal lands and business affairs, including tribal water quality standards.

EPA finds that the Tribe has an adequate accounting system and governmental structure, and in addition possesses adequate general managerial experience, and extensive experience managing a variety of environmental programs. For example, the ED has successfully managed the Tribe's core environmental programs, including the CWA Section 106 Water Pollution Control Program since 1999, and the CWA Section 319 Nonpoint Source Pollution Control Program since 2000. Through these programs, the ED has developed and/or is developing several environmental plans including the Integrated Waste Management Plan, Tribal Emergency Response Plan, Water Quality Management Plan, and Nonpoint Source Management Plan. The Tribe's ability to implement these other programs illustrates its capability to administer an effective water pollution control program. Therefore, 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 the technical and administrative capabilities of the ED, which is the entity that will assume primary responsibility for establishing, reviewing, implementing and revising water quality standards and receiving and processing applications for certification of compliance with water quality requirements and standards for projects that are subject to federal permits or licenses that may

result in discharge to navigable waters or impact water quality on the Reservation. The ED staff currently includes a full-time Director and Deputy Director who are responsible for water quality, and nonpoint source management. The scopes of work and necessary qualifications for the ED employees are included in Appendix I of the Application.

Based upon EPA's program office review of the information in the Tribe's Application and a discussion with the ED, EPA finds that the Tribe has demonstrated that it has the administrative and technical 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. Conclusion

EPA has determined that the Chemehuevi Indian Tribe 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. Pursuant to 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. § 121. Additionally, by virtue of these decisions, the Tribe will be an "affected state" within the meaning of CWA Section 402(b)(3) and (5) and its implementing regulation at 40 C.F.R. § 122.4(d).

Martha Guzman
Regional Administrator