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Tribal Governmental Regulation of Non-Indian Polluters of Reservation Waters

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TRIBAL GOVERNMENTAL REGULATION OF NON-INDIAN POLLUTERS OF RESERVATION WATERS

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> With respect to natural resource management concerns, Mr. President, no one has greater respect and reverence for the land than the original inhabitants of this continent. Although there are differences among the tribes, we have a common set of beliefs and traditions regarding our responsibilities as caretakers for the natural world. In our philosophy, we are part of and inseparable from the natural world, linked together by the gifts of life and spirit. The remaining base of Indian lands is doubly precious to us and must be managed for preservation and production purposes. . . . [W]e seek your support for the rights of Indian tribes to exercise primary jurisdiction over natural resource management within the boundaries of our reservations.
>
> —gaiashkibos,**President
> National Congress of American Indians

I. INTRODUCTION

In 1994, at an historic meeting between leaders of the First Nations of the United States and President Bill Clinton, gaiashkibos thus reaffirmed the desire of Indian tribal governments to play a substantial role in the decisions that affect tribal natural resources and the quality of reservation environments. Ten years earlier, federal environmental law and policy had begun the process of including tribal governments in such decisions.[1] Thereafter, small but important windows of opportunity began to appear through which one could envision tribal governments exercising regulatory authority over the extent and manner of resource development and the attendant environmental impacts on reservation

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** Letter from gaiashkibos, President, National Congress of American Indians, to Bill Clinton, President of the United States, 3 (April 14, 1994) (summarizing tribal priorities for discussion at a presidential meeting with American Indian tribes and Alaska Native villages on April 29, 1994) (on file with author).

1. *See infra* text accompanying notes 6-20.

lands.[2] The question in the 1990s is whether the federal government will support opening these windows, and whether the tribes will then seize the opportunities presented.

Tribal leaders have strong incentives to urge the federal government to open the windows. From time immemorial, the original inhabitants of the North American continent have maintained a close physical and spiritual connection with the natural world. Their vision that humans are caretakers and guardians of nature implies an individual and governmental responsibility to use nature's resources with respect and reverence. For thousands of years, that responsibility was discharged within the framework of custom and tradition guiding the tribe's citizenry on tribal lands.

But contemporary society creates pressures unknown in former times. Federal agencies feel pressure to allow private development on reservation lands. State agencies feel pressure to allow development on state lands adjacent to reservations. Tribal governments are no different; they also have citizens with important needs and interests and they feel the pressure of those who would develop tribal resources to satisfy those needs. But of course, natural resource development has attendant impacts on the quality of the Nation's environment. And environmental pollution tends to be migratory; water and air contamination do not respect political boundaries. Pollution emitted on state or federal lands may likely come to rest on tribal lands, and the opposite is also true.

Tribal governments recognize that others' decisions for on and off-reservation development are likely to affect the health and welfare of tribal citizens and the quality of reservation environments. Hence gaiashkibos' request that President Clinton support federal policy providing tribal governments a seat at the table. Their presence helps to close the circle of environmental protection by ensuring that all lands in the United States are fully considered in the decision-making process. More importantly, tribal regulatory control over the reservation environment ensures that the tribe's value judgments about conservation, development, and stewardship influence the ultimate decision.

This article addresses one of the windows in federal environmental law through which Indian tribal governments might exercise substantial influence over activities that impact the quality of reservation surface waters. Section II briefly discusses the background of federal law and policy regarding the protection of reservation water quality. Section III describes how Indian tribes may receive delegation of the water quality

2. *See infra* text accompanying note 23.

standards program under the federal Clean Water Act, and how tribes can develop such standards. Section IV explains the legal consequences of EPA's approval of tribal water quality standards, and section V concludes that such standards are potent mechanisms for tribal governments to discharge their sovereign responsibility to protect tribal citizens, lands, and natural resources.

II. BRIEF BACKGROUND OF FEDERAL POLICY FOR PROTECTING THE QUALITY OF RESERVATION WATERS

In 1972, Congress enacted the Federal Water Pollution Control Act ("FWPCA") and declared the national policy to eliminate the discharge of pollutants into navigable waters.[3] The Act's goal was to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. Although the FWPCA was silent on the issue of whether the phrase "the Nation's waters" included waters on Indian lands, there was little doubt that EPA had the authority and responsibility to implement the Act in Indian Country.[4] Common sense compelled that conclusion: the fact that surface water bodies characteristically cross jurisdictional boundaries combined with the migratory nature of water contamination meant that pollution flowed both to and from Indian reservations. Hence, the national goals and the federal scheme of uniformity would be frustrated by substantial islands of unregulated lands within the states.[5]

The practical need to implement the FWPCA on Indian reservations arose during a time when the federal government's view of the roles of tribal governments was changing dramatically. In 1968, President Johnson had urged Congress to end the damage of the Termination Era and support tribal self-determination in a partnership with American Indian tribes.[6] In 1970, President Nixon echoed Johnson's criticism of

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3. Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387 (1972). The FWPCA was amended by the Clean Water Act of 1977, and is now commonly known as the Clean Water Act or the CWA. Clean Water Act of 1977, Pub. L. No. 95-219, 91 Stat. 1566-1611 (1977) (codified at 33 U.S.C. §§ 1251-1387 (1988)).

4. *See* Federal Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 116 (1960) (holding that absent specific limitations, federal statutes of general applicability apply to Indian persons and Indian property interests). In the environmental context, see Phillips Petroleum Co. v. EPA, 803 F.2d 545, 555 (10th Cir. 1986) (applying the Safe Drinking Water Act to Indian lands); Washington Dept. of Ecology v. EPA, 752 F.2d 1465, 1472 (9th Cir. 1985) (assuming without discussion that the Resource Conservation and Recovery Act delegated authority to EPA to regulate hazardous waste activities on Indian lands); Nance v. EPA, 645 F.2d 701, 713-14 (9th Cir. 1981) (applying the Clean Air Act to Indian lands); Davis v. Morton, 469 F.2d 593, 597 (10th Cir. 1972) (applying the National Environmental Policy Act to Indian lands).

5. *See Phillips Petroleum*, 803 F.2d at 555-56 (refusing to interpret the Safe Drinking Water Act as not applying to Indian lands because that interpretation would contradict national policy and leave vast areas of the nation subject to groundwater contamination).

6. *See* FELIX S. COHEN, FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 185 (1982 ed). The Termination Era, which began in the early 1940s, comprised the period during which official United

the official policy of termination, and challenged Congress to enact legislation empowering tribes to control the operation and management of federal Indian programs.[7] Although Congress never did repudiate the House Resolution which adopted termination as the nation's official Indian policy,[8] it did "restore" a previously "terminated" tribe in 1973,[9] and enacted the Indian Self-Determination[10] and Education Assistance Act of 1975.[11]

On January 24, 1983, President Reagan reaffirmed the principle of tribal self-determination and the unique political relationship between Indian tribes and the United States.[12] Reagan's view of tribal self-government stemmed from a recognition that, like state and local governments, tribal governments are more aware of the needs and interests of their citizens than the federal government.[13] As such, they should have primary responsibility for establishing and implementing programs intended to meet their citizens' needs. Economic development on reservations was, and is, one of those critical needs, and thus Reagan supported the notion that tribes should have primary responsibility to determine the manner in which tribal natural resources would be developed, as well as the regulatory and enforcement mechanisms necessary to interact with the private sector for on-reservation development.[14]

In November 1984, EPA took a significant but natural step toward implementing Reagan's Indian policy in the environmental context and became the first federal agency to adopt an Indian policy.[15] EPA's Indian Policy acknowledged tribal sovereignty by vowing to work on a government-to-government basis with tribes rather than treating them as subdivisions of states.[16] EPA also embraced its trust obligation to fully consider tribal concerns and interests in implementing federal environ-

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States' policy was the destruction of tribal governments as distinct political entities, and the termination of the unique relationship between the tribes and the federal government. *Id.* at 152.

7. *Id.* at 186.

8. *Id.*

9. Menominee Restoration Act of 1973, Pub. L. No. 93-197, 87 Stat. 770 (codified at 25 U.S.C. §§ 903-903f (1988)).

10. Indian Self-Determination Act, Pub. L. No. 93-638, 88 Stat. 2206 (1975) (codified at 25 U.S.C. §§ 450-450n (1988)).

11. Indian Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2213 (codified at 25 U.S.C. §§ 450-450n, 455-458e (1988)).

12. Statement by the President, Office of the Press Secretary 1 (January 24, 1993).

13. *Id.* at 2.

14. *Id.* at 4.

15. EPA, Policy for the Administration of Environmental Programs on Indian Reservations (Nov. 8, 1984) [hereinafter EPA Indian Policy].

16. *Id.* at 1.

mental regulatory programs on and near Indian reservations.[17] Because tribes are often better situated to assess the impacts of economic development and pollution on tribal interests, EPA promised to consult and coordinate with tribes in making program decisions.[18]

Perhaps most importantly, EPA announced its intention to recognize tribal governments as the primary parties for implementing federal environmental laws; consistent with agency regulations, tribes were to set standards, make environmental policy decisions, and manage federal programs for reservations.[19] EPA also issued Implementation Guidance, which directed regional administrators to set aside funds and provide staff and technical assistance to tribes as they moved to assume program responsibilities like the states.[20]

Apart from insufficient funding, limited tribal infrastructure, and environmental regulatory inexperience,[21] there was one basic problem: Congress had not authorized EPA to delegate federal environmental programs to Indian tribes. However, not two years later, Congress followed EPA's lead and began a series of amendments to federal environmental laws that envisioned the role of tribal governments in a manner similar to the roles played by state governments.[22] These amendments acknowledge the sovereign status of Indian tribes by authorizing EPA to treat tribes in substantially the same manner as states for the purposes of implementing environmental programs and regulating reservation environments.[23]

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17. *Id.* at 3. As a federal agency, EPA has an obligation to carry the Federal government's fiduciary duty to act in good faith when taking actions that affect Indian tribes. *See* United States v. Mitchell, 463 U.S. 206, 224 (1983) (holding that the Department of the Interior has a responsibility to manage tribal timber resources to obtain the greatest benefit for the tribes).

18. *See* EPA Indian Policy, *supra* note 15, at 3.

19. *See* EPA Indian Policy, *supra* note 15, at 2. EPA reaffirmed its policy in 1991, recommending the strengthening of tribal capacity for environmental management. Memorandum from William K. Reilly, EPA, EPA/State/Tribal Relations, to Assistant Administrators, EPA (July 10, 1991).

20. Memorandum from Alvin J. Alm, EPA, Indian Policy Implementation Guidance, to Assistant and Regional Administrators, EPA, (November 8, 1984). One year later, EPA adopted its interim strategy for implementing the policy which recognized that "forcing tribal governments to act through state governments that cannot exercise jurisdiction over [Indian tribes] is not an effective way of implementing programs overall, and certainly is in opposition to the federal policy of working with tribal governments directly." *Interim Strategy for Implementation of the EPA Indian Policy*, Office of Federal Activities, Offices of External Affairs 11 (November 1985).

21. These problems were, of course, tremendous obstacles to the development of effective tribal regulatory programs. They remain so today.

22. *See* 42 U.S.C. §§ 300j-11 (1988) (codifying the 1986 amendments to the Safe Drinking Water Act, Pub. L. No. 99-339); 42 U.S.C. § 9626 (1988) (codifying the 1986 Superfund Amendments and Reauthorization Act to the Comprehensive Environmental Response, Compensation and Liability Act, Pub. L. No. 99-499); 33 U.S.C. §§2706(b)(4), (c)(3) (1988) (codifying the Oil Pollution Act of 1990, P.L. 101-380); 42 U.S.C. § 7601(d) (1988) (codifying the Clean Air Act Amendments of 1990, Pub. L. No. 101-549).

23. *See also* Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 3113-118, (1992) (containing the Indian Technical Amendments).

III. TRIBAL GOVERNMENTAL REGULATION OF WATER QUALITY UNDER THE CLEAN WATER ACT[24]

On February 4, 1987, Congress followed the trend toward recognizing the sovereign authority of tribal governments to regulate pollution sources affecting reservation environments by adding section 518 to the Clean Water Act ("CWA").[25] Section 518 authorized EPA to "treat an Indian tribe as a State" for certain CWA programs.[26] The "treatment" varied with the relevant program: treatment under section 106 meant the tribe was eligible to receive EPA grants for water pollution control;[27] treatment under section 303 meant that EPA would delegate to the tribe primary responsibility for setting standards to protect the quality of reservation waters.[28] With this addition, Congress made clear that EPA was to give Indian tribes the opportunity to assume substantially the same duties, rights, and responsibilities as states for implementing the CWA.

A. TRIBAL ELIGIBILITY TO RECEIVE CWA PROGRAM DELEGATION

This historic opportunity, however, was not automatic; tribes could receive such "treatment as a state" ("TAS") only after they met certain threshold criteria (not applicable to states). EPA could approve tribes for TAS only if:

1. The Indian tribe has a governing body carrying out substantial governmental duties and powers;

2. The functions to be exercised by the Indian tribe pertain to the management and protection of water resources which are held by an Indian tribe, held by the United States in trust for Indians, held by a

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24. The author presented an earlier version of this section at the Fifth Annual Natural Resources Management & Environmental Enforcement on Indian Lands Conference (Albuquerque, NM, 1993), sponsored by the American Bar Association's Section on Natural Resources, Energy, and Environmental Law. That earlier version was co-authored by Richard A. Du Bey and Michael P. O'Connell.

25. 33 U.S.C. § 1377 (1988) (codifying the 1987 amendments to the Clean Water Act, Pub. L. No. 100-4).

26. *Id.* §1377(e) (stating that those CWA programs are Title II (Construction Grants), section 104 (Research, Investigation, and Training), section 106 (Grants for Pollution Control), section 303 (Water Quality Standard), section 308 (Inspections, Monitoring, and Entry), section 309 (Federal Enforcement), section 314 (Clean Lakes), section 402 (National Pollutant Discharge Elimaintain System), and section 404 (Dredge and Fill Material)).

27. 33 U.S.C. § 1377(e) (1988).

28. *Id.* § 1313(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

3. The Indian tribe is reasonably expected to be capable, in the Administrator's judgment, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of [the CWA] and of all applicable regulations.[29]

Congress then directed EPA to promulgate regulations specifying how it would treat tribes as states under the CWA.[30]

Pursuant to section 518, EPA promulgated five regulations setting forth criteria by which EPA will approve tribes for TAS for various CWA programs.[31] Each rule covered TAS requirements for one or several programs; there was no one TAS regulation generic to all CWA programs.[32] However, most of the TAS requirements were substantially similar so that once a tribe received TAS approval under one CWA program, the tribe was only required to supplement its first TAS application with information specific to the next desired program.[33]

Generally, to qualify for TAS under EPA's rules, an Indian tribe must demonstrate that it meets the following four criteria:

1. The tribe is federally recognized;

2. The tribe has a governing body capable of carrying out substantial governmental functions;

3. The tribal government's functions include management and protection of tribal water resources; and

4. The tribe is reasonably capable of carrying out the functions of an effective water quality management program.[34]

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29. 33 U.S.C. § 1377(e). *See also* ENVIRONMENTAL PROTECTION AGENCY, REFERENCE GUIDE TO WATER QAULITY STANDARDS FOR INDIAN TRIBES 4 (1990).

30. *Id.*

31. *See* Safe Drinking Water Act, National Drinking Water Regulations, Underground Injection Control Regulations; Indian Lands, 53 Fed. Reg. 37,396 (1988) (codified at 40 C.F.R. parts 35, 124, 141, 142, 143, 144, 145, and 146); Indian Tribes: Water Quality Planning and Management, 54 Fed. Reg. 14,354 (1989); Comprehensive Construction Grant Regulation Revision, 55 Fed. Reg. 27,092 (1990) (governing grant programs under the CWA) (codified at 40 C.F.R. parts 35 and 130); Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,876 (1991) (codified at 40 C.F.R. part 131); Clean Water Act, Section 404 Tribal Regulations, 58 Fed. Reg. 8,172 (1993) (codified at 40 C.F.R. parts 232 and 233); Treatment of Indian Tribes as States for Purposes of Sections 308, 309, 401, 402, and 405 of the Clean Water Act [NPDES rule], 58 Fed. Reg. 67,966 (1993) (codified at 40 C.F.R. parts 122, 123, 124 and 501).

32. 59 Fed. Reg. 13,820 (1994) (to be codified at 40 C.F.R. parts 123, 124, 131, 142, 144, 145, 233, and 501).

33. *See* 40 C.F.R. § 131.8(b)(6) (1994) (providing TAS requirements for section 303 water quality standards).

34. *See* 40 C.F.R. § 131.8(a) (1994) (providing TAS requirements for section 303 water quality standards); 40 C.F.R. § 130.6(d) (1994) (providing TAS requirements for section 106 pollution prevention).

In March 1994, EPA expressed its dissatisfaction with the TAS approval process.[35] At that time, EPA's regulations viewed TAS approval as a formal "prequalification process," whereby EPA would first determine whether a tribe had the requisite qualities to be worthy of the opportunity to apply for grants or program delegation under the various CWA sections.[36] For example, under section 303, the tribe had to qualify for TAS before it was entitled to initiate the formulation and adoption of water quality standards approvable by EPA.[37]

After several years of receiving and processing TAS applications, very few tribes had actually received any substantive responsibilities under the CWA.[38] EPA was frustrated with the time-consuming nature of the separate TAS prequalification step, and tribes were frustrated with the lack of results (and also the phrase "treatment as a state" which some saw as inherently offensive).[39] Consequently, EPA announced a new process in late 1994.[40] Because section 518 mandates some form of TAS determination, the new process retains the basic TAS requirements of EPA's five prior regulations.[41] But TAS approval is no longer separate from the underlying program approval; a tribe may now submit its water quality standards for approval without having previously "qualified" for TAS.[42]

1. *General Eligibility Requirements for Delegation of the Water Quality Standards Program*

The portion of a tribe's application for program delegation that relates to the general eligibility requirements is relatively straightforward. First, the application should state that the tribe is federally recognized and include the Federal Register page that lists the tribe.[43] The application should also include a narrative statement that describes the form of tribal government, its sources of authority to govern, and the

35. *See* 59 Fed. Reg. 13,820, 13,820-21 (1994) (stating that "The Agency's 'TAS' prequalificaiton process has proven to be burdensome, time-consuming and offensive to tribes").

36. *Id.*

37. *See* 40 C.F.R. § 131.8(c)(5) (1994).

38. *See* 59 Fed. Reg. 38,460 (1994) (noting that by July 28, 1994, EPA had approved 90 tribal TAS applications, but only three of those tribes had received approval for water quality standards programs).

39. *Id.* at 13,821.

40. 59 Fed. Reg. 64,339 (1994) (providing the final rule on eligibility of Indian tribes for program authorization under the CWA and the Safe Drinking Water Act).

41. *Id.*

42. *Id.* at 64,340.

43. 40 C.F.R. § 131.8(b)(1) (1994); *see* 53 Fed. Reg. 52,829, 52,829-32 (1988) (listing tribes recognized for purposes of receiving federal services).

types of governmental duties and functions (e.g., levying taxes, exercising police power) currently performed by the governing body.[44]

EPA's third criterion is that the tribal government currently possess authority over water quality management on the reservation.[45] The standard does not require *current* tribal exercise of that authority, but only *an assertion of regulatory authority* over the waters for which the tribe proposes water quality standards ("WQS").[46] The tribe's assertion must be supported by a statement from the tribal attorney that explains the basis for the assertion, along with copies of any documents like tribal constitutions, bylaws, ordinances, and tribal council resolutions supporting the assertion of authority.[47] Finally, the tribe must also identify the areas and waters over which the tribe asserts its authority.[48]

To meet EPA's fourth criterion, the tribe must convince the Regional Administrator that the tribe either has, or can develop, the capability to administer effectively the program at issue.[49] Previously, EPA had required that the tribe describe its prior management experience with federal programs like the Indian Self-Determination and Education Assistance Act, the Indian Mineral Development Act, and the Indian Sanitation Facility Construction Activity Act,[50] as well as any experience with tribal environmental or health programs.[51] Under EPA's new program eligibility rule, no specific documentation is required; EPA will use its grant and program approval standards to establish the statutory capability requirement.[52]

Normally, of course, offering more rather than less information about prior tribal management experience encourages EPA to find the tribe capable. A narrative statement that describes the tribe's experience and governmental structure is helpful.[53] The statement should identify and describe the tribal agency primarily responsible for administering the water quality standards program,[54] and its technical and administrative capabilities.[55]

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44. 40 C.F.R. § 131.8(b)(2) (1994).
45. *Id.* § 131.8(b)(3).
46. *Id.* § 131.8(b)(3)(i).
47. *Id.* § 131.8(b)(3)(ii), (iii).
48. *Id.* § 131.8(b)(3)(i), (iv). *See infra* Part III.A.2 for a more detailed discussion of tribal jurisdiction over reservation waters.
49. 40 C.F.R. § 131.8(b)(4) (1994).
50. *Id.* § 131.8(b)(4)(i).
51. *Id.* § 131.8(b)(4)(ii).
52. 59 Fed. Reg. 64,339, 64,341 (1994).
53. 40 C.F.R. § 131.8(b)(4)(iii) (1994).
54. *Id.* § 131.8(b)(4)(iv).
55. *Id.* § 131.8(b)(4)(v).

A tribe's lack of prior environmental management experience does not automatically preclude it from demonstrating capability.[56] EPA recognizes that many tribes are just beginning to build infrastructure necessary to manage programs like the WQS program.[57] Thus, the tribe may satisfy the capability requirement by describing a plan that proposes how the tribe *will acquire* the administrative and technical expertise necessary to implement its program.[58] Particularly, the plan must address how the tribe will obtain funds sufficient to acquire the requisite expertise.

2. *Tribal Governmental Jurisdiction over Reservation Waters*

The quick glance above at the requirements for program eligibility implies that EPA approval is a relatively straightforward exercise of explaining the governmental structure of the tribe and asserting that the tribe has or can obtain the resources and infrastructure necessary to implement the desired CWA programs for surface waters on the reservation. At one level, that is true. But the implication glosses over the seminal question usually raised by the exercise of governmental powers in Indian Country: Who has jurisdiction over the on-reservation persons and activities sought to be regulated? Indian reservations typically consist of various portions of land owned by the United Sates and held in trust for tribes or individual Indian peoples, and lands owned in fee simple by non-Indians.[59] Even the casual reader of Indian law knows that modern Supreme Court cases use the presence of non-Indian landowners on reservations to avoid the logical and moral conclusion that tribal governments should regulate persons and activities on-reservation, and state governments (and their subdivisions) should regulate persons and activities off-reservation.[60]

In the context of the CWA's section 303 WQS program, however, there are at least two caveats to this issue. First, EPA makes the determination of whether a tribe or state has adequate jurisdiction to receive a CWA program delegation. EPA has uniformly refused to

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56. *See* 56 Fed. Reg. 64,876, 64,882 (1991).

57. *See* 54 Fed Reg. 39,098, 39,101 (1989) (recognizing tribes have not had substantial experience in administering surface water quality programs).

58. 40 C.F.R. § 131.8 (b)(4)(v) (1994).

59. COHEN, *supra* note 6, at 136-38 (discussing the presence of non-Indian landowners as a natural consequence of the Allotment Era, which partitioned huge areas of tribal communal lands into parcels allotted to individual tribal members).

60. *See, e.g.*, Brendale v. Confederated Tribes and Bands of the Yakima Nation, 492 U.S. 408 (1989) (holding that the Yakima Indian Nation could not regulate the land uses of non-Indians in a predominantly "non-Indian" area of the Nation's reservation).

delegate to states the federal environmental authority to regulate Indian lands.[61] At least one circuit court has held EPA's interpretation reasonable.[62] Thus, under its current policy, if EPA chooses to delegate programs for environmental regulation on reservations, it makes those delegations to tribes.[63] A reviewing court could determine that EPA's basis for making a jurisdictional determination for a particular tribe is insufficient on the administrative record, and overturn the decision.[64] But under established principles of administrative law, the court may not then order the agency to delegate the program to the state for application to reservation waters.[65]

The second caveat is that it is not necessarily clear that traditional concerns of jurisdiction apply to the WQS program. As discussed below,[66] the adoption of tribal WQS offers tribes significant influence over the decisions and activities that threaten the health and welfare of tribal members and the quality of the reservation environment, but that power is indirect. That is, until EPA delegates to the tribe a CWA permitting program (like the section 402 NPDES permitting program),[67] any application of tribal WQS to non-Indians on fee lands will be made by federal agencies, not the tribe. The tribe's adoption of WQS then, does not seek to regulate the conduct of non-Indians on fee lands and therefore the Supreme Court's view of tribal jurisdiction over non-Indians on fee lands is inapposite.

Notwithstanding those two caveats, EPA and others still look to the Supreme Court's current Indian law discourse to make tribal eligibility determinations. It seems beyond question that tribal governments possess jurisdiction over tribal members, whether they act on trust or fee lands.[68] The more lively discussion centers around the existence and extent of tribal civil regulatory control over non-Indians on fee lands.

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61. *See, e.g.*, 48 Fed. Reg. 34,954 (1983) (approving State of Washington's RCRA delegation except as to Indian lands); 53 Fed. Reg. 39,088, 39,089 (1988) (approving State of Nevada's delegation under the Safe Drinking Water Act except as to Indian lands); 59 Fed. Reg. 43,797 (1994) (approving State of Louisiana's delegation under the Clean Air Act except as to sources on Indian lands).

62. Washington Dept. of Ecology v. EPA, 752 F.2d 1465, 1469 (9th Cir. 1985).

63. EPA has, however, consistently indicated its willingness to make partial delegation limiting the tribe's approval to those land areas where the tribe demonstrates jurisdiction. *See, e.g.*, 59 Fed. Reg. 64,339, 64,340 (1994).

64. *Cf.* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 549 (1978) (holding that court's role is to vacate agency's decision and remand for futher consideration if record is insufficient to sustain the agency's initial decision).

65. *Id.*

66. *See infra* Section IV.C.

67. 33 U.S.C. § 1251 (1977).

68. *See* Montana v. United States, 450 U.S. 544 (1981); United States v. Wheeler, 435 U.S. 313 (1978).

There are three possible sources for such tribal authority: federal delegation, federal treaties, and inherent tribal sovereignty.

The most potent source of tribal jurisdiction over non-Indians is federally-delegated power.[69] The issue is arguably raised by section 518 itself, which envisions that "the functions to be exercised by the Indian tribe pertain to the management and protection of water resources which are held by an Indian tribe . . . or [are] otherwise within the borders of an Indian reservation."[70] Section 518 defines "Federal Indian reservation" as "all land within the limits of any Indian reservation . . . notwithstanding the issuance of any patent, and including any rights--of-way running through the reservation."[71] Because Congress did not limit section 518 authority only to trust lands on the reservation, it arguably delegated federal power to tribes to exercise jurisdiction over all waters on the reservation, regardless of any non-Indian uses of or ownership rights in those waters.

EPA did not take that view. Instead, it found section 518 and its legislative history ambiguous with respect to tribal jurisdiction over non-Indians on fee lands within the reservation.[72] In the face of those ambiguities, and given that the issue was an important one not likely to be treated lightly by Congress, EPA concluded that Congress intended neither to expand nor restrict inherent tribal sovereignty.[73] EPA determined that to make eligibility determinations under section 518, it would look to the controlling precedent of the Supreme Court regarding the civil regulatory authority of tribal governments.[74]

The second potential source of tribal jurisdiction over non-Indians is a federal treaty. During the heady days of manifest destiny, the federal government promised many tribes the "exclusive and undisturbed use and occupation" of designated lands in exchange for the tribes' cession of huge tracts of other lands.[75] Those familiar with the Euro-American system of property law understood those treaty terms to mean that tribes could completely exclude non-Indians from the reservations, or could allow them on the reservation only if they acted in

69. *Cf.* United States v. Mazurie, 419 U.S. 544, 557 (1975) (affirming federal conviction for violation of tribal liquor ordinance on basis of a federal delegation to the Wind River Tribe to regular liquor trade on the reservation).

70. 33 U.S.C. § 1377(e)(2) (1988).

71. *Id.* § 1377(h).

72. *See* 56 Fed. Reg. 64,876, 64,879-80 (1991).

73. *Id.*

74. *Id.* at 64,880.

75. *See, e.g.*, United States v. Shoshone Tribe, 304 U.S. 111, 113 (1938) (addressing Shoshone Tribe's property rights under an 1868 treaty that reserved to the Tribe the "absolute and undisturbed use and occupation of its reservation").

accordance with conditions specified by the tribal government.[76] The Supreme Court agreed with that view, with one critical qualification: a tribe loses its treaty-based right to regulate non-Indians on fee lands as soon as Congress opens the reservation for non-Indian use and/or ownership.[77] The effect of the opening (i.e., the presence of non-Indians on the reservation) is the critical factor; Congress' purpose in opening the lands is unimportant to the Court.[78] Thus, if a tribe suffered the indignity of Congress' allotment policy, or had its lands taken for national interests like flood control, it thereby lost any treaty right to regulate the conduct of non-Indians on the areas opened to non-Indians.[79]

The third and most controversial source of potential tribal authority is inherent sovereignty, which flows from a source other than the United States Constitution and predates Congress and the Supreme Court. Its precise contours have never been defined, but for several thousands of years it was understood to encompass authority over tribal members and tribal territories.[80] In the last fifty years, however, the Supreme Court has seemed intent on matching earlier efforts of the executive and legislative branches in undermining the authority of tribal governments. In 1981, the Court's decision in *Montana v. United States*[81] announced the "general proposition" that tribal governments lack sovereign authority over the activities of non-members of the tribe on fee lands within the reservation.[82] The general rule has a needs-based exception, however, that may be applicable in the environomental context. A tribe may regulate "the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political

76. *Montana*, 450 U.S. 564-65.

77. *Id.*

78. South Dakota v. Bourland, 113 S. Ct. 2309, 2318 (1993).

79. *See Bourland*, 113 S. Ct. at 2315-16 (holding that the Cheyenne River Sioux Tribe lost its treaty-based right to regulate non-Indians on waters overlying fee lands opened to non-Indian use by federal flood control acts); *Montana*, 450 U.S. at 547-49 (holding that the Crow Tribe lost its treaty-based right to regulate non-Indians on lands made available to non-Indian ownership through Allotment Acts).

80. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 557-59 (1832) (stating that Indian Nations are distinct political communities, having exclusive authority within their territorial boundaries, as the undisputed possessors of the soil from time immemorial); *Mazurie*, 419 U.S. at 557 (stating that Indian tribes are "unique aggregations possessing attributes of sovereignty over both their members and their territory").

81. 450 U.S. 544 (1981).

82. *Montana*, 450 U.S. at 565. Despite the weakness of the Court's reasoning, and its misapplication of binding precedent leading to an "anomalous result," *see id.* at 569 (Blackmun, J., dissenting), it is clear that the Court as currently composed intends to follow *Montana's* "general proposition." *See Bourland*, 113 S. Ct. at 2321.

integrity, the economic security, or the health and welfare of the tribe."[83]

The *Montana* standard was put to the test in *Brendale v. Confederated Tribes and Bands of the Yakima Nation*.[84] In *Brendale*, the Supreme Court addressed whether the Yakima Indian Nation or Yakima County, Washington, had jurisdiction to zone non-Indian fee lands within two distinct areas of the Yakima Reservation: the "closed" area of the Yakima reservation was primarily owned by the Tribe and tribal members and was not generally open to non-member use; the "open" area was primarily owned in fee by non-Indians and Yakima County provided governmental services to those landowners.[85] The Justices split 4:2:3, so there was no majority rationale. The result, however, was not a surprising leap from the new rule and exception announced in *Montana*. In the closed area, where non-Indian activities were likely to impact important tribal interests, five Justices held that the Yakima Indian Nation had exclusive authority to zone fee lands.[86] In the open area, where non-Indian activities were less likely to impact tribal interests, six Justices held that the County had exclusive authority to zone fee lands.[87]

Some commentators viewed *Brendale* as a retreat from *Montana*'s exception for tribal authority over non-Indian activities affecting tribal interests.[88] But despite the fractured approach of the *Brendale* Court, all of the Justices relied to some extent on *Montana*'s exception for tribal jurisdiction over non-Indian activities affecting important tribal interests and and the result was arguably consistent with *Montana*.[89] Nevertheless, a significant majority of the Supreme Court recently reaffirmed *Montana*'s view of inherent tribal authority over non-Indians as the governing test.

In *South Dakota v. Bourland*,[90] the Court addressed a situation very similar to *Montana*.[91] The Cheyenne River Sioux Tribe sought to

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83. *Montana*, 450 U.S. at 565-66. The court identified one other exception to the general rule: a tribe may also regulate the activities of non-Indians who enter consensual realtionships with the tribe or its members. *Id.*

84. 492 U.S. 408 (1989).

85. Brendale v. Confederated Tribes and Bands of the Yakima Nation, 492 U.S. 408, 415-46 (1989).

86. *Id.* at 441-43 (Stevens, J., writing for the Court); *id.* at 462 (Blackmun, J., concurring).

87. *Id.* at 432 (White, J., writing for the Court); *id.* at 444-45 (Stevens, J., concurring).

88. *See, e.g.*, Peter W. Sly, *EPA and Indian Reservations: Justice Stevens' Factual Approach*, 20 ENVT'L L. RPTR. 10429, 10434 (1990) (stating that "Justice Stevens' open/closed classifications would effectively replace the doctrinal approach derived from the dicta of *Montana*'s second exception").

89. *Cf.* 56 Fed. Reg. 64,876, 64,877 (1991) (stating that "the primary significance of *Brendale* is in its result, which was fully consistent with *Montana*").

90. 113 S. Ct. 2309 (1992).

91. South Dakota v. Bourland, 113 S. Ct. 2309 (1992).

regulate the hunting and fishing activities of non-Indians on the Oahe Reservoir, which overlies former trust and fee lands within the Tribe's reservation.[92] The Reservoir was created when the Army Corps of Engineers built the Oahe Dam for flood control purposes.[93] But the Corps' enabling authority also directed that once created, the Reservoir would be open for general recreational public use.[94] Like the Crow Tribe in *Montana*, the Cheyenne River Sioux argued that it possessed regulatory authority over non-Indians on the Reservoir under (1) its treaty right to exclusive use and occupation of its reservation, and (2) its inherent governmental sovereignty.[95]

The Court's opinion, authored by Justice Thomas, first cited *Montana* as support for the conclusion that regardless of its purpose, when Congress opens Indian lands to non-Indian use, the tribe thereby loses any treaty-based right to regulate the non-Indian activities.[96] As to the Tribe's inherent sovereignty, the Court quoted *Montana*'s "general proposition" that such powers do not extend to the activities of non-Indians on fee lands, and its exception for regulating activities that threaten or have a direct impact on the political integrity, economic security, or health and welfare of the tribe.[97] But because the circuit court had not passed on the district court's findings regarding impact of the non-Indians' activities on tribal health and welfare, the Supreme Court remanded that issue.

On remand, the Eighth Circuit concluded that the Tribe had not met *Montana*'s standard for establishing jurisdiction over non-Indian activities on the Reservoir.[98] The majority reviewed the district court's findings that non-Indian hunters and fishers sometimes harassed Indian cattle, left open pasture gates, took down fence wires, and killed deer otherwise available for Indian subsistence uses.[99] Although the majority found these occurrences undeniably "vexatious" to the tribal members

92. *Id.* at 2313.
93. *Id.*
94. *Id.*
95. *Id.* at 2319-20.
96. *Bourland*, 113 S. Ct. at 2316.
97. *Id.* at 2319-20. Twisting the termination knife in the belly of federal Indian Law, Justice Thomas boldly asserted that after *Montana*, tribal authority over non-Indians cannot survive without congressional delegation "and is therefore *not* inherent." *Id.* at 2320 n.15. That assertion is flatly contradicted by *Montana*'s conclusion that "[a] tribe may also retain *inherent power* to exercise civil authority over the conduct of non-Indians on fee lands, within its reservation when that conduct threatens" certain tribal interests. *Montana*, 450 U.S. at 566. Justice Thomas' assertion is also contradicted by the *Bourland* result; although *Bourland* found no congressional delegation of authority to the tribe to regulate non-Indians on the Oahe Reservoir, the Court remanded to the Eighth Circuit to determine whether, under *Montana*, the Tribe had inherent authority to regulate on the basis of impacts of the non-Indians' activities on tribal interest. *Bourland*, 113 S. Ct. at 2321.
98. South Dakota v. Bourland, 39 F.3d 868, 870 (8th Cir. 1994).
99. *Id.*

affected, it could not hold as clearly erroneous the district court's finding that such occurrences neither threatened nor had a direct effect on the political integrity, economic security, or the health or welfare of the Tribe.[100] However, the majority offered the Tribe a second chance if in the future the "improper conduct of the non-Indian hunters and fishermen on the taken area escalate[d] in severity so as to have a direct effect" on the tribe's interests.[101]

The *Montana* test seems particularly well suited to tribal environmental regulation. Environmental regulation is an exercise of a government's police power, which is intended to protect the health and welfare of the government's citizenry.[102] EPA has quite logically interpreted the CWA as a Congressional determination that activities that pollute the Nation's surface waters present serious and substantial health and environmental impacts.[103] That is especially true for Indian reservations, where uncontaminated water for irrigation, fishing, and other uses, and critical habitat for fish and animals, is absolutely crucial to the survival of the reservation.[104] Whether pollutants come from Indian activities on trust lands or from non-Indian activities on fee lands, the water contamination presents serious and substantial impacts to tribal health and welfare.

At least one commentator has argued for a less holistic look, urging that in making tribal program eligiblity determinations, EPA should prepare maps and tables showing the proportion of fee to trust lands, Indian to non-Indian landowners, and whether any towns or special districts exist on the reservation.[105] EPA has rejected such an approach,[106] and for good reason. Environmental regulation is more directly related to protecting the public health and welfare than the land use zoning regulations addressed in *Brendale*, or the hunting and fishing regulations addressed in *Bourland*.[107] The importance of water quality

100. *Id.*

101. *Id.* at 870-71.

102. *See, e.g.*, Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 488 (1987) (describing Pennsylvania's mining regulations as an exercise of the state's police power to protect the public interest in health and the environment).

103. 56 Fed. Reg. 64,876, 64, 878 (1991).

104. *See* Arizona v. California, 373 U.S. 546, 598-600 (1963); 56 Fed. Reg. 64,876, 64,878 (1991).

105. Sly, *supra* note 88, at 10,435. This approach stems from Justice Stevens' opinion in *Brendale*, which focused on the "Indian" character of the closed area of the Yakima Indian Nation, and the "non-Indian" character of the open area. *See Brendale*, 492 U.S. at 438-44 (opinion of Stevens, J.).

106. *See* 56 Fed. Reg. 64,876, 64,881 (1991) (noting that under the WQS rule, a tribe is not required to submit a map showing the location of fee and trust lands on the reservation).

107. *Id.* at 64, 879.

regulation stems partly from the transport mechanism for water pollutants (i.e., water in rivers, lakes, wetlands), which dramatiacally increases their mobility. Thus, whereas zoning impacts are normally discrete and localized, environmental health risks from water pollution are transitory and may affect people miles from the pollution source.[108]

In addition, as pollutants migrate they tend to mingle with one another, and it becomes difficult if not impossible to separate out the consequences of water quality impairment from different sources.[109] If tribal members use any portion of the affected surface water, or use fish and animal resources that use the affected surface water, the pollution from non-Indian activities on fee lands is likely to affect tribal interests (health, environmental, etc.) in the quality of that water. Thus, in one sense, as the proportion of non-Indian polluters on the reservation increases, so does the risk that Indian uses of those waters will be restricted or eliminated.

Following this analysis, EPA believes that the impacts of water pollution on reservations are sufficient to support tribal regulation of non-Indian activities on fee lands under *Montana*.[110] Yet, EPA still requires a tribe seeking a program eligibility determination to submit a legal analysis demonstrating that its particular circumstance meets the test.[111] However, the tribe's submission need not be a treatise on tribal jurisdiction. The tribe must simply demonstrate that:

1. There are surface waters and critical habitat within the tribe's reservation that are covered by the CWA; and

2. Tribal members use those waters and/or critical habitat, and thus may be exposed to pollutants present in or introduced into those waters and habitat.[112]

The tribe must also explicitly assert that impairments of the quality of reservation waters caused by non-Indian activities would have serious and substantial effects on the health and welfare of the tribe.[113]

Within thirty days of receiving the tribe's application, EPA must give notice to "all appropriate governmental entities."[114] Those governmental entities have thirty days to raise competing or conflicting jurisdictional claims, clearly explaining the substance, basis, and extent

108. *Id.*
109. *Id.* at 64,878.
110. 56 Fed. Reg. 64,876, 64,878 (1991).
111. *Id.* at 64,879.
112. 56 Fed. Reg. 64,876, 64,879 (1991).
113. *Id.*
114. 40 C.F.R. § 131.8(c)(2)(ii) (1994). EPA interprets "appropriate governmental entities" to include states, tribes, and federal agencies located contiguously to the applying tribe's reservation. 56 Fed. Reg. 64,876, 64,884 (1991).

of any objection.[115] In the absence of objection, EPA presumes the adequacy of a tribe's showing if it meets the basic requirements set out above.[116] If an adjacent state or tribe objects, EPA may seek additional information from the tribe or the objecting party, or consult with other federal agencies before making a final determination.[117] If EPA determines that the tribe has shown its jurisdiction over surface waters of the reservation, then it proceeds to determine if the tribe's proposed WQS meet the requirements of the CWA.

B. DEVELOPMENT OF TRIBAL WATER QUALITY STANDARD

The structure of the CWA contemplates two primary mechanisms for achieving the national goals of restoring and maintaining the integrity of the nation's waters: technology-based effluent standards and water quality-based effluent standards. In the former category are standards which set limits for specific pollutants that are based on the technology available to control the discharge; these standards are set by EPA on a nationwide basis without regard to the quality of the receiving waters.[118]

In contrast, water quality-based effluent standards ("WQS") are established for particular water bodies or portions thereof by considering site-specific factors unique to those receiving waters. WQS define the water quality goals of a particular water body, and also serve as a basis for regulatory controls on pollution sources beyond those imposed by the technology-based standards.[119] Fundamentally, WQS consist of designated uses desired to be made of a particular water body, and water quality "criteria" sufficient to protect those uses.[120]

1. *Designation of Uses of Reservation Waters*

The first step in the process of promulgating WQS is for the tribe to identify (or "inventory") all surface waters and may include hydrologically connected groundwaters within the reservation environment that require standards.[121] In appropriate circumstances, tribes may determine that certain artificially-created waters, like irrigation canals or

115. 59. Fed. Reg. 64,339, 64,340 (1994).
116. *Id.* at 64,340.
117. *Id.*
118. *See* 33 U.S.C. § 1316 (1984); 40 C.F.R. §§ 405-471 (1994) (governing technology-based effluent limitations for industrial categories). REFERENCE GUIDE TO WATER QUALITY STANDARDS FOR INDIAN TRIBES, EPA, 440/5-90-002, at 1 (January 1990) [hereinafter EPA WQS GUIDE].
119. EPA WQS GUIDE *supra* note 118, at 1.
120. *Id.* at 1.
121. *Id.* at 6.

ditches, warrant protection through the development and implementation of WQS.[122]

The tribe then develops "use classification systems," which assign specific "uses" to the identified waters.[123] These are the uses that the tribe currently makes or desires to make of the identified waters. At a minimum, the CWA requires that the tribe protect recreational uses in and on the water, and uses by fish, shellfish, and wildlife for protection and propagation.[124] The tribe has the discretion to adopt other use categories and subcategories appropriate to their reservations, so long as those uses and associated water quality criteria are consistent with the purposes of the CWA.[125] Uses likely to be protected would include: public drinking water supplies; irrigated agriculture; recreational activities; power generation; industrial and commercial activities; and cultural or religious activities. Where uses are only practical during specific seasons, a tribe may develop means to protect the CWA's fishable/swimmable goals on a seasonal basis.[126]

If the tribe designates uses that do not include fishable/swimmable uses, the tribe must conduct a "use attainability analysis."[127] A use attainability analysis is a "scientific assessment of the physical, chemical, biological, and economic factors" affecting whether a use can be attained.[128] In particular, the assessment consists of a survey and assessment of the relevant water body, a wasteland allocation, and, if appropriate, an economic analysis.[129] Those analyses assist the tribe in determining which uses of reservation waters are possible, and the relative need for implementation of environmental controls to protect those uses from the adverse consequences of existing and future point and nonpoint sources.

A tribe's choice of uses is an important step in the process of protecting the quality of the reservation environment. Once the tribe has adopted designated uses under the CWA, it is difficult to downgrade or remove uses absent a substantial showing of non-attainability.[130] Tribes may adopt WQS more stringent than necessary to meet the minimum

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122. *Id.*

123. *Id.*

124. 33 U.S.C. § 1251(a)(2) (1989). These minimum uses are loosely referred to as the "fishable/swimmable" goals. EPA WQS GUIDE *supra* note 118, at 1.

125. EPA WQS GUIDE, *supra* note 118, at 7.

126. *Id.* at 7.

127. *Id.* at 7-8.

128. *Id.* at 7.

129. *Id.* at 8. Tribes may avoid devoting excessive resources to attainability analyses by incorporating, where possible, analyses done by adjacent states for similar uses on common water bodies. *See, e.g.*, 56 Fed. Reg. 64,876, 64,889 (1991) (suggesting that tribes borrow adjacent state water quality standards where helpful).

130. EPA WQS GUIDE, *supra* note 118, at 7.

fishable/swimmable goals. However, once adopted, a tribe may only downgrade use by showing that *attaining* the use is not feasible.[131]

2. *Establishment of Water Quality Criteria*

The tribe's use designations essentially establish the tribe's goals for attaining and maintaining a certain level of water quality for the identified surface waters. The mechanisms to achieve those goals are water quality criteria, which are designed to protect the designated uses.[132] Water quality criteria are specific limits on particular pollutants or on the condition of a water body. Compliance with properly selected criteria should achieve a degree of water quality sufficient to protect designated uses.[133]

The tribe may set criteria under any method based on sound science,[134] or it may look to criteria developed by EPA as guidance, modifying that criteria where necessary to reflect site specific conditions.[135] Consistent with the CWA's fishable/swimmable goals, EPA's criteria focus on the effects of pollutants on aquatic life and human health.[136] EPA's criteria offer the tribe two types of useful information: (1) scientific data on the effects of pollutants on aquatic life, human health, and/or recreation; and (2) the specific chemical concentration in water that should achieve adequate water quality to support designated uses.[137] Because tribes are required to designate fishable/swimmable uses, they must adopt aquatic life and human health criteria for any pollutants which data shows may interfere with attaining the designated uses.[138]

Effective tribal criteria usually contain both narrative and numeric water quality criteria. Narrative criteria are statements of acceptable pollutant concentrations without reference to defined units or requirements.[139] A common example of a narrative statement is the provision that toxic material concentrations in surface waters shall be below those which "may adversely affect characteristic water uses."[140] Narrative

131. 40 C.F.R. §§ 131.10(g), (h) (1994).
132. *Id.* § 131.2.
133. *Id.* § 131.11(a).
134. *Id.* § 131.11(b).
135. *See* 56 Fed. Reg. 64,876, 64,886 (1991).
136. 33 U.S.C. § 1314(a)(1) (1989).
137. EPA WQS GUIDE, *supra* note 118, at 8-9.
138. *See* 40 C.F.R. § 131.11(a) (1994).
139. EPA WQS GUIDE, *supra* note 118, at 9.
140. WASH. ADMIN. CODE §§ 173-201-045(1)(c)(ii)(B)(vii) (providing the water quality standards for the State of Washington).

criteria are often used where numeric criterion for a specific chemical is not available or where the chemicals in a toxic effluent cannot be identified.[141] When a tribe adopts narrative criteria for toxic pollutants, however, it must show EPA how the tribe will use the criteria to regulate point sources.[142]

Compared to narrative standards, numeric criteria are more easily understood and enforced. These criteria establish specific chemical concentrations in water of various pollutants.[143] For example, a numeric criterion might require that dissolved oxygen exceed 9.5 mg/1,[144] or that pH shall be within the range of 6.5 to 8.5.[145] In addition, the tribe must adopt numeric criteria for certain toxic pollutants,[146] where discharge of those pollutants may adversely affect designated uses.[147]

3. *Adoption of an Antidegradation Policy*

Apart from either narrative or numeric water quality criteria, the tribe must also adopt an antidegradation policy.[148] An antidegradation policy seeks to maintain existing levels of water quality and proscribes any significant reduction in such water quality which would threaten existing uses.[149] Normally the policy would be reservation-wide, with implementation methods intended to preserve existing uses and high quality waters.[150] Whenever a discharge is found to eliminate a use or degrade high quality waters, the tribe must conduct an antidegradation policy review to ensure that actions taken are consistent with the CWA's goals.[151]

C. APPLICATION AND APPROVAL PROCESS FOR TRIBAL STANDARDS

1. *Preparation of Standards Package*

A tribe's application to EPA for delegation of section 303 authority is referred to as a "standards package." The package includes all relevant material upon which the Regional Administrator approves or

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141. *See* 40 C.F.R. § 131.11(b)(2) (1994).
142. *Id.* § 131.11(a)(2).
143. *Id.* § 131.11(b)(1).
144. *Id.* § 131.35(f)(1)(ii)(B) (containing federal WQS for the Colville Reservation).
145. *Id.* § 131.35 (f)(1)(ii)(E) (containing federal WQS for the Colville Reservation).
146. 33 U.S.C. § 1317(a)(1) (1988) (providing EPA numeric criteria for "priority pollutants" pursuant to section 307(a)(1) of the Clean Water Act.
147. 33 U.S.C. § 1313(c)(2)(B) (1988); 40 C.F.R. § 131.11(a)(2) (1994).
148. *See* 40 C.F.R. § 131.12(a) (1994).
149. *Id.* § 131.12(a)(1), (2).
150. *Id.*
151. EPA WQS GUIDE, *supra* note 118, at 11.

disapproves delegation of the section 303 program to the tribe.[152] Thus, tribes should carefully assess their standards packages to ensure responsiveness to EPA's requirements.

The tribe's standards package must include:

1. Use designations consistent with sections 101(a)(2) and 303(c)(2) of the CWA;

2. Water quality criteria sufficient to protect the designated uses;

3. Scientifically defensible methods and analyses used to establish the WQS;

4. An antidegradation policy and implementation methods that are consistent with EPA's regulation;

5. A certification by the tribal attorney that the WQS were adopted in accordance with tribal law; and

6. Scientifically defensible information on the basis for standards that do not include the minimum fishable/swimmable uses.[153]

Notwithstanding a tribe's own procedure for adopting rules, EPA requires that the tribe hold a public meeting to review the proposed WQS.[154] The meeting must proceed in accordance with both tribal law and certain federal regulations.[155] It should be open to all persons affected by standards decisions, including nonmembers, non-Indians, and state representatives.[156] Prior to the meeting, the tribe must make available to the public the proposed WQS and supporting scientific analyses.[157]

Public input may reveal shortcomings in the proposed WQS and necessitate changes. Once finalized, the tribe adopts or enacts the WQS according to tribal law.[158] The tribal attorney then certifies that the WQS were adopted consistent with tribal law.[159]

2. *EPA's Approval Process*

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152. Including, under EPA's new program eligibility rule, the tribe's description of its satisfaction of the CWA's requirements for program delegation. *See supra* Part III A, B (discussing tribal eligibility to receive CWA program delegation and tribal water quality development).

153. EPA WQS GUIDE, *supra* note 118, at 13.

154. *See* 54 Fed. Reg. 39,098, 39,103-104 (1989). In addition to narrative and numeric water quality criteria, "proposed water quality standards" as used here includes water body use designations, antidegradation policies, and methods and information concerning the scientific basis of the standards. *Id.* at 39,099.

155. 33 U.S.C. § 1313(c)(1) (1988); 40 C.F.R. §§ 131.6(e), 115, 131.20(a), (b) (1994).

156. 40 C.F.R. § 131.20(b) (1994); EPA WQS GUIDE, *supra* note 118, at 13.

157. EPA WQS GUIDE, *supra* note 118, at 13.

158. *Id.*

159. *Id.*

Because tribes are treated as states for purposes of section 303 delegation, EPA reviews tribal WQS under the same statutory and regulatory requirements that it uses to review state standards. Fundamentally, EPA considers whether the proposed tribal WQS are consistent with the CWA and EPA's regulations.[160] EPA also determines whether the scientific analyses performed to establish the WQS were adequate.[161] Also important to EPA is whether the tribe's designated uses and criteria are compatible throughout the water body and whether existing downstream water quality standards are protected.[162]

If EPA finds the tribal standards in compliance with the CWA and EPA's water quality regulations, then it approves the standards by letter to the tribal chairperson.[163] If the Administrator disapproves, then the letter explains why the standards are inconsistent with the CWA and describes how the tribe can revise the standards for full approval.[164] Alternatively, the Administrator may approve the standards conditionally so long as the tribe agrees to complete any minor revisions required by the Administrator within a specified time.[165]

IV. LEGAL CONSEQUENCES OF EPA'S APPROVAL OF TRIBAL WATER QUALITY STANDARDS

A. EPA APPROVAL FILLS REGULATORY VOID FOR RESERVATION WATERS

The most direct consequence of a tribe's development of WQS is that the tribe thereby fills a regulatory void in the CWA that, despite EPA's trust obligation to protect the health and welfare of tribal members and the quality of the reservation environment, has existed for more than twenty years.[166] In one sense, the fundamental structure of the 1972 FWPCA created that void. For example, a central component of the FWPCA was the application of WQS to every water body for which uses are sought to be preserved. Such WQS were to provide the legal and regulatory bases for point source and non-point source water--quality based controls, and to supplement the FWPCA's technological requirements for certain sources.[167] The 1972 Congress recognized that

160. *Id.* at 15.
161. *Id.*
162. *See* 56 Fed. Reg. 64,876, 64,890 (1991).
163. EPA WQS GUIDE, *supra* note 118, at 15.
164. *Id.*
165. *Id.*
166. *See supra* text accompanying notes 3-5 (discussing the federal policy behind protecting the quality of reservation waters).
167. EPA WQS GUIDE, *supra* note 118, at 1; *see supra* text accompanying notes 118-20.

many states had previously adopted WQS under state law,[168] and it desired to preserve the primary responsibility of states to prevent and eliminate water pollution.[169] Thus, Congress directed the states to submit their existing WQS for EPA approval,[170] or if state WQS did not exist, to develop and submit them to EPA within 180 days of the FWPCA's enactment.[171]

Congress also directed EPA to promulgate federal criteria for water quality reflecting the latest scientific information on the processes through which pollutants migrate and concentrate in waters, and the identifiable impacts of such pollutants on public health and welfare, and the environment.[172] The purpose of the federal criteria was to guide the states in developing their WQS, but the criteria were not self-executing; that is, in the absence of state or federal WQS implementing them, the federal criteria did not establish any legally enforceable standards.[173] Where a state failed to submit WQS within the required timeframes, or where EPA found a state's proposed standards inconsistent with the FWPCA, Congress expected EPA to propose and promulgate federal WQS for state waters.[174] EPA's expressed policy, however, was not to promulgate federal standards, but rather to work with states to accomplish consistency of state WQS with the federal requirements.[175]

With varying degrees of diligence, the states responded to Congress' directives. But the states' actions or inactions did not and could not establish WQS for waters in Indian Country. Nothing in the FWPCA suggested that Congress delegated authority to states to regulate the waters of Indian reservations.[176] As a matter of federal Indian law, absent that delegation or some independent source of jurisdiction, states generally lack authority to impose their regulatory schemes on Indian lands.[177] EPA has consistently taken that position with respect to

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168. *See* 56 Fed. Reg. 64,876, 64, 889 (1991).

169. *See* 33 U.S.C. § 1251(b) (1988).

170. *Id.* § 1313(a)(2).

171. *Id.* § 1313(a)(3).

172. *Id.* § 1314(a).

173. *See* 56 Fed. Reg. 64,876, 64,886 (1991). Nor should the standards be self executing. The federal criteria are necessarily set without reference to the site-specific factors that states and tribes would normally consider in developing WQS.

174. 33 U.S.C. § 1313(b) (1988).

175. *Cf.* 56 Fed. Reg. 64,876, 64,891 (1991) (explaining EPA's intent to use the same policy to assist tribes in developing WQS rather than promulgating federal WQS for Indian lands).

176. *See* 54 Fed. Reg. 28,622 (1989) ("The CWA does not, by itself, authorize States to implement or enforce water quality managemment progrms on Indian lands.").

177. *See, e.g.*, California v. Cabazon Band of Mission Indians, 480 U.S. 202, 215 (1987) (asserting that state must show exceptional circumstances to impose civil regulatory laws on Indians on the reservation). This issue is far more complicated and much less absolute than the text's broad assertion implies. For a more detailed analysis of the scope of state jurisdiction over activities

implementing federal environmental programs, refusing to approve state programs asserting any applicability or control over the reservation environment.[178] Challenges to EPA's position have been uniformly rejected by the federal courts.[179]

Prior to the addition of section 518 in the 1987 CWA Amendments, and given EPA's position that states lack authority to implement state WQS on Indian lands, a casual observer might logically have assumed that EPA would then promulgate federal WQS for Indian waters on a reservation by reservation basis. After all, EPA has a trust obligation to protect the reservation environment as well as a mandatory duty to promulgate WQS where necessary to meet the requirements of the CWA.[180] In fact, EPA took such action only once for one reservation, and not until after the tribe insisted and seventeen years had passed since enactment of the FWPCA.[181] In 1989, EPA explained its reasoning for not promulgating federal WQS for Indian waters on two grounds: (1) federal promulgation is "a very deliberate process;"[182] and (2) federal promulgation would be inconsistent with section 518's intention of providing tribes with the first opportunity to set WQS for reservation waters.[183]

So when a tribe demonstrates its eligiblity for program approval and develops WQS, it fills a regulatory void in the implementation of the CWA that states could not and EPA refused to fill. For tribes who issue

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conducted by Indians and non-Indians within the exterior boundaries of Indian reservations, see Judith V. Royster & Rory SnowArrow Fausett, *Control of the Reservation Environment: Tribal Primacy, Federal Delegation, and the Limits of State Intrusion*, 64 WASH. L. REV. 581, 600-13 (1989).

178. *See, e.g.*, 53 Fed. Reg. 43,080 (1988) (denying approval of the portion of the State of Washington's RCRA program purporting to apply to Indian lands in Washington). Note, however, that as a stop-gap measure, EPA adopted a policy of applying state WQS purporting to apply to reservation waters for purposes of determining the conditions for federally-issued permits for discharges into reservation waters. *See* 54 Fed. Reg. 39,098, 39,104 (1989) (quoting September 9, 1988 letter from EPA General Counsel Lawrence Jensen to Dave Frohnmayer, Attorney General of the State of Oregon).

179. *See, e.g.*, Washington v. EPA, 752 F.2d 1465, 1467-68 (9th Cir. 1985).

180. *Compare* 33 U.S.C. § 1313(c)(4)(B) (1988) (stating that EPA must prepare WQS where such standards are necessary to meet CWA requirements), *with* 54 Fed. Reg. 39,098, 39,103 (1989) (stating that EPA would have "a responsibility" to promulgate federal WQS for Indian lands in the absense of tribal WQS).

181. 54 Fed. Reg. 28,622 (1989) (adopting WQS enacted under tribal law by the Colville Indian Nation for reservation waters and promulgating them as federal WQS).

182. *Id.* at 39,103. Despite the fact that the Colville Nation had previously inventoried reservation waters, assigned uses, and developed WQS to preserve those uses, it took EPA three years from the Nation's request to promulgate the Nation's WQS as federal standards. *Id.* at 28,622.

183. 54 Fed. Reg. 39,699 (1989). Of course, EPA's invocation of section 518 as a reason for not promulgating federal WQS supports only post-1991 decisions, the year EPA promulgated its rule for delegating section 303 authority to tribal governments. 56 Fed. Reg. 64,876 (1991). Thus, EPA's inaction over the 19 years from the FWPCA's enactment to the final rule allowing tribes to develop WQS under the CWA is based solely on EPA's view that federal promulgation is a difficult and time-consuming process. No doubt that view is correct, but it does not justify EPA's breach of its trust obligation to protect reservation environments nor EPA's violation of section 303(c)(4)(B)'s requirement to promulgate federal standards necessary to meet the requirements of the CWA.

permits under tribal law or certain CWA programs,[184] their WQS will provide the legal basis for conditions included in the permits to protect water quality.[185] Discharges allowed under federal permits must also comply with tribal WQS.[186] Tribal WQS provide the standards that trigger federal enforcement power to enjoin discharges in violation of the WQS.[187] Tribal WQS also animate the implementation of the CWA's non-point source management programs, by identifying those reservation waters that require the application of "best management practices" to non-point sources of pollution to ensure compliance with WQS.[188]

B. EPA APPROVAL RECOGNIZES TRIBE'S INHERENT SOVEREIGNTY OVER THE RESERVATION ENVIRONMENT

A second consequence of a tribe's development of WQS is EPA's acknowledgment of the tribe's sovereign governmental power to adopt WQS more stringent than those required by the CWA. The CWA establishes a nation-wide minimum standard: state, tribal, or federal WQS must seek to attain water quality adequate to provide for the protection and propagation of fish, shellfish, and wildlife, and provide for recreation in and on the waters of the United States.[189] But in deference to the states' sovereign authority to protect their waters, and in recognition that site-specific factors may warrant regulatory variations, section 510 preserves states' power to (1) adopt WQS more stringent than necessary to protect the minimum CWA uses and (2) designate additional uses.[190] Hence, EPA may not disapprove a state's proposed WQS simply because they exceed the level necessary to meet the CWA's requirements.[191]

EPA interprets section 510 as similarly limiting its authority with respect to tribal WQS. Although section 518 does not expressly reference section 510, it also does not expressly preempt tribes' inherent

184. *See* 58 Fed. Reg. 67,966 (1993) (promulgating final rules for the procedures under which tribes may seek delegation of the section 402 NPDES permit program); 58 Fed. Reg. 8,172 (1993) (promulgating final rules for the section 404 dredge and fill permit program).

185. 33 U.S.C. §§ 1311(b)(1)(C), 1342(a)(3) (1988).

186. *See infra* text accompanying notes 212-19 (discussing conditions of licensing).

187. *See* 33 U.S.C. § 1319(a)(1) (1988) (stating that the Administrator may take action when an individual violates the terms of a permit).

188. 33 U.S.C. § 1329(a)(1) (1988).

189. *Id.* § 1251(a)(2) (denoting fishable/swimmable uses).

190. *Id.* § 1370; International Paper v. Ouellette, 479 U.S. 481 (1987) (providing that section 510 of the Clean Water Act does not impair the states from implementing more stringent standards).

191. 54 Fed. Reg. 39,098, 839,099 (1989) (to be codified at 40 C.F.R. pt. 131) (proposed Sept. 22, 1984). EPA urges states and tribes not to adopt WQS that are more stringent than natural background water quality. *Id.*

sovereign authority to adopt pollution control standards for reservation waters that are more stringent than federal standards. The legislative history of section 518 suggests that Congress intended tribes to exercise the same regulatory authority over water quality as the states, and to "assure fishable and swimmable water *and to satisfy all beneficial uses*."[192] In conjunction with section 518's recognition that a tribe and a state may set different WQS for the same water body,[193] EPA interprets the legislative history as supporting the conclusion that tribes possess section 510 authority.[194] That conclusion is also consistent with EPA's Indian Policy favoring tribal primary responsibility for the quality of reservation environments, and puts tribes on relatively equal footing with states.[195]

The significance of applying section 510 to tribal governments is twofold. First, it recognizes simply that tribal governments possess the sovereign authority to determine, within the parameters of and consistent with the CWA, the extent to which protection of water quality for reservation waters is important. A tribal government's unconsidered conformity to the federal minimum standards, without analyzing site-specific factors like the present quality of certain reservation waters, or the appropriate balance between economic development-type uses and environmental protection-type uses,[196] would be nothing short of an abdication of its public trust obligation to its citizens. Second, the applicability of section 510 to tribal WQS means that EPA will respect a tribe's decision to adopt WQS more stringent than an adjacent state's WQS for the same water body. More specifically, EPA will not force a tribe to lower its WQS merely because an adjacent state's less stringent WQS poses a conflict or causes a dispute.[197]

Because differing WQS for the same water body may cause disputes, however, section 518 directs EPA to establish a mechanism for resolving "unreasonable consequences" arising as a result of differing tribal and

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192. 133 Cong. Rec. S1003 (daily ed. Jan. 21, 1987) (statement of Senator Burdick) (emphasis added).

193. 33 U.S.C. § 1377(e)(3) (1988). Congress directed EPA to establish a mechanism for resolving any "unreasonable consequences" arising from the appliaition of differing WQS set by tribes and states for the same waters. *Id.*

194. 56 Fed. Reg. 64,876, 64,886 (1991). At least one federal district court has deferred to EPA's interpretation as reasonable. *See* City of Albuquerque v. Browner, 865 F. Supp. 733, 739-40 (D.N.M. 1993) (finding that EPA's stated policy authorizes tribes to implement WQS that are more stringent than federal standards).

195. 56 Fed. Reg. 64,876, 64,886 (1991).

196. For example, the tribe may consider potential economic impacts in designating uses of reservation waters, but once those uses are designated, the tribe must develop water quality criteria that support those uses without regard to economic impacts. *Id.*

197. *Id.* at 64,886-87 (refusing to disapprove "overly stringent" tribal WQS as a means to resolve disputes between states and tribes).

state standards set for common water bodies.[198] Where such consequences cause a dispute, either the tribe or the state may petition the appropriate EPA Regional Administrator to resolve the dispute.[199] The written request to EPA must include a specific statement of the problem, including the standards at issue and any factual data showing the alleged consequences.[200] Only the tribe or the state can initiate the process; EPA lacks authority to force either party to the negotiating table.[201]

The Administrator may grant the request if unreasonable consequences have in fact resulted, the parties have made a good faith effort to solve the problem, and the relief sought is consistent with the CWA.[202] Once the Administrator determines EPA involvement is appropriate, the Administrator must make efforts to notify other interested parties of the action, and may allow landowners, permit holders, citizen groups, or other entities to participate.[203]

The dispute resolution process may take one of three forms. With EPA acting as a neutral facilitator, tribes may participate in mediation with the intent of establishing cooperative enforcement agreements with the state.[204] Alternatively, tribes may participate in nonbinding arbitration where the arbitrator presents to the parties a written recommendation for resolution.[205] The final alternative for tribes is simply not to participate, in which case EPA will attempt to resolve the issue as fairly as possible without the participation of all parties.[206]

C. CONTROLS THE ON AND OFF-RESERVATION ACTIVITIES OF NON-INDIANS THAT AFFECT THE WATER QUALITY OF RESERVATION WATERS

The most compelling consequence of tribal WQS approved under the CWA is that, with respect to protecting the quality of reservation waters, tribal WQS equalize some of the power imbalances between tribes, the federal government, and adjacent state governments. Absent a

198. 33 U.S.C. § 1377(e) (1988). The term "unreasonable consequences" is not defined in EPA's regulations. 56 Fed. Reg. 64,876, 64,888 (1988) (EPA's explanation for leaving term undefined).

199. 40 C.F.R. § 131.7(c) (1994).

200. *Id.*

201. *See* 56 Fed. Reg. 64,876, 64,888 (1991) (stating that "EPA believes it does not have the authority to force a Tribe or State into arbitration or mediation").

202. 40 C.F.R. § 131.7(b) (1994) The Code of Federal Regulations also gives other reasons for granting the request. *Id.*

203. *Id.* § 131.7(d); *see* 56 Fed. Reg. 64,876, 64,888 (1991).

204. 40 C.F.R. § 131.7(f)(1) (1994).

205. *Id.* § 131.7(f)(2). Tribes may agree to be bound by the arbitrator's recommendation. *Id.* § 131.7(f)(2)(ii).

206. *Id.* § 131.7(f)(3).

showing of inconsistency with the CWA, neither EPA nor adjacent states may second-guess the value judgments tribal governments make as to the uses to which reservation waters should be put, or the criteria by which those uses will be protected.[207] More importantly, tribal WQS give a tribe a significant measure of control over how federal and state agencies implement their respective CWA programs to the extent that such implementation affects the quality of reservation waters.[208]

1. *Federal Permits for On-Reservation Non-Indian Discharges*

Absent delegation of certain CWA permit programs to tribes,[209] federal agencies retain the authority and responsibility to issue permits to applicants whose on-reservation activities affect the quality of reservation waters. For example, where EPA has not delegated to a tribe the section 402 NPDES permit program, EPA retains authority to issue permits to point source discharges of pollutants into reservation waters.[210] Similarly, where a tribe has not obtained section 404 permit authority, the Army Corps of Engineers retains the authority to issue dredge and fill permits for activities on reservation lands.[211] Yet, both federal agencies may only issue permits that ensure that the discharge will comply with applicable tribal WQS.

Applicants for federally-issued permits or licenses for on-reservation discharges must submit to the issuing agency a "certification" from the tribe that proposed limits and conditions in the federal permit or license will ensure that the discharge complies with tribal WQS.[212] The tribe has three options after examining the application or other information relevant to the proposed discharge's impact on water quality: (1) the tribe certifies that the proposed discharge (made in compliance with the terms of the proposed permit) will comply with tribal WQS and other CWA requirements; (2) the tribe certifies that the proposed discharge will comply with applicable WQS upon the permit's

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207. *See infra* text accompanying notes 214-18.

208. *See infra* text accompanying notes 214-18, 225-32, 252-59.

209. *See supra* note 30 (discussing EPA rules for delegation to tribes of other CWA programs).

210. *See* 33 U.S.C. § 1342(a)(1) (1988) (stating that the Administrator may issue a permit for the discharge of any pollutant).

211. *Id.* § 1344(a).

212. *Id.* § 1341(a)(1); 40 C.F.R. § 124.51(c) (1994). EPA also has an independent duty to confirm that NPDES permits it issues ensure the attainment of applicable WQS, including tribal WQS. *See* 33 U.S.C. § 1311(b)(1)(C) (1988) (permitted discharges must achieve any more stringent standard necessary to attain WQS established pursuant to state law under the authority of section 510); 40 C.F.R. §§ 122.4(a), (d) (1994) (stating that NPDES permits must ensure the attainment of applicable WQS of all "affected" states); 56 Fed. Reg. 64,876, 64,890 (1991) (finding that "affected states" includes affected tribes who satisfy section 518's delegation provision).

incorporation of additional specified conditions; or (3) the tribe denies certification because the proposed discharge cannot comply with applicable WQS even with additional conditions.[213]

The federal agency may not veto or override the tribe's determination that a proposed discharge will violate tribal WQS.[214] Hence, if the tribe denies certification for a particular discharge, section 401 of the CWA prohibits the federal agency from issuing the permit or license,[215] and the applicant cannot (legally) discharge pollutants into reservation waters. An applicant might directly challenge the tribe's certification decision, but she would do so in tribal court under tribal law.[216]

A tribal government has similar power over the issuing federal agency when the tribe determines that compliance with tribal WQS can be attained but only through imposition of additional terms and conditions in the permit or license. Conditions determined by the tribe to be necessary to comply with WQS are integral to the tribe's certification, and thus become part of the federal permit.[217] The issuing federal agency generally lacks discretion to change the terms of the tribe's certification, as these are matters within the expertise and responsibility of the tribal water quality agency.[218] This is true even where EPA believes that the tribe's conditions may be more stringent than necessary to meet tribal WQS.[219]

In a sense, tribal WQS return to the tribe what the Supreme Court took away in the twentieth century: the (federally-enforceable) regulatory power to prohibit non-Indian activities on fee lands that risk

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213. 33 U.S.C. § 1341(a)(1) (1988). Actually, the tribe has a fourth option—waiver of certification—which occurs if the tribe fails or refuses to act on the request for certification within one year. *Id.*

214. *See* In re Bethlehem Steel Corp., 58 Op. of EPA General Counsel 337, 338 (1977) (stating that the EPA has no authority to determine if the state law regulations are too stringent).

215. *Id.*, 56 Fed. Reg. 64,876, 64,890 (1991); United States v. Marathon Dev. Corp., 867 F.2d 96, 98 (1st Cir. 1989) (upholding Massachusett's decision to deny certification on the ground that applicable state WQS would be violated by the proposed discharge).

216. *Cf.* 56 Fed. Reg. 64,876, 64,882 (1991) (stating that EPA does not require tribes to provide judicial review for section 401 certifications because such decisions are based on tribal not federal law).

217. 33 U.S.C. §§ 1341(a)(1), (d).

218. *See, e.g.*, Lake Erie v. Army Corps of Engineers, 526 F. Supp. 1063, 1074 (W.D. Pa. 1981) (finding that certification is the exclusive perogative of the state); Mobil Oil Corp. v. Kelley, 426 F. Supp. 230, 234-35 (S.D. Ala. 1976) (determining that Congress intended for the states to play a paramount role in the certification process).

219. *See, e.g.*, Roosevelt Campobello Int'l Park Comm'n v. EPA, 684 F.2d 1041 (1st Cir. 1982) (finding that EPA has no authority to determine if the state levels are more stringent than necessary), *see supra* note 214. EPA has interpreted section 301(b)(1)(C), however, as imposing on it an independent duty to impose permit conditions EPA beleives are necessary to meet applicable state or tribal WQS, even where the state's or tribe's certification proposes less stringent conditions. *See supra* note 214, at 337-38.

an unacceptable degree of harm to the quality of tribal waters.[220] This is true even in instances where the federal permitting agency would otherwise allow the activities to occur.

Although indirect, the tribe's authority under section 401 to condition a discharger's operations is significant. First, the tribal conditions reflect the tribe's, not the federal agency's, interpretation of tribal WQS and determination of the requirements necessary to comply with those standards. Second, apart from any question of the tribe's jurisdiciton to regulate the non-Indian permittee directly, the tribe's conditions become federal permit conditions enforceable by EPA under federal law. Permit violations are violations of the CWA, which carry federal civil and criminal penalties,[221] and risk permit revocation or termination.[222] Third, the mechanics of the certification process encourage (if not require) the dissatisfied applicant to sue the federal agency who incorporated the tribe's conditions in the federal permit, rather than suing the tribe itself. Such litigation will likely fail on general principles of judicial deference to administrative agencies, but perhaps more importantly from the tribe's perspective, will not directly challenge the tribe's regulatory authority over the applicant, nor the wisdom of the tribe's WQS or its conditions.[223]

The impact of section 401 authority, then, is apparent. A tribe with federally-approved WQS can exert substantial—albeit indirect—authority over whether and under what conditions on-reservation discharges occur. But the legal and practical consequences of tribal WQS are even broader; in some instances the tribe can also influence the manner in which discharges outside tribal territories are permitted. That is, for perhaps the first time, federal law recognizes the need and offers the

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220. Of course, tribal WQS also are effective to regulate the conduct of Indian actors on trust lands.

221. 33 U.S.C. §§ 1311(a), 1319(c), (d) (1988); 40 C.F.R. §§ 122.41(a), (a)(2) (1994) (stating that CWA violations carry civil penalties of $25,000 per day per violation and criminal penalties of $25,000 per day per violation and/or one year imprisonment). Of course, whether EPA prosecutes such a violation is a matter outside the tribe's control. However, evidence shows that EPA's enforcement efforts are less frequent and result in less severe penalties in areas populated by minorities. *See* Marianne Lavelle and Marcia Coyle, *The Federal Government, in its Cleanup of Hazardous Sites and its Pursuit of Polluters, Favors White Communities over Minority Communities Under Environmental Laws Meant to Provide Equal Protection for All Citizens, A National Law Journal Investigation Has Found*, 15 NAT'L L. J. S2 (1992). Yet, the discharger is more likely to be deterred by the threat of federal enforcement and the magnitude of the CWA penalites than the threat of tribal enforcement, for which the jurisdictional basis is potentially questionable, and the maximum penalty is $5,000. *See* 25 U.S.C. § 1302(7) (1988) (stating that a conviction is punishable by one year imprisonment, a fine of $5,000, or both).

222. 40 C.F.R. § 122.41(a) (1994).

223. *See, e.g.*, Albuquerque v. Browner, 865 F. Supp. 733, 738 (D. N.M.1993) (challenging EPA's approval of the Pueblo of Isleta's WQS and EPA's decision to incorporate the Pueblo's conditions in a draft NPDES permit).

opportunity for a tribal government to protect its citizens and the reservation environment from off-reservation activities that are likely to affect them adversely.

2. *Federal Permits for Off-Reservation Non-Indian Discharges*

Where a state and a tribe set identical WQS for a common water body, the state's section 401 certification for a proposed federally--permitted discharge to upstream state waters might logically imply that the discharge would probably also comply with the downstream tribe's WQS.[224] But because tribal governments have section 510 authority, the downstream tribe's WQS may be more stringent than the state's WQS for the same water body. In that instance, the state's section 401 certification probably would not be helpful in determining whether the (upstream) state-based discharge will comply with the tribal WQS.

Cognizant of such situations, the CWA directs EPA to determine if a proposed discharge "may affect" the quality of the waters of any state other than the one in which the discharge is made.[225] Under section 518, that directive requires EPA to determine whether a proposed federally-permitted discharge in an upstream state may affect the water quality of a downstream tribe (with approved WQS).[226] If EPA so determines, then EPA must notify the "affected" tribe of the proposed discharge,[227] and provide the tribe with a copy of the permit application and supporting documentation.[228]

The tribe then evaluates the proposed discharge to determine if it will cause a violation of tribal WQS, and if so, the tribe may object and request a hearing.[229] The permitting agency has a mandatory duty to hold a public hearing upon receiving a timely request from the downstream tribe.[230] If EPA is not the permitting agency, EPA must evaluate the tribe's objection and recommend to the permitting agency whether and under what conditions the license or permit should be

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224. Assuming there are no intervening sources between the point of discharge and the downstream tribe's reservation.

225. 33 U.S.C. § 1341(a)(2) (1988).

226. 56 Fed. Reg. 64,876, 64,890 (1991).

227. 40 C.F.R. § 121.13 (1994).

228. *Id.* § 121.14.

229. 33 U.S.C. § 1341(a)(2) (1988). The downstream tribe may only object to permit issuance on the ground that it will violate tribal WQS. *See* Op. of General Counsel, 155-56 (1973).

230. 33 U.S.C. § 1341(a). The downstream tribe has 60 days from the date of EPA notice to the tribe to make its objection and request for a hearing. *Id.*

issued.[231] The permitting agency is not bound to accept EPA's recommendations, but it must condition the permit in a manner necessary to meet all applicable WQS, including the WQS of a tribe downstream from the proposed discharge.[232] If such conditions cannot ensure compliance with those WQS, the permitting agency may not issue the permit.[233]

3. *A Case in Point:* Albuquerque v. Browner[234]

A recent example partially illustrates the significance of tribal WQS. In 1991, the Pueblo of Isleta chose to exercise its inherent police power to protect the quality of its reservation waters by drafting WQS for the portion of the Rio Grande lying within the reservation.[235] The Pueblo scheduled a public hearing on the draft WQS, inviting the comments of interested parties, including non-members and local governments.[236] On the basis of comments submitted, including comments from EPA, the Pueblo revised its draft WQS and promulgated them as final WQS under tribal law in February 1992.[237] Several of the final WQS were more stringent than the relevant state standards applicable to the Rio Grande.[238] On December 24, 1992, EPA approved the Pueblo's WQS as consistent with section 303(c) of the CWA.[239]

The City of Albuquerque, New Mexico, owns and operates a wastewater treatment plant that discharges pollutants into the Rio Grande five miles upstream from the Pueblo's reservation. The City's discharge

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231. *Id.*; 40 C.F.R. § 121.15 (1994). If EPA is the permitting agency, then it must include limits necessary to achieve compliance with tribal WQS. *See* Memorandum from Cynthia C. Dougherty, Director, Permits Division, Guidance on EPA's NPDES and Sludge Management Permit Procedures on Federal Indian Reservations, to Water Management Division Directors 5 (Nov. 16, 1993).

232. 33 U.S.C. § 1341(a)(2) (1988); *cf.* Arkansas v. Oklahoma, 117 L. Ed. 2d at 254-55 (1992) (although not reaching the question of whether the CWA requires EPA to condition a permit so as to ensure compliance with a downstream state's WQS, upholding EPA's decision to do so as a reasonable exercise of EPA's authority under the CWA).

233. 33 U.S.C. § 1341(a)(2) (1988).

234. 865 F. Supp. 733 (D.N.M. 1993).

235. The Rio Grande flows through the exterior boundaries of the Pueblo of Isleta's reservation on its journey from northern New Mexico, along the border of Texas and Mexico, to the Gulf of Mexico. The Rio Grande Peublos, of which Isleta is one, may have settled on the Rio Grande as early as 900 A.D. Brief of Amicus Curiae, Pueblo of Isleta at 4-5, Albuquerque v. Browner, 865 F. Supp. 733 (D. N.M. 1993) (No. 93-82M) [hereinafter Isleta Brief] (citing sources). Traditional uses of the river by the Pueblo included irrigation, fishing, cutural and spiritual uses. *Id.*

236. EPA's Memorandum in Support of Its Motion for Summary Judgment at 8, Albuquerque v. Browner, 865 F. Supp. 733 (D. N.M. 1993) (No. 93-82M) [hereinafter EPA's Summary Judgment Memorandum]. The CWA requires states developing WQS to be approved under the CWA to provide an opportunity for public participation in the adoption or revision of WQS. 33 U.S.C. § 1313(c)(1) (1988).

237. EPA's Summary Judgment Memorandum, *supra* note 236, at 9.

238. *Browner*, 865 F. Supp. at 736.

239. EPA's Summary Judgement Memorandum, *supra* note 236, at 11. The Pueblo was the first tribe whose WQS were approved by EPA. *Id.*

is regulated by an NPDES permit issued by EPA.[240] At the time when EPA approved the Pueblo's WQS, EPA was in the process of revising the conditions of the City's NPDES permit to reflect newly promulgated state WQS.[241] Consistent with its independent responsibility to ensure that permitted discharges attain all applicable WQS, including those of downstream states and tribes, EPA prepared a draft permit incorporating several conditions necessary to ensure compliance with the Pueblo's WQS.[242]

Before the final permit was issued, the City filed suit against EPA indirectly challenging the additional permit conditions.[243] The City sought to preempt EPA's incorporation of the Pueblo's WQS into the City's permit by attacking EPA's approval of the Pueblo's WQS under several statutory and constitutional theories.[244]

The New Mexico federal district court rejected the City's challenge and granted summary judgment to EPA. For purposes of this analysis, there were three important rulings in the case. First, the court invoked established administrative law principles to review EPA's determinations under the arbitrary and capricious and substantial evidence standards.[245] Those standards of review are highly deferential to the agency's view of the CWA, asking essentially whether the agency acted reasonably and not whether the agency was "right" or made a "good" decision.[246]

Second, under those administrative law principles, the court upheld EPA's interpretation of both the procedure and substance of tribal WQS under the CWA.[247] Procedurally, the court upheld EPA's determination that the CWA did not require EPA to provide notice and comment prior to approving the Pueblo's WQS because the Pueblo had already

240. New Mexico has not sought delegation of the section 402 NPDES program, so EPA issues all permits for covered point source discharges on state lands. *See* 33 U.S.C. § 1342(a) (1988).

241. *Browner*, 865 F. Supp. at 736.

242. *Id.* Because the City's discharge is off-reservation, the City was not required to obtain a section 401 certification from the Pueblo. However, it is not clear whether EPA sought the Pueblo's evaluation of conditions necessary after making a determination that the City's discharge was likely to affect Pueblo waters, *see supra* text accompanying notes 225-28, or EPA simply incorporated the conditions without Pueblo input. The fact that EPA incorporated the conditions in the draft permit probably explains why there is no indication that the Pueblo submitted to EPA a formal objection to the draft permit and a request for hearing.

243. *Browner*, 865 F. Supp. at 736.

244. *Id.* The City's preemptive litigation strategy derived from the Supreme Court's decision in Arkansas v. Oklahoma, which upheld EPA's decision to condition an Arkansas discharger's permit on compliance with Oklahoma's downstream WQS. 112 S. Ct. at 1060-61 (1992).

245. *Browner*, 865 F. Supp. at 737.

246. *Id. See* Chevron v. National Resource Defense Council, 467 U.S. 837, 865-66 (1984) (stating that court's role is to determine whether Congress has spoken on the issue, and if not, to see if the agency's construction of the statute is a permissible one).

247. *Browner*, 865 F. Supp. at 737.

provided notice and considered comments (including the City's comments) in promulgating its WQS under tribal law, as required by the CWA.[248] Substantively, the court held that EPA reasonably interpreted section 518 as including section 510's saving of a tribe's authority to adopt WQS more stringent than the CWA minimum standards.[249] Thus, federal law did not prohibit the Pueblo from adopting WQS more stringent than the federal minima or New Mexico's counterpart standards.

Finally, based on EPA's view of sections 518 and 510, the court correctly refused to second-guess or even to require detailed explanation for EPA's approval of several of the Pueblo's more stringent standards.[250] For instance, the Pueblo's arsenic standard is at least 1,000 times more stringent than both the federal Safe Drinking Water standard[251] and the New Mexico standard.[252] Although the court found the Pueblo's standard "troubling" in light of the naturally high background levels of arsenic in the City's groundwater and the difficulty in detecting arsenic at the level set by the Pubelo's standard,[253] the court did not invalidate the standard. Similarly, the court refused to evaluate the propriety of the Pueblo's fecal chloroform standard intended to protect ceremonial uses, thereby respecting the Pueblo's decision not to explain what ceremonial uses members make of the Rio Grande.[254]

The moral of *Browner* is respect and its teaching is power. The Pueblo of Isleta respected the Rio Grande as the source of life, and sought to protect it by developing WQS. EPA respected the Pueblo's value judgments in the appropriate uses of the Rio, and the criteria necessary to protect them. The federal district court respected Congress' intent to place the primary responsibility for setting pollution standards for the reservation environment on the shoulders of those who will bear the impact of its degradation. The power, of course, lies in the Rio.

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248. *Id.* at 739.
249. *Id.* at 739-40.
250. *Id.* at 740-41.
251. *Id.* at 742.
252. City of Albuquerque's Memorandum in Support of Motion for Summary Judgement, at 19 (No. CV-93-82M) (filed June 11, 1995).
253. *Browner*, 865 F. Supp. at 742.
254. *Id.* at 740 (equating the standard with "primary contact" standards that assume incidental ingestion of water during use to reject the City's argument that the Pueblo's standard was in fact a standard requiring drinking water quality, which the Pueblo allegedly could not attain).

And, with decisions like *Browner*, it may flow there forever.[255]

4. *State Permits for Off-Reservation Non-Indian Discharges*

Also important, but perhaps less dramatic, is the action-forcing impact of tribal WQS for state permit programs. State NPDES programs must provide notice and an opportunity for public hearing for tribes whose waters may be affected by the state's issuance of discharge permits.[256] Once the state has prepared a draft permit and a fact sheet explaining the factual and legal context for the proposed discharge, the state must send notice directly to affected tribes.[257] Those tribes may comment on the proposed permit, and may request a public hearing if one has not already been scheduled.[258]

Unlike the section 401 certification process for federally-issued permits, the state is not automatically bound to accept tribal comments and incorporate suggested conditions in the state permit. However, the state may not issue the permit if it does not include other conditions ensuring compliance with applicable WQS of affected states and tribes.[259] Additionally, the state is required to notify both the tribe and EPA if it refuses to accept the tribal conditions.[260] The state must convince EPA that its reasons for such rejection are adequate, and if it cannot, EPA may object to the issuance of the permit.[261]

EPA's objection to the proposed state permit will be resolved in one of three ways. First, the state may submit to EPA a revised permit.[262] Second, the state may request that EPA hold a public hearing at which the objection and supporting materials will be evaluated.[263] If by either of these methods the state meets EPA's objections, then it may issue the

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255. *But see* Rosie Mestel, *Pueblo Indians Insist on Right to Clean River*, 137 NEW SCIENTISTS 12 (March 20, 1993) ("[i]f the EPA wins the [Browner] case, it could encourage a new kind of American Indian environmental activitism"). Such a view implies the racist assumption that tribal governments are incapable of environmental regulation that is non-discriminatory and scientifically defensible. But the view does inadvertently present the fundamental difference between the approaches of tribal and state governments; whereas Indian people generally hold a world view that includes and supports an environmental ethic stressing the relationship between humans and the natural world, Euro-Americans encourage human alientation from and an exploitative relationship with nature. *See* J. Biard Callicott, *Traditional American Indian and Traiditional Western European Attitudes Toward Nature: An Overview* 231, in ENVIRONMENTAL PHILOSOPHY: A COLLECTION OF READINGS (1983).

256. 33 U.S.C. § 1342(b)(3) (1988); 40 C.F.R. § 123.25(a)(28) (1994).

257. 40 C.F.R. § 124.10(c)(1)(iii) (1994).

258. *Id.* § 124.11.

259. *Id.* § 122.4(d).

260. 33 U.S.C. § 1342(b)(5) (1988).

261. 40 C.F.R. § 123.44(c)(2) (1994).

262. *Id.* § 123.45 (h)(1).

263. *Id.* § 123.45(e).

permit. If not, the third method is for EPA to assume permitting responsiblity for the purpose of issuing the permit.[264] Most important, though, is that EPA's objection to the state's proposed permit stems from the state's unwillingness to ensure that its discharger complies with the tribe's WQS. The objection then blossoms into a forceful federal mandate blocking permit issuance absent revisions to ensure compliance.

Beyond the issuance of particular discharge permits, tribal WQS offer downstream tribes an indirect opportunity to influence the adoption and revision of upstream WQS programs. In the absence of downstream tribal WQS, the upstream state has no federal mandate to consider the quality of downstream reservation waters; the state need only adopt WQS that comply with the minimum CWA standards for EPA approval. If, however, downstream tribal WQS exist, the state must consider how its use designations and criteria determinations affect the water quality of reservation waters.

Section 303(c)(1) of the CWA requires that the state give tribes who share water bodies with the state notice of and an opportunity to comment on new or revised state standards that may differ from relevant tribal standards.[265] The state is free to accept or reject tribal comments, but both new and revised WQS must be approved by EPA. EPA's review and approval process will look to see if the state considered the WQS of downstream waters and drafted the proposed state WQS to provide for the attainment and maintenance of the downstream tribal WQS.[266] If the WQS do not so provide, EPA may reject them.[267]

5. *Superfund Liability for On and Off-Reservation Releases of Hazardous Substances*

There are at least two other important legal consequences to tribal WQS. The Comprehensive Environmental Response, Compensation, and Liability Act[268] ("CERCLA"), or "Superfund," makes parties responsible for releasing hazardous substances into the environment liable for the costs of cleaning up those substances and restoring any

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264. 33 U.S.C. § 1342(d) (1988); *See* Champion Int'l Corp. v. EPA, 850 F.2d 182, 187 (4th Cir. 1988) (finding that state's failure to respond to EPA's objection justified EPA's assumption of permitting responsibility).

265. 33 U.S.C. § 1313(c)(1) (1988); 40 C.F.R. § 131.10(b) (1994); 56 Fed. Reg. 64,876, 64,891-92 (1991) (EPA's expectation that state representatives will participate in public hearings concerning tribal standards, and vice versa). At a similar programmatic level, EPA requires state NPDES programs to provide an opportunity for affected states and tribes to submit written comments on proposed permits. *See supra* text accompanying notes 253-55.

266. 40 C.F.R. § 131.10(b) (1994); 56 Fed. Reg. 64,876, 64,890 (1991).

267. 33 U.S.C. § 1313(c)(3) (1988).

268. 42 U.S.C. §§ 9601-9675 (1988).

injuries caused to natural resources.[269] EPA is responsible for ensuring that the cleanup protects human health and the environment. To do that, CERCLA requires that EPA clean up hazardous waste sites to a degree sufficient to achieve all applicable or relevant and appropriate pollution standards ("ARARs").[270] Federally-approved tribal WQS constitute ARARs for sites impacting the water quality of reservation waters. Thus, tribal WQS impose on EPA and responsible parties an obligation to ensure that Superfund cleanups on and near the tribe's reservation protect reservation water quality.

Second, tribal standards may also be significant under CERCLA's natural resource damages provisions. CERCLA designates Indian tribes as natural resource trustees and authorizes them to recover money damages from parties responsible for injuries to tribal natural resources.[271] Reservation surface water bodies are natural resources within the scope of that authority.[272] To recover, tribal trustees must prove that the party's hazardous substance came in contract with the water resource and injured it.[273] A "per se" injury to surface water resources is proven by demonstrating exceedances of applicable tribal WQS.[274]

V. CONCLUSION

The decision confronting an Indian tribe is whether it wants to take primary responsibilty for protecting the quality of reservation waters, or let EPA or someone else do it. Like any governmental policy decision, answering the question requires prioritizing scarce human, monetary, and other resources. Developing WQS and implementing other CWA programs takes time, money, and effort. But the cultural, spritual, and economic survival of the tribe often depends critically on water. Can any tribe concerned about protecting its citizens afford to let others make fundamental policy decisions about how much pollution reservation waters should tolerate?

Environmental regulation is an exercise of governmental sovereignty. When a tribal government establishes WQS for reservation waters, it

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269. *See* 46 U.S.C. §§ 9607(a), (f)(1) (1992).

270. *Id.* § 9621(d)(2)(A).

271. *See id.* § 9626 (defining treatment of Indian tribes); *id.* § 9607(f) (creating liability for damages to natural resources).

272. *See id.* § 9601(16).

273. *Id.* § 9607 (a)(4)(C).

274. *See* 43 C.F.R. § 11.62(b)(1) (1994) (defining per se injuries to surface waters under the Department of the Interior's natural resource damage regulations). Similarly, tribal health advisories related to natural resource uses issued pursuant to tribal standards constitute proof of injuries to biological resources. *See id.* § 11.62(f)(3).

discharges a trust obligation to its members—to protect their health and welfare and the quality of the environment in which they live. Tribal WQS reflect value judgments made by the tribe, not area directors or bureaucrats. Tribal WQS thus contain the tribe's views on the proper balance between economic development and environmental protection, and the cultural, spriritual, and other uses of water that are importatant to tribal members.

Tribal WQS also send a message to non-Indian residents of the reservation, adjacent states, and Congress that environmental protection is a priority for the tribe. Water pollution's migratory nature means that it flows to and from Indian reservations. Thus, tribal WQS not only protect tribal members and natural resources from water pollution, but they also help protect downstream off-reservation users and resources. It is in this sense that tribes help complete the circle of national clean water policy by seeking delegation of CWA programs.

Tribes' failure to seize the window of opportunity presented by the CWA and other federal environmental laws creates several very real risks. First, the absence of established environmental standards renders the reservation business environment highly uncertain; lack of predictability in the face of unknown standards is likely to drive businesses and other economic ventures to locate off-reservation. Second, EPA may not fill that regulatory void by promulgating federal WQS; and even if it does, those standards will reflect EPA's, not the tribe's, value judgments as to the appropriate uses of reservation waters and the criteria necessary to protect those uses. Third, tribal inaction risks judicial or legislative activism to fill the perceived void.[275] Congress may decide that tribes do not want or are incapable of taking primary responsibility for environmental regulation, and amend the federal laws to exclude tribal governments. Or, more likely, courts may use tribal inaction as a flawed basis to conclude that states have jurisdiction to implement environmental programs on reservations.

There are other less ethereal benefits to developing tribal WQS. The process offers tribes valuable information about the nature and characteristics of reservation waters, unique site-specific factors, and existing and possible uses of those waters. That inventory helps identify possible point sources of contamination, and may help identify best management practices to address non-point sources. Working through

275. *See* Dean Suagee and Chris Stearns, *Indigenous Self-Government, Environmental Protection, and the Consent of the Governed: A Tribal Environmental Review Process*, 5 COLO. J. INT'L ENVTL. L. & POL'Y 59 (arguing that tribes should not assume that the current policy for environmental protection in Indian Country will remain static if they do not accept the challenges it presents).

the process gives the tribe additional administrative and management experience which may later demonstrate to EPA or BIA the tribe's capability to administer other important federal programs on the reservation. Also, EPA grants for developing WQS may asssist the tribe in building tribal infrastructure, such as an environmental agency or commission.

For all of Congress' failings to Indian people in the past, it has provided in section 518 of the CWA a tremendous opportunity for tribal governments to protect their members and the reservation environment. Several tribes have taken the first step toward accepting that important responsibility. Now is the time for other tribes to move to close the circle of environmental protection for the nation's waters and people.