

DECISION DOCUMENT:

Approval of the Twenty-Nine Palms Band's Application for Treatment in the Same Manner as a State for Sections 303 (c) and 401 of the Clean Water Act

TABLE OF CONTENTS

I. Introduction and Administrative Record	2
A. Introduction	2
B. Administrative Record	2
1. Application	2
2. Letter from EPA	4
3. Comments	4
4. Capability Review	4
5. Statutory and Regulatory Provisions	4
6. Policy Statements	5
II. Requirements for TAS Approval	5
A. Federal Recognition	6
B. Substantial Governmental Duties and Powers	6
1. Form of Tribal Government	6
2. Types of Governmental Functions and Source of Tribal Governmental Authority	7
3. Conclusion	7
C. Jurisdiction Over Waters Within the Borders of the Twenty-Nine Palms Reservation	8
1. Map or Legal Description	8
2. Statement Describing Basis of Tribe's Authority	8
3. Identification of the Surface Waters for Which the Tribe Proposes to Establish Water Quality Standards	9
4. Authority over Reservation Waters	9
D. Capability	10
III. Conclusion	11
Attachment - Index to the Administrative Record	

I. Introduction and Administrative Record

A. Introduction

Section 303(c) of the Clean Water Act (CWA) requires the 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 or deny "certification" for Federally permitted or licensed activities 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, among other things, water quality standards it has adopted under Section 303. If a State denies certification, the Federal permitting or licensing agency is prohibited from issuing a permit or license.

Section 518(e) of the CWA authorizes EPA to treat an eligible tribe in the same manner as a state (TAS) for certain CWA programs, including Sections 303 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 and 401 of the CWA. See 56 Fed. Reg. 64876 (December 12, 1991), as amended by 59 Fed. Reg. 13814 (March 23, 1994) (codified at 40 C.F.R. Part 131).

This Decision Document provides the basis and supporting information for EPA's decision to approve the Application from the Twenty-Nine Palms Band of Mission Indians (the "Tribe") for TAS for Section 303(c) and Section 401 of the CWA, pursuant to Section 518(e) of the CWA and 40 C.F.R. Part 131. This approval applies to administration of the Water Quality Standards Program and the Section 401 Certification Program for waters that lie within the exterior borders of the Twenty-Nine Palms Band of Mission Indians Reservation. The Twenty-Nine Palms Band's Reservation consists entirely of Tribal/trust lands in two parcels: one parcel is located near the City of Coachella in Riverside County (Coachella parcel), and the other parcel is near the City of Twenty-Nine Palms in San Bernardino County (Twenty-Nine Palms parcel).

B. Administrative Record

The following documents comprise a portion of the administrative record for this decision.

1. Application

The Tribe's Application for TAS approval to administer the Water Quality Standards and Certification Programs under Sections 303 and 401 of the CWA includes the following:

- a. The Tribe's Application and attached exhibits and a letter of transmittal from Dean

Mike, Tribal Chairman to EPA on May 1, 2005;¹

b. Supplemental information submitted by the Tribe on November 4, 2005, March 10, 2006 and March 17, 2006 to EPA Region 9.

c. Letter dated June 16, 2006, from Dean Mike, Chairman, Twenty-Nine Palms Band of Mission Indians, to Wayne Nastri, Regional Administrator, U.S. EPA, Region 9, clarifying the Tribe's Application.

d. Letter dated July 5, 2006, from Dean Mike, Tribal Chairman, Twenty-Nine Palms Band of Mission Indians, to Jo[Ann] Asami, U.S. EPA Region 9 Regional Counsel's Office, further clarifying the Tribe's Application.

e. Letter dated September 12, 2006, from Dean Mike, Tribal Chairman, Twenty-Nine Palms Band of Mission Indians, to Jo[Ann] Asami, U.S. EPA Region 9 Regional Counsel's Office. Re: Twenty-Nine Palms Application for Water Quality Standards.

¹ If a tribe has previously qualified as eligible for "treatment as a state" under another CWA or a Safe Drinking Water Act program, it need only submit the required information that has not been submitted in the previous Application. 40 C.F.R. § 131.8(b)(6). Accordingly, in processing the Tribe's TAS Application for water quality standards and certification, EPA considered and relied on information previously submitted to EPA in the Tribe's CWA Section 106 grant Application. (See Tribe's CWA Section 106 Application, dated April 29, 1997, which was resubmitted to EPA on May 8, 1997, as part of Application from the Morongo Band of Mission Indians, a consortium of Coachella Valley Tribes.) That Application is part of the record in support of this decision.

2. Letter from EPA

A May 11, 2006 letter from EPA Region 9 Regional Administrator Nastri offered appropriate governmental entities an opportunity to comment on the jurisdictional assertions in the Tribe's Application, and enclosed a copy of the Tribe's Application that included the Tribe's assertion of authority and a copy of the maps showing the Reservation lands over which jurisdiction was being asserted. The letter was sent to the following:

- a. The Honorable Arnold Schwarzenegger
Governor, State of California

- b. John A. James
Tribal Chairman
Cabazon Band of Mission Indians
84-285 Indio Springs Parkway
Indio, CA 92203

The letter recognized that city and county governments and other interested parties might also wish to comment, and noted that EPA was placing a notice in the Desert Sun, a daily newspaper in Palm Springs, announcing the Tribe's TAS Application and assertion of authority. The notice informed interested parties that they could obtain a copy of the Tribe's assertion of authority by calling EPA or could see the complete Application at EPA Region 9. It requested interested parties to submit written comments through, as appropriate, either the Cabazon Band or the California State Water Resources Control Board.

3. Comments

EPA did not receive any comments on the Tribe's Application.

4. Capability Review

By memorandum dated June 29, 2006, Janis Gomes, EPA Region 9, Water Division, Tribal Office, reviewed the capability of the Tribe to administer the Water Quality Standards and Certification Programs and determined that the Tribe has adequate capability.

5. Statutory and Regulatory Provisions

a. Section 518(e) of the Clean Water Act, 33 U.S.C. § 1377(e), authorizes EPA to treat an eligible Indian tribe in the same manner as a state if it meets specified eligibility criteria.

b. "Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations." 56 Fed. Reg. 64876 (codified at 40 C.F.R. Part 131) establish the requirements for a Tribe to obtain TAS approval.

6. Policy Statements

The following EPA policy statements pertain to TAS implementation:

a. EPA Policy for the Administration of Environmental Programs on Indian Reservations. November 11, 1984, which was reaffirmed most recently by EPA Administrator Johnson on September 26, 2005.

b. Memorandum entitled "EPA/State/Tribal Relations." by EPA Administrator Reilly. July 10, 1991.

c. Memorandum entitled "Adoption of the Recommendations from the EPA Workgroup on Tribal Eligibility Determinations." by Robert Perciasepe and Jonathan Cannon. March 19, 1998.

II. Requirements for TAS Approval

Under CWA Section 518(e) and EPA's implementing regulation at 40 C.F.R. § 131.8(a), four requirements must be satisfied before EPA can approve a tribe's application for TAS to administer the Water Quality Standards and Certification Programs under CWA Sections 303(c) and 401. These are: (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 program to be administered by the Indian tribe pertains to the management and protection of water resources that are held by the Indian tribe, held by the United States in trust for Indians, 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) identify what must be included in an application by an Indian tribe for TAS approval to administer a water quality standards and certification program. EPA separately reviews tribal water quality standards under 40 C.F.R. § 131.21, and TAS approval under 40 C.F.R. § 131.8 does not constitute an approval of such standards. But approval of a tribe for TAS for purposes of water quality standards does authorize that tribe to issue certifications under Section 401 of the CWA, see 40 C.F.R. § 131.4(c), provided that the tribe designates a certifying person or agency pursuant to 40 C.F.R. § 121.1(e). This decision does not, however, constitute an approval or disapproval of Tribal Water Quality Standards, which will be addressed in a separate process.

A. Federal Recognition

EPA can approve an application for TAS approval to administer the Water Quality Standards and Certification Programs under Section 303(c) and Section 401 of the CWA only for an "Indian Tribe" that meets the definitions set forth in CWA Section 518(h) and 40 C.F.R. § 131.3(k) and (l). See 40 C.F.R. § 131.8(a)(1). The term "Indian 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." CWA § 518(h) of the CWA, 40 C.F.R. § 131.3(l).

The record includes a narrative statement from the Tribe that describes its reservation and letters from attorneys representing the Tribe that describe the Tribe's authority to regulate water resources within the boundaries of the Reservation. The Tribe is included on the Secretary of the Interior's list of "Indian Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs."² 70 Fed. Reg. 71194, 71197 (November 25, 2005). Based on the information that the Tribe has submitted to EPA in support of its Application for TAS for the Water Quality Standards and Certification Programs under Sections 303(c) and 401, respectively, and on the Secretary of the Interior's formal recognition of the Tribe, EPA has determined that the Tribe meets the criteria of CWA Section 518(h)(1) and 40 C.F.R. § 131.8(a)(1).

B. Substantial Governmental Duties and Powers

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 a tribe submit a descriptive statement that should: (i) describe the form of the tribal government; (ii) describe the 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.

1. Form of Tribal Government

The Tribe's Application includes a narrative statement describing its government, as well as copies of Tribal ordinances. The Tribal government has been functioning in its current basic form since the 1960's. The Tribe's Articles of Association, which were executed on March 1, 1972, provide that the governing body of the Tribe is the General Council, which consists of all Tribal members. The Tribe currently has a total enrollment of 13 members, none of whom live on the Reservation. The Business Committee is elected by the General Council and oversees the day-to-day business of the Tribal government and departments of the Tribal government. The

² The Tribe appears on the Secretary of the Interior's list as "Twenty-Nine Palms Band of Mission Indians of California." 70 Fed. Reg. at 71197.

“Spokesman,” who is commonly referred to as the “Tribal Chairperson,” presides over all meetings of the General Council and the Business Committee, (also known as the Business Council) but can only vote in the event of a tie. Legislative functions are the responsibility of the General Council. The Tribe’s Application satisfies 40 C.F.R. § 131.8(b)(2)(i) by adequately describing the form of its Tribal government.

2. Types of Governmental Functions and Source of Tribal Governmental Authority

The Tribe’s Application describes several types of governmental functions the Tribe currently performs. The General Council, which is commonly referred to as the “Tribal Council,” exercises the powers set forth in the Articles of Association. Those include the powers: to manage, lease, contract or otherwise deal with Tribal assets; employ legal counsel; assess fees for the payment of expenses or to finance projects; establish rules of procedure for the conduct of Tribal affairs; enact ordinances governing Tribal membership; and take such actions as necessary to carry into effect the foregoing powers.

Since the adoption of the Tribe’s Articles of Association, the Tribal Council has approved various ordinances and policies to protect the health and welfare of Tribal members and other persons on the Reservation. Those include a water pollution control ordinance that prohibits the discharge of any pollutant into the waters of the Reservation. The Tribe has also enacted an environmental protection ordinance that, among other things, addresses the effects of gaming activities on the Reservation environment, and protects lands, historic and cultural values, and air, water and land from pollution and degradation. Finally, the Tribe has adopted gaming facility health and safety standards that address activities related to the gaming facility, and a food and beverage, health and safety ordinance that regulates food quality and provides for routine inspections.

The Tribe’s governmental departments include the Tribal Administration and the Tribal Environmental Protection Agency (TEPA). The TEPA is responsible for implementing environmental protection programs, which include water quality protection, water rights, emergency response planning, public health protection and pesticides management. The TEPA is also responsible for food safety and providing emergency response. The TEPA operates a laboratory certified by the State of California that conducts testing of Reservation surface and ground waters and provides laboratory and consultant services for other tribes.

The Tribe has satisfied 40 C.F.R. § 131.8(b)(2)(ii) and (iii) respectively, by adequately describing the “governmental functions currently performed by the Tribal governing body,” and the source of its authority to perform its current governmental functions.

3. Conclusion

Through its submissions in its Application and supplemental information, the Tribe has demonstrated that the Tribal governing body is currently carrying out substantial governmental

duties and powers over a defined area. 40 C.F.R. § 131.8(b)(2).

C. Jurisdiction Over "Waters Within the Borders" of the Twenty-Nine Palms Band of Mission Indians Reservation

Under 40 C.F.R. § 131.8(b)(3), the Tribe is required to submit a statement of authority. The statement should include: (i) a map or legal description of the area over which the Tribe asserts authority to regulate 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 Tribe has submitted maps and a legal description of the Reservation, which consists of two separate parcels. The first parcel is located near the City of Twenty-Nine Palms in San Bernardino, County, California and consists of 160.21 acres described as NW1/4 of sec. 4, T1.S.,R.9E.,SBBM, California. The Trust Patent for the first parcel was issued on November 11, 1895. The second parcel is located near the City of Coachella in Riverside County and consists of 240 acres described as NE1/4,NE1/4NM1/4 and NE1/4SE1/4 Section 30, T.5 S., R. 8E., SBM, California. The second parcel was originally included in the 640 acres patented jointly to the Cabazon and Twenty-Nine Palms Bands in June 10, 1910, Trust Patent No 134436. By Act of Congress (90 Stat. 373), the 240-acre parcel was separated out and a Trust Patent was issued on May 15, 1978, to the Tribe.

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

2. Statement Describing Basis For The Tribe's Authority

The Tribe's Application includes letters prepared by Gary Kovall, Tribal Attorney, dated April 26, 2005, and a letter prepared by Gene R. Gambale, General Counsel dated April 30, 1997, describing the legal basis for the Tribe's authority to exercise governmental functions. These letters assert that the Tribal government has the powers to manage Tribal assets, to enact ordinances and to take such other actions as are necessary to put its powers into effect. The Tribe has used that authority "to protect and promote public health, safety, and [Tribal] welfare."

The Tribe has satisfied 40 C.F.R. § 131.8(b)(3)(ii) by providing a statement by the Tribe's legal counsel that describes the basis for the Tribe's authority to carry out governmental functions.

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

The Tribe's Application asserts authority over all surface waters within the Twenty-Nine Palms Band of Mission Indians Reservation. It specifically identifies the Whitewater River, a major waterway in the Coachella Valley, which bisects the Coachella parcel running in a southeasterly direction. In addition, the Tribe has identified two unnamed ephemeral streams that flow northward through the Twenty-Nine Palms parcel. The length of each of these two streams is approximately 2,640 feet, and when flowing each has a width of about 2-5 feet.

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. Authority over Reservation Waters

EPA believes that the Tribe has adequately demonstrated that it meets the requirements imposed by 40 C.F.R. § 131.8(a)(3) for the following reasons:

The Tribe's Application states that the Reservation consists entirely of trust lands and that there are no fee lands within the Reservation. Further, there are no known nonmember activities that are subject to regulation under the CWA or that affect water quality.

EPA also recognizes that under well-established principles of Federal Indian law, a tribe retains attributes of sovereignty over both its members and its territory. *See, e.g., California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987); *U.S. v. Mazurie*, 419 U.S. 557 (1975). Tribes retain the "inherent authority necessary to self-government and territorial management," and there is a significant territorial component to tribal power. *Merrion v. Jicarilla Apache Tribe*, 450 U.S. 130, 141-142 (1982). *See also White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 151 (1980)(recognizing a geographic component of tribal sovereignty). Consistent with that reasoning, the Tribe's Articles of Association expressly assign the Tribal General Council the authority to manage, lease, contract, or otherwise deal with Tribal assets, which, as already explained, include all of the land within the Reservation.

Finally, there is, as already noted, no nonmember-owned fee land within the Reservation. A tribe retains its well-established power to exclude nonmembers from tribal land, including "the lesser power to place conditions on entry, on continued presence, or on reservation conduct." *Merrion*, 455 U.S. at 144. Thus a tribe can regulate the conduct of nonmembers over whom it could "assert a landowner's right to occupy and exclude." *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 651-651 (2001)(quoting *Strate v. A-1 Contractors*, 520 U.S. 438, 456 (1997)).

The Agency is, therefore, satisfied that the Twenty-Nine Palms Band of Mission Indians has adequate jurisdiction to set water quality standards for waters within the exterior boundaries of the Reservation.

D. Capability

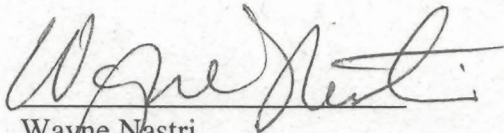
To demonstrate that a tribe has the capability to administer a water quality standards program, 40 C.F.R. § 131.8(b)(4) requires that the tribe's application include a narrative statement of the tribe's capability. The narrative statement should include: (i) a description of the tribe's previous management 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; and (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 an effective water quality standards program or a plan that proposes how the tribe will acquire additional administrative and management expertise. 40 C.F.R. § 131.8(b)(4)(i)-(v).

The Tribe's Application shows that it is reasonably expected to be capable 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. The record includes a memorandum reviewing the Tribe's capability to administer the water quality standards program prepared by Janis Gomes, EPA Region 9, Water Division, Tribal Office, and dated June 29, 2006. Ms. Gomes concluded that the Tribe has demonstrated the capability to administer an effective water quality standards program based on her review of the Application. The memorandum states that the Application describes the Tribe's management experience which includes successfully managing a large casino and a health insurance enterprise. The memorandum also notes that the TEPA has received and managed several environmental grants, and has carried out a number of environmental activities, and that the Tribe operates a laboratory certified by the State of California that provides analytic services to other tribes requesting such services. The memorandum also identifies the TEPA as the designated agency that will review and act on all applications for a Section 401 certification, and concludes that the Tribe has the capability to administer an effective certification program. The TEPA is also the designated agency that will be responsible for administering the Tribe's water quality standards program once the Tribe's water quality standards have been approved by EPA. As stated earlier, the approval of a Tribe's water quality standards requires a separate approval action by EPA.

The Tribe has satisfied the requirements of 40 C.F.R. § 131.8(b)(4) by providing information that describes its capability to administer an effective water quality standards and certification program, and EPA has determined that the Tribe has met the requirements of 40 C.F.R. § 131.8(a)(4).

III. Conclusion

EPA has determined that the Twenty-Nine Palms Band of Mission Indians has met the requirements of CWA Section 518(e), and 40 C.F.R. § 131.8, and therefore approves the Tribe's Application for TAS to administer a water quality standards program pursuant to CWA Sections 518(e) and 303(c). 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 CWA Section 401.



Wayne Nastri
Regional Administrator

October 26, 2006
Date