

DECISION DOCUMENT
FOR
THE U.S. ENVIRONMENTAL PROTECTION AGENCY'S APPROVAL OF
LA JOLLA BAND OF LUISEÑO 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 or Act) requires states to develop, review, and revise (as appropriate) water quality standards for surface waters of the United States. 33 U.S.C. § 1313(c). At a minimum, such standards must include designated water uses, water quality criteria to protect such uses, and an antidegradation policy. 40 C.F.R. § 131.6. In addition, Section 401 of the CWA provides that states may grant, condition, or deny “certification” for federally permitted or licensed activities that may result in a discharge to the waters of the United States. 33 U.S.C. § 1341.

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

This Decision Document provides the basis and supporting information for EPA’s decision to approve, under Section 518 of the CWA and 40 C.F.R. Part 131, the TAS eligibility application from the La Jolla Band of Luiseño Indians (hereinafter, Tribe) allowing the Tribe to establish water quality standards pursuant to Section 303(c) of the CWA and to certify federally permitted or licensed activities pursuant to Section 401 of the CWA for areas within the Tribe’s Reservation. This approval applies to all surface waters that lie within the exterior borders of the Tribe’s Reservation, such as those described in the Application and identified herein and in Appendix II. TAS approval does not constitute approval of water quality standards but rather the Tribe’s eligibility to submit water quality standards to EPA for approval under CWA Section 303(c). Development of such standards would remain subject to all requirements of EPA’s regulations (including requirements for notice and comment); and such standards would still need to be submitted to EPA for review under Section 303(c) to ensure they meet applicable CWA and regulatory requirements. However, approval of the Tribe for TAS authorization to administer water quality standards and certification programs under CWA Sections 303(c) and 401 does immediately authorize the Tribe to issue certifications under CWA Section 401 (*see* 40 C.F.R. § 131.4(c)), provided the Tribe designates a “certifying authority” as defined in 40 C.F.R. § 121.1(e). In addition, tribes authorized to administer the CWA water quality standards program are also “affected states” as the term is used under CWA Sections 402(b)(3) and (5) and 40 C.F.R. § 122.4(d). As “affected states,” they receive notice and an opportunity to comment on certain permits issued under the CWA National Pollutant Discharge Elimination System program.

B. Application and Comments

Selected materials and documents relevant to EPA's decision regarding the Application for TAS are attached as Appendices I-IV. The Application includes 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 August 10, 2021. Included also are a map of the Reservation, map of the waters of the Reservation, and prior TAS approvals for the Tribe.

As provided in 40 C.F.R. § 131.8(c)(2), EPA Acting Regional Administrator, Region IX, Deborah Jordan, signed letters dated September 3, 2021, notifying "appropriate governmental entities"¹ of the substance and basis of the Tribe's assertion of authority in its Application. The notice letters and copies of the Application were sent to Gavin Newsom, Governor of the State of California; U.S. Fish and Wildlife Service, Cleveland National Forest; Bureau of Indian Affairs; Pala Band of Mission Indians; Pauma Band of Luiseño Indians; and the Rincon Band of Luiseño Indians. In addition, consistent with Agency practice, EPA also provided the public with notice and an opportunity to comment on the Tribe's assertion of authority. The public notice was published in *The San Diego Union Tribune* on September 17, 2021. EPA received one comment from the Twenty-Nine Palms Band of Mission Indians supporting the Tribe's application.

C. Statutory and Regulatory Provisions

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

1. Section 518 of the Clean Water Act, 33 U.S.C. § 1377, authorizes EPA to treat an eligible Indian Tribe in a similar manner as a state if the tribe meets the specified eligibility criteria.
2. Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64876 (Dec. 12, 1991), as amended by 59 Fed. Reg. 64339 (Dec. 14, 1994) and clarified by 81 Fed. Reg. 30183 (May 16, 2016) (codified at 40 C.F.R. Part 131), establish the requirements for a tribe to obtain TAS approval and the procedures for EPA to process a tribe's TAS application.

D. Policy Statements

The following policy statements and guidance are also relevant to this TAS decision:

1. *EPA Policy for the Administration of Environmental Programs on Indian Reservations*, November 8, 1984.
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 Assistant Administrator Robert Perciasepe and General Counsel Jonathan Cannon, March 19, 1998.
4. Memorandum entitled “*Strategy for Reviewing Tribal Eligibility Applications to Administer EPA Regulatory Programs*,” by EPA Deputy Administrator Marcus Peacock, January 23, 2008.

II. Requirements and Findings for TAS Approval

Under CWA Section 518 and EPA’s implementing regulations at 40 C.F.R. § 131.8(a), four requirements must be satisfied before EPA can approve a tribe’s application for TAS for water quality standards under Section 303(c) and certifications under Section 401 of the CWA. The application must meet the following criteria: (1) the Indian tribe is recognized by the Secretary of the Interior and exercises authority over a reservation; (2) the Indian tribe has a governing body carrying out substantial governmental duties and powers; (3) the water quality standards program to be administered by the Indian tribe pertains to the management and protection of water resources which are within the borders of the Indian reservation and held by the Indian tribe, within the borders of the Indian reservation and held by the United States in trust for Indians, within the borders of the Indian reservation and held by a member of the Indian tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of the Indian reservation; and (4) the Indian tribe is reasonably expected to be capable, in the Regional Administrator’s judgment, of carrying out the functions of an effective water quality standards program in a manner consistent with the terms and purposes of the Act and applicable regulations.

EPA’s regulation at 40 C.F.R. § 131.8(b) identifies what must be included in a tribe’s TAS application to administer the water quality standards program. Under 40 C.F.R. § 131.8(b)(6), where a tribe has previously qualified for TAS for purposes of a different CWA or Safe Drinking Water Act program, the tribe need only provide the required information that has not been submitted in a previous application.

A. Federal Recognition

The first requirement for a tribal TAS application for water quality standards under CWA Section 303(c) and certification under CWA Section 401 is that the tribe is recognized by the Secretary of the Interior and meets the definitions in 40 C.F.R. § 131.3(k) and (l). 40 C.F.R. § 131.8(a)(1). A tribe must include a statement that it is recognized by the Secretary of the Interior. *See* 40 C.F.R. § 131.8(b)(1). The term “Indian Tribe” or “Tribe” is defined as “any Indian Tribe, band, group, or community recognized by the Secretary of the Interior and exercising governmental authority over a Federal Indian reservation.” 40 C.F.R. § 131.3(l). The term “Federal Indian reservation” is defined as “all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation.” 40 C.F.R. § 131.3(k).

The Application states that the Tribe is recognized by the Secretary of the Interior. EPA has verified that it is a federally recognized tribe, listed in the current Department of the Interior published list of “Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs” as the “La Jolla Band of Luiseno Indians, California (previously listed as the La Jolla Band of Luiseno Mission Indians of the La Jolla Reservation).” *See* 87 Fed. Reg. 4636, 4638 (Jan. 28, 2022). Therefore, EPA has confirmed that the La Jolla Band of Luiseno Indians, whose Reservation is located in San Diego County, California, is recognized by the Secretary of the Interior and meets the definition of an “Indian Tribe” in 40 C.F.R. § 131.3(l) with governmental authority over a “Federal Indian Reservation,” as defined in 40 C.F.R. § 131.3(k), and thus meets the requirements in 40 C.F.R. § 131.8(a)(1) and (b)(1) for TAS approval.

B. Substantial Governmental Duties and Powers

The second requirement for a TAS application for water quality standards under CWA Section 303(c) and certifications under CWA Section 401 is that a tribe has a governing body carrying out substantial governmental duties and powers over a defined area. 40 C.F.R. § 131.8(a)(2). To make this showing, 40 C.F.R. § 131.8(b)(2) requires that the tribe submit a descriptive statement that should: (i) describe the form of the tribal government; (ii) describe the types of governmental functions currently performed by the tribal governing body, such as those exercising police powers affecting or relating to the health, safety, and welfare of the affected population, taxation, and the exercise of eminent domain; and (iii) identify the source of the tribal government’s authority to carry out the governmental functions currently being performed.

A tribe that has previously shown that it meets the “government functions” requirement for purposes of another EPA program generally does not need to make that showing again. *See* 59 Fed. Reg. 64339, 64340 (Dec. 14, 1994) (Simplification Rule). EPA granted approval of the Tribe’s TAS applications for CWA Section 106 (Water Pollution Control Program) grant eligibility on April 1, 1999, CWA Section 319 (Nonpoint Source Pollution) grant eligibility on March 8, 2000, and Clean Air Act Sections 105, 126, and 505(a)(2) eligibility on February 1, 2018. EPA found in each instance that the Tribe had adequately described the form of tribal government, its governmental functions, and the source of tribal authority to carry out those functions. *See* Appendix III. The Tribe’s governance structure and its related governmental functions have not changed since the prior TAS approvals.

Nevertheless, as background and for additional support, EPA briefly summarizes the Tribe’s governmental structure here. The governing body of the La Jolla Band of Luiseno Indians is the General Council. The General Council consists of all voting tribal members twenty-one (21) years of age or older. The General Council exercises the Band’s legislative authority pursuant to the Band’s Constitution, Tribal Law, and statutes of the United States. The Tribal Council of the Band is elected by the General Council to serve two (2) year terms and is comprised of the following five (5) members: Tribal Chairperson, Vice Chairperson, Secretary, Treasurer, and a Council Member. The Councils exercise governmental functions and police powers through the passage of resolutions and the enactment of ordinances pursuant to the Tribe’s Constitution. The Constitution was adopted by the General Council on September 7,

1995, approved by the United States Department of the Interior on December 19, 1995, and amended in 2010. Article VI of the Constitution provides the Tribal Council with the power to certify the enactment of and implement all ordinances, resolutions, or other enactments of the General Council including tribal water quality standards.

EPA has determined, based upon the Tribe's Application and the EPA's approvals of the Tribe's prior TAS applications, that the Tribe has sufficiently described and demonstrated that the Tribal governing body is currently carrying out substantial governmental duties and powers for purposes of 40 C.F.R. § 131.8(a)(2) and (b)(2), (6).

C. Jurisdiction Over Waters Within the Borders of the Tribe's Reservation

The third requirement for tribal TAS applications for water quality standards under CWA Section 303(c) and certifications under CWA Section 401 is that the water quality standards program to be administered by the tribe pertains to the management and protection of water resources that are "within the borders of the Indian reservation and held by the Indian Tribe, within the borders of the Indian reservation and held by the United States in trust for Indians, within the borders of the Indian reservation and held by a member of the Indian Tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of the Indian reservation." 40 C.F.R. § 131.8(a)(3). To demonstrate that this requirement is met, the regulations require that the Tribe submit a statement of its authority to regulate water quality. The statement should include: (i) a map or legal description of the area over which the tribe asserts authority over surface water quality; (ii) a statement by the tribe's legal counsel (or equivalent official) that describes the basis for the tribe's assertion of authority, which may include a copy of documents such as tribal constitutions, by-laws, charters, executive orders, codes, ordinances, and/or resolutions that support the tribe's assertion of authority; and (iii) an identification of the surface waters for which the Tribe proposes to establish water quality standards. 40 C.F.R. § 131.8(b)(3).

1. Map and/or Legal Description

The Application contains a map and a legal description of the area over which the Tribe asserts authority with an identification of the surface waters that are covered. The Reservation currently consists of approximately 8,822 acres of land located in San Diego County. The Tribe's Reservation border is set out in a submitted map of the Reservation. *See Appendix II.*

The La Jolla Indian Reservation was first established by Executive Orders on December 27, 1875, and May 15, 1876. An Executive Order on May 3, 1877, returned some land to the public domain. The present Reservation was established on September 13, 1892, pursuant to the Mission Indian Relief Act of 1891. The Reservation is located in San Diego County and consists of 8,822 acres of land. The Tribe seeks authority to manage and protect water quality on all lands, including fee and all other lands, within the exterior boundaries of the La Jolla Indian Reservation, excluding the non-Reservation land of Cuca Ranch (Lot 38 as listed in the 03/25/1885 plat map) which lies amid, but is not part of, the Reservation. The legal description of the La Jolla Indian Reservation is as follows: Lot 39, shown as the Potrero Indian Reservation, on the General Land Office Plat, dated 03/25/1885, Township 10 South, and Range 1 East of the

San Bernardino Meridian. And Lots 9, 10, and 11 of Section 3 and Lots 8, 9, 10, 11, 12, and 13 of Section 2, Township 11 South, Range 1 East of the San Bernardino Meridian, according to the official plat dated July 16, 1999 by the Bureau of Land Management (BLM). And Assessor Parcel Number 135-160-04, located within Lot 38 or Rancho Cuca, Township 10 South, Range 1 East, in the San Bernardino Meridian; and Assessor Parcel Number 135-220-09 located in the Northwest quarter of Section 24, Township 10 South, Range 1 East, in the San Bernardino Meridian.

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 March 3, 2020, that describes and relies on the express congressional delegation of authority under CWA Section 518 as the basis for the Tribe's authority to regulate water quality under the CWA.

When considering the congressional delegation of authority under the CWA, the main focus of EPA's determination of the extent of an applicant tribe's jurisdiction for CWA regulatory purposes is identifying the geographic boundaries of the Indian reservation area over which the congressionally delegated authority would apply. *See* 81 Fed. Reg. 30183, 30194 (May 16, 2016). As described in the previous section, the boundaries of the Tribe's Reservation have been properly identified. Moreover, the Tribe asserts in its Application that there are no limitations or impediments to its ability to accept and effectuate the congressional delegation of authority under the CWA over its Reservation. EPA is not otherwise aware of any impediment limiting the Tribe's ability to effectuate the congressionally delegated authority. EPA therefore concludes that the Tribe has properly asserted the congressional delegation of authority to regulate surface water quality on its Reservation and has satisfied the application requirement of 40 C.F.R. § 131.8(b)(3)(ii).

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

The Tribe asserts authority over all surface waters within its Reservation and has identified the major surface waters within its Reservation for which it may propose to establish water quality standards, including the JM Creek, Mendenhall Creek, Yapicha Creek, Amago Creek, La Jolla Spring, Cedar Creek², Rattlesnake Creek, Tishmal Creek and the San Luis Rey River and its tributaries.

All of the aforementioned waters are identified in the Tribe's Application and were identified on the maps which were submitted by the Tribe in its Application. *See*, Appendix II. Therefore, EPA has determined that the Tribe has satisfied 40 C.F.R. § 131.8(b)(3)(iii) by identifying the surface waters over which it proposes to establish water quality standards.

² Portions of Cedar Creek sometimes are referred to as Luket Creek

4. EPA's Findings on the Tribe's Assertion of Jurisdiction Over Waters Within the Borders of the Reservation

Based upon the information contained in the Application, EPA finds that the Tribe meets the requirements for TAS approval set forth in 40 C.F.R. § 131.8(a)(3) and (b)(3).

D. Capability

The fourth and final requirement for a TAS application for water quality standards under Section 303(c) and certifications under Section 401 of the CWA is that the tribe is reasonably expected to be capable, in the Regional Administrator's judgment, of carrying out the functions of an effective water quality standards program in a manner consistent with the terms and purposes of the CWA and applicable regulations. *See* 40 C.F.R. § 131.8(a)(4). To demonstrate that a tribe has the capability to administer an effective program, 40 C.F.R. § 131.8(b)(4) requires that the tribe's application include a narrative statement of the tribe's capability. The narrative statement should include: (i) a description of the tribe's previous management experience, which may include the administration of programs and services authorized by the Indian Self-Determination and Education Assistance Act, the Indian Mineral Development Act, or the Indian Sanitation Facility Construction Activity Act; (ii) a list of existing environmental and public health programs administered by the tribal governing body and copies of related tribal laws, policies, and regulations; (iii) a description of the entity (or entities) that exercise the executive, legislative, and judicial functions of the tribal government; (iv) a description of the existing, or proposed, agency of the tribe that will assume primary responsibility for establishing, reviewing, implementing and revising water quality standards; and (v) a description of the technical and administrative capabilities of the staff to administer and manage an effective water quality standards program or a plan that proposes how the tribe will acquire additional administrative and technical expertise. *See* 40 C.F.R. §§ 131.8 (b)(4)(i)-(v).

As discussed above and in the Tribe's previous CWA Section 106, CWA Section 319 and, Clean Air Act Sections 105, 126, and 505(a)(2) TAS applications, the Tribe described its governmental structure as a Tribal Council, composed of elected officials. The La Jolla Environmental Department (ED) is the governmental agency that provides technical support for the Tribe's environmental programs. The ED has been in place since the Tribe received its first General Assistance Program grant. Article VI of the Constitution provides the Tribal Council with the power to certify the enactment of and implement all ordinances, resolutions, or other enactments of the General Council including tribal water quality standards.

EPA finds that the Tribe has an adequate accounting system and governmental structure, and in addition possesses adequate general managerial experience, and extensive experience managing a variety of environmental programs. For example, the ED has successfully managed the Tribe's core environmental programs, including the CWA Section 106 Water Pollution Control Program since 1997, and the CWA Section 319 Nonpoint Source Pollution Control Program since 2001. The ED has developed and/or is developing several environmental programs including ordinance development, working on climate change issues, building overall program and staff capacities, and starting other programs such as the air program and solid waste

program. The Tribe's ability to implement these other programs illustrates its capability to administer an effective water pollution control program. Therefore, the Tribe has satisfied the criteria listed under 40 C.F.R. § 131.8(b)(4)(i)-(iii).

Consistent with 40 C.F.R. § 131.8(b)(4)(iv)-(v), EPA program staff also considered the technical and administrative capabilities of the ED, which is the entity that will assume primary responsibility for establishing, reviewing, implementing and revising water quality standards and receiving and processing applications for certification of compliance with water quality requirements and standards for projects that are subject to federal permits or licenses that may result in discharge to navigable waters or impact water quality on the Reservation. The ED staff currently includes a full-time Environmental Director, Environmental Manager/Air Program Manager, Water Program Manager, Environmental Technician, Solid Waste Program Manager and Solid Waste Assistant, Natural Resources Manager, and Administrative Assistant. The scopes of work and necessary qualifications for the ED employees are included in Part 7 of the Application.

Based upon EPA's program office review of the information in the Tribe's Application and discussions with the ED, EPA finds that the Tribe has demonstrated that it has the administrative and technical capability to administer the CWA Sections 303(c) and 401 water quality standards and certification programs and has met the requirements of 40 C.F.R. §131.8(a)(4) and (b)(4).

III. Conclusion

EPA has determined that the La Jolla Band of Luiseño Indians has met the requirements of CWA Section 518 and 40 C.F.R. § 131.8, and therefore approves the Tribe's Application for TAS to administer the water quality standards program of Section 303(c) of the CWA and its implementing regulations set forth at 40 C.F.R. § 131. Pursuant to 40 C.F.R. § 131.4(c), the Tribe is also eligible to the same extent as a state for the purposes of certifications under Section 401 of the CWA and its implementing regulations set forth at 40 C.F.R. § 121. Additionally, by virtue of these decisions, the Tribe will be an "affected state" within the meaning of CWA Section 402(b)(3) and (5) and its implementing regulation at 40 C.F.R. § 122.4(d).

Martha Guzman
Regional Administrator

Date