

DECISION DOCUMENT  
FOR  
THE U.S. ENVIRONMENTAL PROTECTION AGENCY'S APPROVAL OF  
**THE SENECA NATION OF INDIANS**  
**APPLICATION**

FOR AUTHORIZATION UNDER CLEAN WATER ACT SECTION 518 FOR PURPOSES OF  
ADMINISTERING WATER QUALITY STANDARDS AND CERTIFICATION PROGRAMS  
UNDER CWA §§ 303(c) AND 401

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## **I. BACKGROUND**

### **A. Purpose**

The purpose of this Decision Document is to provide the basis and supporting information for the EPA's decision to approve the Seneca Nation of Indians' (SNI, also referred to as "the Nation") treatment in a similar manner as a state ("TAS") application (the "Application") under Clean Water Act ("CWA") Section 518, 33 U.S.C. § 1377, for purposes of authorization to administer the water quality standards and certification programs under §§ 303(c) and 401 of the CWA, 33 U.S.C. §§ 1313(c) and 1341.

### **B. Introduction**

Under Section 303(c) of the CWA, 33 U.S.C. § 1313(c), states develop, review, and revise (as appropriate) water quality standards for surface waters of the United States. At a minimum, such standards are to include designated water uses, water quality criteria to protect such uses, and an antidegradation policy. 40 C.F.R. § 131.6. In addition, under Section 401 of the CWA 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. 33 U.S.C. § 1341.

Section 518 of the CWA, 33 U.S.C. § 1377, authorizes the United States Environmental Protection Agency ("EPA") to treat an eligible Indian Tribe in a similar manner as a state to manage and protect water resources "within the borders of an Indian reservation," for certain CWA programs, including §§ 303(c) water quality standards and 401 certification. The EPA regulations establish the process by which the EPA implements that authority and determines whether to approve a tribal application for TAS for purposes of administering programs under §§ 303(c) and 401 of the CWA. *See* 40 C.F.R. §§ 131.4(c) and 131.8; 56 Fed. Reg. 64,876 (Dec. 12, 1991); 59 Fed. Reg. 64,339 (Dec. 12, 1994); 81 Fed. Reg. 30183 (May 16, 2016).

In this Decision Document, the EPA sets out the basis for its decision to approve the SNI's Application under Section 518 of the CWA and 40 C.F.R. Part 131, allowing the SNI to establish water quality standards pursuant to Section 303(c) of the CWA and certify federally permitted or licensed activities pursuant to Section 401 of the CWA for areas within the borders of the SNI reservation. This approval applies to all surface waters that lie within the exterior borders of the SNI's reservation, as described in the Application and identified herein and in Appendix II. Approval for authorization to administer water quality standards and certification programs under CWA §§ 303(c) and 401 does not constitute approval of any actual water quality standards, but rather the SNI's eligibility to submit water quality standards to the EPA for approval under CWA Section 303(c). Any future development of such standards by the SNI would remain subject to all requirements of the EPA's regulations (including the requirements providing for public notice and comment); and such standards would still need to be submitted to the EPA for review under Section 303(c) to ensure they meet applicable CWA and regulatory requirements. However, approval of the SNI for TAS authorization to administer water quality standards and certification programs under CWA §§ 303(c) and 401 does immediately authorize the SNI to issue certifications under CWA Section 401 (*see* 40 C.F.R. § 131.4(c)), provided the

SNI designates a “certifying agency” as defined in 40 C.F.R. § 121.1(e). In addition, tribes authorized to administer the CWA water quality standards program are also “affected states” as the term is used 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.

### **C. Application and Comment Process**

The SNI’s Application, dated March 28, 2018, and selected documents relevant to the decision to approve the SNI’s Application are listed in Appendices II-III.

As provided in 40 C.F.R. § 131.8(c)(2), Peter D. Lopez, EPA Regional Administrator, Region II, sent letters dated November 6, 2018, to appropriate governmental entities that offered an opportunity to comment on the SNI’s assertion of authority set forth in its Application. The letters were sent to the Governor of the State of New York, the New York State Department of Environmental Conservation (NYSDEC), the Governor of the State of Pennsylvania, and the Pennsylvania Department of Environmental Protection. No comments were received. In addition, consistent with established procedures, the EPA provided notice of the SNI’s Application to the general public through two local newspaper postings, offering an opportunity to comment on the SNI’s assertion of authority. The public notice was published in the *The Salamanca Press* on December 6, 2018, and in *The Bradford Era* on December 6, 2018. Upon additional communication with the Bradford Sanitary Authority via email on December 12, 2018, the EPA provided the Bradford Sanitary Authority with a copy of the SNI’s Application as requested. No comments from the general public were received.

On July 1, 2019, the EPA sent nine additional outreach emails to the neighboring county commissioners and city officials requesting any questions or comments on the SNI’s assertion of authority. The EPA received one phone call and email inquiry from Deputy Commissioner Kathleen Ellis of Cattaraugus County requesting a copy of the application and asking certain questions regarding the potential impacts of a program approval on the State Revolving Fund (SRF) program. The EPA’s full response is included in the response to comments (Appendix I). Deputy Commissioner Ellis confirmed (via email) that the EPA answered all of her outstanding questions.

On November 15, 2019, the EPA sent 40 additional outreach letters to county officials and municipal dischargers upstream with a hydrologic connection to Seneca Nation waters requesting any questions or comments on the SNI’s assertion of authority to regulate surface water quality within the SNI’s territories. The EPA received ten comments via phone or email; two letters in support of the SNI’s application (NYSDEC and Concerned Citizens of Allegany County); and one letter from the Pennsylvania Grade Crude Oil Coalition (PGCC), Pennsylvania Independent Oil & Gas Association (PIOGA) and Pennsylvania Independent Petroleum Producers Assoc., Inc. (PIPP). See Appendix I for EPA’s full response to the comments.

#### **D. Statutory and Regulatory Provisions**

The following are the statutory and regulatory provisions which govern the EPA's authority to process and evaluate a Nation/Tribe's application to obtain eligibility for purposes of administering water quality standards under Section 303(c) and certification under Section 401 of the CWA:

1. Section 518 of the Clean Water Act, 33 U.S.C. § 1377, authorizes the EPA to treat an eligible Indian Nation/Tribe in a similar manner as a state if the Nation/Tribe meets the specified eligibility criteria.
2. 40 C.F.R. §§ 131.4(c) and 131.8 establish the regulatory requirements for a Nation/Tribe to obtain eligibility approval and the procedures for the EPA to process a Nation/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); 81 Fed. Reg. 30183 (May 16, 2016).

#### **E. Policy Statements**

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

1. *EPA Policy for the Administration of Environmental Programs on Indian Reservations* (Nov. 8, 1984).
2. Memorandum titled *EPA/State/Tribal Relations*, by EPA Administrator William Reilly (July 10, 1991).
3. Memorandum titled *Adoption of the Recommendations from the EPA Workgroup on Tribal Eligibility Determinations*, by EPA Assistant Administrator Robert Perciasepe and General Counsel Jonathan Z. Cannon (Mar. 19, 1998).
4. Memorandum titled *Strategy for Reviewing Tribal Eligibility Applications to Administer EPA Regulatory Programs*, by EPA Deputy Administrator Marcus Peacock (Jan. 23, 2008).

## **II. REQUIREMENTS FOR AUTHORIZATION TO ADMINISTER WATER QUALITY STANDARDS AND CERTIFICATION PROGRAMS UNDER CWA §§ 303(c) AND 401**

Under CWA Section 518 and the EPA's implementing regulations at 40 C.F.R. § 131.8(a), four requirements must be satisfied for the EPA to approve a Nation/Tribe's application for eligibility for purposes of administering water quality standards under Section 303(c) and certifications under Section 401 of the CWA. The application must meet the following criteria: (1) the Indian Nation/Tribe is recognized by the Secretary of the Interior and

exercises authority over a reservation; (2) the Indian Nation/Tribe has a governing body carrying out substantial governmental duties and powers; (3) the water quality standards program to be administered by the Indian Nation/Tribe pertains to the management and protection of water resources which are within the borders of the Indian reservation and held by the Indian Nation/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 the Indian Nation/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 Nation/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.

The EPA's regulation at 40 C.F.R. § 131.8(b) identifies what must be included in an Indian Nation/Tribe's TAS application to administer a water quality standards program. Under 40 C.F.R. § 131.8(b)(6), where an Indian Nation/Tribe has previously qualified for TAS under a different CWA or Safe Drinking Water Act program, the Indian Nation/Tribe need only provide the required information that has not been submitted in a previous application. The 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 establishes the tribe's eligibility to develop and submit water quality standards to the EPA for its approval under CWA Section 303(c). However, approval of an Indian Nation/Tribe for TAS for purposes of water quality standards does immediately authorize that Indian Nation/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). Indian Nations/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 Application states that the SNI is recognized by the Secretary of the Interior, and hence the SNI has met the requirement set forth in 40 C.F.R. § 131.8(b)(1). The EPA has

confirmed that the SNI – whose reservation (the “Reservation”) comprises the Allegany Territory; Cattaraugus Territory; Oil Spring Territory; Buffalo Creek Territory; and Niagara Falls Territory, in Western New York – 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 “Seneca Nation of Indians.” *See* 85 FR 5462, 5465 (Jan. 30, 2020), as also previously determined in the EPA’s approval of the SNI’s eligibility application for purposes of CWA Section 106 (Water Pollution Control Program) grant funding, dated August 14, 2018.

Therefore, the EPA finds that the SNI 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 Nation/Tribe has a governing body carrying out substantial governmental duties and powers over a defined area. 40 C.F.R. § 131.8(a)(2). To demonstrate this, 40 C.F.R. § 131.8(b)(2) requires that the Nation/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 the power of eminent domain; and (iii) identify the source of the tribal government’s authority to carry out the governmental functions currently being performed.

A Nation/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. 64,339, 64,340 (Dec. 14, 1994) (“Simplification Rule”). Consistent with 40 C.F.R. § 131.8(b)(6) and the Simplification Rule, the SNI Application relies on the EPA’s approval on August 14, 2018 of the SNI’s TAS application for CWA Section 106 (Water Pollution Control Program) grant funding, noting that when the EPA approved this application it found the SNI had adequately described the form of tribal government, its governmental functions, and the source of tribal authority to carry out those functions. As explained in the SNI’s Application for CWA Section 106 and summarized in the current Application, the SNI’s government has been operating continuously for centuries. In 1848, the SNI adopted a constitution pursuant to its inherent sovereign authority. The Constitution provides for three branches of government; the legislative branch, composed of the Council; the executive branch, led by the President, Treasurer and Clerk; and the judicial branch, comprised of peacemaker, appellate and surrogate courts. The SNI performs essential governmental functions, including exercising police powers related to public health, safety and welfare, and has extensive experience providing governmental services such as law enforcement, social services and education. The EPA previously determined that the SNI had a government carrying out

substantial duties and authorities when it granted approval in 2018 of the SNI's application for eligibility for purposes of the CWA Section 106 grant program (Appendix IV).

Consistent with the Simplification Rule, the EPA has determined that the SNI has described and demonstrated that it has a governing body carrying out substantial governmental duties and powers over a defined area as required by 40 C.F.R. § 131.8(a)(2) and (b)(2).

### **C. Jurisdiction Over Waters Within the Borders of the Nation'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 Nation/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 Nation/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 Nation/Tribe asserts authority over surface water quality; (ii) a statement by the Nation/Tribe's legal counsel (or equivalent official) which describes the basis for the Nation/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 Nation/Tribe's assertion of authority; and (iii) an identification of the surface waters for which the Nation/Tribe proposes to establish water quality standards. 40 C.F.R. § 131.8(b)(3).

#### **1. Map or Legal Description**

The Application contains detailed maps that show the exterior boundaries of the Reservation<sup>1</sup> covered by the Application, which includes five areas comprising the Nation's Territories, as well as the major surface waters within each Territory (Appendix III).

As described in the application, the SNI Reservation is located in five areas in Western New York: the Allegany Territory; the Cattaraugus Territory; the Oil Spring Territory; the Buffalo Creek Territory; and the Niagara Falls Territory. The Allegany Territory consists of 31,180.9 acres and is located along the Allegany River in Cattaraugus County, New York. The Cattaraugus Territory consists of 22,060.8 acres and is located along Cattaraugus Creek in Cattaraugus, Chautauqua and Erie Counties, New York. The Oil Spring Territory consists of 641.9 acres near Cuba, New York on the border of Cattaraugus and Allegany Counties. The Buffalo Creek Territory is located in Buffalo City in Erie County, New York and is just under 10 acres. The Niagara Falls Territory is located in Niagara Falls City in Niagara County, New York and is approximately 56.2 acres. Maps included in the Application show the exterior boundaries of the five areas comprising the Seneca Nation Territories, as well as the major surface waters within each Territory. The SNI's Application asserts jurisdiction over all lands and waters within the Reservation.

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<sup>1</sup> For purposes of this decision document, there is no distinction between Reservation and Territory.

In 1794, the United States described and recognized a tract of land in Western New York as "the property of the Seneca nation" and acknowledged the SNI's "free use and enjoyment thereof." That land eventually became divided into the Allegany, Cattaraugus, and Oil Springs Territories. The Treaty with the Senecas, 7 Stat. 586 (May 20, 1842), confirmed that the SNI retained the "right and title" in the Allegany, Cattaraugus, and Oil Spring Territories that had been recognized in the 1794 Treaty of Canandaigua. The SNI thus has recognized title in the Allegany, Cattaraugus and Oil Spring Territories. Recognized title "is the equivalent of fee simple ownership." Further, the Nation holds these Territories in "restricted fee" status, meaning that the lands cannot be sold or alienated by the Tribe or Nation for a certain period without approval by the United States. The Buffalo Creek and Niagara Falls territories were acquired with funding appropriated under a settlement act, which specifically provided that lands acquired using such funding "shall be held in restricted fee status by the Seneca Nation." Seneca Nation Settlement Act of 1990 (SNSA), 25 U.S.C. § 1774f(c). The Nation's five restricted fee Territories qualify as "reservation" land. *See, e.g., United States v. Chavez*, 290 U.S. 357 (1933); *United States v. Candelaria*, 271 U.S. 432 (1926); *United States v. Sandoval*, 231 U.S. 28, 48 (1913) (holding that Pueblo lands consisting in part of tribal fee lands are equivalent to "reservation" land). They are thus "reservation" land for purposes of CWA § 518.

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

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

The Application asserts authority to administer the CWA Sections 303(c) and 401 programs over all surface water resources within the Nation's Reservation based on the express delegation of authority to eligible Indian Nations/Tribes to administer CWA regulatory programs over their reservations contained in Section 518 of the CWA. *See* 81 Fed. Reg. 30,183 (May 16, 2016). In light of the congressional delegation of authority, the EPA determines the extent of an applicant Nation/Tribe's jurisdiction for CWA regulatory purposes by identifying the geographic boundaries of the Indian reservation area over which the congressionally delegated authority would apply. *Id.* at 30,194. All of the Nation's lands covered by the Application are clearly described in the Application and above in this decision document and are reservation lands over which the Nation may regulate water quality under the CWA §§ 303(c) and 401 water quality standards and certification programs. The SNI also asserts that there are no limitations or impediments to its ability to accept and effectuate the express delegation of authority from Congress to administer these programs over their entire Reservation areas. Moreover, the EPA has no independent information, whether from an outside source or contained within its own records, identifying any impediment limiting the Nation's ability to effectuate the congressionally delegated authority.

The EPA therefore concludes that the SNI has properly asserted and can rely on 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 SNI Proposes to Establish Water Quality Standards

A Nation/Tribe's statement of authority should also identify the surface waters for which it proposes to establish water quality standards. *See* 40 C.F.R. § 131.8(b)(3)(iii). In its Application, the SNI has provided maps that show the exterior boundaries of the five areas comprising the Nation's Reservation, as well as the major surface waters within each area. Included with the maps is a list of the surface waters within the SNI Reservation, pursuant to 40 C.F.R. §131.8(b)(3) (Appendix II). The EPA therefore concludes that the SNI has satisfied 40 C.F.R. §131.8(b)(3)(iii) by identifying the surface waters within its Reservation over which it proposes to establish water quality standards.

4. EPA's Finding on the SNI's Assertion of Jurisdiction

Based on the information included in the SNI's Application as considered by the EPA and discussed above, the EPA finds that the SNI meets the requirements of 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 Nation/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 Nation/Tribe has the capability to administer an effective program, 40 C.F.R. § 131.8(b)(4) requires that the Nation/Tribe's application include a narrative statement of the Nation/Tribe's capability. The narrative statement should include: (i) a description of the Nation/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 Nation/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 Nation/Tribe will acquire additional administrative and technical expertise. *See* 40 C.F.R. §§ 131.8(b)(4)(i)–(v).

The SNI has submitted in its Application a description of its capability to administer water quality standards and certification programs. The Application describes the extensive basis of the SNI's capacity to implement environmental programs generally, and water programs specifically. The Nation's tripartite government currently employs over 1,000 governmental staff

who carry out the Nation's governmental functions and programs. The SNI also manages numerous federal and state grants, including from the U.S. Department of Agriculture, U.S. Department of Energy, U.S. Department of Health and Human Services (including the Indian Health Service), U.S. Department of Housing and Urban Development, U.S. Department of the Interior, U.S. Department of Justice, U.S. Department of Transportation, USEPA, New York State office for the aging, New York State Department of Health, and New York State Department of Education.

The Nation's Public Health and Environmental Programs administers various programs with an impact on public health. The SNI's existing environmental and public health programs include the following programs:

- Drinking water and sanitary services through the Allegany Tribal Utilities Department.
- Conservation Department (since 1977), which is responsible for enforcing Nation laws addressing conservation and environmental concerns, including solid waste management.
- Fish and Wildlife Department, which regulates and issues licenses for hunting and fishing and also provides community and youth education on natural resource and environmental issues.
- Environmental Protection Department (since 1992) established to protect the Nation's natural environment, to restore and enhance environmental quality in areas that have been subject to degradation, and to ensure that any proposed development that may have significant adverse environmental impacts will undergo a thorough environmental review.
- Laws protecting public health and the environment: Comprehensive Conservation Law; Pesticide Ordinance; Sand and Gravel Permit Law; Source Water Protection Code; Underground and Above-Ground Storage Tank Act; and Waste Disposal Ordinance.

The SNI Environmental Protection Department (EPD) is headed by a Director. The Director will assist the water quality program manager, who will have the primary responsibility for administering the CWA § 106 grant and developing and administering CWA §§ 303(c) and 401 water quality standards and certification programs. Both the water quality program manager and the EPD Director have a clear understanding of the Nation's water quality, impairments to water quality and the quality of contributing watersheds. The program has been monitoring lakes and streams on the Nation's lands for over a decade. The SNI will administer the program with assistance from the Director and will receive assistance with water quality sampling and monitoring from an environmental technician and an environmental associate. EPD plans to expand its Water Quality Program to include additional water quality staff and intends to use the CWA § 106 grant to assist this goal. The technical capabilities of the EPD staff are described in the TAS application (Appendix II).

As discussed in the SNI Application, the SNI's Constitution, as amended, provides for three branches of government: the legislative branch, composed of the Council; the executive

branch, led by the President, Treasurer and Clerk; and the judicial branch, comprised of peacemaker, appellate and surrogate courts. The Council is composed of 16 members, with 8 Councilors from the Allegany Territory and 8 Councilors from the Cattaraugus Territory, elected for staggered four-year terms. The council, presided over by the President, has legislative authority over all of the lands and persons within the Nation's exterior boundaries (except to the extent precluded by federal law), to control the disposition of the Nation's lands, to handle both internal and external affairs, and generally to promote and protect the public health and welfare. In exercise of its governmental powers, the Council enacts ordinances pertaining to the affairs of the Nation and governing conduct within the Nation.

The President and other executive officers oversee the administrative and executive functions of the Nation. The President, Treasurer and Clerk are elected for two-years and leadership rotates every two years between residents of the Cattaraugus and Allegany Territories. The SNI headquarters correspondingly alternates every two years between the Cattaraugus and Allegany Territories.

Consistent with 40 C.F.R. §§ 131.8(b)(4)(iv)–(v), the EPA program staff also considered the capability of the SNI specifically to administer the CWA Section 303(c) water quality standards and Section 401 certification programs. The SNI Environmental Protection Department and the Water Quality Program Manager are responsible for environmental regulation and permitting within the Nation's Territories. The Water Quality Program Manager will have the primary responsibility for administering the CWA § 106 grant and developing and administering CWA §§ 303(c) and 401 water quality standards and certification programs. The water quality program manager will be assisted by the EPD Director.

The SNI's current Application contains a description of the agency and staff who will administer the water quality standards and certification programs, consistent with 40 C.F.R. §§ 131.8(b)(4)(iv)–(v). The résumés of the program staff who will administer the water quality standards and certification programs were included as part of the Application. These résumés indicate that the SNI possesses the administrative and technical capability to administer these programs.

Based upon the EPA's review of the information in the SNI's Application and consistent with EPA's prior approval of the SNI's eligibility application for the purposes of receiving CWA Section 106 grants, the EPA finds that the SNI has demonstrated that it has the capability to administer the CWA §§ 303(c) and 401 water quality standards and certification programs and has met the requirements of 40 C.F.R. §§131.8(a)(4) and (b)(4).

### **III. Conclusion**

The EPA has determined that the SNI has met the requirements of CWA Section 518 and 40 C.F.R. § 131.8 and, therefore, approves the SNI's Application for eligibility to administer the water quality standards program of CWA Section 303(c) and its implementing regulations set forth at 40 C.F.R. Part 131. Consistent with 40 C.F.R. § 131.4(c), the SNI is also eligible to the same extent as a state for the purpose of certifications under CWA Section 401 and its

implementing regulations at 40 C.F.R. § 131.4. By virtue of these decisions, the SNI will also be an “affected state” within the meaning of CWA Section 402(b)(3) and (5) and its implementing regulations at 40 C.F.R. § 122.4(d).

*Walter Mugdan*

Walter Mugdan  
Acting Regional Administrator

March 15, 2021

Date

## **Appendix I: Response to Comments Received**

On July 1, 2019, the EPA provided notice of the SNI's TAS Application to certain local entities located in the vicinity of the reservation lands covered by the Application.

The EPA received one email and phone comment from Deputy Commissioner Kathleen Ellis of Cattaraugus County requesting a copy of the Application and asking certain questions regarding the potential impacts of a program approval on the State Revolving Fund (SRF) program. The EPA responded via phone and e-mail to the Deputy Commissioner's inquiry and confirmed that:

- Approval of this TAS application would not change the SNI's eligibility for SRF funding. The SNI would continue to be eligible for funding under the Clean Water Indian Set-aside.
- The SNI would not be eligible to compete with New York State (NYS) municipalities for SRF funding available to NYS municipalities.

Deputy Commissioner Ellis confirmed via e-mail to the EPA that the EPA had answered all of her outstanding questions.

On November 15, 2019, the EPA reached out regarding the SNI's TAS Application to additional local entities located in the vicinity of the reservation lands covered by the Application. As described below, the EPA received 10 comments, via email or over the phone, requesting further information and three letters.

- Three commenters requested a copy of the SNI Application. In response, the EPA provided the requested copies of the Application. There were no follow-up questions or concerns.
- Four commenters requested further information on how the Application might affect their permits, discharge limits, facilities or dams. The EPA responded to these inquiries via email or over the phone, explaining that the Seneca Nation is currently only applying for TAS eligibility. At this point, the SNI has not yet developed proposed Clean Water Act (CWA) water quality standards (WQS) for its reservation waters, and as a result, the EPA's approval of the SNI's TAS application would have no immediate effect on permits or plant regulations. The EPA also explained that any subsequent WQS adopted by the SNI 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. The EPA clarified that these requirements will ensure an appropriate opportunity for interested entities to provide input on the SNI's proposed WQS, and any concerns regarding the WQS being proposed by the tribe would be appropriately raised and addressed as part of that process. As a result of the EPA's response, there were no further questions or concerns.
- Bradford Sanitary Authority sent a request to the EPA Region 3 to find out if these efforts by the Seneca Nation could have any future impact on their operations or permitting requirements. The EPA Region 2 and Region 3 had a conference call with Bradford Sanitary Authority on January 7, 2020, and on January 8, 2020, the EPA Region 3 sent Bradford Sanitary Authority a letter stating that:

- “If the TAS application is approved, the Seneca Nation’s Clean Water Act authorities would be limited to the Seneca Nation’s territorial boundaries. Outside of the Seneca Nation’s territorial boundaries, applicable State and Federal laws would dictate the water quality standards for any given stream.” “If the Seneca Nation does adopt and EPA approves any such tribal water quality standard, that standard would need to be taken into consideration by the NPDES permitting authority when determining appropriate effluent limits for future Bradford Sanitary Authority NPDES discharge permits.”
  - One commenter described how their county (Niagara County) is adjacent to the SNI but had no hydrologic connection. The EPA appreciates the information and responded to the commenter that the EPA was reaching out to adjacent counties despite the lack of a hydrological connection.
  - One commenter requested a copy of the Application and an extension on the commenting period. This comment was followed by a letter from the Pennsylvania Grade Crude Oil Coalition, Pennsylvania Independent Oil & Gas Association and Pennsylvania Independent Petroleum Producers Assoc., Inc. The EPA provided the Application and granted the extension for 17 additional days. The EPA’s responses to the letter are detailed below.
  - A New York State Department of Environmental Conservation (NYSDEC) submitted a letter stating that it had no concerns or comments. The EPA appreciates the State’s letter.
  - A letter from Concerned Citizens of Allegany County supporting the application. The EPA appreciates the commenter’s support.

As mentioned above, on January 17, 2020, the EPA received a letter from the Pennsylvania Grade Crude Oil Coalition (PGCC), Pennsylvania Independent Oil & Gas Association (PIOGA) and Pennsylvania Independent Petroleum Producers Assoc., Inc. (PIPP) outlining three concerns. Each concern and the EPA’s responses are provided below.

Comment #1: The existing quality of the waters within the borders of the SNI’s lands and the potential tribal sources of pollution are unknown.

EPA Response: The EPA acknowledges and appreciates the comment and offers the following response. The regulatory requirements that the EPA considers in assessing a federally recognized Indian tribe’s (tribe or tribal) eligibility for treatment in the same manner as a state (TAS) for purposes of the Clean Water Act (CWA) water quality standards (WQS) and certification programs are set forth in 40 CFR 131.8 and 131.4(c). Identifying the existing quality of the waters within the borders of the Tribe’s lands and the potential tribal sources of pollution is not required by any of these regulatory provisions. For this reason, the EPA did not evaluate nor request the SNI to evaluate water quality or pollution source data as part of the application process. As described in detail in this Decision Document, the SNI’s Application appropriately asserts jurisdiction to administer the requested programs over reservation water resources and includes sufficient information demonstrating that the Nation meets all TAS criteria.

Comment #2: The SNI’s jurisdictional authority over water resources is not clearly defined.

EPA Response: The EPA appreciates the comment and the need for an applicant tribe to demonstrate its jurisdictional authority. The EPA's regulation at 40 CFR 131.8(b)(3) requires that an application must include a descriptive statement of the Indian tribe's authority to regulate water quality, and 40 CFR 131.8(b)(3)(i) states that the statement should include: A map or legal description of the area over which the tribe asserts authority to regulate surface water quality. In addition, pursuant to 40 CFR 131.8(b)(3)(iii), the statement should include an identification of the surface waters for which the tribe proposes to establish water quality standards.

Section C.1 of the Decision Document above summarizes the SNI's legal description of the area over which it asserts authority to establish WQS. Exhibit 1 of the SNI TAS Application lists the surface waters by name in the "List of Surface Waters within Seneca Nation Territories" table and the waterbodies are delineated in the "Map of the Seneca Nation Territories." The EPA has carefully reviewed the legal description, maps, table, and the list of waters provided and has found that the SNI's submission meets the requirements under 40 CFR 131.8(b)(3), including 40 CFR 131.8(b)(3)(i) and 40 CFR 131.8(b)(3)(iii).

The information above and within the SNI TAS application meets the requirements of 40 C.F.R. §§ 131.8(a)(3) and (b)(3).

When developing and proposing WQS, the SNI will need to identify the waters to which the WQS would apply, notify the public, hold a public hearing, and make the proposed WQS available for review. During this public notice process, commenters will have an opportunity to review the proposal and comment on it.

Comment #3: SNI's capability to finance and administer Water Quality Standards and certification programs is lacking.

EPA Response: The EPA acknowledges and appreciates the comment and agrees on the importance of a tribe's capability to administer and finance a program for which it is seeking TAS. EPA's regulation at 40 CFR 131.8(b)(4)(v) requires 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. The plan must address how the tribe will obtain the funds to acquire the administrative and technical expertise.

The SNI TAS Application provides the following:

The EPD is currently headed by an Interim Director and employs eight other staff members. The Department incorporates several environmental programs, including programs for water and air quality standards, underground and aboveground storage tanks, solid waste, NEPA, Brownfields, and pesticides, as well as having a regulatory permit section that issues construction permits and pesticide application permits, and it has qualified environmental professionals to oversee program implementation.

The Water Quality Program Manager will have the primary responsibility for administering the CWA § 106 grant and implementing programs under it, including developing and administering CWA §§ 303 and 401 water quality standards and certification programs. She currently is assisted on water quality matters generally by the EPD Interim Director and receives assistance with water quality sampling and monitoring from an environmental technician and an environmental associate. EPD plans to expand its Water Quality Program to include additional water quality staff and intends to use the CWA § 106 grant to assist with this goal.

Both the Water Quality Program Manager and the EPD Interim Director have a clear understanding of the Nation's water quality, impairments to water quality, and the quality of contributing watersheds. The program has been monitoring lakes and streams on the Seneca Nation's lands for over a decade. *See* CWA § 106(e)(1). The Water Quality Program also assesses habitat conditions and conducts biological surveys and research specific to each of the Nation's water bodies. The data that the program has collected has been used in lake management and watershed plans and will continue to help determine management strategies for Seneca Nation waters.

The EPD employs experienced staff members who are trained to administer the water quality program. Lisa Maybee has been the Department Director since 2015, and also served in that position previously from 1993-2004. Ms. Maybee graduated from the State University of New York — Fredonia with a Bachelor of Science degree in Environmental Science and has been working in the environmental health and natural resources arena since 1987. She also has worked in the Seneca Nation Health Department and served in the United States Marine Corps and the Marine Corps Reserve. Deleen White is the EPD Water Quality Program Manager and has served in that role since February 2014. As Water Quality Program Manager, Ms. White designs water quality initiatives, conducts program activities, hires and coordinates contractors performing water quality work, and assists with corrective actions addressing water quality problems. Previously, Ms. White worked in EPD as an environmental technician supporting the work of the Program Managers, and as assistant to the Treasurer of the Seneca Nation. Ms. White has completed EPA's Water Quality Standards Academy classroom course. Clifford Redeye, III has served as an Environmental Associate at EPD since 2014. He supports the work of the Program Managers and has experience in water quality, river and roadway spill cleanups, environmental assessments and permitting, and community outreach. He also served as a Project Manager with EPD from 2011-2013, managing fish and wildlife projects and implementing Seneca environmental laws. Mr. Redeye holds a Bachelor of Arts degree from the State University of New York at Buffalo.

As described above in detail in this Decision Document, the information provided in the SNI TAS Application meets the requirements under 40 CFR 131.8(b)(4)(v) and demonstrates that it has the capability specified by 40 C.F.R. §§131.8(a)(4)) to administer the CWA §§ 303(c) and 401 water quality programs.