

DECISION DOCUMENT  
FOR  
THE U.S. ENVIRONMENTAL PROTECTION AGENCY'S APPROVAL OF  
**THE NAVAJO NATION'S**  
**SUPPLEMENTAL APPLICATION**  
FOR TREATMENT IN A SIMILAR MANNER AS A STATE  
UNDER CLEAN WATER ACT SECTION 518  
FOR PURPOSES OF THE  
WATER QUALITY STANDARDS AND CERTIFICATION PROGRAMS  
UNDER  
CLEAN WATER ACT SECTIONS 303(c) AND 401

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## I. BACKGROUND

### A. Introduction

Section 303(c) of the Clean Water Act (“CWA”) requires states to develop, review and revise (as appropriate) water quality standards for surface waters of the United States. At a minimum, such standards must include designated water uses, in-stream criteria to protect such uses, and an antidegradation policy. 40 C.F.R. § 131.6. In addition, Section 401 of the CWA provides that states may grant, condition, or deny “certification” for federally permitted or licensed activities that may result in a discharge to the waters of the United States. The decision to grant or deny certification is based, in part, on the state’s determination regarding whether the proposed activity will comply with water quality standards it has adopted under CWA Section 303(c). If a state denies certification, the Federal permitting or licensing agency is prohibited from issuing a permit or license. *See* 40 C.F.R. § 131.4.

Section 518 of the CWA authorizes the United States Environmental Protection Agency (“EPA”) to treat an eligible Indian tribe as a state (treatment in a similar manner as a state, or “TAS”) to manage and protect water resources “within the borders of an Indian Reservation,” for certain CWA programs, including Sections 303(c) water quality standards and 401 certification. EPA regulations establish the process by which EPA implements that authority and determines whether to approve a tribal application for TAS for purposes of administering 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) (codified at 40 C.F.R. Part 131).

This Decision Document provides the basis and supporting information for EPA’s decision to approve under Section 518 of the CWA and 40 C.F.R. Part 131 a supplemental TAS eligibility application (the “Supplemental Application”) from the Navajo Nation (the “Tribe”). The approval provides eligibility for the Tribe to establish water quality standards pursuant to Section 303(c) of the CWA and to certify federally permitted or licensed activities pursuant to Section 401 of the CWA for the former Bennett Freeze Area, now a part of the Western Navajo Agency. On January 20, 2006, the EPA approved the Navajo Nation’s TAS eligibility application for purposes of Sections 303(c) and 401 of the CWA for all lands in the formal Reservation including the three satellite reservations of Alamo, Canoncito (now known as Tojajiilee) and Ramah, and all tribal trust lands in the Eastern Agency (the 2006 EPA approval). However, the 2006 EPA approval did not include the Bennett Freeze area due to ongoing litigation with the Hopi Tribe over the ownership of the land. Both tribes claimed the Bennett Freeze area as under their jurisdiction. As a result of a federal court decision<sup>1</sup> and an inter-tribal agreement,<sup>2</sup> it was established that the former Bennett Freeze area is within the exterior boundaries of the formal Navajo Reservation.<sup>3</sup>

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<sup>1</sup> *See Masayesva v. Zah*, 816 F. Supp. 1387 (D. Ariz. 1992), *aff’d in part and remanded in part*, 65 F.3d 1445 (9th Cir. 1995) (as amended on denial of rehearing and rehearing *en banc*, December 5, 1995), *cert. denied* sub nom, *Secakuku v. Hale*, 517 U.S. 1168 (1996).

<sup>2</sup> On Sept. 26, 2006, the Navajo Nation Council approved the Navajo-Hopi Intergovernmental Compact, which resolved all remaining issues related to the Tribes’ dispute and lifted the freeze.

<sup>3</sup> On December 4, 2006, the U.S. District Court for the District of Arizona found that lands in the former Bennett Freeze were not “under litigation” any longer, and that the restrictions on development were no longer in force. *Honyoama v. Shirley*, No. CIV74-842 PHX EHC (D. Ariz.) (Order and final judgment, Dec. 4, 2006).

This approval applies to all surface waters that lie within the former Bennett Freeze area within the Western Navajo Agency, as described in the Supplemental Application and identified herein and in Appendix I. This TAS approval does not automatically extend the Tribe's already established water quality standards to the additional water resources within the Western Navajo Agency area, but rather only establishes the Tribe's eligibility to submit water quality standards to EPA for approval under CWA Section 303(c) for this additional area. Development of water quality standards would remain subject to all requirements of EPA's regulations (including requirements for notice and comment), and such standards would still need to be submitted to EPA for review under Section 303(c) to ensure they meet applicable CWA and regulatory requirements.<sup>4</sup>

## **B. Application and Comment Process**

Selected materials and documents relevant to the decision are listed in Appendix I. Included in this list are the Tribe's February 27, 2015, supplemental application for TAS eligibility for purposes of the water quality standards and certification programs under Sections 303(c) and 401 of the CWA, and supporting materials provided by the Tribe ("supporting materials") dated March 23, 2017, which together constitute and will be referred to as the Tribe's "Supplemental Application".

As provided in 40 C.F.R. § 131.8(c)(2), Alexis Strauss, EPA then-Acting Regional Administrator, Region IX, sent a letter dated January 17, 2018, to "appropriate governmental entities"<sup>5</sup> that offered an opportunity to comment on the substance and basis of the Tribe's assertion of authority set forth in its "Supplemental Application". The letter was sent to the Governor of the State of Arizona, the Governor of the State of Colorado, the Governor of the State of Utah, the Governor of the State of New Mexico, the President of the San Juan Southern Paiute Tribe, the President of the Jicarrilla Apache Nation, the Chairman of the Hopi Tribe, the Governor of the Pueblo of Zuni, the Governor of the Pueblo of Laguna, the Chairman of the Ute Mountain Tribe, the Arizona Department of Environmental Quality, the Colorado Department of Public Health, the New Mexico Environment Department, the Western Regional Office of the U.S. Bureau of Indian Affairs, the National Park Service, the U.S. Army Corp of Engineers and the Arizona State Director of the U.S. Department of Interior, Bureau of Land Management. Of these governmental entities, EPA received only one comment from the New Mexico Environment Department, which supported the Tribe's Supplemental Application.

In addition, consistent with Agency practice, EPA provided notice of the Tribe's Supplemental Application to the general public through local newspaper postings and offered an opportunity to comment on the Tribe's assertion of authority. The public notice was published in the Farmington Daily Times, the Standard Examiner and the Flagstaff Arizona Daily Sun on

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<sup>4</sup> EPA's approval of the Tribe's supplemental eligibility to administer CWA Sections 303(c) and 401 water quality and certification programs in the Western Navajo Agency does not include approval of the tribal water quality standards submitted with the Tribe's Supplemental Application.

<sup>5</sup> EPA defines "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 (December 12, 1991).

December 13, 2017. No comments were received in response to the public notice. In addition, EPA exercised its discretion and provided additional notice of the Tribe's Supplemental Application to Reservation-adjacent local governments and sent an email notice to Atkinson Trading Co. Inc., an entity located within the Western Navajo Agency. EPA received comments only from Atkinson Trading Co., which asserted, among other things, that the Navajo Nation does not have authority to regulate its fee land located within the Western Navajo Agency. EPA's response to those comments is included as Appendix II.

### **C. Statutory and Regulatory Provisions**

The following are statutory and regulatory provisions governing this TAS decision:

1. Section 518 of the Clean Water Act, 33 U.S.C. § 1377, authorizes EPA to treat an eligible Indian tribe in the same manner as a state if the tribe meets the specified eligibility criteria.
2. Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64876 (December 12, 1991), as amended by 59 Fed. Reg. 64339 (December 14, 1994) and clarified by 81 Fed. Reg. 30183 (May 16, 2016) (codified at 40 C.F.R. Part 131), establish the requirements for a tribe to obtain TAS approval and the procedures for EPA to process a tribe's TAS application.

### **D. Policy Statements**

The following policy statements and guidance are also relevant to this TAS decision:

1. *EPA Policy for the Administration of Environmental Programs on Indian Reservations*, November 8, 1984.
2. EPA Memorandum entitled "*EPA/State/Tribal Relations*," by EPA Administrator Reilly, July 10, 1991.
3. Memorandum entitled "*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.
4. Memorandum entitled "*Strategy for Reviewing Tribal Eligibility Applications to Administer EPA Regulatory Programs*," by EPA Deputy Administrator Marcus Peacock, January 23, 2008.

## **II. REQUIREMENTS FOR TAS APPROVAL**

Under CWA Section 518 and EPA's implementing regulations at 40 C.F.R. § 131.8(a), four requirements must be satisfied before EPA can approve a tribe's TAS application for water quality standards under Section 303(c) and certifications under Section 401 of the CWA. These are: (1) the Indian tribe is recognized by the Secretary of the Interior and exercises authority over a reservation; (2) the Indian tribe has a governing body carrying out substantial governmental

duties and powers; (3) the water quality standards program to be administered by the Indian tribe pertains to the management and protection of water resources within the borders of the Indian reservation and are held by an 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 an Indian reservation; and (4) the Indian tribe is reasonably expected to be capable, in the Regional Administrator's judgment, of carrying out the functions of an effective water quality standards program in a manner consistent with the terms and purposes of the Act and applicable regulations.

EPA's regulation at 40 C.F.R. § 131.8(b) identifies what must be included in a tribe's TAS application to administer the 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 eligibility under a different CWA or Safe Drinking Water Act program, the tribe need only provide the required information that has not been submitted in a previous application. EPA separately reviews tribal water quality standards under 40 C.F.R. § 131.21. As such, TAS approval does not constitute approval of water quality standards but rather the tribe's eligibility to develop and submit water quality standards to EPA for its approval under CWA Section 303 and 40 C.F.R. § 131.21. However, approval of a tribe for TAS eligibility to administer water quality standards does immediately authorize that tribe to issue certifications under CWA Section 401 (*see* 40 C.F.R. § 131.4(c)), provided the tribe designates a "certifying agency" as defined in 40 C.F.R. § 121.1(e). Tribes authorized to administer the CWA water quality standards program are also "affected states" under CWA Section 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 CWA National Pollutant Discharge Elimination System program.

#### **A. Federal Recognition**

The first requirement for a tribal TAS application for water quality standards under Section 303(c) and certifications under Section 401 is that a tribe is recognized by the Secretary of the Interior and meets the definitions in 40 C.F.R. §§ 131.3 (k) and (l). 40 C.F.R. §131.8(a)(1). A tribe must include in its application a statement that the tribe is recognized by the Secretary of the Interior. *See* 40 C.F.R. §131.8(b)(1). In 40 C.F.R. § 131.3(l), the term "Indian Tribe" or "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." In 40 C.F.R. § 131.3(k), the term "Federal Indian reservation" is defined 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." The Supplemental Application states that the Tribe is recognized by the Secretary of the Interior, and hence the Tribe has met the requirement set forth in 40 C.F.R. §131.8(b)(1). EPA has confirmed that the Navajo Nation, whose reservation is located within the States of Arizona, New Mexico and Utah (generally known as the Four Corners Area), is a federally recognized tribe listed in the current Department of the Interior's published list of "Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs" as the "Navajo Nation, Arizona, New Mexico and Utah". *See* 84 Fed. Reg. 1200, 1202 (February 1, 2019).

Therefore, EPA finds that the Navajo Nation is recognized by the Secretary of the Interior and meets the definition of “Indian Tribe” in 40 C.F.R. § 131.3(l) with governmental authority over a “Federal Indian Reservation” as defined in 40 C.F.R. § 131.3(k), and thus meets the requirements in 40 C.F.R. § 131.8(a)(1) and (b)(1).

## **B. Substantial Governmental Duties and Powers**

The second requirement for a TAS application for water quality standards under CWA Section 303(c) and certifications under CWA Section 401 is that a tribe has a governing body carrying out substantial governmental duties and powers. 40 C.F.R. § 131.8(a)(2). To show that it has a governing body currently carrying out substantial governmental duties and powers over a defined area, 40 C.F.R. § 131.8(b)(2) requires that the tribe submit a descriptive statement that should: (i) describe the form of the tribal government; (ii) describe the types of governmental functions currently performed by the tribal governing body; and (iii) identify the source of the tribal government’s authority to carry out the governmental functions currently being performed.

A tribe that has previously shown that it meets the “governmental functions” requirement for purposes of another EPA program generally need not make that showing again. *See* 59 Fed. Reg. 64339, 64340 (December 14, 1994) (“Simplification Rule”). Consistent with 40 C.F.R. § 131.8(b)(6) and the Simplification Rule, the Navajo Nation’s Supplemental Application relies on EPA’s approval of the Tribe’s original TAS application for CWA Sections 303(c) and 401, noting that when EPA approved this application, it found the Tribe had adequately described the form of tribal government, its governmental functions, and the source of tribal authority to carry out those functions. The Supplemental Application indicates that Tribe’s governance structure and its related governmental functions have not changed since EPA’s 2006 approval of the Tribe’s original TAS application for water quality standards under Section 303(c) and certifications under Section 401 of the CWA.

Therefore, EPA has determined that the Tribe has described and demonstrated that the Tribal governing body is currently carrying out substantial governmental duties and powers for purposes of 40 C.F.R. §§ 131.8(a)(2) and (b)(2), (6).

## **C. Jurisdiction Over “Waters Within the Borders” of the Tribe’s Reservation**

The third requirement for TAS applications for water quality standards under CWA Section 303(c) and certifications under CWA Section 401 is that the water quality standards program to be administered by the tribe pertains to the management and protection of water resources that are within the borders of the Indian reservation. 40 C.F.R. § 131.8(a)(3). To demonstrate that this requirement is met, the regulations require that the Tribe submit a statement of its authority to regulate water quality. The statement should include: (i) a map or legal description of the area over which the tribe asserts authority over surface water quality; (ii) a statement by the tribe’s legal counsel (or equivalent official) which 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 that support the tribe’s assertion of authority; and (iii) an identification of the surface waters for which the tribe proposes to establish water quality standards. 40 C.F.R. § 131.8(b)(3).

## 1. Map or Legal Description

The Navajo Nation's Supplemental Application contains a map and reference to the Tribe's original TAS Application that included a legal description of the area over which the Tribe asserts authority. The boundaries of the formal Reservation were established by Treaty of June 1, 1868, 15 Stat. 667, and were expanded by subsequent acts of Congress. In 1966, the Commissioner of Indian Affairs imposed an administrative freeze over a portion of the Reservation, identified as the Bennett Freeze, which was subsequently codified by statute. As discussed above, the Bennett Freeze Area was excluded from the January 20, 2006 EPA TAS approval due to litigation between Navajo Nation and the Hopi Tribe regarding jurisdiction over the area. After the Navajo-Hopi Intergovernmental Compact, which resolved all remaining issues related to the Tribes' dispute and lifted the freeze, and the federal court decision approving the Intergovernmental Compact and confirming the Navajo Nation's jurisdiction over the former Bennett Freeze area, *see Honyoama v Shirley*, No. CIV 74-842-PHX-EHC (D. Arizona) (Order and final judgement, Dec. 4, 2006), the Navajo Nation now seeks to expand its approved TAS eligibility for Sections 303(c) and 401 of the CWA to the former Bennett Freeze Area within the Western Navajo Agency – which is specifically identified in the map contained in the Tribe's Supplemental Application and is located entirely within the State of Arizona. The Tribe's Supplemental Application asserts jurisdiction over all lands and waters within the former Bennett Freeze Area of the Western Navajo Agency.

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

## 2. Statement Describing the Basis for the Tribe's Authority

The Tribe's Supplemental Application for TAS for the CWA Sections 303(c) and 401 programs for the Bennett Freeze Area included a Statement of the Tribal Attorney General that describes the Tribe's inherent sovereign authority over all lands and resources, including water resources, within the Reservation as a basis for the Tribe's authority to regulate water quality under the CWA. *See Exhibit E, Supplemental Jurisdictional Statement*. The Attorney General Statement also describes the Tribe's current jurisdiction over surface waters within its Reservation following EPA's 2006 approval of the Tribe's original TAS application for the CWA Sections 303(c) and 401 programs, and cites to the federal litigation establishing Navajo Nation's jurisdiction over the former Bennett Freeze Area and its surface waters within the Western Navajo Agency. To further support the Tribe's assertion of jurisdiction over this additional area, the Attorney General Statement cites relevant federal Indian law precedent supporting the Tribe's exercise of inherent authority to regulate water quality in the area covered by its Supplemental Application.

While the Tribe's Supplemental Application was pending, EPA issued a final interpretive rule clarifying the authority of tribes to administer regulatory programs over their entire reservations pursuant to CWA Section 518. This clarification is described in EPA's *Revised Interpretation of Clean Water Act Tribal Provision*, 81 Fed. Reg. 30183 (May 16, 2016)

("Interpretive Rule"), which construes Section 518 as an express congressional delegation of civil regulatory authority to eligible tribes. This reinterpretation of Section 518 eliminates the need for applicant tribes to demonstrate their inherent authority to regulate reservation waters under the CWA. Instead, tribes can rely on the congressional delegation of authority as the source of their authority to regulate reservation waters under the CWA. *Id.* at 30190, 30194.

In light of the congressional delegation, the main focus in determining the extent of an applicant tribe's jurisdiction for CWA regulatory purposes is to identify the geographic boundaries of the Indian reservation area over which the congressionally delegated authority would apply. *Id.* at 30194. In the Interpretive Rule, EPA also recognized that there may be rare instances where special circumstances limit or preclude a particular tribe's ability to accept or effectuate the congressional delegation of authority over its reservation. *Id.* at 30192-193. Such special circumstance could arise, for instance, under a separate federal statute establishing unique jurisdictional arrangements for a specific state or reservation, or under the provisions of particular treaties or tribal constitutions that may limit a tribe's ability to exercise relevant authority. *Id.*

By letter dated March 23, 2017, the Tribe clarified that the Tribe's primary basis of regulatory authority over surface waters on the Western Navajo Agency is the congressional delegation of authority in CWA Section 518. The Tribe also asserted that, based upon the resolution of the dispute with the Hopi Tribe regarding the former Bennett Freeze Area, there are no limitations or impediments to its ability to accept and effectuate this congressional delegation of authority under the CWA for that area. Moreover, EPA is not aware of any impediment limiting the Tribe's ability to effectuate the congressionally delegated authority for the Western Navajo Agency. We, therefore, conclude that the Tribe has properly asserted the congressional delegation of authority and has satisfied the application requirement of 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

In its Supplemental Application, the Navajo Nation has identified all the surface waters contained within the former Bennett Freeze Area located within the Western Navajo Agency on its Reservation for which it is proposing to extend its EPA-approved water quality standards. Specifically, the Tribe describes the following as waterbodies in the Western Navajo Agency of the Reservation: Tanner Wash, Shinumo Wash, Tatahatso Wash, Hamblin Wash, Moenkopi Wash (above and below Hopi Reservation), Little Colorado River, Lee Canyon, Tappan Wash, Cedar Wash, Deadman Wash, Dinnebito Wash. These waterbodies are indicated in the map and the list of waters included in Appendix III. Therefore, the Tribe has satisfied 40 C.F.R. § 131.8(b)(3)(iii) by identifying the surface waters within the Western Navajo Agency of its Reservation over which it proposes to extend its EPA-approved water quality standards.

### 4. EPA's Finding on the Tribe's Assertion of Jurisdiction

As described above, the Tribe has provided information to meet each of the application submission requirements relating to its demonstration of jurisdiction over Reservation waters in the Bennett Freeze Area. EPA received comments from one entity about the Tribe's assertion of

authority, which are fully addressed in the response to comments document in Appendix II. The comments do not address the Tribe's assertion of congressionally delegated authority under CWA Section 518 to administer water quality standards and certification programs on its Reservation. Based on the information included in the Tribe's Supplemental Application as discussed above, EPA finds that the Navajo Nation meets the requirements in 40 C.F.R. § 131.8(a)(3) and (b)(3).

#### **D. CAPABILITY**

The fourth and final requirement for a TAS application for water quality standards under Section 303(c) and certifications under Section 401 of the CWA is that a 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 CWA and applicable regulations. *See* 40 C.F.R. § 131.8(a)(4). To demonstrate that a tribe has the capability to administer an effective program, 40 C.F.R. § 131.8(b)(4) requires that the tribes' application include a narrative statement of the tribe's capability. The narrative statement should include: (i) a description of the tribe's previous management experience, which may include the administration of programs and services authorized by the Indian Self-Determination and Education Assistance Act, the Indian Mineral Development Act or the Indian Sanitation Facility Construction Activity Act; (ii) a list of existing environmental and public health programs administered by the tribal governing body and copies of related tribal laws, policies, and regulations; (iii) a description of the entity (or entities) that exercise the executive, legislative, and judicial functions of the tribal government; (iv) a description of the existing, or proposed, agency of the tribe that will assume primary responsibility for establishing, reviewing, implementing and revising water quality 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 that proposes how the tribe will acquire additional administrative and technical expertise. *See* 40 C.F.R. §§ 131.8 (b)(4)(i)-(v).

As discussed in the Navajo Nation's original TAS application and EPA's approval of that application for TAS for purposes of Sections 303(c) and 401 of the CWA, the Tribe has a large and elaborate tripartite government, with executive, legislative and judicial branches. One of the primary functions specified by the Tribe is the use of its judicial branch to protect the health, safety and welfare of the Navajo people. The original TAS application also indicates that the Navajo possesses eminent domain authority, criminal enforcement authority and the power to tax both individuals and corporations.

The Navajo Nation Environmental Protection Agency (NNEPA) is an independent agency within the Tribe's Executive Branch that serves as the implementing agency and technical support for the Tribe's environmental programs. The NNEPA is organizationally divided into different environmental media departments and has a staff of around fifty-five environmental specialists. The Surface and Ground Water Protection Department of the NNEPA oversees the water quality standards program, among other environmental and public health programs, and has eight employees. Therefore, the Tribe has satisfied the criteria listed under 40 C.F.R. §§ 131.8(b)(4)(i)-(iii).

Consistent with 40 C.F.R. §§ 131.8(b)(4)(iv)-(v), EPA program staff also consider the capability of the Tribe to specifically administer the CWA Section 303(c) water quality standards and Section 401 certification programs. The NNEPA, which has trained personnel that are experienced at implementing the water quality standards program since EPA's 2006 TAS approval, will continue to be the entity that has primary responsibility for establishing, reviewing, implementing and revising water quality standards and certifying permits. It will continue administering the water quality standards program and receiving and processing applications for certification of compliance with water quality requirements and standards for projects that are subject to federal agency permits or licenses that may result in discharge in CWA navigable waters or impact water quality within the Navajo Nation Reservation. The additional water resources within the Bennett Freeze area will not add any significant new burden to the staff already administering the CWA Section 303(c) water quality standards and Section 401 certification programs.

Based upon EPA's review of the information in the Tribe's Supplemental Application and the Tribe's proven ability to administer the water quality standards program in Reservation areas outside the Western Navajo Agency, EPA finds that the Tribe has demonstrated that it has the capability to administer the CWA Sections 303(c) and 401 water quality standards and certification programs within the Western Navajo Agency and has met the requirements of 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**

Under EPA's TAS regulations, the EPA provides certain notices and an opportunity to comment on an applicant tribe's assertion of authority to regulate reservation water quality. The EPA reiterates here that this TAS decision does not constitute an approval of the Tribe's water quality standards. The EPA's review and approval or disapproval of new or revised water quality standards is a separate Agency action under the CWA, distinct from the EPA's decision on the Tribe's TAS application for eligibility to administer CWA Sections 303(c) and 401 program authority on reservation lands. Under the CWA, a tribe must first be approved for TAS before the EPA can approve a tribe's submitted water quality standards under CWA Section 303(c). If the EPA approves a tribe's water quality standards, those standards then become federally-applicable water quality standards for CWA purposes over the waters within the scope of the TAS approval. The EPA notes that any water quality standards adopted by the Tribe and submitted to the EPA for action under the CWA would need to satisfy all CWA and regulatory requirements, including requirements for public involvement in the adoption process. 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 being proposed by the Tribe can be appropriately raised and addressed as part of that process.

### **IV. Conclusion**

EPA has determined that the Navajo Nation has met the requirements of CWA Section 518 and 40 C.F.R. § 131.8, and therefore approves the Tribe's Supplemental TAS Application to administer the water quality standards program of CWA Section 303(c) and its implementing

regulations set forth at 40 C.F.R. § 131.6. Consistent with 40 C.F.R. § 131.4(c), the Tribe is also eligible to the same extent as a state for the purposes of certifications under CWA Section 401 and its implementing regulations at 40 C.F.R. § 131.4. The Tribe will be treated in the same manner as an “affected state” under CWA Section 402(b)(3) and (5) and its implementing regulations at 40 C.F.R. § 122.4(d).



5-21-19

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Michael Stoker  
Regional Administrator  
Date