

**2004 Response to Comments on Pawnee Nation of Oklahoma's
Application for Program Authorization under Clean Water Act §§303(c) and 401**

The Water Quality Standards Regulations in 40 CFR §131.8 require EPA to notify "appropriate governmental entities" to allow comment on the Tribe's assertion of authority to implement the water quality standards and §401 certification programs. The preamble to the regulation (56 Fed. Reg. 64876-64896) describes governmental entities as "States, Tribes and other Federal entities located contiguous to the reservation of the Tribe which is applying for treatment as a State" (TAS). EPA requested comments from government entities on the Pawnee Nation's assertion of authority to implement the water quality standards and §401 certification programs within the boundaries of the Tribe's trust lands.

The preamble to the Water Quality Standards Regulation (56 Fed. Reg. 64876-64896) also states that EPA will make an effort to provide local governments and others an opportunity to comment. EPA placed public notices in the *Pawnee Chief*, the *Daily Oklahoman* and the *Tulsa World* to notify local governments and citizens of the Pawnee Nation's request for program authorization under the Clean Water Act (CWA). EPA and the Pawnee Nation identified local entities that could be affected by the Pawnee Nation's water quality standards. An announcement, the public notice and two maps of the Pawnee Nation's trust lands were mailed to the following local offices and establishments: the Payne County Seat, the Pawnee County Seat, the Mayor of Pawnee and the New Life Center.

The Bureau of Indian Affairs (BIA) provided specific information on the Pawnee Nation's lands. The BIA Pawnee Agency provided a map titled "Restricted Indian Land Pawnee Reservation," dated October 1991. The BIA Anadarko Area Office provided a copy of the Land Index Report for the Pawnee Nation. EPA compared the Land Index Report with the two maps contained in the Pawnee Nation's application and the map provided by the BIA-Pawnee Agency. These three sources of information are consistent for the tribal trust lands identified in the Decision Document.

For member allotments, there were a few discrepancies between the BIA map, the Land Index Report and the map submitted by the Pawnee Nation. EPA requested clarification on the status of specific tracts of land from the BIA Anadarko Area Office, which responded by letter dated March 2, 1999.

Public notices were published in the *Pawnee Chief* on April 29, 1998, and in the *Daily Oklahoman* and the *Tulsa World* on May 2, 1998. The following submitted comments in response to this initial notice:

- Indian Health Service from Randy E. Grinnell, Acting Area Director;
- Natural Resources Conservation Service from Eddie L. Kephart, Assistant State Conservationist;
- Oklahoma Corporation Commission Response from Jay Edwards, General Administrator;

- BIA - Pawnee Agency from Julia M. Langan, Superintendent (map of “Restricted Indian Land Pawnee Reservation” (October 1991) included);
- Kaw Nation from Wanda Stone, Chairperson; Walter I. Hare, Jr. Administrative Services Director and Timothy F. Kennedy;
- BIA -Anadarko Area Office response from Bruce Maytubby, Chief of Trust Services Branch (Information from *Bureau of Indian Affairs Land Index Report* database also included (171 pp., dated May 4, 1998));
- Oklahoma Conservation Commission from Mike Thralls, Director;
- U.S. Fish and Wildlife Service response from Jerry Brabander, Field Supervisor; and,
- Debi Koebrick, Manager - BIA - Anadarko Area Office Land Titles & Records.

A June 10, 1998 discussion at Inter-Tribal Environmental Council conference between Derek Smithee, Oklahoma Water Resources Board (OWRB) and Diane Evans, EPA confirmed that the Oklahoma Water Resources Board did not receive any comments in response to the April and May 1998 public notices published in the *Pawnee Chief*, the *Daily Oklahoman*, and the *Tulsa World*.

A second public notice was published in the *Daily Oklahoman*, and the *Tulsa World* on July 14, 2004 and in the *Pawnee Chief* on July 21, 2004. On July 16, 2004, letters were sent to appropriate governmental entities seeking input on the assertion of authority in the Pawnee Nation’s TAS application. Comments on this second notice were received from the following:

- Oklahoma Corporation Commission from Ben Jackson, General Counsel;
- Indian Health Service from Dale Keel, Acting Area Director;
- Oklahoma Office of the Secretary of Environment (OSE) from Miles Tolbert, Secretary of the Environment;
- OWRB (transmitted by OSE letter) from Duane A. Smith, Executive Director;
- Senator James Inhofe, including a letter from Senator Inhofe to David Walker, Comptroller General of the United States;
- Oklahoma Department of Environmental Quality (transmitted by OSE letter) from Steven A. Thompson, Executive Director;
- Oklahoma Department of Mines from Tekleab Tsegay, Chief, Technical Services;
- Cherokee Nation of Oklahoma from Chadwick Smith, Principal Chief;
- Muscogee (Creek) Nation from A.D. Ellis, Principal Chief;
- St. Regis Mohawk Tribe from Chief Margaret Terrance, Chief Barbara Lazore, and Chief James Ransom;
- Eastern Shawnee Tribe of Oklahoma from Charles Enyart, Chief;
- BIA response from Michael R. Smith, Regional Director;
- Seneca-Cayuga Tribe of Oklahoma from LeRoy Howard, Chief;
- National Tribal Environmental Council (NTEC) from David F. Conrad, Executive Director;

- OWRB transmittal of public comments from Derek Smithee, including:
 - Environmental Federation of Oklahoma, Inc. from James R. Barnett, President and General Counsel;
 - Oklahoma Municipal League, Inc. from Danny George, Executive Director;
 - Oklahoma Independent Petroleum Association (OIPA) from Angie Burckhalter, Director of Regulatory Affairs; and
 - Oklahoma Farm Bureau & Affiliated Companies from Marla R. Peek, Director of Regulatory Affairs.

All comments were considered in making a determination on the TAS application. Significant comments are discussed below.

Comments and Responses from 1998 Notice

Comment 1A: The Indian Health Service and the Natural Resources Conservation Service each sent letters in support of the Pawnee Nation's water quality program. Both agencies deferred to the Pawnee Nation and the BIA for issues on land status.

Response 1A: EPA appreciates the support of the Indian Health Service and the Natural Resources Conservation Service on CWA programs.

Comment 2A: The Oklahoma Corporation Commission suggested that the Pawnee Nation refrain from developing its own water quality program due to complicated jurisdictional issues and recommended that the Tribe work with the state agencies and other groups to address water quality issues. The Oklahoma Corporation Commission also noted that the state agencies welcome input from tribal governments on programs such as water quality standards, monitoring, and nonpoint source pollution.

Response 2A: EPA appreciates the Oklahoma Corporation Commission's response. EPA acknowledges that tribal jurisdictional issues in Oklahoma are complex and strongly supports cooperation between neighboring jurisdictions. EPA's Indian Policy, established in 1984, supports the development of tribal environmental programs. EPA also recognizes that state agencies such as the Office of the Secretary of Environment, the OWRB and the Oklahoma Conservation Commission solicit input from tribal governments on water quality programs. The 1984 policy also states that EPA encourages cooperation among states, Indian Tribes and local governments on environmental issues. We understand that the State and the Tribe have engaged in discussions regarding a framework to coordinate water quality standards.

Comment 3A: The Kaw Nation stated that it had no lands adjacent to those represented on the color map labeled as "Exhibit 4" (tribal lands in Pawnee and Payne Counties) and therefore did not dispute the Pawnee Nation's jurisdiction on these lands. The Kaw Nation agreed that five Tribes - the Kaw Nation, the Otoe-Missouria Tribe of Oklahoma, the Pawnee Nation, the Ponca Tribe of Indians of Oklahoma and the Tonkawa Tribe of Indians of Oklahoma - each hold one-

fifth interest in the Chilocco Campus as shown in "Attachment A" of the Tribe's application. Lastly, the Kaw Nation did not challenge the general claim of the boundary between Kaw and Pawnee Nation lands at Chilocco, but did not attest to the accuracy of the map labeled Attachment A.

Response 3A: EPA appreciates the Kaw Nation's response. EPA's approval of the Pawnee Nation's request for program authorization for CWA §303(c) and §401 does not include the Chilocco Campus. This approval action does include the Pawnee Nation's tract of 823.56 acres at Chilocco. If a dispute on the boundary between the Kaw Nation's lands and the Pawnee Nation's lands at Chilocco arises as a result of a water quality issue, EPA will solicit further advice from the BIA. The description in the Decision Document of the Pawnee Nation's lands at Chilocco was obtained from the BIA's Land Index Report.

Comment 4A: The Oklahoma Conservation Commission stated its support of the Pawnee Nation's effort to develop water quality standards. The Conservation Commission also noted the growth of tribal environmental offices and complimented the Pawnee Nation on its programs. Finally, the Conservation Commission indicated the benefits of state, tribal and federal cooperation.

Response 4A: EPA appreciates the Oklahoma Conservation Commission's support of tribal water quality programs and looks forward to continuing work with state and tribal agencies on water quality programs.

Comment 5A: The U.S. Fish and Wildlife Service commented on the difficulty of implementing water quality regulations on small portions of water bodies and noted that application of different regulations may be confusing to the regulated community. The Service also commented that EPA's approval of the Pawnee Nation's authority to issue §401 certification will have no adverse effect on listed or proposed threatened or endangered species, but individual actions may require consultation under §7 of the Endangered Species Act. The U.S. Fish and Wildlife Service indicated that it would review water quality standards proposed by the Pawnee Nation.

Response 5A: EPA will continue to work with all parties to implement water quality standards in a consistent manner. EPA will consult with the Fish and Wildlife Service under the Endangered Species Act (ESA) regarding approval of the Pawnee Nation's water quality standards to the extent that approval of those standards may affect listed, threatened or endangered species or critical habitat. Issuance of §401 certification by the Pawnee Nation (or a state) is not subject to consultation under the ESA; however, the federal agency issuing a permit which requires §401 certification (such as an NPDES permit or a §404 permit) is responsible for fulfilling any applicable requirements of the ESA.

EPA would like to make one clarification. The Service's letter stated "any water quality standards proposed by the Pawnee Nation must be at least as protective as the state standards." State and tribal standards must be as protective as the minimum requirements of the CWA and

the implementing regulations. State and tribal standards must also consider the downstream uses of neighboring jurisdictions, but do not have to be identical (see 40 CFR §131.10(b)). Thus, if the State of Oklahoma has adopted a water quality standard that is more stringent than federal requirements, the Pawnee Nation must take into consideration Oklahoma's standard and ensure that the tribal standard provides for the attainment and maintenance of the standard applicable to the downstream state waters and otherwise meets the minimum federal requirements.

Comments and Responses from the 2004 Notice

Comment 1B: The Oklahoma Corporation Commission (“OCC”) “objects to the Pawnee Nation’s effort to use TAS under CWA as a means to gain TAS under SDWA.” The OCC explains in a footnote that this comment is based on uncertainty over whether the Pawnee Nation is asserting authority over the underground injection control (UIC) program of the Safe Drinking Water Act (SDWA). The footnote cites the Pawnee Nation Tribal Environmental Regulatory Act of 1997, included in the submittal, as an assertion of authority over UIC activities.

Response 1B: The application is limited to the authority of the Pawnee Nation to establish water quality standards under §303 of the CWA and for certification authority under §401 of the CWA. The transmittal letter from the Pawnee Nation President as well as the resolution from the Pawnee Nation Business Council indicate that this application is limited to those specific CWA programs. EPA is not approving TAS for the Pawnee Nation under any other statutes or for any other provisions of the CWA in this decision.¹

Comment 2B: OCC, the Oklahoma Municipal League and the Environmental Federation of Oklahoma comment that it is unfeasible to allow separate tribal water quality standards in Oklahoma due to the history of allotments and the lack of “reservations” in the State. Senator James Inhofe also expressed concern about granting TAS in Oklahoma due to the absence of formal reservations. ODEQ and OWRB commented that the ruling in Oklahoma Tax Commission v. Citizen Band Potawatomi Tribe of Oklahoma, 498 U.S. 505 (1991) is limited to sovereign immunity as related to state taxes.

Response 2B: In a final rule dated December 12, 1991 (56 Fed. Reg. 64876-64896), EPA stated that “it is the status and use of the land that determines if it is to be considered ‘within a reservation’ rather than the label attached to it.” 56 Fed. Reg. at 64881. As a result, Tribes without formal reservation areas may be treated as states for land held in trust by the United States for the Tribe. EPA’s position is based on long-standing Supreme Court case law, including Oklahoma Tax Commission v. Citizen Band Potawatomi Tribe of Oklahoma, 498 U.S. 505 (1991), and cases cited therein. Though the controversy in that case was centered around applicability of state taxes in Indian country, the Court’s finding is not limited to taxation and is consistent with general principals of federal Indian law.

¹EPA has previously approved TAS for the Pawnee Nation for purposes of funding eligibility under §106 of the CWA.

Comment 3B: OCC, OIPA, Senator Inhofe and the Oklahoma Farm Bureau each commented that EPA should not approve TAS for Tribes in Oklahoma because of the complexity in determining which lands are tribal trust lands and because Indian country in Oklahoma varies over time. The Oklahoma Water Resources Board (OWRB) and the Oklahoma Department of Environmental Quality (ODEQ) assert that the legal descriptions of four parcels are inadequate. OWRB added that there appear to be inconsistencies between the map and the legal descriptions of three parcels.

Response 3B: Records of all lands held in trust by the United States for a specific Tribe are maintained by the BIA. In comments on the Pawnee Nation application, the Superintendent of the BIA's Pawnee Agency provided legal descriptions of the lands held in trust for the Tribe as well as a list of lands that were no longer in trust. The Chief of the Trust Services Branch also provided a printout of trust lands, though this contains both tribal trust lands and member allotments. As to the trust lands at issue in this decision, BIA commented that the legal descriptions in the record are correct. Quarter, section, township and range make up an adequate legal description. That these descriptions are sufficient to determine location is evinced by ODEQ's own comment that the four parcels over which they express concern are tribal cemeteries. Finally, where there is a conflict between maps provided by the Pawnee Nation and the BIA legal descriptions, the BIA legal descriptions control under EPA's decision.

Comment 4B: ODEQ asserts that four of the parcels identified as tribal trust lands have no waters that flow through or touch upon them.

Response 4B: EPA agrees that there don't appear to be any streams, lakes or potential waters on the following four areas of tribal trust land. EPA notes that if there are in fact no existing or potential surface waters on these lands, EPA expects the Pawnee Nation WQS submission would not include standards for these areas.

- 10 acres in the SW quarter (SE part) of Section 16, Township 19N, Range 5E Indian Meridian (Payne County);
- 10 acres in the SW quarter (SW part) of Section 18, Township 21N, Range 5E Indian Meridian (Pawnee County);
- 10 acres in the SW quarter (SE part) of Section 20, Township 22N, Range 5E Indian Meridian (Pawnee County);
- 10 acres in the NE quarter (SW part) of Section 32, Township 22N, Range 4E Indian Meridian (Pawnee County).

Comment 5B: ODEQ, OWRB and the BIA each commented on the lack of quality of the maps provided by Pawnee Nation. The comments are that the maps lack sufficient clarity, detail and scale.

Response 5B: It is somewhat difficult to identify the various tribal trust lands from the maps. However, legal descriptions for nine parcels of tribal trust land provided by BIA were available to the public for the most recent public comment period. These legal descriptions are sufficient

to determine the lands on which any EPA-approved Pawnee Nation water quality standards would apply.

Comment 6B: ODEQ asserts that surface waters for which the Pawnee Nation will be establishing standards are not identified.

Response 6B: Some water bodies are not named because they do not have formal names. The known water bodies and associated tribal trust lands are as follows:

- 366.03 acres in the NE quarter (all parts), NW quarter (NE and SE parts), SW quarter (NE and SE parts), and SE quarter (all parts) of Section 32, Township 22N, Range 5E Indian Meridian (Pawnee County) - Black Bear Creek and unnamed tributary (sometimes called Possum Creek);
- 320 acres in the NW quarter (all parts) and SW quarter (all parts) of Section 33, Township 22N, Range 5E Indian Meridian (Pawnee County)- Black Bear Creek and unnamed tributary;
- 240 acres located in the NE quarter (NE and SE parts) and the SE quarter (all parts) of Section 22, Township 29N, Range 2E Indian Meridian (Kay County) - Chilocco Creek and three unnamed tributaries to Chilocco Creek;
- 180 acres located in the SW quarter (all parts), SE quarter (SW part), and NW quarter (SW part) of Section 23, Township 29N, Range 2E Indian Meridian (Kay County) - unnamed tributary to Chilocco Creek;
- 403.56 acres in the NE quarter (NW and SW parts), NW quarter (all parts), SW quarter (all parts), and SE quarter (NW and SW parts) of Section 26, Township 29N, Range 2E Indian Meridian (Kay County) - three unnamed tributaries to Chilocco Creek.

This TAS approval covers riparian wetlands associated with Black Bear Creek, Chilocco Creek and the unnamed tributaries on any of the identified tribal trust lands. As discussed above under Response 4B, there are four areas of tribal trust lands included in this approval which do not have known surface waters.

Comment 7B: ODEQ and OWRB point out that the most recent public notice indicates that Pawnee Nation is not seeking TAS over allotments, but the TAS application does request authority over member allotments.

Response 7B: This comment is correct. Through clerical error, the most recent public notice was incorrect in stating that Pawnee does not seek TAS over member allotments. However, for the reasons discussed in the Decision Document, EPA is not approving the Pawnee Nation for member allotments.

Comment 8B: OCC and OIPA commented that, in Oklahoma, the trust status of the land changes rather frequently as land is placed into trust or loses its trust status. This creates a moving target in terms of jurisdiction. The OCC comment also references the “complexity and scope of Indian land identification and location of any and all lands that may be affected by TAS status.” OWRB commented that the Pawnee Nation must prove the trust status of all parcels for which EPA is granting TAS.

Response 8B: Lands held in trust for Tribes do not lose their trust status as frequently as this comment suggests. Member allotments change more frequently, but EPA is not approving TAS for Pawnee Nation member allotments. The BIA maintains records on trust lands, and is the proper agency for determining the trust status of lands. BIA provided EPA with a list of tribal trust lands and, in their comments to the recent public notices, verified that the parcels identified are held in trust for the Pawnee Nation.

Comment 9B: OCC comments: “The Pawnee Tribe cannot claim a sovereign right to protect the public health, safety and welfare of a general tribal population or a defined geographical province, unlike the nations and tribes in other cases in controversy, where there is a definite tribal enclave where legitimate claims of public health and safety can be observed.” The commenter, citing the 1981 Supreme Court test for civil authority over non-member activities within a reservation in Montana v. U.S., 450 U.S. 544, indicates that because the Pawnee Nation does not have formal reservation boundaries, they have no sovereign authority to protect tribal members on tribal trust lands. OCC also comments that the Pawnee Nation does not meet the statutory criteria for TAS because establishment of water quality standards is not necessary to prevent a serious and substantial effect on the health and welfare of the Tribe, citing the factors from the Montana test and from EPA’s regulations regarding tribal jurisdiction over nonmember activities within a reservation. They comment that the standards are not necessary because their sampling of the waters which run through Pawnee Nation lands indicate they are not impaired.

Response 9B: As was stated in response 2B, in a final rule dated December 12, 1991 (56 Federal Register (“Fed. Reg.”) 64876-64896), EPA indicated that the geographic scope of the tribal eligibility under the CWA includes lands held in trust for a Tribe.

This comment confuses the Supreme Court test for civil authority over nonmembers with the statutory requirements for TAS. In order for a Tribe to have civil authority over non-member activities, the test in Montana must be met. However, the Pawnee Nation is not seeking regulatory authority over non-members on fee lands, and we are aware of no non-member activities on the trust lands at issue in this decision that affect water quality. In addition, EPA and not the Tribe is the permitting authority responsible for implementing any approved Pawnee Nation water quality standards.

Impairments to water quality, whether from oil and gas exploration and production or otherwise, are not a prerequisite to establishment of water quality standards or this TAS decision. Section 518(e) and EPA’s implementing regulations establish four criteria for TAS. First, the applicant

must be a federally-recognized Tribe exercising governmental authority over an Indian reservation. Second, the Tribe must have a governing body carrying out substantial governmental duties and powers. Third, the powers to be exercised must pertain to water resources held by a Tribe, by the United States in trust for Indians or held by an Indian subject to a restriction on alienation, or otherwise within the borders of an Indian reservation, and over which the Tribe can demonstrate authority. Fourth, the Tribe must be reasonably expected to be capable of carrying out the functions for which TAS is sought.

Comment 10B: The Muscogee Creek Nation commented that individual Indian allotments are excluded from state regulation citing Colville Confederated Tribes v. Walton, 647 F.2d 42 (9th Cir. 1981). The Muscogee Creek Nation comments that EPA's interpretation of the CWA excludes Tribes from obtaining TAS for non-reservation Indian country is contrary to the EPA Indian Policy. This Tribe states that such a position is contrary to federal Indian law principles, and that restricted and trust allotments are subject to tribal and federal control to the exclusion of state regulation, citing Indian Country U.S.A. Inc. v. State of Oklahoma, 829 F.2d 967, 976 (10th cir. 1987).

Response 10B: As noted in the decision document, EPA has not treated allotments outside of formal reservations as within the scope of CWA §518(e), and the Pawnee Nation has not demonstrated as a legal matter that the allotments covered by its application fall within the scope of that section. The language in §518(e)(2) limits tribal eligibility to those areas "otherwise within the borders of an Indian reservation." Section 518(h) defines an "Indian tribe" as "any Indian tribe, band, group, or community recognized by the Secretary of the Interior and exercising governmental authority over a Federal Indian reservation." Because of the specific language in the CWA, EPA may only approve tribal programs for reservations. Under the case law, reservations include formally designated reservations and lands held in trust by the United States for a Tribe. *E.g.*, United States v. John, 437 U.S. 634, 98 S.Ct. 2541, 57 L.Ed.2d 489 (1978), Indian Country U.S.A. v. State of Oklahoma, 829 F. 2d 967 (10th Cir. 1987) cert. denied by Oklahoma Tax Com'n v. Muscogee (Creek) Nation, 487 U.S. 1218 (1988), Oklahoma Tax Commission v. Citizen Band Potawatomi Tribe of Oklahoma, 498 U.S. 505 (1991), Oklahoma Tax Commission v. Sac and Fox Nation, 508 U.S. 114, 123 (1993) reh'g denied 509 U.S. 933 (1993).

For comments 11B through 22B, it should be noted that 40 CFR §131.8(c)(3) specifically states that "(c)omments shall be limited to the Tribe's assertion of authority." We are responding even though these comments do not directly relate to the Pawnee Nation's assertion of authority.

Comment 11B: OCC states that should Pawnee Nation's standards be revised in the future such that they are significantly different from state standards, the different standards would cause confusion for permit applicants as well as creating difficulties for enforcement and water quality planning entities. The Oklahoma Municipal League, OIPA, Senator Inhofe and the Environmental Federation of Oklahoma expressed similar concerns, commenting that if each

Tribe in Oklahoma established separate or even contradictory standards, the result would significantly burden the regulated community and restrict the State's economic growth. These commenters, citing City of Albuquerque v. Browner, 97 F.3d 415 (10th cir. 1996) cert denied 522 U.S. 965 (1997), assert that there could be significant economic burdens resulting from a Tribe setting standards significantly more stringent than the state standards.

Response 11B: The water quality standards currently being discussed by the Pawnee Nation are very similar to the state standards, and thus the concern that the Pawnee Nation will adopt very different standards from the state standards seems premature or speculative; however, we acknowledge that the Tribe might some day decide to change those standards, just as the State might change its existing standards. To date, the Pawnee Nation is the only Oklahoma Tribe to have submitted a TAS request for water quality standards.

It is important to note that today's action of approving TAS for the purpose of establishing water quality standards does not constitute approval of any particular standards. EPA has yet to act on specific standards developed by the Pawnee Nation. Further, any new or future changes in state or tribal water quality standards would have to come to EPA for approval before taking effect under the CWA. Where the proposed change in water quality standards is consistent with the other sovereign's standards, none of the implementation issues raised by commenters would arise, and review is likely to be relatively simple and uncomplicated. In the event that the state or a Tribe proposes changes in water quality standards that would result in inconsistencies with adverse impacts like those of concern to the commenters, the Agency would, as it has done in practice, take such inconsistencies into consideration.

EPA is also prepared to help facilitate appropriate discussions with the Pawnee Nation and the State of Oklahoma towards the establishment of state and tribal standards that are mutually compatible and supportive wherever possible. Further, where states and Tribes face difficulties in resolving their differences regarding water quality standards for shared waters, pursuant to CWA §518(e), EPA has established a dispute resolution process that can be initiated by states or Tribes where one government's water quality standards would lead to unreasonable consequences for the other government. See 40 CFR §131.7.

Comment 12B: OCC commented that the Pawnee Nation lacks the funding to implement TAS under the CWA. Senator Inhofe, referencing OCC comments, expressed this same concern. ODEQ commented that capability may have changed since the application was submitted and should be updated.

Response 12B: Section II. D. of the Decision Document details EPA's determination regarding capability of the Pawnee Nation to implement the water quality standards and 401 certification programs. The Pawnee Nation is eligible for funding under a number of EPA grant programs, including the CWA grant program. This funding was adequate for the development of draft water quality standards and EPA has no evidence to indicate insufficient funds for any necessary revisions. Nor does EPA have any indication that the Pawnee Nation has insufficient means for

carrying out the certifications under §401 of the CWA. The authority for all other CWA implementation, such as issuance and enforcement of permits in Pawnee Nation Indian country, is being retained by EPA. As a result, resources beyond what the Pawnee Nation has shown are not necessary at this time. Should the Pawnee Nation seek other regulatory programs, a review of necessary resources is part of the requisite capability demonstration. In further support of the position that the Pawnee Nation has the capability to implement the water quality standards program, it should be noted that the Pawnee Nation is implementing a water quality monitoring program for assessment of physical, chemical, and biological parameters.

Comment 13B: Comments from the ODEQ, OWRB, OCC, OIPA, the Farm Bureau, and the Environmental Federation of Oklahoma all objected to a grant of TAS due to the “checkerboard” nature of Indian country in Oklahoma. They assert that approval of water quality standards for non-contiguous tracts results in numerous, potentially conflicting, permit requirements from a variety of governmental entities.

Response 13B: EPA is prepared to help facilitate appropriate discussions with the Pawnee Nation and the State of Oklahoma towards the establishment of tribal and state standards that are mutually compatible and supportive wherever possible.

Comment 14B: OCC, OIPA, the Farm Bureau, and the Environmental Federation of Oklahoma each expressed the concern that tribal standards in this area would be duplicative. In the words of the OCC: “In Oklahoma, the general public health, safety and welfare of individual American Indian property owners and tribal trust lands are protected by the existing state-based water quality standards.” ODEQ provided similar comments.

Response 14B: Because EPA has not approved Oklahoma's water quality standards for Indian country in Oklahoma, under the CWA the state water quality standards are not applicable on tribal trust lands such as are the subject of this action.

Comment 15B: OCC, OIPA, the Farm Bureau, and the Environmental Federation of Oklahoma assert that Pawnee Nation's application for TAS for the purposes of establishing water quality standards “represents an unnecessary attempt to duplicate existing environmental programs and an unnecessary bureaucratic layer.” ODEQ commented similarly that approval of TAS enables the development of potentially inconsistent, overlapping and redundant standards and programs.

Response 15B: As stated in the previous response, the Oklahoma water quality standards do not apply in tribal trust lands under the CWA. Water quality standards adopted by the Pawnee Nation and approved by EPA would not duplicate any CWA programs that currently exist for these waters. As noted above, permit writers must make sure that permits contain any limits necessary to ensure consistency with downstream standards. Further, the authority to establish water quality standards “is in accord with powers inherent in Indian tribal sovereignty.” City of Albuquerque v. Browner, 97 F.3d 415, 423 (10th Cir.1996)(cert. denied 522 U.S. 965 (1997)). As noted above, EPA is prepared to help facilitate appropriate discussions with the Pawnee

Nation and the State of Oklahoma towards the establishment of tribal and state standards that are mutually compatible and supportive wherever possible

Comment 16B: Approval of TAS under the CWA makes it easier to obtain Safe Drinking Water Act programs, leading to an adverse impact on oil and gas producers and the OCC.

Response 16B: Under EPA's "simplification rule," 59 Fed. Reg. 64339 (December 14, 1994), there is a reduced burden on Tribes in obtaining TAS if the Tribe has TAS under another statute or program. For example, a Tribe with TAS for one program would not need to provide further information in a subsequent TAS application to demonstrate that it is a federally-recognized Tribe with a governing body carrying out substantial duties and powers. However, Tribes must show authority to implement each program, jurisdiction over the areas allowed by each statute (assuming a regulatory program is what is being sought) and capability to implement that program. Approval of TAS for one program is by no means an automatic approval for a different program. Because the underground injection control program of the SDWA is not at issue in this action and the Pawnee Nation has made no indication of an intent to seek TAS for SDWA programs, it is premature to address the Tribe's ability to obtain TAS for those programs.

Comment 17B: OIPA, the Environmental Federation of Oklahoma and the Farm Bureau each state that approval of the Pawnee Nation's TAS application should be delayed until completion of the report by the General Accounting Office (GAO) requested by Senator James Inhofe in a letter to the Comptroller General of the United States dated June 1, 2004. In a letter to Regional Administrator Richard Greene dated June 3, 2004, Senator Inhofe also requested EPA postpone program authorizations until this report can be issued.

Response 17B: The Pawnee Nation's application for TAS to develop water quality standards was submitted in 1998. EPA is aware of Senator Inhofe's request to GAO. However, EPA believes it has an obligation to issue a decision on this TAS application.

Comment 18B: ODEQ comments that the Pawnee Nation did not support certain assertions made regarding water quality in the Arkansas River and Black Bear Creek.

Response 18B: These assertions by the Pawnee Nation are not necessary to EPA's evaluation of the Tribe's TAS application. As stated in a previous response, the CWA does not require a demonstration of water quality impairment for the Pawnee Nation to receive TAS. Therefore, no such documentation is necessary.

Comment 19B: ODEQ commented that the Pawnee Nation has requested TAS for §401 certification authority, yet does not have approved water quality standards in place. The comment asks what standards the Pawnee Nation would use for certification.

Response 19B: EPA is granting the request for the Pawnee Nation to be treated in a manner similar to a state with regard to CWA §401 certification authority. Ultimately, the Pawnee

Nation will certify to Tribal water quality standards when they are adopted by the Tribe, and approved by EPA.

Comment 20B: ODEQ commented at length about EPA's capability to implement environmental programs on member-held allotments throughout Oklahoma and attached additional materials regarding the State's opinion of authority over allotments under the CWA. The Cherokee Nation and the Muscogee Creek Nation also commented regarding EPA's lack of resources.

Response 20B: These comments are outside the scope of this TAS decision. EPA is granting TAS to the Pawnee Nation for tribal trust lands only. EPA's authority over allotments is not at issue here. Regardless, EPA will continue to make every effort to fulfill our responsibilities to implement environmental laws.

Comment 21B: The Cherokee Nation, the Muscogee Creek Nation, the Eastern Shawnee Tribe of Oklahoma, the Seneca-Cayuga Tribe of Oklahoma, NTEC and the Saint Regis Mohawk Tribe commented in support of approval of the Pawnee Nation TAS. The Saint Regis Mohawk Tribe asserts that the Pawnee Nation submitted an application that meets all CWA requirements and that "there is no legal reason to further delay approval" of the application. The Tribal commenters assert that Tribes have inherent authority as sovereign governments and TAS authorization is a means of exercising that authority.

Response 21B: We agree that EPA should proceed with a decision regarding the Pawnee Nation TAS application.

Comment 22B: The Eastern Shawnee Tribe of Oklahoma, the Seneca-Cayuga Tribe of Oklahoma, NTEC and the Saint Regis Mohawk Tribe point out that, in the context of implementation of the CWA, "states have often established differing standards, usually without unreasonable consequences." These commenters acknowledged that in the few instances where there is a conflict, federal courts decide the issues, citing to the case of Arkansas v. Oklahoma, 503 U.S. 91 (1992). They further commented that Congress affirmed the "fundamental right of both tribal and state sovereigns to set standards to protect their citizens" and that it is appropriate for EPA to have a conflict resolution mechanism to "resolve serious differences if and when they might arise." Several Tribes point out that this mechanism has not been needed because tribal standards are usually consistent with state standards.

Response 22B: The dispute resolution mechanism mentioned in these comments has a statutory basis in §518(e) of the CWA. EPA has promulgated regulations concerning this process at 40 CFR §131.7.