



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 6
1445 ROSS AVENUE, SUITE 1200
DALLAS, TX 75202-2733

NOV 04 2004

Honorable George Elton Howell
President
Pawnee Nation of Oklahoma
P.O. Box 470
Pawnee, OK 74058

Dear President Howell:

The Environmental Protection Agency (EPA) has completed its review of the Pawnee Nation of Oklahoma's request for Clean Water Act (CWA) §303(c) and §401 program authorization and is approving that request as it pertains to the majority of tribal trust lands. The request for program authorization was submitted for EPA's approval by letters dated February 18, 1998 and March 30, 1997 (actually sent March 30, 1998), and received by EPA on March 2, 1998 and April 6, 1998.

Complete documentation of our review of the request for program authorization can be found in the enclosure titled *Decision Document: Partial Approval of Pawnee Nation of Oklahoma Application for Program Authorization under §303(c) and §401 of the Clean Water Act*. As part of the review, EPA was required to request comments from other governmental entities located contiguous to the Pawnee Nation on the Tribe's authority to regulate water quality on tribal lands. A response to comments is included in the docket for this decision.

In the preamble to the final amendments to the Water Quality Standards Regulation dated December 12, 1991 (56 Fed. Reg. 64876-64896), EPA stated that the Agency "believes that it was the intent of Congress to limit Tribes to obtaining treatment as a State status to lands within the reservation." 56 Fed. Reg. at 64881. This position is based on the limitation in CWA §518(e) to waters "otherwise within the borders of an Indian reservation" and the definition of "Indian tribe" contained in CWA §518(h)(2). CWA §518(h)(2) 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." The term "Federal Indian reservation" is defined in CWA §518(h)(1) as:

[A]ll 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.

This is the same definition used to define the reservation component of "Indian country" in 18 U.S.C. 1151(a).

Based on the language and contents of the program authorization request, EPA assumes that the Pawnee Nation's request for the CWA §303(c) and §401 programs does not include an assertion of a formal reservation. However, in the 1991 preamble to the Water Quality Standards Regulation, EPA noted that the Agency considers trust lands formally set apart for the use of Indians - such as the tribal trust lands over which the Pawnee Nation seeks program authorization - to be "within a reservation"

for purposes of §518(e)(2), even if they have not been formally designated as “reservations.” 56 Fed. Reg. at 64881 (citing Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 111 S. Ct. 905, 910 (1991)). EPA and the courts have treated tribal trust lands outside the boundaries of formal reservations as “reservations” under EPA regulations and 18 U.S.C. 1151(a)(the reservation component of “Indian country”). See Arizona Pub. Service Co. v. U.S. Environmental Protection Agency, 211 F.3d 1280, 1294 (D.C. Cir. 2000), cert. denied 532 U.S. 970 (2001); HRI, Inc. v. EPA, 198 F.3d 1224, 1249-54 (10th Cir. 2000). Therefore, Tribes without formal reservations may receive program authorization under the CWA for tribal trust lands.

In addition to tribal trust lands, the application from the Pawnee Nation seeks program authorization for member allotments. EPA is not approving the portion of the application for these allotments because the Pawnee Nation has not demonstrated as a legal matter that these allotments fall within the scope of CWA §518(e).

Furthermore, the Pawnee Nation seeks program authorization over certain land at Chilocco, Oklahoma, known as the Chilocco Campus. The Pawnee Nation has an undivided interest in the Chilocco Campus, along with four other Tribes in the area. These Tribes all have the same rights and no single Tribe has authority over the jointly held lands. Because the Pawnee Nation has not demonstrated adequate authority for CWA program authorization over that area, EPA is not approving treatment in the same manner as a State for the jointly held lands. The Pawnee Nation’s tribal trust lands south of the Chilocco Campus are included in EPA’s approval.

Therefore, based on our review, EPA approves the Pawnee Nation’s program authorization request under CWA §303(c) and §401 for tribal trust lands other than the jointly held Chilocco Campus. The partial approval of the Pawnee Nation’s original request does not preclude the Tribe’s regulation of water quality on allotments under its own laws.

EPA looks forward to working with the Pawnee Nation of Oklahoma in implementing its water quality programs. We are 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.

If you have any questions or concerns, please contact me at (214) 665-2100 or the Region 6 Water Quality Protection Division at (214) 665-7101.

Sincerely yours,



Richard E. Greene
Regional Administrator

Enclosure

cc: Monty Matlock, Pawnee Nation of Oklahoma - Dept. of Environmental Conservation & Safety

DECISION DOCUMENT:

**PARTIAL APPROVAL OF PAWNEE NATION OF OKLAHOMA
APPLICATION FOR PROGRAM AUTHORIZATION
UNDER §303(c) AND §401 OF THE CLEAN WATER ACT**

**U.S. EPA REGION 6
October 2004**

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I. Introduction

A. Purpose:

The purpose of the Decision Document is to provide the basis and supporting information for the Environmental Protection Agency's (EPA) partial approval of the application from the Pawnee Nation of Oklahoma to administer §303(c) (Water Quality Standards program) of the Clean Water Act (CWA). EPA's regulation found at 40 CFR §131.4(c) states:

Where EPA determines that a Tribe is eligible to the same extent as a State for purposes of water quality standards, the Tribe likewise is eligible to the same extent as a State for purposes of certifications conducted under Clean Water Act Section 401.

EPA's approval applies to the administration of the water quality standards and §401 certification programs for waters that lie fully or partially within the exterior borders of the Pawnee Nation's tribal trust lands. EPA is not approving the portion of the application for member allotments because the Pawnee Nation has not demonstrated as a legal matter that these allotments fall within the scope of CWA §518(e).

Furthermore, the Pawnee Nation seeks program authorization over certain land at Chilocco, Oklahoma known as the Chilocco Campus. The Pawnee Nation has an undivided interest in the Chilocco Campus, along with four other Tribes in the area. These Tribes all have the same rights and no single Tribe has authority over the jointly held lands. Because the Pawnee Nation has not demonstrated adequate authority for CWA program authorization over that area, EPA is not approving treatment in the same manner as a state (TAS) for the jointly held lands. The Pawnee Nation's tribal trust lands south of the Chilocco Campus are included in EPA's approval.

In conclusion, the waters and associated tribal trust land parcels for which TAS is being approved 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;

- 10 acres in the SW quarter (SE part) of Section 16, Township 19N, Range 5E Indian Meridian (Payne County) - no known surface waters;
- 10 acres in the SW quarter (SW part) of Section 18, Township 21N, Range 5E Indian Meridian (Pawnee County) - no known surface waters;
- 10 acres in the SW quarter (SE part) of Section 20, Township 22N, Range 5E Indian Meridian (Pawnee County) - no known surface waters;
- 10 acres in the NE quarter (SW part) of Section 32, Township 22N, Range 4E Indian Meridian (Pawnee County) - no known surface waters;
- 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 parts), 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 part), 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.

B. Application:

The Pawnee Nation's application for program authorization under CWA §303 and §401 consists of two documents:

- the Tribe's application to administer the CWA §303(c) and §401 programs, letter from Marshall Gover, President, Pawnee Tribe of Oklahoma, dated February 13, 1998, received by EPA on March 2, 1998.
- supplemental information to the application, letter from Marshall Gover, President of the Pawnee Tribe of Oklahoma, dated March 30, 1997 (should be 1998), received by EPA on April 6, 1998.

C. Chronology of Events:

February 13, 1998 - Application for program authorization under CWA §§303 and 401.

March 30, 1997[8] - Supplemental information for request for program authorization under CWA §§303 and 401.

April 29, 1998 - Letters to "appropriate governmental entities," from William B. Hathaway, EPA Water Quality Protection Division Director. Letters and copies of the two maps in the Pawnee Nation's application were sent to the following entities.

Cherokee Nation of Oklahoma	Office of the Secretary of Environment
Kaw Nation	Oklahoma Water Resources Board
Muscogee (Creek) Nation	Oklahoma Dept. of Agriculture
Osage Tribe of Indians	Oklahoma Dept. of Environmental Quality
Otoe-Missouria Tribe of Oklahoma	Oklahoma State Dept. of Health
Ponca Tribe of Indians of Oklahoma	Oklahoma Dept. of Mines
Tonkawa Tribe of Indians	Oklahoma Dept. of Transportation
Bureau of Indian Affairs -Anadarko Office	Oklahoma Dept. of Wildlife Conservation
Bureau of Indian Affairs - Pawnee Agency	Oklahoma Conservation Commission
Indian Health Service	Oklahoma Corporation Commission
Federal Highway Administration	Oklahoma Indian Affairs Commission
Natural Resources Conservation Service	Oklahoma Tax Commission
U.S. Fish and Wildlife Service	Oklahoma Geological Survey
U.S. Geological Survey	Office of the Governor of Oklahoma

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, so that local governments and citizens could comment. Consistent with the preamble to EPA's water quality standards regulation (see 56 Fed. Reg. 64876-64896), the public notices requested that comments from local governments and citizens be submitted to the appropriate state agency. In this case, the Oklahoma Water Resources Board was the appropriate state agency to compile comments from local entities and the public. EPA mailed an announcement, the public notice and two maps of the Pawnee Nation's trust lands to the following local offices and establishments: the Payne County Seat, the Pawnee County Seat, the Mayor of Pawnee (attn: Public Works Dept.) and the New Life Center (located on Chilocco campus).

May 8, 1998 - Indian Health Service response from Randy E. Grinnell, Acting Area Director.

May 8, 1998 - Natural Resources Conservation Service response from Eddie L. Kephart, Assistant State Conservationist.

May 14, 1998 - Oklahoma Corporation Commission response from Jay Edwards, General Administrator.

May 21, 1998 - Bureau of Indian Affairs (BIA) - Pawnee Agency response from Julia M. Langan, Superintendent. Map of "Restricted Indian Land Pawnee Reservation" (October 1991) included with response.

May 28, 1998 - Kaw Nation response from Wanda Stone, Chairperson; Walter I. Hare, Jr. Administrative Services Director and Timothy F. Kennedy.

May 28, 1998 - 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).

May 29, 1998 - Oklahoma Conservation Commission response from Mike Thralls, Director.

June 2, 1998 - U.S. Fish and Wildlife Service response from Jerry Brabander, Field Supervisor.

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

December 2, 1998 - Letter to Bruce Maytubby, Chief - BIA Anadarko Office Trust Services Branch, from Richard Hoppers, Chief - EPA Region 6 Ecosystems Protection Branch. Copies sent to Julia Langdon, Superintendent - BIA Pawnee Agency; Marshall Gover, President - Pawnee Tribe of Oklahoma; and, Monty Matlock, Director - Pawnee Tribe Dept. of Environmental Conservation and Safety.

March 2, 1999 - Letter from Debi Koebrick, Manager - BIA - Anadarko Area Office Land Titles & Records to Richard G. Hoppers, Chief - EPA Region 6 Ecosystems Protection Branch.

May 4, 2004 - Letter from William Honker, Acting Deputy Director, Region 6 Water Quality Protection Division to Honorable George Elton Howell, President of the Pawnee Nation of Oklahoma approving the Pawnee Nation's application for TAS for purposes of §303 and §401 of the CWA.

June 3, 2004 - Letter from Senator James Inhofe, Chairman of the Senate Committee on Environment and Public Works to Richard Greene, Regional Administrator, Region 6, U.S. EPA. Included June 1, 2004 letter from Senator Inhofe to David Walker, Comptroller General of the United States.

June 3, 2004 - Letter from Miguel Flores, Director, Region 6 Water Quality Protection Division to Honorable George Elton Howell, President of the Pawnee Nation of Oklahoma, rescinding the May 4, 2004, TAS approval letter.

July 16, 2004- Letters to “appropriate governmental entities,” from William Honker, Acting Deputy Director, Region 6 Water Quality Protection Division. Letters and copies of the two maps in the Pawnee Nation’s application were sent to the following entities:

Cherokee Nation of Oklahoma	Office of the Secretary of Environment
Kaw Nation	Oklahoma Water Resources Board
Muscogee (Creek) Nation	Oklahoma Dept. of Agriculture
Osage Tribe of Indians	Oklahoma Dept. of Environmental Quality
Otoe-Missouria Tribe of Oklahoma	Oklahoma State Dept. of Health
Ponca Tribe of Indians of Oklahoma	Oklahoma Dept. of Mines
Tonkawa Tribe of Indians	Oklahoma Dept. of Transportation
Bureau of Indian Affairs -Anadarko Office	Oklahoma Dept. of Wildlife Conservation
Bureau of Indian Affairs - Pawnee Agency	Oklahoma Conservation Commission
Indian Health Service	Oklahoma Corporation Commission
Federal Highway Administration	Oklahoma Indian Affairs Commission
Natural Resources Conservation Service	Oklahoma Tax Commission
U.S. Fish and Wildlife Service	Oklahoma Geological Survey
U.S. Geological Survey	Office of the Governor of Oklahoma
Bureau of Land Management	
U.S. Army Corps of Engineers	

Public notices were published in the *Daily Oklahoman* and the *Tulsa World* on July 14, 2004 and the *Pawnee Chief* on July 21, 2004, so that local governments and citizens could comment. As discussed above, the public notices instructed that comments from local governments and citizens be submitted to OWRB. The notice requested comments by August 16, 2004. EPA mailed an announcement, the public notice and two maps of the Pawnee Nation’s trust lands to the following local offices and establishments: the Payne County Seat, the Pawnee County Seat, the Mayor of Pawnee (attn: Public Works Dept.) and the New Life Center (formerly located on Chilocco campus).

July 21, 2004 - Oklahoma Corporation Commission response from Ben Jackson, General Counsel.

August 13, 2004 - Indian Health Service (IHS) response from Dale Keel, Acting Area Director.

August 13, 2004 - Oklahoma Office of the Secretary of Environment (OSE) response from Miles Tolbert, Secretary of the Environment.

August 13, 2004 - Oklahoma Water Resources Board response (transmitted by OSE letter) from Duane A. Smith, Executive Director.

August 16, 2004 - Oklahoma Department of Environmental Quality (transmitted by OSE letter) from Steven A. Thompson, Executive Director.

August 17, 2004 - Oklahoma Department of Mines response from Tekleab Tsegay, Chief, Technical Services.

August 20, 2004 - Cherokee Nation response from Chadwick Smith, Principal Chief.

August 20, 2004 - Muscogee (Creek) Nation response from A.D. Ellis, Principal Chief.

August 20, 2004 - St. Regis Mohawk Tribe response from Chief Margaret Terrance, Chief Barbara Lazore, and Chief James Ransom.

Undated (received August 23, 2004) - Eastern Shawnee Tribe of Oklahoma response from Charles Enyart, Chief.

August 23, 2004 - Bureau of Indian Affairs response from Michael R. Smith, Regional Director.

Undated (received September 1, 2004) - Seneca-Cayuga Tribe of Oklahoma response from LeRoy Howard, Chief.

August 24, 2004 - Oklahoma Water Resources Board transmittal of public comments from Derek Smithee, including the following:

July 21, 2004 - Environmental Federation of Oklahoma, Inc. letter from James R. Barnett, President and General Counsel

August 5, 2004 - Oklahoma Municipal League, Inc. letter from Danny George, Executive Director

August 10, 2004 - Oklahoma Independent Petroleum Association letter from Angie Burckhalter, Director of Regulatory Affairs

August 16, 2004 - Oklahoma Farm Bureau & Affiliated Companies letter from Marla R. Peek, Director of Regulatory Affairs

II. Requirements for Tribal Program Authorization under Clean Water Act §303(c) and §401

Under CWA §518(e) and EPA's implementing regulation at 40 CFR §131.8, four requirements must be satisfied before EPA can approve a Tribe's application to administer the water quality standards and §401 certification programs. These are: (A) the Indian Tribe is recognized by the Secretary of the Interior and meets the definitions in §131.3(k) and (l)¹; (B) the Indian Tribe has a governing body carrying out substantial governmental duties and powers; (C) the water quality standards program to be administered by the Indian Tribe pertains to the management and protection of water resources which are held by the Indian Tribe, held by the United States in trust for Indians, held by a member of the Indian Tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of the Indian reservation; and, (D) 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.

A. Federal Recognition:

The Pawnee Nation of Oklahoma is a federally-recognized Tribe (see 67 Fed. Reg. 46327-46333, July 12, 2002). The Tribe is made up of a confederation of the Chaui, Kitkehahke, Petahauerate and Skeedee bands. The Pawnee Nation adopted a Tribal Constitution under the Oklahoma Indian Welfare Act (25 U.S.C. 501 *et seq.*), which has been approved by the BIA.

In addition, to meet the definition of "Indian tribe," there must be the equivalent of a reservation over which the Tribe has authority.² The Pawnee Nation's 1857 reservation was sold in 1876 and the Tribe bought a little over 283,000 acres in north central Oklahoma. By 1893, a portion of this land had been allotted in 160 acre tracts to 821 tribal members. The remaining 169,000 acres were opened for

¹ 40 CFR §131.3(l) defines the term "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." 40 CFR §131.3(k) defines Federal Indian reservation as "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." In order to be eligible for TAS, a Tribe must meet the definition of Indian Tribe, which requires a "reservation." EPA interprets the term "reservation" to include lands held in trust for a Tribe, even if such lands have not been formally designated as a reservation. See 56 Fed. Reg. 64876-896 (citing Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 111 S.Ct. 905 (1991)).

² See §518(e)(2) of the CWA, 33 U.S.C. §1377(e)(2).

non-Indian settlement. While the restrictions have lapsed on some of these tracts, many were placed in trust with the BIA for the Tribe. The lands which were placed in trust for the benefit of the Tribe are considered reservations under EPA's regulations and existing case law.³ Therefore, the Pawnee Nation meets the criteria of a federally-recognized Tribe exercising authority over a reservation.

B. Substantial Governmental Duties and Powers:

The Pawnee Nation has a governing body with substantial governmental duties and powers. Article II(d) of the Pawnee Constitution establishes the Pawnee Business Council and delineates the jurisdiction and powers of the Council. Article II(d)(i) asserts tribal jurisdiction over all water and air within Indian country "consistent with applicable federal law." Paragraph (ii) establishes a Law and Order and Judicial System "to protect the peace, safety, health and welfare" of the members of the Tribe.

Pursuant to this authority, the Business Council has adopted its own environmental laws. For example, Title VI, section 566 of the Pawnee Law and Order Code makes it unlawful to pollute any water over which the Tribe has authority. Article II(d)(iv) states that the Constitution, bylaws and laws and ordinances passed by the Pawnee Business Council are the supreme law of the Pawnee Nation. The Pawnee Constitution also recognizes the Nasharo Council. This Council, made up of two members from each of the four original bands, has authority to review actions of the Business Council that relate to membership and treaty rights, including treaty rights that pertain to water resources. The Pawnee Nation has implemented a CWA grant since 1996. In addition to the development of water quality standards, the Pawnee Nation is implementing a comprehensive monitoring and assessment program for surface waters; has drafted a Nonpoint Source Assessment and Management Plan; has conducted an environmental needs assessment; and, has created an environmental learning center for the community. Therefore, the Pawnee Nation has demonstrated that it has a governing body with substantial governmental duties and powers.

C. Jurisdiction over "Waters within the Borders" of Reservation Lands:

In the preamble to the Final Rule, "Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations," dated December 12, 1991 (56 Fed. Reg. 64876-64896), EPA stated that the Agency "believes that it was the intent of Congress to limit Tribes to obtaining treatment as a State status to lands within the reservation" (56 Fed. Reg. at 64881). This position is based on the limitation in CWA §518(e) to waters "otherwise within

³ See footnote 1, supra.

the borders of an Indian reservation” and the definition of “Indian tribe” contained in the CWA §518(h)(2). CWA §518(h)(2) 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.” The term “Federal Indian reservation” is defined in CWA §518(h)(1) as:

[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.

This is the same definition used to define the reservation component of “Indian country” in 18 U.S.C. 1151(a).

In the 1991 preamble, EPA noted that the Agency considers trust lands formally set apart for the use of Indians to be “within a reservation” for purposes of §518(e)(2), even if they have not been formally designated as “reservations.” 56 Fed. Reg. at 64881 (citing Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 111 S. Ct. 905, 910 (1991)). EPA and the courts have treated tribal trust lands outside the boundaries of formal reservations as “reservations” under EPA regulations and 18 U.S.C. 1151(a)(the reservation component of “Indian country”). See Arizona Pub. Service Co. v. U.S. Environmental Protection Agency, 211 F.3d 1280, 1294 (D.C. Cir. 2000), cert. denied 532 U.S. 970 (2001); HRI, Inc. v. EPA, 198 F.3d 1224, 1249-54 (10th Cir. 2000). Accordingly, Tribes without formal reservations may receive program authorization under the CWA for tribal trust lands.

The request from the Pawnee Nation for the water quality standards program discusses the Tribe’s land base in Section I of the Narrative Statement. The Tribe does not discuss whether the 1876 reservation remains in existence, but does reference the 1893 allotment. Based on the submittal, EPA assumes that the Pawnee Nation’s request for the CWA §303(c) and §401 programs does not include an assertion of a formal reservation. The application seeks program authorization for certain tribal trust lands and member allotments.

By treaty with the United States, the Pawnee Nation held a sizeable reservation in what is now Nebraska and Kansas. Under treaties of 1833, 1843, and 1857, the Pawnee Nation ceded their land to the United States except for a 30-mile by 10-mile reservation in Nebraska. That reservation was sold in 1876 and the Tribe bought a little over 283,000 acres in north central Oklahoma. By 1893, a portion of this land had been allotted in 160 acre tracts to 821 tribal members. The member allotments comprise a portion of the area for which the Pawnee Nation seeks authorization for CWA §303(c) and §401. The remaining 169,000 acres

were opened for non-Indian settlement. While the restrictions have lapsed on some of these tracts, many were placed in trust with BIA for the Tribe.

The Pawnee Constitution allows the Business Council to exercise authority to protect the water resources over which the Tribe has jurisdiction. The CWA requires the Tribe to demonstrate that the functions to be exercised pertain to the management and protection of water resources held by the Tribe, held by the United States in trust for Indians, held by a member of a Tribe if there is a restriction on alienation, or otherwise within the borders of an Indian reservation (§518(e)(2), 33 U.S.C. §1377(e)(2)). The submittal from the Pawnee Nation includes a map of trust lands over which the Tribe asserts jurisdiction. The Tribe has submitted a copy of the Tribal Constitution and the Pawnee Tribe of Oklahoma Law and Order Code asserting civil jurisdiction over these areas. The Pawnee Nation's tribal trust lands which are included in the areas where the Tribe has shown authority to receive this program authorization under the CWA are listed below:

- 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)
- 320 acres in the NW quarter (all parts) and SW quarter (all parts) of Section 33, Township 22N, Range 5E Indian Meridian (Pawnee County)
- 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)
- 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)
- 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)
- 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)

Therefore, the Pawnee Nation has identified water resources on tribal trust lands (i.e., "reservation" lands), and has cited to the Tribal Constitution and Code asserting jurisdiction over these lands. EPA finds that under well-established

principles of Federal Indian law, the Nation retains attributes of sovereignty over both its members and its territory and has authority to establish water quality standards on these tribal trust lands. See, e.g., California v. Cabazon Band of Mission Indians, 480 U.S. 202, 207 (1987).

The submittal from the Pawnee Nation also includes areas where the Tribe has not demonstrated that it has met the requirements in CWA §518(e) and EPA's implementing regulations. First, the Pawnee Nation seeks to receive program authorization over member allotments.

The preamble to the final Water Quality Standards Regulation discusses several comments received on the term "reservation" in CWA §518:

Comments received suggested that EPA should alter its reading of this provision to allow Tribes to qualify for treatment as a State over all water resources within its jurisdiction. These comments asserted that limiting Tribes to water resources within the reservation would prevent a Tribe from obtaining treatment as a State status over water resources outside the reservation to which it has legitimate jurisdictional claim. Examples cited included traditional resource areas (known as "usual and accustomed" areas) outside reservation borders, and all lands held in trust for Tribes by the U.S. Government or held by individual Indians that lie outside reservation borders, lands in "Indian Country" (as defined in 18 U.S.C. 1151) that lie outside reservation borders and, in general, all water resources within the territorial jurisdiction of the Tribe that lie outside reservation borders.

* * *

56 Fed. Reg. at 64881

EPA responded:

Under today's rule, Tribes are limited to obtaining treatment as a State status for only water resources within the borders of the reservation over which they possess authority to regulate water quality. The meaning of the term "reservation" must, of course, be determined in light of statutory law and with reference to relevant case law. EPA considers trust lands formally set apart for the use of Indians to be "within a reservation" for purposes section 518(e)(2), even if they have not been formally designated as "reservations." Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 111 S. Ct. 905, 910 (1991). This means 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. EPA believes that it was the intent of Congress to limit Tribes to obtaining treatment as a State status to lands within the reservation. EPA bases this conclusion, in part, on the definition of "Indian Tribe" found in CWA section 518(h)(2).

Id.

EPA has consistently interpreted the term "reservation" to include tribal trust lands, even if they are not part of a formal reservation, see 63 Fed. Reg. 7254, 7258 (February 12, 1998) (preamble to EPA's Clean Air Act Tribal Authority Rule). However, EPA has not treated allotments outside of formal reservations as within the scope of CWA §518(e), see id., 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.

Second, there is an area over which the Pawnee Nation has not shown adequate authority for program authorization. That area is known as Chilocco campus. The Pawnee Nation has an undivided interest in that land along with four other Tribes. The five Tribes all have the same rights and no single Tribe has authority over the jointly held lands. The Pawnee Nation has not demonstrated adequate authority for EPA to approve the Tribe for CWA program authorization over that area.

It should be noted that EPA is not today determining the scope of the Tribe's regulatory authority for all purposes. EPA is today finding that the Pawnee Nation has sufficient authority to establish water quality standards under the CWA for the lands held in trust by the United States for the Tribe and to perform certifications under CWA §401. EPA will continue to be responsible for issuance and enforcement of CWA National Pollutant Discharge Elimination System permits for Indian country in Oklahoma, including the Pawnee Nation's tribal trust lands and member allotments. Also, the U.S. Army Corps of Engineers will continue to issue and enforce permits under CWA §404 and the Rivers and Harbors Act for Indian country in Oklahoma.

D. Capability:

The Pawnee Nation of Oklahoma has demonstrated that it is reasonably capable of establishing and implementing a water quality standards and §401 certification program in a manner consistent with the terms and purposes of the CWA and applicable regulations. In determining that the Pawnee Nation has the capability to establish and implement an adequate water quality standards and §401 certification program, EPA considered that the Tribe:

1. Has developed and staffed a Department of Environmental Conservation and Safety to carry out the mission of programs such as water quality standards.
2. Has conducted an environmental needs assessment and enacted the Pawnee Tribal Environmental Regulatory Act.
3. Has developed draft water quality standards which include the CWA requirements of identifying and designating beneficial uses for tribal water bodies, identifying water quality criteria to protect those beneficial uses, and a policy on antidegradation.
4. Has developed a water quality monitoring program for assessment of physical, chemical, and biological parameters.
5. Has demonstrated administrative capability with cooperative agreements under CWA §104(b)(3), CWA §106 and the General Assistance Program.

Therefore, the Pawnee Nation has demonstrated capability to implement the water quality standards and § 401 certification programs.

III. Response to Comments

A public comment period was initiated on April 29, 1998 for the purposes of seeking input from the public and appropriate governmental entities. EPA received nine comments during this comment period. A second public comment period was initiated in July 2004. EPA received eleven responses to its request for comments from Indian Tribes and state and federal agencies. The Oklahoma Water Resources Board received four responses to the public notices and forwarded these letters to EPA. All comments were evaluated by EPA's Office of Regional Counsel and Water Quality Protection Division. A summary of significant comments and EPA's response is included in the docket for this action.

IV. Conclusion

EPA has determined that the Pawnee Nation of Oklahoma has met the requirements of 40 CFR §131.8 and CWA §518 and is authorized to implement the CWA §303(c) and §401 programs for the lands identified in Part II.C. of this document. The Pawnee Nation has not provided sufficient information to support approval of TAS for member allotments and certain jointly held lands referred to as the Chilocco Campus. EPA stands ready to assist the Pawnee Nation in the development of its WQS. EPA is also prepared to help facilitate appropriate discussions with the Tribe and the State of Oklahoma towards the establishment of state and tribal standards that are mutually compatible and supportive wherever possible.