

DECISION DOCUMENT
FOR
THE U.S. ENVIRONMENTAL PROTECTION AGENCY'S APPROVAL OF
CABAZON BAND OF MISSION INDIANS
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

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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, 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. 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) water quality standards and 401 certification. 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* 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 Cabazon Band of Mission Indians (“CBMI” or “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 Tribe’s reservation. This approval applies to all surface waters that lie within the exterior borders of the Tribe’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. 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 included as Appendices I-IV. Included as Appendix I is the Tribe’s application for TAS for purposes of the water quality standards and certification programs under Sections 303(c) and 401 of the CWA, dated April 2018, which will be referred to as the Tribe’s “Application.”

As required by 40 C.F.R. § 131.8(c)(2), the EPA Regional Administrator, Region IX, Michael Stoker, sent a letter dated June 12, 2018, notifying “appropriate governmental entities”¹ of the substance and basis of the Tribe’s assertion of authority in its Application. The notice letter, as well as copies of the Application, were sent to the State of California, the Honorable Edmund G. Brown and the Twenty-Nine Palms Band of Mission Indians, the Honorable Chairman Darrell Mike. Comments were received from the California State Water Resources Control Board on July 25, 2018 regarding the Tribe’s assertion of authority and addressed in the Response to Comment (Appendix IV). In addition, consistent with Agency practice, EPA also provided notice to the general public and an opportunity to comment on the Tribe’s assertion of authority, which included the Region IX Project Officer’s contact information for members of the public who wanted to obtain a copy of the Application to review. The public notice was published in The Desert Sun on June 15, 2018. On June 12, 2018, EPA exercised its discretion by conducting additional outreach regarding the Tribe’s Application to local governments, including the County of Riverside, the Coachella Valley Water District, the City of Indio, the City of Coachella, the City of Thermal and the City of Mecca. As part of that local outreach, the Region held a conference call with the local governments on July 10, 2018. No comments were received on the Application from the public or local governments.

C. Statutory and Regulatory Provisions

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

1. Section 518 of the CWA, 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 and guidance 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.

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).

3. Memorandum entitled “*Adoption of the Recommendations from the EPA Workgroup on Tribal Eligibility Determinations*,” by EPA 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 treatment in a similar manner as a state 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. After making an affirmative TAS determination, EPA reviews any submitted 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 eligibility to develop and submit water quality standards to EPA for its approval under CWA Section 303 and 40 C.F.R. § 131.21. 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 deemed to be “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 for a tribal TAS application for water quality standards under CWA Section 303(c) and certification under CWA 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). A tribe must include in its application a statement that the tribe is recognized by

the Secretary of the Interior. *See* 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.”

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 “Cabazon Band of Mission Indians, California.” *See* 84 Fed. Reg. 1200, 1201 (February 1, 2019). Therefore, EPA has confirmed that the Cabazon Band, whose Reservation is located in Indio, meets the definition of an “Indian Tribe” set forth at 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 tribal 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; 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 (December 14, 1994) (“Simplification Rule”). EPA granted approval of the Tribe’s TAS application for CWA Section 106 (Water Pollution Control Program) grant eligibility in June 1995 and CWA Section 319 (Nonpoint Source Pollution Prevent) grant eligibility on September 2009, and 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 approval.

While the Tribe need not make the “government functions” showing again under the Simplification Rule, in this instance, since CBMI has provided information regarding its governmental organization and functions in its Application, we will provide a brief summary of those factors. As described in the Application, CBMI operates under written Articles of Association found in the Cabazon Tribal Code, which were approved by the Commissioner of Indian Affairs on April 13, 1965. Under those Articles, the governing body of the Tribe is the General Council, which consists of all adult members over 18 years of age. The General Council,

in turn, elects 5 members to the Cabazon Business Committee. The governmental functions of the General Council and Business Committee include the authority and responsibility “to promote the health, education, safety and welfare of the tribe; to manage, lease and otherwise deal with tribal lands and assets; to levy taxes and assess fees; to manage tribal affairs in a competent manner; and to enact codes and ordinances to carry out the tribe’s powers.”

EPA has determined that, based upon the Tribe’s Application and EPA’s prior approval of the Tribe’s CWA Section 106 Water Pollution Control TAS application in June 1995 and CWA Section 319 Nonpoint Source Pollution Prevention in September 2009, 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), (b)(2) and (b)(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 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. *See* Appendix II. The Tribe’s Reservation is located in Indio, CA. As stated in the Tribe’s Narrative Statement, the Reservation was originally established by Presidential Decree by Ulysses Grant in 1876 as consisting of three parcels of raw desert totaling 2,400 acres.² The Reservation has decreased in area to approximately 1,389 acres through various legal mechanisms. The Reservation was diminished and portions of the land were granted to the Southern Pacific Railroad by Congressional acts following the passage in 1891 of the “Act for the Relief of the Mission

² *See* Executive orders relating to Indian reservations: from May 14, 1855 to July 1, 1912, pg. 46, *available at* <https://archive.org/details/cu31924097621753/page/n1> (last visited November 1, 2019).

Indians in the State of California.”³ Additionally, in 1976, a portion of the Reservation was transferred by Congress from the Cabazon Band of Mission Indians to the 29 Palms Band of Mission Indians.⁴

The Reservation is located on non-contiguous lands in the eastern half of the Coachella Valley, Riverside County, California. It is divided over four sections of land; Sections 19, 30, and 32 are located in Township 5 and Range 8, and Section 6 is located in Township 7, Range 9. These sections occur adjacent to the cities of Indio and Coachella, and the unincorporated communities of Thermal and Mecca. Reservation land in Section 32 is located just north of the City of Coachella, where the Whitewater River and Highway 86 cross the Reservation lands diagonally. The boundaries of the Tribe’s Reservation lands are depicted in the map attached as Appendix II. These boundaries were recently confirmed in a compact between the State of California and CBMI, executed on August 19, 2019, which states that, “Those certain parcels of land being held in trust by the United States of America for the Cabazon Band of Mission Indians, County of Riverside, State of California,” include “APNs: 603-030-006, 603-040-004, 603-040-008, 603-081-015, 603-090-012, 603-090-019, 603-290-008, 603-290-017, 603-290-018, 603-290-019, 603-300-024, 603-300-027, 603-300-028, 603-300-029, 696-530-004, 696-530-005, 696-530-006, 727-020-003, 727-020-004, 727-020-006, 727-020-007.”⁵

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 for the CWA Sections 303(c) and 401 programs included a Statement from the Tribe’s legal counsel dated October 27, 2017 that describes and relies on the 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 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 also 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

³ Acts of the Fifty First Congress. Session II. Laws of the United States. Chapter 65 Jan. 12, 1891. 26 Stat., 712.

⁴ Public Law 94-271, 90 Stat. 373 (1976).

⁵ *See* “Tribal-State Compact Between the State of California and the Cabazon Band of Mission Indians,” executed August 19, 2019, Appendix A, *available at* <https://www.gov.ca.gov/wp-content/uploads/2019/08/Cabazon-Compact.pdf> (last visited November 1, 2019).

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 Cabazon Band has identified surface waters within its Reservations for which it proposes to establish water quality standards, which include portions of the Whitewater River.

All of the aforementioned waters are identified in Appendix II and were identified on the map which was submitted by the Tribe as part of 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, and the analysis above, EPA finds that the Tribe meets the requirement 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 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 previous TAS Applications, the Tribe described its governmental structure as the Cabazon Business Committee, which possesses executive, legislative and judicial powers. The Cabazon Band of Mission Indians, as described in the narrative statement, is organized under Articles of Association, which creates a General Council whose responsibility is to manage the affairs of the Tribe. The General Council, in turn, elects

five members to the Cabazon Business Committee, which includes a Chairman, a First and Second Vice-Chairman, a Secretary-treasurer and a Liaison to the General Council. The members of the Business Committee appoint a Member-at-Large, who also serves on the Committee. Members of the Business Committee serve four-year terms. The Tribe's Judiciary consists of a Tribal Court.

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 and public health programs. For example, the CBMI Environmental Department is the agency that is responsible for providing the technical staff support for the Tribe's environmental programs and a variety of community health programs. As further discussed below, 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 Environmental Department staff has gained more experience in implementing its environmental programs and has successfully implemented and gained capacity from the General Assistance Program, Water Pollution Control Program (CWA Section 106), and Nonpoint Source Pollution Prevention Program (CWA Section 319). In addition, the Tribe has experience with other environmental programs, which it has identified as part of the Application, including the development of codes to regulate environmental practices and protect water quality by enforcing these codes. 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 further considered the technical and administrative capabilities of the Cabazon Band Environmental Department, which is the entity that has been assigned the 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 in navigable waters or impact water quality on the Reservation. After an analysis and recommendation put forth by the CBMI Environmental Department staff, the Environmental Department Director will be responsible for any final action regarding approval of Section 401 certification applications and finalization and submittal to EPA of proposed water quality standards. Petitions for review of any final action, such as the denial of a Section 401 Certification application, are reviewed and acted on by the Tribal Business Committee and Tribal Court.

The Tribe's TAS Application also contains descriptions of the specific positions along with the resumés of the program staff who will administer the water quality standards and certification programs. The Environmental Department is comprised of four dedicated staff members that, based upon review of the resumés, possess extensive work experience with environmental management and regulation. In addition, the Environmental Department is supported by other programs within the tribal governance structure, including Human Resources, Finance, Information Systems, the Tribal Court, and a Tribal Public Safety Department. The position descriptions and resumés demonstrate that the staff at the CBMI Environmental Department possess the administrative and technical capability to administer an effective water quality standards and certification program.

Based upon EPA's program office review of the information in the Tribe's Application and discussions with the environmental 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. CONCLUSION

EPA has determined that the 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. § 131.6. 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).

John W. Busterud
Regional Administrator

Date