

DECISION DOCUMENT  
FOR  
THE U.S. ENVIRONMENTAL PROTECTION AGENCY'S APPROVAL OF  
**SAN CARLOS APACHE TRIBE**  
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

## **TABLE OF CONTENTS**

### **I. Background**

- A. Introduction
- B. Application and Comments
- C. Statutory and Regulatory Provisions
- D. Policy Statements

### **II. Requirements and Findings for TAS Approval**

- A. Federal Recognition
- B. Substantial Governmental Duties and Powers
- C. Jurisdiction Over “Waters Within the Borders” of the Tribe’s Reservation
  - 1. Map or Legal Description
  - 2. Statement Describing the Basis for the Tribe’s Assertion of Authority
  - 3. Identification of the Surface Waters for which the Tribe Proposes to Establish Water Quality Standards
  - 4. EPA’s Findings on the Tribe’s Assertion of Jurisdiction over “Waters Within the Borders” of the Reservation
- D. Capability

### **III. Conclusion**

Appendix I	Application (without Attachments)
Appendix II	Map of Tribal Surface Waters
Appendix III	EPA Approval of San Carlos Apache Tribe’s previous TAS Applications (CWA 106 and CWA 319)
Appendix IV	Response to Comments

## 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 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 Sections 303(c) water quality standards and 401 certifications. 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 San Carlos Apache Tribe (“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 border of 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.

This 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 at 40 C.F.R. Part 131 (including requirements for notice/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 agency” 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 decision are included as Appendices I-IV. Included are 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 March 31, 2016, and supplemental materials provided by the Tribe in November 2017, which together constitute and will be referred to as the Tribe’s “Application.”

As required by 40 C.F.R. § 131.8(c)(2), the EPA Regional Administrator for Region 9, Michael Stoker, sent a letter dated December 7, 2018 notifying “appropriate governmental entities”<sup>1</sup> 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 the Governor of Arizona, the Honorable Doug Ducey; Ms. Cheryl Pailzote, Director, White Mountain Apache Tribe’s Natural Resources Department; the Arizona Department of Environmental Quality (“ADEQ”); the United States Bureau of Indian Affairs (“BIA”); the U.S. Bureau of Land Management (“BLM”); and the United States Forest Service, Tonto National Forest (“USFS”). One comment was received from the White Mountain Apache Tribe on February 28, 2019.

In addition, consistent with Agency practice, EPA also provided the public with notice of and an opportunity to comment on the Tribe’s assertion of authority. The public notice was published in the *Arizona Silver Belt* and *Copper Country News* on October 24, 2018. Finally, EPA exercised its discretion and conducted additional outreach to local governments, Gila, Graham and Pinal Counties, Arizona on December 13, 2018, and the City of Globe, Arizona on August 27, 2019, via emails to city council members. In response to EPA’s outreach efforts, representatives of the City of Globe submitted a letter dated October 2, 2019, which indicated support of the San Carlos Apache Tribe’s Application. Apart from those received from the White Mountain Apache Tribe and the City of Globe, no comments were received. All comments are discussed in Appendix IV of this Decision Document.

---

<sup>1</sup> 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).

### **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. 40 C.F.R. §§ 131.4(c) and 131.8 establish the regulatory requirements for a tribe to obtain TAS approval and the procedures for EPA to process a tribe's TAS application. *See* Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,876 (Dec. 12, 1991); 59 Fed. Reg. 64,339 (Dec. 14, 1994); 81 Fed. Reg. 30183 (May 16, 2016).

### **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 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 treatment in a similar manner as a state for purposes of administering 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 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 applicable 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 verified that the Tribe is a federally recognized tribe, listed as the "San Carlos Apache Tribe of the San Carlos Reservation, Arizona," 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." *See* 85 Fed. Reg. 5462, 5465 (Jan. 30, 2020). EPA has confirmed that the San Carlos Apache Tribe 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 applicable to 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 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 the tribe submit a descriptive statement that: (i) describes the form of the tribal government; (ii) describes 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) identifies 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 needs not make that showing again. See 59 Fed. Reg. 64339, 64340 (Dec. 14, 1994) ("Simplification Rule"). Consistent with 40 C.F.R. 131.8(b)(6) and the Simplification Rule, the Tribe's Application relies on EPA's prior approval of the Tribe's TAS applications for CWA Section 106 Water Pollution Control Program and CWA Section 319 Nonpoint Source Program grant eligibility, which found the Tribe had adequately described the form of tribal government, its governmental functions, and the source of tribal authority to carry out those functions. These approvals are included as Appendix III to the TAS decision document. The Tribe's governance structure and its related governmental functions have not changed since the prior TAS approvals.

However, since the Tribe provided information about its tribal governance system, notwithstanding the ability to rely upon the prior TAS approvals, EPA briefly describes it in this Decision Document. The Tribe's Application includes a tribal attorney letter, dated November 28, 2017, from Mr. A.B. Ritchie, San Carlos Apache Tribe's Attorney General, and other documents which contain narrative descriptions of the structure, duties, and powers of the San Carlos Apache Tribe's tribal government. The documents provided by the Tribe include the San Carlos Apache Tribe's Amended Constitution and Bylaws, which were adopted by the Tribe on February 24, 1954. The San Carlos Apache Tribe is governed by the San Carlos Tribal Council ("Council"), as described in the Indian Reorganization Act of 1934 and the 1954 Amended Constitution and Bylaws. The Amended Constitution and Bylaws provide the Council with powers of self-government, including powers outlined by code, ordinance, or resolution, as appropriate. The Council consists of a Chairman and Vice-Chairman (each elected for terms of four years) and nine Council members (elected for staggered terms of four years). Three of the nine members are elected from the Bylas District, two from the Gilson District, two from the Peridot District, and two from the Seven Mile District. All adult Tribal members over 25 years of age are eligible to be elected into the Council by popular vote.

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 on October 14, 1994, and the Tribe's CWA Section 319 Non-Point Source Pollution TAS application on March 3, 2000, the Tribe has 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 applicable to 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 legal description of the boundaries of the Reservation, indicating the area over which the Tribe asserts authority over surface waters. The Application also includes a map highlighting those surface waters within the Reservation with a description of waterbodies on the San Carlos Apache Reservation in Section 4.2 of the tribe's Application. A copy of this map is included in Appendix II.

In its Application, the Tribe asserts authority over its Reservation, which was established by Executive Order on November 9, 1871. Subsequently, the Reservation was diminished in size via Executive Orders issued on January 26, 1877 and March 31, 1877, as well as by an Act of Congress, issued on June 7, 1897 (30 Stat. 64). As a result, the Reservation currently consists of 1,854,396 acres (2,854 square miles) spanning Gila, Graham, and Pinal Counties in southeastern Arizona. The western border of the San Carlos Apache Reservation is situated approximately 4 miles east of Globe, Arizona, and the northern edge is bordered by the White Mountain Apache



Indian Reservation. The Reservation map included as Appendix II is based on an official survey by BIA, which was prepared in 1927. There are no fee lands or lease lands on the San Carlos Apache Reservation, and all lands within the exterior boundaries of the Tribe's Reservation are held in trust by the United States for the benefit of the Tribe.

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 Attorney General dated November 28, 2017, that describes and relies on the express congressional delegation of authority to eligible Indian tribes to administer regulatory programs contained in CWA Section 518 as the bases of the Tribes authority of administer these CWA programs on its Reservation.

In light of the congressional delegation of authority, the main focus in determining 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 above, all of the Tribe's lands included in the Application are reservation lands where the Tribe may regulate water quality under the CWA's delegation of authority on its Reservation. 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. 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 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

In its Application, the Tribe identifies surface water within its Reservation for which it proposes to establish water quality standards in the future, which include, but are not limited to, the five significant lakes: San Carlos Lake, Seneca Lake, Dry Lake, Point of Pines Lake, and Talkalai Lake. San Carlos Lake is the largest of these lakes, containing 19,985 surface acres of water when full. Formed by the construction of Coolidge Dam in 1924, it is also the largest body of water in the State of Arizona. There also are seven rivers or streams on the San Carlos Apache Reservation: Gila River, San Carlos River, Black River, Blue River, Salt River, Bonita Creek,

Eagle Creek, and Bear Wallow. In total, there are approximately 336 miles of perennial streams on the San Carlos Apache Reservation, as well as 3,825 miles of intermittent and ephemeral streams. Moreover, 38,728 acres of freshwater wetlands are associated with rivers and lakes on the Reservation.

The waters are identified on the Reservation Map which was submitted by the Tribe in its Application, attached as 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.

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 San Carlos Apache Tribe has established that the Tribe meets the jurisdictional 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 to approve 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) which 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 for the Water Pollution Control Program under CWA Section 106 and the Non-Point Source Pollution under CWA

Section 319, the Tribe's governmental structure consists of the Council, comprised of a Chairman and Vice Chairman (each elected for terms of four years) and nine Council members (elected for staggered terms of four years).

In approving the Tribe's CWA Section 106 and CWA Section 319 TAS Applications, EPA found that the Tribe possessed adequate general managerial experience, accounting system, and governmental structure, in addition to extensive experience managing a variety of environmental and public health programs. The San Carlos Apache Tribe's Environmental Protection Agency ("SCAT EPA") is the agency in charge of the Tribe's Water Pollution Control Program and is responsible for protecting the environment and public health on the San Carlos Apache Reservation. SCAT EPA has provided technical staff support for the Tribe's other environmental programs and a variety of community health programs.

SCAT EPA's environmental 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 Water Pollution Control Program and the CWA 319 Nonpoint Source Pollution TAS Applications, SCAT EPA staff, and its contracted consultants, have gained experience in implementing its environmental programs through multiple funding sources from EPA such as the EPA's General Assistance Program (GAP), Water Pollution Control Program (CWA 106), Nonpoint Source Pollution Prevention Program (CWA 319), and Wetlands Program (CWA 104). The Tribe has also developed and submitted alongside the Application its Tribally-approved proposed Water Quality Standards for surface waters (which includes wetlands and ground water), which were approved by the Tribal Council in a unanimous resolution (No. DC-13-278) on December 13, 2013. As a result, EPA finds that 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 other criteria related to the capability of the Tribe to administer the CWA Section 303(c) water quality standards and Section 401 certification programs. More specifically, as discussed above, the SCAT EPA is the entity that has been assigned the primary responsibility for establishing, reviewing, implementing, and revising water quality standards and certifying permits. The Tribe's current TAS application contains a description of the department and staff that will administer the water quality standards and certification programs. The Application described the position of the Environmental Director, who is responsible for oversight of tribal environmental programs, and the Water Quality Coordinator, who is responsible for collection of samples and implementation of Clean Water Act grant work plans. The position descriptions and resumés of the program staff who will administer the water quality standards and certification programs were also included as part of the Application. These position descriptions and resumés indicate that the Tribe possesses the administrative and technical capability to administer these programs.

Based upon EPA's program office review of the information in the Tribe's Application

and discussions with the tribal 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 San Carlos Apache 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. Part 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  
Regional Administrator

---

Date