

**ENVIRONMENTAL APPEALS BOARD  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C.**

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| <b>In Re:</b>                                     | ) |
|   | ) |
|   | ) |
| <b>Four Corners Power Plant</b>                   | ) |
| <b>NPDES Renewal Permit: NN0000019</b>            | ) |
| <b>Arizona Public Service Company (Permittee)</b> | ) |
|   | ) |
|   | ) |
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**NPDES Appeal No. 19-06**

**ARIZONA PUBLIC SERVICE COMPANY'S RESPONSE TO  
PETITION FOR REVIEW**

**ATTACHMENT 16**

**DECISION DOCUMENT:**

**APPROVAL OF THE NAVAJO NATION  
APPLICATION FOR TREATMENT IN THE SAME MANNER AS A STATE  
FOR SECTIONS 303(c) AND 401 OF THE CLEAN WATER ACT**

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## **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 Navajo Nation ("the Tribe" or "the Nation") 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. CWA Section 518(e)(2) authorizes EPA to treat a tribe as a state for water resources "within the borders of an Indian reservation." This approval applies to all surface waters identified by the Tribe that lie within the exterior borders of the Navajo Indian Reservation, as described in the Application: the Reservation, as established by the Treaty of June 1, 1868 and expanded by subsequent acts of Congress and executive orders that enlarged the Reservation; the satellite reservations of Alamo, Canonicito, and Ramah; and the Tribal trust lands located outside of the formal reservations within the Eastern Agency; it does not include the former Bennett Freeze area. The approval does not cover Morgan Lake, a water body that the Tribe identified in an October 31, 2005 clarification letter as not requested for approval.

### **B. Administrative Record**

The following documents comprise a portion of the administrative record for this decision. Appendix I contains an index to the administrative record for this decision.

## **1. Application and Supporting Materials**

The Tribe's Application for TAS for purposes of the water quality standards and certification programs under Sections 303 and 401 of the CWA includes the following letters and related documents from the Tribe and its Counsel:

11/22/99 Letter from Kelsey A. Begaye, President of the Navajo Nation to Felicia A. Marcus, EPA Region 9 Regional Administrator enclosing CWA Section 303 "Eligibility Application"

4/21/00 Letter from Jill Grant, Esq., Nordhaus, Haltom, Taylor, Taradash and Frye, LLP to Patrick Antonio, Navajo Nation Water Quality Program

11/27/00 Letter from Patrick Antonio, Hydrologist, Navajo Nation Environmental Protection Agency to Wendell Smith, EPA Region 9 enclosing map for revised eligibility determination

12/10/00 Letter from Julia A. Jones of Dorsey and Whitney LLP to Wendell Smith, EPA Region 9 re: Notice of Proposed Action on Navajo Nation TAS Application for CWA Section 303

8/07/01 Letter from Kelsey A. Begaye, President of the Navajo Nation to Alexis Strauss, Director, EPA Region 9 Water Division enclosing revised TAS Application

8/08/01 Letter from Patrick Antonio, Navajo EPA to Wendell Smith, EPA Region 9 enclosing copies of revised TAS Application

4/19/02 Note from Patrick Antonio, Navajo EPA to Wendell Smith EPA Region 9, attaching October 10, 2001 letter from Derrick Watchman Moore, Executive Director, Navajo EPA to Alexis Strauss and October 5, 2001 statement regarding Tribal jurisdiction from Navajo Nation Attorney General Levon Henry

11/15/02 Letter from Calvert L. Curley, Acting Executive Director of the Navajo EPA to EPA Region 9 Regional Administrator Wayne Nastri

1/09/03 Letter from Arlene Luther, Acting Executive Director of Navajo EPA to Wayne Nastri, EPA Region 9 Regional Administrator regarding Navajo Eligibility Application—Petition for Federal Water Quality Standards

1/21/03 Letter from Arlene Luther, Navajo EPA to Wayne Nastri, EPA Region 9 Regional Administrator Regarding Navajo TAS Application—Additional Information Regarding Impacts of Nonmember Activities on Health, Welfare, Political Integrity, and Economic Security of Navajo Nation and its Members

6/09/03 Letter from Arlene Luther, Navajo EPA to Wayne Nastri, EPA Region 9 Regional Administrator

6/27/03 E-mail and Fax from Deb Misra, Navajo Nation EPA to Wendell Smith, EPA Region 9

12/15/03 Fax from Deb Misra, Navajo EPA, to Wendell Smith, EPA Region 9 regarding Mr. Misra's Professional Qualifications

12/15/03 Fax from Patrick Antonio, Navajo EPA to Wendell Smith, EPA Region 9 containing copies of previous e-mails between Antonio and Smith on 7/18 and 7/23

12/15/03 Fax from Edith Snyder, Navajo EPA to Wendell Smith, EPA Region 9 attaching resume of Navajo EPA Executive Director Stephen Brian Etsitty

10/31/05 Letter from Steve Etsitty, Navajo EPA, to Wayne Nastri, EPA Regional Administrator clarifying that the Tribe's Application does not cover Morgan Lake, the only listed Tribal water within the lease area for the Four Corners Power Plant

## **2. Letters and Related Documents from EPA**

12/28/00 Letter from Felicia Marcus, Regional Administrator, EPA Region 9 to appropriate governmental entities notifying them of the substance and basis of Navajo Nation's jurisdictional assertions regarding its TAS Application.

2/16/01 Letter from Laura Yoshii, Acting Regional Administrator, EPA Region 9 to Peter Maggiore, Secretary of State of New Mexico Environment Dept. with cc's to listed governmental entities

3/21/01 Letter from Wendell Smith, EPA Region 9 to Patrick Antonio, Navajo EPA

6/07/01 Letter from Laura Yoshii, Acting Regional Administrator, EPA Region 9 to Jacqueline Shafer, Director of Arizona Department of Environmental Quality

4/08/02 Letter from Wayne Nastri, Regional Administrator, EPA Region 9 to appropriate governmental entities notifying them of the substance and basis of jurisdictional assertions in amended TAS Application

5/23/02 Letter from Wayne Nastri, Regional Administrator, EPA Region 9 to Gary Johnson, Governor, State of New Mexico

7/01/02 Letter from Alexis Strauss, EPA Region 9 to Paul Ritzma, New Mexico Environment Department General Counsel, with cc's to listed governmental entities

11/08/02 Letter and enclosure from Wendell Smith, Manager, EPA Region 9 Water Quality Programs to Patrick Antonio, Navajo EPA

3/04/02 Letter from Catherine Kuhlman, EPA Region 9 Acting Water Division Director to Arlene Luther, Navajo EPA

5/02/03 Fax Transmittal with attachment from Wendell Smith, EPA Region 9 to Thomas Sayre Llewellyn, Esq., Washington, DC representing Arizona Public Service Company.

7/23/03 Letter from Wayne Nastri, Regional Administrator, EPA Region 9 to Tracy Hughes, General Counsel of the State of New Mexico

7/31/03 Letter from Wayne Nastri, Regional Administrator, EPA Region 9 to Stephen B. Etsitty, Director of the Navajo Nation EPA

8/29/03 Letter from Alexis Strauss, EPA Region 9 Water Division Director to Deborah Seligman, Director, Governmental Affairs of New Mexico Oil and Gas Association

9/15/05 Letter from EPA Region 9 Regional Administrator Wayne Nastri transmitting Proposed Findings of Fact to appropriate governmental entities for comment

11/16/05 Memorandum from Wendell Smith, EPA Region 9 Water Programs Manager regarding Region's Assessment of Navajo Nation's Capability for CWA TAS Application

### 3. Governmental Entity Comments Regarding Tribal Authority

As already noted, former EPA Region 9 Regional Administrator Felicia Marcus sent a letter dated December 28, 2000, notifying appropriate governmental entities<sup>1</sup> of the substance and basis of the Tribe's assertion of authority in its original Application as provided at 40 C.F.R. § 131.8(c)(2). Notice went to the governors of states adjacent to the Navajo Nation: Arizona, New Mexico, Utah, and Colorado; to Tribes with reservations adjacent to the Navajo Nation; and to various federal agencies. EPA extended the comment period to March 2, 2001.

On August 8, 2001, the Navajo Nation amended its Application. As a result, on April 8, 2002, EPA again notified appropriate governmental entities of the substance and basis of the Tribe's assertion of authority in the Amended Application. In addition to that notice, EPA also placed announcements in local newspapers to notify interested parties, including local governments, who could comment to EPA through the appropriate governmental entities. Notice of the Amended Application was sent to the following recipients:

The Honorable Evelyn James, President  
San Juan Southern Paiute Tribe  
P.O. Box 2656  
Tuba City, AZ 86404

The Honorable Gary Johnson, Governor  
State of New Mexico  
State Capitol Building, 4th Floor  
Santa Fe, NM 87503

The Honorable Wayne Taylor, Jr, Chairman  
The Hopi Tribe  
P.O. Box 123  
Kykotsmovi, AZ 86039

The Honorable Claudia Vigil Muniz,  
President  
Jicarilla Apache Tribe  
P.O. Box 507  
Dulce, NM 87259

The Honorable Jane Hull, Governor  
State of Arizona  
1700 W. Washington St.  
Phoenix, AZ 85007

The Honorable Malcom B. Bowekaty,  
Governor  
Pueblo of Zuni  
Zuni, NM 87327

The Honorable Michael O. Leavitt,  
Governor  
State of Utah  
Salt Lake City, Utah 84114

The Honorable Bill Owens, Governor  
State of Colorado  
136 State Capitol  
Denver, CO 80203

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<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. at 64884. EPA also received comments from non-governmental entities. Those and all other comments are discussed in Appendix III.



The Honorable Harry Early, Governor  
Pueblo of Laguna  
P.O. Box 194  
Laguna, NM

The Honorable Ernest House, Chairman  
Ute Mountain Tribe  
P.O. Box 248  
Towac, CO 81334

EPA also notified environmental officials of some of the Tribes and States, and officials of various federal entities, including the following: U.S. Park Service, U.S. Bureau of Reclamation, U.S. Bureau of Indian Affairs, U.S. Army Corps of Engineers, and U.S. Bureau of Land Management.

EPA received comments from the following state, tribal, and federal entities that either supported approval of the Tribe's Application or raised no competing or conflicting jurisdictional claims: Arizona, Utah, the Pueblo of Zuni, the Pueblo of Laguna, and the Bureau of Land Management. The only other commenting governmental entity, the State of New Mexico, asserted that the Tribe lacked authority over certain non-trust lands in New Mexico outside the boundaries of the formal Reservation as described in the Application and used in this Decision Document. On January 9, 2003, the Tribe sent EPA a letter captioned as a petition for Federal Water Quality Standards that withdrew the Tribe's assertion of authority over those non-trust lands. On June 27, 2003, New Mexico sent EPA a letter revising the State's previous comments and expressing support for the Tribe's Application, but reiterating its objections to the Tribe's claims to jurisdiction over surface waters not within the formal Reservation or on Trust land. In light of the Tribe's previous letter, the State's comment about the Tribe's assertion of authority is moot because it refers to areas that are not part of the Tribe's Application and, thus, are not covered by EPA's approval in this Decision Document. Finally, on October 31, 2005, the Tribe sent EPA an additional letter clarifying that it did not wish EPA to address Morgan Lake.

Consistent with its practice, EPA prepared proposed Findings of Fact relating to the Tribe's narrowed jurisdictional claim and, on September 15, 2005, it circulated them for comment to the affected governmental entities that had received notice of the Tribe's jurisdictional assertions. EPA received no comments from those governmental entities on the proposed findings.<sup>2</sup> EPA has adopted the proposed Findings of Fact, which as modified in final form, are contained in Appendix II.

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<sup>2</sup> The only comment in response to the Proposed Findings of Fact was from the Arizona Public Service Company (APS), which operates a facility on Tribal land leased from the Tribe; APS also commented on the two previous notifications, and all of its comments are addressed in the Response to Comments attached as Appendix III.

#### **4. Capability Review**

By memorandum dated November 16, 2005, Wendell Smith, EPA Region 9, State, Tribal, and Municipal Programs Office, reviewed the capability of the Tribe to administer the water quality standards and certifications programs and, as explained below, 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**

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

b. EPA 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 TAS application for water quality standards under Section 303(c) and certification under Section 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 water quality standards program to be administered by the Indian tribe pertains to the management and protection of water resources that are held by an Indian tribe, held by the United States in trust for Indians, held by a member of an Indian tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of an 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 an application by an Indian tribe for TAS to administer a water quality standards 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 agency" as defined in 40 C.F.R. § 121.1(e).

#### **A. Federal Recognition**

EPA can approve a TAS application for water quality standards under Section 303 and certification under Section 401 only from 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)(2), 40 C.F.R. § 131.3(l). The term "Federal Indian Reservation" means "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." CWA § 518(h)(1), 40 C.F.R. § 131.3(k).

The Navajo Nation, Arizona, New Mexico, and Utah, 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." 68 Fed. Reg. 68180, 68182 (December 5, 2003). Furthermore, as discussed below, the Tribe is exercising governmental authority over a reservation within the meaning of the CWA. Thus, EPA has determined that the Tribe meets the requirements of 40 C.F.R. § 131.8(a)(l).

#### **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 the tribe submit a descriptive statement that should: (i) describe the form of the tribal Government; (ii) describe the types of governmental functions currently performed by the tribal governing body; and (iii) identify the source of the tribal government's authority to carry out the governmental functions currently being performed.

The Tribe's Application relies on EPA's previous approval of the Tribe's TAS application for CWA Section 106, noting that when EPA approved that application, it found the Tribe had adequately described the form of tribal government, the governmental functions the government performs, and the source of Tribal authority to carry out those functions. A tribe

that has previously shown that it meets the "governmental functions" requirement for purposes of another EPA program need not make that showing again. *See* 59 Fed. Reg. 64339, 64340 (December 14, 1994) (regulation simplifying TAS process). EPA's review and approval of the Section 106 Application described the basis for its determination that the statement supporting the Section 106 Application established that the Tribe meets the "governmental functions" requirements as follows:

According to that statement, the Navajo Nation has a large and elaborate tripartite government, with executive, legislative, and judicial branches. The Application also describes numerous governmental functions which the Tribe performs. One of the primary functions specified by the Tribe is the use of its police powers to protect the health, safety, and welfare of the Navajo people. The Application also indicates that the Nation possesses eminent domain authority, criminal enforcement authority, and the power to tax both individuals and corporations.

EPA has determined that the Tribe's submissions in its Application and supplemental information, including the prior TAS approval in 1993 adequately demonstrate that the Tribal governing body is currently carrying out substantial governmental duties and powers over a defined area and that nothing has happened in the interim to change that determination. Thus, the Tribe meets the requirements in 40 C.F.R. § 131.8(b)(2).

### **C. Jurisdiction Over "Waters Within the Borders" of the Navajo Indian Reservation**

Under 40 C.F.R. § 131.8(b)(3), the Tribe is required to 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 Tribe has submitted maps and a legal description of the Reservation, which consists of 17,585,494 acres of land in Arizona, New Mexico, and Utah. Appendix II describes the Reservation as follows:

The Navajo Nation's Reservation is the largest Indian reservation in the United States, including 17,585,494 acres within its reservation boundaries as established by the Treaty of June 1, 1868 and expanded by subsequent executive orders. The original Application submitted by the Nation included

all lands in the formal Reservation and the Eastern Agency area in New Mexico, with a few exceptions. The Nation subsequently narrowed the scope of the Application to lands in the formal Navajo Reservation, including the satellite reservations, and Tribal trust lands in the Eastern Agency, but excluding all Eastern Agency lands other than Tribal trust lands and excluding Morgan Lake, the only Tribally identified surface water located on certain lands the Tribe leases to Arizona Public Service Company.

In sum, the Application covers all lands within the formal Reservation excluding the former Bennett Freeze area: the three satellite reservations of Alamo, Canonicito and Ramah, and all tribal trust lands in the Eastern Agency.<sup>3</sup> As explained below, it effectively does not include land the Tribe leases for the Four Corners Power Plant and Navajo Generating Station.

EPA has determined that 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. Identification of the Surface Waters for which the Tribe Proposes to Establish Water Quality Standards**

The Tribe's Application, as clarified in the Tribe's October 31, 2005 letter, asserts authority over all surface waters identified by the Tribe within the Reservation except for Morgan Lake. The Tribe has submitted a Map attached to its Application as Exhibit C that shows the Reservation waters. The Tribe has also submitted water quality standards that identify those Reservation waters for which it proposes to establish standards. The list of covered waters is attached as Appendix IV. Without conceding authority, the Tribe in its October 31, 2005 clarification letter expressly asked that EPA not make a finding regarding Tribal authority over Morgan Lake, which is a manmade cooling pond that is the only listed Tribal water within the areas leased by the Tribe for the Four Corners Power Plant and Navajo Generating Station.<sup>4</sup> 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.

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<sup>3</sup> EPA has consistently interpreted the term "reservation" under CWA § 518(e) as allowing for the inclusion of trust lands set apart for the use of a tribe, even if the lands have not been formally designated as reservations. *See e.g.* 56 Fed. Reg. 64876, 64881 (December 12, 1991).

<sup>4</sup> In approving the Tribe's Application, EPA is not making any findings about the Tribe's authority over Morgan Lake or the Four Corners Power Plant and Navajo Generating Station or their owners and operators. EPA also is deferring the issue of whether the Tribe's water quality standards, if and when approved by EPA, would apply to any CWA-permitted discharges from these facilities to Tribal waters. To the extent necessary, EPA will consider these issues, and how they relate to the lease provisions, in the context of future permitting or other relevant action taken by EPA.

### 3. Statement Describing Basis for the Tribe's Authority

Finally, the Application identifies the legal authorities under which the Tribe performs its governmental functions. These authorities include the provisions of the Navajo Tribal Code, and various resolutions that have been enacted by the Tribal Council and its Committees. As indicated in the Tribe's Section 106 Application, many of these authorities were previously provided to EPA (as part of the Navajo TAS application to develop a Public Water System Supervision (PWSS) program under the Safe Drinking Water Act).

### 4. Authority over Reservation Waters

CWA Section 518(e)(2) authorizes EPA to treat a tribe as a state for water resources "within the borders of an Indian reservation." EPA has interpreted this provision to require that a tribe show inherent authority over the water resources for which it seeks TAS approval. 56 Fed. Reg. at 64880. The Nation has asserted that it has authority to set water quality standards and issue certifications for all surface waters that it has identified within the Reservation boundaries as described in the Application and clarifying letter. As explained in the analysis below, including the analysis of the information in the Findings of Fact in Appendix II, EPA has determined that the Navajo Nation has shown inherent authority over nonmember activities for purposes of the CWA water quality standards and water quality certification programs.

EPA analyzes a tribe's water quality authority under the CWA over activities of nonmembers on nonmember-owned fee lands under the test established in *Montana v. United States*, 450 U.S. 544 (1981) (*Montana* test). In *Montana*, the Supreme Court held that absent a federal grant of authority, tribes generally lack inherent jurisdiction over nonmember activities on nonmember fee land. However, the Court also found that Indian tribes retain inherent sovereign power to exercise civil jurisdiction over nonmember activities on nonmember-owned fee lands within the reservation where (i) nonmembers enter into "consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements" or (ii) "... [nonmember] conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 565-66. In analyzing tribal assertions of inherent authority over nonmember activities on fee lands on Indian reservations, the Supreme Court has reiterated that the *Montana* test remains the relevant standard. *See, e.g., Strate v. A-1 Contractors*, 520 U.S. 438, 445 (1997) (describing *Montana* as "the pathmarking case concerning tribal civil authority over nonmembers"); *see also Nevada v. Hicks*, 533 U.S. 353, 358 (2001) ("Indian tribes' regulatory authority over nonmembers is governed by the principles set forth in [*Montana*]").

In the preamble to EPA's 1991 water quality standards regulation, the Agency noted that, in applying the *Montana* test and assessing the impacts of nonmember activities on fee lands on an Indian tribe, EPA will rely upon an operating rule that evaluates whether the potential impacts of regulated activities on the tribe are serious and substantial. 56 Fed. Reg. at 64878-79. EPA also recognized that the analysis of whether the *Montana* test is met in a particular situation

necessarily depends on the specific circumstances presented by the tribe's application. *Id.* at 64878. In addition, in that rulemaking, EPA noted as a general matter "that activities which affect surface water and critical habitat quality may have serious and substantial impacts" and that, "because of the mobile nature of pollutants in surface waters and the relatively small length/size of stream segments or other water bodies on reservations . . . any impairment that occurs on, or as a result of, activities on non-Indian fee lands [is] very likely to impair the water and critical habitat quality of the tribal lands." *Id.* EPA also noted that water quality management serves the purpose of protecting public health and safety, which is a core governmental function critical to self-government. *Id.* at 64879.

The Clean Water Act addresses the maintenance and restoration of the physical, chemical, and biological integrity of waters of the United States, including tribal waters, by providing that tribes treated in the same manner as states, act to "prevent, reduce, and eliminate pollution." CWA Section 101(b). CWA Section 518 authorizes tribes to carry out CWA functions that "pertain to the management and protection" of reservation water resources. The *Montana* test analyzes whether the tribe is proposing to regulate activity that "threatens" or "has some direct effect" on tribal political integrity, economic security, or health or welfare. That test does not require a tribe to demonstrate to EPA that nonmember activity "is actually polluting tribal waters," if the tribe shows "a potential for such pollution in the future." *Montana v. EPA*, 141 F.Supp.2d 1249, 1262 (D. Mont. 1998), quoting *Montana v. EPA*, 941 F.Supp. 945, 952 (D. Mont. 1996), *aff'd* 137 F.3d 1135 (9th Cir. 1998), *cert denied* 525 U.S. 921 (1998). Thus, EPA considers both actual and potential nonmember activities in analyzing whether a tribe has authority over nonmember activities under the Clean Water Act.<sup>5</sup>

EPA recognizes that under well-established principles of federal Indian Law, a tribe retains attributes of sovereignty over both its lands and its members. *See e.g. California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987); *U.S. v. Mazurie*, 419 U.S. 544, 557 (1975). Further, 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. *See also White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 151 (1980) (significant geographic component to tribal sovereignty).

And a tribe also retains its well-established power to exclude non-members 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

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<sup>5</sup> EPA has not resolved whether it is necessary to analyze under the *Montana* test the impacts of nonmember activities on tribal/trust lands, such as those covered in this Application, to find that a tribe has inherent authority to set water quality standards for such areas. EPA believes, however, that, as explained in this Decision Document, the Tribe could show authority over nonmember activities on tribal/trust lands covered by the Application under the *Montana* "impacts" test.

persons over whom it could “assert a landowner’s right to occupy and exclude.” *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 651-652 (2001), quoting *Strate*, 520 U.S. at 456.

The Tribe’s Application makes the following claims about the importance of Tribal water quality to the Tribe:

These waters are used by the [T]ribe and by individual members for crop irrigation, livestock and wildlife watering, fishing, ceremonial and religious uses, and in some instances domestic uses. Any impairment of these waters would therefore have a serious and substantial impact on the health, safety and welfare of the Navajo Nation and its members. Moreover, because of the scattered nature of the nonmember-owned fee lands within the Reservation, as shown on the maps attached as Exhibits C and G, any impairment of water quality on those lands can not help but have an effect on the water quality of neighboring [T]ribal lands inhabited by [T]ribal members. This interrelationship means that the Navajo Nation must be able to regulate water quality on these lands in order to exercise self-governance and ensure that its members and other residents of the Navajo Nation will have the clean water necessary to their health, safety, and welfare. The Navajo Nation’s regulation of water quality throughout Navajo Indian country is thus integral to the protection of the health and welfare of the Navajo Nation, as well as to the political integrity of the Navajo Nation as a government, and therefore meets the *Montana* test.

As explained more fully below and in Appendix II, the Tribe supported its claims with evidence that it uses the waters as it asserts and with information showing how current and potential nonmember activities on the Reservation have or may have direct effects on the Tribe’s political integrity, economic security, and health and welfare.

The facts upon which EPA has relied in reviewing and making findings regarding the Tribe’s assertion of authority to regulate the activities of nonmembers on the Reservation are presented in the Application, supplemental materials, and Appendix II to this Decision Document. EPA also bases its findings and conclusions on its special expertise and practical experience regarding impacts to water quality and the importance of water quality management, recognizing that clean water may be crucial to the survival of the Tribe and its members. As explained more fully in Appendix II, EPA makes several findings, including the following:

EPA finds that the Tribe has shown that the uses the Tribe makes of the waters include domestic, ceremonial, and religious uses, crop irrigation, livestock and wildlife watering, fishing, and recreation in and on the water; that each of those uses is important to the Tribe and that regulating water quality is important to protecting the uses. EPA has further found that the Reservation’s characteristics are such that various human activities occur or may occur, including septic system operation, energy production, forestry, and agriculture and livestock



raising, including pesticide and herbicide use; and that those activities, if not properly regulated, can seriously affect the Tribe.

EPA also cites and relies on specific examples of nonmember presence and activities on the Reservation including those from private residences and commercial businesses. For example, Appendix II describes actual or potential water quality impacts from the following: residential septic tanks, sand and gravel operations, a concrete plant, a hospital, rangeland, a recreational vehicle park, a motel and a trading post. There are also substantial nonmember mineral extraction activities within the Reservation, including a mining complex located partially within the Reservation with an annual production of 12 million tons and a total of 110 sedimentation ponds, and a surface coal mining operation that has 18 outfalls. Actual or potential impacts from those nonmember activities include untreated sewage from faulty septic systems or overflowing sewage lagoon systems; excessive sediment transport from livestock overgrazing or leaking water wells; storm runoff or discharges from mining facilities, industrial facilities or construction sites, and coal slurry line releases. Those impacts have the potential to seriously affect the Tribe.

Based on the preceding findings, and additional findings and information, all described more fully in Appendix II, EPA concludes that existing and potential future nonmember activities within the Reservation have or may have direct effects on the political integrity, economic security and health or welfare of the Tribe that are serious and substantial.

Thus, the Agency has determined that 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 assertion of authority over surface waters within the borders of the Reservation. And that determination, in conjunction with the previously stated findings, means that the Tribe has met the requirement set forth at 40 C.F.R. § 131.8(a)(3).

#### **D. Capability**

To demonstrate that a tribe has the capability to administer an effective 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; (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. 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 November 16, 2005 memorandum prepared by Wendell Smith, EPA Region 9, State, Tribal, and Municipal Programs Office, that explains the reasons for finding that the Tribe is capable of administering its water quality standards program. Mr. Smith concluded that the Tribe has demonstrated the capability to administer an effective water quality standards program based on his review of the Application and other documents. He notes that the Tribe has extensive prior involvement in a number of environmental and public health programs. He reports that the Application states that the Navajo Nation Environmental Protection Agency (NNEPA) is an independent agency within the Nation's Executive Branch and that it will have primary responsibility for developing and revising water quality standards and certifying permits. NNEPA is well-funded and has a fourteen-person staff whose resumes indicate that the NNEPA possesses the administrative and technical capabilities to administer the water quality standards program.

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 Navajo Tribe 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 the 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.

  
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Wayne Nastri  
Regional Administrator

Date 1/20/06