

**U.S. ENVIRONMENTAL PROTECTION AGENCY
REGION 10**

DECISION DOCUMENT:

**APPROVAL OF THE SQUAXIN ISLAND TRIBE OF THE SQUAXIN
ISLAND RESERVATION APPLICATION FOR
TREATMENT IN A SIMILAR MANNER AS A STATE FOR
CLEAN WATER ACT SECTIONS 303(c) WATER QUALITY STANDARDS
AND 401 WATER QUALITY CERTIFICATION PROGRAMS**

February 9, 2023

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I. Introduction and Index to Decision

A. Introduction

This Decision Document provides the basis and supporting information for the U.S. Environmental Protection Agency’s (“EPA” or “Agency”) decision to approve the Squaxin Island Tribe of the Squaxin Island Reservation’s (“Squaxin” or the “Tribe”) application for treatment in a similar manner as a state (“TAS”) for Clean Water Act (“CWA”) section 303(c), water quality standards, and section 401, water quality certification, pursuant to section 518(e) of the CWA and part 131 in Title 40 of the Code of Federal Regulations (“C.F.R.”). Section 518(e) of the CWA authorizes EPA to treat an Indian tribe in a similar manner as a state to manage and protect water resources “within the borders of an Indian reservation,” under certain CWA programs, including the section 303(c) water quality standards and section 401 certification programs.

EPA received the Squaxin TAS application on August 8, 2022. The Tribe’s TAS application includes six exhibits and numerous supporting documents. The entire application, including its exhibits and supporting documents, is hereinafter referred to as the “Application.”¹ The Application includes all lands within the exterior boundaries of the Squaxin reservation as well as the Tribe’s trust parcels (“Squaxin Reservation and Trust Lands”), as laid out in the maps submitted by the Tribe and described in Section C.1 of this Decision Document. The Tribe’s Application does not cover the Tribe’s fee lands or other areas outside of the Squaxin Reservation and Trust Lands.

EPA regulations at 40 C.F.R. part 131 establish the process by which the Agency implements the water quality standards program and determines whether to approve a tribal application for purposes of administering programs under sections 303(c) and 401 of the CWA. *See* 56 Fed. Reg. 64876 (December 12, 1991), as amended by 59 Fed. Reg. 64339 (December 14, 1994).

This decision to approve the Tribe’s Application does not constitute an approval of tribal water quality standards. EPA’s review and approval or disapproval of the Tribe’s water quality standards is a separate Agency action under the CWA.

B. Index to Decision

The following documents constitute a portion of the materials considered by the Agency in support of this decision; a selected index of those materials is detailed in Appendix A.

1) Application Materials

The Tribe’s Application for the water quality standards and certification programs under CWA sections 303(c) and 401, respectively, includes the following documents:

- *TAS Application – WQS and Water Quality Certification*, Squaxin Island Tribe of the Squaxin Island Indian Reservation (August 8, 2022).
 - Exhibit 1: Authorizing Resolution NO. 22-46, Tribal Council authorization to complete an attorney certification for the Application
 - Exhibit 2: Constitution and Bylaws of the Squaxin Island Tribe of the Squaxin Island Indian Reservation, July 8, 1965, as amended 1998 and 2000

¹ The Tribe’s Application was made available for review at <https://squaxinland.org/epa-treatment-as-a-state/>.

- Exhibit 3: Treaty of Medicine Creek 1854 10 Statute 1132
- Exhibit 4: Maps of Squaxin Island Indian Reservation and Trust Lands
- Exhibit 5: Land list of the Squaxin’s off-island Reservation, Trust, and fee parcels
- Exhibit 6: Legal descriptions of Squaxin Island Reservation and Trust Lands

2) Comments Regarding Tribal Authority

As provided at 40 C.F.R. § 131.8(c)(2) and noted in Appendix A, by letter dated September 1, 2022, EPA provided notice to the state of Washington, in its capacity as an appropriate governmental entity,² of the opportunity to comment on the substance and basis of the Tribe’s assertion of authority to regulate the quality of surface waters on the Squaxin Reservation and Trust Lands under the CWA. The comment period occurred from September 1, 2022 to September 30, 2022. EPA did not receive comments from the State regarding the Tribe’s assertion of jurisdictional authority.

Consistent with Agency practice, EPA also provided the public notice and an opportunity to comment on the assertion of jurisdictional authority in the Tribe’s Application to regulate surface water quality in the waters within its Reservation and Trust Lands. A public notice was published in two newspapers—The Seattle Times, a daily newspaper based in Seattle, and The Olympian, a daily regional newspaper that serves Olympia and the southern Puget Sound area. Both newspapers published the notices on August 31, 2022. The published notices identified EPA’s website on which the Tribe’s TAS Application was posted³ and notified the public of the comment opportunity. The notice directed comments to EPA and the Washington State Department of Ecology regarding the Tribe’s assertion of jurisdictional authority by September 30, 2022.

EPA received comments from the Mason County Board of Commissioners, the Public Utility District No. 1 of Mason County, and the Kitsap Public Utility District. EPA’s responses to the comments received during the public comment period are provided in Appendix B to this Decision. The Tribe provided its responses to these comments to EPA on November 1, 2022.

3) Statutory and Regulatory Provisions

The following statutory and regulatory provisions govern this eligibility decision:

- Section 518 of the CWA, 33 U.S.C. § 1377, authorizes EPA to treat an Indian tribe in a similar manner as a state if it meets specified eligibility criteria; and
- 40 C.F.R. §§ 131.4(c) and 131.8 establish the regulatory requirements for a tribe to obtain eligibility approval and the procedures for EPA to process a tribe’s eligibility application. See Amendments to the Water Quality Standards Regulation That Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,876 (Dec. 12, 1991); 59 Fed. Reg. 64,339 (Dec. 14, 1994); and 81 Fed. Reg. 30183 (May 16, 2016).

² EPA defines the term “appropriate 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.” 56 Fed. Reg. 64876, 64884 (Dec. 12, 1991). Consistent with EPA’s regulations, EPA provided notice to all appropriate governmental entities. In this instance, EPA provided notice to the State of Washington.

³ <https://www.epa.gov/publicnotices>

4) Policy Statements and Additional Documents

The following policy statements, guidance, and additional documents are also relevant to this eligibility decision:

- *EPA Policy for the Administration of Environmental Programs on Indian Reservations* (November 8, 1984)⁴
- EPA Memorandum titled *EPA/State/Tribal Relations*, by EPA Administrator Reilly (July 10, 1991)⁵
- Memorandum titled *Adoption of the Recommendations from the EPA Workgroup on Tribal Eligibility Determinations*, by EPA Assistant Administrator Robert Perciasepe and General Counsel Jonathan Cannon (March 19, 1998)⁶
- Memorandum titled *Strategy for Reviewing Tribal Eligibility Applications to Administer EPA Regulatory Programs*, by EPA Deputy Administrator Marcus Peacock (January 23, 2008)⁷
- Memorandum titled, *Review of the Squaxin Island Tribe's Application for Treatment in a Similar Manner as a State for Purposes of Administering the Water Quality Standards Program: Demonstration of Capabilities*, by Andrea Ramirez, Water Quality Standards Coordinator, thru Hanh Shaw, Manager, Standards and Assessment Section, to Ted Yackulic, Assistant Regional Counsel (January 30, 2023)

II. Requirements for Approval

Under CWA section 518(e) and the implementing regulation at 40 C.F.R. § 131.8(a), four requirements must be satisfied before EPA can approve an Indian tribe's application to administer a water quality standards program under section 303(c) and a water quality certification program under section 401.⁸ The requirements are:

- 1) The Indian tribe is recognized by the Secretary of the Interior and exercises authority over a reservation;
- 2) The Indian tribe has a governing body carrying out substantial governmental duties and powers;
- 3) The water quality standards program to be administered by the Indian tribe pertains to the management and protection of water resources which are within the borders of the Indian reservation and held by the Indian tribe, within the borders of the Indian reservation and held by the United States in trust for Indians, within the borders of the Indian reservation and held by a member of an Indian tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of the Indian reservation; and
- 4) The Indian tribe is reasonably expected to be capable, in the [EPA] 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 CWA and applicable regulations.

⁴ Available at <https://www.epa.gov/sites/production/files/2015-04/documents/indian-policy-84.pdf>

⁵ Available in pages 98-103 of *Working Effectively with Tribal Governments*

⁶ Available in the Administrative Record for this action

⁷ Available at https://www.epa.gov/sites/production/files/2015-10/documents/strategy-for-reviewing-applications-for-tas_0.pdf

⁸ The term "Indian tribe" means "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 § 233.2.

EPA’s regulation at 40 C.F.R. § 131.8(b) identifies the information that must be included in an application by an Indian tribe to administer a water quality standards program. Consistent with the regulation at 40 C.F.R. § 131.8(b)(6), where an Indian tribe has previously qualified for TAS under a different CWA or Safe Drinking Water Act program, the tribe need only provide the required information which has not been submitted in a previous application. Where EPA determines that an Indian tribe is eligible to the same extent as a state for purposes of administering a water quality standards program, the tribe likewise is eligible to the same extent as a state for purposes of certifications conducted under CWA section 401. *See* 40 C.F.R. § 131.4(c). Tribes authorized to administer the CWA water quality standards program are also “affected states” under CWA §§ 402(b)(3) and (5), and 40 C.F.R. § 122.4(d). As “affected states,” they receive notice and an opportunity to comment on certain permits issued under the National Pollutant Discharge Elimination System program.

A. Federal Recognition

Under CWA section 518(e) and its implementing regulation, EPA can approve an application from an eligible “Indian tribe” that meets the definitions set forth in CWA section 518(h) and 40 C.F.R. § 131.3(k) and (l). *See* 40 C.F.R. § 131.8(a)(1). The term “Indian tribe” is defined as “any Indian tribe, band, group, or community recognized by the Secretary of the Interior and exercising governmental authority over a Federal Indian reservation. CWA section 518(h)(2), 40 C.F.R. § 131.3(l). The term “Federal Indian reservation” means “all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation.” CWA section 518(h)(1), 40 C.F.R. § 131.3(k).

The Squaxin is a federally recognized tribe and is listed as “Squaxin Island Tribe of the Squaxin Island Reservation” in the Department of the Interior’s current list of federally recognized tribes. *See*, 88 Fed. Reg. 2112, 2114 (Jan. 12, 2023). Furthermore, as discussed below, the Tribe is exercising governmental authority over a reservation within the meaning of the CWA. Thus, EPA has determined that the Squaxin meets the requirements of 40 C.F.R. §§ 131.8(a)(1) and (b)(1).

B. Substantial Governmental Duties and Powers

To demonstrate that it has a governing body currently carrying out substantial governmental duties and powers over a defined area, 40 C.F.R. § 131.8(b)(2) requires that the tribe submit a descriptive statement that should: (i) describe the form of the tribal government; (ii) describe the types of governmental functions currently performed by the tribal governing body, such as, but not limited to, the exercise of police powers affecting (or relating to) the health, safety, and welfare of the affected population, taxation, and the exercise of eminent domain; and (iii) identify the source of the tribal government’s authority to carry out the governmental functions currently being performed.

1) Form of Government

The structure and authorities of the Squaxin government are generally described in the Constitution and Bylaws of the Squaxin Island Tribe of the Squaxin Island Reservation, Washington (July 8, 1965, as amended 1998 and 2000) (hereinafter referred to as the “Constitution and Bylaws”). Article III of the Constitution and Bylaws identify the Squaxin Tribal Council as the Tribe’s governing body. While the Tribal Council provides most governmental services, the Tribe’s General Council and Tribal Court also perform governmental services. The structures and authorities of the General

Council and Tribal Council are articulated in the Constitution and Bylaws. The structure and authority of the Tribal Court is described in Title 4 (Court System) of the Constitution and Bylaws.

2) Types of Government Functions

The General Council consists of all enrolled Squaxin members who are at least 18 years old. The General Council has the authority to elect or remove members of the Tribal Council, resolve election disputes, pass referendums, and amend the Constitution and Bylaws.⁹

The Tribal Council is a representative body that exercises legislative and executive functions of government. Article V of the Constitution and Bylaws describes the membership and procedures for electing members of the Tribal Council. The Tribal Council consists of seven members elected by the Tribe's General Council. The members include a Chairperson, a Vice-Chairperson, a Secretary and Treasurer, and three Council Members. All members of the Tribal Council are elected to three-year terms. Elections of Tribal Council members are staggered.

Article III of the Constitution, Section 1, subsections (a)-(i) list the enumerated powers of the Tribal Council. The listed authorities include, but are not limited to the following:

1. To negotiate with federal, state, and local governments and others on behalf of the Tribe and to advise and consult with representatives of the United States government on all activities that may affect the Tribe;
2. To acquire, manage, lease, or use tribal real property and other tribal assets, together with all improvements which may be acquired by the Tribe from the United States or elsewhere, with the approval of the Secretary of the Interior wherever required by Federal law;
3. To prevent the sale, disposition, lease or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the Tribe;
4. To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior, so long as such approval is required by law;
5. To advise the Secretary of the Interior with regard to all appropriation estimates or Federal projects for the benefit of the Tribe prior to the submission of such estimates to the Bureau of the Budget and Congress;
6. To administer any funds within the control of the Tribe and to make expenditures of available funds for tribal purposes in accordance with a budget approved by the tribal council;
7. To determine its own rules of procedures;
8. To promulgate and enforce ordinances governing the conduct of members of the Squaxin Island Tribe; and
9. To take such actions as are necessary to carry into effect any of the foregoing powers and duties.

Article VI of the Constitution describes the duties of Tribal Council members. Article VI describes the duties of the Chairman, Vice-Chairman, Secretary, and Treasurer. Section 5 of Article VI empowers the Tribal Council with the authority to appoint such committees and other personnel as required.

⁹ See, Articles V, VII, IX and IX of the Constitution and Bylaws.

While the powers and duties enumerated in the Constitution and Bylaws are not exhaustive, they demonstrate many of the legislative and executive functions that the Tribal Council serves.

The Tribal Council delegates the responsibility for day-to-day management of Tribal affairs to the Squaxin's Tribal Administrator. The Tribal Administrator oversees the management of tribal departments that the Tribal Council has delegated specific responsibilities to. Each department is headed by a director who reports to the Tribal Administrator.¹⁰ The Tribal departments include:

- Natural Resources Department;
- Behavior Health Services;
- Cultural Resources Department;
- Department of Planning and Community Development;
- Executive Service;
- Family Service;
- Finance Department;
- Health Clinic;
- Human Resources;
- Information Systems;
- Northwest Indian Treatment Center;
- Public Safety and Justice;
- Legal Department; and
- Ta Ha'Buts Learning Center

The Tribal Council is supported by several commissions. Each commission exercises authorities delegated to the commission by the Tribal Council. The Tribe's commissions include a Budget Commission, an Education Commission, a Gaming Commission, a Housing Commission, and Utilities Commissions.

The Tribal Council established a Tribal court system in 1966. The Tribe's court system is governed by Title 4 of the Constitution and Bylaws.¹¹ The Tribal Council has appointed a chief judge and an associate judge who oversee matters within the Court's jurisdiction. The Court oversees criminal, civil, employment, and child welfare matters. Title 4 of the Constitution and Bylaw articulates the Court's jurisdiction as well as the rules and procedures by which the Court operates. The Tribal Council has established, among other purposes, rules for the administration of the Court, representation of a party, civil procedure, criminal procedure, evidence, and appellate procedure.

The Tribe has appointed the Northwest Intertribal Court System to provide appellate court services to the Tribe.

¹⁰ See, <https://squaxinisland.org/3d-flip-book/fy21-government-annual-reports/>. This is an example of the annual report the Tribal Government produces each year that documents, among other things, the services provided during the subject year.

¹¹ Title 4 is publicly available for review at: https://library.municode.com/tribes_and_tribal_nations/squaxin_island_tribe/codes/code_of_ordinances?nodeId=TIT4COSY_CH4.12RUGORE.

3) Source of the Squaxin Governmental Authority

The Tribe's Application identifies the Squaxin Constitution and Bylaws, the laws the Tribe has promulgated pursuant to its Constitution and Bylaws, and the express congressional delegation of civil authority that section 518 of the CWA provides as the basis for its authority to administer the CWA sections 303(c) and 401 programs. As noted in the Application, the Squaxin's Constitution and Bylaws have been approved by the Secretary of the United States Department of Interior. Section 1.b. of Article III of the Constitution and Bylaws empowers the Tribal Council to manage the Tribe's real property and other assets. This authority has allowed the Tribe to develop, enact, and implement regulatory schemes related to, among others, natural resources, treaty fin fishing, treaty shell fishing, hunting, and forestry practices.

4) Substantial Governmental Duties and Powers Conclusions

The above description of the bases of authority and of the functions carried by the Squaxin to regulate the conduct of its members, protect and maintain tribal resources and health, and control the disposition of the tribal property demonstrate that the Squaxin has met the requirements at 40 C.F.R. §§ 131.8(a)(2) and (b)(2).

C. Jurisdiction over Waters within the Borders of the Squaxin Reservation and Trust Lands

Under 40 C.F.R. § 131.8(b)(3), a tribe is required to submit a statement of authority to regulate water quality. The statement should include: (i) a map or legal description of the area over which the Indian tribe asserts authority to regulate surface water quality; (ii) a statement by the tribe's legal counsel (or equivalent official) that describes the basis for the tribe's assertion of authority and which may include a copy of documents such as tribal constitutions, by-laws, charters, executive orders, codes, ordinances, and/or resolutions which support the tribe's assertion of authority; and (iii) an identification of the surface waters for which the tribe proposes to establish water quality standards.

1) Map or Legal Description

The Tribe's Application includes maps that show the general location of the Squaxin Reservation and Trust Lands, the Squaxin's usual accustomed fishing areas and its ceded lands.¹² In addition, the Tribe's Application includes a series of maps that show the location of each parcel of Reservation and Trust Lands; and these maps include the locations of surface waters on each parcel.¹³ The Application covers all waters within the boundaries of the Squaxin's Reservation and Trust Lands. The maps also identify lands owned by the Tribe that are not part of the Squaxin Reservation or held in trust for the Tribe and are not covered by this decision document. These lands are identified as fee lands on the maps.¹⁴

¹² See, Tribe's Application at 27-30; and Exhibit 4 of the Tribe's Application. The Tribe's usual accustomed fishing areas and ceded lands are not covered by the Tribe's Application.

¹³ See, Exhibit 4 of the Tribe's Application.

¹⁴ The Tribe has not sought CWA TAS approval for these fee lands in the Application, and EPA is not approving CWA TAS authority for the fee lands in this decision. The Tribe may seek approval to administer Sections 303(c) and 401 if the fee lands are taken into trust for the benefit of the Tribe.

The Tribe's Application includes deeds or title documents that provide legal descriptions for each parcel of Reservation and Trust Lands subject to the Application.¹⁵ The deed and title descriptions describe the boundaries of each parcel of Squaxin Reservation and Trust Lands. Eight of these parcels include portions of adjacent surface waters as a boundary of the parcel. The boundaries for each of these parcels are described below:

- The Squaxin Island Reservation includes the tidelands and submerged waters to a depth of minus 18 feet mean low, lower water surrounding Squaxin Island.¹⁶
- The Arcadia property in the town of Arcadia, Washington, includes oyster lands and the property extends to the line of the mean low tide.¹⁷
- Parcel number 2 of the Whitener property extends to the centerline of Little Skookum Creek.¹⁸
- The Moore property extends to the centerline of Little Skookum Creek.¹⁹
- Parcel number 1 and number 2 of the Wood property extend to the centerline of Little Skookum Creek.²⁰
- The Knutson property extends to the centerline of Little Skookum Creek.²¹
- The Collier property includes tidelands "suitable for the cultivation of oysters."²²
- Parcel 2 of the Ogg property extends to the centerline of Little Skookum Creek.²³

The Tribe's Application includes information that documents when the Tribe's Reservation lands were afforded reservation status.²⁴ Additionally, the legal descriptions included in Exhibit 6 to the Tribe's Application demonstrate that the Tribe's identified trust lands are held in trust by the United States for the Squaxin as well as when the subject property was taken into trust. Tribal trust lands, like the Squaxin Trust Lands located outside the boundaries of its Reservation, have the same status as formal reservations for purposes of EPA's programs. Some tribes may have tribal trust lands within the borders of a formal reservation, or in addition to, and separate from, a formal reservation. In any case, tribal trust lands, wherever located, qualify as Indian reservation lands.²⁵ Therefore, all the Squaxin Reservation and Trust Lands are eligible for inclusion in the Tribe's Application.

As discussed above, EPA provided notice to the appropriate governmental entity and the public of the opportunity to comment on the substance and basis of the Squaxin's assertion of authority as part of the review process for the Tribe's Application. The Application identifies the land and surface waters covered by the Application. No competing or conflicting jurisdictional claim regarding the identified Reservation boundaries or the area within the boundaries was made. In addition, the deed

¹⁵ See, Appendix 6 of the Tribe's Application.

¹⁶ See, the Tribe's Application at 27-29.

¹⁷ See, legal description of #10 Arcadia in Exhibit 6 of the Tribe's Application at 1.

¹⁸ See, legal description of #25 Whitener in Exhibit 6 of the Tribe's Application at 2.

¹⁹ See, legal description of #37 Moore in Exhibit 6 of the Tribe's Application at 6.

²⁰ See, legal description of #40 Wood in Exhibit 6 of the Tribe's Application at 1 and 2.

²¹ See, legal description of #53 Knutson in Exhibit 6 of the Tribe's Application at 1.

²² See, legal description of #67 Collier in Exhibit 6 of the Tribe's Application at 3.

²³ See, legal description of #75 Ogg in Exhibit 6 of the Tribe's Application at 2.

²⁴ See, the Tribe's Application at 36

²⁵ For CWA purposes, Indian reservations include trust lands validly set aside for Indian tribes even if such lands have not formally been designated as an Indian Reservation. *See* 56 *Fed. Reg.* 64876, 64881 (December 12, 1991); *see also*, *Arizona Public Service Company v. EPA*, 211 F.3d 1280, 1292-94 (D.C. Cir. 2000); 81 *Fed. Reg.* 30183, 30192 (May 16, 2016), *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 511 (1991).

and title records included in the Application provide express documentation that the described lands are held in trust for the Tribe.²⁶

EPA concludes that the Squaxin has satisfied 40 C.F.R. § 131.8(b)(3)(i) by providing maps and a legal description of the area over which the Tribe asserts authority to regulate surface water quality under the CWA.

2) Statement Describing the Basis for the Tribe's Authority

The Squaxin relies on both its inherent authority and the express congressional delegation of civil authority that section 518 of the CWA provides as the basis for its authority to administer the CWA sections 303(c) and 401 programs.²⁷

The source of the Squaxin's inherent authority is its Constitution and Bylaws. The Squaxin's Constitution and Bylaws empower the Squaxin with authority over its Reservation and Trust Lands.²⁸ Specifically, the Tribal Constitution and Bylaws affirm the Tribal Council's authority to manage tribal lands.²⁹

The Squaxin also relies on the congressional delegation of authority provided by CWA section 518 of the CWA. EPA interprets section 518 as an express congressional delegation of authority to eligible tribes.³⁰ The Tribe asserts that there are no limitations or impediments to its ability to accept and effectuate the congressionally delegated authority. EPA received no comments challenging this assertion of the Squaxin's authority. EPA therefore concludes that the Squaxin can rely on the congressional delegation of authority to regulate surface water quality over its Reservation and Trust Lands, as described above, and that the Tribe has satisfied the application requirement at 40 C.F.R. § 131.8(b)(3)(ii).

3) Identification of the Surface Waters for which the Tribe Proposes to Establish Water Quality Standards

The Tribe's Application asserts authority over all surface waters within the areas covered by the Squaxin Reservation and Trust Lands. These waters are generally identified on page 38 of the Tribe's Application, and more specifically identified in maps included in Exhibit 4 of the Application. The maps included in Exhibit 4 identify the types of surface waters located on the Squaxin Reservation and Trust lands, including waters in and around Squaxin Island, as well as off-island tidelines, creeks, streams, and wetlands. These maps also identify waterbodies or portions of waterbodies that serve as boundaries to such lands (e.g., tidelands, submerged waters, rivers or streams that flow into, over and through such lands) and are identified above in Section II.C.1 of this Decision.

EPA concludes that the property descriptions and maps the Squaxin submitted to identify the location of surface waters for which the Squaxin asserts jurisdictions satisfy 40 C.F.R. §

²⁶ Each legal description included in Exhibit 6 to the Tribe's Application expressly notes that the subject property is held in trust.

²⁷ See, the Squaxin Application at 36-37.

²⁸ See, Exhibit 2 to the Squaxin Application, Constitution of the Squaxin at Art. 1 and Art. III.

²⁹ *Id* at Art. I, §§ 1.b and 1.i.

³⁰ EPA's *Revised Interpretation of Clean Water Act Tribal Provision*, 81 Fed. Reg. 30183 (May 16, 2016) ("Interpretive Rule").

131.8(b)(3)(iii).

4) Conclusion Regarding Jurisdiction

Based on the above discussion, EPA concludes that the Squaxin meets the requirements at 40 C.F.R. §§ 131.8(a)(3) and (b)(3).

D. Capability

To demonstrate that a tribe is reasonably expected to be capable of administering an effective water quality standards program, 40 C.F.R. § 131.8(b)(4) requires that the tribe's application include a narrative statement of the tribe's capability. The narrative statement should include: (i) a description of the Indian tribe's previous management experience, which may include the administration of programs and services authorized by the Indian Self-Determination and Education Assistance Act, the Indian Mineral Development Act or the Indian Sanitation Facility Construction Activity Act; (ii) a list of existing environmental and public health programs administered by the tribal governing body and copies of related tribal laws, policies, and regulations; (iii) a description of the entity (or entities) which exercise the executive, legislative, and judicial functions of the tribal government; (iv) a description of the existing, or proposed, agency of the Indian tribe which will assume primary responsibility for establishing, reviewing, implementing and revising water quality standards; and, (v) a description of the technical and administrative capabilities of the staff to administer and manage an effective water quality standards program or a plan which proposes how the tribe will acquire additional administrative and technical expertise. The plan must address how the Tribe will obtain the funds to acquire the administrative and technical expertise.

1) Description of the Tribe's Prior Management Experience

The Squaxin administers numerous governmental services. These services include administrative, natural resource, finance, public health, housing, and social and community service programs. The Tribe's administration of several governmental services demonstrates its management experience. The Squaxin tribal government manages twelve departments. The Application includes copies of the Tribe's judicial and regulatory codes as well as documents and links to websites that illustrate the breadth of the Tribe's management experience.³¹ The Application also includes descriptions of several programs it manages with state and local governments. In addition, pursuant to the Title IV of the Indian Self-Determination and Education and Assistance Act of 1975 (Pub. L. 93-638), and the Tribal Self-Governance Program the Act created, the Squaxin have received funds to manage numerous programs that would otherwise be managed the United States Bureau of Indian Affairs and/or the United States Department of Health and Human Services through the Indian Health Service since 1995.³² These programs include aquaculture planning, cultural, enrollment, educational, habitat protection, harvest management, health, housing, and water resource management.³³ Tribal participation in the Tribal Federal Self-Government programs requires the participating tribe to perform annual audits of the Tribal Self-Determination Contracts or Self-Funding Agreements, and to demonstrate that there have been no uncorrected significant and material exceptions audit to such contracts or agreements.³⁴ The Squaxin's participation in the Self-

³¹ See, <https://squaxinland.org/epa-treatment-as-a-state/>; The Tribe also makes its most recent annual report available for public review at <https://squaxinland.org/3d-flip-book/fy21-government-annual-reports/>.

³² See, the Tribe's TAS Application at and <https://www.ihs.gov/selfgovernance/tribes/>.

³³ *Id.*

³⁴ See, e.g., <https://www.ihs.gov/selfgovernance/funding/>.

Governance Program, the breadth of the Tribe's prior governing experience, and its history of implementing programs with state and local governments supports a determination that the Squaxin is capable of administering the CWA sections 303(c), water quality standards, and 401, water quality certification programs.

2) List of Tribally Administered Environmental Programs

As previously noted, the Tribe's Application identifies the administrative departments at page 10 of the Application. These departments include several that serve public health or environmental services. For example, the Natural Resource Department ("NRD"), Cultural Resources Department, and the Department of Planning and Community Development provide environmental services, and the Family Services, Health Clinic, and Northwest Indian Treatment Center provide public health services.³⁵ Each of these departments manages programs that provide significant benefits to the Tribe, Tribal members, and members of other tribes or non-members who live within or near the Squaxin Reservation and Trust Lands. The Tribe has also demonstrated its ability to effectively track and manage the cost of funding programs. As noted in the Tribe's February 14, 2000, CWA section 319 TAS application, the Squaxin has successfully administered a variety of federal grants since its federal recognition.

3) Description of Entities which Exercise Executive, Legislative, and Judicial Functions

As more specifically described in section II.B of this Decision, the Squaxin's Government exercises executive, legislative and judicial authority. These functions are exercised by the Tribal Council and Tribal Court.

As previously noted, the Tribal Council is an elected body of seven Council Members. The Tribal Council exercises the Tribe's executive and legislative powers.³⁶ The Tribal Council delegates the authority to manage day to day operations of the Squaxin Government to a Tribal Administrator. The Tribal Administrator manages the overall operations of the departments within the Squaxin Government. Each department is headed by a director who reports to Tribal Administrator.

The Tribal Court carries out the judicial functions of the Squaxin pursuant to Tribal Code. The Tribal Court exercises jurisdiction over the civil and criminal matters arising within Squaxin Indian Country.

4) Description of the Agency of the Tribal Government which will Assume the Primary Responsibility for Establishing, Reviewing, Implementing, and Revising Water Quality Standards

The NRD will be responsible for establishing, reviewing, implementing and revising water quality standards. The Squaxin Application articulates the NRD's goals and objectives, primary functions, organizational structure, and staff. The Application also discusses several projects the NRD has undertaken or is undertaking.

³⁵ See, <https://squaxinland.org/government/departments/>. This link also provides links that describes services provided by the subject department.

³⁶ As noted at pages 5 above, the Tribal Council is elected by the Tribe's General Council which is made up of all enrolled Squaxin members who are at least 18 years old.

The following discussion relies on information provided by or made publicly available by the Tribe as well as the EPA memorandum entitled, *Review of the Squaxin Island Tribe's Application for Treatment in a Similar Manner as a State for Purposes of Administering the Water Quality Standards Program: Demonstration of Capabilities*, by Andrea Ramirez, Water Quality Standards Coordinator, thru Hanh Shaw, Manager, Standards and Assessment Section, to Ted Yackulic, Assistant Regional Counsel (January 30, 2023).

The NRD has 30 years of experience. NRD is staffed by 21 employees, which includes a director, three program managers, five staff scientists, eight technicians, and administrative staff. Detailed position descriptions and the previous work and educational backgrounds of the NRD staff who will be primarily responsible for administering the water quality standards and water quality certification programs are provided on pages 49-52 of the Tribe's Application. The responsible staff members currently hold the following positions:

- **Assistant Director:** Oversees a diverse departmental program including fish, wildlife, shellfish, habitat, and water programs that operates on a substantial budget. The assistant director supports the Department director on policy leadership programs and guidance of staff.
- **Research Fisheries Biologist:** Works on marine fisheries research and assessment and prioritization of marine and freshwater habitats.
- **Quantitative Service Manager:** Develops and maintains data necessary to establish tribal water quality standards. Provides technical support to the Natural Resources staff that includes data management software functions, such as GIS, SQL, and MS Access.
- **Water Resource Specialist:** Works on statistical analysis and model development, design and implementation of hydrology, fisheries, and wildlife research. Also serves as a fisheries and wildlife technician.
- **Biological Technician:** Operates as the Tribe's primary hydrographer. Performs regular water and sediment sampling, salmon and fish habitat surveys, as well as other monitoring activities.

The Application identifies five goals that the NRD has established for 2022. Each goal is supported by several objectives that represent actions that the NRD has or will undertake to attain the applicable goal. The goals and objectives address efforts to, among other things, enhance, promote, perpetuate, protect, and restore the Tribe's treaty protected rights to fish, shellfish, and wildlife and the habitats that support fish, shellfish, and wildlife.³⁷ The NRD's use of goals to inform work activities is a reasonable approach to ensure the effectiveness of the NRD efforts.

EPA approved Tribe's applications for TAS under CWA §§ 106 and 319 in 1998 and 2000, respectively. As documented in the Application, the Tribe has considerable experience implementing EPA-Tribal Environmental Plans (ETEPs) and water quality assessment plans through the CWA sections 106 and 319 programs.³⁸

Pages 41-42 of the Application provide detail about two of the Tribe's ETEPs which focused on recovery efforts in the Puget Sound (Application, pp. 41-42). The 2021-26 ETEP includes goals to build geospatial models for sea-level rise, shellfish and finfish harvest.

³⁷ See, the Tribe's Application at 36-38, and the *EPA Demonstration of Capability Memorandum*.

³⁸ See, the *EPA Demonstration of Capability Memorandum* at 2.

The Squaxin’s fiscal year 2010-2018 Water Quality Assessment Report³⁹ documents the water quality monitoring activities the NRD conducted in 2020. This water quality monitoring program focused on collecting and evaluating water quality data and other information in the Kamilche watershed portion of the Squaxin Island Reservation. The work was conducted pursuant to an EPA approved quality assurance project plan (QAPP). The NRD monitored streams within this area to assess whether aquatic life is supported by evaluating several water quality parameters including temperature, pH, turbidity, nutrients, habitat, biota, flow, and dissolved oxygen. The Tribe’s QAPP for long-term water quality monitoring program⁴⁰ documents the procedures the Tribe used for data sample collection, laboratory analysis, and data analysis strategies to ensure high quality results. This plan shows the Tribe’s capability of developing and implementing a robust long-term monitoring program.

The Tribe’s Application describes seven NRD projects to demonstrate the Tribe’s capability to implement the CWA water quality standards and water certification programs.⁴¹ These projects include:

- **Project 1 – Oakland Bay, Western Coast Initiative.** This project involved multiple parties, including the State of Washington, Mason County, shellfish industry representatives, and the Squaxin. Oakland Bay is an important location for shellfish harvesting by the Squaxin and the non-tribal shellfish industry. The project involved (1) developing and implementing a water quality monitoring program to identify problematic sources of pollution; and (2) taking corrective measures to address the identified sources. The effort resulted in the restoration and re-opening of 55 acres of shellfish habitat and the establishment of Mason County’s first shellfish protection district.
- **Project 2 – Biological Recovery of Goldsborough Creek Basin.** The Goldsborough Creek Basin comprises approximately 40% of the area that drains into Oakland Bay. After the removal of dam in this Basin, the Squaxin partnered with the South Puget Sound Salmon Enhancement Group, Keta Waters, Anchor Environmental and the Capital Land Trust to undertake biological recovery projects, including construction of a fish passage, and development of instream flow model to assist in the groundwater protection efforts.
- **Project 3 – Skookum Valley Investigation and Actions.** This project involved several habitat restoration projects that included designing, implementing, and monitoring intended to improve fish and wildlife habitat.
- **Project 4 – Ongoing Clean Water Investigations and Committees.** The NRD has participated in Mason County water quality monitoring project for over 17 years. The project involves the collection of fecal coliform bacteria as well as other water quality and streamflow quantity data throughout Mason County. The Washington State Departments of Ecology and Health, and Mason County are partners in the monitoring effort.

³⁹ January 24, 2020. Water Quality Assessment Report for the Squaxin Island Tribe. Available at <https://squaxinland.org/wp/wp-content/uploads/2022/06/SIT-EPA-106-Up-To-2018-WQ-Assessment-FINAL-012420-1.pdf>

⁴⁰ March 8, 2016. Quality Assurance Project Plan. Available at <https://squaxinland.org/wp/wp-content/uploads/2022/06/2017QAPP.pdf>

⁴¹ The Squaxin Application includes documentation related to each of the seven projects. See, <https://squaxinland.org/epa-treatment-as-a-state/>.

- **Project 5 – Comprehensive GIS Support.** The Squaxin incorporates Geographic Information System (GIS) analysis into the Tribe’s monitoring, reporting and engagement activities. The Tribe maintains a publicly available GIS Portal⁴² and an online water quality map.⁴³
- **Project 6 – Groundwater Investigations Leading to Groundwater Protection.** NRD provides data and funds to support the development of groundwater models by the United States Geological Survey and Independent Firms. NRD uses and shares the models with local municipal and county governments inform water quality impacts.
- **Project 7 – Regional Planning.** NRD participates in regional planning efforts and the development of comprehensive plans, shoreline master plans, drinking water protections efforts, and the wastewater treatment.

Based on the information provided by the Squaxin and the analysis contained in EPA’s *Demonstration of Capability Memorandum*, EPA concludes that the Squaxin is reasonably expected to be capable of carrying out the functions of an effective water quality standards program in a manner consistent with the terms and purposes of the CWA and applicable regulations and have met the requirements at 40 C.F.R. §§ 131.8(a)(4) and (b)(4).

III. EPA's TAS Determination is a Separate Process from an EPA Decision on a Tribe's Submittal of Water Quality Standards

As described above in section I.B.2, pursuant to EPA’s TAS regulations at 40 C.F.R. § 131.8(c)(2), EPA provided notice and the opportunity to comment on the Tribe’s assertion of authority to regulate the quality of surface waters on the Squaxin Reservation and Trust Lands. Any comments addressing the substance of the water quality standards that an eligible tribe may develop and submit to EPA in the future for review and action under CWA section 303(c) are beyond the scope of the TAS application review process.

This TAS decision does not constitute an approval of any Squaxin water quality standards. EPA’s review and approval or disapproval of new or revised water quality standards is a separate Agency action under the CWA, distinct from EPA’s decision on the Tribe’s Application for eligibility to administer CWA sections 303(c) and 401 programs. Under the CWA, a tribe must first be approved for TAS before submitting water quality standards under CWA section 303(c) for EPA review. If EPA approves a tribe’s water quality standards, those standards then become federally applicable water quality standards for CWA purposes over those waters of the United States that are within the scope of the TAS approval.

Any water quality standards adopted by the Tribe and submitted to EPA for review and action under the CWA must satisfy all CWA and regulatory requirements, including requirements for public involvement in the adoption process. For example, before adopting final standards, the Tribe must hold a well-publicized public hearing on a draft proposal, notify the public and affected parties, and provide copies of relevant materials in advance of the hearing. As part of the final rulemaking procedure, the Tribe will provide a responsiveness summary to the Tribal decision-maker and the public. See 40 C.F.R. §

⁴² <https://maps.squaxin.us/portal/home/>

⁴³ <http://maps.squaxin.us/portal/apps/webappviewer/index.html?id=6cf745e30f5643b5a79b60f7a7247510>

131.20(b) and 40 C.F.R. part 25. These requirements will ensure an appropriate opportunity for interested entities to provide input on the Tribe’s proposed water quality standards, and any concerns regarding the standards proposed by the Tribe would be appropriately raised and addressed as part of the public participation process.

EPA also notes that section 518(e) of the CWA addresses the possibility that disputes may arise between a state and an eligible Indian tribe as a result of differing federally approved water quality standards on shared water bodies. This provision directs EPA to promulgate regulations that provide a mechanism for resolving any unreasonable consequences that may arise from different state and tribal water quality standards. EPA’s dispute resolution mechanism regulations at 40 C.F.R. § 131.7 authorize the Regional Administrator to attempt to resolve (and provide a detailed process for resolving) such disputes between a state and a tribe with TAS approval in certain circumstances.⁴⁴

IV. Conclusion

EPA has reviewed the Squaxin’s TAS Application for purposes of CWA sections 303(c) and 401. EPA has assessed whether the Application meets the eligibility criteria established by CWA section 518(e) and the applicable regulations. Based upon this review, EPA concludes that the Squaxin has made the required demonstration to meet the eligibility and application requirements at 40 C.F.R. §§ 131.8(a)(1)-(4) and (b)(1)-(6) to administer the water quality standards program for surface waters of the Reservation and Trust Lands. Pursuant to 40 C.F.R. 131.4(c), the Squaxin is also eligible to the same extent as a state for purposes of the water quality certification program under CWA section 401. Additionally, by virtue of these decisions, the Squaxin will be an “affected state” within the meaning of CWA section 402(b)(3) and (5) and its implementing regulation at 40 C.F.R. § 122.4(d).

DANIEL
OPALSKI

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Daniel D. Opalski, Director
Water Division
EPA Region 10

⁴⁴ Where disputes between states and Indian tribes arise as a result of differing water quality standards on common bodies of water, the Regional Administrator shall attempt to resolve such disputes where: (1) the difference in water quality standards results in unreasonable consequences; (2) the dispute is between a state and a tribe which EPA has determined is eligible to the same extent as a state for purposes of water quality standards; (3) a reasonable effort to resolve the dispute without EPA involvement has been made; (4) the requested relief is consistent with the provisions of the CWA and other relevant law; (5) the differing state and tribal water quality standards have been adopted pursuant to state and tribal law and approved by EPA; and (6) a valid written request has been submitted by either the tribe or the state. 40 C.F.R. § 131.7.