



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10
1200 Sixth Avenue
Seattle, WA 98101**

Reply To
Attn Of: ORC-158

APPENDIX II

**RESPONSE TO COMMENTS ON THE LUMMI NATION
APPLICATION FOR TREATMENT IN THE SAME MANNER AS A STATE (TAS)
FOR SECTIONS 303(c) AND 401 OF THE CLEAN WATER ACT**

By letter dated March 20, 1999, EPA notified the appropriate governmental entity, the State of Washington, as to the substance and basis of the jurisdictional assertions in the Lummi Tribe's TAS Application. At the time of notification, EPA also published notices in local newspapers informing the public of the opportunity to comment through the State. On October 10, 2006, EPA transmitted to the appropriate governmental entity Proposed Findings of Fact regarding the impacts of nonmember activities within the Reservation on water quality and the Tribe; EPA requested comments on whether it should use those facts as the basis for its decision regarding the Tribe's authority over nonmember activities.

EPA's regulations require EPA, after receiving a tribe's application, to provide notification, including "information on the substance and basis of the Tribe's assertion of authority to regulate the quality of reservation waters" to "appropriate governmental entities for comments." 40 C.F.R. § 131.8(c). Comments "shall be limited to the Tribe's assertion of authority." *Id.* EPA's practice is also to offer Proposed Findings of Fact for comment, and to address all comments received during the comment period, including comments sent directly to EPA from non-governmental entities.

Comments were submitted to EPA by the State of Washington as follows:

1. By letter dated July 26, 1999, Tom Fitzsimmons, the Director of the State of Washington Department of Ecology submitted comments on the Tribe's Application.
2. By letter dated November 7, 2006, Jay Manning, the Director of the State of Washington Department of Ecology, wrote that the State had no additional facts to add to the analysis on EPA's Proposed Findings of Fact regarding the Tribe's authority over nonmember activities on lands within the Reservation to administer the water quality standards program.

State Comments on the Tribe's Application by letter dated July 26, 1999

1. Comment: While the State agreed with the approach EPA has established for evaluating the Tribe's inherent authority, the State asked that EPA review the Application to determine whether the Tribe has demonstrated serious and substantial impacts on a water body specific basis in

making EPA's *Montana*-test determination regarding the Tribe's authority over the activities of nonmembers on fee lands.

EPA Response: In this case, the Tribe has submitted an Application and supplemental materials showing serious and substantial impacts that take place or may take place as the result of nonmember activities within each of the major watersheds of the Reservation. The topography of the Reservation creates surface water drainage patterns where waters flow freely from lands owned by the Tribe or Tribal members to nonmember-owned land or from nonmember to Tribal land. With the exception of evapotranspiration losses and water discharged into off-Reservation waters from the two wastewater-treatment plants operated by the Lummi Nation, all water that falls onto or passes through the Lummi Reservation either discharges to the resource-rich tidelands and/or estuaries of the Lummi Nation and/or contributes to aquifer recharge. Storm water from both member and nonmember lands is generally combined in outfalls that discharge to tidelands, due to the interspersed pattern of land ownership within the Reservation boundaries. Based on that information, The Tribe has made a showing of facts that there are surface waters within the Reservation used by the Tribe or its members (and thus that the Tribe or its members could be subject to exposure to pollutants present in, or introduced into, those waters) and that the waters of the Reservation are resources subject to protection under the CWA. The Tribe has also shown that impairment of waterbodies in each watershed by the activities of nonmembers on lands within the Reservation has or may have a direct effect on the political integrity, economic security, and health or welfare of the Tribe that is serious and substantial. In light of the Tribe's showing, and EPA's factual findings, no further analysis is needed. EPA believes that the information provided by the Tribe adequately demonstrates the Tribe's inherent authority to establish water quality standards for all water bodies within the Reservation. Further, the State has not disputed the Tribe's authority over water bodies in general or any particular water body.

2. Comment: The State requested that EPA assess the Reservation boundaries, which the State noted it had not separately analyzed.

EPA Response: Sec. 518(e) of the CWA and 40 C.F.R. §131.8(a) require that the water quality standards program to be administered by the Indian tribe pertain to the management and protection of waters held by the Indian tribe, held by the United States in trust for the Indians, held by a member of the Indian tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of the reservation. As part of EPA's review of the Application, we have examined documents provided by the Tribe in the form of maps and other documents that describe the Reservation boundaries. EPA is satisfied that the Tribe has adequately identified the boundaries of the Reservation.

3. Comment: The State asked that EPA consider past and current litigation over the Tribe's reserved water rights, and consider the State's obligation to properly manage water sources.

EPA Response: EPA believes that neither CWA Sec. 518 nor TAS status directly affect water rights, *see* CWA Sec. 510, and that the issues with regard to particular water rights are not

relevant to the demonstration of this Tribe's inherent authority to administer the CWA water quality standards program for waters that are within the borders of the Reservation

4. Comment: The letter asked that EPA ensure that the Tribe's water quality standards are compatible with Washington's, which the State believes is especially important for waters that are shared by the two jurisdictions.

EPA Response: EPA's long-standing position, which has been upheld by the courts, is that nothing in the Clean Water Act precludes either a Tribe or a State from adopting water quality standards more stringent than required under the Act. EPA's view has been that because of Sec. 510 of the Act, it may not disapprove either Tribal or State standards solely on the grounds that the standards are too stringent, nor will it resolve a conflict between jurisdictions by disapproving a Tribal or State standard and Federally promulgating a less stringent standard. In fact, Congress contemplated the possibility of conflicting standards and disputes in the 1987 amendments to the Clean Water Act, which provided for the Administrator of EPA to promulgate regulations to:

“... provide a mechanism for the resolution of any unreasonable consequences that may arise as the result of differing water quality standards that may be set by States and Indian tribes located on common bodies of water.” 33 U.S.C. § 1377(e)

On December 12, 1991, EPA published regulations providing the “Dispute Resolution Mechanism,” located at 40 C.F.R. § 131.7 (56 FR 4894).

Still, EPA agrees that it is in the interests of EPA, the Tribe, and the State to work together so as to minimize the potential for disputes that could be referred to EPA for resolution. EPA encourages the development of agreements that explicitly describe how the Tribe, State, and EPA will coordinate and communicate in the management of water quality issues to more efficiently and effectively implement the Clean Water Act.

5. Comment: The State also asked that EPA delineate permit issuance authority over all boundary waters, and it expressed a willingness to consider intergovernmental agreements that will insure coordinated, effective and responsible environmental protection.

EPA Response: The Tribe is not seeking, and EPA is not approving, eligibility or approval of a permit program under Sec. 402 or 404 of the CWA. EPA will continue to be responsible for issuing National Pollution Discharge Elimination System (NPDES) Permits under Sec. 402 of the CWA for discharges to waters of the Reservation.

Other Comments submitted to EPA by the State of Washington:

By letter dated August 3, 1999, C. Thomas Laurie, Intergovernmental Liaison for the State of Washington Department of Ecology forwarded the comment letters on the Lummi Tribe's application that were received by the State.

Comments forwarded by the State

A number of citizens, organizations, and local governments submitted comments in 1999 on the Tribe's TAS Application. Those comments were submitted to the State, which forwarded them to EPA. Some comments were brief and made a single point, most often that the commenter opposed approval of the Tribe's TAS Application. Others were more detailed, and, in some cases, raised more than one point. None of the comments raised any significant legal issues about the Tribe's jurisdiction, and many of them did not address jurisdiction at all. Consistent with its practice, EPA is summarizing and responding to the comments received. No additional comments from citizens, organizations, or local governments were submitted to the State or to EPA in response to a public notice that EPA published in local newspapers to notify interested parties that, by letter dated October 10, 2006, the State was offered an opportunity to comment on EPA's Proposed Findings of Fact.

1. Comment: Many commenters argued that EPA should not approve the Tribe for TAS because nonmembers have a limited voice in tribal government, and generally cannot vote in tribal elections.

EPA Response: CWA section 518 (e) and EPA's implementing regulations authorize EPA to treat an eligible Indian tribe in the same manner as a State for purposes of carrying out water quality standards management functions for reservation waters within tribal jurisdiction. The statute directs the eligibility criteria that a tribe must meet as follows: that the Tribe is federally recognized, that it "has a governing body carrying out substantial duties and powers," that "the functions to be exercised by the Indian tribe pertain to the management and protection of water resources * * * within the borders of an Indian reservation," and that the "tribe is reasonably expected to be capable * * * of carrying out the functions to be exercised in a manner consistent with the terms and purposes of" the Clean Water Act and "of all applicable regulations." CWA §§ 518(e)(1)-(3). *See generally* 56 FR 64876, 64885 (December 12, 1991) (preamble to EPA tribal water quality standards regulations noting inappropriateness of considering factors not listed in statute). EPA has approved the Tribe's Application based on EPA's determination that the Tribe meets those statutory eligibility requirements as implemented by EPA's regulations.

2. Comment: Many commenters asserted that a tribal role in water quality management is unnecessary and duplicative because states are already managing water quality.

EPA Response: The Clean Water Act expressly authorizes EPA to approve eligible tribes to manage water quality for reservation water resources. EPA has not approved the State of Washington's water quality standards within the Lummi Nation Reservation.

3. Comment: Many commenters asserted that EPA should not approve the Tribe for TAS because it will not do a good job of managing water quality, or it is incapable of doing so.

EPA Response: EPA believes that the Tribe has the capability to adopt water quality standards and issue water quality certifications under the Clean Water Act. Neither the Clean Water Act nor the water quality standards regulations authorize EPA to approve a tribe for TAS unless EPA determines that the tribe is "reasonably expected to be capable . . . of carrying out the functions to be exercised in a manner consistent with the term and purposes of [the Act] and of all applicable regulations." CWA § 518(e)(3); 40 C.F.R. § 131.8(a)(4). As explained in the Decision Document approving the Lummi Nation Application, EPA has determined that the Tribe has adequate capability.

4. Comment: Some commenters wrote that having the Tribe set water quality standards, will give the Tribe unfair control in off-Reservation development and planning efforts, and hurt the area economy.

EPA Response: In reviewing state or tribal water quality standards for approval under the Clean Water Act, EPA considers whether the standards are consistent with the requirements of the Act and its implementing regulations. At their discretion, States and Tribes may consider economic impacts in developing and revising designated uses in their water quality standards. See 40 C.F.R. § 131.10(g)(6) and EPA's Water Quality Standards Handbook, at 2-9 to 2-10.

5. Comment: Many commenters asserted that the Tribe should not be approved for TAS because the Tribe lacks authority over lands it does not own, and should not have authority over fee lands.

EPA Response: The Clean Water Act authorizes eligible tribes to set water quality standards for waters within their reservations and does not make eligibility dependent on who owns the lands adjacent to those waters. As explained in more detail in the Decision Document, the Tribe has demonstrated that it has inherent authority over nonmember activities on the reservation under *Montana v. U.S.*, 450 U.S. 544 (1981). Further, this approval applies only to waters within the Lummi Reservation.

6. Comment: Some commenters wrote that if TAS status is granted to the Tribe, then the Tribe would govern all the major water bodies in the Greater Whatcom County area.

Response: As noted above, Sec. 518(e) of the CWA and 40 C.F.R. § 131.8(a) require that the water quality standards program to be administered by the Indian tribe pertain to the management and protection of waters that are within the borders of an Indian reservation. As part of EPA's review of the Application, we have examined documents provided by the Tribe in

the form of maps and other documents that describe the Reservation boundaries. EPA is satisfied that the Tribe has adequately identified waters to which water quality standards of the Tribe would apply under the CWA if those standards are approved by EPA. Further, the Tribe's water quality standards if approved by EPA would apply only to waters of the Reservation. EPA will continue to be responsible for issuing National Pollution Discharge Elimination System (NPDES) Permits under Sec. 402 of the CWA for discharges to waters of the Reservation

7. Comment: Some commenters expressed concern that the TAS application is part of an attempt to expand tribal power, and stated that the Tribe should not be allowed to set water quality standards until there has been more consideration of the potential implications of this approval.

EPA Response: As already noted, the statute provides for eligible tribes to be treated in the same manner as states. Under the Clean Water Act, eligible tribes may only exercise authority over reservation activities within their authority. Further, this approval covers only the Tribe's authority for water quality standards and certifications, not any other functions.
