

2005 Response to Comments on Pueblo of Taos Application for Treatment in the Same Manner as a State under §518 of the Clean Water Act (CWA) for Purposes of Administering CWA §303(c) and §401

The water quality standards regulation found at 40 CFR §131.8 requires the Environmental Protection Agency (EPA) to notify “appropriate governmental entities” to allow comment on an Indian 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) defines 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.” By letter dated April 20, 2005, EPA requested comments from governmental entities on the Pueblo of Taos’ assertion of authority to implement the water quality standards and §401 certification programs for the areas covered by the Tribe’s application: the main Reservation and the areas of Tribal trust lands identified as Tracts A and B and the Karavas Tract.¹

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 *Taos News* and the *Santa Fe New Mexican* on April 22, 2004, to notify local governments and citizens of the Pueblo of Taos’ request for treatment in the same manner as a state for Clean Water Act (CWA) §303 and §401. EPA and the Pueblo of Taos also identified local entities that could be affected by the Tribal water quality standards. At the same time, EPA mailed an announcement, the public notice, the map of the Pueblo of Taos reservation lands, and the list titled “*Taos Pueblo Trust and Fee Lands Within the original Taos Pueblo Land Grant*” to the following local offices and establishments: the Manager of Taos County, the Manager of the Town of Taos, the Public Utilities Director of the Town of Taos, the Mayor of the Village of Taos Ski Valley, and Molycorp, Inc.

The Town of Taos requested an extension to the comment period, which was granted by EPA following coordination with the Pueblo of Taos. By letter dated June 4, 2005, EPA notified governmental entities of the extension to the public comment period. On June 8, 2005, EPA also mailed a copy of the public notice announcing the extension to the local offices and establishments previously mentioned. EPA received five responses during the comment period, including the letter from the Town of Taos forwarded by the New Mexico Environment Department (NMED). All comments were evaluated by EPA’s Water Quality Protection Division and Office of Regional Counsel.

- U.S. Department of Energy (Denver Regional Office) from William S. Becker, Director;
- U.S. Army Corps of Engineers (Albuquerque District) from Daniel Malanchuk, Chief, Regulatory Branch;
- U.S. Forest Service (Carson National Forest) from Martin D. Chavez, Jr., Forest Supervisor;

¹This document uses the term “Reservation” to include the entire area covered by the Tribe’s application: the main Reservation, Tracts A and B, and the Karavas Tract.

- NMED from Ron Curry, Secretary; and,
- NMED transmittal of public comments from Marcy Leavitt, Surface Water Quality Bureau Chief that included the following:

Town of Taos letter from Bobby F. Duran, Mayor.

All comments were considered in making a determination on the application for treatment in the same manner as a state for CWA §303(c) and §401. Comments are summarized below with EPA's responses. 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 to all comments even though some of these comments do not directly relate to the Pueblo of Taos' assertion of authority. Some of the comments relate to the Tribe's adopted water quality standards. EPA's responses regarding the Tribe's standards themselves represent the Agency's general or preliminary views, and are not intended to predetermine the results of EPA's review of those standards under CWA §303(c).

Comment 1: The U.S. Department of Energy sent a letter providing "no comment" regarding the Pueblo of Taos' request for treatment in the same manner as a state under CWA §518 for CWA §303 and §401. The U.S. Army Corps of Engineers sent a letter stating that "We have no objection to the U.S. Environmental Protection Agency approving the Pueblo of Taos' request for Section 303 and Section 401 program authority."

Response 1: EPA appreciates the responses from the U.S. Department of Energy and the U.S. Army Corps of Engineers.

Comment 2: The U.S. Forest Service and the NMED each sent a letter in support of approving the application. In a separate letter transmitting comments from the Town of Taos, the NMED noted that its support of the Pueblo of Taos' application had not changed based on the Town of Taos' comments.

Response 2: EPA appreciates the response from the U.S. Forest Service and the NMED on CWA programs.

Comment 3: The Town of Taos cited §518 of the CWA which directs EPA to promulgate regulations and reads:

"...promulgate final regulations which specify how Indian tribes shall be treated as States for purposes of this Act. The Administrator shall, in promulgating such regulations, consult affected States sharing common water bodies and provide a mechanism for the resolution of any unreasonable consequences that may arise as a result of differing water quality standards that may be set by States and Indian tribes located on common bodies of waters. Such mechanism shall provide for explicit consideration of relevant factors including but not limited to, the effects of differing water quality permits requirements on

upstream and downstream dischargers, economic impacts and present and historical uses and quality of the waters subject to such standards. Such mechanism should provide for the avoidance of such unreasonable consequences in a manner consistent with the objective this Act.”

The Town requested assurance that EPA “adequately addresses resolution of issues as required by this section,” and claimed it “has not received any information how Taos Pueblo and EPA propose to resolve unreasonable consequences,” from differing water quality standards. The Town of Taos also stated that it “does not dispute the Pueblo’s ability to administer the program.”

Response 3: EPA has promulgated regulations implementing CWA §518 at 40 CFR §131.7 and §131.8. 40 CFR §131.7 establishes the dispute resolution mechanism. The process established under that regulation can be initiated by states or Indian tribes where one government believes another government’s water quality standards would lead to unreasonable consequences for the other government. A municipality or industry cannot initiate the dispute resolution mechanism, but can request that a state or Indian tribe do so on its behalf.

Comment 4: The Town of Taos stated that the Pueblo of Taos water quality standards will usurp the jurisdiction of the State of New Mexico and override the State’s water quality standards.

Response 4: EPA has not approved the State of New Mexico’s water quality standards under the CWA for the areas that are covered by the decision document. Thus, if water quality standards are adopted by the Pueblo of Taos and approved by EPA for the area covered by the decision document they will not duplicate any CWA standards that currently exist for these waters. This approval, moreover, does not extend beyond water quality standards and §401 certification, and EPA retains authority for implementing other CWA functions, such as issuance and enforcement of permits, in Indian country in New Mexico. Permits must contain any limits necessary to ensure consistency with downstream standards in effect under the CWA. *See City of Albuquerque v. Browner*, 97 F.3d 415, 423 (10th Cir.1996)(cert. denied 522 U.S. 965 (1997)). As noted above, the NMED has expressed its support for approval of the Pueblo of Taos’ application.

Comment 5: The Town of Taos requested that approval of the Pueblo of Taos application for CWA §303 and §401 authority be delayed until completion of the report by the General Accountability Office (GAO) requested by Senator James Inhofe in a letter to the Comptroller General of the United States dated June 1, 2004. The Town of Taos supported that request by quoting language from Senator Inhofe’s letter that focused on non-contiguous trust lands in Oklahoma, which is in EPA Region 6. The Town also stated that the Pueblo of Taos had requested CWA authority over noncontiguous trust lands in New Mexico, which is also located in EPA Region 6.

Response 5: The Pueblo of Taos' application for CWA §303 and §401 authority was submitted in 2003. EPA is aware of Senator Inhofe's request to GAO. However, EPA has reviewed the GAO's report and does not believe it provides any basis for delaying EPA's decision or disapproving this application for treatment in the same manner as a state. For further discussion on the Pueblo of Taos lands included in EPA's approval for treatment in the same manner as a state, see Section II.C. of the decision document.

Comment 6: The Town of Taos commented that an analysis of potential economic impacts is required by the CWA before approval of an application for treatment in the same manner as a state or water quality standards, particularly where tribal standards are more stringent than federal requirements. The comments also suggested that a cost/benefit analyses must be conducted prior to approval of the Tribal water quality standards or the application for treatment in the same manner as a state. The Town also asserted that the Tribal water quality standards are subject to the federal Unfunded Mandates Reform Act, and funding must be provided to municipalities required to meet such standards. The Town also requested that the Pueblo and EPA provide funding for whatever mitigation plans may be required to meet the standards. Finally, the Town of Taos cited a policy on "Tribal Water Standards" adopted by the New Mexico Municipal League which acknowledges the authority of Indian tribes to adopt water quality standards and recommends that justification such as cost-benefit analyses be required from federal agencies where tribal standards are more stringent than federal requirements. The Municipal League's policy also states that municipalities and state governments should be allowed to participate in the rule-making process.

Response 6: CWA §518, the provision governing treatment in the same manner as a state, does not require that EPA analyze the economic impact of tribal standards before approving a tribe for treatment in the same manner as a state. The CWA also does not require that a tribe undertake such an analysis as a prerequisite for treatment in the same manner as a state approval. As already noted, §518 of the CWA requires that a tribe make the following demonstration: that "the Indian tribe 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 CWA and "of all applicable regulations." Whether any particular set of water quality standards that a tribe adopts is consistent with the CWA is an issue that EPA will address when it approves or disapproves those particular new or revised water quality standards. States and tribes may, at their discretion consider economic impacts in developing and revising water quality standards. See 40 CFR §131.10(g)(6) and EPA's *Water Quality Standards Handbook*² (see Chapter 2 and Appendix M).

² U.S. EPA. 1988. *Water Quality Standards Handbook: Second Edition*. Office of Water. EPA-823-B-94-005a. Washington, D.C. Available from: <http://www.epa.gov/waterscience/library/wqstandards/handbook.pdf> and <http://www.epa.gov/waterscience/library/wqstandards/handbookappx.pdf>.

The Unfunded Mandates Reform Act (UMRA) does not apply to EPA's treatment in the same manner as a state approval, because the relevant sections of UMRA, sections 201-205, apply only to rulemakings. EPA's approval for treatment in the same manner as a state is not a rulemaking, but rather is an informal adjudication. Further, the approval for treatment in the same manner as a state does not impose any enforceable requirements on any entities. Any such requirements would be the result of future EPA actions and the requirements of the CWA.

In the 1986 amendments to the CWA, Congress replaced the Wastewater Treatment Construction Grants Program with the State Revolving Loan Fund (SRF). The SRF program provides low interest loans to publically-owned wastewater treatment systems to address wastewater infrastructure needs. The fund has been capitalized since 1988 by annual EPA grants to the NMED. To date, EPA has provided \$100 million to the New Mexico SRF program. In addition to the EPA funds, federal funds are made available through other federal agencies such as the Department of Agriculture, the Economic Development Administration and the Department of Housing and Urban Development to assist communities with wastewater infrastructure needs.

EPA notes that the Pueblo of Taos provided public notice on its proposed standards on March 1, 2001, conducted a public hearing on April 18, 2001, and allowed comments to be submitted until April 27, 2001. In addition, during the week of March 23, 2001, the Pueblo of Taos also sent notification of the proposed standards and public hearing through the mail to state, county, and local officials. The Town of Taos provided written comments during this process, which were considered by the Pueblo of Taos and included in its Response to Comments. EPA does not conduct a public participation process when reviewing state or tribal water quality standards.

Comment 7: The Town of Taos noted that the Pueblo of Taos has not detected all of the substances included in its water quality standards in water bodies and requested that instream monitoring, human health risk assessments, Use Attainability Analyses (UAA), and additional public participation be completed prior to approval of the water quality standards and the application for treatment in the same manner as a state.

Response 7: The federal water quality standard regulation requires that a UAA be conducted only in the limited circumstances where a state or Indian tribe adopts designated uses for a water body that do not meet the goals of CWA §101(a)(2), or where the state or tribe is removing certain designated uses. States and Indian tribes, at their discretion, may conduct UAAs when designating uses consistent with CWA §101(a)(2). There is no requirement that a UAA, or other type of site-specific evaluation, be conducted for each use in water quality standards, except in the limited circumstances described above.

There are two general approaches that may be used by states and Indian tribes to select numeric criteria for protection of designated uses. The first option is to adopt criteria for all substances for which EPA has developed a numeric recommendation. The second option is to adopt criteria for priority toxic pollutants that may reasonably be expected to interfere with attaining designated

uses, and for other substances that may be found in waters. The State of New Mexico now uses the first approach and the Pueblo of Taos has chosen to use the second approach. Most Indian tribes and states, including the Pueblo of Taos and State of New Mexico, use EPA's recommended values for numeric criteria. Finally, most states or tribes do not routinely monitor for all substances in water quality standards.

Comment 8: The Town of Taos correctly noted that for a particular reach of the Rio Pueblo de Taos, the Tribal water quality standards include a Domestic Water Supply use (which incorporates groundwater recharge), but the State standards do not include this designated use. The Town of Taos also questioned whether the Pueblo's criteria are functionally equivalent to the State's human health criteria and commented that several of the Tribal criteria are more stringent.

Response 8: EPA acknowledges that water quality standards adopted by an Indian tribe may differ from those adopted by an adjacent state, just as two states may have different standards for the same water body. As noted above, state and tribal standards must be as protective as the minimum requirements of the CWA and the implementing regulation. 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 New Mexico has adopted a water quality standard that is more stringent than federal requirements, the Pueblo of Taos must take into consideration New Mexico'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 even if it would be less stringent than the State standard.

The criteria under the Domestic Water Supply use in the Pueblo of Taos water quality standards are generally based on EPA's Maximum Contaminant Levels to protect human consumption of water, while the State's human health criteria are intended to protect human consumption of fish. EPA notes that for several parameters listed in the Town of Taos' comment, both the State water quality standards and the Pueblo of Taos standards include aquatic life criteria which are more stringent than either the State's human health criteria or the Pueblo's criteria under the Domestic Water Supply use. Also, a series of calculations are used to develop effluent limitations in National Pollutant Discharge Elimination System (NPDES) permits and the most stringent criterion may not result in the most stringent permit limit for a particular substance.

Comment 9: The Town of Taos noted that some water quality criteria in the Pueblo of Taos water quality standards and the New Mexico water quality standards are lower than what is routinely measured by analytical laboratories and questioned whether the units of micrograms per liter ($\mu\text{g/l}$) for specific substances should be milligrams per liter (mg/l).

Response 9: The criteria in the Pueblo of Taos water quality standards for DDT and polychlorinated biphenyls are measured in micrograms per liter. EPA's recommended values for CWA criteria are based on aquatic toxicology or human health impacts and do not consider

detection limits. Many state and tribal standards contain numeric criteria which are smaller than detection limits of the analytical methods required to be used by NPDES discharges. EPA Region 6 will calculate the numerical limitation dictated by the State or Tribal water quality standards to establish the water quality-based effluent limit (WQBEL). To address situations where WQBELs are below the sensitivity of available approved analytical techniques, EPA Region 6 has established a procedure based on achieving minimum quantification levels (MQLs). MQLs are the lowest concentration at which a particular substance can be quantitatively measured. In cases where WQBELs are smaller than the MQL, the permittee is considered to be in compliance with effluent limits established in a permit when measurements are less than the MQL established for that pollutant.

Comment 10: The Town of Taos commented that the Pueblo of Taos' acute aquatic life criterion for aluminum (748 µg/l) is more stringent than the State's aluminum acute criterion of 750 µg/l.

Response 10: EPA's recommended acute aquatic life criterion for aluminum is 748 µg/l.³ Due to rounding, this value is often published as 750 µg/l which has been adopted by several states and Indian tribes. It is unlikely that the difference of 2 µg/l in the acute criteria would affect wastewater treatment levels for a wastewater facility. EPA notes that the State standards include a chronic aquatic life criterion of 87 µg/l, which was not adopted by the Pueblo of Taos. Therefore, for aluminum aquatic life criteria, the New Mexico State standards are more stringent than the Pueblo of Taos water quality standards.

Comment 11: The Town of Taos correctly noted that the Pueblo of Taos has adopted a criterion for chlorine of 3 µg/l for coldwater fisheries, while the New Mexico State standards include a chronic criterion of 11 µg/l to protect aquatic life.

Response 11: EPA's recommendation for an aquatic life chronic criterion is 11 µg/l. The value of 3 µg/l is based on a recommendation from the U.S. Fish and Wildlife Service. Both the New Mexico State standards and the Pueblo of Taos water quality standards meet the requirements of the CWA and federal water quality standards regulation. The most recent NPDES application submitted by the Town of Taos indicates that the facility uses ultraviolet disinfection. However, some facilities with ultraviolet disinfection may temporarily use chlorine disinfection while maintenance or repair activities are performed. As discussed above under Response 9, a series of calculations are used to derive effluent limitations. The Pueblo of Taos water quality standards include a provision to consider dilution in calculating effluent limitations based on aquatic life

³ U.S. EPA. 1988. *Ambient Water Quality Criteria for Aluminum - 1988*. Office of Water Regulations and Standards. EPA 440/5-86-008. Washington, D.C. Available from: http://cfpub.epa.gov/npdes/pubs.cfm?program_id=0 (search for "aluminum" under keyword option)

criteria. Also, MQLs are considered in establishing reporting limits as discussed in Response 10. The MQL for total residual chlorine currently used in the NPDES program is 11 µg/l.

Comment 12: The Town of Taos commented that the Pueblo of Taos has adopted criteria for *E. coli* bacteria, while the State's water quality standards include only criteria for fecal coliform bacteria. The Town of Taos also correctly noted that the Pueblo's water quality standards include criteria for iron, but the State standards do not have criteria for this parameter.

Response 12: EPA's recommended criteria for protection of contact recreation uses have been for *E. coli* bacteria. Although the EPA-recommended values were published in 1986, states have historically used criteria for fecal coliform bacteria to protect recreational contact in surface waters. Most states have adopted criteria for *E. coli* in recent years. The State of New Mexico adopted criteria for *E. coli* in its 2005 triennial revision of its water quality standards. The iron criteria under the Drinking Water and Aquatic Life uses in the Pueblo of Taos water quality standards are based on EPA-recommended values. As discussed above, states and Indian tribes must consider the standards of downstream jurisdictions but the water quality standards do not have to be identical.