

DECISION DOCUMENT:

**APPROVAL OF THE LUMMI 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 Selected Documents

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, condition, 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 Section 303(c) and 401 of the CWA. See 56 Fed. Reg. 64876 (December 12, 1991), as amended by 59 Fed. Reg. 12814 (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 a TAS eligibility application (the “Application”) from the Lummi Nation (or the “Tribe”) 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 in the same manner as a state for water resources “within the borders of an Indian reservation.” This Decision Document approving the Tribe as eligible for TAS applies to all surface waters identified by the Tribe that lie within the exterior borders of the Lummi Indian Reservation, as described in the Application. The Lummi Nation asserts it has the authority to manage and protect water quality within the boundaries of the Lummi Indian Reservation as described in the Treaty of Point Elliot, January 22, 1855, together with those lands, tidelands and waters added by the Executive Order of November 11, 1873.

B. Selected Documents

The following documents comprise a portion of the 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 legal counsel:

March 8, 1995 – Letter from Henry Cage, Chairman Lummi Indian Business Council to Mr. Chuck Clarke, EPA Region 10, Regional Administrator, requesting approval for treatment in the same manner as a state under the water quality standards and certification programs under the Clean Water Act, and submission of the Lummi Nation's Application.

Attachment: March 8, 1995, Document, The Lummi Nation's March 1995, Application for treatment in the same manner as a state under the Water Quality Standards and Certification Programs Under Sections (303)(c) and 401 of the Clean Water Act.

February 1, 1999 - Letter from Henry Cagey, Chairman Lummi Indian Business Council to Mr. Chuck Clarke, EPA Region 10, Regional Administrator, enclosing additional information related to the Lummi Nation's March 1995 Application for TAS under the Water Quality Standards Program under Section 303(c) and 401 of the Clean Water Act.

Attachment: February 1, 1999, Document, "Supplement to the Lummi Nation's March 1995 Application to Administer the Water Quality Standards Program under Sections 303(c) and 401 of the Clean Water Act";

Attachment: February 1, 1999, Document, "Addendum to the Lummi Nation's March 1995 Application to Administer the Water Quality Standards Program under Sections 303(c) and 401 of the Clean Water Act."

June 5, 2000 – Letter from Leroy Deardorff, Director of Lummi Environmental Protection Program to Richard McAllister, Assistant Regional Counsel, EPA Region 10 submitting supplemental information in support of the Lummi "TAS" Application.

Attachment: Lummi Tribal Sewer and Water District response to EPA Warning letter for NPDES No. 002566-6 (dated February 21, 2000). This letter includes as an attachment a letter from the Lummi Natural Resources Department to the Dairy Nutrient Advisory Committee (dated November 8, 1999), that clarifies what happened and identifies corrective actions that have occurred;

Attachment: March 31, 2002, Document, "Lummi Indian Reservation Wetland Management Program Technical Background Document."

May 2, 2003 – Letter from Leroy Deardorff, Director of Lummi Environmental Protection Program to Richard McAllister, Assistant Regional Counsel, EPA Region 10 submitting supplemental information in support of the Lummi "TAS" Application.

Attachment: Judge Rothstein Rulings in *United States, Lummi Nation v. Keith Milner and Shirley A. Milner*, et, Civil Action No. C01-809R (U.S. District Court, Western District of Washington);

- Order Denying Defendant Milner's Motion for Summary Judgment, Docket 87, October 4, 2002.

- Order Granting in Part and Denying in Part Plaintiffs' Motion to Exclude Testimony, Limit Discovery, and Strike Defenses, Docket 137, November 27, 2002.
- Order Granting United States' and Harry F. Case's Motions for Partial Summary Judgment, Docket 156, December 16, 2002.
- Order Denying Defendants' Motion for Summary Judgment and Striking as Moot Lummi Nation's Motion for Partial Summary Judgment, Docket 158, December 20, 2002.
- Order Denying Defendants' Motion for Reconsideration, Docket 176, January 13, 2003.
- Order Granting United States' and Lummi Nation's Motion for Partial Summary Judgment, Docket 195, January 27, 2003.
- Order Denying Defendants' Motion for Reconsideration, Docket 217, February 7, 2003.
- Order Denying Motion for Summary Judgment Re: Arresting Landward Movement of Boundary, docket 218, February 12, 2003.

Attachment: Judge Zilly's ruling in *U. S. v. Lummi Nation v. Washington State Department of Ecology, et al*, Civil Action No. C01-0047Z (U.S. District Court, Western District of Washington);

- Order, Docket 304, February 24, 2003.

March 9, 2004 – Letter from Leroy Deardorff, Director of Lummi Environmental Protection Program to Richard McAllister, Assistant Regional Counsel, EPA Region 10 submitting supplemental information in support of the Lummi “TAS” Application.

Attachment: February 11, 2004, certification documentation and the certified version of the Lummi Nation Water Resources Protection Code (Title 17 of the Lummi Nation Code of Laws);

Attachment: February 11, 2004, certification documentation and the certified version of the Lummi Nation Land Use, Zoning, and Development Code (Title 15 of the Lummi Nation Code of Laws).

June 3, 2004 – Letter from Leroy Deardorff, Director of Lummi Environmental Protection Program to Richard McAllister, Assistant Regional Counsel, EPA Region 10 submitting supplemental information in support of the Lummi “TAS” Application.

Attachment: Public Brochure on Lummi Water Resources Division.

Attachment: April 16, 2004, email from Ken Koch from the Washington Department of Ecology regarding State 303(d) listings on the Lummi Reservation, and the Lummi Nation's May 24, 2004 response letter.

Attachment: May 20, 2004, Letter to Sandy Point Improvement Company regarding a proposed aquatic herbicide application to Agate Lake on the Lummi Indian reservation.

Attachment: March 11, 1997, EPA inspection report for the Frank Moser Dairy on fee land located on the Lummi Reservation.

Attachment: Lummi Water Resources Division. November 11, 1997, Document, "Lummi Nation Wellhead Protection Program Phase I."

Attachment: Lummi Water Resources Division. December 31, 1998, Document, "Lummi Reservation Storm Water Management Program Technical Background Document."

Attachment: Lummi Water Resources Division. March 31, 2000, Document, "Lummi Indian Reservation Wetland Management Program Technical Background Document."

Attachment: Lummi Water Resources Division. December 20, 2001, Document, "Lummi Nation Nonpoint – Source Assessment Report."

Attachment: Lummi Water Resources Division. January 11, 2002, Document, "Lummi Nation Nonpoint-Source Management Program."

Attachment: Lummi Nation Code of Laws (2004) Vols 1 & 2.

Attachment: Lummi Water Resources Division. March 26, 2004, Document, "Lummi Nation Multi-Hazard Mitigation Plan."

April 26, 2006 – Letter from Leroy Deardorff, Director of Lummi Environmental Protection Program to Richard McAllister, Assistant Regional Counsel, EPA Region 10 submitting supplemental information in support of the Lummi "TAS" Application.

Attachment: February 2006, Document, "Lummi Nation Atlas."

Attachment: The 2006 Digital Atlas of the Lummi Indian Reservation.

May 25, 2006 – Letter from Leroy Deardorff, Director of Lummi Environmental Protection Program to Robert Hartman, Assistant Regional Counsel, EPA Region 10 submitting supplemental information in support of the Lummi "TAS" Application, regarding nonmember activities on trust land.

2. Letters and Related Documents From EPA

March 20, 1999, letter from Robin Slate, Tribal Program Coordinator, EPA Region 10 to Mr. Tim Ballew, Chairman Lummi Indian Business Council, providing notice that EPA had received the Tribe's Application and that the Application contained the necessary documentation for EPA to initiate the consultation and evaluation process relative to the Section 303(c) authority.

June 1, 1999, letter from Chuck Clarke, Regional Administrator, EPA Region 10, to the Honorable Gary Locke, Governor of the State of Washington, notifying the State of Lummi Nation's TAS Application, and requesting comments on the Lummi Nation's assertion of authority to regulate surface water quality on the reservation. In addition to that notice, EPA placed announcements in local newspapers to notify interested parties, including local governments, of the opportunity to comment.

June 23, 1999, letter from Chuck Clarke, Regional Administrator, EPA Region 10, to C. Thomas Laurie, Intergovernmental Liaison, Washington Department of

Ecology, granting the State's request to extend the comment period on the Lummi Nation's Application an additional 30 days.

Oct. 10, 2006, letter from Ronald A Kreizenbeck, Acting Regional Administrator, EPA Region 10, to the Honorable Christine Gregoire, Governor of the State of Washington, providing an opportunity to comment on EPA's Proposed Findings of Fact, and on the Tribe's supplemental application, which were attached to the letter. In addition to that notice, EPA also placed announcements in local newspapers to notify interested parties, including local governments, of the opportunity to comment.

3. Governmental Entity Comments Regarding Tribal Authority

As noted above, former EPA, Region 10, Regional Administrator Chuck Clarke, sent a letter dated June 1, 1999, notifying the State of Washington of the substance and basis of the Tribe's assertion of authority in the Application as provided at 40 C.F.R. § 131(8)(c)(2).

By letter on July 26, 1999, the State of Washington submitted comments to EPA. In addition a number of citizens, organizations, and local governments submitted comments on the Application. Those comments were submitted to the State, which forwarded them to EPA. These comments are addressed in the Response to Comments, Appendix II.

Consistent with its practice, EPA prepared proposed Findings of Fact relating to the Tribe's assertion of jurisdiction over nonmember activities on the Reservation and, on October 2, 2006, EPA sent them to the State of Washington for comment. By letter dated November 7, 2006, the State of Washington informed EPA that the State had no comments on the proposed findings. EPA has adopted the proposed Finding of Facts in final form as the Findings of Fact document, which is included as Appendix I to this Decision Document.

4. Capability Review

By memorandum dated June 22, 2000, Marcia Lagerloef, EPA Region 10's Water Quality Standards Coordinator, reviewed the capability of the Tribe to administer the water quality standards and certification 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 criteria.

b. "Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations," 56 Fed Reg. 64876 (December 12, 1991) (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)(l), 40 C.F.R. § 131.3(k).

The Lummi Nation 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”. 70 Fed. Reg. 71194, 71195 (Nov. 25, 2005). 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)(1) and (b)(1).

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 in part on EPA’s previous approval of the Tribe’s TAS Application for CWA Section 106 grants, noting that when EPA approved that application, it found that 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 statements supporting the Section 106 Application established that the Tribe meets the “duties and powers” requirements.

The Tribe has also provided in its submission of supplemental information to the Application, additional evidence about “duties and powers/governmental functions.” The Application describes several types of governmental functions that the Lummi Nation currently performs. For example, the Lummi Nation manages Federal and State grants and contracts covering general governmental responsibilities and, more specifically, the area of Natural Resource management. The Lummi Indian Business Counsel (LIBC) administers fisheries management, enforcement, and environmental protection programs. The LIBC, through the Lummi Natural Resources Department (LNRD), is the manager for Reservation fisheries, and co-manager with the State of Washington of the tribal fishery in the State of Washington. The LIBC also administers a Bureau of Indian Affairs contract for reforestation of logged lands on the Reservation.

The Lummi Nation has a fully trained and certified Law and Order Department that has the authority for citing civil violations by residents of the Lummi Reservation. Officers of the Lummi Law and Order Department operate cooperatively with Whatcom County, State, other Tribes, and Federal law enforcement departments. As a Division of the Law and Order Department, the Lummi Tribal court system has jurisdiction over all criminal and civil ordinances issued by the LIBC. The Lummi Nation also operates a Reservation Water and Sewer system constructed with funding obtained through the Clean Water Act. The program provides services to Reservation residents, Indian and non-Indian alike.

EPA has determined that the Tribe's submissions in its Application and supplemental information, including information regarding the prior TAS Application and approval, adequately demonstrate that the Tribal governing body is currently carrying out substantial governmental duties and powers over a defined area. Thus, the Tribe meets the requirements in 40 C.F.R. §§ 131.8 (a)(2) and (b)(2).

C. Jurisdiction Over "Waters Within the Borders" of the Lummi 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. The Reservation consists of approximately 20,000 acres of land, including 13,000 acres of upland property and 7,000 acres of tideland. Nonmember-owned lands comprise 23 percent of the uplands of the Reservation (15 percent of the total Reservation). The Lummi Reservation consists of two peninsulas and an island that extend into the saltwater of Bellingham Bay and the Georgia Straits. The Application states:

The area addressed by the water quality standards includes all lands and water within the boundaries of the Lummi Indian Reservation notwithstanding the issuance of any patent, and including all rights-of-way running through the Reservation. The island of Chah-choo-sen between the mouths of the Lummi (Nooksack) River, described in the Treaty of Point Elliot, January 22, 1855 together with those lands, tidelands and waters added by the Executive Order of November 11, 1876 are the boundaries of the Lummi Reservation.

EPA has determined that the Tribe has satisfied 40 C.F.R. § 131.8(b)(3)(i) by providing a map and legal description of the area over which the Lummi Nation asserts authority to regulate surface water quality.

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

The Tribe's Application states that the Tribe's water quality standards will apply to all waters within the existing boundaries of the Reservation. The Application specifically identifies the following 12 water bodies that are wholly or partially within the Reservation boundaries.

- a. Nooksack River
- b. Kwina Slough
- c. Lummi/Red River
- d. Jordan Creek
- e. Bellingham Bay
- f. Portage Bay
- g. Hale Passage
- h. Lummi Bay
- i. Georgia Straits
- j. Sandy Point Canal System
- k. Agate Lake
- l. Surface waters of Portage Island

The Tribe's Application also states that the water quality standards will apply to all other waters within the Reservation regardless of how the water body originated, including but not limited to wetlands and surface waters that are standing, flowing, perennial, intermittent, or ephemeral within the boundaries of the Reservation. 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.

3. Statement describing basis for the Tribe's authority over Reservation Waters

The Lummi Nation has identified the legal authorities pursuant to which the Tribe performs its governmental functions. The Application includes a statement by the Tribe's legal counsel describing the basis of the Lummi Nation's authority. The Lummi Nation is organized pursuant to a Constitution and By-Laws approved by the Assistant Commissioner of Indian Affairs on April 2, 1948, and amended on April 10, 1970, and again in 1996. The Lummi Nation is governed by its constitutionally-formed 11-member governing body, the Lummi Indian Business Council, and the General Council, which includes the voting population of the Tribe. The specific powers of the LIBC are enumerated in Article VI of the Tribal Constitution. Several of those specific powers provide a basis for the Tribe to exercise civil regulatory authority over ground and surface water pollution on the Reservation.

CWA Section 518(e)(2) authorizes EPA to treat a tribe in the same manner 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, including those that it has identified, that are within the Reservation boundaries as described in the Application. As explained in the analysis below, which also considers the information contained in the Findings of Fact of Appendix I to this Decision Document, EPA is determining that the Lummi Nation has shown inherent authority over nonmember activities for purposes of the water quality standards and water quality certification programs under the Clean Water Act.

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 powers 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., *State 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, 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 of 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 (1988). Thus, EPA considers both actual and potential nonmember activities in analyzing whether a tribe has authority over nonmember activities under the Clean Water Act.¹

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).

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 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 Application describes in detail the importance of surface water quality to the Lummi Nation and the many ways the Tribe and its members use surface waters. Maps provided by the Lummi Nation show all the waters within the Reservation. Uses of the water by the Nation and its members that the Tribe seeks to protect include subsistence, ceremonial, and commercial fishing and shellfish harvesting, wildlife habitat, recreation in and on the water, and cultural uses and domestic uses. The Tribe has asserted that impairment of such water on the Reservation would have a serious and substantial effect on the political integrity, economic security, or health or welfare of the Lummi Nation and its members.

¹ 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.

The Application describes the topography of the Reservation, which 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 the recharge of aquifers that supply drinking water to residents of the Reservation. 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.

As explained more fully below and described in Appendix I, the Tribe supported its claims with information about how it and its members use the waters 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 to the Application, and Appendix I 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. Based on the information summarized in Appendix I, EPA makes several findings, as described below.

EPA finds that the Tribe has shown that the uses the Tribe makes of the waters include subsistence, ceremonial, and commercial fishing and shellfish harvesting, wildlife habitat, recreation in and on the water, and cultural uses and domestic uses. We find that each of those uses is important to the Tribe and that regulating water quality is important to protecting the uses. EPA further finds that the Reservation's characteristics are such that various human activities occur or may occur, that if not properly regulated, can seriously affect the Tribe and members of the Tribe.

EPA also cites and relies on information regarding nonmember presence and activities on the Reservation including private residences and commercial businesses provided in the Findings of Fact. For example, Appendix I describes actual or potential water quality impacts from the following; residential septic systems, forestry, recreational activities (e.g., golf course operation and maintenance), agriculture and livestock raising, including the use of herbicides and pesticides, commercial transportation activities, including a ferry, and shoreland anti-erosion activities. The actual or potential impacts from these nonmember activities could impact Tribal interests through releases of contaminants such as household chemicals, household cleansers, solvents, heating oil, fertilizer, herbicides, insecticides, septage, coliform and noncoliform bacteria, and effluents from barnyards and feedlots. These environmental impacts have the potential to

seriously affect the Tribe. Appendix I includes a citation to a 1982 order by the U.S. District Court for the Western District of Washington that upheld the Tribe's authority to undertake sewage management and to require every residence, both member and nonmember, located within 200 feet of a sewer line to connect with the Tribe's sewer system.² In that decision, the court's factual description of the serious problems that arose in the absence of Tribal sewage management illustrates the potential impacts of unregulated residential activities on the Tribe and its members.

Based on the preceding findings, and additional findings and information described more fully in Appendix I, 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. Based on that determination and the previously stated findings, EPA finds that the Tribe has met the requirement set forth at 40 C.F.R. § 131.8(a)(3) and (b)(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 standard; 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 June 22, 2000 memorandum prepared by Marcia Lagerloef, EPA Region 10 Water Quality Standards Coordinator, that explains the reasons for finding that the Tribe is capable of administering its water quality standards program. Ms. Lagerloef

² *Lummi Indian Tribe. v. Hallauer.*, No C79-682R (Feb. 5, 1982, W.D. Washington) (slip opinion).

concluded that the Tribe has demonstrated the capability to administer an effective water quality standards program based on her review of the Application, her direct experience working with staff of the tribe, and her knowledge of the Tribe's efforts to develop water quality standards. The Application demonstrates that the Tribe has a wide range of experience administering natural resource programs, and has successfully managed a Clean Water Act Section 106 grant, and includes a full description of how the Tribal government is organized to carry out environmental management functions. The memorandum also concludes that the Tribe has the capability to administer an effective 401 certification program.

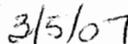
The Tribe has satisfied the requirements to 40 C.F.R. § 131.8(b)(4) by providing information that describes its capability to administer an effective water quality standards and certification program, and EPA has determined that the Tribe has met the requirements of 40 C.F.R. § 131.8(a)(4).

III. Conclusion

EPA has determined that the Lummi Nation 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 purpose of certification under CWA Section 401.



Elin D. Miller
Regional Administrator



Date