Water Law Review

Volume 5 | Issue 2 Article 5

1-1-2002

Wisconsin v. EPA: Tribal Empowerment and State Powerlessness under 518(e) of the Clean Water Act

Paul M. Drucker

UNIVERSITY OF DENVER
WATER LAW REVIEW

VOLUME 5 ISSUE 2 SPRING 2002

WISCONSIN V. EPA: TRIBAL EMPOWERMENT AND STATE POWERLESSNESS UNDER § 518(e) OF THE CLEAN WATER ACT

PAUL M. DRUCKER†

I. Introduction **324**
II. The Clean Water Act **325**
A. Meeting the CWA's Goals: Effluent Limitations and Water Quality Standards 327
1. Effluent Limitations and the National Pollutant Discharge Elimination System 328
2. Water Quality Standards 330
B. The Convergence of Water Quality Standards, Effluent Limitations, and NPDES Permits 332
C. Transboundary conflicts: Pollution Flows Downstream ... 336
III. The Clean Water Act's Cooperative Federalism and Indian Tribes **340**
A. "Treatment as a State" Status for Indian Tribes 340
1. Section 303: Water Quality Standards 341
2. Section 401: Certification of Compliance with Water Quality Standards 342
3. Section 402: NPDES Permits 344
B. *Albuquerque v. Browner*: "Treatment as a State" *Really Means* Treatment as a State 345
C. Obtaining "Treatment as a State" Status 347

† Paul M. Drucker. B.A. 1995 University of Kansas, J.D. 1999 DePaul University College of Law (Dean's Scholar Scholarship Recipient 1996-1999), LL.M with distinction (Concentration: Environmental Law) 2002 Georgetown University Law Center. The author wishes to thank Professors Lisa Heinzerling and Richard Lazarus of Georgetown University Law Center for their expert guidance and steadfast support. The author also thanks his wife, Holly, for her unwavering patience. The author welcomes questions and comments by e-mail: pmd73@yahoo.com.

1. Inherent Tribal Authority 349
i. *Montana v. United States*: "The Montana Test" 350
ii. *Brendale* Causes Debate 351
iii. The EPA's Resolution 352
iv. The *Montana* Test and "Treatment as a State" Designation 354
v. The EPA's Presumption of Inherent Authority 355
D. Opposing a Tribe's Application for "Treatment as a State" Status 357
1. "Appropriate" Governmental Entities: Who May Challenge? 357
2. Limitations: What May Be Challenged? 359
IV. When the Governmental Entity's challenge to "Treatment as a State" Designation Has Failed – May It Please the Court: *Wisconsin v. EPA*..... 362
A. Back on Their Heels: The Standard of Review of TAS Decisions 362
B. Facts 364
C. The Court's Analysis 366
1. Not "Within the Borders" 367
2. The Equal Footing Doctrine 368
3. Inherent Authority over Off-Reservation Activities 373
V. Implications 375
A. "Treatment as a State" Designations to Administer Water Quality Standards Will Increase 376
B. Governmental Entity Challenges to "Treatment as a State" Designation: A Futile Exercise? 381
1. The Waterbody Is Not Navigable 383
2. Impairment of a Reservation Waterbody Will *Not* Have Serious and Substantial Effects on the Political Integrity, Economic Security, or Health or Welfare of the Tribe 385
VI. An Alternative Approach – Watershed Management..... 388
VII. Conclusion 393

I. INTRODUCTION

> "In this case, we confront one of the more complex kinds of overlapping sovereignty that exists in the United States today: that between the States and Indian tribes."[1]

With this statement, Judge Diane Wood, writing for a unanimous panel of the United States Court of Appeals for the Seventh Circuit, began an opinion in a case marking a turning point in water pollution regulation under the Clean Water Act. In *Wisconsin v. EPA*, the court rejected the State of Wisconsin's challenge to the EPA's grant of

1. Wisconsin v. EPA, 266 F.3d 741, 743 (7th Cir. 2001).

"Treatment as a State" status to the Sokaogon Chippewa Community Indian Tribe for purposes of setting water quality standards under the Clean Water Act.[2] In doing so, the court confirmed what many in the environmental field have suspected or suggested: Indian tribes with "Treatment as a State" status are co-equal sovereign regulatory bodies of the same class as individual states under the Clean Water Act. In addition, it will be extremely difficult, if not impossible, for a state to challenge a tribe's "Treatment as a State" designation.

This article reviews the Seventh Circuit's seemingly simplistic decision over the complex issues in *Wisconsin v. EPA* with an eye toward its repercussions for nationwide water pollution regulation. To appreciate the implications of this decision, one must understand the basic framework of the Clean Water Act, including the important role of cooperative federalism in achieving the Act's goals. Accordingly, Part I of this article reviews the fundamental components of the Clean Water Act. Part II discusses the extension of the Clean Water Act's cooperative federalism to Indian tribes, enabling qualified tribes to exercise many of the same regulatory powers as states for waters within reservation boundaries. This discussion includes an important examination of how a tribe qualifies for "Treatment as a State" status and notions of "inherent authority." Part III reviews the facts in *Wisconsin v. EPA* and maps the court of appeals' opinion. Part IV assesses this case's implications, specifically focusing on the potentially significant increase in tribal assertion of authority under the Clean Water Act and the tremendous difficulty that states face in challenging a tribe's "Treatment as a State" designation. Part V considers watershed management as an alternative approach that may be better suited for comprehensive and cooperative water pollution regulation. The author argues four main points: (1) the Seventh Circuit's decision in *Wisconsin v. EPA* was correct as a matter of law; (2) more tribes will be seeking "Treatment as a State" status to administer water quality standards; (3) the court's opinion in *Wisconsin v. EPA* has eliminated most of the viable challenges a state may make in opposition to the grant of "Treatment as a State" status to a tribe; and (4) a potential influx of additional water pollution regulatory authorities is of questionable value to the Clean Water Act's operation which may be better served by basing regulation on hydrological boundaries rather than political borders.

II. THE CLEAN WATER ACT

The Federal Water Pollution Control Act of 1948 was the federal government's first, albeit modest, attempt to statutorily regulate water pollution in the twentieth century.[3] The Act was revised numerous times between its enactment and 1971.[4] As a whole, however, this

2. *Id.*

3. STEVEN FERREY, ENVIRONMENTAL LAW: EXAMPLES AND EXPLANATIONS 222 (2d ed. 2001).

4. EPA v. California *ex rel.* State Water Res. Control Bd., 426 U.S. 200, 202 n.2

initial attempt to control water pollution was flawed, deficient, and ineffective in many ways.[5] The situation came to a head in 1971 when the Senate Public Works Committee concluded, "the national effort to abate and control water pollution has been inadequate in every vital aspect."[6] In response to this finding,[7] Congress enacted the Federal Water Pollution Control Amendments of 1972.[8] In 1977, after additional amendments were enacted, the Federal Water Pollution Control Act became known as the Clean Water Act ("CWA" or "Act").[9]

The Supreme Court described the CWA as "an all encompassing program of water pollution regulation . . . [whose] 'major purpose. . .' was to 'establish a *comprehensive* long range policy for the elimination of water pollution'."[10] The statute itself proclaims that its overarching and lofty objective is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[11] To reach this objective, the CWA sets forth specific attainment goals including: (1) eliminating pollutant discharge into navigable waters; (2) achieving an

---

(1976).

5. *See id.* at 202-03. The United States Supreme Court explained the specific problems with the statute before 1972:

> [T]he Federal Water Pollution Control Act employed ambient water quality standards specifying the acceptable levels of pollution in a State's interstate navigable waters as the primary mechanism in its program for the control of water pollution. This program based on water quality standards, which were to serve both to guide performance by polluters and to trigger legal action to abate pollution, proved ineffective. The problems stemmed from the character of the standards themselves, which focused on the tolerable effects rather than the preventable causes of water pollution, from the awkwardly shared federal and state responsibility for promulgating such standards, and from the cumbrous enforcement procedures. These combined to make it very difficult to develop and enforce standards to govern the conduct of individual polluters.

Id. Professor Ferrey further described the statute's ineffectiveness:

> Prior to 1972, enforcement of water pollution violations was difficult because enforcement depended on a discharger's ability to reduce the *ambient* water quality of the *receiving* waters below a specific level. . . . Given multiple discharges to many water bodies, the agency's burden in proving which discharger was the sole cause of pollution was nearly impossible.

FERREY, *supra* note 3, at 222-23. *See also* Piney Run Pres. Ass'n v. County Comm'rs, 268 F.3d 255, 264 (4th Cir. 2001) ("This water quality standard scheme . . . was plagued by many problems. Significantly, it was often difficult to formulate precise water quality standards and even more difficult to prove that a particular operator's discharge reduced water quality below these standards.").

6. Victor B. Flatt, *A Dirty River Runs Through It (The Failure of Enforcement in the Clean Water Act)*, 25 B.C. ENVTL. AFF. L. REV. 1, 7 (1997) (quoting S. REP. NO. 92-414 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3674).

7. *State Water Res. Control Bd.*, 426 U.S. at 204.

8. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (1972). After a "long and contentious" debate, the amendments were enacted over a presidential veto on October 18, 1972. William A. Anderson, II & Eric P. Gotting, *Taken in Over Intake Structures? Section 316(b) of the Clean Water Act*, 26 COLUM. J. ENVTL. L. 1, 9 n.49 (2001).

9. Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (1977); Flatt, *supra* note 6, at 6 n.31.

10. City of Milwaukee v. Illinois, 451 U.S. 304, 318 (1981).

11. 33 U.S.C. § 1251(a) (1994).

interim water quality goal wherever attainable, which provides for fish, shellfish, and wildlife protection and propagation and recreation in and on the water (often referred to as the "fishable & swimmable" goal);[12] and (3) prohibiting toxic pollutant discharge in toxic amounts.[13] From these admirable ambitions, one can discern that the ultimate aim of the CWA is the tall order of eliminating pollutant discharges into United States waterways.[14]

A. MEETING THE CWA'S GOALS: EFFLUENT LIMITATIONS AND WATER QUALITY STANDARDS

In order to work toward the CWA's objectives, there must be a way to gauge the "quality" of the Nation's waters and the pollutants that enter them. Without this ability, realistic regulatory enforcement has proved unworkable.[15] Therefore, the CWA's new regulatory framework included a new set of "measuring tools." The Court of Appeals for the Tenth Circuit explained the role and function of these new tools as follows:

> The Clean Water Act provides two measures of water quality. One measure is an "effluent limitations guideline." Effluent limitations guidelines are uniform, technology-based standards promulgated by the EPA, which restrict the quantities, rates and concentrations of specified substances discharged from point sources. The other measure of water quality is a "water quality standard." Unlike the technology-based effluent limitations guidelines, water quality standards are not based on pollution control technologies, but express the desired condition or use of a particular waterway. Water quality standards supplement technology-based effluent limitations guidelines "so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels."[16]

Thus, the CWA is generally concerned with regulating levels of *pollutants discharged* from point sources[17] (i.e., effluent limitations) and

---

12. Robert W. Adler, *Integrated Approaches to Water Pollution: Lessons from the Clean Air Act*, 23 HARV. ENVTL. L. REV. 203, 209 n.35 (1999).

13. 33 U.S.C. § 1251(a)(1)-(3). The CWA's introduction sets forth a total of seven national "goals" and "policies." Two "goals" set specific attainment target dates. Total elimination of pollutant discharge into the navigable waters was targeted to be accomplished by 1985. The attainment date for the establishment of water quality providing for the protection and propagation of fish, shellfish, and wildlife and providing for recreation in and on the water was July 1, 1983. Neither of these deadlines were met. FERREY, *supra* note 3, at 224.

14. Flatt, *supra* note 6, at 8.

15. *See supra* text accompanying note 5.

16. City of Albuquerque v. Browner, 97 F.3d 415, 419 n.4 (10th Cir. 1996) (internal citations omitted).

17. "Point sources" are defined as "any discernable, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). A "nonpoint source" includes "everything that is not a 'point

establishing pollution limits for navigable *water bodies that receive* pollutant discharges (i.e., water quality standards). These two gauges form the basis for virtually all water pollution control under the CWA.

1. Effluent Limitations and the National Pollutant Discharge Elimination System

The National Pollutant Discharge Elimination System ("NPDES") is the heart of the CWA's enforcement regime.[18] The NPDES mechanism "provides for the issuance of discharge permits ("NPDES permits") that allow the holder to discharge pollutants at levels below thresholds incorporated in the permit."[19] The permit system is the means of achieving and enforcing the technology-based effluent limitations by specifically identifying to the polluter what may be legally expelled from an end-pipe into a waterbody.[20] The EPA promulgates effluent limitation guidelines using the latest scientific knowledge[21] and after carefully considering various statutorily prescribed factors.[22] By following the terms of their NPDES discharge permits, permit holders can avoid liability under the CWA.[23]

At first blush, the idea that the CWA grants "licenses to pollute" seems squarely at odds with the Act's goal of eliminating pollutant discharge into navigable waters.[24] Yet, the CWA is a careful mix of absolutist language and carved-out exceptions. Section 301, known as the "centerpiece of the CWA,"[25] demonstrates this, stating "[e]xcept as in compliance with this section and [other sections of the Act], the discharge of any pollutant by any person shall be unlawful."[26] Thus,

---

source' or not associated with a discrete point of discharge." FERREY, *supra* note 3, at 217. Examples include discharges attributable to farming, construction, mining, and urban runoff. *Id.* There tends to be disparate regulatory treatment of point sources and nonpoint sources. "Consignment to the point source category brings attentive regulation .... Relegation to the nonpoint source group beings loose oversight." Flatt, *supra* note 6, at 8 n.53 (citing WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW § 4.5 at 303 (2d ed. 1994)). One reason for this may be that it is physically easier to monitor discrete discharges from, for instance, pipes of a factory than it is to measure runoff of polluted water into a waterbody. Another reason may be that nonpoint source pollution generally emanates from land use; therefore, to mitigate such pollution, land use activities must be controlled—often leading to an array of different problems. FERREY, *supra* note 3, at 217, 452-456.

18. 33 U.S.C. § 1342.

19. Trout Unlimited, Inc. v. City of New York, 273 F.3d 481, 486 (2d Cir. 2001).

20. EPA v. California ex *rel.* State Water Res. Control Bd., 426 U.S. 200, 204-05 (1976).

21. 33 U.S.C. § 1314(a)(1).

22. When considering effluent limitation guidelines, the EPA must make three essential determinations: "(1) whether the pollutant results from a non-point source or a point source; (2) whether the pollutant is classified as conventional, non-conventional, or toxic; and (3) whether the discharger is a new or existing source of pollution." Flatt, *supra* note 6, at 8.

23. Piney Run Pres. Ass'n v. County Comm'rs, 268 F.3d 255, 265 (4th Cir. 2001).

24. 33 U.S.C. § 1251(a)(1); *see also supra* text accompanying note 13.

25. Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 204 F.3d 149, 151 (4th Cir. 2000).

26. 33 U.S.C. § 1311(a).

the CWA creates a scheme of *strict liability* for *any* pollutant discharge *unless* the discharge fits into one of the CWA's limited exceptions.[27]

In reality, the only "exception" by which a pollutant discharger can escape the strict liability of the CWA is by compliance with a valid NPDES permit.[28] Resultantly, the CWA regulatory regime does not create an outright discharge ban, but instead establishes a sophisticated discharge allowance system for polluters.[29] The ultimate goal, however, has not been forsaken. The NPDES permit mechanism contemplates a *gradual* progression of point source discharge reduction using *technology-based standards.*[30] The premise is that, "[a]lthough Congress intended the CWA to lead to the long-term elimination of pollutants in the nation's waterways, Congress recognized the technological infeasibility of prohibiting all pollutants in the short term."[31] Therefore, rather than unrealistically forcing an immediate about-face by industry and other polluters, the CWA uses NPDES permits to "progress toward the national goal of eliminating the discharge of all pollutants."[32] As pollution control technology improves and ostensibly becomes more economical, such technology will be incorporated into the tolerated pollutant limits in NPDES permits.[33] Thus, rather than contravening the fundamental purpose of the CWA, the "permits to pollute" are the monitoring tools used to achieve it.[34] "The availability of such permits simply recognizes 'that

---

27. *Piney Run Pres. Ass'n*, 268 F.3d at 265.

28. *Id.* (citing Natural Res. Def. Council, Inc. v. Costle, 568 F.2d 1369, 1374 (D.C. Cir. 1977)) ("The legislative history makes clear that Congress intended the NPDES permit to be the only means by which a discharger from a point source may escape the total prohibition of [§] 301(a).").

29. Trout Unlimited, Inc. v. City of New York, 273 F.3d 481, 486 (2d Cir. 2001). There are two basic types of NPDES permits: (1) individual and (2) general. An *individual permit* is specifically tailored to an individual facility using the detailed information contained in the permit application. A *general permit* covers multiple facilities within one category. It is a generally applicable permit, which covers categories of point sources having common attributes. General permits may only be issued to dischargers with similar characteristics located within a specific geographical region. The idea behind the general permits is to promote efficiency by covering similar dischargers under one preset permit rather that expending resources to issue individual permits. EPA Office of Water, Office of Wastewater Management, *National Pollutant Discharge Elimination System Permit Program, at* http://cfpub.epa.gov/npdes/index.cfm?program_id=0 (last visited Nov. 18, 2001).

30. 33 U.S.C. §§ 1311, 1314.

31. *Piney Run Pres. Ass'n*, 268 F.3d at 265.

32. 33 U.S.C. § 1311(b)(2)(A).

33. *See id.* §§ 1314(b)(1)(B), 1316(b)(1)(B).

34. Flatt, *supra* note 6.

> The permits specify the control technology applicable to each pollutant, the effluent limitations a discharger must meet, and the deadline for compliance. Each pollutant then must be monitored, and the results submitted to EPA or to another governing entity in periodic discharge monitoring reports (DMRs). Permits under NPDES may be granted for no more than five years, but are renewable thereafter.

Id. at 12 (internal citations omitted). *See generally* Amy E. Fortenberry, *Moving Violations: Violations of the Clean Water Act and Implications for CERCLA's Federally Permitted Release Exception*, 24 B.C. ENVTL. AFF. L. REV. 821 (1997).

pollution continues because of technological limits, not because of any inherent rights to use the nation's waterways for the purpose of disposing of wastes'."[35] Clearly, the NPDES permitting structure constituted a major shift in mindset and procedure for both regulators and dischargers.

In addition, the CWA allows the federal government to delegate to state governments the authority to administer the NPDES program for point sources located within a state.[36] The EPA must approve any such state program,[37] and once it does, the state is considered a "primacy state" for CWA purposes.[38] In the absence of an approved state program, the EPA administers the NPDES permit program.[39] Even in primacy states, the EPA retains power to both block issuance of any NPDES permit to which it objects,[40] and take enforcement action.[41] Importantly though, a primacy state may adopt discharge permit conditions more stringent than those federally required.[42] Thus, the CWA sets up a system of "cooperative federalism,"[43] whereby the federal government offers the states the opportunity to regulate discharge limits so long as the state standards meet or exceed the federal standards.[44]

2. Water Quality Standards

In the simplest of terms, "[a] water quality standard defines the water quality goals of a water body, or portion thereof, by designating the use or uses to be made of the water[45] and by setting criteria necessary to protect the uses."[46] When considering water quality standards, the frame of reference is not what is being *discharged* from an end-pipe, but rather the *water body* into which such a pipe expels pollutants. Thus, water quality standards and technology-based effluent limitations are, at least initially, distinct measuring tools.

---

35. Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 204 F.3d 149, 151 (4th Cir. 2000) (quoting Natural Res. Def. Council, Inc. v. Costle, 568 F.2d 1369, 1375 (D.C. Cir. 1977)).

36. 33 U.S.C. § 1342(b). *See, e.g.*, Trout Unlimited, Inc. v. City of New York, 273 F.3d 481, 486 (2d Cir. 2001) (discussing NPDES program administered by New York State Department of Environmental Conservation which calls its program the State Pollution Discharge Elimination System).

37. The requirements that a state must meet for EPA approval are set forth at 33 U.S.C. § 1342(b).

38. S. Ohio Coal Co. v. Office of Surface Mining, 20 F.3d 1418, 1427 (6th Cir. 1994).

39. 33 U.S.C. § 1342(a) (1994); Arkansas v. Oklahoma, 503 U.S. 91, 103 (1992).

40. 33 U.S.C. § 1342(d)(2); Int'l Paper Co. v. Ouellette, 479 U.S. 481, 489 (1987).

41. 33 U.S.C. § 1342(i).

42. *Id.* § 1370; *S. Ohio Coal Co.*, 20 F.3d at 1427-28.

43. New York v. United States, 505 U.S. 144, 167 (1992); *S. Ohio Coal Co.*, 20 F.3d at 1427 (internal quotation marks omitted).

44. 33 U.S.C. § 1370.

45. For a concise explanation of the "use designation" process *see* Janet K. Baker, *Tribal Water Quality Standards: Are There Any Limits?*, 7 DUKE ENVTL. L. & POL'Y F. 367, 372-73 (1997); *see also* 40 C.F.R. § 131.10 (2001).

46. 40 C.F.R. § 131.2.

"Whereas technology-based and process-based controls are concerned with the reduction of pollution at the *source*, the water quality standards focus on the *receiving waters* and their designated uses. These standards create a baseline for the level of a particular pollutant that a body of water may tolerate."[47] However, as will be more fully explained below, in the end, water quality standards and effluent limitations do not act in isolation but instead work together to form an integrated water pollution control system.[48]

While the EPA generally promulgates effluent limitations,[49] the states have the primary role in promulgating water quality standards.[50] The EPA, however, provides states with substantial guidance in developing water quality standards. The EPA develops criteria for water quality reflecting the latest scientific knowledge and provides such information to the states as guidance.[51] States can utilize the EPA's recommended water quality criteria or use other criteria for which they have sound scientific support.[52] While the states very often rely on the EPA's recommended criteria,[53] they are also specifically authorized to develop standards more stringent than those recommended by the EPA.[54] The CWA requires that states review their water quality standards at least once every three years in a process commonly known as "triennial review" to ensure that the standards protect the public health or welfare, enhance the quality of water, and serve the purposes of the CWA.[55] A state must provide notice and hold

---

47. Flatt, *supra* note 6, at 11 (internal citations omitted) (emphasis added). The EPA's Office of Water explains the fundamentals of water quality standards as follows:

> Water quality standards include designated uses for a water body (e.g., public water supply, propagation of fish and wildlife, recreation); water quality criteria necessary to support the designated uses; and a policy for preventing degradation of the quality of water bodies. Water quality criteria include numeric criteria for specific parameters (e.g., copper, chlorine, temperature, pH); toxicity criteria to protect against the aggregate effects of toxic pollutants; and narrative criteria that describe the desired condition of the water body (e.g., free from visible oil sheen).

EPA Office of Water, Office of Wastewater Management, *Overview of the Water Quality Standards-to-Permits Process, at* http://cfpub.epa.gov/npdes/wqbasedpermitting/wqoverview.cfm?program_id=2 (last modified Feb. 28, 2001).

48. *See generally* EPA Office of Water, Office of Wastewater Management, *Overview of the Water Quality Standards-to-Permits Process, at* http://cfpub.epa.gov/npdes/wqbasedpermitting/wqoverview.cfm?program_id=2 (last modified Feb. 28, 2001).

49. *See* 33 U.S.C §§ 1311, 1314.

50. *Id.* § 1313(a)-(c); Am. Paper Inst., Inc. v. EPA, 996 F.2d 346, 349 (D.C. Cir. 1993); 40 C.F.R. § 131.4.

51. 33 U.S.C. § 1314(a); City of Albuquerque v. Browner, 97 F.3d 415, 419 n.5 (10th Cir. 1996).

52. *Albuquerque v. Browner*, 97 F.3d at 419 n.5.

53. 33 U.S.C. § 1314; *Am. Paper Inst., Inc.*, 996 F.2d at 349.

54. 40 C.F.R. § 131.4(a).

55. 33 U.S.C. § 1313(c)(1); *Am. Paper Inst., Inc.*, 996 F.2d at 349. "Additionally, the CWA directs states to consider a variety of competing policy concerns during these reviews, including a waterway's 'use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other

a public hearing before any water quality standard is adopted or revised.[56] The proposed water quality standards and supporting analyses must be available to the public prior to the hearing to allow for informed participation.[57]

The EPA has the final word on a state's water quality standards. After a state has followed the required procedures and revised or adopted a new water quality standard, the state must submit said standard to the EPA for review and approval along with the various analyses the state employed in developing the standard.[58] The CWA requires the EPA to ensure that a state's standard is consistent with the provisions of the Act.[59] Specifically, the EPA ensures that the state has adopted criteria that protect the designated water uses, that the state has followed its own legal procedure for revising or adopting standards, and that the state's standards are based on appropriate data and scientific analysis.[60] If the EPA feels that a state's standard does not pass muster under the CWA, it will notify the state and specify the changes necessary for EPA approval.[61] If the state does not adopt the EPA's revisions within ninety days after notification, the EPA will itself impose the standards on the state.[62] The EPA may also impose revised or new water quality standards on a state "in any case" where the EPA determines that the standard is necessary to meet the requirements of the CWA.[63] This illustrates that, notwithstanding the CWA's "shift in focus of environmental regulation towards the *discharge* of pollutants,[64] water quality standards still have an important role in the CWA regulatory scheme."[65] Indeed, as will be seen, state water quality standards are often at the heart of the extraterritorial conflicts concerning water pollution control.

B. The Convergence of Water Quality Standards, Effluent Limitations, and NPDES Permits

Water quality standards, technology-based effluent limitations, and NPDES permits all work together in an integrated system to accomplish the CWA's pollution reduction objectives. The NPDES permit program is the "point of contact"[66] between technology-based effluent limitations and water quality standards. The simple reason is

---

purposes'." *Id.* at 349 (citing 33 U.S.C. § 1313(c)(2)(A)).

56. 40 C.F.R. §§ 131.10(e), 131.20(b).

57. *Id.* § 131.20(b).

58. 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. 131.20(c).

59. 33 U.S.C. § 1313(c)(3); 40 C.F.R. § 131.5(a)(1).

60. 40 C.F.R. § 131.5(a)(2)-(4).

61. 33 U.S.C. § 1313(c)(3); 40 C.F.R. § 131.5(b).

62. 33 U.S.C. § 1313(c)(3)-(4).

63. *Id.* § 1313(c)(4)(B).

64. *See supra* text accompanying note 5.

65. Piney Run Pres. Ass'n v. County Comm'rs, 268 F.3d 255, 265 (4th Cir. 2001) (emphasis added).

66. John S. Harbison, *The Downstream People: Treating Indian Tribes as States Under the Clean Water Act*, 71 N.D. L. REV. 473, 477 (1995).

that state water quality standards determine, in part, the allowable effluent discharge for an NPDES permit. While case law and commentary can agree on this point, they often seem to travel confusingly divergent statutory paths to reach the same conclusion. Although frustrating, such dissimilar explanations of the incorporation of water quality standards in the NPDES permit procedure is understandable. "The 1972 Act removed the requirement for a single implementation plan from the definition of [water quality standards] and replaced it with a series of somewhat confusing, overlapping planning and implementation requirements spread throughout various sections and subsections of the Act."[67] With these hazards in mind this article will try to take the least circuitous route in explaining water quality standards under the NPDES permit program.

The starting point is section 302(a) of the CWA, which explains that where the application of federal effluent limitations would interfere with the attainment or maintenance of water quality standards in a water body, the effluent limitations for contributing point sources must be adjusted to promote the achievement of the water quality standards.[68] Next, section 303(d) of the Act requires individual states to adopt water quality standards, identify waters where technology-based effluent limitations will be insufficient to meet water quality standards, and limit pollutant discharge into those waters thus preventing contravention of water quality standards.[69] Finally, section 301, which has been described as the "centerpiece of the Clean Water Act,"[70] requires that effluent limitations shall be *achieved*[71] as well as "any more stringent limitation, including those necessary to meet water quality standards . . . established pursuant to any State law. . . ."[72] Thus, section 301 "expressly identifies the *achievement* of state water quality standards as one of the Act's central objectives."[73]

Next, and perhaps most importantly, is the language of section 402 of the Act.[74] This section governs the NPDES permit system, irrespective of whether the EPA or a state is administering it. Section 402 allows issuance of NPDES discharge permits only upon the express condition that the discharge meets the requirements of sections 301 and 302.[75] As explained above, those sections require adherence to

67. Adler, *supra* note 12, at 215.

68. 33 U.S.C. § 1312(a) (1994).

69. *Id.* § 1313(d); *see also,* FERREY, *supra* note 3, at 221.

70. Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 204 F.3d 149, 151 (4th Cir. 2000).

71. 33 U.S.C. § 1311(b)(1)(A) (emphasis added).

72. *Id.* § 1311(b)(1)(C).

73. *Id.* § 1311(b)(1)(C); Arkansas v. Oklahoma, 503 U.S. 91, 106 (1992) (emphasis added).

74. 33 U.S.C. § 1342.

75. *Id.* §1342 (a)(1). Section 402 also allows issuance of a permit prior to the taking of necessary implementing actions relating to all such requirements (i.e., those under §§ 1311, 1312, 1316, 1317, 1318, and 1343) if other conditions established by the EPA in furtherance of the NPDES process are met. *Id.* "This provision gives EPA considerable flexibility in framing the permit to achieve a desired reduction in

state water quality standards. This shows how section 402 is the "point of contact" between effluent limitations and water quality standards. In addition, EPA regulations pointedly state that a discharge permit may not be issued "[w]hen the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected States."[76] At the end of this statutory maze, the ultimate result is that NPDES permits must comply with sections 301 and 302 of the CWA as well as with the EPA's regulations. Because these statutes and regulations mandate adherence to state water quality standards, NPDES effluent limitations are inextricably linked to state water quality criteria.[77]

The upshot of all this is that a discharge permit transforms "'generally applicable effluent limitations and other standards—including those based on water quality—into obligations . . . of the individual discharger'."[78] Stated another way:

> [T]he rubber hits the road when the state-created [water quality] standards are used as the basis for specific effluent limitations in NPDES permits. . . . [O]nce a water quality standard has been promulgated, section 301 of the CWA requires all NPDES permits for point sources to incorporate discharge limitations necessary to satisfy that standard.[79]

Thus, not only does a prospective pollutant discharger have to demonstrate that it will *individually* comply with effluent limitation guidelines; but also it must demonstrate that its discharge, *in combination with other sources of pollution* to the water body, will not interfere with the attainment of state water quality standards.[80] Of

---

pollutant discharges," and acknowledges "Congress did not regard numeric effluent limitations as the only permissible limitation on a discharger." Natural Res. Def. Council, Inc. v. Costle, 568 F.2d 1369, 1380 n.21 (D.C. Cir. 1977). In fact, as the *Costle* court recognized, the other limitations Congress contemplated were water quality standards. *Id.*

76. 40 C.F.R. § 122.4(d) (2001).

77. *See* Fortenberry, *supra* note 34, at 829; *see also* EPA Office of Water, Office of Wastewater Management, *Overview of the Water Quality Standards-to-Permits Process*, *at* http://cfpub.epa.gov/npdes/wqbasedpermitting/wqoverview.cfm?program_id=2 (last modified Feb. 28, 2001).

> When assessing point source discharges to determine whether controls based on water quality standards are necessary, an NPDES permitting authority should conduct an analysis to determine whether the discharge causes, has the 'reasonable potential' to cause, or contributes to an excursion of any water quality criteria in the receiving water. Where effluent limits based on water quality standards are necessary, the permitting authority allocates responsibility for controls through wasteload allocations and then effluent limits in NPDES permits consistent with those wasteload allocations.

Id.

78. United States Steel Corp. v. Train, 556 F.2d 822, 830 (7th Cir. 1977) (quoting EPA v. California ex *rel.* State Water Res. Control Bd., 426 U.S. 200, 205 (1976)).

79. Am. Paper Inst., Inc. v. EPA, 996 F.2d 346, 350 (D.C. Cir. 1993).

80. *See* Piney Run Pres. Ass'n v. County Comm'rs, 268 F.3d 255, 266 (4th Cir. 2001) ("NPDES permits are therefore somewhat interdependent; the permitting authority must account for the effluent discharge of others in calculating the appropriate levels

course, if a prospective discharger's technology-based controls will be sufficient to meet both federal effluent guidelines *and* state water quality standards, that would normally be sufficient to obtain a discharge permit.[81] However, a prospective discharge that would comply with federal effluent limitations would nevertheless violate the CWA if it hindered realization of state water quality standards.[82] The permitting agency can issue a permit only if it incorporates the more stringent limitations, which exceed federal effluent guidelines and are sufficient to satisfy state water quality standards.[83]

The Total Maximum Daily Load ("TMDL") provisions of the CWA provide the general method of translating a state's water quality standards into discharge permits.[84] The TMDL program has been described as "the intersection of the CWA's technology-based and water quality-based components of regulation."[85] Under section 303(d) of the CWA, states and tribes with "Treatment as a State" ("TAS") status must develop lists of impaired water bodies within their jurisdiction.[86] "These impaired waters do not meet water quality standards that states, territories, and authorized tribes have set for them, even after point sources of pollution have installed the minimum required levels of pollution control technology."[87] Section 303(d)(1)(C) of the Act requires each state to set TMDLs for the impaired waters identified.[88] "A TMDL specifies the maximum amount of a pollutant that a water body can receive and still meet water quality standards, and allocates pollutant loadings among point and nonpoint pollutant sources."[89] The CWA requires "[s]uch load shall be

---

for an individual permit holder.").

81. Flatt, *supra* note 6, at 11.

82. *See* 33 U.S.C. §§ 1311(b)(1)(C), 1312(a), 1313(d), 1341, 1342.

83. *Id.* §§ 1311(b)(1)(C), 1312(a), 1313(d), 1341, 1342; *see also* Fortenberry, *supra* note 34, at 830.

84. 33 U.S.C. §1313 (d).

85. J.B. Ruhl, *The Environmental Law of Farms: 30 Years of Making a Mole Hill Out of a Mountain*, 31 ELR NEWS & ANALYSIS 10203, 10211 n.115 (2001).

86. According to the EPA, the lack of water quality standard attainment continues to be a major problem:

> Over 40% of our assessed waters still do not meet the water quality standards states, territories, and authorized tribes have set for them. This amounts to over 20,000 individual river segments, lakes, and estuaries. These impaired waters include approximately 300,000 miles of rivers and shorelines and approximately 5 million acres of lakes—polluted mostly by sediments, excess nutrients, and harmful microorganisms. An overwhelming majority of the population—218 million—live within 10 miles of the impaired waters.

EPA Office of Water, *Overview of Current Total Maximum Daily Load – TMDL – Program and Regulations, at* http://www.epa.gov/owow/tmdl/overviewfs.html (last modified May 17, 2001).

87. *Id.*

88. 33 U.S.C. § 1313(d)(1)(C).

89. EPA Office of Water, *Overview of Current Total Maximum Daily Load – TMDL – Program and Regulations, at* http://www.epa.gov/owow/tmdl/overviewfs.html (last modified May 17, 2001); *see also* Natural Res. Def. Council, Inc. v. Muszynski, 268 F.3d 91, 94 (2d Cir. 2001) ("In effect, a TMDL posts a limit on the total amount of a pollutant a water body may receive over a period of time."); *see also* Ruhl, *supra* note 85, at 10212 n.119 ("Point sources implement the wasteload allocations within TMDLs

established at a level *necessary to implement the applicable water quality standards* with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality."[90] Thus, the TMDL system is how the CWA attempts to convert the desired water quality standards into practical discharge constraints allocated among the various dischargers to a water body.[91]

It is evident at this point that individual states wield great power over pollutant discharges from point sources located within their borders. The states have the central role in determining water quality standards, and state or EPA issued discharge permits must comply with such standards. Consequently, a state's EPA approved adjustment of water quality standards may single-handedly determine the ability of a prospective discharger to obtain an NPDES permit. This demonstrates that state authority under the CWA is not a mere facade without substance or implication. To the contrary, the states' role in setting water quality standards puts serious bite into the NPDES permit system.

C. TRANSBOUNDARY CONFLICTS: POLLUTION FLOWS DOWNSTREAM

There is nothing too surprising about a state's authority to regulate point source discharges or water quality standards for water bodies within its borders. Yet, it is very common for streams, lakes, rivers, groundwater, and all other types of water bodies and waterways to traverse the borders of more than one state. One of the fundamental physical characteristics of water as a natural resource is its mobility. Most pollutant discharges into a transboundary waterway do not simply contaminate the local region around the discharge; instead, such pollutants flow throughout the waters to which the original receiving waterway is connected. Thus, for every waterway that crosses a border, one state will be upstream and another downstream from the

---

through enforceable water quality-based discharge limits in NPDES permits authorized under section 402 of the CWA.") (internal quotations omitted); *see also supra* text accompanying note 77.

90. 33 U.S.C. § 1313(d)(1)(C) (emphasis added).

91. There has been extensive litigation and controversy concerning the development of TMDLs under the CWA.

> While TMDLs have been required by the Clean Water Act since 1972, until recently states, territories, authorized tribes, and EPA have not developed many. Several years ago citizen organizations began bringing legal actions against EPA seeking the listing of waters and development of TMDLs. To date, there have been about 40 legal actions in 38 states. EPA is under court order or consent decrees in many states to ensure that TMDLs are established, either by the state or by EPA.

EPA Office of Water, *Overview of Current Total Maximum Daily Load – TMDL – Program and Regulations, at* http://www.epa.gov/owow/tmdl/overviewfs.html (last modified May 17, 2001). The EPA has promulgated new regulations to speed up the adoption and effectuation of the TMDL framework. However, through an appropriations rider, Congress has thus far prevented the Agency from spending any money to implement the rule. *Id. See generally* Jonathan Z. Cannon, *EPA and Congress (1994-2000): Who's Been Yanking Whose Chain?*, 31 ELR NEWS & ANALYSIS 10942 (2001).

discharge. Articulated from a more global perspective:

> [A] fundamental ecological and economic truth [is that] in the watersheds[92] in which we live, all of us are Upstream or Downstream People, and most of us are both. As Upstream and Downstream People, we exist in a complex web of ecological and economic connections with our watersheds and with each other.[93]

Since the CWA requires all fifty states to promulgate water quality standards,[94] there are at least fifty upstream and downstream sovereigns with diverse interests in the water within their borders. The problem plainly arises: what happens when a proposed upstream discharge threatens to violate the water quality standards of a downstream state to which the water flows?[95]

The United States Supreme Court answered this critical question in the seminal case of *Arkansas v. Oklahoma*.[96] In that case, the city of Fayetteville, Arkansas applied to the EPA for an NPDES permit for a new sewage treatment plant.[97] The EPA was the permitting authority because Arkansas was not authorized to administer its own NPDES permit program at the time of the plant's completion.[98] The EPA issued the permit authorizing the discharge of up to half of the plant's effluent into a stream in northwestern Arkansas.[99] That stream's flow passed through a series of creeks and eventually entered the Illinois River at a point twenty-two miles upstream from the Arkansas-Oklahoma border.[100] One of the conditions of the discharge permit was "that if a study then underway indicated that more stringent limitations were necessary to ensure compliance with Oklahoma's

---

92. The term "watershed" is often copiously used in academic discourse on pollution control without ever informing the reader what it means. A watershed is:

> the land area that drains water to a particular stream, river, or lake. It is a land feature that can be identified by tracing a line along the highest elevations between two areas on a map, often a ridge. Large watersheds, like the Mississippi River basin contain thousands of smaller watersheds.

U.S. Geological Survey, *Water Science Glossary of Terms*, *at* http://wwwga.usgs.gov/edu/dictionary.html (last modified July 5, 2001). "Watersheds are nature's boundaries. They are the areas that drain to water bodies, including lakes, rivers, estuaries, wetlands, streams, and the surrounding landscape. Ground water recharge areas are also considered." EPA Office of Water, Office of Wetlands, Oceans, & Watersheds, *EPA's Most Frequently Asked Questions Related to Wetlands, Oceans & Watersheds*, *at* http://www.epa.gov/owow/questions.html (last modified Sept. 5, 2001).

93. Harbison, *supra* note 66, at 473.

94. 33 U.S.C. § 1313(a)(3)(A).

95. At this juncture, this article is not referring to upstream dischargers which require a federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities which may result in a pollutant discharge. *See id.* § 1341(a)(1). The special rules concerning a downstream state's voice in such matters is discussed later in Part II(A)(2) of this article.

96. 503 U.S. 91 (1992).

97. *Id.* at 95.

98. *Id.* at 103.

99. *Id.* at 95.

100. *Id.*

water quality standards, the permit would be modified to incorporate those limits."[101]

Both Arkansas and Oklahoma sought judicial review. "Arkansas argued that the Clean Water Act did not require an Arkansas point source to comply with Oklahoma's water quality standards."[102] Oklahoma claimed the EPA permitted discharge in Arkansas violated Oklahoma's water quality standards which provided that "no degradation of water quality shall be allowed in the upper Illinois River, including the portion of the river immediately downstream from the state line."[103] Essentially, the court was faced with two questions. The first was whether the EPA must apply the water quality standards of downstream states when issuing a permit for a discharge in the upstream state. The second question was if the CWA does not *statutorily require* such consideration by the permitting agency, does the *EPA still have the authority* to mandate such compliance in its regulations.[104] The Court decided that it did not need to reach the first question because its answer to the second question disposed of Arkansas' challenge.[105] The Court held that even if the CWA does not *require* upstream discharges to comply with downstream water quality standards, the CWA does not limit the *EPA's authority* to direct such compliance by regulation.[106]

In reaching this decision, the Court noted that the CWA does not authorize a downstream state to veto a discharge allowed by an upstream state simply because the downstream state alleges that its water quality standards will be compromised. Citing its decision in *International Paper Co. v. Ouellette*,[107] the Court reiterated that a downstream state's only recourse is to apply to the EPA Administrator when it is unhappy with the allowance of an upstream discharge.[108] In fact, the CWA sets forth a procedure that upstream states must follow to alert any state whose waters may be affected by the issuance of a permit.[109] After such notification, section 402 of the CWA provides:

---

101. *Id.*

102. *Arkansas v. Oklahoma*, 503 U.S. at 97. In addition to the condition in the EPA granted discharge permit, upon Oklahoma's challenge of the permit to the EPA, the Agency's Chief Judicial Officer had ruled that the CWA required any discharge permit be strict enough to meet downstate water quality standards. *Id.* at 96-97.

103. *Id.* at 95 (internal quotations omitted).

104. *Id.* at 104. A third question the court faced concerned the water degradation issues surrounding Oklahoma's challenge to the issuance of the permit and is not relevant for this article. The Court also made clear at the outset that its answers to these questions did not turn on whether a state or the EPA was the permitting authority since the requirements and procedures for issuing discharge permits are the same no matter which entity is administering the NPDES program. *Id.* at 102 n.7, 103, 105 n.10.

105. *Id.* at 104.

106. *Id.* at 105.

107. 479 U.S. 481 (1987).

108. *Arkansas v. Oklahoma*, 503 U.S. at 100 (citing *Ouellette*, 479 U.S. at 490-91).

109. 33 U.S.C. § 1342(b)(3) (1994).

> [A]ny State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the [EPA] Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, . . . the permitting State will notify such affected State (and the [EPA] Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing.[110]

In connection with this provision, the CWA provides the EPA Administrator broad discretion to set conditions for NPDES permits issued by the EPA,[111] and allows the Administrator to block the issuance of a state discharge permit as being "outside the guidelines and requirements of this chapter."[112] Furthermore, as mentioned above, the EPA's regulations bluntly state: "No permit may be issued . . . [w]hen the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected States."[113] In *Arkansas v. Oklahoma*, the EPA relied upon this regulation when issuing the discharge permit for the sewage treatment plant.[114]

The Court connected the wide discretionary latitude given to the EPA Administrator in the Act with the EPA's regulatory mandate that upstream discharges may not violate downstream water quality standards. In so doing, the Court concluded that:

> The regulations relied on by the EPA were a perfectly reasonable exercise of the Agency's statutory discretion. The application of state water quality standards in the interstate context is wholly consistent with the Act's broad purpose "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." . . . [T]he achievement of state water quality standards [is] one of the Act's central objectives. The Agency's regulations conditioning NPDES permits are a well-tailored means of achieving this goal.[115]

The Court clarified that although the CWA limits participation by an *affected state* in permitting decisions (i.e., it can submit its recommendations about, but cannot veto a proposed permit), such limits "do not in any way constrain the *EPA's authority* to require a point source to comply with downstream water quality standards."[116] This holding was a colossal event for water pollution control throughout the United States. It was a firm proclamation that

110. *Id.* § 1342(b)(5). This procedure applies irrespective of whether the EPA or a state is administering the permit program. *See id.* § 1342(a)(3).

111. *See id.* § 1342(a)(2); *Arkansas v. Oklahoma*, 503 U.S. at 105.

112. 33 U.S.C. § 1342(d)(2).

113. 40 C.F.R. § 122.4(d) (2001). This prohibition applies irrespective of whether the EPA or a state is administering the permit program. *See Arkansas v. Oklahoma*, 503 U.S. at 105 n.10; 40 C.F.R. § 123.25.

114. *Arkansas v. Oklahoma*, 503 U.S. at 105.

115. *Id.* at 105-106.

116. *Id.* at 106 (second emphasis added).

pursuant to the EPA's regulations, a state or the EPA may not issue a discharge permit if such discharge will violate another state's water quality standards.[117] Thus, the regulatory battle lines were drawn—the borders of the individual states of the nation. After *Arkansas v. Oklahoma*, the victors in this battle would generally be the more vulnerable downstream states.

III. THE CLEAN WATER ACT'S COOPERATIVE FEDERALISM AND INDIAN TRIBES

As explained thus far, the CWA, like many other federal statutes,[118] "anticipates a partnership between the States and the Federal Government, animated by a shared objective: 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'"[119] Within this framework of cooperative federalism, states have a choice between letting the federal government wholly regulate water pollution of the navigable waters within the state or to self-regulate with federal approval and oversight.[120] Most states have chosen the latter option and, in addition to setting water quality standards as required by the CWA, have availed themselves of the opportunity to administer their own NPDES programs. To date, all but six states have EPA approved NPDES programs.[121]

A. "TREATMENT AS A STATE" STATUS FOR INDIAN TRIBES

In 1987, Congress amended the CWA to extend this cooperative federalism framework to include Indian tribes.[122] Upon application and approval by the EPA, an Indian tribe may receive "Treatment as a State"[123] ("TAS") status for purposes of the CWA.[124] The implications of

---

117. This is the general rule, and unless the EPA allows a variance, both the EPA and state permitting authorities must comply with this admonition. Certain types of variances are permitted under the EPA's regulations. *See* 40 C.F.R. §§ 123.25, 124.51(b), 124.62, 131.13.

118. *See* New York v. United States, 505 U.S. 144, 167-68 (1992) and cases cited therein discussing other statutes incorporating cooperative federalism mechanisms.

119. Arkansas v. Oklahoma, 503 U.S. 91, 101 (1992) (quoting 33 U.S.C. § 1251(a)).

120. *See* Kenaitze Indian Tribe v. Alaska, 860 F.2d 312, 314 (9th Cir. 1988).

121. The only states that currently do not have approved NPDES programs are Alaska, Arizona, Idaho, Massachusetts, New Hampshire, and New Mexico. Puerto Rico also does not have an approved program. Interestingly, the Virgin Islands had a permit program approved in 1976. In 1998, Texas became the most recent state to obtain approval. All of the approved states (but not the Virgin Islands) also have an approved "general permits" program. EPA Office of Water, Office of Wastewater Management, *State Program Status*, *at* http://cfpub.epa.gov/npdes/statestats.cfm?program_id=12 (last modified Mar. 3, 2001); *see also supra* text accompanying note 29.

122. 33 U.S.C. § 1377(e) (1994).

123. The "Treatment as a State" terminology was recently changed to "treatment in the same manner as a State" in response to tribes objecting to the original phrase. "Many tribes commented that they are not 'States'; rather, they have a unique relationship with the United States Government." EPA Office of Water, American Indian Environmental Office, Resource Guide, *Chapter Three: EPA's Approach to Environmental Protection in Indian Country*, *at*

a TAS designation are exactly as the name implies, a tribe will have the same regulatory opportunities as a state under the CWA. Specifically, a tribe may receive TAS status for purposes of:

> (a) research, investigations, training, and information under section 104; (b) grants for pollution control programs under section 106; (c) water quality standards and implementation plans under section 303; (d) reports on water quality under section 305; (e) reporting requirements under section 308; (f) enforcement of standards under section 309; (g) clean lake programs under section 314; (h) nonpoint source management programs under section 319; (i) certification under section 401 that federally issued permits or licenses will be in compliance with water quality standards; (j) issuance of NPDES permits under section 402; and (k) issuance of permits for dredged or fill material under section 404.[125]

A tribe may receive TAS status for some or all of these CWA provisions depending on what the tribe applies for and what the EPA approves.[126] A number of tribes have seized upon the opportunity to become an integral player in water pollution control by seeking TAS status for some of the allowable purposes.[127] The most important functions mentioned for which a tribe can obtain TAS status are the opportunity to set water quality standards and implementation plans under section 303; the responsibility under section 401 to certify that federally issued permits or licenses will be in compliance with tribal water quality standards; and the power to issue NPDES permits under section 402.[128] These will be examined in turn.

1. Section 303: Water Quality Standards

The tribes obtain a powerful regulatory tool with the ability to set water quality standards. It enables a tribe to supplement the federally set effluent limitations with EPA approved water quality standards. Also, identical to the implications when a state sets water quality

---

http://www.epa.gov/indian/resource/chap3.htm#86 (last visited Jan. 14, 2002); *see also* EPA Office of Water, American Indian Environmental Office, *Laws Regulations & Guidance, at* http://www.epa.gov/indian/treatst.htm (last visited Jan. 2, 2002) ("The term 'treatment-as-a-State' is somewhat misleading and may be offensive to tribes.").

124. This concept is not unique to the CWA. Indian tribes may also receive "Treatment as a State" status under the Safe Drinking Water Act and Clean Air Act for certain types of program authorizations and grant awards. 42 U.S.C. §§ 300j-11, 7601(d).

125. Jane Marx et al., *Tribal Jurisdiction Over Reservation Water Quality and Quantity*, 43 S.D. L. REV. 315, 329 (1998); *see also* 33 U.S.C. § 1377(e); Amendments to the Water Quality Standards Regulations that Pertain to Standards on Indian Reservations, 54 Fed. Reg. 39,098 (Sept. 22, 1989) (codified at 40 C.F.R. pt. 131).

126. *See, e.g.*, Paul G. Kent, *EPA Approves Treatment as a State Status for Mole Lake Tribe - Other Applications Pending*, 2 WIS. ENVTL COMPLIANCE UPDATE Issue 11 (Nov. 1995).

127. *See* EPA Office of Water, American Indian Environmental Office, *Treatment of Tribes in the Same Manner as States/Program Approval Matrix, at* http://www.epa.gov/indian/matrix.htm (last modified March 1998). No tribe has applied for TAS status for all of the permissible purposes under the CWA. *Id.*

128. *See, e.g.*, Kent, *supra* note 126.

standards, a prospective pollutant discharge that would be in compliance with federal effluent limitations would nevertheless be unlawful under the CWA if it hinders realization of a TAS tribe's water quality standards. In such a situation, an NPDES permit for a prospective discharger on reservation land may be issued only if effluent limitations are incorporated that exceed the federal guidelines and protect tribal water quality standards. It is generally recognized that not only do Indian tribes commonly adopt water quality standards requiring more stringent effluent limitations than federally required, but also tribal water quality standards are usually more restrictive than even the state standards in which the reservations are located.[129]

2. Section 401: Certification of Compliance with Water Quality Standards

As a counterpart to TAS designation for administering water quality standards, a tribe will also be subject to the responsibilities of section 401 of the CWA. Section 401 provides:

> Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate . . . that any such discharge will comply with [effluent limitations and water quality standards].[130]

Section 401, therefore, obligates states and TAS designated tribes to grant or deny certification for federally permitted or licensed activities that may result in a discharge into navigable waters within its borders. As explained by the EPA:

> The decision to grant or deny certification is based on a State determination regarding whether the proposed activity will comply with, among other things, applicable water quality standards. States and Tribes qualifying for treatment as States may thus deny certification and prohibit the federal permitting or licensing agency from issuing a permit or license for activities that will violate water

129. *See, e.g., id.* The EPA permits TAS tribes great leeway in setting water quality standards. In fact, the "EPA believes that criteria sufficiently stringent to meet the fishable and swimmable goals may not be disapproved under the CWA, on the grounds that such criteria are more stringent than natural background water quality." Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,876, 64,886 (Dec. 12, 1991) (codified at 40 C.F.R. pt. 131); *see also* 33 U.S.C. § 1341(a)(2). For an extensive review and critique of the EPA's position, see Mark A. Bilut, *Albuquerque v. Browner, Native American Tribal Authority Under the Clean Water Act: Raging Like A River Out of Control*, 45 SYRACUSE L. REV. 887, 898 (1994).

130. 33 U.S.C. § 1341(a)(1).

quality standards.[131]

In addition, a TAS tribe that is downstream from a proposed discharge activity under section 401 may protest a certification by the *originating* upstream state when the downstream TAS tribe determines that "the proposed activity would violate its water quality requirements."[132] When the EPA receives a federal license or permit application accompanied by a certification under section 401(a)(1) from the state in which the discharge *originates*, the EPA must notify other states and TAS tribes whose water quality may also be affected by the discharge "certified" by the originating upstream state.[133] If a state or TAS tribe then objects to the permit issuance because the extraterritorial effect of the applicant's discharge will violate the state or tribal water quality standards, a series of procedural mechanisms begin. The end result is that the federal agency "shall condition such [federal] license or permit in such manner as may be necessary to insure compliance with applicable water quality requirements [of the downstream state or TAS tribe]. If the imposition of conditions cannot insure such compliance such agency shall not issue such license or permit."[134] Thus, a downstream TAS tribe's water quality standards may, in effect, bar upstream activity subject to federal licenses or permits. The authority to set water quality standards is clearly a powerful tool.

It makes sense that a tribe's capacity to "certify" compliance with its water quality standards (or protest another state's certification) goes hand-in-hand with its authority to set water quality standards. Standards with which to "certify" compliance must exist. In fact, when the EPA approves a tribe's TAS designation for purposes of section 303 (water quality standards) and section 401 (certification) it does so simultaneously and combines each approval into one category of TAS authorization (i.e., EPA approval of TAS status for sections 303/401 purposes).[135] To date, the EPA has granted only a small fraction of eligible tribes such authorization. Of the 145 tribes who have applied and been approved for TAS designation for at least one CWA activity, twenty-one have been approved for sections 303/401 purposes and

131. Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations, 56 Fed. Reg. at 64,890.

132. *Id.* at 64,876; *see also* 33 U.S.C. § 1341(a)(2).

133. 33 U.S.C. § 1341(a)(2).

134. *Id.*; *see also* Arkansas v. Oklahoma, 503 U.S. 91, 103 (1992) ("Section 401(a)(2) appears to prohibit the issuance of any federal license or permit over the objection of an affected State unless compliance with the affected State's water quality requirements can be ensured.").

135. *See* EPA Office of Water, American Indian Environmental Office, *Treatment of Tribes in the Same Manner as States/Program Approval Matrix, at* http://www.epa.gov/indian/matrix.htm (last modified March 1998); *see also* 40 C.F.R. § 131.4(c) (2001) ("Where EPA determines that a Tribe is eligible to the same extent as a State for purposes of water quality standards, the Tribe likewise is eligible to the same extent as a State for purposes of certifications conducted under Clean Water Act section 401.").

sixteen have applications pending.[136]

3. Section 402: NPDES Permits

Finally, tribes may receive TAS status for purposes of administering an NPDES program under section 402 for discharges within the boundaries of the Indian reservation.[137] Interestingly though, the EPA has not authorized any tribes to issue discharge permits.[138] In fact, only two tribes have even applied to receive such authorization and their applications are still pending.[139] There may be many reasons for the dearth of requests for section 402 authorization, including a choice by tribes to allocate limited resources to other purposes for which they desire TAS designation.[140] Perhaps the most obvious explanation is that tribes simply do not need such authorization in order to protect their water resources. In the absence of an approved tribal NPDES program, the EPA bears the burden of administering the permit program for discharges within the boundaries of Indian reservations.[141] Once a tribe has authorization to set water quality standards, the conditions in any discharge permit issued by the EPA for reservation point sources must be sufficient to satisfy such standards.[142] The result is the enforcement of tribal water quality standards through an EPA administered NPDES permit program. Thus, the tribe accomplishes its regulatory goal without bearing the additional costs and administrative burdens of operating the permit program.

---

136. *See* EPA Office of Water, American Indian Environmental Office, *Treatment of Tribes in the Same Manner as States/Program Approval Matrix, at* http://www.epa.gov/indian/matrix.htm (last modified March 1998). Results from the 1990 census showed 278 federally recognized Indian reservations. EPA Office of Water, American Indian Environmental Office, Resource Guide, *Chapter One: Understanding Native Americans, at* http://www.epa.gov/indian/resource/chap1.htm (last visited Jan. 14, 2002).

137. 33 U.S.C. § 1377(e).

138. EPA Office of Water, Office of Wastewater Management, *State and Tribal Program Issues, at* http://cfpub.epa.gov/npdes/statestribes/issues.cfm?program_id=12 (last modified Feb. 21, 2001).

139. EPA Office of Water, American Indian Environmental Office, *Treatment of Tribes in the Same Manner as States/Program Approval Matrix, at* http://www.epa.gov/indian/matrix.htm (last modified March 1998).

140. In discussing a tribe's capability to manage water quality standards, the EPA explained that tribes need to "give serious consideration" to the "resource impacts" and "annual resource commitments" of assuming such a burden. Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,876, 64,883 (Dec. 12, 1991) (codified at 40 C.F.R. pt. 131); *see also* 33 U.S.C. § 1341(a)(2). Such considerations seem equally important for a TAS tribe considering whether to apply for NPDES permitting authority which would also require significant resources.

141. EPA Office of Water, Office of Wastewater Management, *State and Tribal Program Issues, at* http://cfpub.epa.gov/npdes/statestribes/issues.cfm?program_id=12 (last modified Feb. 21, 2001); *see also* Arkansas v. Oklahoma, 503 U.S. 91, 103 (1992).

142. *Arkansas v. Oklahoma*, 503 U.S. at 103.

B. *ALBUQUERQUE V. BROWNER*: "TREATMENT AS A STATE" *REALLY MEANS* TREATMENT AS A STATE

In the real world of pollution control, of what relevance is the above discussion concerning TAS designation for water quality standards and certification of compliance? Can it really be that a TAS tribe is a co-equal sovereign with states for water pollution regulation, or is there some "catch"? A review of the important case of *Albuquerque v. Browner*[143] answers these questions and illustrates why TAS status really matters.

In *Albuquerque v. Browner*, the EPA granted the Isleta Pueblo Indian Tribe TAS status to administer water quality standards and to certify compliance with such standards (i.e., sections 303/401 authorization) for waters located within its reservation in New Mexico.[144] The tribe proposed, and the EPA approved water quality standards for the portion of the Rio Grande River that flows through the reservation. Not unexpectedly, the tribe's standards were more stringent than both the federal minimums and those set by the state of New Mexico.[145]

The city of Albuquerque ("City") operated a waste treatment facility that created a point source discharge on the Rio Grande approximately five miles north of the Isleta Pueblo Reservation. The EPA issued a permit that authorized the facility's discharge,[146] so the plant was considered a federally licensed or permitted facility under section 401 of the CWA. Consequently, the Isleta tribe should have received two forms of protection if it was, in practice, to be treated as a state. First, the permitting authority (the EPA in this case) would not be allowed to issue a discharge permit for the treatment facility, pursuant to EPA's regulations and *Arkansas v. Oklahoma*, if the discharge would violate a downstream TAS tribe's water quality standards. Second, because Albuquerque's plant required a federal license or permit, it would fall under the purview of section 401, again requiring the imposition of conditions to insure compliance with downstream water quality standards.

The City filed suit against the EPA contending, among other things, that section 518 "does not allow tribes to establish water quality standards more stringent than federal standards and does not permit tribal standards to be enforced beyond tribal reservation boundaries."[147] With respect to its first argument, the City asserted that section 518 specifically listed the authorized functions for a TAS tribe under the CWA and section 510 was *not* included as one of the authorized functions.[148] That section of the Act allows a state to set

143. City of Albuquerque v. Browner, 97 F.3d 415 (10th Cir. 1996).

144. *Id.* at 419.

145. *Id.* at 419, 421.

146. *Id.* at 419. Recall that New Mexico is one of the few states that has not been authorized to administer its own NPDES permit system. *See supra* text accompanying note 121.

147. *Albuquerque v. Browner*, 97 F.3d at 421.

148. *Id.* at 423.

water quality standards more stringent than the federal minimums.[149] The City's argument, therefore, was the familiar doctrine of *expressio unius est exclusio alterius*; that inclusion of specific functions in the statute necessarily excludes functions not mentioned.[150] Since section 510 was excluded from section 518, the City argued, TAS tribes were *not* authorized to set water quality standards more stringent than the federal minimums.[151]

The EPA countered the City's position by pointing out that section 510 was merely a savings clause recognizing authority already possessed by the state.[152] "Because a savings clause confers no new authority, but instead clarifies existing authority [that] is not preempted [by the CWA], it was not necessary for Congress to specifically reference section 510 when it authorized the [EPA] Administrator to treat tribes as states."[153] The Court of Appeals for the Tenth Circuit agreed that it was unnecessary to incorporate section 510 into section 518 to give tribes powers to set more stringent water quality standards because "Indian tribes have residual sovereign powers that *already guarantee* the powers enumerated in [section 510], absent an *express*... *elimination* of those powers."[154] In addition, although not expressly articulated by the court, one commentator noted the strongest and most obvious reason to interpret the CWA as allowing tribes to set more stringent standards than the federal minimums:

> [I]t would make little sense for Congress to create section 518 as part of the 1987 Clean Water Act amendments, but give tribes no power to adopt stringent water quality standards.... If viewed as the City argues, section 518 would be an illusory delegation of power, since tribes would be unable to adopt more stringent standards and the [CWA prohibits] the adoption of standards less stringent than the federal criteria. As such, [tribes] would only be able to adopt standards neither more nor less stringent than federal standards, and this would render section 518 meaningless.[155]

In *Albuquerque v. Browner*, the court of appeals made clear that section 518 was *not* an illusory delegation of power and that TAS tribes do indeed have the same authority as states to adopt water quality standards more stringent than the federal minimums.[156]

The City's second argument that tribal water quality standards could not be enforced beyond reservation boundaries was a flashback to *Arkansas v. Oklahoma*. Recall in that case, the Supreme Court held

149. 33 U.S.C. § 1370 (1994).
150. *See, e.g.*, United States v. Rivera, 153 F.3d 809, 811 (7th Cir. 1998).
151. *Albuquerque v. Browner*, 97 F.3d at 423.
152. *Id.*
153. Bilut, *supra* note 129, at 898.
154. *Albuquerque v. Browner*, 97 F.3d at 423 (emphasis added).
155. Bilut, *supra* note 129, at 899.
156. *Albuquerque v. Browner*, 97 F.3d at 423.

that it was within the EPA's statutory discretion to promulgate and enforce regulations requiring upstream point source discharges to comply with downstream water quality standards. Now, the moment of truth had arrived for Indian tribes: could TAS tribal water quality standards receive similar protection from upstream discharges?

The court of appeals resoundingly answered that question in the affirmative based primarily on the fact that tribes, like individual states, are not the sovereign imposing their water quality standards on the upstream dischargers.[157] It was the *EPA exercising its authority* through its valid regulations requiring such compliance.[158] Furthermore, section 518 incorporated the relevant NPDES statutory provisions, construed in *Arkansas v. Oklahoma* to allow the EPA to require upstream dischargers to comply with downstream water quality standards.[159]

The important thing to take away from *Albuquerque v. Browner* is that it made crystal clear that TAS tribes would be afforded identical rights and powers as actual states for authorized purposes under the CWA. TAS tribes are not second-class sovereigns,[160] but instead are bestowed with the statutory tools to make a major impact on transboundary water regulation. *Albuquerque v. Browner* confirmed that "Treatment as a State" *really means* treatment as a state.

C. OBTAINING "TREATMENT AS A STATE" STATUS

There is a specific process that tribes must follow to acquire TAS status. In section 518(e) of the CWA, Congress set out the threshold qualifications that a tribe must meet and directed the EPA to promulgate final regulations to expound upon and effectuate TAS designation.[161] On December 12, 1991, after full notice and comment rulemaking, the EPA issued a final rule articulating: (1) the procedures by which an Indian tribe may qualify for treatment as a state for purposes of the CWA section 303 water quality standards and section 401 certification programs; and (2) a mechanism to resolve unreasonable consequences that may arise from Indian tribes and

157. *Id.* at 424.

158. *See* 40 C.F.R. § 122.4(d) (2001). Of course, this concept is somewhat of a legal fiction; hence its importance and constant reiteration throughout this article. The practical effect of the EPA's regulations is that a downstream state or TAS tribe will indeed be imposing its water quality standards on the upstream discharger. But, this is only made possible by the EPA's (i.e., the federal government's) regulations requiring upstream permits to comply with downstream water quality standards. If the EPA decided to repeal or amend its regulations, a downstream state would have no authority to veto upstream discharge permits which would result in the contravention of downstream water quality standards. By focusing on this argument in *Albuquerque v. Browner*, the court avoided heavy reliance on the second *Montana* exception (discussed *infra* Part II.C). *See* Andrea K. Leisy, *Inherent Tribal Sovereignty and the Clean Water Act: The Effect of Tribal Water Quality Standards on Non-Indian Lands Located Both Within and Outside Reservation Boundaries*, 29 GOLDEN GATE U.L. REV. 139, 166 (1999).

159. *Albuquerque v. Browner*, 97 F.3d at 424 n.13.

160. *See* Wisconsin v. EPA, 266 F.3d 741, 750 (7th Cir. 2001).

161. 33 U.S.C. § 1377(e) (1994).

states setting differing water quality standards on common bodies of water.[162]

In these regulations, the EPA's TAS criteria track the threshold qualifications specified by Congress in section 518(e) and add that the applicant tribe must have federal recognition. The final rule states that the EPA "may accept and approve a tribal application for purposes of administering a water quality standards program if the Tribe meets the following criteria:"[163]

> (1) The Indian Tribe is recognized by the Secretary of the Interior. . .;
> (2) The Indian Tribe has a governing body carrying out substantial governmental duties and powers;
> (3) The water quality standards program to be administered by the Indian Tribe pertains to the management and protection of water resources which are within the borders of the Indian reservation and held by the Indian Tribe, within the borders of the Indian reservation and held by the United States in trust for Indians, within the borders of the Indian reservation and held by a member of the Indian tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of the Indian reservation; and
> (4) The Indian Tribe is reasonably expected to be capable, in the Regional Administrator's judgment, of carrying out the functions of an effective water quality standards program in a manner consistent with the terms and purposes of the Act and applicable regulations.[164]

The regulations go on to explain the information required to be included in the TAS application submitted by the tribe to the EPA. Of significance is the requirement that the tribe include "[a] descriptive statement of the Indian tribe's authority to regulate water quality"[165] in order to satisfy the third requirement of the EPA's TAS criteria. That

---

162. Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,876 (Dec. 12, 1991) (codified at 40 C.F.R. pt. 131). In addition to requiring regulations specifying how Indian tribes shall be treated as states under section 518, Congress explicitly required the EPA to provide a dispute resolution mechanism of this type. 33 U.S.C. § 1377(e).

163. 40 C.F.R. § 131.8(a) (2001).

164. *Id.* § 131.8(a)(1)-(4).

165. *Id.* § 131.8(b)(3).

> This statement should include: (i) A map or legal description of the area over which the Indian Tribe asserts authority to regulate surface water quality; (ii) A statement by the Tribe's legal counsel (or equivalent official) which describes the basis for the Tribes [sic] assertion of authority and which may include a copy of documents such as Tribal constitutions, by-laws, charters, executive orders, codes, ordinances, and/or resolutions which support the Tribe's assertion of authority; and (iii) An identification of the surface waters for which the Tribe proposes to establish water quality standards.

Id.

is, when are reservation waters sufficiently "held" by a tribe so that it may have jurisdiction to set water quality standards for them?[166] This becomes a crucial issue in Wisconsin's challenge to the EPA's grant of TAS status to the Sokaogon Chippewa Community Indian Tribe and requires exploration in more detail.

1. Inherent Tribal Authority

During the rulemaking process to develop qualifications for tribes to receive TAS status to administer water quality standards "[t]he issue of whether and how EPA should require Tribes to demonstrate . . . authority to regulate water quality within the boundaries of their reservations, attracted significant comment."[167] Some commentators suggested the Tribes needed to submit detailed information and reasons supporting their jurisdictional claims over the waters they proposed to regulate and, in essence, start with a presumption against their inherent authority.[168] Predictably, "other commentators asserted that Tribes invariably possess inherent authority to regulate all reservation waters, and that EPA should presume the existence of such authority and not require Tribes to make any specific factual showing."[169] Clearly, the EPA's response is important to the Indian tribes:

> The inherent sovereignty of Indian tribes is a longstanding precept of federal Indian law. The continued viability of tribal sovereignty, exercised through the tribal governmental powers that have not been diminished, is particularly relevant to the protection and enhancement of the natural resources on which many tribes depend for economic subsistence and cultural continuity. Water is perhaps

166. As discussed further below, the EPA found that section 518(e) as a whole was not an explicit delegation of regulatory authority to Indian tribes. The phrase in the third criterion concerning waters "otherwise within the borders of an Indian reservation" has been interpreted by the EPA "as a separate category of water resources and also as a modifier of the preceding three categories of water resources, thus limiting the Tribe to acquiring [TAS] status for the four specified categories of water resources within the borders of the reservation." Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations, 56 Fed. Reg. at 64,881. So, according to the EPA, this phrase simply designates another category of water resources a tribe *may* be able to regulate *after* it provides sufficient evidence of its inherent authority over such waters.

167. *Id.* at 64,877.

168. *Id.*

169. *Id.* The specific context in which the debate arose was whether an Indian Tribe may enforce its water quality standards against non-members of the tribe on non-Indian-owned fee lands within the boundaries of the reservation. In *Wisconsin v. EPA*, 266 F.3d 741, 745 (7th Cir. 2001), none of the land within the Sokaogon Chippewa Community Reservation was controlled or owned outright by non-members of the tribe. The existence of fee land owned by non-tribal members on reservation land may require a more studied appraisal of the tribe's TAS application, but does not alter the standards the EPA will use to evaluate a tribe's authority over the water it proposes to regulate.

the most fundamental of such resources.[170]

In order to resolve these differing views of the necessity and method of demonstrating inherent authority, the EPA considered and reconciled *Montana v. United States*[171] and *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation.*[172]

i. *Montana v. United States*: "The Montana Test"

In *Montana v. United States,* the Crow Tribe of Montana attempted to prohibit non-Indians from hunting and fishing on all lands within the reservation, including lands owned in fee simple by non-Indians.[173] The tribe believed it had authority to enact these regulations based on its claimed ownership of the bed of the Big Horn River,[174] the treaties which created the reservation,[175] and its inherent power as a sovereign.[176]

The Supreme Court squarely rejected the tribe's authority to enact the regulation and refuted each of the tribe's underlying justifications.[177] The Court held that absent *express congressional delegation* "Indian tribes lack civil authority over the conduct of non-members on non-Indian land within a reservation."[178] The Court, however, carved out two exceptions to this rule, commonly referred to as the "*Montana* exceptions."[179] The Court held that "in certain circumstances, even where Congress has not expressly authorized it, Indian tribes retain sovereign power to exercise civil jurisdiction over non-Indians on fee lands."[180] The first exception permits tribes to exercise civil jurisdiction over non-members who enter into consensual relationships with a tribe or its members through commercial dealing, contracts, leases, or other arrangements.[181] The second exception permits tribes to exercise jurisdiction over non-members whose conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[182] For

170. Edmund J. Goodman, *Indian Tribal Sovereignty and Water Resources: Watersheds, Ecosystems and Tribal Co-Management,* 20 J. LAND RESOURCES & ENVTL. L. 185, 191-92 (2000).

171. Montana v. United States, 450 U.S. 544 (1981).

172. Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408 (1989).

173. *Montana v. United States,* 450 U.S. at 544.

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.* at 544-46.

178. *See* Montana v. EPA, 137 F.3d 1135, 1140 (9th Cir. 1998) (citing *Montana v. United States,* 450 U.S. at 564).

179. *Montana v. United States,* 450 U.S. at 565-66.

180. *See Montana v. EPA,* 137 F.3d at 1140 (citing *Montana v. United States,* 450 U.S. at 566).

181. *Montana v. United States,* 450 U.S. at 565.

182. *Id.* at 566. Although beyond the scope of this article, it is worth mentioning that concepts of inherent sovereignty arise in the first instance when examining

purposes of TAS designation and the CWA, the second exception is critical.

Accordingly, if the EPA were to follow the Supreme Court's interpretation of permissible tribal authority during the rulemaking, it had three questions to pose. First, the EPA had to determine whether Congress *expressly delegated* authority to tribes to regulate all reservation waters. If yes, then the inquiry ended and there was no need to evaluate inherent authority.[183] However, if the EPA found that Congress had not expressly delegated the authority to regulate all reservation waters, it would have to consider whether either of the two "*Montana* exceptions" applied.[184]

In the context of water regulation, the first *Montana* exception concerning consensual relations is generally inapplicable. Therefore, the EPA would primarily evaluate whether the regulation of the water involved conduct that threatened or had some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.[185] As will be explained in further detail below, because the EPA determined that section 518 is *not* an express grant of authority to tribes, the second *Montana* exception carries great weight in determining a tribe's authority to regulate non-member conduct.[186]

ii. *Brendale* Causes Debate

During the rulemaking, there was considerable debate whether the *Montana* standards remained intact or if the Supreme Court had abrogated them in *Brendale v. Confederated Tribes & Bands of the Yakima Nation.*[187] In that case, both the Yakima Nation and the state of Washington "asserted authority to zone non-Indian real estate developments on two parcels within the Yakima reservation, one in an area that was primarily Tribal, the other in an area where much of the land was owned in fee by nonmembers [of the tribe]."[188] In an extensive and complicated opinion, the Court "split 4:2:3 in reaching the decision that the Tribe should have exclusive zoning authority over

---

certain aspects of sovereignty Indian tribes have lost or retained throughout the years. "[T]hrough their original incorporation into the United States as well as through specific treaties and statutes, the Indian tribes have lost many attributes of sovereignty." *Id.* at 563 (citing United States v. Wheeler, 435 U.S. 313, 323 (1978)). In sum, Indian tribes now have a "diminished status" as sovereigns. *Id.* at 565.

183. *See* Regina Cutler, *To Clear the Muddy Waters: Tribal Regulatory Authority Under Section 518 of the Clean Water Act*, 29 ENVTL. L. 721, 728 (1999) ("Under this analysis, an appeal to inherent sovereignty as a basis for a tribe's civil regulatory jurisdiction is unnecessary if Congress has directly delegated that authority to the tribe.").

184. *Id.*

185. *Montana v. United States*, 450 U.S. at 566.

186. Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,876, 64,880 (Dec. 12, 1991) (codified at 40 C.F.R. pt. 131).

187. Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408 (1989).

188. Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations, 56 Fed. Reg. at 64,877.

property in the Tribal area and the State should have exclusive zoning authority over non-Indian owned property in the fee area."[189] Perhaps because none of the three opinions in *Brendale* could agree on a common approach for applying the second *Montana* exception, or because neither of the two opinions representing the opinion of the Court rely on *Montana* as the basis for their holding, many commentators decreed that *Brendale* caused the death of *Montana's* second exception.[190]

The EPA disagreed with this assessment of *Brendale.* It found that the Supreme Court had not abrogated the viability of the *Montana* test, but simply could not reach a consensus how to formulate the second exception in the complicated factual scenario of *Brendale.*[191] Putting it another way, "[a]lthough the Justices disagreed over how to apply *Montana's* second exception in [the *Brendale*] context, a majority of the Justices nonetheless agreed that the *Montana* rule controlled."[192] The EPA recognized, however, that in *Brendale* several of the justices argued that in order for inherent authority to arise under the second *Montana* exception, the regulated activity's effect should be "demonstrably serious."[193]

iii. The EPA's Resolution

At this point in the rulemaking, the EPA decided the *Montana* test was still valid but that expressions by some Justices in *Brendale* combined with statements made in subsequent opinions provoked uncertainty as to what type of activity would trigger a tribe's inherent authority under *Montana's* second exception. The EPA responded to this predicament with a cautious, inclusive, and flexible approach:

> In evaluating whether a tribe has authority to regulate a particular activity on land owned in fee by nonmembers but located within a reservation, EPA will examine the Tribe's authority in light of evolving case law as reflected in Montana and Brendale. The extent of such tribal authority depends on the effect of that activity on the tribe. . . .
>
> [T]he Agency will apply, as an interim operating rule, a formulation of [the second Montana exception, i.e., inherent authority] that will require a showing that the potential impacts of regulated activities on the tribe are serious and substantial.
>
> The choice of an Agency operating rule containing this standard is taken solely as a matter of prudence in light of judicial uncertainty and does not reflect an Agency endorsement of this standard per

189. *Id.*

190. Cutler, *supra* note 183, at 729; *see also* Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations, 56 Fed. Reg. at 64,877.

191. Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations, 56 Fed. Reg. at 64,877-78.

192. Montana v. EPA, 137 F.3d 1135, 1140 (9th Cir. 1998).

193. Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations, 56 Fed. Reg. at 64,878 (internal citations omitted).

se.[194]

Thus, the EPA adopted a careful blend of *Montana* and *Brendale*, perhaps on the hunch that further judicial development of the inherent authority concept would yield the same result.

It appears that EPA was correct. In 1997, the Supreme Court decided *Strate v. A-1 Contractors*[195] in which Justice Ginsburg penned a unanimous opinion resurrecting the *Montana* test from any perceived erosion. In *Strate*, the Court disallowed tribal court jurisdiction over a personal injury lawsuit resulting from an automobile accident occurring between two non-members on a state highway running through the Indian reservation.[196] The Supreme Court agreed the dispute was "distinctly non-tribal in nature . . . [arising] between two non-Indians involved in a run-of-the-mill highway accident."[197] As such, tribal jurisdiction was not connected to the self-governance of the tribe. The Court held that because a tribe's inherent power does not reach beyond what is necessary to protect self-government or to control internal relations of the tribe, the facts in this case could not trigger *Montana's* second exception.[198]

It is still not entirely clear whether Justice Ginsburg's explanation of *Montana's* second exception was a narrowing of its reach or merely a clarification of the original rule designed to head off overuse.[199] In any event, this holding was important for two reasons. First, the EPA had determined, during the rulemaking, that water quality management protects public health and safety and, therefore, is critical to the *self-government* of a tribe.[200] Second, irrespective of how one interprets Justice Ginsburg's statements, notions of protecting self-government and internal relations reflect potentially "serious and substantial" impacts on the tribe; the primary standard the EPA had used.[201] Thus, in its rulemaking statements discussing "self-government" and "serious

194. *Id.* (first and second emphasis added).

195. 520 U.S. 438 (1997).

196. *Id.* at 439. The state highway was a federally-granted right-of-way for which the state paid the Tribes. Since the Tribes could no longer assert a landowner's right to occupy and exclude over the property, the Court likened it to land within reservation borders alienated to non-Indians in fee simple. Characterized as such, the *Montana* test was clearly applicable. *Id.* at 455-56.

197. *Id.* at 457 (internal indications omitted).

198. *Id.* at 459.

199. *Strate* may arguably be read as a mere clarification of the original intent of the *Montana* test with *Brendale* being a complicated transitional case between *Montana* and *Strate*. The most troublesome result of this reading is that while tribal "self-government" and "internal relations" can easily be paralleled to "political integrity" and "economic security," a disconnect results when trying to connect *Montana's* "health or safety" component. The extremely convenient bridge for this gap was the EPA's finding that water quality management protects public health and safety and, therefore, is critical to the *self-government* of a tribe. *See infra* note 202.

200. Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,876, 64,879 (Dec. 12, 1991) (codified at 40 C.F.R. pt. 131) (emphasis added).

201. *Id.* at 64,878-79.

and substantial effects," it appears the EPA's standards for applying *Montana's* second exception foreshadowed the Supreme Court's holding in *Strate.*[202] Moreover, it is evident *Strate* is exactly the type of "evolving case law" the EPA hoped would arise to help guide the Agency in its future decisions.

iv. The *Montana* Test and "Treatment as a State" Designation

To where does this arduous exploration lead? It leads back to the original *Montana* test bolstered by the Supreme Court's indication that the EPA's rule that the potential impacts must be "serious and substantial" (indicated by threats to tribal self-government or internal relations) to trigger inherent authority is on target. To simplify, the following is the structure of the *Montana* test applied by the EPA:

A. Did Congress expressly delegate authority to the tribes to regulate the activity over all reservation land or waters?
If yes, then the tribe has express authority to exercise civil regulatory jurisdiction over non-Indians on fee lands and there is no need to discuss inherent sovereignty.

B. If no, does the activity fall into one of the two following *Montana* exceptions?

(1) It concerns activity relating to non-members who enter into consensual relationships with the tribes or its members through commercial dealing, contracts, leases or other arrangements; or

(2) It concerns conduct that threatens or has a direct serious and substantial effect on the political integrity, the economic security, or the health or welfare of the tribe.

Once it had established the proper framework of the *Montana* test, the EPA could use it to evaluate section 518(e) of the CWA.

Under this test, the EPA's first query was whether section 518(e) was an express delegation to qualified tribes of regulatory authority over all reservation waters. More specifically, the EPA needed to determine if the section resulted in expanding tribal authority and jurisdiction over non-Indians.[203] The statute itself is not explicit in this regard so the EPA reviewed the legislative history. The legislative history was conflicting and ambiguous, reflecting many of the perils of straying beyond the text of a statute itself.[204] Therefore, the EPA

202. Montana v. EPA, 137 F.3d 1135, 1141 (9th Cir. 1998).

203. Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations, 56 Fed. Reg. at 64,880.

204. Judge Easterbrook of the Seventh Circuit has recognized the hazards of relying on legislative history:

> One may say . . . that legislative history is a poor guide to legislators' intent because it is written by the staff rather than by members of Congress, because it is often losers' history ("If you can't get your proposal into the bill, at least write the legislative history to make it look as if you'd prevailed"), because it becomes a crutch ("There's no need for us to vote on the amendment if we can write a little legislative history"), because it complicates the task of execution and obedience (neither judges nor those whose conduct is

concluded that "[g]iven that the legislative history ultimately is ambiguous and inconclusive, EPA believes that it should not find that the statute expands or limits the scope of Tribal authority beyond that *inherent* in the Tribe absent an express indication of Congressional intent to do so."[205] The EPA was saying section 518(e) is not an express grant of additional authority to qualified tribes, but is only a mechanism to recognize authority that they already possess. In light of this finding, the EPA reached two important conclusions. The first was that for a tribe to receive TAS status under the CWA, it would need to have *inherent authority* over the waters it desired to regulate.[206] That is, the second *Montana* exception needed to be satisfied. The second finding was that a tribe will need to make an *affirmative demonstration* of its inherent authority to the EPA.[207] This had to be done by completing the TAS application and providing verifying documentation in support of the tribe's authority. In sum, according to the EPA, section 518(e) authorized TAS treatment over activities already within a tribe's inherent authority and the tribe must supply proof that such authority exists.

v. The EPA's Presumption of Inherent Authority

At first glance, it appears there is a formidable roadblock to a tribe obtaining TAS status. After all, the idea of inherent authority over an activity that threatens or has a direct serious and substantial effect on the political integrity, the economic security, or the health or welfare of the tribe is seemingly amorphous and malleable. Now, the EPA

> supposed to be influenced by the law can know what to do without delving into legislative recesses, a costly and uncertain process). Often there is so much legislative history that a court can manipulate the meaning of a law by choosing which snippets to emphasize and by putting hypothetical questions—questions to be answered by inferences from speeches rather than by reference to the text, so that great discretion devolves on the (judicial) questioner.

In re Sinclair, 870 F.2d 1340, 1343 (7th Cir. 1989).

205. Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations, 56 Fed. Reg. at 64,880 (emphasis added).

206. At this point, this article becomes unconcerned with the first *Montana* exception. The consensual relationship concept is much more clear-cut and unlikely to give rise to complicated disputes. In any event, it is not a subject of EPA deliberation during the TAS rulemaking process, nor is it at issue in *Wisconsin v. EPA.*

207. Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations, 56 Fed. Reg. at 64,881

> The Agency does not believe . . . that it would be appropriate to recognize Tribal authority and approve treatment as a State requests in the absence of verifying documentation. In addition, in light of the legislative history of section 518, the question of whether section 518(e) is an explicit delegation of authority over non-Indians is not resolved. Therefore, the EPA does not believe it is currently appropriate to eliminate the requirement that Tribes make an affirmative demonstration of their regulatory authority. EPA will authorize Tribes to exercise responsibility for the water quality standards program once the Tribe shows that, in light of the factual circumstances and the generalized findings EPA has made regarding reservation water quality, it possess the requisite authority.

Id.

required "proof" of such authority from the tribes. From the legalese terminology to the desire for "evidence," it sounded almost as if the intent was to intimidate tribes from applying for TAS designation.

To the contrary though, the EPA made the showing of inherent authority quite easy. In fact, although the Agency makes the ultimate decision concerning tribal jurisdiction on a case-by-case basis,[208] "the Agency presumes that, in general, Tribes are likely to possess the authority to regulate activities affecting water quality on the reservation."[209] The EPA provided numerous reasons for this presumption including: (1) the Agency has "special expertise [in] recognizing that clean water . . . is absolutely crucial to the survival of many Indian reservations;"[210] (2) the enactment of the CWA itself constitutes a legislative finding that activities which affect water quality "may have *serious and substantial impacts*;"[211] (3) the mobile nature of pollutants may cause *serious and substantial impacts* even if they do not originate on Indian owned lands;[212] (4) Congress expressed a preference for tribal regulation of reservation water quality;[213] and (5) water quality management protects public health and safety and, therefore, is critical to *self-government.*[214] The EPA collectively labels these: "generalized findings regarding the relationship of water quality to tribal health and welfare."[215] These generalized findings "supplement[] the factual showing a tribe makes in applying for treatment as a State."[216] The obvious intent of this structure is to allow an applicant tribe to meet the *Montana* second exception without difficulty.

The EPA incorporated this intent into the TAS application process. Recall the criteria that the regulations require an applicant to meet in order to receive TAS designation.[217] The EPA frankly admits that to meet those requirements, a tribal application for TAS status "will need to make a relatively simple showing of facts"[218] asserting that: "(1) there are waters within the reservation used by the tribe, (2) the waters and critical habitat are subject to protection under CWA, and (3) impairment of waters would have a serious and substantial effect on the health and welfare of the tribe."[219] Once the tribe meets this

208. *Id.* at 64,878, 64,881.
209. *Id.* at 64,881.
210. *Id.* at 64,878.
211. *Id.* (emphasis added).
212. Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations, 56 Fed. Reg. at 64,878 (emphasis added).
213. *Id.*
214. *Id.* at 64,879 (emphasis added).
215. *Id.*; *see also* Montana v. EPA, 137 F.3d 1135, 1139 (9th Cir. 1998).
216. Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations, 56 Fed. Reg. at 64,879; *see also Montana v. EPA*, 137 F.3d at 1139.
217. 40 C.F.R. § 131.8(a)(1)-(4) (2001).
218. Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations, 56 Fed. Reg. at 64,879.
219. *Montana v. EPA*, 137 F.3d at 1139.

initial burden, the EPA will, in light of the facts presented by the tribe and supplemented by the Agency's generalized findings regarding the relationship of water to tribal health and welfare, *presume* an actual showing of tribal jurisdiction over fee lands.[220] Unless an appropriate governmental entity demonstrates a tribe's lack of jurisdiction, the EPA will find that the tribe has inherent authority and will grant it TAS status for administering water quality standards.[221]

D. OPPOSING A TRIBE'S APPLICATION FOR "TREATMENT AS A STATE" STATUS

The EPA's regulations include a specific procedure for the EPA's Regional Administrator to follow when processing an Indian tribe's application for TAS status to administer water quality standards.[222] The regulations require the Administrator provide "appropriate notice" to "all appropriate governmental entities" within thirty days after receipt of a tribe's TAS application.[223] The notice "shall include information on the substance and basis of the Tribe's assertion of authority to regulate the quality of reservation waters."[224] The governmental entities have thirty days to submit comments on the tribal application and the Administrator must consider such comments when evaluating whether the tribe should be granted TAS status.[225] This process is important because, as discussed above, unless an appropriate governmental entity can demonstrate that a tribe lacks jurisdiction over reservation waters, the EPA will *presume* that the applicant tribe has inherent authority to set water quality standards. The notice and comment procedure is a governmental entity's primary opportunity to oppose TAS status. The regulations raise two important questions: (1) what exactly is an "appropriate governmental entity" permitted to comment on the TAS application?; and (2) are there any limitations to the permissible scope of the governmental entities' comments and challenges to a TAS application? These questions will be addressed in turn.

1. "Appropriate" Governmental Entities: Who May Challenge?

The concept of *which* governmental agencies are permitted to comment on a tribe's TAS application is of great interest to any locale or industry that may be affected by an Indian tribe being granted TAS status to set water quality standards. In other words, under the EPA's regulations, what is an "appropriate governmental entity?" There are many state, county, local, and tribal governments that may have important interests at stake if a particular tribe is given authority to set

220. Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations, 56 Fed. Reg. at 64,879.
221. *Montana v. EPA*, 137 F.3d at 1139.
222. 40 C.F.R. § 131.8.
223. *Id.* § 131.8(c)(2)(ii).
224. *Id.* § 131.8(c)(2)(i).
225. *Id.* §§ 131.8(c)(3), 131.8(c)(4).

water quality standards for reservation waters. For instance, in *Albuquerque v. Browner*, would the city of Albuquerque have been an "appropriate governmental entity" entitled to comment on the Isleta Pueblo Indian Tribe's assertion of authority to adopt water quality standards for the Rio Grande water flowing through the reservation? Does a state that is located three or four states upstream from the reservation receive notice and comment privileges? What about a local county government coordinating a regional water reclamation program? The result in *Albuquerque v. Browner* made clear that these and other governmental entities may be drastically affected by the imposition of tribal water quality standards if a TAS application is approved.[226]

Recognizing this, during the notice and comment period for the proposed regulations specifying the TAS criteria and application processing procedures, several commentators requested clarification of what would be considered "appropriate governmental entities."[227] The EPA responded that the phrase "appropriate governmental entities" would be defined as "States, Tribes, and other Federal entities located contiguous to the reservation of the Tribe which is applying for treatment as a State."[228] Thus, the EPA not only significantly narrowed the type of governmental entity that could participate, but also curtailed the number of participants by restricting the geographic connection the entity must have with the tribe. Interestingly, the EPA also decided that neighboring tribes will be treated as "appropriate governmental entities" whether or not they have obtained TAS status.[229]

With respect to local governments such as cities and counties, the EPA excluded them from the definition of "appropriate governmental entities."[230] Not only are these entities not entitled to notice under the regulations, but also, if such governments catch wind of a pending TAS application and submit comments challenging a tribe's assertion of authority, the EPA will not consider such comments.[231] However, the EPA does encourage local governments to direct their comments to the "appropriate State governments" which may then include such concerns in any comments they chose to submit.[232] To encourage such involvement, the EPA stated that it would "make an effort to provide notice to local governments by placing an announcement in appropriate newspapers . . . [that] will advise interested parties to direct comments on Tribal authority to appropriate State

226. *See* City of Albuquerque v. Browner, 97 F.3d 415, 424-26 (10th Cir. 1996).

227. Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,876, 64,884 (Dec. 12, 1991) (codified at 40 C.F.R. pt. 131).

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

232. Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations, 56 Fed. Reg. at 64,884.

governments."[233] This appears to be a strangely contradictory element of the EPA's policy. The Agency first says that local governments are not "appropriate governmental agencies" and will not receive notice of a TAS application or an opportunity to comment. Then, in the same breath, it decides to provide publication notice to local governments and encourages them to submit their comments to the EPA through the state. Why not provide notice and an opportunity to directly comment in the first instance? Or, at the very least, why not provide local governments with the same type and quality of notice that it provides to states,[234] even if such notice only advises the local government to direct comments to the state government? If not internally inconsistent, the EPA's approach is, at best, inefficient.[235]

Finally, the EPA clarified that the notice and comment procedure for TAS applications is "not intended to establish any form of adjudication or arbitration process to resolve differences between State and Tribal governments."[236] Instead, the comments are simply another piece of information for the EPA to evaluate as it deliberates whether a tribe has the requisite authority to receive TAS status.[237] The EPA thus quashed any notions of the existence of a dispute resolution process before TAS status is granted, and reinforced that the Agency is the sole determiner of a tribe's eligibility for TAS designation.

2. Limitations: What May Be Challenged?

Once it was determined that states, tribes, and other federal entities would be the only participants in the notice and comment process, the question arose as to about *what*, exactly, the EPA would permit these parties to comment. In practical terms, the question became: what type of objections would the EPA consider in opposition to a tribe's TAS application and what, if anything, was excluded from challenge?

The proposed regulations had indeed narrowed the allowable subject matter of comments. The proposed rule stated: "The Regional Administrator shall provide thirty days for comments to be submitted on the Tribal application. *Comments shall be limited to the Tribe's assertion of authority.*"[238] This rule is a pared down way for the EPA to say that it

233. *Id.*

234. When alerting the state of a tribe's TAS application, the EPA provides notice to "the most appropriate State contacts which may include, for example, the Governor, Attorney General, or the appropriate environmental agency head." *Id.* This is certainly a more reliable and targeted type of notice than the mere publication notice which the EPA will "make an effort" to provide for local governments.

235. From a practical standpoint, it seems that it would be administratively more burdensome to identify the appropriate local newspapers and manage the logistics of proper publication notice than it would be to simply send a single form notice to the appropriate local government contact in the first instance.

236. Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations, 56 Fed. Reg. at 64,884.

237. *Id.*

238. Amendments to the Water Quality Standards Regulations that Pertain to Standards on Indian Reservations, 54 Fed. Reg. 39,098, 39,108 (proposed Sept. 22,

intended only to consider comments that addressed the third criterion needed for TAS designation. As described above, the third criterion concerns the question of whether the waters in which the tribe sought to regulate are within the borders and "held" by the tribe either directly or indirectly.[239] The answer to this question turns on whether the tribe has inherent authority over the waters for which it seeks to administer water quality standards, thus invoking the EPA's use of the second *Montana* exception.[240] Consequently, the proposed EPA rule only allowed comments on whether a tribe applying for TAS designation actually had inherent authority over the waters it sought to regulate.

This proposed rule did not sit well with governmental entities that were prospective challengers to TAS applications. In their comments to the proposed rule, they claimed that it was "unlawful to limit public comment to just the Tribal demonstration of authority [and that the regulations] should allow public review of all four statutory criteria."[241] The EPA rejected this assertion. The Agency reasoned that the CWA does not require the EPA to provide notice and comment on TAS applications to begin with; therefore, if the Agency chose to accept comments at all it was within its discretion what subjects would receive consideration. But why did the EPA pick the third criterion—the tribe's assertion of authority over the waters? The Agency's answer was that it believed that it did not need any outside input to accurately decide the other TAS criteria.[242] That is, the Agency was sufficiently informed to determine whether the tribe is federally recognized, is a governing body carrying out governmental powers, and is capable of administering an effective water quality standards program. Accepting comments on these criteria, according the EPA, would unnecessarily complicate and delay the TAS application process.[243]

In contrast, the "EPA believes that providing for comment on the authority criterion is appropriate because this is the only criterion which outside comments might help to address."[244] Implicit in this belief is the Agency's concession that it may not have access to, or have the wherewithal to locate, all of the pertinent information concerning a tribe's asserted inherent authority. Another reason may be that the "authority criterion" may be the one criterion that the commenting

---

1989) (to be codified at 40 C.F.R. pt. 131) (emphasis added).

239. 40 C.F.R. § 131.8(a)(3) (2001).

240. The reason for this, as explained above, is that the EPA had interpreted section 518(e) to *not* be an express grant of regulatory authority over all reservation waters (despite the "or otherwise within the borders of an Indian reservation" language in the statute). Under *Montana*, without an express delegation, tribal regulation of reservation waters would only be granted if tribes could demonstrate inherent authority over the waters.

241. Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,876, 64,884 (Dec. 12, 1991) (codified at 40 C.F.R. pt. 131).

242. *Id.*

243. *Id.*

244. *Id.*

governmental entities are in the best position to challenge. That is, unlike the other TAS criteria, other states may oppose tribal authority over certain waters because it believes that the subject waters are actually "held" by the state and could not be the subject of a tribe's inherent authority. A state may be asserting authority over the same waters that a tribe wants to regulate; this factor makes the "authority criterion" unique.

In the end, the EPA adopted its proposed rule. In doing so, the EPA significantly limited the number of comments that it would have to contend with when processing a TAS application. The final regulations limit comments from appropriate government entities about a TAS application to a tribe's assertion of authority.[245] Only states, tribes, and other federal entities located contiguous to the applicant's reservation are allowed to comment on a tribe's request for TAS designation. The limitations incorporated in this rule appear to tip the decisional scale in favor of Indian tribes receiving TAS status, a viewpoint that becomes a major point of contention in *Wisconsin v. EPA.*

One may argue that not only does the EPA start with the presumption that an applicant tribe will have inherent authority over reservation waters, but also, that such a presumption is practically irrebuttable by a challenging governmental entity. The strict limitations placed on the notice and comment opportunities, the EPA's generalized findings supporting tribal inherent authority, the EPA's finding of congressional policy favoring tribal regulation of water quality, and the EPA's express statements espousing a preference for delegation of authority to tribes all buttress the position that challenges to a TAS application by appropriate governmental entities will be futile. Of course, the response to this contention is that the entire notice and comment procedure for TAS applications is not statutorily required in the first instance, and the EPA is in fact being generous by allowing it. It would thus follow that there is no basis to complain about the restrictive nature of the comment process or the presumptive position in favor of tribal authority.

Is the opportunity to comment on tribal authority over particular water resources nothing but an illusory mechanism with a foregone conclusion? Is there any objectivity in the analysis of a tribe's asserted authority over reservation waters? Are there effective legal challenges an "appropriate governmental entity" can make in opposition to a tribe's TAS designation? These questions, as well as the numerous other issues discussed so far in this article, arise in the important case of *Wisconsin v. EPA.*

245. 40 C.F.R. § 131.8(c) (2001).

IV. WHEN THE GOVERNMENTAL ENTITY'S CHALLENGE TO "TREATMENT AS A STATE" DESIGNATION HAS FAILED – MAY IT PLEASE THE COURT: *WISCONSIN V. EPA*

When the EPA grants or denies treatment as a state status to a tribe, it is not necessarily the end of the line for the tribe or the governmental entities challenging the tribe's authority. The EPA is, after all, a federal administrative agency whose decisions are subject to judicial review by the federal courts. Because of the ease with which a tribe may demonstrate inherent authority over reservation waters and the EPA's proclivity to grant TAS status, the most likely factual scenario for judicial review is where a governmental entity is seeking review of a TAS designation. Such a situation played out recently when the state of Wisconsin sought judicial review of the EPA's decision to grant TAS status to the Sokaogon Chippewa Community Indian Tribe for purposes of setting water quality standards under section 303 and certifying compliance with those standards under section 401. In *Wisconsin v. EPA*,[246] the Court of Appeals for the Seventh Circuit rejected Wisconsin's opposition to the TAS designation, thus establishing a high threshold for a governmental entity to successfully challenge a grant of TAS status.

A. BACK ON THEIR HEELS: THE STANDARD OF REVIEW OF TAS DECISIONS

It is especially important for purposes of this article to pay attention to the standard of review used by a federal court in reviewing a TAS designation. While the standard of judicial review is perhaps a mundane subject needing only quick mentioning in other contexts, the instant case demonstrates the application of review standards and attendant difficulties encountered by governmental entities opposing tribal authority status.

The well-settled rule is that a federal court will grant an agency substantial deference when reviewing its decisions. The Administrative Procedure Act ("APA")[247] dictates that when an administrative agency is interpreting an agency-administered statute as applied to a particular set of circumstances, the reviewing court may only set aside the agency action if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[248] This standard applies when a court is reviewing agency *fact-finding* and, as applied, is very deferential.[249]

Furthermore, the long-standing test fashioned by the Supreme Court in *Chevron v. Natural Resources Defense Council*[250] supports upholding agency interpretations of statutes they administer. In

246. Wisconsin v. EPA, 266 F.3d 741 (7th Cir. 2001).
247. Administrative Procedure Act, 5 U.S.C. § 706 (1994).
248. *Id.* § 706(2)(a).
249. CAE, Inc. v. Clear Air Eng'g, Inc., 267 F.3d 660, 675 (7th Cir. 2001).
250. Chevron U.S.A., Inc., v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

Chevron, the Court held that "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."[251] Following this standard, when a lawsuit is brought by a governmental entity challenging the EPA's finding of tribal authority over the reservation waters, the first step is to look at the CWA itself. Section 518 of the CWA does *not* address what standards to apply in order to ascertain whether a tribe has authority over reservation waters. That is, the statute does *not* explain how to determine if the waters are "held" directly or indirectly by the tribe, how to administer the application process, or what competing claims of authority over the subject waters may trump a tribe's claim. However, section 518 is not completely silent; it expressly directs the EPA to "promulgate final regulations which specify how Indian tribes shall be treated as States for purposes of this chapter."[252] The TAS regulations promulgated by the EPA are also "given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute."[253]

Finally, not only will the promulgated regulations specifying the TAS designation procedure receive a "light touch review," but the *actual decisions* the EPA makes in applying those regulations will also receive substantial deference. The Supreme Court reiterated this viewpoint recently when it stated: "[w]e have recognized a very good indicator of delegation meriting *Chevron* treatment in express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or *rulings for which deference is claimed.*"[254] Thus, the EPA's decision (arising from its promulgated regulations) whether or not to grant a tribe TAS status to administer water quality standards will also receive substantial deference.

---

251. *Id.* at 843.

252. 33 U.S.C. § 1377(e)(3).

253. *Chevron*, 467 U.S. at 843-44.

> If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.

Id. In *Montana v. EPA*, 137 F.3d 1135 (9th Cir. 1998), the Ninth Circuit rejected a facial challenge to TAS regulations. The court in *Montana* found that the EPA is not entitled to deference concerning the *scope* of tribal authority because it is a question of law, it has nothing to do with the EPA's expertise, and it was not a subject specifically committed to the EPA's regulation. Notwithstanding this heightened level of review, the court held the EPA had not "committed any material mistakes of law in its delineation of the scope of inherent tribal authority." *Id.* at 1140.

254. United States v. Mead Corp., 533 U.S. 218, 229 (2001) (emphasis added); *see also* Wisconsin v. EPA, 266 F.3d 741, 746 (7th Cir. 2001).

> [T]he EPA here has interpreted the statute by promulgating formal regulations, using plenary notice-and-comment procedures, and then implementing its rule with respect to the Band through a formal process in which the State was entitled to be heard. Its *regulations and subsequent decision* are therefore entitled to deference under *Mead* and *Chevron*. (emphasis added).

Id. at 746.

The ultimate result combines the APA's standard of review for agency *fact-finding* with *Chevron's* deference to an agency's promulgation and application of congressionally mandated regulations. Accordingly, when a governmental entity fails to convince the EPA that a tribe does not have the requisite authority for TAS status, the government must challenge the EPA's decision under the arbitrary, capricious, abuse of discretion, or otherwise contrary to law standard.[255] This deferential standard makes challenging the grant of TAS status in the courts exceedingly difficult.

B. FACTS

Judge Wood's opinion explained the backdrop of *Wisconsin v. EPA* very clearly and, for that reason, this article shall generally restate the court's articulation of the facts[256] (with some supplementary information from the parties' briefs and other materials). The Sokaogon Chippewa Community is an Indian tribe located in northeastern Wisconsin on an 1,850 acre reservation. The tribe is also known as the Mole Lake Band of Lake Superior Chippewa Indians and thus is referred to by the court as "the Band."[257] There are three lakes on or adjacent to the Band's reservation: Mole Lake, Bishop Lake, and Rice Lake.[258] Rice Lake, which lies at the headwaters of the Wolf River, is the largest waterbody on the reservation and is one of the last remaining ancient wild rice beds in the state of Wisconsin.[259] The wild rice serves as a significant dietary, economic, and cultural resource for the Band. Each year in early autumn, the Band holds the traditional rice harvest on Rice Lake in the same manner as they have done for many years.[260] The harvest is a significant part of the Band's heritage.[261] Furthermore, the Band is generally reliant on all of its reservation water resources for food, fresh water, medicines, and raw materials.[262]

A unique characteristic of the Mole Lake reservation is that all of the land within the reservation is held by the United States in trust for the tribe; none of the land is owned in fee by non-members of the tribe. This fact obviates many of the legal and policy intricacies of the *Montana* test because there is no concern about regulating activity by non-members of the tribe on fee lands within the reservation.

In August of 1994, the Band applied for TAS status to administer water quality standards for reservation waters.[263] Pursuant to TAS

255. Conversely, this standard would apply equally where a tribe challenges the EPA's denial of TAS designation.

256. *Wisconsin v. EPA*, 266 F.3d at 744-45.

257. *Id.* at 745.

258. Great Lakes Intertribal Council, *Sokaogon (Mole Lake) Band of Chippewa Indians, at* http://www.glitc.org/mlchip.htm.

259. *Id.*

260. Wild Rice Harvest, *Article by Olive Glasgo, at* http://www.molelake.com/.

261. *Id.*

262. *Wisconsin v. EPA*, 266 F.3d at 745.

263. *Id.*

application processing regulations, the EPA notified Wisconsin of the Band's TAS application submission. The EPA invited comment from Wisconsin concerning the Band's assertion of authority over reservation waters and any competing claim of jurisdiction the state may have. "Wisconsin opposed the application, arguing that it was sovereign over all of the navigable waters in the state, including those on the reservation, and that its sovereignty precluded any tribal regulation."[264] Specifically, Wisconsin sent two letters to the EPA claiming that the Equal Footing Doctrine reserved all navigable waters and land under them to the people of the states, and that the creation of the Mole Lake reservation ninety-one years after Wisconsin was admitted to the Union did not divest the state of its authority over those waters.[265] Wisconsin emphasized that the EPA interpreted section 518(e) of the CWA as intending only to recognize authority the tribe already possessed; not to grant any new authority.[266] Wisconsin argued that under the Equal Footing Doctrine the state possessed sovereignty over reservation waters long before the Mole Lake reservation was even created; therefore any grant of authority to the Band over such waters would extend *new* authority to the Band rather than simply recognize *preexisting* jurisdiction.

After extensive administrative hearings, the EPA granted TAS status to the Band for section 303 and 401 purposes. The EPA determined the Band met all four TAS criteria including demonstration of inherent authority over all of the reservation waters. In granting TAS status to the Band, the EPA dismissed Wisconsin's Equal Footing Doctrine argument primarily for two reasons. First, Wisconsin's reading of the doctrine as giving the state absolute authority over the *waters* overlying the submerged beds was overbroad. That is, even if the state has title to the shores and submerged beds of reservation waters, such rights do not trump the federal government's constitutional authority to regulate the navigable *waters* of the United States. Second, neither the Equal Footing Doctrine nor title to lakebeds is mentioned in section 518 of the CWA. Congress did not limit TAS designation to those tribes who *owned* submerged lands within their reservations. According to the EPA, inherent authority over reservation waters does not turn on who holds title to land underlying the waters. Consequently the Band received TAS status despite Wisconsin's objections to the application.

This plot, of course, is not without all the essential characters of a classic environmental melodrama. Upstream from Rice Lake on the Wolf River was a large, nearly completed, privately owned, zinc-copper sulfide mine.[267] Mines create substantial point source discharges

264. *Id.*

265. Brief for Appellant at 10-11, Wisconsin v. EPA, 266 F.3d 741 (7th Cir. 2001) (No. 99-2618).

266. *See* Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,876, 64,880 (Dec. 12, 1991) (codified at 40 C.F.R. pt. 131).

267. In the court's opinion, Judge Wood characterized the Band's TAS designation

containing various pollutants that mandate NPDES permits.[268] In addition, "[a]lthough mining permits are issued by various State agencies, the Office of Water may review State issued permits to ensure compliance with water quality criteria and ensure that effluent guidelines for ore/coal mining and processing are properly applied to wastewater discharges from these activities."[269] Now the picture becomes clear; if the Band received TAS status, it would likely set water quality standards stringent enough to proscribe some or all of the discharge from the upstream mine. Without being able to discharge certain amounts into the river, the operation of the mine may be severely limited or completely prohibited.

On January 25, 1996, Wisconsin filed an action with the District Court for the Eastern District of Wisconsin seeking revocation of the EPA's grant of TAS status to the Band. On April 28, 1999, the district court upheld the TAS designation on summary judgment. The court found that the EPA reasonably interpreted its regulations when it determined that a tribe could regulate all water within a reservation regardless of who owned the submerged lands. Two months later Wisconsin filed a notice of appeal and the Band intervened as a defendant, filing a brief in support of TAS designation. Oral argument commenced on November 6, 2000 before a panel of the Seventh Circuit Court of Appeals consisting of Judges Diane Wood, Ann Williams, and Michael Kanne. More than ten months after oral argument, in late September of 2001,[270] Judge Wood issued a unanimous opinion.

C. THE COURT'S ANALYSIS

At the outset of its opinion, the court of appeals pointed out that this case was ripe for adjudication. It did not matter that the Band had not yet promulgated specific water quality standards resulting in any sort of restriction on an upstream discharge or to an ongoing project. Wisconsin's real challenge, the court explained, was the grant of TAS status to the Band. By granting TAS status, the EPA effectively created a state-like entity within the borders of Wisconsin.[271] If the court found

---

as "an action with the potential to throw a wrench into the state's planned construction of . . . [the] mine." *Wisconsin v. EPA*, 266 F.3d at 745. In its Petition for Rehearing and Suggestion for Rehearing *En Banc* of the Seventh Circuit Panel's decision, Wisconsin characterized Judge Wood's statement as a "glaring factual error." Petition for Rehearing and Suggestion for Rehearing *En Banc* at 13-14, *Wisconsin v. EPA*, 266 F.3d 741 (7th Cir. 2001) (No. 99-2618). Wisconsin sought to clarify that a private company, not the state, was planning and constructing the mine. However, even if true, this fact does not necessarily negate the state's likely concern over the potentially stifling effect of the Band's water quality standards on economic development upstream from the reservation (including the mine in question).

268. *See generally* EPA Office of Water, Office of Wastewater Management, *Mining, at* http://cfpub.epa.gov/npdes/indpermitting/mining.cfm?program_id=14 (last modified Nov. 26, 2001).

269. *Id.*

270. This delay perhaps reflected the intricacies of the issues involved in this case.

271. *Wisconsin v. EPA*, 266 F.3d at 745.

this action improvident, there was a present injury caused by the EPA that the court had the power to remedy.[272]

Turning to the substantive analysis, the court noted that "Wisconsin is challenging the EPA's findings only with respect to the third requirement for TAS status—the demonstration of the tribe's inherent authority to regulate water quality within the borders of the reservation."[273] The court was merely highlighting that the state was renewing challenges it was permitted to make during the notice and comment period.[274] This raises the interesting question of whether, despite the state's inability to submit comments on other TAS criteria, it could seek judicial review of conclusions pertaining to those criteria, e.g., a tribe's capability to administer a water quality standards program. In this case, however, the sole focus was on the EPA's finding that the Band sufficiently demonstrated inherent authority over the waters it sought to regulate.

1. Not "Within the Borders"

The court quickly rejected Wisconsin's argument that Rice Lake was not within the borders of the Mole Lake Reservation. The argument was never presented to the district court and was not made to the EPA during the comment period; as a result, it was waived.[275] For good measure, the court noted that even if it were to consider the argument, it would be of no merit. "Rice Lake is almost completely surrounded by reservation land (and the small percentage that is not abuts off-reservation trust lands)."[276] In these circumstances, the EPA could reasonably conclude that Rice Lake was sufficiently within the reservation's borders.[277] Thus, while the argument was technically waived by Wisconsin, the court took the opportunity to make a significant statement concerning the geographic scope of waters that may fall within the purview of tribal regulation. It is conceivable that in the future, a tribe involved in similar litigation would cite to the court's judicial dictum.[278]

---

272. *Id.*; *see also* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).

273. *Wisconsin v. EPA*, 266 F.3d at 746.

274. *Id.* at 745.

275. *Id.* at 746.

276. *Id.*

277. *Id.*

278. *See* Alloy Int'l Co. v. Hoover-NSK Bearing Co., 635 F.2d 1222, 1225 n.5 (7th Cir. 1980) (discussing judicial dictum); *see also* Cates v. Cates, 619 N.E.2d 715 (Ill. 1993)

> The term *'dictum'* is generally used as an abbreviation of *obiter dictum*, which means a remark or opinion uttered by the way. Such an expression or opinion as a general rule is not binding as authority or precedent within the *stare decisis* rule. On the other hand, an expression of opinion upon a point in a case argued by counsel and deliberately passed upon by the court, though not essential to the disposition of the cause, if *dictum*, is a *judicial dictum*. And further, a judicial dictum is entitled to much weight, and should be followed unless found to be erroneous (internal citations omitted).

Id. at 717.

2. The Equal Footing Doctrine

The court next addressed Wisconsin's renewal of its argument that the tribe simply could not have authority over reservation waters because the state had title to reservation waters and lands submerged beneath those waters pursuant to the Equal Footing Doctrine. The Equal Footing Doctrine took shape in *Pollard v. Hagan*[279] where the United States Supreme Court held that a state receives absolute title to the beds of navigable waterways within its boundaries upon admission to the Union.[280] The general premise flowing from the Equal Footing Doctrine is that newly admitted states have the same rights, sovereignty, and jurisdiction over their lands as the original thirteen states.[281] Since the original states had title to the submerged lands within their borders, then so must the states subsequently admitted to the Union.[282] Thus, in *Pollard* "the Court established the absolute title of the States to the beds of navigable waters, a title which neither a provision in the Act admitting the State to the Union nor a grant from Congress to a third party was capable of defeating."[283]

Ownership of the submerged lands, however, does not result in a state's absolute right to regulate the *overlying waters.* In *Montana v. United States,* the Court explained:

> [T]he ownership of *land* under navigable waters is an incident of sovereignty. As a general principle, the Federal Government holds such lands in trust for future States, to be granted to such States when they enter the Union and assume sovereignty on an "equal footing" with the established States. After a State enters the Union, *title to the land* is governed by state law. *The State's power over the beds of navigable waters remains subject to only one limitation: the paramount power of the United States to ensure that such waters remain free to interstate and foreign commerce.*[284]

Thus, the federal government retains a dominant navigable servitude to regulate waters of the country under the Commerce Clause.[285] The tension becomes apparent, as Wisconsin is sovereign over the land on which the water in the state sits, while the overlying water is always subject to the extensive power of the Commerce Clause.[286] The CWA

279. 44 U.S. 212 (1845).

280. Oregon *ex rel.* State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 374 (1977).

281. *Pollard,* 44 U.S. at 230.

282. *Id.* at 229.

283. *Corvallis Sand & Gravel Co.,* 429 U.S. at 374; *see also* Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 283-85 (1997).

284. Montana v. United States, 450 U.S. 544, 551 (1981) (internal citations omitted) (emphasis added).

285. *See* Gibbons v. Ogden, 22 U.S. 1, 197 (1824) ("The power of Congress [under the Commerce Clause], then, comprehends navigation, within the limits of every State in the Union; so far as that navigation may be, in any manner, connected with 'commerce with foreign nations, or among the several States, or with the Indian tribes'.").

286. *See* United States v. Schaffner, 258 F.3d 675 (7th Cir. 2001).

itself is an example of the federal government asserting its Commerce Clause authority over the quality of navigable waters throughout the nation.[287] Only through federal delegation, strictly overseen, may a state administer its own programs under the CWA. Indeed, even in one of the savings clauses of the CWA, Congress chose its words very carefully in specifying what water rights states reserve under the Act: "[i]t is the policy of Congress that the authority of each State to allocate *quantities* of water within its jurisdiction shall not be superceded, abrogated or otherwise impaired by this chapter."[288]

The Equal Footing Doctrine argument Wisconsin put forth is not cleanly disposed of by reference to a single case or statute. Nevertheless, the court of appeals convincingly rejected the argument. The court started its analysis by assuming Wisconsin did in fact have title to the beds of water within the reservation. The court next addressed the case of *Wisconsin v. Baker*,[289] which Wisconsin continuously cited to in its briefs. In *Baker*, the Chippewa Indians claimed that an 1854 treaty with the United States creating the tribe's reservation in Wisconsin also gave the tribe the *exclusive* right to hunt and fish in reservation waters.[290] As a result, the tribe contended, it had the power to restrict *public* hunting and fishing in those lakes. However, eight years *prior* to the treaty creating the reservation, Wisconsin had been admitted to the Union on "equal footing" with the original states.[291] Therefore, it obtained title to all submerged lands including those that eventually were encompassed within the reservation boundaries.

In *Baker*, the court of appeals made two important findings. First, the 1854 treaty was silent concerning any grant of exclusive hunting

---

> [I]n determining whether Congress, in exercising its power under the Commerce Clause, has acted within the bounds of its constitutional authority, we must keep in mind that congressional power under the Commerce Clause "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution."

Id. at 678 (citing *Gibbons*, 22 U.S. at 196).

287. *See* United States v. Hartsell, 127 F.3d 343, 348 n.1 (4th Cir. 1997) (explaining that the CWA is certainly a valid exercise of congressional power under the Commerce Clause); Burnette v. Rowland, Nos. 3:94-CV-00420, 3:94-CV-00676, 1998 U.S. Dist. LEXIS 11710, at *8 (D. Conn. May 4, 1998) ("Congress enacted RCRA and the CWA, along with CERCLA, pursuant to the Commerce Clause.").

288. 33 U.S.C. § 1251(g) (1994) (emphasis added). Wisconsin also attempts to rely on another savings clause in the CWA which declares that nothing in the Act shall be "construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States." *Id.* § 1370(2). Wisconsin contended that this provision reinforced that § 518(e) could not be used to trump its preexisting title and control over reservation waters. This argument does not further Wisconsin's position because it merely begs the question of whether Wisconsin actually obtained title to and exclusive control over the reservation waters pursuant to the Equal Footing Doctrine.

289. 698 F.2d 1323 (7th Cir. 1983).

290. *Id.* at 1333.

291. *Id.*

and fishing rights on reservation waters to the Chippewa Tribe.[292] Second, the power to regulate fishing and hunting on navigable lakes was one of the powers held by the original thirteen states incidental to their ownership of the submerged lands;[293] therefore, when Wisconsin was admitted to the Union on "equal footing," it was vested with regulatory power over hunting and fishing.[294] The court determined that the Equal Footing Doctrine gave Wisconsin both title to the submerged lands in the state and the power to regulate hunting and fishing on all of the state's navigable waters. Since the court found that neither the 1854 treaty nor any other action by the United States government clearly divested Wisconsin of its regulatory power over hunting or fishing on navigable waters, the Chippewa Tribe could not claim it had that same authority over reservation waters.

Judge Wood rejected Wisconsin's heavy reliance on *Baker* on three grounds. First, *Baker* was decided before section 518(e) of the CWA was enacted. "The legal structure governing *Baker* involved only the treaty that created the reservation, and that treaty did not contain any language regarding the tribe's power to regulate reservation waters."[295] In this case, there exists section 518(e) of the CWA that allows a delegation of authority to Indian tribes over reservation waters when specific statutory and regulatory criteria are satisfied.[296] Additionally, there is nothing in section 518(e) that limits such TAS grants only to those tribes with title to the submerged lands of reservation waters.

Second, unlike the Band in this case, the Chippewa Tribe in *Baker* did "not contend that public fishing and hunting pose[d] an imminent threat to the political integrity, the economic security, or the health or welfare of the [tribe]."[297] As a result, the court found that not only did the Chippewa Tribe lack *express authority* to regulate reservation waters under the treaty, but also it did not make a claim that it had *inherent authority* under the second *Montana* exception. More importantly, to Judge Wood, the *Baker* court's line of reasoning indicated that the court "left open the possibility that state ownership of lake beds may not preclude tribal authority over the waters if tribal regulation was necessary to protect the 'political integrity, the economic security, or the health or welfare' of the Band."[298] Thus, contrary to Wisconsin's arguments, the *Baker* decision did not foreclose the possibility of a tribe obtaining regulatory authority over reservation waters even where the reservation was created subsequent to the state acquiring title to the submerged lands.[299]

---

292. *Id.* at 1333-34.

293. *Id.*; *see also* Montana v. United States, 450 U.S. 544, 550-51 n.1 (1981).

294. *Baker*, 698 F.2d at 1333-34.

295. Wisconsin v. EPA, 266 F.3d 741, 747 (7th Cir. 2001).

296. *Id.*

297. *Baker*, 698 F.2d at 1335 (internal quotations omitted).

298. *Wisconsin v. EPA*, 266 F.3d at 747.

299. Wisconsin makes too much out of the *Baker* court's explanation that state regulation of hunting and fishing on state waters arises from the state's title to the submerged lands. Wisconsin asserts that such authority must mean that the state has

Finally, the court of appeals rejected the application of *Baker* because it concerned hunting and fishing rights, which traditionally fall within the purview of state regulation.[300] In contrast, *Wisconsin v. EPA* concerned water quality standards of navigable waters. Unlike hunting and fishing rights, the federal government (i.e., the EPA), not the state, regulates water quality.[301] In fact, the state can only act in this area when and how the federal government allows it. It is the revocable delegation of authority by the EPA that enables Wisconsin to set water quality standards for the state and to administer an NPDES permit program.[302]

After discrediting *Baker* as inapplicable to this case, the court went on to describe "legal principles" that *were* applicable. According to the court, these principles all "support the EPA's determination that a state's title to a lake bed does not in itself exempt the waters from all outside regulation."[303] Put another way, these concepts explain why the Equal Footing Doctrine is *not* an obstacle to a tribe obtaining TAS status.

The first concept is Congress's expansive power to regulate navigable waters of the United States under the Commerce Clause as discussed above. The court's strongest statement rejecting Wisconsin's equal footing argument came when it pointed out that:

> [Congress's Commerce Clause power over navigable waters] has not been eroded in any way by the Equal Footing Doctrine cases, which "involved only the shores of and lands beneath navigable waters. [The doctrine] cannot be accepted as limiting the broad powers of the United States to regulate navigable waters under the Commerce Clause."[304]

There is simply no body of precedent that gives states unbridled regulatory authority over the actual water that passes through or overlays the submerged lands they own.[305] Despite Wisconsin's references to case law, which make remarks that "navigable waters uniquely implicate sovereign state interests,"[306] it ignores what Judge Wood ultimately finds controlling. Since *Pollard*, states have received

---

title to the waters and the exclusive right to control the use thereof. This is quite a leap! In fact, it seems that authority to regulate hunting and fishing as an incident to submerged land ownership is just that: the authority to regulate hunting and fishing.

300. *Wisconsin v. EPA*, 266 F.3d at 747.

301. *Id.*

302. *See, e.g.*, 33 U.S.C. § 1342(c)(3) (1994) (explaining procedure for EPA's withdrawal of an EPA approved state NPDES program for noncompliance).

303. *Wisconsin v. EPA*, 266 F.3d at 747.

304. *Id.* (citing Arizona v. California, 373 U.S. 546, 597-98 (1963)).

305. States do manage appropriation and riparian water distribution systems. The CWA contemplates that it can coexist with such systems. 33 U.S.C. § 1251(g).

306. Wisconsin's citation to *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 282-84 (1997) does not promote its position. In fact the majority of the language from the opinion that is cited explains that only the *lands underlying* navigable waters are "sovereign lands." Simply because "navigable waters uniquely implicate [state] sovereign interests" does not mean states receive title to the waters themselves. *See generally id.*

both title and authority specifically over *submerged lands and shores* within the state. This separation of underlying lands and shores from the overlying water is intentional. The federal government's authority over all navigable waters applied to the original thirteen states and applies similarly to subsequently admitted states, such as Wisconsin, through the Equal Footing Doctrine. Congress' broad Commerce Clause power is not diminished by state ownership of submerged lands and shores. Even the state's power over the *beds of navigable waters* remains subject to "the paramount power of the United States to ensure that such waters remain free to interstate and foreign commerce."[307]

The United States' extensive authority over Indian tribes also worked to convince the court. This authority is exclusive and comes directly from the Constitution.[308] In fact, the general rule is that state laws may only be applied to Indians on their reservations if Congress allows.[309] For instance, in the case of the Mole Lake Band, the EPA, not Wisconsin, administers the NPDES permit program for reservation discharges in the absence of an approved tribal program.[310]

At the close of its analysis, the court points out that Wisconsin does not deny that its ownership of submerged lands would not prevent the federal government from regulating reservation waters and, thus, "cannot now complain about the federal government allowing tribes to do so."[311] While this argument initially sounds appealing, its brevity in the opinion makes it unclear and subject to attack. There are two problems with Judge Wood's statement. The first is that the CWA allows a tribe to receive "Treatment as a state" status under the CWA, not "Treatment as the Federal Government." There may be certain actions within the authority of the federal government to perform that would be constitutionally improper for a state to administer. For instance, the federal government could require Wisconsin to stop a project that might block a navigable waterway, but it is doubtful that it could authorize California to direct Wisconsin to do the same. If the federal government tried designating a similar federal duty to a TAS tribe, it would be giving the tribe privileges beyond what any other state could constitutionally obtain.

The second problem is that it gives the impression the court thinks that section 518(e) is an express grant of authority to tribes over reservation waters. Simply reasoning that if the federal government has regulatory jurisdiction, it can delegate the same to a tribe ignores the EPA's determination that section 518(e) was *not* an express delegation of authority to tribes over reservation waters. During the

307. Montana, v. United States, 450 U.S. 544, 551 (1981).

308. U.S. CONST. art. I, § 8, cl. 3; *see also Wisconsin v. EPA*, 266 F.3d at 747.

309. *Wisconsin v. EPA*, 266 F.3d at 747 (citing California v. Cabazon Band of Mission Indians, 480 U.S. 202, 207 (1987)).

310. EPA Office of Water, Office of Wastewater Management, *State and Tribal Program Issues, at* http://cfpub.epa.gov/npdes/statestribes/issues.cfm?program_id=12 (last modified Feb. 21, 2001); *see also* Arkansas v. Oklahoma, 503 U.S. 91, 103 (1992).

311. *Wisconsin v. EPA*, 266 F.3d at 747.

rulemaking, the EPA determined section 518(e) of the CWA intended only to recognize authority that the tribe already possessed; not to grant any new authority.[312] Wisconsin argued that any grant of authority to the Band over reservation waters would be extending *new* authority to the Band rather than simply recognizing *preexisting* jurisdiction. So, the issue is not whether the federal government can simply let the tribe do what the federal government could; the issue here is whether the tribe possessed inherent authority over the reservation waters to begin with. Although, in the next section of its opinion, the court recognized that the EPA does not consider section 518(e) an express grant of authority, the court's brief statement concerning federal delegation could be construed as an internal inconsistency in the opinion.

Read practically though, Judge Wood's statement simply calls Wisconsin's bluff concerning the Equal Footing Doctrine. If title to, and exclusive control over the reservation waters truly passed to the state under the Equal Footing Doctrine, regulation of the water would even be beyond federal power.[313] But, Wisconsin admits the federal government *can* regulate its waters (without any act of divestiture), and therefore simultaneously admits that the power over overlying waters could not have been part of the rights and powers granted to the states under the Equal Footing Doctrine. Such regulation falls under the Commerce Clause and exceeds the jurisdiction of the original thirteen states.[314] Accordingly, asserting title and control to overlying waters was received (and) granted (or) vested at the time of statehood as a defense to a tribe's inherent authority over reservation waters lacks merit.

3. Inherent Authority Over Off-Reservation Activities

The court of appeals next dealt with Wisconsin's argument "that the Band did not make the required showing of authority over those activities potentially affected by its imposition of water quality standards."[315] Wisconsin argued the Band could not establish its inherent authority over extraterritorial activity such as the upstream mine, because *Montana* only applies to on-reservation activities of non-members. Wisconsin believed a tribe could only establish its inherent authority by showing that impairment of the reservation's waters *from*

312. Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,876, 64,880 (Dec. 12, 1991) (emphasis added) (codified at 40 C.F.R. pt. 131).

313. Wisconsin's argument is that title to the overlying waters was granted to the state with the title to the submerged lands. If such title to the waters was of equivalent quality to that of the submerged lands, *Pollard* and its progeny would dictate that a state's title to the *waters* is "absolute" and neither a provision in the Act admitting the state to the Union nor a grant from Congress to a third party (i.e., an Indian tribe) is capable of defeating a state's title to the waters. *See* Oregon *ex rel.* State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 374 (1977).

314. *See generally* United States v. Gardner, 107 F.3d 1314, 1318-19 (9th Cir. 1996).

315. *Wisconsin v. EPA*, 266 F.3d at 748.

on-reservation activities would affect the political integrity, the economic security, or the health or welfare of the tribe.

The court's responses to this position prove it unavailing. First and foremost, Wisconsin ignored that Congress permits a tribe to receive "Treatment as a State" status. Such designation gives a tribe all of the rights and powers of a state for approved purposes under the CWA. The holding in *Arkansas v. Oklahoma* and the EPA's regulations instruct that upstream discharges must comply with downstream states' water quality standards. The lesson of *Albuquerque v. Browner* is that a TAS tribe is not a second-class sovereign but is treated as a full-fledged state under the CWA. Accordingly, upstream extraterritorial activities must comply with a downstream TAS tribe's water quality standards. Thus, by enacting section 518(e), Congress created an express statutory provision that allows TAS tribes the ability to regulate reservation waters even if extraterritorial activities are affected.

Wisconsin's argument that the Band has not shown inherent authority over extraterritorial activities (and it never could because its authority only extends to non-members *within* reservation boundaries) puts the cart before the horse. The Band sought to regulate the water quality standards of the reservation, not the activity of the upstream mine or any other facility. It is only *after* the Band shows it has authority to regulate the *reservation* waters that its water quality standards are imposed on upstream dischargers—not the other way around. Extraterritorial jurisdiction is not relevant in considering inherent authority in the first instance, but is simply a side effect arising from the grant of TAS designation. In addition, "[t]here is no case that expressly rejects an application of *Montana* to off-reservation activities that have significant effects within the reservation."[316] A TAS applicant need only establish inherent authority over the regulation of reservation waters by showing that: "(1) there are waters within the reservation used by the tribe, (2) the waters and critical habitat are subject to protection under the CWA, and (3) impairment of waters would have a serious and substantial effect on the health and welfare of the tribe."[317] A tribe need not demonstrate authority over *off-reservation activity* to satisfy any of these elements.

Second, and further evidencing that off-reservation effects are irrelevant in the TAS application stage, is that Congress mandated establishment of a dispute resolution mechanism to work out "unreasonable consequences" arising from different water quality standards set by states and tribes on the same waterbody.[318] The EPA established such a system. It is hard to conceive why Congress recognized this issue and required a transboundary dispute-solving device it if did not anticipate that a TAS tribe's water quality standards could restrict certain off-reservation activities.[319]

316. *Id.* at 749.
317. Montana v. EPA, 137 F.3d 1135, 1139 (9th Cir. 1998).
318. 33 U.S.C. § 1377(e) (1994).
319. *Wisconsin v. EPA*, 266 F.3d at 749.

Third, the court pointed out that a TAS tribe is still subservient to the EPA's decisions concerning national water pollution control. Under the CWA, a downstream TAS tribe's only recourse is to apply to the EPA Administrator when it is unhappy with the allowance of an upstream discharge; it cannot veto an upstream activity.[320] Indeed, it is the EPA—not the tribe or the state—requiring upstream compliance with downstream water standards.[321] The EPA's *regulations* prohibit issuance of permits that could cause downstream water quality standard violations.[322] The EPA could easily amend its regulations, allow for variances,[323] or use the dispute resolution mechanism to allow an upstream discharge that may otherwise violate downstream water quality standards. The ultimate authority remains with the federal government and a TAS tribe receives no more than any other approved state under the CWA.

Finally, an underlying difficulty with Wisconsin's stance from the outset was that it "conceded that the waters within the Band's reservation are very important to the Band's economic and physical existence."[324] In the court's view, this concession turned Wisconsin's argument into the following: "we acknowledge that the Band would have inherent authority over reservation waters *but for* our title to and control over the submerged lands and the overlying waters, and a tribe's inability to regulate non-members outside the reservation." Once the court refuted Wisconsin's two primary objections to inherent authority, it was left with Wisconsin's admission that the impairment of waters would have a serious and substantial effect on the health and welfare of the tribe. Wisconsin should not be faulted for such a position; a contrary argument would surely have been disingenuous.

V. IMPLICATIONS

There are 554 federally recognized Indian tribes in the United States.[325] In the 1990 census, the federal government recognized 278 Indian land areas as reservations.[326] Some reservation areas include significant acreage. For instance, "the Navajo Reservation consists of some 16 million acres in Arizona, New Mexico, and Utah."[327] Such

320. Arkansas v. Oklahoma, 503 U.S. 91, 100 (1992) (citing International Paper Co. v. Ouellette, 479 U.S. 481, 490-91 (1987)). A TAS tribe also may also submit comments and recommendations to the permitting state and the EPA with respect to any permit application being considered. 33 U.S.C. § 1342(b)(5).

321. *Arkansas v. Oklahoma*, 503 U.S. at 106.

322. 40 C.F.R. § 122.41 (2001).

323. *See supra* note 117.

324. *Wisconsin v. EPA*, 266 F.3d at 750.

325. EPA Office of Water, American Indian Environmental Office, *Tribal Environmental and Natural Resource Assistance Handbook, at* http://www.epa.gov/indian/tribhand.htm.

326. EPA Office of Water, American Indian Environmental Office, Resource Guide, *Chapter One: Understanding Native Americans, at* http://www.epa.gov/indian/resource/chap1.htm.

327. *Id.*

numbers make clear that the widespread grant of TAS designation to tribes to administer water quality standards could potentially have an enormous impact on the functioning of the CWA throughout the United States. Furthermore, while reservation land is spread throughout the country, the vast majority of reservations are concentrated in the western states and Alaska.[328] The western states are historically where the most intense disputes have arisen over water regulation due to the constant supply and demand problems associated with the climate and topography.[329] The patchwork of reservation land in the West comes with the potential for a collage of different water quality standards set by TAS tribes—a virtual guarantee of transboundary conflicts. Thus, a whole new saga in the storied water battles of the West may find a stage in section 518(e) of the CWA. Of course, although perhaps more pronounced in the West, transboundary conflicts may play out in any of the fifty states where TAS tribes are located (e.g., Wisconsin). Complications that arise from empowering more tribes with regulatory power under the CWA are not hard to envision.

The implications of the Seventh Circuit's holding in *Wisconsin v. EPA* concern the *prelude* to water quality conflicts between tribes and states; the TAS designation process itself. That is, the court's opinion helps set the tone concerning tribes' ability to obtain TAS status in the first instance, thus enabling them to become sovereign players in the CWA and assert their authority. Specifically, this article addresses two likely implications of the Seventh Circuit's holding. First, more tribes will apply for and receive TAS status to administer water quality standards. And second, opposition by governmental entities to TAS designation to administer water quality standards will be virtually futile. These predictions are reviewed in more detail below.

A. "TREATMENT AS A STATE" DESIGNATIONS TO ADMINISTER WATER QUALITY STANDARDS WILL INCREASE

The threshold determinant of the potential ramifications of section 518(e), and its accompanying regulations, is how many Indian tribes are going to apply for and obtain TAS designation to set water quality standards. Clearly, the easier it is for tribes to obtain TAS status, the more likely it is that additional tribes will apply for such designation.[330] Indian tribes often have limited personnel and

328. "Four states (all in the West) have Indian populations of 100,000 or more: Oklahoma, California, Arizona, and New Mexico. The six states where Native Americans make up 5 percent or more of the total population are Alaska, New Mexico, Oklahoma, South Dakota, Montana, and Arizona." *Id.*

329. *See generally* Betsy Cody, *Western Water Resource Issues*, Congressional Research Service Reports, *at* http://www.cnie.org/NLE/CRS/abstract.cfm?NLEid=16352.

330. Such logic is subject to the caveat that resource limitations faced by many tribes may dissuade them from applying for TAS status irrespective of their anticipated ability to obtain such designation. *See supra* text accompanying note 140. Conversely, due to the extreme importance of water resources to many reservations, some tribes may pursue TAS status no matter how difficult the fight or how high the costs.

resources to deal with environmental matters[331] and pursuing TAS designation would seem more appealing when there are fewer obstacles (i.e., less expenditure of resources) to its attainment.[332] Thus far, this article has described some of the ways it has been made easier for tribes to show that hey have sufficient inherent authority over reservation waters to receive TAS designation. In addition, this article has discussed some of the obstacles facing a governmental entity in opposing a tribe's assertion of authority during the TAS application phase or when seeking judicial review of the EPA's grant of TAS designation. In combination, these two observations appear to tip the scale in favor of tribal regulatory authority despite competing claims of jurisdiction from "appropriate governmental entities."

The state of Wisconsin would claim that this characterization is a drastic understatement of the practical realities of the TAS designation process. Although never addressed by the court of appeals' opinion, Wisconsin had vehemently argued this point in its briefs. Wisconsin pointedly asserted that the "TAS application process is designed to lead to a predetermined result—the granting of tribal applications for treatment as a state."[333] According to Wisconsin, the EPA's proclamation that it would examine each tribal claim of authority on a "case-by-case basis" was nothing but lip service, and upon application by a tribe for TAS status, a finding of tribal authority over reservation waters was a forgone conclusion.

---

331. *See* EPA Office of Water, American Indian Environmental Office, *Tribal Environmental and Natural Resource Assistance Handbook, at* http://www.epa.gov/indian/tribhand.htm.

> Many tribes have limited environmental staffs that are faced with the challenge of addressing a broad range of environmental issues. Unlike state environmental programs that have received annual federal funding for many years, Tribal environmental programs generally must compete annually for their funds. . . . Therefore, Tribal environmental staffs spend a large part of their time applying for grants and searching for sources of federal assistance.

Id.

332. In addition, population trends and industrial development may make it more important than ever for a tribe to assert control over its water resources. The EPA notes that population studies indicate Indians are not shifting away from reservation areas, Indian populations are growing, and more than half of tribal lands now have at least as many non-Indians as Indians residing there. The Agency observed:

> There are two interesting implications of this information for environmental management purposes. First, Native Americans are not leaving their homelands and, in fact, there is a likelihood that these communities will develop to accommodate their increasing numbers. Second, many Native American communities perceive that they have been and are being encroached upon by the larger non-Native American populations. Environmental management will be needed more than ever before to minimize environmental impacts as populations grow. Also, Native American environmental management systems will need to be innovative and creative in accommodating the needs of their Native American and non-Native American populations.

EPA Office of Water, American Indian Environmental Office, Resource Guide, *Chapter One: Understanding Native Americans, available at* http://www.epa.gov/indian/resource/chap1.htm.

333. Brief for Appellant at 10, Wisconsin v. EPA, 266 F.3d 741 (7th Cir. 2001) (No. 99-2618).

Specifically, Wisconsin was troubled by the lack of an honest appraisal by the EPA of a tribe's claim of jurisdiction over reservation waters. Remember, for a tribe to satisfy the second *Montana* exception (i.e., inherent authority) an application for TAS status "will need to make a relatively simple showing of facts"[334] asserting that: (1) there are waters within the reservation used by the tribe; (2) the waters and critical habitat are subject to CWA protection; and (3) impairment of waters would have a serious and substantial effect on the health and welfare of the tribe.[335] Once the tribe meets this initial burden, the EPA will presume, in light of facts presented in the TAS application supplemented by the Agency's generalized findings regarding the relationship of water quality to tribal health and welfare, that there has been an actual showing of tribal jurisdiction and thus, authority to set water quality standards.[336]

According to Wisconsin, this test "create[s] an insurmountable presumption that tribes should obtain TAS status"[337] and is a "test for inherent tribal authority that no tribe can fail."[338] The indignation underlying Wisconsin's assertions stems from what it believes to be the EPA's total disregard of competing claims of jurisdiction over reservation waters despite the Agency's policy "on paper" to seek out and consider input on the subject. In Wisconsin's view, the test implemented by the EPA belies any Agency intent to consider competing claims of jurisdiction. The only way a state could overcome the EPA's presumption of tribal inherent authority would be to show "that a reservation contains no water that is used by tribal members."[339] Such a showing would be virtually impossible for a state to make.

It seems that Wisconsin's observations are not completely unfounded hyperbole. A careful reading of TAS regulations, rulemaking proceedings, and EPA policy statements expressed in various administrative publications support the position that everything will be done to ensure an applicant tribe will receive TAS status. Primarily, as discussed above, the EPA starts with the presumption a that tribe will have inherent authority over reservation waters. The Agency has assembled a collection of conclusions which, despite being innocuously labeled as "generalized findings," are in fact virtual proclamations that tribes will *always* possess authority to regulate reservation waters. The EPA attempts to mitigate the impact of the generalized findings' determinative quality by stating that the findings will simply *supplement* a tribe's factual showing in its TAS application. However, in the same breath, the Agency admits a

334. Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,876, 64,879 (Dec. 12, 1991) (codified at 40 C.F.R. pt. 131).

335. *Id.*

336. *Id.*

337. Brief for Appellant at 16, Wisconsin v. EPA, 266 F.3d 741 (7th Cir. 2001) (No. 99-2618).

338. *Id.*

339. *Id.* at 40.

sufficient showing of facts will be "relatively simple."[340] With the question of TAS authorization turning on whether a tribe has inherent authority over the reservation waters, how can the EPA's standards lead to any result but a grant of TAS designation?

Tribes that desire to chart the destiny of their water resources have a helping hand in the EPA because the Agency has an institutional predilection for tribal administration of water quality standards. More tribes will apply for TAS status because its bestowment by the EPA is virtually guaranteed. For those incredulous as to the existence of such a policy, one need only read the EPA's own words:

> Qualifying for administration of the water quality standards program is optional for Indian Tribes and there is no time frame limiting when such application can be made. *As a general policy, EPA will not deny a tribal application.* Rather than formally deny the tribe's request, EPA will continue to work cooperatively with the tribe in a continuing effort to resolve deficiencies in the application or the tribal program *so that tribal authorization may occur.* EPA also concurs with the view that the intent of Congress and the EPA Indian Policy is to *support tribal governments in assuming authority to manage various water programs.*[341]

Such policy statements send a clear signal to both tribes and interested governmental entities that when a tribe submits a TAS application to administer water quality standards, the EPA is hardly a neutral decision-maker weighing the application against any competing claims of jurisdiction.[342] Instead, the Agency's institutional predisposition is

---

340. Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations, 56 Fed. Reg. at 64,879.

341. EPA Water Quality Standards Branch, *Water Quality Standards Handbook Second Edition* (Sept. 1993 & Update Aug. 1994), *available at* http://www.epa.gov/waterscience/library/wqstandards/handbook.pdf (emphasis added); *see also* Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations, 56 Fed. Reg. at 64,884 ("the provision allowing appropriate governmental entities to comment on tribal assertions of authority is not intended as a barrier to Tribal program assumption."); *see id.* at 64,881 ("the Agency presumes that, in general, Tribes are likely to possess the authority to regulate activities affecting water quality on the reservation."); *see id.* at 64,888 ("Although *EPA believes that tribes should be provided every opportunity to regulate water quality and to participate in environmental control programs,* during dispute resolution actions the appointed mediator/arbitrator will act first and foremost as a neutral facilitator of discussions between parties.") (emphasis added); *see id.* at 64,879 (A tribal application for TAS status "will need to make a relatively simple showing of facts.").

342. In an effort to drive home its claim of EPA "bias" in the TAS designation process, Wisconsin explained that EPA officials had gone so far as to engage in criminal conduct to defeat Wisconsin's competing claims of jurisdiction over waters of other reservations in the state. When *Wisconsin v. EPA* was initially filed in the district court, it was consolidated with four other cases where Wisconsin was challenging the EPA's decisions granting TAS status to two additional tribes: the Menominee and Oneida. During the discovery phase of the consolidated cases, evidence surfaced that EPA officials had backdated EPA documents pertaining to the TAS applications of the Menominee and Oneida tribes and then falsely testified on multiple occasions about having done so. This was done by the EPA officials, Wisconsin explains, to "bolster the administrative records and thereby defeat Wisconsin's claim of sovereignty over waters

to encourage tribal applications for TAS status, and, once received, make sure they are approved.

So it would seem that applying for TAS status to administer water quality standards would be an efficient use of limited tribal resources allocated for environmental protection. Water is traditionally one of the most important environmental aspects of Indian reservations and an integral part of many tribes' heritage. Therefore, reservation water quality likely ranks high on the environmental priority list of many tribes.[343] The EPA has made the path to obtaining TAS designation for administering water quality standards one of little resistance; or perhaps more accurately, one where a tribe will be assisted until it reaches its destination.[344] As verified by the Seventh Circuit in

---

within Wisconsin's Indian reservations." Brief for Appellant at 3-4, 13, 16-18, Wisconsin v. EPA, 266 F.3d 741 (7th Cir. 2001) (No. 99-2618).

Consequently, a federal grand jury indicted Marc Radell, an Associate Regional Counsel of the EPA, and Claudia Johnson, the Region V Tribal Coordinator/Program Manager. Ms. Johnson died before the disposition of the case against her. However, Mr. Radell pleaded guilty to contempt of court for his actions and admitted the factual analyses in the records of the Oneida, Menominee, and Lac du Flambeau (another TAS tribe) cases did not exist at the time of the TAS decisions. He also admitted that he had filed false affidavits and had testified falsely at his deposition to conceal the fabrication of the administrative record. *Id.*

As a result, the EPA withdrew previously granted TAS designations to the Oneida and Lac du Flambeau tribes and the Menominee tribe voluntarily relinquished its TAS status. The Mole Lake Band's application was not affected, however, because "there was no similar factual findings document in the record of the Band's application." Without evidence of wrongdoing pertaining specifically to the Band, the original TAS designation remained in effect and the case proceeded. *Id.* at 13.

This chain of events certainly legitimizes suspicions that, in practice, the EPA's process for determining whether a tribe has inherent authority over reservation waters means nothing; approval of a TAS application is inevitable. After all, why would government employees, including an attorney, with seemingly no personal interest at stake conduct such malfeasance? Wisconsin reasonably argues it is a result of the EPA's institutional bias in favor of granting TAS applications under all circumstances. However, while such arguments are extremely interesting and intuitively reasonable, they are only of peripheral relevance to the situation in *Wisconsin v. EPA.* Wisconsin apparently does not dispute the finding that there was no misconduct with respect to the Band's application. To impute a type of "character evidence" from the malfeasance involved with a few tribal applications to the entire application and designation process (including the Band's application) would be legally dubious. The court of appeals did not even address these matters in its opinion.

343. *See, e.g.,* Mni Sose Intertribal Water Rights Coalition, *at* http://www.mnisose.org. The EPA's American Indian Environmental Office also helps tribal environmental managers make decisions on environmental priorities for the reservation and provides for EPA implementation assistance for environmental programs. EPA Office of Water, American Indian Environmental Office, *Mission & EPA Contacts, available at* http://www.epa.gov/indian/miss.htm.

344. *See* EPA Office of Water, American Indian Environmental Office, Resource Guide, *Chapter Three: EPA's Approach to Environmental Protection in Indian Country, at* http://www.epa.gov/indian/resource/chap3.htm

> [T]he Agency will recognize tribal governments as the primary parties for setting standards, making environmental policy decisions, and managing programs for reservations, consistent with Agency standards and regulations; *and as impediments in our procedures, regulations, or statutes are identified that limit our ability to work effectively with tribes consistent with this Policy, we will seek to remove those impediments.* (emphasis added).

Id. The mission of the American Indian Environmental Office within the EPA's Office

Wisconsin v. EPA, a tribe need not be concerned that its efforts in obtaining TAS status will be for naught because extreme deference will be afforded the EPA in any judicial review of its decision.

B. GOVERNMENTAL ENTITY CHALLENGES TO "TREATMENT AS A STATE" DESIGNATION: A FUTILE EXERCISE?

If more tribes apply for and receive TAS designation to administer water quality standards, then there may be a proportionate number of competing claims of jurisdiction over reservation waters by governmental entities. By this point, it should be clear that this article forecasts that opposition to tribal TAS applications will be futile. Three main points can be deduced from *Wisconsin v. EPA*: EPA approval of a TAS application is virtually guaranteed, courts will defer to Agency discretion, and almost all conceivable legal challenges by an "appropriate governmental agency" have been foreclosed.

The court of appeals, however, attempted to leave a glimmer of hope for other legitimate and successful challenges to TAS designation. In its conclusion, the court stated:

> We have no occasion to say whether, on a different set of facts, the EPA might extend the notion of a tribe's "inherent authority" to affect off-reservation activities so far as to go beyond the standards of the statute or the regulations. If it ever arises, that will be another case, for another day.[345]

It is, however, extremely difficult to envision the "day" and the "case" to which the court alludes. If the court was referring to an egregious hypothetical situation where the EPA is allowing a tribe to exercise extraterritorial jurisdiction over an activity completely unrelated to political integrity, economic security, or health or welfare of the tribe, then, of course, the court could halt such a warped application of the *Montana* test. But, in the more pragmatic context of TAS designation to tribes for section 303 and 401 purposes, the Seventh Circuit has foiled realistic challenges by governmental entities to the EPA's decisions. The court not only gave substantial deference to EPA determinations, but, more importantly, squarely and convincingly rejected what may have been the only viable legal arguments for contesting a TAS designation to administer water quality standards.

A brief reflection on the arguments presented by Wisconsin and rejected by the court is in order. First, Wisconsin argued that Rice Lake was not within the borders of the Band's reservation boundaries.[346] Although this argument was waived, the court still

---

of Water is to coordinate the "*Agency-wide effort* to strengthen public health and environmental protection in Indian Country, with a *special emphasis* on building Tribal capacity to administer their own environmental programs." EPA Office of Water, American Indian Environmental Office, *Mission & EPA Contacts*, *at* http://www.epa.gov/indian/miss.htm (emphasis added).

345. Wisconsin v. EPA, 266 F.3d 741, 750 (7th Cir. 2001).

346. *Id.* at 746.

spoke to it and decided that the EPA could reasonably conclude that Rice Lake was sufficiently within the reservation's borders.[347] Second, the court repudiated Wisconsin's claim that the Equal Footing Doctrine vested the state with title to and exclusive control over submerged lands and overlying waters within the reservation's borders well before the reservation was created.[348] Wisconsin argued that its title made it impossible for the Band to have inherent authority over the reservation waters because the EPA construed section 518(e) as only recognizing *preexisting* authority of tribes and Wisconsin was admitted to the Union before creation of the reservation. This legal argument is complicated and troubling until it is understood that the Equal Footing Doctrine concerns only the "shores of and lands beneath navigable waters"[349] and in no way limits "the broad powers of the United States to regulate the navigable waters under the Commerce Clause."[350] That is, the court rejected the assertion that a state receives title to *overlying waters* under the Equal Footing Doctrine. The court also refuted Wisconsin's contention that the Band could only establish its inherent authority over reservation waters by showing that impairment of waters from *on-reservation activities* would affect the political integrity, economic security, or health or welfare of the tribe. In rejecting this somewhat backwards argument, the court of appeals recognized that extraterritorial jurisdiction is not relevant in considering a tribe's inherent authority over reservation waters in the first instance, but is only a side effect arising from a *grant* of TAS designation. Furthermore, as explained in *Arkansas v. Oklahoma*, neither TAS tribes nor states truly exercise extraterritorial jurisdiction under the CWA. Rather, it is the *federal government* (pursuant to the EPA's regulations) that requires upstream states to comply with downstream water quality standards. Finally, it should not be forgotten that an underlying fundamental precept here is that the federal government is vested with exclusive authority over relations with Indian tribes.

The points argued by Wisconsin raised substantial questions of law. And, although this article's position is that the Seventh Circuit accurately disposed of the issues—Wisconsin's contentions were formidable. So formidable that it is difficult to conceive of a stronger challenge a state could mount in opposition to a TAS designation. Is there really a factual scenario, as the court of appeals muses, which could give rise to a different result?[351] What feasible argument is left

347. *Id.*

348. *Id.* at 746-47.

349. *Id.* at 747 (internal quotations omitted).

350. *Wisconsin v. EPA*, 266 F.3d at 747 (internal quotations omitted).

351. In briefly exploring this question, this article assumes that a court would scrutinize and likely reverse absolutely outrageous designations of TAS status. For instance, if a tribe were to apply for and receive TAS status to set water quality standards for a lake located 300 miles outside the reservation borders (and completely unconnected through waterways to the reservation), it can be safely assumed that a successful challenge could be brought. Here, this article will give credit to the tribes

for a governmental entity seeking review of a TAS designation to administer water quality standards?

1. The Waterbody Is Not Navigable

One possibility may be for a state to aver the waterbody or bodies a tribe seeks to regulate are not "navigable waters." As discussed above, the federal government's broad Commerce Clause jurisdiction creates an ever-present dominant navigable servitude over the navigable waters of the United States. Indeed, the CWA itself is borne of such authority.[352] However, the Supreme Court made clear that "the grant of authority to Congress under the Commerce Clause, though broad, is not unlimited."[353] In *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, the Supreme Court clarified that the phrase "navigable waters" as used in the CWA carries significant meaning. In that case, the Army Corps of Engineers ("Corps") denied a consortium of Chicago municipalities a permit to fill some seasonal and permanent ponds created by abandoned gravel mining pits. The Corps claimed it had jurisdiction to issue fill permits for the ponds because the ponds met the definition of "navigable waters" found in the Corps' regulations and because migratory birds that "crossed state lines" were using the ponds.

The Court disagreed that the Corps had jurisdiction over the ponds in the abandoned gravel pits. The Court acknowledged that under the CWA, Congress "evidenced its intent to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term,"[354] but, this did not make the term "navigable" devoid of meaning. According to the Court, the term "has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could be reasonably so made."[355] However, the isolated ponds formed in the gravel pits were not adjacent to navigable waters or "inseparably bound up with the waters of the United States."[356] As a result, the Court concluded that the ponds were not navigable waters under the CWA subject to the Corps' jurisdiction. The fact that migratory birds used the ponds could not be used by the Corps to bootstrap regulatory jurisdiction under the Commerce Clause. Specifically, the court refused to hold that "isolated ponds, some only seasonal, wholly located within two Illinois counties, fall under § 404(a)'s definition of 'navigable waters'

and the EPA and avoid such "improbable hypotheticals." Nixon v. United States, 506 U.S. 224, 238 (1993) (Stevens, J., concurring).

352. *See supra* text accompanying note 287.

353. Solid Waste Agency v. United States Army Corps of Eng'rs, 531 U.S. 159, 173 (2001) (citing United States v. Morrison, 529 U.S. 598 (2000); United States v. Lopez, 514 U.S. 549 (1995)).

354. *Id.* at 167 (citing United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 133 (1985) (internal quotations omitted).

355. *Id.* at 172.

356. *Id.* at 167 (internal quotations omitted).

because they serve as habitat for migratory birds."[357] Moreover, the Court explained that "[p]ermitting [the Corps] to claim federal jurisdiction over ponds and mudflats falling within the 'Migratory Bird Rule' would result in a significant impingement of the States' traditional and primary power over land and water use."[358]

This leaves open the possibility that a state could claim that TAS jurisdiction could not be given to a tribe for a waterbody within the reservation which is akin to an isolated pond not adjacent to navigable waters and not "inseparably bound up with the waters of the United States." In *Wisconsin v. EPA*, Judge Wood specifically noted that "here no one disputes that the waters at issue are 'navigable waters' for purposes of either the [CWA] or the Commerce Clause."[359] Thus, a clear inference can be drawn that a set of facts that raises significant doubts concerning the navigability of waters a tribe seeks to regulate may lead to an effective challenge of TAS designation.

In the final analysis, however, a "navigability" challenge would seem an unlikely scenario. First, it would seem less likely that a tribe would apply for TAS designation over completely isolated water bodies in the first instance. This may not be an effective allocation of the tribe's limited resources dedicated to environmental protection. Protecting reservation waters from transboundary pollution is the major impetus for tribes seeking power over its water quality standards. If a waterbody is truly isolated and not connected to navigable bodies of water, it is unlikely that transboundary water pollution will be a major concern. Second, if one gives even a modicum of credit to the EPA, one would anticipate the Agency might filter out TAS designation claims for waters not falling under the jurisdiction of the CWA. This is a situation where one may expect the EPA would assist a tribe with its TAS application by dissuading requests for jurisdiction over non-navigable waters in favor of navigable water bodies. Third, it is questionable whether a state would care whether a tribe received TAS status over a non-navigable waterbody within reservation boundaries.[360] If the waterbody was truly isolated from the other waters of the state, then even extremely strict water quality standards for that waterbody would have no restrictive effect on discharges outside the reservation because there is nothing "upstream" from an unconnected waterbody.

Finally, even if a tribe receives TAS status over a non-navigable waterbody within reservation boundaries and the state protests, there may be a standing issue. As the Seventh Circuit pointed out, "state laws may usually be applied to Indians on their reservations only if

357. *Solid Waste Agency*, 531 U.S. at 171-72.

358. *Id.* at 174.

359. Wisconsin v. EPA, 266 F.3d 741, 747 (7th Cir. 2001).

360. On the other hand, if a state owns fee lands within reservation borders or has an interest in a private property owner of fee lands within the reservation, a restriction on non-navigable waters that hinders use of the land may give rise to a jurisdictional dispute.

Congress so expressly provides."[361] So, even if the waterbody was not navigable for purposes of the CWA, and a tribe should not have received TAS status for it, if it is located within reservation boundaries it is questionable whether the state could enforce its own laws concerning the water in the first place.[362] For these reasons, while contesting TAS status for a tribe to administer water quality standards of a non-navigable waterbody may still be an open avenue, the practical reality is that the likelihood of success is probably minimal.

2. Impairment of a Reservation Waterbody Will *Not* Have Serious and Substantial Effects on the Political Integrity, Economic Security, or Health or Welfare of the Tribe.

Another more obvious, albeit similarly restrictive, route for a state to take is to argue that impairment of the waterbody or bodies a tribe seeks to regulate will not have serious and substantial effects on the political integrity, economic security, or health or welfare of the tribe. In other words, a state could attempt to show the waterbody simply has no value to the tribe and any degradation of it would have no detrimental effect on the tribe whatsoever. Recall that one of the ways Judge Wood distinguished *Wisconsin v. EPA* from *Wisconsin v. Baker* is that the Chippewa Tribe in *Baker* did not claim the conduct it sought to regulate (public fishing and hunting) posed a threat to the political integrity, economic security, or health or welfare of the tribe. In *Wisconsin v. EPA*, both parties conceded that the waters within the Mole Lake Reservation "are very important to the Band's economic and physical existence."[363]

Similarly, in the context of a TAS designation, if a tribe fails to articulate how impairment of the waters it seeks to regulate will adversely impinge on the political integrity, economic security, or health or welfare of the tribe, a state may have a strong basis to contest an EPA grant of TAS status. Since the EPA's generalized findings ostensibly will be used only to supplement the tribe's factual showing of inherent authority, a complete failure by a tribe to present facts elucidating the importance of reservation waters to the tribe should be insufficient to receive TAS status. However, rather than a total failure by the tribe to provide, and the EPA to require, a sufficient factual showing, the more likely circumstances in which a state would lodge this type of challenge is when it believes a tribe is overstating the importance of the reservation waters it seeks to regulate. That is, no matter how useless or remote the waterbody, a tribe would always aver that any impairment thereof would harm the political integrity, economic security, or health or welfare of the tribe.

While taking the position that a tribe has misstated or the EPA has

361. *Wisconsin v. EPA*, 266 F.3d at 747.

362. A response to this argument is that, notwithstanding the state's inability to set standards for reservation waters, the state would still prefer federal standards to be used rather than those set by the tribe.

363. *Wisconsin v. EPA*, 266 F.3d at 750.

misconstrued the true significance of reservation waters may lead to spirited debate about who is best equipped to answer such a question, the ultimate result will likely be the same: the challenging state will be unsuccessful. First, as a practical matter, it would seem less likely that a tribe would waste its time and limited resources in applying for TAS designation for water bodies that are completely irrelevant to it. Similarly, if TAS status were granted, the tribe would be dedicating its valuable regulatory assets to something inconsequential to the tribe.

In addition, courts will trust the EPA to make decisions concerning the importance of reservation waters. Given the deferential standard of review of TAS decisions, a court would be hard-pressed to substitute its judgment in favor of the Agency's in a sensitive area such as the significance of reservation waters to tribes. Absent egregious malfeasance by the EPA,[364] the Agency will be considered the more capable arbiter as to the consequences arising from impairment of tribal water resources.

It is also difficult to conceive a factual scenario where a reservation waterbody would be considered irrelevant to the tribe. Given the breadth of the EPA's "generalized findings regarding the relationship of water quality to tribal health and welfare,"[365] and the undemanding factual showing a tribe must make, virtually any waterbody located within the reservation would have *some* effect on the tribe if impaired. Even if a tribe does not consistently use the waterbody, is not dependent on it for water, food, or materials, or the water is already polluted; the traditional relationship between the waterbody and the political integrity, economic security, or health or welfare of the tribe is not necessarily disconnected. It must be considered that "[N]ative Americans have . . . views that are very different from mainstream world views and that what happens to land and resources matters a great deal to Native Americans."[366] Indians generally believe that all resources on their homelands are essential and interconnected, and thus, it would be very difficult to posit that certain water bodies lack the requisite importance for a tribe to obtain authority over them. "In non-Indian parlance, traditional [Indian] wisdom is *systems thinking.* It is a discipline for seeing wholes, recognizing patterns and interrelationships, and learning how to structure human actions accordingly."[367] Therefore, it would be repugnant to Indian heritage for a state challenging TAS designation to attempt a division of reservation water resources into those whose impairment would be

364. *See supra* note 342.

365. Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,876, 64,879 (Dec. 12, 1991) (codified at 40 C.F.R. pt. 131); *see also* Montana v. EPA, 137 F.3d 1135, 1139 (9th Cir. 1998).

366. EPA Office of Water, American Indian Environmental Office, Resource Guide, *Chapter One: Understanding Native Americans, at* http://www.epa.gov/indian/resource/chap1.htm.

367. *Id.* (citing NATIVE HERITAGE, PERSONAL ACCOUNTS BY AMERICAN INDIANS 1790 TO THE PRESENT xix-xxii (Arlene Hirschfelder ed., 1995)).

significant to a tribe's way of life and those whose impairment would have no serious impact.

Nevertheless, there could be factual circumstances where a state could make a compelling argument that it was arbitrary and capricious, or otherwise contrary to law, for the EPA to grant TAS status for certain reservation waters. For example, what if there was a small navigable lake located on the outskirts of a reservation's boundaries that the tribe had explicitly or impliedly "disowned" on the day the reservation was created? The tribe constructed a barrier to the lake so no one on reservation land could gain access to it and it was never used for drinking, hunting, fishing, materials, industry or Indian rituals. So, although the lake was within the reservation boundaries, for all intents and purposes it was detached from the tribe's use and way of life. Furthermore, the lake is connected by rivers to upstream states, but is not connected by waterway to other water bodies in the reservation. The tribe then applies for and receives TAS status to administer water quality standards for the cordoned-off lake. In this situation, a state may have a legitimate, fact-based argument that TAS designation was improvidently granted because impairment of the lake's water quality would not have substantial or serious effects on the political integrity, economic security, or health or welfare of the tribe.

Such hypotheticals, while not impossible, do seem extreme. In addition, the state will encounter similar problems discussed above in the context of a navigability challenge. Again, it would be doubtful that a tribe would expend its resources on waters without relevance to it. And, of course, a court will generally trust the EPA's reasonable scrutiny of such circumstances, especially when the facts are on the margin. There would be other hurdles as well; one would be establishing a genuine schism between the waterbody and the health and safety of the tribe. For instance, even if no surface waters connect the lake to other water bodies or lands the tribe utilizes, it is very possible that contamination of the cordoned-off lake could have a groundwater effect potentially reaching drinking water, crops, and other water bodies.

Furthermore, just because the tribe has chosen to detach itself from the waterbody does not necessarily mean that it did not have preexisting authority over it. Similarly, it does not mean the tribe will not choose to utilize the water in the future for economic growth, food and water, or other purposes. While the test for inherent authority over reservation waters examines whether their impairment may seriously or substantially affect the political integrity, economic security, health or welfare of the tribe, there is no requirement that it be the tribe's *current* political integrity, economic security, health or welfare. Such a requirement would be counterintuitive to the whole rationale of preventing harm to the waters before it happens. The point is that even in the unlikely event that it could be genuinely shown that the impairment of a reservation waterbody is *currently* inconsequential to a tribe, a detrimental effect on the tribe's future utilization of the water resource may be sufficient for the tribe to

establish inherent authority.[368] In any event, should such strange scenarios arise, a challenging state will wage its word against the EPA's and the tribe's as to whether the impairment of a reservation waterbody *really* would be germane to the tribe. A state taking such a stance would be wise to have a sound factual basis to avoid not only quick defeat in the courts, but also an appearance of offensive presumptuousness.

In sum, it appears that most of the strictly legal arguments a state would use to contest a TAS designation, especially in the course of judicial review of the EPA's decisions, have been foreclosed. The little room left by the Seventh Circuit to contest TAS designation revolves primarily around very specific factual situations, and even then, provides little assurance that such challenges will bear any fruit. The inexorable bottom line is that, absent entirely novel factual circumstances, state opposition to the grant of TAS status to a tribe to administer reservation water quality standards is futile.

VI. AN ALTERNATIVE APPROACH – WATERSHED MANAGEMENT

Although it is beyond the scope of this article to expound thoroughly upon possible alternative approaches to water regulation in the United States, it would be remiss to conclude without at least superficially touching upon the subject. After all, this article foretells the coming of a new age in water pollution regulation where numerous Indian tribes apply for, receive, and assert the authority made available to them by Congress in section 518(e) of the CWA and approved by various federal courts of appeal. What if all or a majority of the tribes located on the 278 United States Indian reservations did in fact apply for and receive TAS status to regulate reservation water quality? And what if these TAS tribes set water quality standards with an extremely high level of stringency as anticipated? Such a situation—whether it happens relatively rapidly or at a measured pace—theoretically has the potential to create a national water pollution program with over 328 independent sovereigns setting water quality standards within their borders.[369] Not only would such a situation increase the incidence of transboundary conflicts, but also it would alter the entire character of the CWA. Is this the best way to operate a comprehensive federal statute intended "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters?"

The fundamental problem with this framework is simple—it draws regulatory lines along political boundaries rather than geographic

368. Such an approach raises additional questions such as whether a tribe should be required to explain whether it actually intends to integrate the waterbody in the future or whether it need merely raise the possibility of doing so.

369. Under the CWA, "States" includes states, the District of Columbia, Puerto Rico, the Virgin Islands, Guam, American Samoa, the Northern Mariana Islands, and the Trust Territory of the Pacific Islands. 33 U.S.C. § 1362(3) (1994).

boundaries. This method is incongruous to the character of the regulated resource. The Nation's waters, the lands that surround and affect them, and the sources of their pollution all transcend the political boundaries of states and Indian tribes. Water pollution is an intricate problem. An extremely broad range of chemical, physical, and biological factors causes injury to the country's waters and their aquatic ecosystems.[370] Effective restoration and protection of the water resources in this country are not amenable to easy fragmentation and distribution of regulatory power based simply on each sovereign controlling what will be tolerated within its borders. As aptly stated by one commentator:

> The current structure of the Clean Water Act, which vests regulatory authority in political units unrelated to environmental geography, is fractured along lines that lead away from either good economics or good environmental policy. Moreover, giving tribes the status of states under the Clean Water Act opens the fractures even wider, something the basic principles of ecology and economics would surely counsel against. We do not need *less* integrated planning on a basinwide scale.... Political boundaries are contingencies of human history; we come to geographical boundaries with our hats in our hands.[371]

The EPA acknowledges that while the original framework of the CWA prompted significant progress in improving the country's waters, "[t]oday's problems require more creative, comprehensive solutions."[372] The rigidity of state and reservation borders form inflexible jigsaw-puzzle-like regulation that is simply mismatched to the mobile, multifaceted, and complex water resource.

This mismatch sets the stage for discord among not only states and tribes, but also the many "on the ground" users and influencers of water resources. "By locating regulatory authority along political boundaries—that is, by vesting it in individual states as opposed to a collective association of all affected parties—the Clean Water Act inevitably begets conflicts among upstream and downstream users asserting superior rights."[373] The scale of these conflicts is not trivial. For example, in *Albuquerque v. Browner*, the Isleta Pueblo tribe set its standards for arsenic 1,000 times more stringent than New Mexico's standards, and almost 2,500 times more stringent than the EPA's standard for safe consumption.[374] In addition, the level of the arsenic that occurred naturally in the Rio Grande was above the levels set by the tribe so that even if Albuquerque's wastewater was 100 percent pure when discharged, the arsenic levels in the reservation waters

370. Adler, *supra* note 12, at 204.
371. Harbison, *supra* note 66, at 495.
372. EPA Office of Water, *The Watershed Approach*, *at* http://www.epa.gov/owow/watershed/wa1.html.
373. Harbison, *supra* note 66, at 481.
374. Bilut, *supra* note 129, at 896.

would still have exceeded the tribal standards.[375] To comply with the arsenic standard, Albuquerque would have been "required to build a reverse osmosis tertiary level treatment facility at a capital cost of $250,000,000, with approximately 26 million dollars per year in operating costs."[376] According to Albuquerque, the term "comply" in these circumstances is somewhat misleading because the treatment facility would serve no real purpose. The tribe's arsenic standard was "below levels measurable by modern laboratory equipment [and] the ambient level [of arsenic would] never improve due to the natural background conditions in the groundwater."[377] In the end, however, Albuquerque lost. The point here is that the tensions created by the CWA are real and substantial, and that the border-based framework can lead to sub-optimal results. Add a considerable number of TAS tribes to the mix, and the friction increases exponentially.[378]

So what is all this talk of "geographical boundaries" and how do they work in the water regulation context? The concept of regulating water pollution using "geographical boundaries" simply means regulation and management on a *watershed* basis. As mentioned earlier, a watershed is:

> [T]he land area that drains water to a particular stream, river, or lake. It is a land feature that can be identified by tracing a line along the highest elevations between two areas on a map, often a ridge. Large watersheds, like the Mississippi River basin contain thousands of smaller watersheds.[379]

Thus, the borders of sovereigns do not define watersheds. "Watersheds are *nature's boundaries.* They are the areas that drain to water bodies, including lakes, rivers, estuaries, wetlands, streams, and the surrounding landscape. Groundwater recharge areas are also considered."[380] The idea is that by regulating swaths of naturally

---

375. *Id.*

376. *Id.*

377. *Id.* at 903.

378. The EPA's regulations (required by Congress in section 518(e) of the CWA) setting forth a dispute resolution mechanism for disputes arising between states and tribes as a result of differing water quality standards on common bodies of water are not the panacea for these conflicts. 40 C.F.R. § 131.7 (2001). The regulations provide for two mechanisms. The first is mediation in which the EPA appoints a mediator who simply acts as a neutral facilitator "whose function is to encourage communication and negotiation between all parties to the dispute." *Id.* § 131.7(f)(1)(ii). The mediation process has no binding effect on the parties. The second mechanism provided for is arbitration. Under this process, "[t]he parties are not obligated to abide by the arbitrator's or arbitration panel's recommendation unless they voluntarily entered into a binding agreement to do so." *Id.* § 131.7(f)(2)(iv). Participation in either mediation or arbitration is strictly voluntary. *Id.* § 131.7(f)(1)(i), (f)(2), (f)(3). Thus, it is arguable the dispute resolution mechanism, although venerable in name and concept, lacks efficacy to solve transboundary conflicts.

379. U.S. Geological Survey, *Water Science Glossary of Terms, at* http://wwwga.usgs.gov/edu/dictionary.html.

380. EPA Office of Water, Office of Wetlands, Oceans & Watersheds, *EPA's Most Frequently Asked Questions Related to Wetlands, Oceans & Watersheds, at*

interrelated lands and aquatic ecosystems, water pollution is being addressed on a more holistic and thoughtful level rather than looking one-dimensionally at sovereign borders. The EPA observed that, "because watersheds are defined by natural hydrology, they represent the most logical basis for managing water resources. The resource becomes the focal point, and managers are able to gain a more complete understanding of overall conditions in an area and the stressors which affect those conditions."[381] The ultimate hope of watershed management is optimal pollution control with minimal conflict.

Watershed management is a broad area, and is the subject of extensive writing. It is only cursorily touched upon in this article to show that stark divisions between TAS tribes, states, and other interested parties in the water pollution arena do not necessarily have to be the norm. A watershed management development plan typically follows certain distinct phases: watersheds are identified and mapped; the "stakeholders" in the watershed including federal, state, tribal, and local agencies are assembled to analyze threats to the watershed and to devise responses to these threats; the selected responses are applied to the watershed; and progress in achieving water quality goals are regularly monitored, with adjustments made as necessary.[382] The effort is aimed at being a cooperative, integrated approach, devoid of power mongering and autocracy.

The EPA has articulated three "guiding principles" on which to build all watershed programs. The first is "*partnerships*," whereby those parties "most affected by management decisions are involved throughout and shape key decisions."[383] This, according to the EPA, "ensures that environmental objectives are well integrated with those for economic stability and other social and cultural goals. It also provides that the people who depend upon natural resources within the watersheds are well informed of and participate in planning and implementation activities."[384] The second principle is a "*geographic focus*," which changes the boundaries for water pollution management to those created by nature rather than the mere political borders of sovereigns.[385] The third is "*sound management techniques based on strong science and data*," whereby the stakeholders in the watershed collectively employ sound science to set goals, implement action plans, and monitor results.[386] The idea behind this approach is that "actions are

---

http://www.epa.gov/owow/questions.html (emphasis added).

381. EPA Office of Water, *Why Watersheds?*, *at* http://www.epa.gov/owow/watershed/why.html.

382. PETER S. MENELL & RICHARD B. STEWART, ENVIRONMENTAL LAW AND POLICY 514 (1994); *see also* EPA Office of Water, *Watershed Protection – An Introduction*, *available at* http://www.epa.gov/owow/watershed/index2/html.

383. EPA Office of Water, *Watershed Approach Framework*, *at* http://www.epa.gov/owow/watershed/framework.html.

384. *Id.*

385. *Id.*

386. *Id.*

based upon shared information and a common understanding of the roles, priorities, and responsibilities of all involved parties."[387] The obvious motivation and hopeful result of these idealistic guiding principles is to manage and reduce water pollution with a minimum of conflict.

To accomplish this, entire jurisdictions are divided into geographic management units based on hydrologic connections, with existing regulatory programs and political boundaries "*factored into*" decisions about the formation of the units.[388] Thus, the regulatory framework is founded upon the practical realities of how water pollution really works and merely adds in the existence of political boundaries as a supplemental, but not primary, consideration. States, tribes, and local interests can then compare priorities, develop plans, reach compromises, and "leverage their limited resources to meet common goals."[389] The result is a water pollution regulatory system that transcends political borders by defining and regulating water using hydrologic boundaries, and fostering cooperation by all stakeholders in the watershed from the outset.

So, unlike the confrontational posture the state/TAS tribe dichotomy creates, the watershed approach envisions cooperative efforts from those affected and affecting the waterbodies of the country. By creating an atmosphere of teamwork between states, TAS tribes, local governments, and individual parties, "the watershed approach can build a sense of community, reduce conflicts, increase commitment to the actions necessary to meet societal goals and, ultimately, improve the likelihood of sustaining long-term environmental improvements."[390] The EPA believes that states and tribes are the principal players in implementing a watershed approach because they already manage many of the existing water and natural resource protection programs.[391] Indeed, "[f]or the long term, EPA envisions locally-driven, watershed-based activities embedded in comprehensive state and tribal watershed approaches all over the United States."[392]

Implementing such a utopian paradigm is, of course, no simple matter.[393] And, multi-party settings have their own set of difficulties.[394] The EPA, however, is taking major steps to encourage watershed management and provide support for its development. The Agency

---

387. *Id.*

388. *Id.* (emphasis added).

389. EPA Office of Water, *Watershed Approach Framework, at* http://www.epa.gov/owow/watershed/framework.html.

390. *Id.*

391. *Id.*

392. *Id.*

393. *See generally* William Goldfarb, *Watershed Management: Slogan or Solution?*, 21 B.C. ENVTL. AFF. L. REV. 483 (1993).

394. *See* Harbison, *supra* note 66, at 491-92 (explaining certain potential difficulties in watershed management with multiple parties involved that, while formidable, are not insuperable).

has made a "[c]onsiderable effort . . . in streamlining program administrative requirements that hinder watershed approaches and [has invested] in developing useful watershed tools and services."[395] The EPA has also recognized the damaging nature of transboundary conflicts to internal political relations as well as to the protection of the country's water resources. The Agency's Office of Water has announced that it has put a "[h]igh priority . . . on developing and supporting comprehensive state and tribal watershed approach strategies that actively involve public and private interests at all levels to achieve environmental protection."[396] Thus, the push is on to fundamentally change the model of water regulation in this country to a watershed approach, and this article submits that such a plan is a potent alternative to the divisions and conflicts inevitably produced by the current framework.

VII. CONCLUSION

The decision by the Seventh Circuit Court of Appeals in *Wisconsin v. EPA* was important in that it both confirmed TAS Indian tribes' status as co-equal sovereigns for authorized functions under the CWA, and correctly foreclosed the most feasible legal challenges to a tribe's TAS designation. In fact, it now appears that in all practicality, any opposition by a state to the grant of TAS status is futile. Put simply, the court's opinion and the EPA's regulations and operating procedures make clear that TAS status to administer water quality standards is available for the tribes' taking. The importance of water resources to tribes and this latest affirmation of the ease in which TAS status may be obtained will likely persuade many Indian tribes to direct their limited environmental resources to obtaining control over reservation waters. As more tribes assert this control, transboundary water pollution conflicts will increase on a scale not yet seen. The EPA, however, is trying to stem this potential tide of conflict and discord between sovereigns by redrawing the regulatory lines to those created by hydrologic boundaries rather than those marking political borders. Such watershed management practices envision cooperation over conflict and environmental protection over environmental protectionism. Thus, the CWA itself is at a crossroads. It will be up to

395. EPA Office of Water, *Why Watersheds?*, *at* http://www.epa.gov/owow/watershed/why.html.

396. EPA Office of Water, *Watershed Approach Framework*, *at* http://www.epa.gov/owow/watershed/framework.html. On January 25, 2002, the EPA announced that President Bush is including $21 million in his 2003 budget for new watershed protection initiatives. The money will be used to "target up to 20 of this country's most highly-valued watersheds for grants. EPA will be working cooperatively with state governors, tribes and other interested parties on this initiative." In her enthusiastic statement announcing the allocation, EPA Administrator Christie Whitman stated: "I have heard a watershed defined as 'communities connected by water,' a good reminder that we all live downstream from someone." U.S. Environmental Protection Agency, EPA Newsroom, *EPA Announces New Initiative to Protect and Preserve America's Waterways*, *at* http://www.epa.gov/epahome/headline4_012502.htm (last updated Mar. 19, 2002).

the CWA's integral participants—the EPA, states, and empowered Indian tribes—to take the path that restores and protects the water resources of the United States while also preserving and protecting a cooperative spirit among its inhabitants.