

U.S. ENVIRONMENTAL PROTECTION AGENCY

REGION 5

DECISION DOCUMENT:

APPROVAL OF THE  
**KEWEENAW BAY INDIAN COMMUNITY'S**  
APPLICATION FOR TREATMENT IN A SIMILAR  
MANNER AS A STATE FOR THE CLEAN WATER ACT  
SECTIONS 303(c) WATER QUALITY STANDARDS  
AND 401 CERTIFICATION PROGRAMS

April 2020

## TABLE OF CONTENTS

### Table of Contents

I. Introduction and Index to the EPA Decision .....	4
A. Introduction .....	4
B. Index to the EPA Decision .....	5
1. Application and Supporting Materials.....	5
2. Letters and Related Documents to/from the EPA .....	5
3. Comments on the Tribe’s Application .....	5
4. Statutory and Regulatory Provisions .....	6
5. Policy Statements .....	6
II. Requirements for Program Eligibility Approval.....	7
A. Federal Recognition .....	7
B. Substantial Governmental Duties and Powers .....	8
C. Jurisdiction Over Waters within the Borders of a Reservation and on one Trust Land Parcel	10
D. Capability .....	13
III. EPA’S TAS Determination is a Separate Process from an EPA Decision on a Tribe’s Submittal of Water Quality Standards.....	17
IV. Conclusion.....	19
Appendix I: Table of Entities Receiving Notice and Providing Comments .....	20
Appendix II. EPA Response to Comments.....	22
1. Comments on Geographic Scope of Jurisdictional Assertion .....	22
2. Comments Regarding the Scope of Surface Waters Included in the Application.....	24
3. Comments Relating to the Treaty of 1854.....	26
4. Comments on the Geographic Scope of Delegation .....	27
5. Comments that the Application Contains Outdated Materials .....	27
6. Comments that EPA’s Online and Paper Application Materials were Unorganized .....	28
7. Comments on Outreach on Application.....	29
8. Comments Asserting Tribes Should not have Regulatory Authority under the CWA.....	30
9. Comments on Scope of Jurisdiction for Permitting Authority Within the L’Anse Reservation .....	33
10. Comments about Creation of Conflicting Systems of Regulations .....	33

11. Comments Relating to the Tribal Court and CWA 401 Certifications .....	37
12. Concerns about Costs of Meeting More Stringent Tribal WQS .....	38
13. Concerns about Potential “Veto” of Permits .....	39
14. Comments Regarding Lack of Non-Member Representation in Tribal Government.....	40
15. Comment on Whether TAS for 303/401 is separate from TAS for CWA 319 .....	41
16. Comments Regarding the Tribe’s Capability to Carry out a Water Quality Standards and Certification Program.....	42
17. Comments Requesting that KBIC Make Water Quality Standards and Information Publicly Available.....	43
18. Comments Requesting that KBIC Cooperatively Work with MI EGLE.....	43
19. Comments that the EPA should Reject KBIC’s Application and Prevent “Specific Needs” from Overriding Enforcement .....	44
20. Comments that Federally approved WQS will override non-federal Local or State Programs .....	44
21. Comments that Approval of TAS will Limit Access to Waterbodies within Reservation .....	45
22. Comments Requesting Additional Information .....	45
22. Comments in Support of the KBIC Application .....	47
Appendix III. Maps of Keweenaw Bay Indian Community Reservation and Water Resources .....	51

## I. Introduction and Index to the EPA 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 application<sup>1</sup> from the Keweenaw Bay Indian Community (KBIC or Tribe) for program eligibility for Clean Water Act (CWA) Section 303(c) Water Quality Standards (WQS) and Section 401 Water Quality Certification, pursuant to Section 518(e) of the CWA and 40 C.F.R. Part 131. CWA Section 518(e)(2) authorizes the EPA to treat a tribe as a state (treatment in a similar manner as a state, or TAS) for water resources “within the borders of an Indian reservation.” The Tribe’s TAS application includes all lands within the exterior boundaries of KBIC’s L’Anse Reservation and also identifies a parcel of tribally held trust land contiguous with the Reservation border that qualifies as informal reservation land, as explained below. As described in Section III below, this decision does not constitute an approval of the Tribe's water quality standards. The EPA's review and approval or disapproval of the Tribe's water quality standards would be a separate, future Agency action.

Section 303(c) of the 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 uses of waters, criteria to protect such uses, and an antidegradation policy. See 40 C.F.R. § 131.6. In addition, Section 401 of the CWA provides that states may grant or deny “certification” for federally permitted or licensed activities that may result in a discharge to the waters of the United States.

Section 518(e) of the CWA authorizes the EPA to treat an eligible tribe in a similar manner as a state for certain CWA programs, including Sections 303(c) and 401. The EPA Water Quality Standards Regulation at 40 C.F.R. § 131.8 establishes the process by which the Agency implements that authority and determines whether to approve a tribal application for program eligibility for purposes of administering 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), and 81 *Fed. Reg.* 30183 (May 16, 2016).

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<sup>1</sup> The Tribe’s Application contains several parts: Letter from Warren C. Swartz to Susan Hedman, Regional Administrator, enclosing application for TAS for Sections 303(c) and 401 of the CWA, May 21, 2013 [hereafter “CWA Application”] and that was amended on July 25, 2013 [hereafter “Amended CWA Application”]; and Letter from Warren C. Swartz to Robert A. Kaplan, Acting Regional Administrator, enclosing application for TAS for Sections 303(c) and 401 of the CWA, October 27, 2017 [hereafter “Supplemental CWA Application”].

## B. Index to the EPA Decision

The following documents constitute a portion of the record for this Agency decision. Appendix I contains a selected index of materials considered by the EPA for this decision.

### 1. Application and Supporting Materials

The Tribe's application for program eligibility for water quality standards and certifications under Sections 303(c) and 401 of the CWA includes the following letters and related documents from the Tribe and its counsel:

- Letter from Warren C. Swartz to Susan Hedman, Regional Administrator, enclosing application for TAS for Sections 303(c) and 401 of the CWA, May 21, 2013 which was amended on July 25, 2013;
- Letter from Warren C. Swartz to Robert A. Kaplan, Acting Regional Administrator, enclosing application for TAS for Sections 303(c) and 401 of the CWA, October 27, 2017;
- Letter from Warren C. Swartz to Cathy Stepp, Regional Administrator, providing response to public comments on jurisdiction and capability, October 17, 2019;
- L'Anse Indian Reservation maps of: waterbodies and drainage basins, topography, reservation boundaries, and wetlands.

### 2. Letters and Related Documents to/from the EPA

- Letter from Stephanie Kozich, KBIC, to David Horak, EPA, providing additional information regarding capability, September 6, 2019.
- Memorandum from Barbara Wester, EPA, Office of Regional Counsel, to the file summarizing telephone conversation with Baraga Township and Village officials, October 17, 2019.

### 3. Comments on the Tribe's Application

On April 2, 2019, Cathy Stepp, Regional Administrator, U.S. EPA Region 5, notified appropriate governmental entities (AGEs) and the public by letter and through notices in local newspapers of the substance and basis of the Tribe's assertion of authority contained in its application as provided at 40 C.F.R. § 131.8(c)(2). The letter provided a thirty-day period for submittal of comments on the Tribe's assertion of authority, as well as all other comments, and it also enclosed a copy of the application. In addition, the EPA posted the application materials on its website.

The EPA also provided an opportunity for local governments (including Baraga County, Michigamme and Covington Townships, and the Villages of L'Anse and Baraga), and the

public to review and comment on the assertion of authority in the Tribe's application. The EPA placed public notices in area newspapers including the *Mining Journal*, *L'Anse Sentinel* and the *Daily Mining Gazette*. In addition to application materials posted on the EPA's website, the EPA also posted paper copies of the application at 13 tribal and local governmental offices. Additionally, the EPA and the Tribe shared further outreach materials with local print media; the Tribe held meetings with the State of Michigan; the EPA responded to local newspaper information requests and questions; and the EPA published a Fact Sheet and Frequently Asked Questions on its website.

During the April 8 through May 23, 2019 comment period, the State of Michigan requested additional time to submit comments through June 21, 2019. The EPA granted this request. In addition to notifying the State of the extension of the comment period, a notification was sent to designated local governmental offices. Appendix I provides a table of entities notified of the public comment opportunity and a list of comments received. Appendix II provides the EPA's response to comments.

#### 4. Statutory and Regulatory Provisions

The following are certain statutory and regulatory provisions relevant to the EPA's decision.

- a. Section 518 of the Clean Water Act, 33 U.S.C. § 1377, authorizes the EPA to treat an eligible Indian tribe in the same manner as a state if it meets specified eligibility criteria.
- b. U.S. EPA, "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) (codified at 40 C.F.R. Part 131) (*see also* 81 *Fed. Reg.* 30183 (May 16, 2016)), establish the regulatory requirements for a tribe to administer water quality standards and certification programs.

#### 5. Policy Statements

The following are guidance documents and policy statements relevant to the Agency's decision.

- a. EPA Policy for the Administration of Environmental Programs on Indian Reservations, November 11, 1984.
- b. Memorandum from Jonathan Cannon and Robert Perciasepe to Assistant Administrators and Regional Administrators, "Adoption of the Recommendations from the EPA Workgroup on Tribal Eligibility Determinations," March 19, 1998.

- c. Memorandum from Marcus Peacock to Assistant Administrators and Regional Administrators, “Strategy for Reviewing Tribal Eligibility Applications to Administer EPA Regulatory Programs,” January 23, 2008.

## II. Requirements for Program Eligibility Approval

Under CWA Section 518 and the EPA's implementing regulation at 40 C.F.R. § 131.8(a), four requirements must be satisfied before the EPA can approve a tribe's program eligibility application for water quality standards under Section 303(c) and certification under Section 401. 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 that are held by an Indian tribe, held by the United States in trust for Indians, 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.

The EPA's regulation at 40 C.F.R. § 131.8(b) identifies what must be included in an application by an Indian tribe for program eligibility to administer water quality standards. The EPA separately reviews tribal water quality standards under 40 C.F.R. §§ 131.6 and 131.21. A program eligibility approval by the EPA under 40 C.F.R. § 131.8 does not constitute an approval of water quality standards. Where the EPA determines that a 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 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 National Pollutant Discharge Elimination System program.

### A. Federal Recognition

Under Section 518 of the CWA and its implementing regulations, the EPA can approve a program eligibility application only from an “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(1). 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).

KBIC is a federally recognized tribe.<sup>2</sup> As discussed below, the Tribe is exercising governmental authority over its reservation and trust parcel included in its TAS application. Thus, the EPA finds that the Tribe meets the requirements of 40 C.F.R. §§ 131.8(a)(1) and (b)(1).

## B. Substantial Governmental Duties and Powers

To show that it has a governing body carrying out substantial governmental duties and powers over a defined area, 40 C.F.R. § 131.8(b)(2) requires that a tribe submit a statement that: (i) describes the form of the tribal government; (ii) describes the types of governmental functions currently performed by the tribal governing body; and (iii) identifies the source of a tribal government's authority to carry out the governmental functions currently being performed. As explained below in more detail, the Tribe's CWA Application describes the form of its government, types of governmental functions performed, and the Tribe's authority to carry out the governmental functions being performed. The Tribe's Supplemental CWA Application affirmed that there were no significant changes concerning Tribal governance at the time of the Supplemental CWA Application.

**(i) Form of the Tribal Government:** The Tribe's government is comprised of:

- A 12-member Tribal Council;<sup>3</sup>
- Two voting districts, L'Anse and Baraga, each of which have six elected council members;<sup>4</sup>
- A tribal court exercising both criminal and civil jurisdiction under KBIC's tribal laws at both trial and appellate levels.<sup>5</sup>

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<sup>2</sup> U.S. Department of the Interior, Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs, 85 Fed. Reg. 5462, 5463 (January 30, 2020). This is a website that can be cited: <https://www.govinfo.gov/content/pkg/FR-2020-01-30/pdf/FR-2020-01-30.pdf> last checked February 12, 2020. The Tribe's CWA Application includes a citation to the Department of the Interior Bureau of Indian Affairs listing of federally recognized Indian Tribes in the United States. 80 Fed. Reg. 1942, 1946 (Jan. 14, 2015), KBIC CWA Application, Appendix C.

<sup>3</sup> CWA Application at 2-3; Amended CWA Application at 5-6; Supplemental CWA Application at 1-2.

<sup>4</sup> CWA application at 2-3; Amended CWA Application at 6; Supplemental CWA Application at 2-3.

<sup>5</sup> CWA Application at 6-7; Amended CWA Application at 6, 9; Supplemental CWA Application at 2-3.



(ii) **Types of Government Functions Performed by the Tribe:** Governmental functions performed by the tribe include the following:

- Boards, committees and task forces covering programs for drugs, education, natural resources/forestry, culture, youth education, and energy;
- A community college chartered in 1975;
- Legislative and regulatory functions over hunting, fishing, trapping, and gathering; water supply and wastewater management; household solid and hazardous waste management; natural resources; social services (elder care, housing, and heating); tribal conservation management districts, together with the U.S. Department of Agriculture; Bureau of Indian Affairs-approved integrated resource management planning; and the Tribe’s public works department;
- Law enforcement;
- Public health: The Tribe operates public drinking water supplies and wastewater sewer lines that serve the reservation. It conducts sampling at private residential drinking water wells and coordinates with Indian Health Service to address problems. The Tribe has completed source water assessments and protection plans for the public water supplies and has undertaken well abandonment projects to permanently seal unused residential wells to protect groundwater;<sup>6</sup>
- Casino management;
- Issuance of harvesting licenses; and,
- Natural Resource Management department.<sup>7</sup> Natural resource programs include fishery/wildlife assessment and monitoring, invasive species monitoring and control, wetlands, habitat assessment, and aquaculture. Environmental programs include surface water monitoring, tribal site response related to Brownfields and contaminated properties, air quality, solid waste and household hazardous waste management. The EPA has previously granted the Tribe TAS for CWA Section 106 Water Pollution Protection.

(iii) **Source of the Tribe’s Governmental Authority:** The Tribe’s Applications contain documentation showing that its government is organized under a federally approved constitution and is divided into legislative, executive, and judicial functions. The Tribe’s government carries out authorities and programs to implement social services, education, taxation, land management, natural resource management, commercial businesses, and law enforcement through tribal ordinances and codes adopted by the Tribal Council.<sup>8</sup>

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<sup>6</sup> CWA Application at 51-52.

<sup>7</sup> CWA Application at 4-8, 46-52; Amended CWA Application at 6-11, 48-54; Supplemental CWA Application at 1-2 and 4.

<sup>8</sup> CWA Application, Appendix D: Constitution and By-Laws of the KBIC Indian Community, December 17, 1936. See also CWA Application, Appendix E: KBIC Tribal Code, Table of Contents; Appendix F: KBIC Government Structure and Committees/Boards/Task Force Groups; Appendix G: Title 10; Hunting, Fishing, Trapping and Gathering Ordinance; Appendix J: Resolution KB-1020-2001, Tribal Conservation District Act; and Appendix M: KBIC Health Department Structure.

The above description of the bases of authority and of the functions carried out by the Tribe to regulate the conduct of members, control the disposition of property, and provide for the public health and environmental protection demonstrates that the Tribe has met the requirements of 40 C.F.R. §§ 131.8(a)(2) and (b)(2).

#### C. Jurisdiction Over Waters within the Borders of a Reservation and on one Trust Land Parcel

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 Tribe asserts authority over 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, 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).

**(i) Map or Legal Description:** The Tribe's application seeks TAS eligibility for purposes of administering water quality standards and certifications over lands located within the exterior boundaries of the KBIC Reservation and for one adjacent parcel held in federal trust for the Tribe.<sup>9</sup> The boundaries of the Tribe's reservation are set out in the Treaty of 1854 (10 Stat. 1109 (September 30, 1854)), as subsequently surveyed:

1st. For the L'Anse and Vieux De Sert bands, all the unsold lands in the following townships in the State of Michigan: Township fifty-one north range thirty-three west; township fifty-one north range thirty-two west; the east half of township fifty north range thirty-three west; the west half of township fifty north range thirty-two west, and all of township fifty-one north range thirty-one west, lying west of Huron Bay. 10 Stat. 1109, Art. 2.

The Tribe's CWA Application provides the following current description of the reservation boundary:

Township fifty-one north range thirty-three west; township fifty-one north range thirty-two west; the east half of township fifty north range thirty-three west; the west half of township fifty north range thirty-two west, and all of township fifty-one north range thirty-one west, lying west of Huron Bay.<sup>10</sup>

In *Keweenaw Bay Indian Community v. Michigan*, 784 F. Supp. 418 (D. W.D. Michigan, February 28, 1991), the Michigan District Court affirmed these boundaries, but additionally determined that the Tribe's reservation did not extend into Keweenaw Bay, as the beds and

<sup>9</sup> Amended CWA Application at 12-13; Supplemental CWA Application at 1-3.

<sup>10</sup> CWA Application, at 9-10; Amended CWA Application at 12-13.

banks of the Bay had passed to Michigan upon statehood, prior to the creation of the KBIC reservation. 784 F. Supp. at 420.<sup>11</sup> Accordingly, the Tribe's Supplemental CWA Application clarifies that the Tribe seeks to assert jurisdiction for the purposes of this Application only to the high-water mark of the Bay:

Consistent with the United States District Court for the Western District of Michigan's ruling concerning title to and jurisdiction over the beds and waters of Keweenaw Bay in that case for the purpose of this Application, **the KBIC does not seek to assert regulatory jurisdiction over the beds or waters of the Keweenaw Bay** [emphasis in original].<sup>12</sup>

Additionally, the Tribe provided information that established the tribal trust land status of a parcel located at Twp. 50 N, R 33 W, Sect. 9.<sup>13</sup> The Tribe's Supplemental CWA Application provides a warranty deed, dated February 25, 1941, showing the fee to trust transfer of this parcel to the United States in trust for the Tribe. that the parcel is held in trust for KBIC. The legal description of this parcel is as follows:

A parcel of land in the Southeast quarter (SE ¼) of the Southeast quarter (SE ¼) of Section Nine (9), Township Fifty (50) North of Range Thirty-three (33) West, described as follows:

Commencing at the southeast corner of Section Nine (9), Township Fifty (50) North of Range Thirty-three (33) West; thence West 1320 feet; thence north 924 feet; thence east 1320 feet; thence south 924 feet to the place of beginning, containing twenty-eight (28) acres, more or less.<sup>14</sup>

Tribal trust lands validly set aside for Indian tribes, sometimes termed *informal reservations*, have the same status as formal reservations for purposes of the 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. For other tribes, such tribal trust lands may constitute the tribe's entire reservation land base. In any case, tribal trust lands, wherever located, qualify as within the borders of an Indian reservation.<sup>15</sup> Therefore, the trust land encompassed by this parcel constitutes informal reservation land and, thus, is eligible for inclusion in the Tribe's Application.

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<sup>11</sup> Supplemental CWA Application at 5.

<sup>12</sup> Supplemental CWA Application at 5.

<sup>13</sup> Supplemental CWA Application at 5 and Appendix OO.

<sup>14</sup> State of Michigan, County of Houghton, Baraga County Register's Office, Warranty Deed, 52 *Deeds* 416 (July 7, 1941), KBIC CWA Supplemental Application, Appendix OO.

<sup>15</sup> 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).

The legal description and maps provided by the Tribe in its Application are consistent with the L'Anse reservation boundary, as delineated by the Michigan District Court and, as noted in our response to comments in Appendix II of this document, the Michigan Department of Environment, Great Lakes and Energy (MI EGLE) does not dispute this boundary.

Based on the information described above, the EPA has determined that the Tribe 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.

**(ii) Statement Describing Basis for the Tribe's Authority:** By letter dated October 27, 2017, the Tribe supplemented its Application to rely on the congressional delegation of authority<sup>16</sup> in CWA Section 518 in addition to its inherent authority presented in its original Application.<sup>17</sup> The EPA received no comments challenging this assertion of the Tribe's authority. The EPA is not otherwise aware of any impediment limiting the Tribe's ability to effectuate the congressionally delegated authority. The EPA therefore concludes that the Tribe can rely on the congressional delegation of authority to regulate surface water quality over its formal and informal Reservation lands, as described above, and that the Tribe has satisfied the application requirement of 40 C.F.R. § 131.8(b)(3)(ii).

**(iii) Identification of the Surface Waters for which the Tribe Proposes to Establish Water Quality Standards:** A tribe's descriptive statement of authority in its application for TAS approval 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, KBIC asserts authority, and this decision approves the Tribe's TAS eligibility (to the extent permitted by the CWA), over surface water resources located on lands within the exterior boundary of the L'Anse reservation and one parcel of trust land, as described above.<sup>18</sup> The locations and boundaries of these waters are depicted in the maps included in the Tribe's Application. Some of the key waters identified by the maps and included in this approval are the following named waters (and their tributaries) that occur within those areas: Bella Lake Creek; Bishop Lake; Camp Creek; Dakota Creek; Daults Creek; Dead Man's Creek; Denomie Creek; Gomanche Creek (and its tributaries); Kallio Creek; Kelsey Creek; Laughs/Laws/Lost Lake; Linden Creek; Little Carp River; Little Silver Creek; Meadow Creek; Mud Lakes and Sloughs; Mud Lake Creek, Page Creek; Pekkala Creek; Pequaming Sloughs and Wetland; Pinery Lakes; Robillard Creek; Sand Point Sloughs; Silver River (and its tributaries); Third Lake (including its inlet creek); Unlabeled #1 Creek into Huron Bay; Unlabeled # 2 Creek into Huron Bay; and Unlabeled # 3 Creek into Huron Bay, and tributaries for those water bodies, and excluding the beds or waters of the Keweenaw Bay.

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<sup>16</sup> 81 *Fed. Reg.* 30183 (May 16, 2016).

<sup>17</sup> CWA Application at 55 (referencing letter from Dorsey & Whitney LLP, to President Warren Swartz, Jr., May 16, 2013, at 10); CWA Supplemental Application at 3.

<sup>18</sup> CWA Application, p. 8.

The Tribe has satisfied 40 C.F.R. § 131.8(b)(3)(iii) by identifying the surface waters over which it proposes to establish water quality standards.

(iv) **The EPA's Finding on the Tribe's Assertion of Jurisdiction:** Based on the information included in the Tribe's Application as discussed above, the EPA finds that KBIC meets the requirements set forth at 40 C.F.R. § 131.8(a)(3) and (b)(3).

#### D. Capability

#### **40 C.F.R. § 131.8(b)(4) *A narrative statement describing the capability of the Indian Tribe to administer an effective water quality standards program***

To demonstrate that a tribe has the capability to administer 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 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 capabilities. 40 C.F.R. §§ 131.8(b)(4)(i)-(v) requirements are addressed in more detail below.

KBIC's Application describes the governmental authorities and offices that carry out environmental management programs for the Tribe. Included in the narrative is a description of the Natural Resources Department and the associated natural resource regulatory codes which this department has the authority to implement. The Tribe's Application additionally describes the authority vested in this department by the Tribe to regulate water, including the authority to establish water quality standards and to make water quality certification decisions should the Tribe's request for these authorities be approved by the EPA. The description of authorities, programs, regulations, organizational roles, and hiring practices demonstrates the Tribe's experience and capability in implementing environmental and public health programs.

In a supplemental letter, dated October 7, 2019,<sup>19</sup> the Tribe submitted additional information on capability in response to comments by the State and others. The letter summarizes the technical

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<sup>19</sup> Letter from Warren C. Swartz, President, KBIC to Cathy Stepp, Regional Administrator, USEPA Region 5, October 7, 2019.

training, meetings, and conferences involving current KBIC staff and managers; partnerships with other tribes, federal and state governments; non-profits and academic institutions including the Great Lakes Indian Fish and Wildlife Commission (GLIFWC) and others; the formation of a water quality standards multidisciplinary team to develop and review water quality standards; contracts with Michigan Technological University (MTU) for water quality standards work; recent outreach and education events (e.g. Tribal Water Day); and two additional *curricula vitae* for the MTU researcher and assistant professor working with KBIC on water quality standards issues.

**(i) 40 C.F.R. § 131.8(b)(4)(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 (25 U.S.C. 450 et seq.), the Indian Mineral Development Act (25 U.S.C. 2101 et seq.), or the Indian Sanitation Facility Construction Activity Act (42 U.S.C. 2004a).***

The Tribe’s CWA Application and Supplemental CWA Application provide information describing the Tribe’s previous administrative and management experience with federal programs and specific environmental programs. The KBIC government employs approximately 300 people. Other tribal enterprises employ an additional 400 people. The application notes many years of experience managing and implementing multiple tribal and federal programs, including contract and compact programs authorized by the Indian Self-Determination and Education Assistance Act (25 U.S.C. §450 *et seq.*).<sup>20</sup>

The Tribe’s application materials describe management of programs for public health; social services; law enforcement; education; tribal courts; accounting and realty; housing assistance; water supply, sewer and wastewater systems; fish, wildlife, native plant and invasive species programs; water resources management, forestry, hazardous substances control program; solid waste management program; firefighting crew; and the effective implementation of treaty rights in the Chippewa ceded territories.

EPA-funded environmental programs administered and managed by the Tribe include: General Assistance Program (solid waste, radon monitoring, permitting assistance, renewable energy policy development, recycling program), Tribal Response Program for development and implementation of Brownfield work; Lake Superior Management Plan participation and implementation; Clean Water Program (CWA Section 106); and Air Quality Program (Clean Air Act Section 103 funding).

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<sup>20</sup> CWA Application, pp. 48-53.

**(ii) 40 C.F.R. § 131.8(b)(4)(ii) *A list of existing environmental or public health programs administered by the Tribal governing body and copies of related Tribal laws, policies, and regulations.***

The Tribe's public health and environmental programs are described in the KBIC TAS Application and are also summarized in the previous section above. These include the following programs and services covering:

- Fish, wildlife, native plant and invasive species;
- Water resources management;
- Forestry;
- Hazardous substances control;
- Solid waste management;
- Groundwater and residential well sampling;
- Spring cleanup programs;
- Conservation;
- General Assistance Program (solid waste, radon monitoring, permitting assistance, renewable energy policy development, recycling programs);
- Tribal Response Program for development and implementation of Brownfield work;
- Lake Superior Management Plan (participation and implementation);
- Clean Water Program;
- Air Quality Program (Clean Air Act (CAA) 105 TAS application was approved on October 7, 2019); and
- Environmental Outreach and Education.

The Tribe's public health programs and services include:

- Public water supply, sewer and wastewater systems;
- In-home care of elderly and handicapped tribal members;
- Healthcare transportation services;
- KBIC Indian Health Clinic and a health benefits program; and
- Hazardous waste collection.

**(iii) 131.8(b)(4)(iii) *A description of the entity (or entities) which exercise the executive, legislative, and judicial functions of the Tribal government.***

As explained above, KBIC's government exercises executive, legislative and judicial authority. The Tribal Council has delegated the day to day government operations administrative authority and duties to the offices of the President and Chief Executive Officer, who head the executive branch of the KBIC Government. The Tribal Council retains legislative authority and retains authority over operation of the executive branch. Decisions made by the Executive Council, the Council President, the Chief Executive Officer, boards, committees and governmental

departments are subject to Tribal Council review. A tribal court system administers the Tribe's civil and criminal codes.

**(iv) 131.8(b)(4)(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.***

The Tribe's CWA Application materials included a description of the administrative agency responsible for implementation of the EPA-approved tribal water quality standards program as well as the technical capability of staff. The KBIC Natural Resources Department (KBNRD) will carry out the water quality standards and 401 certification programs. Two existing water program staff, the Water Resource Specialist and the Water Resource Technician will administer the programs and receive supervision from the Natural Resource Director.

**(v) 131.8(b)(4)(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. The plan must address how the Tribe will obtain the funds to acquire the administrative and technical expertise.***

The Tribe's CWA Application included resumes and a brief description of capability. The Tribe's CWA Supplemental Application indicated the Tribe had trained and experienced staff to effectively implement its program, but the EPA received several comments during the second public comment phase on the Tribe's application that questioned the Tribe's capability to implement an effective water quality standards program. In response, EPA requested that KBIC provide additional information regarding capability. EPA also held a conference call with representatives of MI EGLE on August 28, 2019, in which EPA obtained clarification regarding additional information the State sought regarding the Tribe's capability. On October 7, 2019, KBIC sent a letter to the EPA that provided additional information regarding capability. The letter summarizes the Tribe's technical training; professional engagements; partnerships with tribal, federal, state, non-profits and academic institutions; and recent outreach and education events. As a result, the Tribe has provided documentation of not only their present capability in running complex public health and environmental management programs (i.e., those covering fish and wildlife conservation, forestry, hazardous substance control, solid waste, water resources, etc.) but also of what resources and both in-house and outside expertise it will utilize in developing water quality standards. KBIC has explained that it aims to expand in house training for its water resources staff and intends to form a multi-disciplinary team to advise during the water quality standards development process. That team will include tribal water quality experts, as well as experts from Michigan EGLE, GLIFWC, and Michigan Technological University (MTU). KBIC has also explained that it has a contract with MTU to assist it in water quality standards development and the MTU contact has extensive experience in water quality standards work within Michigan and Wisconsin.



Funding for the KBNRD as well as for the ongoing training of water resources staff will include CWA Section 106 Water Pollution Protection funding, along with Bureau of Indian Affairs (BIA) 638 Water Program funding, tribal funding and tribal general revenue funds. The Tribe's CWA Section 106 program has been in place since January 1993 and includes Reservation-wide water quality monitoring, assessment, inspection and analysis. Other sources of funding include the Indian Self-Determination and Education Assistance Act funding from the BIA, and programmatic and grant funding received from the BIA, EPA, U.S. Department of Agriculture, U.S. Fish and Wildlife Service, U.S. Geological Survey, and other agencies and organizations.

Based on the information provided by the Tribe that describes its capability to administer an effective water quality standards and certification program, the EPA finds that KBIC meets the requirements in 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, under the EPA's TAS regulations, the EPA provides notice and an opportunity to comment on an applicant tribe's assertion of authority to regulate reservation water quality. Any comments addressing the substance of actual water quality standards that an eligible tribe may develop and submit to the EPA in the future for review under CWA Section 303(c) are beyond the scope of the TAS process. However, the EPA notes that several commenters have raised concerns about potential water quality standards conflicts that may arise between the State of Michigan and KBIC.

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 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 the 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 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. For example, before adopting final standards, the tribe must hold a well-publicized public hearing, notify the public and affected parties and provide copies of relevant materials in advance, and for final rulemaking provide a responsiveness summary to the tribal decision-maker and the public. See 40 C.F.R. § 131.8 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 being proposed by the tribe would be appropriately raised and addressed as part of that process.

The 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 the EPA to promulgate regulations providing a mechanism for resolving any unreasonable consequences that may arise as a result of differing state and tribal water quality standards. This mechanism must provide for explicit consideration of relevant factors including, but not limited to, the effects of differing water quality permit requirements on upstream and downstream dischargers, economic impacts, and present and historical uses and quality of the waters subject to such standards. The EPA has promulgated such regulations at 40 C.F.R. § 131.7, which 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.<sup>21</sup>

It is the EPA's understanding that the Tribe has participated in discussions with the State of Michigan regarding the adoption of water quality standards. The Region supports these efforts and encourages KBIC and Michigan to continue these discussions, including other interested stakeholders as appropriate. The EPA encourages an inclusive discussion among all concerned entities in the area to help promote cooperative approaches to implementation of CWA programs.

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<sup>21</sup> 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 with TAS approval; (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 by the State and Tribe 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.



## Appendix I: Table of Entities Receiving Notice and Providing Comments

<b>ID</b>	<b>Appropriate Government Entities (AGEs) Notified</b>
	Gretchen Whitmer, Governor of Michigan
	Mike Prusi, Director - Governor's Northern Michigan Office
	Dana Nessel, Michigan Attorney General
	<b>Local Governments Notified</b>
	Kim Fedie, Baraga County Clerk
	LeAnn LeClaire, Village of Baraga
	Robert Lafave, Village of L'Anse
	Lowella Eskel, Covington County Supervisor
	Amy Leaf, Village of L'Anse and Covington Township
	William Seppanen, Michigamme Township Supervisor
	Debbie Kinnunen, Clerk's Assistant Michigamme Township
	Peggy Loonsfoot, Office of the President and KBIC Tribal Center
	Lorie Denomie, KBIC Tribal Court
	Jackie Larson, Skanee Post Office
	<b>Additional Local Government Outreach</b>
	Baraga Township and Baraga Village Officials conference call with EPA – October 17, 2019
	<b>AGE Comments Received</b>
A	State of Michigan - MI EGLE, Liesel Eichler Clark, Director (Diana Klemans)
	<b>Local Government Comments Received</b>
N	Wendy Goodreau - Baraga County Board of Commissioners
T	Amy Isaacson, Baraga Township Supervisor. See Baraga County and Township meeting summary of October 17, 2019
	<b>Public Comments Received</b>
B	Katie Cather
C	Roberta Schultz
D	Damon Lieurance
E	Patrick Hanchin, Charlevoix Fisheries Station
F	Dean I. Reid, D and S Forest Services Company
G	Zachary W. Behler, Foster, Swift, Collins, and Smith, PC; Village of Baraga
H	Denise Pallarito, Michigan Association of Timbermen
I	Linda Zimmer
J	Kevin Godbout, Weyerhaeuser

K	Evan McDonald, Keweenaw Land Trust
L	Horst Schmidt, Upper Peninsula Environmental Coalition
M	Sharon L. Eklund, Baraga County Democratic Party
P	Nancy Warren
Q	Jeff Ratcliff, KBIC Economic Development Alliance
R	Glen D. Tolksdorf, Tolksdorf Forestry
S	Nancy Schuldt, Fond du Lac Environmental Program
U	Ann McCammon Soltis, Great Lakes Indian Fish and Wildlife Commission
W,X	Linda Rullison, Friend of the Land of Keweenaw
Y	Wes Windover, Biewer Forest Management LLC
Z	Deb Hanson
AA	Margo Santti
BB	Theresa Kraker
CC	Carl Lindquist, Superior Watershed Partnership and Land Trust
DD	John Saarinen
EE	Michael L. Roberts
FF	Nick Lindemann, Selkey Fabricators LLC
GG	Dave (last name unknown), phone message
HH	Pete (last name unknown), L'Anse Township
II	David Timdral
JJ	Tim Bennet
KK	Anonymous phone message left by an individual
LL	Anonymous phone message left by an individual

## Appendix II. EPA Response to Comments

The Keweenaw Bay Indian Community (KBIC) applied to the EPA for treatment in a similar manner as a state (or TAS) for purposes of administering the water quality standards (WQS) and water quality certification programs under Clean Water Act (CWA) Sections 303(c) and 401.

In accordance with EPA practice and pursuant to 40 C.F.R. 131.8(c), the EPA notified appropriate governmental entities and the general public of, and provided an opportunity to comment on, “the substance and basis of the Tribe’s assertion of authority to regulate the quality of reservation waters.” Consistent with EPA policy and practice, the EPA provided the KBIC an opportunity to respond to the agency regarding all comments received.

The EPA received 36 separate letter, email, and telephone comments on the KBIC application.<sup>22</sup> Comments are organized by topic. Comments are referenced below using [letter] to identify the commenter as listed in Appendix 1. The EPA identifies the number of the question/comment by the capital letter Q and responses by the capital letter R. Copies of all comments received are found in the Administrative Record for this decision.

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### 1. Comments on Geographic Scope of Jurisdictional Assertion

Q1: [A] and [G] The Tribe’s TAS application should be limited to surface waters within the L’Anse Reservation.

**R1:** The EPA acknowledges and appreciates the comment submitted by the State of Michigan, the Village of Baraga, and touched upon by other commenters. Under CWA Section 518, tribes can seek eligibility to administer CWA regulatory programs over their entire reservations, both formal and informal. Tribes can seek TAS with respect to water resources pertaining to any type of on-reservation land, including, for example, reservation land held in trust by the United States for a tribe, reservation land owned by or held in trust for a member of the tribe, and reservation land owned by non-tribal members. Conversely, tribes cannot obtain TAS under the CWA for water resources pertaining to any non-reservation Indian country or any other type of non-reservation land.<sup>23</sup>

The term “reservation” includes:

- *Formal Indian reservations* established through federal treaties with tribes, federal statutes, or Executive Orders of the President.

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<sup>22</sup> Comments are directly quoted as noted.

<sup>23</sup> See 81 *Fed. Reg.* 30183, 30191.

- Tribal trust lands validly set aside for Indian tribes, sometimes termed *informal reservations*. Such trust lands 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. For other tribes, such tribal trust lands may constitute the tribe's entire reservation land base. In any case, tribal trust lands, wherever located, qualify as within the borders of an Indian reservation.

The Tribe's application for TAS includes all those surface waters located within the L'Anse Reservation and on one parcel of off-reservation land held in trust for the tribe. Surface waters encompassed within these two land areas are eligible for inclusion in the Tribe's request for TAS.

Q2: [J:34] "Weyerhaeuser will be directly impacted by this proposal. According to the tribal boundary map provided in EPA's notice, we have roughly 16,000 acres of timberlands located within the tribal boundary. It is unclear if the tribal boundary map is correct. Additionally, the map provided does not provide a legal description upon which a potentially impacted party can determine if land-proposed [sic] for inclusion are [sic] non-reservation land, or land formally designated as reservation land but now owned by non-tribal members."

Q3: [N:48] "The ownership of land on the KBIC reservation, unlike many other Indian reservations, is primarily non-Indian. In fact, KBIC and its members own less than 1/3 of the real property located within their reservation boundaries. The remaining 2/3 of that land is owned by non-Indian individuals or entities."

**R2-3:** Under CWA Section 518, tribes can seek eligibility to administer CWA regulatory programs over their entire reservations. Tribes can seek TAS with respect to water resources pertaining to any type of on-reservation land, including, for example, reservation land held in trust by the United States for a tribe, reservation land owned by or held in trust for a member of the tribe, and reservation land owned by non-tribal members. Conversely, tribes cannot obtain TAS under the CWA for water resources pertaining to any non-reservation Indian country or any other type of non-reservation land.

As discussed in Section II.C.i above, in addition to the maps included in its application, KBIC provided a legal description of the reservation that is consistent with the federal district court decision establishing the exterior boundaries of the reservation and has, additionally, provided a legal description of the trust parcel located adjacent to its formal reservation boundary. As discussed in the Decision Document, surface waters on all lands encompassed within the exterior boundaries of the L'Anse reservation and on the single trust parcel are eligible for inclusion in the Tribe's application for TAS, irrespective of land ownership.

Q4: [A:1] “Footnote 9 in the KBIC’s 2017 supplemental submittal holds open the possibility that it will seek broader regulatory jurisdiction in the future. . . . If KBIC asserts jurisdiction over the bed or waters of Lake Superior in the future, the USEPA must notify EGLE and any other affected state agencies in a timely manner so that they may respond.”

**R4:** The EPA acknowledges and appreciates the comment submitted by the State of Michigan. The Tribe’s application makes no claim, and the EPA has made no approval, of TAS that would extend to the bed or waters of Lake Superior. The EPA agrees that should KBIC decide to request approval to extend its TAS to additional lands outside the boundaries of the reservation, including the bed or waters of Lake Superior, KBIC would be required to submit a new application for such extension of authority, and the EPA would be required to notify the State and others as the Agency did for this Application.

## 2. Comments Regarding the Scope of Surface Waters Included in the Application

Q5: [A:2] “The USEPA’s regulations allow trust lands to be included in a TAS application, but only if they are ‘within the borders of the Indian reservation.’ [citations omitted]. The USEPA’s regulations do not allow a Tribe to obtain TAS approval to develop WQS outside of an Indian reservation. . . . The trust lands at issue in this application are excluded from the map of water bodies within the L’Anse Reservation that are Appendix B to its Draft WQS, which are within Appendix PP to the TAS application. It is not clear from those maps and other application materials whether that parcel has surface water bodies for which the KBIC would develop WQS in the first place. Thus, the KBIC’s TAS application cannot extend to lands outside the reservation.”

**R5:** The EPA acknowledges and appreciates the comment submitted by the State of Michigan. As noted in our response to comments in Section 1, trust lands validly set aside for a Tribe constitute informal reservation lands, eligible for TAS approval. The parcel in question may contain a small emergent patch of wetlands and drainage channels, but has not been surveyed in detail.<sup>24</sup> However, the presence or absence of surface waters does not impact eligibility for TAS.

Q6: [G:28] “The Village has been provided a map that suggests that KBIC believes it can assert jurisdiction over water bodies outside of the KBIC Reservation as well, including the Linden Creek within the Village limits. . . . [A] small portion of the Village bordered on the South by Eastern Avenue, on the West by the Keweenaw Bay, to the North by Jentoft Road, and on the East by the Village Limit. . . is on the KBIC Reservation. . . If KBIC’s pending TAS Application is accepted by your office, the Village asks that the Northern neighborhoods and any waterbodies outside the Reservation be excluded from the regulated area.”

**R6:** The EPA acknowledges and appreciates the comment submitted by the Village of L’Anse. As explained in our Response 2-3, above, surface waters on all lands encompassed within the



exterior boundaries of the L'Anse reservation and on the single trust parcel are eligible for inclusion in the Tribe's Application for TAS, irrespective of land ownership. This includes that portion of Village lands located within the reservation boundary and the portion of Linden Creek within the reservation boundary and excludes the beds and banks of Keweenaw Bay. The EPA does not expect tribal eligibility for TAS to administer water quality standards under the CWA to alter Village zoning patterns or authorities. Neighborhoods and waterbodies outside of the Reservation, except for the one trust property listed, are not included in the Tribe's TAS Application.

Q7: [A] "If the KBIC intends to regulate only those surface water bodies listed in its application or depicted on the maps it has provided, then it has adequately identified the surface waters where it proposes to establish WQS. If the KBIC intends to establish WQS for other surface waters, it must provide a method to identify them."

**R7:** The EPA appreciates the State of Michigan's comment that the maps and surface water descriptions in the Tribe's application correctly depict the external Reservation boundaries and surface water resources.

Q8: [A:3] "The KBIC makes a variety of statements about waters within the L'Anse Reservation in the application that are not listed or mapped. The KBIC refers to all surface waters, and all waters of the United States, and all waters of the United States under the USEPA's regulatory definition of that term. These different terms create confusion about which surface waters would be subject to WQS that the KBIC seeks to develop. . . . There are several ways the KBIC can comply with 40 C.F.R. Section 131.8(b)(3)(iii), while also establishing WQS for unlisted and unmapped waters. For instance, the KBIC may adopt a definition of waters to which its WQS apply, describe the natural characteristics of surface waters it regulates, or could use a combination of these approaches when defining surface waters."

Q9: [A:4] "Regardless of which approach the KBIC chooses, it must clarify this definition or other method of identifying the unlisted and unmapped surface waters that will be subject to the WQS it develops before the USEPA can act on its TAS application. Regardless of the waters the KBIC intends to cover by its WQS, the USEPA may only approve TAS for those waters that are waters of the United States under the CWA regulations. These waters may change as the regulatory definition for water of the United States changes."

**R8-9:** The EPA acknowledges the State of Michigan's comments on water quality standards that may be established by KBIC for waters within the L'Anse Reservation. However, the approval of the TAS Application does not address the scope of federal jurisdiction over any waters of the United States. As indicated above, the EPA has determined that the Tribe has satisfied 40 C.F.R. § 131.8(b)(3)(iii), which requires that a tribe's application include "[a]n identification of the surface waters for which the Tribe proposes to establish water quality standards." The

identification requirement in 40 C.F.R. § 131.8(b)(3)(iii) and the other TAS eligibility criteria, described above, do not require the Tribe to demonstrate or the EPA to determine if the identified waters are waters of the United States. Accordingly, the EPA’s determination that the Tribe has identified surface waters within its Reservation for which it proposes to establish water quality standards is not a determination that the waters identified by the Tribe are waters of the United States.

As noted above, this TAS approval does not constitute approval of water quality standards but rather the Tribe’s eligibility to submit water quality standards to EPA for approval under CWA Section 303(c). Development of such standards would remain subject to all requirements of the EPA’s regulations 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. EPA-approved water quality standards are applicable for CWA purposes only for those waters that are waters of the United States.

### 3. Comments Relating to the Treaty of 1854

Q10: [A:9] “. . . KBIC's application asserts that the Treaty of La Pointe, 10 Stat. 1109 (Sept. 30, 1854) (1854 Treaty), is a source of its authority to regulate water quality on the L'Anse Reservation. According to the application, in the 1854 Treaty, ‘KBIC reserved to itself the territory and resources within the Reservation in exchange for some of the KBIC's interest in other land in the western Upper Peninsula of Michigan.’ . . . In 1854, after failing to force the Ojibwe Bands to remove (even after the Sandy Lake tragedy), the United States negotiated a new treaty with the Ojibwe Bands that were parties to the 1842 Treaty. Article 1 secured a land cession on the north and west shores of Lake Superior, not in Michigan. Therefore, it is not clear what ‘other land in the western Upper Peninsula’ in the 1854 Treaty exchanged for the L'Anse Reservation as the KBIC claims. Moreover, the 1854 Treaty created the L'Anse Reservation out of lands that had been ceded; it does not recognize a reservation of unceded aboriginal lands as the application implies. . . . When making a decision on this TAS application, the USEPA should not rely on the statement concerning the 1854 Treaty quoted above.”

Q11: [J:35] “The L'Anse reservation is the oldest and largest reservation in Michigan. Established under the Chippewa Treaty of 1854, it created the permanent homeland of the Chippewa (Ojibwa Anishnaabeg) band signatories to the Treaty. The 1854 Treaty-which [sic] forms the basis for KBIC's assertion of jurisdiction over the majority of lands identified in its application created a reservation from “all the unsold lands” in the designated area. EPA must determine whether all of the land identified in KBIC's application were included in the Chippewa Treaty of 1854, i.e., whether the lands had first been sold before the 1854 Treaty was signed.”

**R10-11:** The EPA acknowledges the comments regarding the establishment of the L’Anse reservation. As indicated in Response to Comment 3, under CWA Section 518, tribes can seek

eligibility to administer CWA regulatory programs over their entire reservations. The exterior boundaries of the L'Anse reservation were judicially delineated and affirmed by the federal district court for the Western District of Michigan. There, the court considered the 1854 Treaty and the subsequent history of land ownership within the reservation in detail. The State of Michigan was a party to this litigation and is bound by its orders. *Keweenaw Bay Indian Community v. State of Michigan*, No. M87-278-CA2, Order (W.D. Michigan, December 7, 1989); and *Keweenaw Bay Indian Community v. State of Michigan*, No. M87-278-CA2, Order, 784 F. Supp. 418 (W.D. Michigan, February 28, 1991). The comment does not appear to raise a concern with the geographic boundaries of the reservation as defined by the federal court. Thus, the EPA has no basis to conduct an independent evaluation of treaty history apart from that conducted by the federal court.

#### 4. Comments on the Geographic Scope of Delegation

Q12: [J:33] “In order to approve KBIC's request for TAS approval, EPA must clearly identify the legal and jurisdictional limits of this delegation. Issues of legal jurisdiction for the purpose of TAS delegation are unclear, and accordingly the request for delegation must be deferred until these jurisdictional matters are resolved.”

**R12:** EPA appreciates and acknowledges the comment. As explained in R1 above, the Tribe's application for TAS describes those surface waters located within the L'Anse Reservation and on one parcel of off-reservation land held in trust for the tribe. Surface waters encompassed within these two land areas are eligible for inclusion in the Tribe's request for TAS.

#### 5. Comments that the Application Contains Outdated Materials

Q13: [A:10] “Because the KBIC's TAS application has been pending since 2013, there are numerous statements or materials that are outdated. The USEPA should rely only on up-to-date, accurate information when deciding what action to take concerning this application.” The application should not include news articles and other information relating to State budget issues.

Q14: [A:11] “Other information in the application, such as information concerning the permit application for the Kennecott Eagle Mine and the construction of the KBIC's transfer station, are also outdated.” Additionally, the application should include efforts to amend the constitution and to update information about the independence of tribal courts.

Q15: [A:12] “EGLE is not suggesting that the time the USEPA needs to process a TAS application should be held against an applicant, but it should ensure that the information it relies on to make factual findings and issue a decision on the application is accurate and current. The USEPA should not make assumptions to fill in any gaps. Ideally, when applications have been pending for a long time, the USEPA would identify the current

information that is responsive to the application requirements so that the parties commenting on the application can focus on the materials relevant to the USEPA's decision.”

**R13-15:** The EPA acknowledges and appreciates MI EGLE’s comment regarding the preference for keeping materials updated in dockets provided for public notice and comment. KBIC’s application contains materials that span the time period from 2013 to the present because KBIC submitted its initial CWA Application in 2013 and its CWA Supplemental Application in 2017. The CWA Supplemental Application incorporated the Tribe’s 2013 Application and provided additional information. The EPA considered all of the application materials provided by the Tribe in reaching the final determination on the Tribe’s request for TAS for CWA Sections 303(c) and 401.

## 6. Comments that EPA’s Online and Paper Application Materials were Unorganized

Q16: [A:15] “The TAS application paper materials the USEPA provided to EGLE were disorganized, with pages out of order or missing. The materials posted on the USEPA's Web site were not presented in a way that allowed readers to distinguish between the 2013 application and the 2017 supplement, which made it difficult to understand what the supplement was addressing.” Issues the State described regarding posted materials included:

- A. There were two different copies of Appendix R in the paper copies, one including KBIC’s surface water organics monitoring program, one containing water quality sampling locations and related reports, and also a copy of the Tribe’s CWA 305(b) report. The State also commented that the online materials did not include Appendix R.
- B. The book contained in Appendix U, the Great Lakes Fish and Wildlife Commission’s (GLIFWC) Plants Used by the Ojibwa Indians, was present only in the paper copy of the application provided by EPA.
- C. Appendix SS, KBIC’s Hazardous Substances Control Ordinance, was missing Appendix B in the paper copies but the State accessed it in the online version.
- D. Additionally, the State described difficulty navigating scanned documents in the online version of the application.

**R16:** The EPA appreciates and acknowledges the comment provided by MI EGLE that the online and paper records for the KBIC TAS application might have raised confusion regarding the organization of certain materials.

In response to this comment, the EPA undertook a thorough investigation of the records that were posted both online at the EPA’s website and the paper files that were sent to the State and to the 11 repositories that were designated as official sites during the public comment process. The EPA does not find that the discrepancies noted by MI EGLE between the paper and electronic records amount to an insufficient record for the purposes of public notice and comment, as explained below.

Comment A: The EPA checked the online application materials and found that parts 1 and 2 of Appendix R were omitted from the online version but were included in the paper copy of the application.

Comment B: The EPA agrees that the GLIFWC book was missing in the on-line version – the EPA does not publish materials for which others hold copyright. The book was included in the paper copies available to MI EGLE and at the other repositories. The EPA acknowledges that additional clarity would have been provided had the EPA noted that the book was only available in the paper records.

Comment C: The EPA notes that Appendix SS is the Tribe’s Hazardous Substance Control Ordinance, which includes Appendix B, a list of soil cleanup levels. As the Tribe’s regulations for soil cleanup standards were included in the application only as part of a general showing of capability for implementing tribal environmental programs generally, the Tribe’s Application contained other materials that were substantively related to capability, and the soil standards are not substantively related to the Tribe’s Application for TAS for water quality standards, the EPA does not consider the omission of the sub-appendix relating to soil cleanup standards to be a defect in the public notice for the application. The EPA notes that this appendix was available in the online copy of the application that was available for public review throughout the public comment period and is found at Appendix SS.

Comment D: Additionally, the EPA notes that while some of the online files contained documents that were hundreds of pages long, these documents contained hyperlinks to assist in navigation. The EPA provided bookmarks and hyperlinks to help with navigation and ease of viewing.

Finally, the EPA notes that it received no inquiries relating to any of the documents referenced above during the extended public comment period, including from MI EGLE.

## 7. Comments on Outreach on Application

Q17: [FF:89] “. . .[W]hy is this not publicized, and a normal public hearing required? This is a wide spread move affecting more than 100,000 people and it seems like it’s being pushed through without letting the public know. They [KBIC] have already been on record against the mines, wind turbines, local power plant, ceiling tile plant and more. What do you think will happen when they have control? Please do not allow this to happen.”

**R17:** The EPA appreciates the comment and agrees that CWA TAS applications and adoption of CWA Section 303(c) water quality standards should undergo robust notice and comment opportunities that broadly reach interested parties and as consistent with EPA regulations.

The EPA’s TAS regulations for the CWA Sections 303(c) water quality standards and 401 certification programs (see 40 C.F.R. § 131.8 (c) *Procedure for processing an Indian Tribe’s*

*application*) include a process for notice to appropriate governmental entities—states, tribes and federal entities located contiguous to the reservation of an applicant tribe. Section 131.8(c)(2)–(3) affords these entities notice and 30 days to submit comments on the applicant tribe’s assertion of authority. As a matter of Agency policy, the EPA also makes such notice (e.g., via newspaper and website publications) broad enough that other potentially interested entities, such as local governments and the public, can participate in the process. The EPA’s public notice and outreach are described in detail in Section I.B.3 of our Decision Document.

In addition to the opportunities for public involvement the EPA provided, representatives from KBIC attended and held meetings soliciting input on their TAS application. Tribal representatives attended the “Tribal Water Day” in March 2019 and displayed TAS goals. MI EGLE staff including the State District Manager, attended. KBIC representatives attended a meeting with MI EGLE to discuss the State’s comments on the Tribe’s TAS application in St. Ignace on June 17.<sup>24</sup> KBIC representatives attended State Senator Ed McBroom’s “Office Hours” to discuss the TAS application on June 7, 2019 and tribal representatives attended the Baraga County Commissioner meeting on June 10, as well as a Baraga County Democratic Committee meeting on July 16, 2019 to discuss TAS application.<sup>25</sup>

The EPA notes that the Agency’s review of actual water quality standards involves a separate CWA action from review of the Tribe’s TAS Application. To the extent it addresses the process for adoption of water quality standards, the comment does not address the assertion of authority to manage and protect reservation water resources contained in the Tribe’s TAS Application and is thus outside the scope of the TAS comment process. The EPA notes, however, that 40 C.F.R. Part 25 establishes public notification and outreach requirements for the water quality standards adoption process. All states, eligible tribes and U.S. territories adopting water quality standards must meet the minimum requirements for public participation in 40 C.F.R. Parts 25 and 131 for the EPA to approve their water quality standards. Hence, the same level of public notice and review are required to be conducted for adoptions of new or revised tribal, state, U.S. territory or federal water quality standards.

## 8. Comments Asserting Tribes Should not have Regulatory Authority under the CWA

Q18: [B:17] “No tribe, culture, organization, religion, spiritual, or other group(s) should have any authority to ‘regulate’ any natural resources that belong to all citizens. Such organizations, tribes, religions, or ad hoc spiritual groups must have only one obligation that must be fully enforced: To obey and comply with all regulations and mandates.”

Q19: [B:18] “It matters not that a group may have centuries of cultural, traditional, religious, spiritual, sacrificial, or a multitude of other rituals or activities in their histories. Using ritual or historical activities to create and justify their own arbitrary standards or to avoid

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<sup>24</sup> Email from Stephanie Cree, KBIC, to David Horak, *et al.*, June 14, 2019.

<sup>25</sup> Email from Steffanie Cree to David Horak, December 10, 2019.

compliance with federal or state standards is not only a ruse, it is offensive to all who want natural resources protection regulations applied equally to all. The KBIC 's attempt to circumvent such regulations could wreak havoc and create a mishmash of ordinances which would make enforcement impossible.”

Q20: [B:19] “Only duly authorized governmental agencies that use scientific assessment to protect and ensure quality standards of natural resource--including but not limited to water, air, wildlife (terrestrial and aquatic), forest, plants, etc.--must fully occupy the regulatory arena.”

Q21: [B:20] “Of grave concern is the KBIC's and/or any other organization’s reported claims that their need to regulate water (air or any other resource) on their lands is based in [sic] a goal to shape regulations to fit their community's specific needs. We strongly oppose any such arguments as frivolous, opportunistic, and fraught with multiple negative impacts. If every individual or organization only complied with laws to fit their ‘specific needs,’ the results would be disastrous.”

Q22: [D:24] “As a Michigander that is 1/8<sup>th</sup> Native American, I am completely opposed to granting the KBIC Treatment as a State. I am not a member of their tribe, but I am a citizen of Michigan. This will continue to drive a wedge between the native community and Michiganders. This is eliminating Michigan’s sovereignty and gives a Native community power over Michiganders and their lands. This will be bad for Michigan, as a whole, because this will set a precedent in Michigan. It will destroy the relationship between local Michiganders and their Native neighbors! How is it right to allow KBIC members an extra vote on how we care for our natural resources, once as a Michigander and once as a member of the KBIC? Why should I, as a 1/8 Native and Michigander, be relegated to ½ of the citizenship of my KBIC neighbors? The greatest promise that America gives its citizens is that we will be treated EQUALLY under the law. Every facet of every government in the United States of America should endorse this basic truth of liberty. If this goes through, it will be a slap in the face to every American citizen that is a Michigander.”

Q23/24: [F:27] [H:31][R:62] “The State of Michigan manages over 3,288 miles of shore line, including inland waterways. The biologists and scientists that manage the massive bodies of water have the entire State of Michigan's best interest based on science and not a special interest group. I believe this would set a bad precedent and undermine the state of Michigan's management plan.”

Q25: [HH:91] Voicemail Message; Opposition of the KBIC WQS application.

Q26: [II:92] Telephone comment: The commenter doesn’t understand how anyone can take over his constitutional right to representation. “It’s like being governed by Canada.” He is a U.S. citizen and is concerned that as such he will be dictated to by the tribe and will have no voice. He believes there are constitutional issues here.

Q27: [JJ:93] “Indians are trying to control water and air. They want control from the DEQ.” He’s “100% against it”; his family is against it. “They have no right to impose on our rights. Why would a handful of people be dictating to us? Handful of tribes should not take over air and water quality.”

Q28: [KK:94] Anonymous. Opposition of the KBIC running EPA in the UP of Michigan.

Q29: [LL:95] Anonymous. Message: “I do not want the tribe to take over.”

**R18-29:** The EPA acknowledges and appreciates those commenters who assert that they oppose tribal assumption of authority under the CWA. The Agency wishes to clarify that in 1987, Congress amended the CWA by adding Section 518 to address the role of tribes. Section 518 of the CWA provides that tribes can receive authority to administer certain CWA programs if they can demonstrate to EPA that they meet several specific criteria. They must be federally recognized, have a functioning government, have the requisite jurisdiction over the lands that they name in their application, and have appropriate capability to administer the specific programs they seek – in this case, WQS and water quality certifications. CWA Section 518(e) and the EPA’s regulation at 40 C.F.R. §131.8 describe the specific criteria a tribe must meet, and the forms of documentation they must provide to EPA, in order to be found eligible for TAS for the WQS program. These requirements are further discussed in Sections I and II of the Decision Document.

EPA wishes to further clarify some of the Agency’s regulatory requirements that are set up to ensure integrity and transparency as tribes take on and implement the WQS and water quality certification programs. First, EPA ensures that the tribe has provided the application information required by EPA regulations, and will request more information if it finds gaps in documentation. Second, EPA notifies and reaches out to state and local governments, relevant federal agencies, and the local public to obtain any further information that would question – or support – the tribe’s assertion of authority, including any information about impediments to the tribe’s ability to effectuate that authority. Third, authorized tribes must meet the same requirements imposed on states when they set WQS or issue water quality certifications. For example, if EPA finds that a state or tribe’s water quality criteria are not scientifically defensible, those criteria cannot go into effect for CWA purposes. Fourth, once approved for TAS, the tribe itself must notify affected entities and provide public hearings to explain and take comments on the specific WQS they propose to adopt. Finally, when adopting WQS rules, the tribe also needs to provide a responsiveness summary to the public and certify to EPA that the tribe has adopted the WQS in accordance with all requirements of law.

It is also important to note that EPA’s approval of TAS is limited to administering CWA WQS and water quality certifications. EPA-approved tribal standards affect only permitting and other requirements under the CWA, not under state laws or local ordinances that are not tied to the



CWA. Similarly, the tribe can only certify *federal* licenses and permits, not *state* or *local* licenses or permits.

Within the above framework, EPA encourages the KBIC and its state and local neighbors to coordinate and collaborate in implementing the tribal WQS and water quality certification programs toward achieving common water quality goals.

## 9. Comments on Scope of Jurisdiction for Permitting Authority Within the L’Anse Reservation

Q30: [J:37/38] “KBIC has not expressed its intent to seek permitting and enforcement approval under the Clean Water Act. Accordingly, any TAS status, if conferred, should be limited to developing WQS and issuing certifications under Section 401, if KBIC chooses to retain that authority. We ask that EPA clarify the limited governance role afforded to KBIC, if granted TAS status. Without this clarification, non-tribal landowners may be subject to issues of enforcement and implementation which likely exceed TAS delegation which is limited to the development of WQS and issuing certifications under Section 401.”

Q31: [Q:56] “Would the tribe have any regulatory authority once they have established and received EPA approval of their water quality standards? Section 16 of the FAQ indicates they have no enforcement authority, but do they have any other regulatory authority?”

**R30-31:** The EPA acknowledges and appreciates these comments and notes that any grant of CWA Sections 303(c) and 401 program authority is limited to administering those two programs. The EPA is the only entity currently administering the federal CWA NPDES permitting program on the L’Anse Reservation. In the absence of the Tribe’s authority to administer permitting and enforcement activities, the EPA has been and will continue to administer those programs. The approval of TAS for the Tribe for Sections 303(c) and 401 should not interfere with the EPA’s current implementation of any CWA National Pollutant Discharge Elimination System (NPDES) permitting authority within the L’Anse Reservation.

Finally, the EPA notes that the Tribe’s TAS application addresses only the Tribe’s eligibility to administer the water quality standards and certification programs. The application does not seek eligibility to administer CWA discharge permitting on any lands.

## 10. Comments about Creation of Conflicting Systems of Regulations

Q32: [J:36] “TAS designation will lead to jurisdictional uncertainty between landowners, KBIC, and the State of Michigan related to control of certain activities on private lands within reservation boundaries. This uncertainty would involve complicated and not easily resolved legal questions regarding state versus tribal sovereignty. EPA needs to ensure that jurisdictional issues are resolved before they confer TAS status to KBIC.”

Q33/39: [F:26; H:30; R:61; Y:74] “Allowing the KBIC to adopt, review and revise water quality standards and certify that the discharges comply with those water quality standards for all the surface waters within KBIC L'Anse Reservation creates a unsystematic set of standards that make [sic] it harder for business owners, like myself, to do business.”

Q34: [J:36] “TAS designation will lead to jurisdictional uncertainty between landowners, KBIC, and the State of Michigan related to control of certain activities on private lands within reservation boundaries. This uncertainty would involve complicated and not easily resolved legal questions regarding state versus tribal sovereignty. EPA needs to ensure that jurisdictional issues are resolved before they confer TAS status to KBIC.”

Q35: [J:38; Y:75] “The State of Michigan has in place a strong program to establish WQS, protect water quality and achieve use designations. Granting TAS authority to KBIC to establish WQS is not necessary and will increase the regulatory burden on businesses, landowners, the state and federal government.”

Q36 [see also Q30]: [J:37/38] “KBIC has not expressed its intent to seek permitting and enforcement approval under the Clean Water Act. Accordingly, any TAS status, if conferred, should be limited to developing WQS and issuing certifications under Section 401, if KBIC chooses to retain that authority. We ask that EPA clarify the limited governance role afforded to KBIC, if granted TAS status. Without this clarification, non-tribal landowners may be subject to issues of enforcement and implementation which likely exceed TAS delegation which is limited to the development of WQS and issuing certifications under Section 401.”

Q37: [J:39] “Approving this request could lead to a patchwork of regulatory burdens for private timberland owners. MI Department of Natural Resources (DNR) and MI Department of Environmental Quality (DEQ) are accountable for implementing forestry Best Management Practices (BMPs) as required under the nonpoint source provision of Section 319 of the CWA. The state-based forestry BMP programs provide EPA with assurances that state delegated non-point programs are designed to achieve WQS. In addition to compliance with MI forestry BMPs, landowners may also be required to obtain certain state and county permits associated with the following forestry activities: Stream and road crossings, soil erosion and sediment control, wetland dredge and fill, and cultural and archeological resource protection[.] In the event EPA were to eventually approve KBIC's WQS, non-tribal property owners located within reservation boundaries and areas outside reservation boundaries, but within areas the tribe assert jurisdiction, may need to seek permits or otherwise comply with WQS and/or forestry BMPs, issued by both the State of MI and KBIC.”

Q38: [N:50] “Baraga County is also worried about the potential economic impacts caused by entities that may be deterred from locating in Baraga County or adjoining counties by differing water quality standards. I understand that today, there are 13 tribes in the state of Michigan. . . . That means that potentially there could be 15 separate substantially different

water quality standards in Michigan (16 if you count the state itself) that an incoming business concern will have to navigate. Such a hodgepodge of regulatory control over the waters of this state seems to defeat the very purpose of the Clean Water Act and will certainly scare off potential investors considering Baraga County, and the state of Michigan itself, for a new home.”

Q40: [DD:82] “The KBIC would have you believe that non-tribal industries and individuals are unfettered and unregulated which is patently false. The State of Michigan and the Federal EPA both currently issue permits based on strict criterion and enforce said permits. The current system works fine; there is no need to add an unaccountable tribal government that will only sow confusion and conflict.”

Q41: [B:16 and MI Senate Resolution 49] “. . . Approving these requests [for CWA and CAA TAS] would inevitably lead to unreasonable consequences, a patchwork of regulations, and be inappropriate for non-tribal property owners within and outside of the reservation borders. This is a significant concern given that the reservation boundaries encompass approximately 59,071 acres of land, of which only 35 percent (20,427 acres) are tribal lands.”

[B:16, MI Senate Resolution 49] “. . . The state of Michigan already has in place strong water quality standards to protect state waters. The state has designated that all state waters should be safe for fishing, swimming, and other uses and support native aquatic life and wildlife. The state has established—and the United States Environmental Protection Agency (EPA) has approved—scientifically based water quality criteria that ensure these uses are preserved. . . .”

Q42: [B:16, MI Senate Resolution 49] “. . . The state of Michigan has administered for decades permit programs that protect the air and water for all Michigan residents. . . . Since 1972, Michigan has administered a permit program under state law that prevents discharges that would impair the designated uses of state waters. The EPA delegated authority to administer permit programs under the federal Clean Water Act to the state in 1973 based on these laws and has recently re-approved that delegated authority. This request by the Keweenaw Bay Indian Community raises questions and concerns on how future permits issued by the state could be impacted, including wetland permits, permits for discharges into state waters, and hydropower licenses. . . .”

Q43: [B:16, MI Senate Resolution 49] “. . . Approving the Keweenaw Bay Indian Community request would not improve air or water quality but would create an unnecessary layer of government bureaucracy and increase the regulatory burden on businesses, property owners, and the state. Regardless of whether the request is approved, the state of Michigan will continue to regulate activities impacting state air and waters within the reservation under state law. Michigan's programs are sufficient to protect residents and wildlife from pollution . . . .”

**R32-43:** The EPA acknowledges and appreciates that the commenters are concerned about potentially conflicting or inconsistent water quality regulations.

The EPA wishes to clarify that our approval of the Tribe's TAS Application does not review or approve any actual water quality standards under Section 303(c) of the CWA. Any such approval (or disapproval) of water quality standards would occur in a separate EPA decision following submission of standards adopted by the Tribe for the EPA's review. The Agency notes that MI EGLE, which is responsible for adopting water quality standards for the State of Michigan, has not been federally authorized to adopt water quality standards for the L'Anse Indian Reservation.

Adoption of CWA water quality standards are subject to public participation requirements as described in CWA Section 303 and 40 C.F.R. Parts 25 and 131, and that require states and authorized tribes to hold widely-publicized public hearings and to solicit, consider, and respond to comments from interested and potentially affected parties and the public.<sup>26</sup> Concerns regarding potentially conflicting or inconsistent water quality regulations should be addressed through the appropriate opportunity for comment when water quality regulations are proposed for adoption in the future. The EPA also notes that differences between applicable water quality standards of separate regulating entities can exist in many contexts—e.g., across state-state boundaries—and that the EPA's regulations at 40 C.F.R. § 131.7 provide a mechanism for states and tribes to resolve disputes relating to differing water quality standards on shared water bodies. The EPA encourages the Tribe and its neighboring jurisdictions to work collaboratively to develop and implement water quality standards.

Q44: [N:49] "I understand that the EPA put in place a process for states and tribes to enter mediation to resolve disputes about a tribe's regulations that may differ from or be stricter than the state's standards. This mediation process, however, with very few exceptions, will be far too burdensome and costly for land and/or business owners who are injured by an unfair regulation. Without any representation in the KBIC government, such individuals are left with no recourse in the event of such an action by KBIC."

**R44:** EPA acknowledges and appreciates the commenter's concern. EPA wishes to clarify that tribal WQS should be developed considering the quality and uses of waters entering and leaving

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<sup>26</sup> Authorized tribes must comply with EPA's public participation requirements when administering water quality standards (WQS) programs under the Clean Water Act. § 131.20(b). This means that tribes must hold well-publicized public hearings when adopting their initial water quality standards and invite comments. 40 C.F.R. § 25.5(b). They must also do so when reviewing their water quality standards at least once every three years and when revising standards. § 131.20(b). They must maintain lists of persons and organizations that have expressed an interest or could be affected by the standards, including adjacent states, tribes, local dischargers, and interest groups. § 25.4(b)(5), § 25.3(a). They must notify those listed and the general public at least 45 days before WQS hearings, must invite comments on the current standards, must highlight significant issues and consequences of proposed actions, and must provide full documents and summaries at least 30 days before the hearing. § 25.5(b). Finally, for final actions they must prepare a responsiveness summary that summarizes public comments and sets forth the agency's responses for the appropriate tribal decision-making official and the public. § 25.8.

reservations. The EPA's regulations at 40 C.F.R. § 131.10 require that a state or tribe ensure that its WQS provide for the attainment and maintenance of the WQS of downstream waters. Thus, it is important that neighboring states (including authorized tribes) consider adjacent state or tribal WQS even though there is no requirement for the standards to be identical.

A state or authorized tribe can consider previously federally approved adjacent WQS, as well as EPA's Model WQS Template, as a starting point for developing WQS. In considering previously approved WQS, however, WQS developers should coordinate with the appropriate EPA Regional Office to determine whether the WQS are up to date with federal requirements and the latest scientific information.

To the extent that differences do arise between a tribe's and a state's WQS, the EPA encourages the tribe and state to resolve their differences without EPA involvement, ideally before either one begins the WQS adoption process. The EPA routinely provides technical assistance to states and tribes in the development of water quality standards. Should differences in the application of standards arise between a tribe and state, there is a dispute resolution mechanism available under 40 C.F.R. § 131.7 that sets out a process for resolving differences. The EPA's role is to mediate such disputes. Costs of such mediation would be borne by the government entities involved in the mediation; not by local landowners or businesses. For more information see: <https://www.epa.gov/sites/production/files/2017-07/documents/tribal-state-wqs-dispute-resolution.pdf> (last checked February 13, 2020).

## 11. Comments Relating to the Tribal Court and CWA 401 Certifications

Q45: [A:7] “. . . KBIC's Tribal Code does not include a process for parties subject to the Certification Program to invoke the Tribal Court's jurisdiction. Given Tribal sovereign immunity from suit, there is insufficient information in the application to demonstrate that the Tribal Court will resolve disputes concerning any USEPA program that the KBIC administers and implements. At a minimum, the KBIC must commit to providing a process for individuals to access its Tribal Court voluntarily.”

Q46: [A:8] “. . . Congress did not delegate jurisdiction over non-Indians to Tribal Courts in the CWA. Whether a Tribal Court can exercise jurisdiction of a non-Indian, particularly a person or entity that does not voluntarily consent to that jurisdiction, must be decided under the test in *Montana v. United States*, 450 U.S. 544, 565-66 (1981). The USEPA does not have the authority under the CWA to make that decision for the courts or to alter the general rule that Tribal Courts do not exercise jurisdiction over non-Indians.”

**R45-46:** The EPA acknowledges and appreciates these comments from the State of Michigan. The CWA provides no role for the EPA in the review or approval of the certification regulations used by states or tribes. Thus, this comment regarding the role of tribal courts in regulating non-members for purposes of a tribe's application of tribal authority under CWA Section 401 is outside the scope of the EPA's review of the Tribe's application for TAS (or a

submission of tribally-adopted WQS to EPA for approval). CWA Section 518 authorizes the EPA to treat eligible Indian tribes in a similar manner as states for the purpose of administering a variety of programs under the statute, expressly including Section 303(c) water quality standards and Section 401 certifications. Under longstanding regulations, the EPA has implemented that authority and provided criteria and procedures for interested tribes to obtain TAS for purposes of these programs.

Under the existing regulations, tribes receive TAS authorization to administer Section 401 certifications at the same time they receive such authorization for purposes of the CWA WQS program. 40 C.F.R. § 131.4(c) expressly states that where the EPA determines that a tribe is eligible for TAS for purposes of WQS, the tribe is likewise eligible to the same extent as a state for purposes of Section 401 certifications. The regulations then establish criteria, application requirements, and application processing procedures for tribes to obtain TAS authorization for purposes of CWA WQS. *See* 40 C.F.R. § 131.8. Thus, any tribe interested in TAS authorization for purposes of Section 401 certifications may apply for TAS under 40 C.F.R. § 131.8 for authorization to administer the WQS program and, upon approval, is eligible to grant/condition/deny or waive 401 certifications.

Tribes typically specify that they are seeking TAS authorization for both 401 certification and WQS programs, and the EPA's decision documents clearly memorialize granting such authority. Under the existing regulations, tribes authorized for Section 401 are immediately treated the same as states with regard to issuing certifications. Therefore, like states, they may issue certifications irrespective of the status of their WQS within the Section 303(c) review process, so long as they have designated a certifying agency or governmental program as defined at 40 C.F.R. § 121.1(e) to do the work. Authorized tribes are subject to the same limitations that apply to states regarding the scope of requirements and conditions that can be included in certifications.

## 12. Concerns about Costs of Meeting More Stringent Tribal WQS

Q47: [N:50] One commenter expressed concerns “about the potential economic impacts caused by entities that may be deterred from locating in Baraga County or adjoining counties by differing water quality standards. Such a hodgepodge of regulatory control over the waters of this state seems to defeat the very purpose of the Clean Water Act and will certainly scare off potential investors considering Baraga County, and the state of Michigan itself, for a new home.”

Q48: [F:26; H:30; R:61; Y:74] “Allowing KBIC to adopt, review and revise water quality standards and certify that the discharges comply with those water quality standards for all the surface waters within KBIC L'Anse Reservation creates a unsystematic set of standards that make it harder for business owners, like myself, to do business.”

Q49: [T:67] “The potential economic impact caused by entities that may be deterred from locating in Baraga County or adjoining counties by differing water quality standards.”

Q50: [AA:77] “Please do not approve this, it will affect our businesses and our livelihood here in the UP.”

Q51: [EE:85] “I feel that if this application is granted, the Keweenaw Bay Indian Community will have an unregulated hand in negatively affecting the economic future of Baraga County. There has already been public threats by their members of action to be taken against the State of Michigan if this application is granted. The effects of this could be devastating and extremely costly to both the citizens of Baraga County and the State.”

**R47-51:** The EPA acknowledges and appreciates the comments regarding potential administrative and financial burdens. As noted elsewhere, any adoption of CWA water quality standards by the Tribe would need to comply with applicable public participation requirements, which would provide an opportunity to raise concerns regarding proposed water quality standards.

### 13. Concerns about Potential “Veto” of Permits

Q52: [Q:58] “Can a tribe veto a federally issued NPDES permit?”

Q53: [B:16, MI Senate Resolution 49] “This request by the Keweenaw Bay Indian Community raises questions and concerns on how future permits issued by the state could be impacted, including wetland permits, permits for discharges into state waters, and hydropower licenses.”

Q54: [B:16, MI Senate Resolution 49] “. . . Approving the Keweenaw Bay Indian Community request would lead to jurisdictional conflicts between the community and the state related to control of activities on state-owned land within the reservation boundaries. These conflicts would involve complicated and not easily resolved legal questions regarding state versus tribal sovereignty. It would also raise questions regarding potential impacts to state-owned mineral rights within the reservation.”

**R52-54:** [Please also refer to Response to Comments, Section 2, and Responses 30-31 above.] The EPA acknowledges and appreciates the comments regarding the concerns about the Tribe’s future water quality standards and potential impacts to NPDES and other state permits. The EPA notes, as discussed in Responses 32-43 above, that adoption of CWA water quality standards is subject to public participation requirements as described in CWA Section 303 and 40 C.F.R. Part 25 and § 131.

Tribes receiving approval for TAS for Sections 303(c) and 401 are authorized to grant, grant with conditions, waive, or deny CWA Section 401 certification requests associated with federal

licensing or permitting activities within their reservations. For more information, please refer to Responses 45-46 above.

#### 14. Comments Regarding Lack of Non-Member Representation in Tribal Government

Q55: [Q:59] “Is there any requirement that a tribe involve the non-tribal community within the reservation in the process of establishing WQS?”

Q56: [DD:82] “Conflict, due to the fact that local non-tribal residents have little to no input into tribal government decisions and their enforcement that affects tribal and non-tribal residents alike. Therefore, I urge you to deny the KBIC request for tribal authority over water regulations.”

Q57: [B:16, MI Senate Resolution 49] “Approving the Keweenaw Bay Indian Community request would subject non-tribal property owners within reservation boundaries to the decision-making of a tribal government in which they have no representation. Only around one-third of the people living within the reservation boundaries are tribal members. Our nation was founded on the democratic concept that people should have a say and be represented in the government that impacts their lives.”

Q59: [EE:83] “The Keweenaw Bay Indian Community is a Sovereign Nation. They have their own Government, operating within the State of Michigan and the United States. As such the members of the Keweenaw Bay Indian Community have full Constitutional rights as US citizens allowing them to vote in all US, State and Local elections. However, Non-Members such as myself have no representation or manner of recourse in Keweenaw Bay Indian Community government.”

Q60: [EE:84] “I believe it to be UnConstitutional [sic] for the Keweenaw Bay Indian Community to be able to monitor, enforce or set regulations for non-members of their Community in any matter. We are guaranteed by the United States Constitution to have a representative Government. Allowing the Keweenaw Bay Indian Community to act as a State, without the ability of all those with-in that jurisdiction to have equal representation, is, in my opinion a violation of my Constitutional rights.”

Q61: [J:35] “Granting KBIC the ability to control the activities of non-Indians in this regard subjects them to the control of a sovereign nation in which they have no representation and no political remedy if the KBIC leadership is acting in a manner that unfairly burdens non-Indians in favor of tribal members.”

Q62: [N:48; T:66] “The ownership of land is primarily non-Indian. Approximately 2/3 of the land on the reservation is owned by non-Indian individuals or entities. Granting KBIC the ability to control the activities of non-Indians in this regard subjects them to the control of a sovereign nation in which they have no representation.”



Q63: [EE:86] “I would like to ask for your help in ensuring that the EPA denies the application. The State and Federal Government can continue to regulate as they are currently are, allowing all Citizens both members of the Keweenaw Bay Indian Community and those who are not to have equal representation and recourse.”

Q64: [GG:90] In a telephone message, one commenter expressed concerns about giving up civil rights. Regulation should remain in the EPA’s hands. The commenter believes there are “interior” motives and is strongly opposed to this action.

Q65: [II:92] In a telephone message, one commenter expressed that he doesn’t understand how anyone can take over his constitutional right to representation. It would be similar to being governed by Canada. He is a U.S. citizen and would be dictated by the Tribe and have no voice.

Q66: [JJ:93] In a telephone message, one commenter expressed that Indians are trying to take control of water and air from the MDEQ. He and his family are opposed to this action. He believes that the Tribe is imposing on their rights.

[B:16, MI Senate Resolution 49] “. . . Approving the Keweenaw Bay Indian Community request would subject non-tribal property owners within reservation boundaries to the decision-making of a tribal government in which they have no representation.”

**R55-66:** The EPA acknowledges and appreciates the commenters’ questions and concerns that non-members may not have a direct role in tribal government representation. As discussed in Responses 32-43 above, the adoption of CWA water quality standards is subject to public participation requirements as described in CWA Section 303 and 40 C.F.R. Part 25 and § 131. Tribes receiving approval for TAS for Sections 303(c) and 401 are authorized to grant, grant with conditions, waive, or deny CWA Section 401 certification requests associated with federal licensing or permitting activities within their reservations. For more information, please refer to Responses 45-46 above.

#### 15. [Comment on Whether TAS for 303/401 is separate from TAS for CWA 319](#)

Q67: [J:39]: “Forestry BMPs are referenced in the CWA under the Section 319 non-point control program of the CWA. We understand KBIC has expressed its intent to seek approval only for WQS, not for any other program under the CWA, including the Section 319 program. Accordingly, any TAS status, if conferred, would not include authority to develop or enforce programs like CWA Section 319. We ask that EPA clarify this point.”

**R67:** In this application, KBIC is not seeking, and the EPA is not approving, eligibility or approval of a non-point source water management program. If KBIC seeks authority for the CWA Section 319 program, a separate TAS application must be submitted to the EPA.

## 16. Comments Regarding the Tribe's Capability to Carry out a Water Quality Standards and Certification Program

**Q68:** [S: 64, W:72, CC:80]: A number of questions or observations were submitted regarding the capability of the KBIC to carry out a water quality standards and certification program. Of the ten comments regarding capability, three were in support of KBIC capability (comments S:64, W:72, CC:80) and seven were in opposition (see Q69 below) to granting TAS based upon KBIC's capability. The three commenters supportive of KBIC's capability indicate the Tribe has worked collaboratively to address certain threats to the Lake Superior Watershed on "a wide variety of water quality, habitat restoration, tribal education and pollution prevention projects." Additional comments were provided in support of the KBIC Natural Resource Department staff having extensive experience and expertise in monitoring surface water, groundwater, aquatic habitat conditions and traditional foods such as wild rice. Lastly, one commenter indicated the Tribe has "demonstrated effective and ongoing management and regulatory programs that will support and complement a tribal water quality standards program."

**Q69:** [A:5, A:6, J:40, N:51, T:68, DD:81, FF:87]: several commenters conveyed concerns about the KBIC capability to implement a WQS program, indicating a lack of toxicologists and WQS program expertise. Comments were also submitted indicating the education and experience of KBIC NRD staff relevant to WQS were not adequately described in the TAS application. One commenter asked for "EPA to defer a decision on KBIC's TAS until KBIC demonstrates its technical and administrative ability."

**R68-69:** The EPA acknowledges and appreciates those comments that expressed concerns and questions regarding the scope of the Tribe's capacity to carry out a water quality standards program. The EPA's regulations at 40 C.F.R. § 131.8(b)(4) specify that in determining capability, a tribe should provide a description of its previous management experience, a list of existing public health and environmental programs managed by a tribe, a description of the existing or proposed agency of the tribe that will administer the WQS program, a description of the technical and administrative capabilities of a tribe's staff or a plan which proposes how the Tribe will acquire additional administrative and technical expertise, as well as any additional information the Agency might request.<sup>27</sup>

The TAS record includes the information the Tribe submitted to fulfill capability requirements, and the EPA's Decision Document provides a detailed discussion of how the Tribe has demonstrated its capability to implement the authority it is seeking for CWA Sections 303(c) and 401.<sup>28</sup> As noted in our Decision Document, the Tribe's CWA Application included resumes and a brief description of capability. The Tribe's CWA Supplemental Application indicated the Tribe had trained and experienced staff to effectively implement its program, but

<sup>27</sup> See EPA Decision Document at Section II.D.

<sup>28</sup> See EPA Decision Document at Section II.D

the EPA received several comments during the second public comment phase on the Tribe's application that questioned the Tribe's capability to implement an effective water quality standards program. In response, EPA requested that KBIC provide additional information regarding capability. EPA also held a conference call with representatives of MI EGLE on August 28, 2019, in which EPA obtained clarification regarding additional information the State sought regarding the Tribe's capability.

On October 7, 2019, KBIC sent a letter to the EPA that provided additional information regarding capability. The letter summarizes the Tribe's technical training; professional engagements; partnerships with tribal, federal, state, non-profits and academic institutions; and recent outreach and education events. As noted above, the Tribe has provided documentation of not only their present capability in running complex public health and environmental management programs (i.e., those covering fish and wildlife conservation, forestry, hazardous substance control, solid waste, water resources, etc.) but also of what resources and both in-house and outside expertise it will utilize in developing water quality standards. KBIC has explained that it aims to expand in house training for its water resources staff and intends to form a multi-disciplinary team to advise during the water quality standards development process. That team will include tribal water quality experts, as well as experts from Michigan EGLE, GLIFWC, and Michigan Technological University (MTU). KBIC has also explained that it has a contract with MTU to assist it in water quality standards development and the MTU contact has extensive experience in water quality standards work within Michigan and Wisconsin.

On the basis of all of this information, EPA concluded that KBIC has met the TAS requirements for capability.

#### 17. Comments Requesting that KBIC Make Water Quality Standards and Information Publicly Available

Q70: [A:13] "The public, including both members and nonmembers of the KBIC, needs to know the substantive requirements for these CWA TAS programs if they are expected to abide by them. Accordingly, if the USEPA intends to grant the KBIC's TAS application, the KBIC should make any provisions of the Tribal Code and other information about the Tribal WQS and Certification Programs easily accessible to the public."

**R70:** The EPA agrees that information regarding water quality standards must be made publicly available. See Response 32-43 above.

#### 18. Comments Requesting that KBIC Cooperatively Work with MI EGLE

Q71: [A:14] "If the USEPA approves the KBIC's TAS application, MI EGLE specifically asks that the USEPA and KBIC engage with its staff at an early point before the proposed WQS are submitted to the USEPA for approval."

**R71:** The EPA appreciates the MI EGLE’s willingness to consider Tribal/Federal/State intergovernmental efforts to ensure effective environmental protection for the Keweenaw Bay Indian Community, the residents of the L’Anse reservation, and the residents of the State of Michigan.

#### 19. Comments that the EPA should Reject KBIC’s Application and Prevent “Specific Needs” from Overriding Enforcement

Q72: [C:21] “We urge complete rejection of the KBIC's application and urge strong monitoring, inspections, and enforcement of all KBIC or other tribal areas where “specific needs” noncompliant activities may already be occurring.”

**R72:** The EPA acknowledges and appreciates the commenter’s desire for full enforcement of environmental programs within the KBIC reservation or in Indian country. While the commenter did not specify what “specific needs” might result in non-compliance, the EPA maintains the authority to implement all federal environmental programs within the exterior boundaries of federally recognized Indian reservations, including under the CWA. The EPA notes that conditions in NPDES permits issued for surface water discharges within a reservation, like those issued for surface water discharges within a state, must “ensure compliance with the applicable water quality requirements of all affected States.” Further, under Section 518(e) of the CWA, the EPA has established a mechanism for resolving any unreasonable consequences that may arise because of differing water quality standards set by states and tribes located on common bodies of water. For further information about the EPA’s implementation of the CWA in Indian country, see Response 30-31 above.

#### 20. Comments that Federally approved WQS will override non-federal Local or State Programs

Q73: [G:29] “The Village processes all the waste water collected on the Reservation and provides lab support for KBIC's wastewater processing activities. . . . Annually, the Village is required to empty the sludge storage facility at its wastewater treatment plant. This has always been done by applying for the Certificate of Coverage under the State of Michigan General Permit Authorizing Land Application of Biosolids. . . the Village decided to start land application of its biosolids in a portion of this area to encourage further growth on the 120 acre parcel that is owned in fee by the Village. . . Therefore, . . . the Village objects to KBIC's application as tendered to the EPA. If KBIC's pending TAS Application is accepted by your office the Village asks that the Village property and Certificate of Coverage discussed in this letter be excluded from tribal jurisdiction.”

[Q:60] “Does EPA take into consideration local and tribal land use regulations when evaluating WQS established by tribes?”

**R73:** The EPA acknowledges and appreciates the concerns raised by those commenters who questioned whether federal approval of a tribe’s application for TAS and/or of a tribe’s water quality standards would override non-federal local or state regulatory programs. The spread of biosolids is not an activity that is considered to be a direct discharge to surface waters for purposes of the CWA, thus the EPA would not anticipate that the Tribe’s future water quality standards, if approved, would affect the conditions applicable pursuant to the Village’s Certificate of Coverage. The EPA is the permitting authority related to biosolids within Indian country in Michigan. State permitting of the spread of biosolids also must comply with federal rules.

The EPA’s authority to approve or disapprove proposed tribal WQS is based upon the statutory and regulatory requirements of CWA Section 303(c) and the implementing regulations at 40 C.F.R. §§ 131 and 132 (if located in the Great Lakes basin). The EPA also works with U.S. Fish and Wildlife Service to ensure proposed WQS will not harm threatened or endangered species under Section 7 of the Endangered Species Act and federal regulations at 50 C.F.R. Part 402. Generally, the EPA does not review local and tribal land use regulations as part of the WQS approval/disapproval process. For a discussion of the public comment process associated with a tribe or state’s development of WQS, see Responses 32-43.

## 21. Comments that Approval of TAS will Limit Access to Waterbodies within Reservation

Q74: [BB:78] “I would like to express my concern over the proposal for the tribe to regulate the waters on and around the reservation. Most of the projects the tribe undertakes are funded through grants and are designed to put money into their own coffers, often at the expense of the tax payers. Our local roads are in complete disrepair, and the tribal members pay no road taxes. The local infrastructure suffers, while tribal members pay no property taxes. They are not able to undertake a project like this without further burdening the tax payers, who will most likely lose access to these waters and surrounding areas if this proposal is granted. This is a dangerous road to go down and will set a bad precedent for future decisions. Thank you for considering the future consequences of this kind of proposal.”

**R74:** The EPA acknowledges and appreciates the concern raised by the commenter who questioned whether federal approval of a tribe’s application for TAS and/or of a tribe’s water quality standards would result in diminishment of access to waters on the reservation. As explained in our Response 12 above, Congress provided that tribes may apply for TAS under the CWA. EPA’s authority does not extend to property or other tax matters.

## 22. Comments Requesting Additional Information

Q75: [E:25] “Do you have an idea of when the EPA will make its determination?”

**R75:** Upon considering all of the application materials provided by the Tribe, comments from appropriate governmental entities, and public comments, the EPA has reached its final determination to approve the Tribe as eligible to administer CWA Sections 303(c) and 401 certification programs.

Q76: [P:53] “From what I gather from reading the proposal and FAQ, KBIC is requesting to establish their own water quality standards. If this is to occur will there be any oversight by EPA?”

**R76:** Yes. See Response to Comment 32-43 above.

Q77: [P:54] “Will KBIC be responsible for all the enforcement?”

**R77:** No. See Response to Comments 30-31, and 72 above.

Q78: [P:55] “I live in a neighboring county and support strong water quality standards. It is my understanding KBIC is required to submit those standards to EPA. If granted the authority to establish their own water quality standards, will they be able to change those standards and weaken them in the future without authority of EPA?”

**R78:** No. See Response to Comments 52-54 above.

Q79: [Q:56] “Would the tribe have any regulatory authority once they have established and received EPA approval of their water quality standards? Section 16 of the FAQ indicates they have no enforcement authority, but do they have any other regulatory authority?”

**R79:** See Responses to Comments 30-31 and 45-46 above. Under the existing regulations, tribes that obtain TAS authorization for purposes of Section 401 are immediately treated the same as states with regard to issuing certifications. Therefore, like states, they may issue certifications irrespective of the status of their WQS within the Section 303(c) review process, so long as they have designated a certifying agency or governmental program as defined at 40 C.F.R. § 121.1(e) to do the work. Such authorized tribes would also be subject to the same limitations on the types of requirements and conditions they may include in their Section 401 certifications as apply to states. The EPA will retain federal enforcement authority within the L’Anse reservation. KBIC may continue to exercise its inherent authority to enforce its regulations under tribal law.

Q80: [Q:57] “What is the tribe’s role once they establish WQS?”

**R80:** See Response to Comment 44-46 above.

Q81 [T:69] In addition to the support of the listed concerns that have already been presented by the Baraga County Board of Commissioners, the Township of Baraga Board of Trustees asks that the Environmental Protection Agency meet with all County,

Township and Village Officials. The township asks that the EPA conducts this additional outreach to the local officials to ensure that their input is considered prior to completing an action on this application.

**R81:** Baraga Township and Baraga Village Officials requested a meeting with the EPA regarding the Keweenaw Bay Indian Community’s Application for CWA Sections 303(c) and 401. The conference call with representatives from the EPA, Baraga Township and the Village of Baraga was held on October 17, 2019. The local governmental representatives requested that the EPA explain the consequences of an EPA approval of the Tribe’s application for Treatment as a State.

The EPA explained the process of tribal TAS and how it is different from the submission by a state or approved tribe of water quality standards. The EPA explained that currently no federally approved water quality standards apply within the exterior boundaries of the L’Anse Reservation. The EPA explained that permitting and enforcement authority remain with the EPA for federal permits within the L’Anse reservation.

The local government representatives stated that this conversation answered many questions they had and that they had gained a better understanding of what the KBIC TAS Application means. The EPA closed with an invitation for local governmental officials to contact the Agency if there were further questions.

## 22. Comments in Support of the KBIC Application

Q82: [C:22] “I am a non-native resident of the Village of L’Anse, Michigan. I am writing this letter in support of the actions taken by KBIC to be recognized as a State for purposes of water and air quality monitoring.”

Q83: [C:23] “In order to maintain this area's natural beauty it is necessary that qualified, committed and *local* personnel have a strong voice at the table when issues involving protection of the quality of our water and air are being decided. Due to the beautifully remote location of many of the natural assets of the Michigan's Upper Peninsula it has been proven that hours, days or even weeks can elapse before Lansing (or Marquette) can respond to concerns over spills, seepage, emissions or natural disasters such as floods or erosion. Therefore, it only makes sense that when qualified scientists living in the community and sharing the same air, water, flora and fauna as the rest of us, offer to work with the EPA and the AQP to secure everyone's basic rights to safe water and air, that we should take full advantage of their commitment. For these reasons I ask that the KBIC’s TAS application receive your full attention and support.”

Q84: [I:32] “Although I am non-native, not a scientist, politician, or corporation, I do share a living space within the Ojibwe Community area on Lake Superior. I believe my Ojibwe neighbors have every right to hunt, fish and gather on these sacred lands and

water areas. Granting them another layer of environmental protection through TAS would strengthen these promised rights. I hope you will provide TAS status to them as they are truly the 'First' stewards of beautiful Lake Superior & the Upper Peninsula of Michigan.”

Q85: [J:41] “Weyerhaeuser has maintained a good and productive working relationship with Lake Superior Band of Chippewa (Ojibwa Anishnaabeg) Keweenaw Bay Indian Community. While we have raised concerns over this proposal, we are willing to work with EPA and KBIC to resolve the issues raised. In closing, please accept this letter in the cooperative manner in which it is intended, and we look forward to working with EPA and KBIC.”

Q86: [K:42] “I am writing on behalf of the Keweenaw Land Trust (KLT) to strongly support the Keweenaw Bay Indian Community of Michigan (KBIC) application for Treatment in a Similar Manner as States (TAS) for Water Quality Standards for surface water in their L'Anse Reservation. . . .” “We are partnered with the KBIC on several projects and programs of shared interest for natural resource conservation and management.”

Q87: [K:43] “Wild rice is a traditional staple for the Anishinaabe - the adoption of Water Quality Standards for KBIC will allow them to set standards that protect wild rice cultivation and thereby also supports the health of KBIC members. . . .” “In a similar regard, researchers reported findings at the KBIC Tribal Water Day demonstrating that KBIC members consume fish in much greater quantities than the average of the non-tribal population. In the case of fish affected by consumption advisories, this means KBIC members are ingesting contaminants at total levels much greater than the non-tribal populations, thus greatly amplifying their health risks. . . .” “For all these reasons, we believe the KBIC should receive the TAS status to develop and administer their own water quality standards for surface waters within their L'Anse Reservation and to continue their monitoring program to certify that discharges comply with those water quality standards.”

Q88: [K:44] “We recognize the strong KBIC commitment to good stewardship of natural resources and community wellness. As the people most directly impacted by critical water quality issues, we believe the KBIC deserves the self-determination to develop their own standards for water quality and to manage the fresh water resources upon which they vitally depend.”

Q89: [K:45] “The Upper Peninsula Environmental Coalition (UPEC) is writing in support of the Keweenaw Bay Indian community (KBIC) in their request to have “treatment in a similar manner as a state” under the Clean Water Act (CWA) Section 303(c) Water Quality Standards and 401 Certification programs. UPEC a 501 (c)(3) organization established in 1976, adopted a mission to educate and advocate for the environmental health of the entire Upper Peninsula. In this role we collaborate with other



conservation organizations and tribes in the peninsula. We have a long history of working with the Keweenaw Bay Indian Community. Our experience with KBIC has repeatedly shown they have met your standards to become a “treatment in a similar manner as a state”. Your list of requirements under the Clean Water Act (CWA) section 303(c) Water Quality Standards and 401 Certification programs have been fully outlined in their application as well as within their tribal governance structure: have a governing body carrying out substantial governmental duties and powers, have appropriate authority, and be capable of carrying out the functions of the program. Stewardship of their lands is part of the Anishinaabe tradition of treating the land, air and water with care for the next seven generations. In other words, a perpetual care plan that recognizes their responsibility to the future.”

Q90: [K:46] “We, the Baraga County Democratic Party, are proud to submit the attached letter of support for the Keweenaw Bay Indian Community TAS application. We are confident that the KBIC will help protect the surface waters of our area for the benefit of all our citizens.”

Q91: [K:47] “*The Keweenaw Bay Indian Community's Supplemental Submission in Support of its Application for Treatment as a State under the Clean Water Act* clearly documents its ability to meet all requirements to obtain approval of TAS application. The Baraga County Democratic Party is confident that KBIC's commitment and ability to protect the surface waters of the L'Anse Indian Reservation will protect the health, safety, and welfare of tribal and non-tribal members of our county.”

Q92: [S:63] “As Water Projects Coordinator for the Fond du Lac Band of Lake Superior Chippewa, I would like to offer my comments in support of the Keweenaw Bay Indian Community's application to develop and administer water quality standards for waters of the L'Anse Reservation. This step is one of the most important and effective means for tribes to exercise sovereign authority under federal statute to protect vital and culturally significant water resources.”

Q93: [S:65] “Speaking on behalf of another Lake Superior Chippewa community, I can attest to the prime importance of *nibi*, or water, to the KBIC people; it is fundamental to their ways of life. EPA Region 5 should expedite approval of this application for Treatment as an Affected State (TAS), and support KBIC in exercising their inherent authority to protect their abundant fresh water resources.”

Q94: [U:70] “The Voigt Intertribal Task Force (Task Force) of the Great Lakes Indian Fish and Wildlife Commission (GLIFWC), by motion at its May 2, 2019 meeting, hereby expresses its support for the Keweenaw Bay Indian Community's (KBIC's or Tribe's) proposal for treatment as a state (TAS) under section 518(c) of the Clean Water Act.”

Q95: [U:71] “The exercise of these treaty-guaranteed rights supports a tribal lifeway that depends on clean and healthy natural resources for cultural, subsistence and economic purposes. The Tribe's exercise of its sovereignty in establishing a water quality standards program will help ensure that those resources are protected from substances that could degrade water quality.”

Q96: [X:73] “KBIC appears to clearly meet all requirements to obtain approval of a TAS application. . . .” “That it meets these requirements is well-documented in the document it has submitted entitled *Keweenaw Bay Indian Community's Supplemental Submission in Support of its Application for Treatment as a State under the Clean Water Act.*”

Q97: [Z:76] “I strongly support the wish of the keweenaw bay indian community [*sic*] to regulate their water. water is a sacred source of life. I would support all communities to be able to regulate their water. here in Michigan we have a 66-year-old crude oil pipeline that transports 21 million gallons of crude oil daily through the straits of mackinac [*sic*]. we've organized petitions, made phone calls, testified at hearings, written op eds, and more. nothing has worked against the power of the oil & gas industry. the is [*sic*] something deeply amiss when a community is prevented from protecting their water and local economy from harm. I encourage EPA to give their approval.”

Q98: [CC:69] “The Superior Watershed Partnership (SWP) is a Great Lakes non-profit organization serving communities in the Upper Peninsula of Michigan. On behalf of the SWP board and staff I am pleased to provide this letter in support of the Keweenaw Bay Indian Community (KBIC) to administer and implement an independent water quality standards program for related tribal lands and waters.”

**R82-98:** The EPA acknowledges and appreciates the comments received from citizens, businesses, public interest groups, and intergovernmental entities, and others in support of the KBIC TAS Application. The EPA also recognizes the willingness expressed by many commenters to partner with or assist the KBIC to protect the water resources and public health of all those living within the L'Anse reservation.

## Appendix III. Maps of Keweenaw Bay Indian Community Reservation and Water Resources



