

Appendix A

QUAPAW TRIBE OF OKLAHOMA

Copy of Determination Letter for Section 319 funding under Clean Water Act

[See Attached]



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 6

1445 ROSS AVENUE, SUITE 1200
DALLAS, TX 75202-2733



The Honorable John L. Berrey
Chairman
Quapaw Tribe of Oklahoma
P.O. Box 765
Quapaw, OK 74363

OCT 08 2009

Dear Chairman Berrey:

This letter is to inform you of our determination in response to your request for treatment-in-a-similar-manner-as-a-state (TAS) status under Clean Water Act (CWA) §518 for the purpose of eligibility to receive grant funding available under CWA §319 to assist the tribe in controlling non-point sources of pollution that can affect water resources. As explained further below, we have determined that the Quapaw Tribe of Oklahoma has met CWA §518 criteria for TAS, has fulfilled other applicable prerequisites, and is eligible for Section 319 grant funding.

Introduction and Background

The Quapaw Tribe of Oklahoma submitted its application for TAS for Section 319 funding purposes on August 26, 2009, and submitted additional materials on September 18, 2009. Section 319 establishes a program for grants to states to assist in controlling nonpoint sources of pollution that can affect water resources. Under this provision, states are eligible to receive grants from Environmental Protection Agency (EPA) on approval of two key submissions concerning nonpoint sources and affected waters: (1) assessment report, and (2) a management plan. A state with an approved assessment report and management plan is eligible for grants to assist the state in implementing the management program. As to Indian tribes, Section 518(e) of the CWA authorizes treatment in the same manner as a state for purposes of Section 319 funding, if the tribe meets several specific criteria.

Therefore, in order to determine that Quapaw Tribe of Oklahoma is eligible for CWA 319 funding, EPA must review the Tribe's TAS application to determine if CWA §518 criteria are met, and review the Tribe's assessment report and management plan under Section 319 to determine if Section 319 prerequisites have been met.

Review of Assessment Report and Management Plan under CWA Section 319

Under Section 319, states and (when Section 518(e) is also satisfied) Indian tribes are eligible to receive grants from EPA where they have satisfied two key requirements. First, the state must prepare and submit to EPA for approval, an assessment report that, among other things : (1) identifies navigable waters within the state that, without additional measures to control nonpoint sources of pollution, cannot reasonably be expected to attain or maintain applicable water quality standards; (2) identifies categories of nonpoint sources of pollution;

(3) describes the state process for identifying best management practices for addressing nonpoint sources; and (4) identifies state and local programs for addressing pollution from nonpoint source and improving water quality. CWA Section 319(a), 33 U.S.C. §1329(a). Second, each state (or a combination of states) must submit to EPA for approval a management program that the state proposes to implement in the first four fiscal years after submission for controlling nonpoint source pollution. CWA Section 319(b) U.S.C. §1329(b).

We have reviewed the NonPoint Source Assessment Report and Nonpoint Source Management Plan submitted by the Quapaw Tribe of Oklahoma and found both to be thorough, well written, and consistent with EPA guidance. Accordingly, they are approved.

Review of TAS eligibility under CWA Section 518

Section 518 of the CWA and its relevant implementing regulations set forth four requirements for TAS eligibility for the purpose of receiving a nonpoint source grant:

- (1) The Indian tribe must be recognized by the Secretary of the Interior and must exercise governmental authority over a Federal Indian reservation. 33 U.S.C. §1377(h)(2).
- (2) The Indian tribe must have a governing body carrying out substantial governmental duties and powers. 33 U.S.C. §1377(e)(1); 40 CFR § 130.6(d)(1).
- (3) The functions to be exercised by the Indian tribe must pertain to the management and protection of water resources held by an Indian tribe, held by the United States in trust for Indians, held by a member of an Indian tribe if such property is subject to a trust restriction on alienation, or otherwise within the borders of an Indian reservation. 33 U.S.C. §1377(e)(2); 40 CFR § 130.6(d)(2).
- (4) The Indian tribe must reasonably be expected to be capable of carrying out the functions to be exercised in a manner consistent with the terms and purposes of the CWA and applicable regulations. 33 U.S.C. §1377(e)(3); 40 CFR § 130.6(d)(3).

EPA has recognized that the federal recognition and governmental duties and powers requirements for TAS eligibility are essentially the same for separate TAS applications from the same tribe, and has therefore requested that the applicant tribes inform EPA whether they have been previously approved for TAS for other programs. 59 Fed. Reg. 13814, 13815 (March 23, 1994). Consistent with this request, the Quapaw Tribe of Oklahoma's application refers to its June 1999, TAS approval for CWA §106 purposes. We have considered the information submitted by Quapaw Tribe of Oklahoma in connection with its previous CWA §106 TAS application as well as the information in the current TAS application. Our findings are as follows:

Federally-recognized Tribe; Substantial Governmental Duties and Powers

In its CWA 319 TAS application under the CWA, the Quapaw Tribe of Oklahoma submitted has demonstrated that they are a federally-recognized tribe by providing a copy of 74 Fed. Reg. 40218 (August 11, 2009), which shows that the Department of the Interior, Bureau of Indian Affairs (BIA) has included the Quapaw Tribe in its list of Indian Entities recognized and Eligible to Receive Services from the BIA. The TAS Application also includes a letter prepared by the General Counsel for the Quapaw Tribe, which describes the Tribe's "Governing Resolution", that delegates authority for key governmental functions to the Quapaw Tribal Business Committee. The Tribe conducts elections for the members of the Tribal Business Committee. The Tribal Business Committee has legislative powers, which it has exercised by adoption of resolutions and enactment of statutes. The General Counsel's letter points out that the Quapaw Tribe is a self-governance tribe for purposes of Public Law 93-638, the "Indian Self-Determination and Education Assistance Act", 25 U.S.C. §§ 450 et seq. Enclosed with the application are copies of the Tribal statutes establishing an Environmental Commission.

EPA finds that the Quapaw Tribe of Oklahoma's CWA Section 319 TAS Application contains adequate documentation to demonstrate that governing bodies of the Quapaw Tribe do exercise "substantial governmental duties and responsibilities" and therefore meet the requirements of CWA § 518(e)(1). The Quapaw Tribe has enacted legislation, held elections, negotiated intergovernmental agreements, conducted self-governance activities, established an Environmental Commission, and promulgated environmental regulations.

Functions Pertain To Management Of Water Resources on Lands That Meet Ownership/Status Requirements Described in 518 (e) (2) and 40 CFR § 130.6(d) (2)

The Tribe's TAS Application must show that CWA Section 319 activities would pertain to water resources on tribal lands that meet ownership and status requirements of CWA 518(e)(2). The EPA has interpreted CWA § 518(e) (2) to include lands held in trust by the United States for a tribe. The Quapaw Tribe of Oklahoma's TAS Application includes a map showing numbered tracts, color-coded to show which tracts are "trust land", "restricted land", and "fee land". The Map indicates that water resources are associated with "trust land" tracts, numbered 4, 5 and 8 (Garrett Creek), as well as trust tracts numbered 3 and 10 (Beaver Creek). The TAS Application includes a copy of the "Quapaw Tribe of Oklahoma Nonpoint Source Assessment" (hereafter the "Assessment"). The Assessment indicates that Garrett Creek is a tributary of Tar Creek and lies within the watershed of the Neosho River, while Beaver Creek is a tributary to Spring River and lies within the Spring River watershed.

The TAS Application includes a Table that provides legal description, acreage, and ownership interest for each numbered tract shown on the Map. The Table shows 100% property interest for tracts 3, 4, 5, 8 and 10. The Quapaw tribe also provided copies of deeds for many numbered tracts on the Map. The deeds for tracts 3, 4, 5, 8, and 10 show that these tracts are held by the United States in trust for the Quapaw Tribe of Oklahoma.

EPA finds that the Quapaw Tribe of Oklahoma 319 TAS Application shows that the Quapaw tribe has tribal trust lands and waters that fall within the categories of eligible lands under CWA § 518(e)(2).

Capability

To be eligible for TAS under CWA §518, EPA must find that the Quapaw Tribe of Oklahoma can reasonably be expected to be capable of carrying out the functions to be exercised in a manner consistent with the terms and purposes of the CWA and applicable regulations. 33 U.S.C. §1377(e)(3); 40 CFR §130.6(d)(2). The Quapaw Tribe of Oklahoma has demonstrated that it is capable of administering a nonpoint source program in a manner consistent with the terms and purposes of the CWA and applicable regulations. In determining that the Quapaw Tribe of Oklahoma has this capability, EPA considered that:

- a. The Quapaw Tribe of Oklahoma has established and staffed a Quapaw Tribe Environmental Department to carry out the mission of water quality programs. This department will administer the CWA Section 319 grant.
- b. The Quapaw Tribe of Oklahoma has developed a water quality monitoring program for assessment of physical, chemical, and biological parameters.
- c. The Quapaw Tribe of Oklahoma has demonstrated administrative capability with cooperative agreements under CWA Section 106, the General Assistance Program, and other federal programs.
- d. The Quapaw Tribe of Oklahoma has implemented a CWA grant since 1999 and has been found eligible for TAS for CWA Section 106 purposes.
- e. As previously noted, the Quapaw Tribe of Oklahoma has submitted an approvable Nonpoint Source Assessment Report and Management Plan.

SAFETEA-LU (Transportation legislation of 2005)

Section 10211(b) of SAFETEA-LU requires tribes in Oklahoma seeking TAS for certain programs under EPA statutes to enter into a cooperative agreement with the State agency “with federally delegated program authority” to jointly plan administering program requirements. Public Law 109-59, 199 Stat. 1144 (August 10, 2005). EPA has previously determined that the CWA §319 grant program does not involve any delegation of program authority and the cooperative agreement requirement under SAFETEA-LU does not apply. Because the Quapaw Tribe of Oklahoma’s TAS application relates solely to eligibility to receive CWA §319 grant funding, the application and EPA’s decision on it are outside the scope of Section 1021(b)(2).

Conclusion

Therefore, considering all information submitted by the Quapaw Tribe of Oklahoma in the current application as well as in connection with its previous 1999 TAS approval, EPA finds that the Quapaw Tribe of Oklahoma has satisfied the requirements of CWA Section 518 for Treatment in the same manner as a State for purposes of CWA §319, and hereby approves your TAS application. EPA also finds that the Nation's Assessment Report and Nonpoint Source Management Plan meet applicable requirements and the Tribe is therefore determined to be eligible for the purposes of CWA §319 funding.

If you have any questions, please feel free to contact me at (214) 665-7101, or have your staff call George Craft, Project Officer at (214) 665-6684, or Deborah Ponder, Acting Director of the Office of Tribal Affairs and Environmental Justice at (214) 665-8069. We look forward to working closely with the Quapaw Tribe of Oklahoma on your Nonpoint Source Program.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Bill Luthans", with a stylized, flowing script.

Bill Luthans
Acting Director
Water Quality Protection Division

cc: Tim Kent
Environmental Director, Quapaw Tribe of Oklahoma