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> The Earth and myself are of one mind. The measure of the land and the measure of our bodies are the same.
>
> Hinmaton Yalatkit (Joseph), Nez Perce Chief[1]

> We now dare to wonder: Are we so unique and powerful as to be essentially separate from the earth?
>
> Albert Gore, United States Vice-President[2]

From time immemorial, the indigenous peoples of North America have depended on the earth's natural resources for their physical, mental, and spiritual well-being.[3] For the last two hundred years, the United States government has held a fiduciary obligation to protect the health and welfare of Native Americans and the quality of the reservation environment in which they reside.[4] The federal government's attempts to achieve both economic development and a healthy environment have often resulted in dis-

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[1] NATIVE AMERICAN WISDOM 97 (Running Press 1993).

[2] SENATOR ALBERT GORE, EARTH IN THE BALANCE 1 (1992).

[3] *See generally* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 441 (1942)(citing authorities).

[4] *See* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); *cf.* Morton v. Ruiz, 415 U.S. 199 (1974).

parate application of the trust obligation in the environmental arena, however.[5]

This year, Congress will consider reauthorizing the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA or "Superfund").[6] An issue of critical importance to tribal governments is how Congress will balance these issues in a way that protects the environment and meets the federal government's obligation to tribal governments and their members, reservation lands, and tribal natural resources.

We believe that CERCLA should treat tribal governments as the appropriate regulatory entities to respond to hazardous substance releases affecting the reservation environment. To support that assertion, Section I summarizes briefly the background of federal law and policy as it relates to Indian tribes and protection of the reservation environment. In Section II, we describe the current roles of tribal governments in implementing CERCLA's remedial and natural resource damage programs. Our recommendations as to how Congress could improve CERCLA's implementation both on- and off-reservation are offered in Section III. Finally, in Section IV we conclude that by expanding the role of tribal governments, Congress could close the circle of environmental protection and ensure that the Superfund program is implemented in a comprehensive manner on federal, state, and tribal lands.

I. FEDERAL LAW AND POLICY FOR ENVIRONMENTAL PROTECTION OF THE RESERVATION ENVIRONMENT

In large part, the federal government created Indian reservations to isolate native peoples from encroaching settlement by European immigrants.[7] Trade and intercourse between settlers and natives were prohibited or strictly regulated, and commercial and industrial uses of reservation lands were limited.[8] Yet, over time, the air, water, land, and natural resources of these pristine reser-

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[5] *See generally* Marianne Lavelle & Marcia Coyle, *Unequal Protection: The Racial Divide in Environmental Law, A Special Investigation*, NAT'L L.J., Sept. 21, 1992, at S2 (noting that Native American lands often bear a disproportionate burden of the nation's hazardous pollution).

[6] 42 U.S.C. §§ 9601-75 (1988).

[7] *See* COHEN, *supra* note 3, at 28.

[8] *See generally* FRANCIS PAUL PRUCHA, A BIBLIOGRAPHICAL GUIDE TO THE HISTORY OF INDIAN-WHITE RELATIONS IN THE UNITED STATES (1977).

vation lands were impacted by commercial activities such as farming, ranching, oil and gas exploration, mining, and timber, fish, and game harvesting.

The United States government and its agencies, like the Environmental Protection Agency (EPA), have a fiduciary duty to protect Indian tribes and their members from such pollution.[9] Federal environmental laws apply to reservation lands,[10] and the scope of the government's trust obligation includes the duty to enforce those laws on and near reservations.[11] The government may also discharge its obligation by the delegation and funding of enforcement authority under those laws to tribal governments.[12]

All three branches of the federal government have embraced this view of the trust responsibility. In 1983, President Ronald Reagan confirmed the government's obligation to protect Native Americans and reservation lands, while recognizing that tribal governments should have the primary role for managing affairs affecting the health and welfare of the reservation population.[13] In 1984, the EPA pledged to implement federal environmental programs responsive to Indian tribes, and acknowledged that tribal governments are best suited to respond to reservation-specific concerns.[14] The EPA's strategy was to treat tribes separately and not

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[9] U.S. v. Mitchell, 463 U.S. 206, 224 (1983); Nance v. EPA, 645 F.2d 701, 711 (9th Cir.) *cert. denied sub non.* Crow Tribe of Indians v. EPA, 454 U.S. 1081 (1981); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); *cf.* Morton v. Ruiz, 415 U.S. 199 (1974).

[10] *See* Phillips Petroleum Co. v. EPA, 803 F.2d 545, 555-56 (10th Cir. 1986) (Safe Drinking Water Act applies to Indian country); Wash. Dept. of Ecology v. EPA, 752 F.2d 1465, 1469 (9th Cir. 1985) (Resource Conservation and Recovery Act applies to Indian country); Davis v. Morton, 469 F.2d 593, 597 (10th Cir. 1972) (National Environmental Policy Act applies to Indian country).

[11] *See Phillips Petroleum*, 803 F.2d at 549 (noting that the federal government retains responsibility to implement Safe Drinking Water Act on Indian lands until the tribe assumes primary enforcement responsibility); *Ecology*, 752 F.2d at 1469-70 (deferring to EPA's interpretation of its responsibility to implement RCRA in Indian country).

[12] *Cf. Phillips Petroleum*, 803 F.2d at 557, n.16 (holding that Safe Drinking Water Act did not provide for safe implementation on Indian lands); *Ecology*, 752 F.2d at 1470 (suggesting that federal delegation to states would be inconsistent with the federal trust obligation).

[13] OFFICE OF THE PRESS SECRETARY, THE WHITE HOUSE, STATEMENT BY THE PRESIDENT (January 24, 1983) (on file with the JOURNAL OF NATURAL RESOURCES & ENVIRONMENTAL LAW).

[14] EPA Memorandum from William D. Ruckelhaus on EPA Policy for the Administration of Environmental Programs on Indian Lands (January 20, 1984) (on file with the JOURNAL OF NATURAL RESOURCES & ENVIRONMENTAL LAW).

force them to act through state governments that lack jurisdiction to enforce environmental laws on reservations.[15]

The judiciary has supported the EPA's view, finding that federal enforcement of environmental laws in the reservation environment is consistent with the trust responsibility,[16] and that states generally lack such enforcement authority on reservation lands.[17] The United States Supreme Court has concluded that tribal governments may regulate activities of members and nonmembers where they threaten the economic security, political integrity, or health and welfare of the tribe.[18]

Congress has clarified, and to some extent codified, these executive and judicial pronouncements. Recent amendments to environmental statutes direct EPA to treat Indian tribes "as states,"[19] and thereby explicitly recognize the sovereign authority of tribal governments to regulate pollution sources affecting the quality of the reservation environment.[20] The 1987 amendments to the Clean Water Act (CWA), for example, allow the EPA to delegate to tribes programs for establishing water quality standards and to issue permits for point sources and dredge and fill activities.[21] The 1990 amendments to the Clean Air Act allow the EPA to delegate to tribes authority to promulgate implementation plans and to redesignate areas for purposes of the prevention of significant deterioration.[22]

These legislative, judicial, and executive developments suggest several themes underlying environmental regulation on reservation lands. First, both the federal and tribal governments have public trust obligations to protect the health and welfare of tribal members and the quality of the reservation environment. Second, as between the two sovereigns, the tribal government is better

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[15] *See* EXTERNAL AFFAIRS, OFFICE OF FEDERAL ACTIVITIES, INTERIM STRATEGY FOR IMPLEMENTATION OF THE EPA INDIAN POLICY (November 1985).

[16] *See* Phillips Petroleum Co. v. EPA, 803 F.2d 545, 549 (10th Cir. 1986); Dept. of Ecology v. EPA, 752 F.2d 1465, 1469-70 (9th Cir. 1985).

[17] *See Phillips Petroleum*, 803 F.2d at 557, n.16; *Ecology*, 752 F.2d at 1470.

[18] Montana v. United States, 450 U.S. 544, 566 (1981).

[19] *See* 42 U.S.C. § 300f(10) (1988) (Safe Drinking Water Act); 33 U.S.C. § 1377(e) (1988) (Clean Water Act); 33 U.S.C. § 2702 (1986) (Oil Pollution Act); 42 U.S.C. § 7601(d) (1988) (Clean Air Act).

[20] *See* 42 U.S.C. § 300f(10) (1988) (Safe Drinking Water Act); 33 U.S.C. § 1377(e) (1988) (Clean Water Act); 33 U.S.C. §§ 2701(15), (36) (Supp. III 1991) (Oil Pollution Act); 42 U.S.C. § 7601(d) (1988) (Clean Air Act).

[21] *See* 33 U.S.C. §§ 1313, 1342, 1345, 1377(e) (1988).

[22] *See* 42 U.S.C. §§ 7410(o), 7474(c), 7601(d) (1988).

positioned to assess local conditions affecting the quality of the reservation environment, and should have primary responsibility for protecting its members and the reservation environment. Third, pollution does not respect the political boundaries drawn between state and federal lands or between trust and fee lands within the reservation, making it difficult to separate the consequences of different actors' actions.[23] Fourth, effective environmental protection requires that tribal governments regulate all activities affecting the reservation environment, whether conducted on trust or fee lands or by tribal members or nonmembers.[24]

II. THE CURRENT ROLE OF TRIBAL GOVERNMENTS UNDER CERCLA IN RESPONDING TO RELEASES OF HAZARDOUS SUBSTANCES

A. Current Role of Tribal Governments for Remedial Activities

Congress embraced the government's trust responsibility to Indian tribes in the 1986 Superfund Amendments and Reauthorization Act (SARA).[25] SARA added section 126 to CERCLA, which directed the EPA to treat qualifying tribal governments substantially the same as states for specified provisions of CERCLA.[26] To qualify, an Indian tribe must: (1) be federally recognized; (2) have a governing body exercising authority to protect the health and welfare of tribal members and the reservation environment; and (3) have jurisdiction over a site where CERCLA actions are contemplated.[27] Once qualified, a tribal government may require potentially responsible parties (PRPs) to produce documents and allow physical access and testing of

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[23] *See* 56 Fed. Reg. 64,876 (1991) (stating that non-member activities on fee lands are likely to impair the water and critical habitat of tribal lands).

[24] *Id.* (Congress has expressed preference for tribal regulation of surface water quality on reservations to assure compliance with the Clean Water Act).

[25] Pub. L. No. 99-499, 100 Stat. 1613 (1986) (codified at 42 U.S.C. §§ 9601-9675 (1988)) [hereinafter SARA].

[26] 42 U.S.C. § 9626(a) (1988).

[27] 40 C.F.R. § 300.515(b) (1992).

releases,[28] consult with the EPA on proposed remedial actions,[29] and assist the EPA in setting remedial action priorities.[30]

Coordination between the EPA and affected tribes greatly influences the effectiveness of response actions. The National Response Center must notify tribes potentially affected by a release of hazardous substances, for example.[31] The EPA must consult with affected tribes before selecting remedial actions for particular releases.[32] In particular, tribes may review, comment on, and concur in, preliminary assessments or site investigations, remedial investigations or feasibility studies, and final remedy selection and design.[33] Moreover, the EPA must notify affected tribes when it begins negotiations with PRPs for any of the above activities.[34]

The nature and extent of interaction between tribes and the EPA for Superfund activities, including the EPA-tribe relationship, requirements for EPA oversight, and interaction regarding review of key documents are generally established in a state Superfund Memorandum of Agreement.[35] For site specific activities, the National Contingency Plan (NCP) encourages tribes to enter into cooperative agreements with the EPA to take or support response actions for hazardous substance releases.[36] Tribes that execute cooperative agreements with the EPA may assume lead-agency status at sites over which the tribe has jurisdiction for the purpose of taking remedial actions.[37]

B. Current Role of Tribal Governments for Natural Resource Damage Assessment and Restoration

While CERCLA's first goal is to remove hazardous substances released into the environment, CERCLA is also concerned with repairing any adverse impacts to natural resources caused by

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[28] 42 U.S.C. § 9604(e) (1988).

[29] 42 U.S.C. § 9604(c)(2) (1988).

[30] 42 U.S.C. § 9605 (1988).

[31] 42 U.S.C. § 9603(a) (1988).

[32] 42 U.S.C. § 9604(c)(2) (1988).

[33] 40 C.F.R. § 300.515(c)-(g) (1992).

[34] 40 C.F.R. § 300.520(a) (1992).

[35] 42 U.S.C. § 9604(d)(1)(A) (1988); 40 C.F.R. § 300.505(a) (1992); 40 C.F.R. § 300.515(a)(1) (1992).

[36] 40 C.F.R. § 300.180(d) (1992).

[37] 40 C.F.R. § 300.500(b) (1992).

the release.[38] PRPs are liable for damages resulting from injury to, destruction of, or loss of natural resources.[39] Injuries are measurable adverse changes in the chemical or biological quality or viability of the resources resulting from exposure to hazardous substances.[40] The measure of damages is the value of lost services provided by the resources, the cost of restoring the resources, and the reasonable costs of assessing the extent of the injuries.[41]

A party is liable to the natural resource trustee for such damages. The trustee is the government or governments (including tribal governments) with jurisdiction over the resources injured.[42] Where a release appears to have caused injury to natural resources under tribal jurisdiction, the tribal trustee is authorized to perform a natural resource damage assessment. An assessment quantifies the extent of injury, establishes a causal link between the release and the injury, and assigns a dollar value to the injury.[43] Upon documenting an injury, the tribal trustee may then seek to recover money damages from responsible parties. Like any legal claim, a trustee may recover damages through litigation or settlement. The trustee must then use all sums recovered to restore, rehabilitate, or acquire the equivalent of the injured resources.[44]

III. REAUTHORIZING CERCLA: EXPANDING THE ROLE OF TRIBAL GOVERNMENTS IN RESPONDING TO RELEASES OF HAZARDOUS SUBSTANCES

A. Changes to Tribal Role in Remediation

Congress' decision in 1986 to treat qualifying tribes as states in implementing the Superfund program was a major step toward closing the circle of protection for the health and welfare of tribal

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[38] CERCLA defines natural resources as "land, fish, wildlife, biota, air water, ground water, drinking water supplies, and other such resources" of the federal, state, local, and tribal governments. 42 U.S.C. § 9601(16) (1988).

[39] 42 U.S.C. § 9607(a)(4)(C) (1988). Hereinafter "injury" is used to denote injury to, destruction of, or loss of natural resources.

[40] 43 C.F.R. § 11.14(v) (1992).

[41] 42 U.S.C. § 9607(a)(4)(C) (1988); Ohio v. Dept. of the Interior, 880 F.2d 432, 444-49 (D.C. Cir. 1989).

[42] 42 U.S.C. § 9607(f)(1) (1988).

[43] 43 C.F.R. § 11 (1992) (Department of Interior regulations for conducting natural resource damage assessments).

[44] 42 U.S.C. § 9607(f)(1) (1988).

members and their lands. In reauthorizing CERCLA, Congress should expand further the role of tribal governments in addressing the risks posed to tribal members and nonmembers by hazardous substances. The following are several suggestions for improving or enhancing the role of tribes under the Superfund remedial action program.

1. Treat Tribes as States Under State-Involvement Provisions Expanded or Modified in this Reauthorization

A number of commentators have argued that state-implemented response actions would result in more prompt cleanups that are more cognizant of local concerns.[45] The Association of State and Territorial Solid Waste Management Officials recently proposed a model for state delegation of the Superfund program.[46] The EPA has reportedly reached general agreement that state involvement should be expanded to track the agency's air, waste, and water programs which states may operate in lieu of the federal program.[47]

Congress should include tribal governments if it expands state involvement in the Superfund program. The rationale for treating tribes as states suggests that the role of tribes should evolve in a manner corresponding to the progression of the states' role. Congress should amend section 126 to incorporate any new or modified provisions allowing states to exercise enhanced or expanded authority.[48]

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[45] *See, e.g., EPA Eyeing States' Role in Superfund Process, Offers Options*, SUPERFUND REP., September 22, 1993, at 19-20 (discussing the comments of Gary Pulford, Minnesota Pollution Control Agency, at the Sept. 9, 1993 meeting of the Superfund Evaluation Subcommittee of the National Advisory Committee on Environmental Policy and Technology ("NACEPT") and the position paper submitted to the NACEPT Subcommittee by ARCO, General Electric, Monsanto, and WMX Technologies).

[46] *See id.*

[47] *See EPA Supports Major Expansion of State Authority in Superfund*, SUPERFUND REP., Oct. 20, 1993, at 4.

[48] At a minimum, Congress should specifically consider the appropriateness of extending to tribes those additional powers and responsibilities that Congress may delegate to states in 1994.

2. Require Tribal Certification of Final Remedies for On- and Off-Reservation Releases Potentially Affecting the Reservation Environment

CERCLA requires the EPA to consult with affected tribes before determining any appropriate remedial actions.[49] The EPA intends to ensure meaningful and substantial involvement of tribes in response actions, including allowing tribes to assume the lead for undertaking such actions, or acting as a support agency for EPA-led actions.[50] CERCLA does not require the EPA to obtain the affected tribe's concurrence on the final remedy, however.[51] At tribe-led federally financed sites, however, the EPA must agree with the tribe's proposed remedial action plan.[52]

This one-sided consultation can lead to remedies not fully protective of resources that the United States holds in trust for the affected tribe ("trust resources"). The EPA is not a resource agency and is not charged with protecting trust resources. Congress should require the EPA to obtain a certification from the affected tribe that the EPA's proposed remedy protects the most sensitive biological trust resource at risk.[53] Alternatively, Congress should direct the EPA to consider specifically potential risks to trust resources in evaluating remedial actions, and consider submissions of the tribe or tribes with interests in the affected resources.

3. Redefine ARARs to Include Tribal Standards and Cleanup Levels Sufficient to Protect the Most Sensitive Biological Trust Resource at Risk

The EPA must select final remedies that attain a degree of cleanup protective of human health and the environment.[54] Where the remedy leaves hazardous substances, pollution, or contaminants on-site, the remedy must meet all legally applicable or relevant and appropriate federal standards, and all state standards

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[49] 42 U.S.C. § 9604(c)(2) (1988).

[50] 40 C.F.R. § 300.500(a) (1992).

[51] 40 C.F.R. § 300.515(e)(2)(ii) (1992).

[52] 40 C.F.R. § 300.515(e)(1) (1992).

[53] An analogous provision exists in the Clean Water Act. The Act requires an applicant for a federal permit to obtain from the state or tribe a certification that the proposed activity complies with state or tribal effluent limitations and water quality standards. *See* 33 U.S.C. § 1341 (1988).

[54] 42 U.S.C. § 9621(d)(1) (1988).

more stringent than federal standards identified in a timely manner by the state (ARARs).[55]

As sovereign governments, tribes have promulgated environmental standards and requirements under tribal and federal law potentially applicable or relevant to pollution or contaminants at Superfund sites. For example, under the CWA, tribes may establish water quality standards for on-reservation water bodies.[56] Tribal water quality standards must meet, but may be more stringent than, the federal minimum standards.[57] Congress should amend section 121 of CERCLA to include any environmental standard, requirement, criteria, or limitation promulgated by a tribe under tribal law or under a federally delegated program that is more stringent than federal standards.

Even where an affected tribe has not promulgated applicable or relevant standards, however, the EPA retains its trust obligation to ensure that remedies leaving contaminants on-site protect trust resources. Congress should also amend section 121 of CERCLA to require that the EPA's final remedies attain cleanup levels protective of the most sensitive biological trust resource at risk, and to seek from the affected tribe a certification to that effect.[58]

4. Revise Application of Hazard Ranking System to Releases Affecting Reservation Environments

SARA required that the EPA modify the hazard ranking system (HRS) so that it accurately assesses the relative degree of risk posed to human health and the environment by various sites.[59] Recognizing the importance of water as a public resource and as a pathway for pollutant migration, Congress required that the revised HRS accurately assess health risks posed by contamination of surface waters where such waters may be used for recreation or

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[55] 42 U.S.C. § 9621(d)(2)(A) (1988).

[56] *See* 33 U.S.C. § 1377 (1988) (authorizing EPA to treat tribes as states for purposes of the water quality standards program); 40 C.F.R. § 131.8 (1992) (requirements for treatment as a state approval); *see also* City of Albuquerque v. EPA, No. 93-82-M (D.N.M. suit filed January 25, 1992) (water quality standards adopted by Pueblo of Isleta under the Clean Water Act).

[57] *See* 33 U.S.C. § 1370 (1988); 40 C.F.R. § 131.4 (1992).

[58] *See supra* text at notes 49-54 for discussion of new requirement that EPA obtain from affected tribes a certification that proposed remedies protect the most sensitive biological trust resource.

[59] 42 U.S.C. § 9605(c) (1988).

consumption.[60] In response, the EPA shifted the HRS from its primary focus on human health risks, to place greater emphasis on releases posing significant threats to the environment, especially sensitive environments like wetlands, national parks, and sanctuaries.[61]

Despite the 1986 revisions, the HRS may not accurately value risks to reservation environments. For example, tribal economies and subsistence lifestyles often depend critically on uncontaminated water, fish, and game resources. The migratory nature of those natural resources makes both on- and off-reservation releases potential threats to tribal health and welfare. As EPA Administrator Carol Browner has recognized, the EPA's pollution standards must be revised to reflect accurately the reality that risks posed by contaminated fish and other aquatic resources is greater for Native Americans than for other segments of the population.[62] Congress should amend section 105(C)(2) to direct that the EPA accurately assess the risks of contamination of tribal surface waters directly or through pollutant migration. Congress should also direct the EPA to value trust lands on reservations as sensitive environments like other federal lands reserved in the national interest such as national parks and recreation areas.

5. Clarify the EPA's Authority to Involve Tribal Governments in Response Actions at Sites Potentially Affecting Tribal Trust Resources

To qualify for treatment as a state, a tribe must have jurisdiction over the site the EPA is evaluating.[63] If the tribe lacks jurisdiction, then the EPA is not specifically authorized to give notice of a release affecting the reservation environment, consult on proposed remedial actions, share information obtained from PRPs, coordinate on health assessments, or consider tribal priorities for the NPL.[64]

Yet numerous off-reservation sites adversely impact trust resources. Whether or not a tribal government has actual authority

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[60] 42 U.S.C. § 9605(c)(2) (1988).

[61] 40 C.F.R. § 300 (1992), App. A, Table 4-23 (Sensitive Environments Rating Values).

[62] Paul Shukovsky, *Tribes Take on Pollution: Greater Risk in Eating Fish Spurs Action*, SEATTLE POST-INTELLIGENCER, Sept. 7, 1993, at A1.

[63] 40 C.F.R. § 300.515(b)(3) (1992).

[64] *See* 42 U.S.C. § 9626(a) (1988); 40 C.F.R. § 300.515(b) (1992).

over the source of the releases, the trust responsibility requires the EPA to notify, share information, and consult with the affected tribe. Congress should direct the EPA to treat tribes as states where they either have jurisdiction over the site or the site impacts or threatens to impact trust resources.[65]

6. Revise Grant Funding Requirements for Indian Tribes

CERCLA authorizes the EPA to make Technical Assistance Grants (TAGs) of up to $50,000 to groups of individuals affected by releases or threatened releases.[66] TAG grants pay for technical advisors who interpret technical information so that grant recipients may make informed comments on the EPA's proposed actions.[67] The EPA may award one TAG grant per site, and the site must either be on the NPL or have been nominated to the NPL and response actions already commenced.[68]

The EPA may also award grant funds to tribes to participate in response actions.[69] Funds are awarded pursuant to cooperative agreements that may either be site-specific, as in the case of tribe-led remedial agreements,[70] or general, as in the case of Core Program agreements supporting general tribal involvement in the Superfund program.[71] Tribes are eligible for funds only if they qualify for treatment as a state,[72] including a showing of capability to administer the program. Recipients must comply with extensive accounting standards.[73]

Like that of states, tribal participation in pollution control programs is more effective when there is federal financial and technical assistance. Unlike states, most tribes lack alternative sources of revenue and thus require federal funding to participate. The absence of tribal representatives in response activities affect-

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[65] The only exception to this recommendation would be for cooperative agreements between EPA and a tribe for tribe-led response actions. 42 U.S.C. § 9604(d) (1988). Congress recognized in the code that a tribe should demonstrate jurisdiction before it may implement response actions. *Id.*

[66] 42 U.S.C. § 9617(e)(1) (1988).

[67] 42 U.S.C. § 9617(e)(1) (1988).

[68] 42 U.S.C. § 9617(e)(2) (1988); 40 C.F.R. § 35.4025 (1991).

[69] 42 U.S.C. § 9604(d)(1)(A) (1988).

[70] *See* 40 C.F.R. § 35.6110 (1991).

[71] 40 C.F.R. § 35.6015(a)(15), .6110 (1991) (definition of Core Program Cooperative Agreement); 40 C.F.R. § 35.6215-.6235 (1991) (requirements for Core Program Cooperative Agreements).

[72] 40 C.F.R. § 35.6010 (1991).

[73] *See* 40 C.F.R. § 35.6270-6290 (1991).

ing reservation environments leaves a substantial gap in CERCLA implementation. Congress should ensure adequate tribal participation by: (1) allowing the EPA to make TAG grants of up to $100,000 to an affected tribe, regardless of the site's NPL status and regardless of other TAG grant recipients for that site; (2) allowing the EPA to award cooperative agreement funds to a tribe who can show administrative and technical capability *or* a plan for achieving capability to undertake CERCLA actions;[74] (3) allowing the EPA to award Core Program funds to a tribe affected by facilities not within the tribe's jurisdiction; and (4) directing the EPA to evaluate whether its accounting requirements are overly onerous for tribes with limited infrastructure and resources.

B. Changes to Tribal Role as a Natural Resource Trustee

As natural resource trustees, tribes play a more direct role in protecting their resources than is the case under Superfund's remedial action program. CERCLA authorizes tribes to bring legal claims against PRPs and to restore natural resources injured by hazardous substance releases. Tribes need not satisfy treatment-as-a-state requirements to be trustees. Still, Congress could effectively assist tribal trustees in achieving CERCLA's goal of restoring injured natural resources by adopting the following recommendations.

1. Provide Access to the Hazardous Substance Superfund for Damage Assessment Activities

CERCLA originally provided that trustees unable to recover damages from PRPs could access CERCLA's Hazardous Substance Superfund ("Fund") for such damages.[75] Fearing that trustees' claims would deplete the Fund and render the remedial program impotent, Congress later prohibited expenditures from the Fund for natural resource damage claims.[76]

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[74] EPA's Clean Water Act treatment of state regulations require a tribe to show reasonable capability to carry out effective CWA functions. *See* 40 C.F.R. § 131.8(a) (1992). However, the tribe may make this showing by proposing a plan for acquiring the expertise to implement an effective program. *Id.*

[75] *See* 42 U.S.C. § 9611(b)(2) (1988); 40 C.F.R. § 306 (1992) (former regulations governing claims against the Fund for natural resource damages).

[76] *See* 26 U.S.C. § 9507(c)(1)(A)(ii) (1991) (Superfund Revenue Act of 1986); 52 Fed. Reg. 33, 812 (Sept. 8, 1987) (final EPA rule withdrawing 40 C.F.R. § 306 procedures for natural resource damage claims against the Fund).

Congress' decision particularly impacted tribes who depend on healthy natural resources for physical and spiritual sustenance. Unlike state and federal agencies, tribal trustees lack yearly budget allocations to fund assessment activities. Although tribal trustees may seek to recover their assessment costs from PRPs, such claims are likely to fail if funds to prepare them adequately are unavailable. As a result, natural resource injuries may be left unaddressed. Congress should allow tribal trustees to access the Fund for their costs in assessing injury to tribal trust resources.[77]

2. Provide Tribal Trustees with Authority to Order PRPs to Undertake Damage Assessment Activities

A fundamental shortcoming of CERCLA's natural resource damage program is that it does not give trustees any direct authority over PRPs responsible for injuries. That gap and the bar against paying for assessments with the Fund encourages PRPs to be recalcitrant, knowing that the trustee cannot prove liability without incurring substantial damage assessment costs. CERCLA's goal of restoring injured resources is hindered by these limitations. Congress should provide tribal trustees with authority to order PRPs to perform assessment activities specified in the Department of the Interior's regulations.

3. Clarify the EPA's Authority to Order PRPs to Collect Data Relevant to Trustees' Damage Assessment Needs

The EPA has broad authority to collect or require PRPs to collect information potentially useful to the trustees.[78] The EPA must evaluate the concentration, toxicity, propensity to bioaccumulate, persistence, and mobility of the hazardous substances released.[79] This information helps the trustees identify for the EPA remedial alternatives that protect and restore injured natural

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[77] Any risk of depleting the Fund decreases substantially by limiting tribal reimbursement for assessment activities only, and not for restoration costs.

[78] The EPA must investigate releases of hazardous substances "as [EPA] may deem necessary or appropriate to identify the existence and extent of the release or threat thereof, the source and nature of the hazardous substance, pollutants, or contaminants involved, and the extent of the danger to the public health or welfare or to the environment." 42 U.S.C. § 9604(b)(1) (1988).

[79] 40 C.F.R. § 300.430(d) (1992).

resources.[80] The EPA's data may also assist tribal trustees in conducting assessments more promptly and less expensively.

As noted above, trustees' inability to order PRPs to perform assessment activities like chemical and biological sampling threatens CERCLA's goals. Congress should specifically authorize the EPA, when requested by a tribal trustee, to issue consent orders including requirements for PRP collection of data useful for assessment purposes.[81]

4. Include Loss of Subsistence Uses of Natural Resources within Scope of Damages

Like states, tribal trustees are authorized to seek recovery of damages, including reasonable assessment costs, for natural resources "belonging to, managed by, controlled by, or appertaining to [the] tribe."[82] Unlike states, many tribes in the continental United States have federally protected rights to make subsistence uses of off-reservation fish and game, although they may not own, control, or manage the resources.[83] Alaska Natives may make subsistence uses of fish, game, and plants on federal lands currently managed by the state of Alaska.[84]

Arguably, CERCLA overlooks those rights by limiting tribal trustees' authority to resources over which they have jurisdiction. Additionally, CERCLA does not compensate tribes for lost subsistence uses because all sums recovered from PRPs must be used to restore injured resources.[85] In contrast, the Oil Pollution Act of 1990 imposes liability for damages for any loss of subsistence use

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[80] *See* REGION 10, SUPERFUND BRANCH, EPA, SUPERFUND NATURAL RESOURCE TRUSTEE NOTIFICATION AND COORDINATION MANUAL 6 (September 1989) (on file with the JOURNAL OF NATURAL RESOURCES & ENVIRONMENTAL LAW).

[81] Arguably, CERCLA currently provides sufficient authority for EPA to order a PRP to collect data usable for damage assessments, so long as EPA could use the data to better characterize a site for remedial action decisionmaking. *See* 42 U.S.C. §§ 9604(b)(1), 9622(j) (1988). The recommended amendment would clarify this authority and also require EPA to include such requirements in consent orders when requested by tribal trustees.

[82] 42 U.S.C. § 9607(f)(1) (1988).

[83] *See* Puyallup Tribe of Indians v. Dept. of Game, 391 U.S. 392 (1968); Tulee v. Washington, 315 U.S. 681 (1942); United States v. Winans, 198 U.S. 371, 381 (1905).

[84] *See* 16 U.S.C. §§ 3111-26 (1988) (Title VIII of the Alaska National Interest Lands Conservation Act of 1980).

[85] *See* 42 U.S.C. § 9607(f)(1) (1988).

of natural resources.[86] Any claimant making subsistence use of the injured resources may recover such damages in compensation for the lost use, regardless of who owns or manages the resources.[87] Congress should bring losses of subsistence uses within the scope of natural resource damage liability.[88]

5. Provide Damage Assessments Prepared by Tribal Trustees with a Rebuttable Presumption

The Department of the Interior (DOI) has promulgated regulations establishing guidelines for how trustees may assess injury to natural resources resulting from releases of hazardous substances.[89] Trustees have discretion not to follow DOI's regulations,[90] but federal and state assessments complying with the regulations have a rebuttable presumption of validity in any administrative or judicial proceeding under CERCLA or the CWA.[91]

No compelling reason appears that similar status should not be accorded assessments prepared by tribal trustees in compliance with DOI's regulations. The OPA accords a rebuttable presumption to tribal trustees' assessments of injuries caused by releases of oil.[92] Congress should amend section 107(f)(2)(C) to include tribal trustees' assessments within the scope of those assessments accorded the status of a rebuttable presumption in any administrative or judicial proceeding under CERCLA or the CWA.

6. Direct DOI to Incorporate Exceedances of Tribal Standards and Health Advisories As Per Se Injuries

Whether or not a tribal trustee follows the DOI's procedures to assign a dollar value to a particular claim, the DOI's regula-

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[86] Oil Pollution Act of 1990, Pub. L. No. 101-380, §§ 1001(15), (36) (codified at 33 U.S.C. §§ 2701(15), (36) (Supp. III 1991)).

[87] Oil Pollution Act §§ 1001(15), (36).

[88] Congress should also clarify that sums recovered for losses of subsistence uses are to be retained by the claimant as compensation for the lost use. *See, e.g.*, Oil Pollution Act § 1006(f).

[89] *See generally*, 43 C.F.R. pt. 11 (1993) (this part titled "Natural Resource Damage Assessments" supplements procedures found in the National Oil and Hazardous Substances Pollution Contingency Plan at 40 C.F.R. pt. 300 (1992) for determining compensation for the injured).

[90] *See* 40 C.F.R. § 300.615(c)(4) (1992).

[91] 42 U.S.C. § 9607(f)(2)(C) (1988).

[92] Oil Pollution Act § 1006(e)(2).

tions are important because the trustee, PRPs, and the courts will use them to evaluate whether liability exists for the releases at issue. A PRP is liable only for releases causing "injury,"[93] which the regulations define as a measurable adverse change in the chemical or physical quality or viability of a natural resource resulting from exposure to hazardous substances.[94] For example, death or inability to reproduce is considered an adverse change for biological resources like birds or fish.[95] Even if the resource functions normally, however, a per se injury is shown where the resource contains contaminant concentrations in excess of state or federal standards promulgated to protect the resource.[96]

The rationale behind per se injuries is that a state or federal agency with expertise has previously determined tha. level of contamination beyond which the resource will suffer harm or will threaten human health or the environment. So it is with tribal standards; tribal environmental and health agencies make similar determinations about the ability of resources under their jurisdiction to tolerate exposures to certain contaminants. Congress should direct the DOI to revise its regulations to provide that the repeated exceedance of tribal environmental and health standards are per se injuries to tribal natural resources.

7. Improve Coordination Between Tribal Trustees and the EPA and State and Federal Trustees

Coordination between the EPA and trustees and among trustees serves the public interest by minimizing duplication, maximizing scarce agency resources, and implementing CERCLA's remedial and natural resource damage programs in a complementary rather than contrary fashion. Recognizing these benefits, CERCLA directs the EPA to notify federal and state trustees of potential natural resource damages and to coordinate its investigations with those trustees.[97] The EPA must also notify and encourage

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[93] 42 U.S.C. § 9607(a)(4)(C) (1988).

[94] *See* 43 C.F.R. § 11.14(v) (1993).

[95] *See* 43 C.F.R. § 11.62(f)(1)(i) (1993).

[96] *See, e.g.*, 43 C.F.R. § 11.62(f)(1)(iii) (1993) (injury to biological resource shown by exceedance of state health standards for consumption of the resource); 43 C.F.R. § 11.62(b)(1)(iii) (1993) (injury to surface water resource shown by exceedance of state or federal water quality criteria promulgated under § 304 of the CWA).

[97] 42 U.S.C. § 9603(b)(2) (1988).

federal trustees to participate in settlement negotiations with parties potentially responsible for natural resource damages.[98]

There appears to be no legitimate explanation for why the EPA is not required to notify and encourage the participation of tribal trustees, who are specifically authorized to act independently of federal and state trustees. Congress should expand the EPA's notification and participation responsibilities to include tribal trustees. Congress also should explicitly encourage coordination among trustees at sites where multiple trustees have jurisdiction by requiring any trustee, federal, state, or tribal, who discovers potential injuries to notify other trustees who may have jurisdiction over the resources.[99]

CONCLUSION

CERCLA recognizes the sovereign authority of tribal governments by providing them with substantial authority to protect human health, the environment, and natural resources. Yet CERCLA currently falls short of more recent statutes[100] in ensuring that tribal governments have sufficient authority and opportunity to discharge their public trust obligations effectively.[101] This break in the circle is, however, repairable. Congress should seize this opportunity to help tribes become reliable partners with federal and state agencies in the struggle to protect all Americans—native and non-native alike—from the threats posed by hazardous substances.

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[98] 42 U.S.C. § 9622(j)(1) (1988).

[99] *Cf.* 40 C.F.R. § 300.615(a) (1992) (where there are multiple trustees with concurrent or coexisting jurisdictions, the trustees hould coordinate and cooperate in carrying out their responsibilities).

[100] *See supra* text accompanying notes 20-22 regarding the 1987 amendments to the Clean Water Act and the 1990 amendments to the Clean Air Act.

[101] The current law is only partly responsible for this state of affairs. Congress must be prepared to appropriate to EPA funds sufficient to ensure the effective participation of tribal governments. Tribal governments in the 1990s are not unlike the state governments ten and twenty years ago when environmental regulatory programs and technical expertise were in their infancy. These relatively new programs require administrative and institutional infrastructure, equipment, staff training, enforcement powers, and time to evolve. The federal trust obligation and the national interest in effective pollution control on all lands require that Congress ensure that tribal governments have a legitimate and fair opportunity to develop and implement credible programs.