

# Seneca Nation of Indians

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## PRESIDENT'S OFFICE

September 13, 2021

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### **Re: Potential Revisions to the Federal Water Quality Standards Regulations to Protect Native Nations' Reserved Treaty Rights**

Dear Administrator:

Greetings on behalf of the Seneca Nation. We appreciate the opportunity to offer comments on the U.S. Environmental Protection Agency's ("EPA's") proposed revisions to federal water quality standards ("WQS") regulations (40 CFR Part 131) to explicitly and sustainably protect Native Nations' reserved rights (treaty rights) in state waters, consistent with existing legal obligations. We submit these written comments to the EPA to reflect our general positions concerning this topic.

### **Background**

In the "Agreement with the Seneca dated September 15, 1797,"<sup>1</sup> commonly referred to as the "Treaty of the Big Tree," the Seneca ceded to non-natives approximately 3.5 million acres of land, nearly all of our traditional homeland. A key provision of that treaty contained a reservation to us of fishing and hunting rights within the land we relinquished: "Also, excepting and reserving to them, the said parties of the first part and their heirs, the privilege of fishing and hunting on the said tract of land hereby intended to be conveyed." Thus, pertinent to the current EPA consultation and coordination, the Seneca Nation holds rights reserved by treaty to fish in waters where New York has Clean Water Act ("CWA") jurisdiction to establish WQS. It is

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<sup>1</sup> 7 Stat. 601.

imperative that New York be required to maintain fish populations that are safe to eat in sustenance quantities in waters where the Seneca Nation has a reserved right to fish based on the Treaty of the Big Tree.

The protection of our water rights will sustain our culture and our way of viewing life. For the Seneca Nation people, it starts with the creation story that defines who we are as Ogwe'oweh (the Original Beings). It speaks generally and symbolically about the events that led to our creation on Etinö'eh Yöëdzade (Mother Earth). From the time we first hear this story as children through the voices of our own mothers and grandmothers, we are given direction and understanding of our place in the world and our relationship to the other elements of Creation. With the reciting of the Thanksgiving Address (the Ganö:nyo:k), we learn that we, the People, are part of the complex Web of Life and an integral part of Creation. Throughout our lives, it reinforces our worldview and it helps to set the framework of our cultural thinking.

We give thanks to the O:neganos, or Waters of the World, for fulfilling their responsibilities given by the Creator. These responsibilities are many. Central to them is to quench the thirst for all life. Our Creator made those rivers and lakes and said "Whenever you're dry and thirsty, go there, to any river, any stream, and it will quench your thirst for that is the way I make the world." The O:neganos are the bloodlines of our Etinö'eh Yöëdzade. As such, they have important responsibilities to carry sustenance to the rest of Creation. The Waters also have a responsibility to cleanse and purify Mother Earth, to keep the people clean and healthy. Finally, the Thanksgiving Address reminds us that it is our responsibility to take care of all life, including the waters. We recognize that all life is interrelated. If the Waters are to fulfill their responsibilities, then we must ensure that they have the opportunity to do so.

### **Native Nation's Reserved Rights (Treaty Rights) Require Special Consideration**

During the July 19, 2021, EPA Listening Session for Tribal Governments, EPA offered background on how reserved rights are considered in the WQS process. Previous to 2016, EPA and the states generally did not take into consideration Native Nations' reserved rights in determining WQS for state waters. In 2016, after extensive consultation and coordination with Native Nations regarding reserved rights to fish, EPA began requiring that human health criteria for state waters be set at stricter standards in such situations. In 2019, EPA changed its position and ceased requiring special consideration concerning WQS when reserved rights existed. Currently, EPA is returning to its 2016 position, determining that this position best comports with the CWA. The Seneca Nation supports EPA's return to its 2016 position requiring special consideration concerning WQS when Native Nations' reserved rights exist.

### **EPA Initiative to Harmonize WQS with Native Nations' Reserved Rights**

The document provided by EPA<sup>2</sup> (attached to the "Dear Tribal Leader" letter) describes how the "EPA is now considering amending the nationally-applicable federal WQS regulations to explain how WQS actions must be harmonized with applicable tribal reserved rights where those rights

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<sup>2</sup> *Consultation and Coordination Plan for Potential Revisions to the Federal Water Quality Standards Regulations to Protect Tribal Reserved Rights.*

to a particular resource exist and are implicated.” In particular, the document presents a bulleted list of concepts that EPA is considering proposing in amending “the WQS regulations at 40 CFR Part 131.”<sup>3</sup> The Seneca Nation is in support of the concepts presented in the list. In the Seneca Nation’s view, the key concept from the list is that “requirements outlining that the scope/definition of these reserved rights and their protection must be informed by consultation with the affected tribe(s).” Meaningful consultation with affected Native Nations on the scope and definition of their reserved rights is crucial and a lack of such consultation would basically nullify the process of protecting those rights.

### **Pre-proposal Feedback from the States**

The document provided by EPA<sup>4</sup> mentions that, in addition to soliciting feedback on the concepts from Native Nations, “EPA also anticipates soliciting pre-proposal feedback from the states, since the rule will have implications for how states establish and revise WQS.” Since we are stakeholders in this process, the Seneca Nation requests that the pre-proposal feedback from the states be made accessible to Native Nations prior to, or no later than the time of, publication of the proposed rule in the Federal Register.

We look forward to your careful consideration of our comments.

Nya:wëh (thank you),



Matthew B. Pagels  
Seneca Nation President

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<sup>3</sup> The bulleted list is as follows:

- The requirement that states and EPA must not impair tribal reserved rights when establishing, revising, and evaluating WQS.
- The requirement that if reserved rights exist in the geographic area where a given set of WQS will apply, and the rights are related to a certain level of CWA protection that can be defined by available data, upholding those rights requires providing that level of CWA protection.
- Requirements outlining that the scope/definition of these reserved rights and their protection must be informed by consultation with the affected tribe(s).
- Providing options for regulatory approaches that states and EPA can use to ensure tribal reserved rights are protected:
  - Designated uses that explicitly incorporate protection of resources covered by tribal reserved rights.
  - Criteria that protect tribal reserved rights in waters where those rights apply.
  - Assignment of Tier 3 antidegradation protection (i.e., requirement to maintain and protect current and future improved water quality) in waters where tribal reserved rights apply and where current water quality is sufficient to protect those rights.

<sup>4</sup> See note 2, *infra*.