

DECISION DOCUMENT  
FOR  
THE U.S. ENVIRONMENTAL PROTECTION AGENCY'S APPROVAL OF  
**TABLE MOUNTAIN RANCHERIA**  
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. 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 (“treatment as a state” or “TAS”) to manage and protect water resources “within the limits 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* 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, a TAS eligibility application (the “Application”) from the Table Mountain Rancheria (“Table Mountain” 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(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 this TAS decision are attached as Appendices I-III, including 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 through August 26, 2020.

As provided in 40 C.F.R. § 131.8(c)(2), EPA Regional Administrator, Region 9, John W. Busterud, sent a letter dated March 6, 2020, notifying appropriate governmental entities (“AGE”) of the substance and basis of the Tribe’s assertion of authority in its Application. The notice letters, as well as copies of the Application, were sent to Colonel Handura, United States Army Corps of Engineers; Governor Gavin Newsom, State of California, with a copy to the State Water Resources Control Board; and Mr. Alan Anspach, U.S. Bureau of Indian Affairs. In addition, consistent with Agency practice, EPA provided notice to the general public and an opportunity to comment on the Tribe’s assertion of authority, which included providing the EPA Region 9 Project Officer’s contact information to members of the public who wanted to obtain a copy of the Application to review. The public notice was published in *The Fresno Bee* on February 25, 2020, which covers the area in California where the Tribe’s Reservation is located. On March 11, 2020, EPA also conducted additional outreach regarding the Tribe’s Application to local governments, including the County of Fresno, City of Fresno, and the City of Clovis. EPA received no comments from the public or any of the noticed parties.

### **C. Statutory and Regulatory Provisions**

The following are certain statutory and regulatory provisions relevant to this TAS decision:

1. Section 518 of the CWA, 33 U.S.C. § 1377(e), which 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), which establish the requirements for a tribe to obtain TAS approval under the CWA 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.
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 TAS for water quality standards under Section 303(c) and certifications under Section 401 of the CWA. The application must demonstrate that the tribe meets 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 under 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 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 “Table Mountain Rancheria.” *See* 85 Fed. Reg.

5462, 5465 (January 30, 2020). Therefore, EPA has confirmed that the Table Mountain Rancheria, whose reservation is located in northeastern Fresno County, 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, such as, but not limited to, the exercise of 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 (December 14, 1994) (“Simplification Rule”). EPA granted approval of the Tribe’s TAS applications for CWA Section 106 (Water Pollution Control Program) grant eligibility in June 2001 and CWA Section 319 (Nonpoint Source Pollution Prevention) grant eligibility in March 2002, 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 approvals.

As background and for additional support, EPA summarizes the Tribe’s governmental structure here. As described in the Application, the Tribe has a governing body created through its Constitution and Bylaws, adopted in 1980, and amended in 1992. The Preamble of the Constitution states that its purpose is to promote and protect the Tribe’s interests and common welfare. Article IV establishes the General Council, consisting of all enrolled Tribal Members, as the governing body of the Tribe, and a Tribal Council, to carry out the day to day business of the Tribe and who are elected by the General Council. Under Article VII of the Tribe’s Constitution, the Tribal Council has broad powers over matters involving the Tribe, including the powers to manage, lease, contract, and otherwise deal with tribal assets, to employ legal counsel, and to take any actions that are necessary to carry into effect any of its powers. The Tribe’s Articles were intended to give the Tribal Council broad powers to regulate and enforce tribal requirements and to manage Rancheria lands and natural resources for the perpetual welfare of the Tribe and its members.

EPA has determined that, based upon the Tribe’s Application and EPA’s prior approvals of the Tribe’s CWA Section 106 Water Pollution Control TAS application in June 2001 and CWA Section 319 Nonpoint Source Pollution Prevention TAS application in March 2002, 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 a tribal TAS application for water quality standards under Section 303(c) and certifications under Section 401 of the CWA 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 a 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 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 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. In addition, in a letter to the Regional Administrator dated December 19, 2019, the Tribe stated that it sought TAS jurisdiction over all “Tribal Trust Land,” meaning both areas within its formal Reservation, regardless of ownership, and all areas outside the formal Reservation held in trust for the benefit of the Tribe.<sup>1</sup>

The Tribe’s Reservation is located in northeastern Fresno County. As stated in the Tribe’s Narrative Statement, “the original Rancheria land was deeded to the Tribe on September 27, 1916.” However, the Table Mountain Rancheria was disbanded in 1959 as a result of the California Rancheria Act. In 1983, the United States District Court (Northern District Court of California) issued a judgment ordering the Secretary of Interior to once again recognize the Table Mountain Band of Indians, allowing for the reorganization of the Table Mountain Rancheria. *See Table Mountain Rancheria (TMR) v. Watts*, C-80-4595-MHP (N. D. Cal. Mar. 28, 1983).” In *TMR v. Watt*, the court also re-established the exterior boundaries of the Reservation as those of the original Reservation prior to disbandment, with the exception of one parcel, APN 310-210-06. As this parcel was later placed in trust by BIA for the benefit of the

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<sup>1</sup> Reservations include both formal reservations (*e.g.*, named reservations established through federal treaties with tribes, federal statutes, or Executive Orders of the President) as well as tribal trust lands that may not be formally designated as reservations, but that qualify as informal reservations. *See, e.g.*, 56 FR 64876, 64881, December 12, 1991; 81 FR 30183, 30192 (May 16, 2016); *Arizona Public Service Co. v. EPA*, 211 F.3d 1280, 1292-1294 (D.C. Cir. 2000), *cert. denied sub nom., Michigan v. EPA*, 532 U.S. 970 (2001). Tribes may thus seek TAS authorization for both formal and informal reservations, and both types of lands are referred to as reservations.

Tribe, the entire historic Reservation is included within the scope of the Tribe's assertion of authority, regardless of ownership of those parcels. See Appendix II (the historic Reservation is depicted as the area within the yellow-checked line).

In addition, since 1983, BIA has put in trust other lands outside of the formal Reservation for the benefit of the Tribe. As explained above, these additional trust lands are within the scope the Tribe's assertion of authority for CWA Sections 303(c) and 401. See Appendix II (areas colored green outside the historic Reservation boundary). EPA has determined that the Tribe has therefore 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 on the original Reservation as reinstated by the *TMR v. Watts* decision as well as on land held by BIA in trust for the Tribe outside of that original Reservation.

## 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 June 25, 2019 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 Tribal 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 the 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 congressional 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 land held in trust for the Tribe and has identified major surface waters within its Reservation. These major surface waters include the Upper Rancheria, Winchell Creek, Millerton Lake, San Joaquin River, and Little Dry Creek.

All of the aforementioned waters are listed in the Tribe's Application and are identified on the map which was submitted by the Tribe as part of its Application. See Appendix II. The Application also provides a more detailed list of named surface waters within the Reservation. 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 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 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 CWA Section 106 and CWA Section 319 TAS applications, the Tribe described its governmental structure as the Tribal Council. The Preamble of the Table Mountain Rancheria Constitution states that its purpose is to promote and protect the Tribe's interests and common welfare. Article IV establishes the General Council, consisting of all enrolled Tribal Members, as the governing body of the Tribe, and a Tribal Council, to carry out the day-to-day business of the Tribe and who are elected by the General Council. Under Article VII, the Tribal Council has broad powers over matters involving the Tribe and the Rancheria, including the powers to manage, lease, contract, and otherwise deal with tribal assets, to employ Tribal legal counsel, and to take any actions that are necessary to carry into effect any of its powers. The Tribe's Articles were intended to give the Tribal Council broad powers to regulate and enforce tribal requirements and manage Rancheria lands and natural resources for the perpetual welfare of the Tribe and its members.

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. The Tribal Environmental Department ("TED") works with the Tribal Council Designee, Tribal Legal Counsel, Tribal Public Works Department, Cultural Resources Department, Tribal Medical Services, and Casino Managers to manage the Tribal environmental resources. The TED is a funded extension of the Tribal Council and operates under the guidelines outlined in a Policies and Procedures guideline

developed by the TED in 2000. The TED has been successfully managing the Tribe's General Assistance Program and Clean Water Act programs for nearly twenty (20) years and would utilize that experience to manage water quality standards. The responsibilities to establish, review, implement, and revise water quality standards including conducting water quality certifications will be assigned to the Tribe's Environmental Planning Office ("TEPO"), which, under the direction of the Tribal Council, is responsible for initiating activities designed to protect or restore tribal lands and surrounding areas through the issuance of law, regulation, ordinance, code, or resolution. 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 TED and the TEPO, which are the entities that would be 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.

The Tribe's Application also contains descriptions of the program staff who will administer the water quality standards and certification programs. The Environmental Manager will be responsible for developing and administering grants, coordinating and reporting to the Tribal Council, budgeting, reviewing compliance, and managing the TED. Utilizing funding from Clean Water Act grant programs along with allocations from the Tribal Council, the Tribe plans to hire and train a Water Quality Specialist. The Water Quality Specialist would be responsible for any final action regarding approval of water quality standards and certification applications, including finalization and submittal to EPA of proposed water quality standards. The Water Quality Specialist will be responsible for implementing the Clean Water Act grant, water quality program, water quality monitoring and reporting, preparing documentation, making compliance decisions, and supporting the Environmental Manager. The position descriptions demonstrate that the staff at TED possess or will possess the administrative and technical capability to administer an effective water quality standards and certification program.

Based upon EPA's review of the information in the Tribe's Application and discussions with the Tribe's 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  
BUSTERUD**

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John Busterud  
Regional Administrator

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