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Establishing Applicable Water Quality Standards for Surface Waters on Indian Reservations

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ESTABLISHING APPLICABLE WATER QUALITY STANDARDS FOR SURFACE WATERS ON INDIAN RESERVATIONS

ABSTRACT

The Clean Water Act is the foundational water law in the United States. It seeks to protect the nation's waters through establishing programs that limit pollutant discharge into surface waters. Water quality standards serve an essential role in protecting the surface waters of the United States because they set effluent limitations necessary to reduce pollutant discharge and to maintain the designated uses of the surface waters. Although all states have water quality standards for surface waters that run through their respective boundaries, most tribes lack water quality standards that are applicable for establishing effluent limitations under the Clean Water Act. With over 500 federally recognized tribes in the United States, the lack of water quality standards for surface waters that run through many of these tribes' lands undermines surface water protection.

This Comment proposes a solution to this regulatory gap in the Clean Water Act. It suggests the Environmental Protection Agency ought to promulgate a new rule making tribal water quality standards applicable for Clean Water Act programs even though they may not have been approved by the Agency.

This Comment begins with a historical background of tribal authority over water quality and a discussion of the current status of water quality standards implementation on Indian reservations. By exploring the reasons for and the consequences of the lack of applicable water quality standards on Indian reservations, this Comment then explains how its proposal will alleviate the problems associated with protecting water quality on Indian reservations and ensure that tribal rights to waters are secured.

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INTRODUCTION

Water is a very important limited natural resource that is fundamental for public health and welfare.¹ However, it has been and continues to be threatened by pollution.² The Clean Water Act (CWA) seeks to mitigate this threat by implementing programs to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”³ The CWA regulates discharges from point sources by requiring each point source to obtain a permit under the National Pollution Discharge Elimination System (NPDES) permit program.⁴ These NPDES permits set effluent limitations—how much of a pollutant may be discharged—based upon the Water Quality Standards (WQS) for the surface waters into which the pollutants are discharged.⁵ Therefore, setting applicable WQS is an essential component to issuing NPDES permits, achieving the goals of the CWA, and protecting surface waters of the United States for the public.

WQS are either set by a state, a Treatment as a State (TAS) designated tribe, or the Environmental Protection Agency (EPA).⁶ About half of the states have promulgated WQS for CWA purposes.⁷ EPA has promulgated WQS for the states that have failed to do so.⁸ However, most tribes lack WQS for CWA purposes: of the 566 federally recognized tribes, only forty-two have EPA-approved, tribally adopted WQS.⁹ EPA, recognizing tribes as sovereigns, has

¹ Heather Cooley, *Water Management in a Changing Climate*, in *THE WORLD’S WATER 2008–2009: THE BIENNIAL REPORT ON FRESHWATER RESOURCES* 39, 39 (Peter H. Gleick ed., 2009).

² EPA, EPA-190-R-14-006, FISCAL YEAR 2014–2018 EPA STRATEGIC PLAN 15–16 (2014).

³ Federal Water Pollution Control Act, 33 U.S.C. § 1251(a) (2012).

⁴ *See generally id.* § 1342 (2012) (explaining permits for discharge of pollutants and state permit programs).

⁵ *Id.* § 1341(a)(1)–(2) (2012); 40 C.F.R. § 122.44(d)(1)(ii) (2015).

⁶ 33 U.S.C. §§ 1313(a)(3)(A), (C), 1377(e) (2012).

⁷ *See Federally Promulgated Water Quality Standards for Specific States, Territories, and Tribes*, EPA, <https://www.epa.gov/wqs-tech/federally-promulgated-water-quality-standards-specific-states-territories-and-tribes> (last visited Sept. 16, 2016) (listing the twenty-seven states and the District of Columbia for which the EPA has promulgated water quality standards; each state that does not appear on this list has promulgated its own standard).

⁸ *See id.*; 33 U.S.C. § 1313(b)(2) (requiring the Administrator to promulgate a WQS for each state which has not independently set a WQS within 190 days of publishing a regulation).

⁹ *See Indian Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs*, 80 Fed. Reg. 1942, 1942 (Jan. 14, 2015) (listing the federally-recognized tribes in the United States); *EPA Approvals of Indian Tribal Water Quality Standards*, EPA [hereinafter *Indian Tribal Approvals*], <https://www.epa.gov/wqs-tech/epa-approvals-tribal-water-quality-standards> (last visited Feb. 4, 2017) (“Currently, 54 tribes have been found eligible to administer a WQS program, and EPA has approved WQS for 42 of these tribes. EPA has promulgated federal WQS for 1 tribe not included in these totals.”).

not promulgated WQS for surface waters within Indian reservations,¹⁰ and most tribes have not applied for TAS status to administer WQS for surface waters within their reservations.¹¹ Without applicable WQS, a major problem arises when a point source seeks to discharge water pollution into an Indian reservation. With over 500 recognized tribes in the United States, the lack of applicable WQS on Indian reservations suggests many water segments throughout the United States are not adequately protected. This Comment argues that EPA ought to promulgate a new rule establishing that EPA Regional Offices¹² (Regions) should apply tribally adopted, yet unapproved WQS.

This Comment proceeds in four Parts. Part I provides background on tribal legal authority in the United States and the role of tribal authority in the CWA and WQS. It explains why many Indian reservations lack WQS and how the lack of applicable WQS has left EPA Regions to inconsistently issue NPDES permits on Indian reservations. Because of the inconsistent approaches to issuing NPDES permits on Indian reservations, Part II argues that EPA should promulgate a new rule establishing that Regions shall apply tribally adopted, yet unapproved WQS for NPDES permits on Indian reservations as long as they are protective of downstream state's WQS. This approach best promotes EPA's policy toward tribal sovereignty and the purposes of the CWA. Part III outlines how the new rule would better ensure the protection of tribal waters and promote tribal sovereignty. Part IV concludes by highlighting the benefits of this proposed rule.

I. BACKGROUND: TRIBAL AUTHORITY AND THE CLEAN WATER ACT

This Comment proposes a solution to the lack of applicable WQS for most surface waters within Indian reservations. A cursory background on tribal legal authority and the CWA helps explain why this regulatory gap exists. Part I presents this background in two sections. Section A explains how tribal legal authority has evolved from the early 1800s to the current era. Section B

¹⁰ See Amendments to the Water Quality Standards Regulations That Pertain to Standards on Indian Reservations, 54 Fed. Reg. 39,098, 39,103 (Sept. 22, 1989) (stating that EPA will not promulgate federal WQS for a tribe unless the tribe affirmatively declines to seek treatment as a state after EPA determines the tribe possesses such authority).

¹¹ Only fifty-four tribes are TAS-designated tribes. *Indian Tribal Approvals*, *supra* note 9.

¹² EPA divides the country up into ten Regions, in each of which the Regional Office is responsible for carrying out EPA's environmental programs. *Visiting a Regional Office*, EPA, <https://www.epa.gov/aboutepa/visiting-regional-office> (last visited Feb. 4, 2017).

provides a regulatory overview of the CWA and explains the function of WQS in achieving the purposes of the CWA.

A. *Status of Tribal Legal Authority in the United States*

In the United States, Indian tribes are considered neither sovereign nations nor states.¹³ Rather, tribes are an amalgam of the two, which makes unclear the extent to which tribes reign sovereign over their land.¹⁴ This section explains the rights tribes have in the United States and then contextualizes these rights into tribal authority over water.

The extent of tribal sovereignty was first articulated by the Supreme Court in the early 1800s.¹⁵ The Court established that Indian nations were not independent, foreign nations, but rather were “domestic dependent nations.”¹⁶ Tribes were to look to the federal government for protection; the United States, as trustee of tribal land, was held responsible for ensuring that tribal resources were protected.¹⁷ Although the Court considered tribes to be “completely under the sovereignty and dominion” of the United States,¹⁸ the Court added further nuance to the tribes’ dependent status in *Worcester v. Georgia*.¹⁹ The Court in *Worcester* acknowledged Indian nations as “distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed [sic] by the United States.”²⁰ Therefore, under this principles of tribal sovereignty, tribes have exclusive authority within Indian territory unless precluded by the federal government.²¹ States may not infringe on this tribal authority.²²

¹³ See *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16, 20 (1831) (holding an Indian tribe within the United States “[is] not a state of the union” nor “a foreign state in the sense of the constitution”).

¹⁴ See *id.* at 17 (“Though the Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned right to the lands they occupy . . . [t]heir relation to the United States resembles that of a ward to his guardian.”).

¹⁵ See *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Cherokee Nation*, 30 U.S. (5 Pet.) at 1; *Johnson & Graham’s Lessee v. M’Intosh*, 21 U.S. (8 Wheat.) 543 (1823).

¹⁶ *Cherokee Nation*, 30 U.S. (5 Pet.) at 17.

¹⁷ See *id.*

¹⁸ See *id.* (describing the way foreign nations perceived the relationship between Indian tribes and the federal government at the time).

¹⁹ 31 U.S. (6 Pet.) at 515.

²⁰ *Id.* at 557.

²¹ See *id.* at 594.

²² *Id.*

The Supreme Court contextualized the principles of tribal sovereignty to a tribe's right to water in *Winters v. United States*.²³ The case concerned whether a downstream tribe could restrain an upstream state from diverting water that naturally flowed into the reservation boundary and significantly contributed to the tribe's agricultural pursuits.²⁴ Interpreting ambiguities in federal Indian law in favor of the tribes, the Court found that although the treaty establishing the tribe's reservation was silent as to water, the tribe had an implied reservation of water residing within the boundaries of its reservation.²⁵ The Court's holding, known as the *Winters* doctrine, firmly established that tribes had a right to water to meet the purposes of their reservation.²⁶

The Court, however, did not articulate the extent of a tribe's right to water until much later. In *Arizona v. California*, the Court held that tribes were allowed to take into account "the future as well as the present needs of the Indian Reservations."²⁷ Additionally, in *Colville Confederated Tribes v. Walton*, the Court held that tribes may use their vested right to water in any lawful manner as they see fit.²⁸

The Court remains silent on tribal rights to water quality. However, the Court will likely uphold a tribe's assertion of a right to protect the water quality within its reservation because, as scholars have noted, poor water quality can affect a tribe's ability to meet the purposes of its reservation.²⁹ In the alternative, tribes have the opportunity to protect their water quality through the CWA. Tribal authority to establish WQS through the CWA is discussed below in section B.2, after a brief overview of the CWA and how WQS are established for states.

²³ 207 U.S. 564 (1908).

²⁴ *Id.* at 565, 567.

²⁵ *Id.* at 576.

²⁶ See Lloyd Burton, *The American Indian Water Rights Dilemma: Historical Perspective and Dispute-Settling Policy Recommendations*, 7 UCLA J. ENVTL. L. & POL'Y 1, 31 (1987) ("The essential theme of the *Winters* doctrine is that on the date federal land is reserved, there is also reserved enough previously unappropriated water to fulfill the purpose(s) for which the reservation was created.").

²⁷ 373 U.S. 546, 600 (1963).

²⁸ 647 F.2d 42, 48 (9th Cir. 1981) ("[S]ubsequent acts making the historically intended use of the water unnecessary do not divest the Tribe of the right to the water.").

²⁹ See Sean M. Hanlon, *A Non-Indian Entity Is Polluting Indian Waters: "Water" Your Rights to the Waters, and "Water" Ya Gonna Do About It?*, 69 MONT. L. REV. 173, 205 (2008) ("The *Winters* doctrine would not be satisfied if the reserved water provided to the reservation to fulfill its purposes was polluted or otherwise unusable or unnatural.").

B. Regulatory Overview of the CWA and WQS

Congress enacted the Federal Water Pollution Control Act, later expanded by the CWA, “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”³⁰ To achieve its goals, the CWA seeks to obtain water quality sufficient to at least protect aquatic life and recreation.³¹ To meet its water quality goals, the CWA requires point source polluters to obtain an NPDES permit.³² When issuing an NPDES permit, the permitting authority,³³ either an authorized state or EPA, enforces technology-based effluent limits (TBELs) to ensure WQS established for the discharge-receiving waters are protected.³⁴ If TBELs are insufficient to meet the applicable WQS, water quality-based effluent limits (WQBELs) are used.³⁵ Thus, WQS “serve as the regulatory basis for the establishment of [effluent limitations],” which are necessary components of permissible point source discharges.³⁶

WQS are used “to protect public health or welfare, enhance the quality of water and serve the purposes of the [CWA].”³⁷ WQS include (1) one or more designated uses for each water body or water body segment, (2) water quality criteria, and (3) an antidegradation policy.³⁸ Designated uses “is a classification system for waterbodies based on the expected uses of those waterbodies.”³⁹ At a minimum, the designated uses must protect aquatic life and recreation.⁴⁰ Water quality criteria consist of numerical concentration levels, narrative statements, or both, specifying the amounts of various pollutants that may be present in each water body without impairing the designated uses of that water body.⁴¹ EPA publishes federally recommended

³⁰ 33 U.S.C. § 1251(a) (2012).

³¹ *See id.* § 1314(a)(1)–(2) (2012).

³² *See id.* § 1342 (2012).

³³ *Id.* § 1342(a)(5)–(b) (explaining that EPA is the permitting authority unless a state applies to EPA to be the permitting authority for waters within its state’s boundaries, and that EPA will approve a state’s permit program so long as it meets the requirements set forth in 33 U.S.C. § 1342(b)).

³⁴ *Id.* § 1341(a)(1)–(2) (2012); 40 C.F.R. § 122.44(d)(1)(ii) (2015).

³⁵ 33 U.S.C. § 1311(b)(1)(C) (2012).

³⁶ 40 C.F.R. § 131.2 (2014).

³⁷ *Id.*

³⁸ 33 U.S.C. § 1313(c)(2)(A) (2012).

³⁹ WATER PERMITS DIVISION, EPA, EPA-833-K-10-001, NPDES PERMIT WRITERS’ MANUAL, § 6.1.1.1 (2010) [hereinafter NPDES MANUAL].

⁴⁰ *See* 40 C.F.R. § 131.6(a) (2014). Additional uses that may be protected include agricultural, industrial, and navigational uses. *See* 33 U.S.C. § 1313(c)(2)(A).

⁴¹ NPDES MANUAL, *supra* note 39, § 6.1.1.2 (“[EPA] requires states to adopt water quality criteria using sound scientific rationale . . . [which can take the form of] both numeric and narrative water quality

water quality criteria set to protect aquatic life and recreation.⁴² Antidegradation policies “specif[y] the framework to be used in making decisions about proposed activities that will result in changes in water quality.”⁴³ They require the existing use and water quality of surface waters that are above state WQS to remain protected.⁴⁴

WQS may be established by the states⁴⁵ or qualified tribes,⁴⁶ and the EPA holds oversight authority to ensure that the WQS protect the federal minimum requirements.⁴⁷ Originally, the CWA only provided states the authority to establish WQS.⁴⁸ Because states and tribes were given authority to establish WQS at different times, the regulatory requirements for establishing WQS differ slightly for each type of entity.⁴⁹ First, section B.1 discusses state development of WQS. Then, section B.2 explains how tribes were given authority to establish WQS and what additional criteria they must satisfy to do so.

1. States Are Delegated the Responsibility of Developing WQS

Congress delegated to states the responsibility of developing WQS for all water bodies within their borders.⁵⁰ If states fail to set WQS, or if EPA determines a state’s WQS fails to meet CWA requirements, EPA will establish WQS for the state.⁵¹ Thus, EPA maintains oversight authority over state WQS.⁵² In deciding whether to approve a state’s WQS, the EPA Regional Administrator determines whether the state’s WQS conform to the CWA and support the uses designated by the state.⁵³ The Regional Administrator must disapprove a state’s WQS if the standards do not meet the minimum requirements of the CWA.⁵⁴ Thus, the CWA sets a floor, not a ceiling; states

criteria. . . . States establish narrative criteria where numeric criteria cannot be established, or to supplement numeric criteria.”)

⁴² 33 U.S.C. § 1314(a)(1) (2012).

⁴³ NPDES MANUAL, *supra* note 39, § 6.1.1.3.

⁴⁴ *See* 40 C.F.R. § 131.12(a) (2014).

⁴⁵ *See infra* Part I.B.1.

⁴⁶ *See infra* Part I.B.2.

⁴⁷ 40 C.F.R. § 131.5(b).

⁴⁸ *See infra* note 61.

⁴⁹ *See infra* notes 68–86 and accompanying text.

⁵⁰ 33 U.S.C. § 1313(a)(3)(A) (2012).

⁵¹ *Id.* § 1313(b)(1), (c)(3).

⁵² 40 C.F.R. § 131.5(a) (“Under section 303(c) of the Act, the EPA is to review and to approve or disapprove State-adopted water quality standards.”)

⁵³ *See* 33 U.S.C. § 1313(c)(1)–(2)(A).

⁵⁴ 40 C.F.R. § 131.5(b).

may set WQS at the federal standards or establish more stringent standards than necessary to comply with the CWA.⁵⁵

A state's WQS are not applicable for CWA purposes until they are approved by the Regional Administrator.⁵⁶ Although old WQS may expire as a matter of state law and states may adopt new or revised WQS, for CWA purposes, the old WQS remain in effect until EPA approves the state's WQS or EPA promulgates a more stringent standard.⁵⁷ In response to concerns about EPA delays in approving WQS, EPA stated that permitting authorities could base NPDES permit limits on unapproved WQS if the unapproved WQS were more stringent than the previous standards.⁵⁸ However, EPA is not required to uphold a state's unapproved WQS. EPA may choose to apply the formerly approved WQS, and courts may find applying unapproved WQS to run afoul of the law.⁵⁹

The rules and regulations related to a state's development of its WQS also apply to tribes if tribes apply for and are approved as TAS status for the administration of WQS.⁶⁰ The following section explains how tribes may receive TAS status to administer WQS for waters within their reservation.

2. CWA § 518 Allows Tribes to Establish WQS

Originally, Congress did not authorize tribes to administer any CWA programs.⁶¹ EPA was delegated the authority to promulgate federal WQS for waters on Indian lands when the EPA Administrator found WQS on Indian

⁵⁵ 33 U.S.C. § 1370 (2012); *see also* Illinois v. Milwaukee, 731 F.2d 403, 413 (7th Cir. 1984) (stating that the CWA only prevents states from adopting and enforcing effluent limitations that are less stringent than federal standards).

⁵⁶ EPA Review and Approval of State and Tribal Water Quality Standards, 65 Fed. Reg. 24,641, 24,642 (Apr. 27, 2000) (codified at 40 C.F.R. § 131.21(c)) (applicable to state WQS adopted after May 30, 2000).

⁵⁷ *Id.* at 24,643.

⁵⁸ Memorandum from Geoffrey H. Grubbs, Director, EPA Office of Sci. & Tech., to Water Division Directors, Regions I–X, on Questions and Answers on EPA's "Alaska Rule," Q.7 (Sept. 12, 2000) (stating that although unapproved standards are "not the 'applicable' standards for CWA purposes[,] . . . they are not preempted by the CWA").

⁵⁹ *See* Thomas v. EPA, No. C06-0115, 2007 WL 4439483, at *12 (N.D. Iowa Dec. 17, 2007) (holding that Iowa's revised and unapproved WQS were "not yet applicable to the various waters" and that the State would "not be justified in applying the proposed revised standard in compiling the Section 303(d) list").

⁶⁰ 40 C.F.R. § 131.3(j) (2014) (including TAS-designated tribes under the definition of "States" for purposes of the CWA).

⁶¹ Water Quality Standards for the Colville Indian Reservation in the State of Washington, 54 Fed. Reg. 28,622 (July 6, 1989) (codified at 40 C.F.R. § 131) (stating that prior to Congress passing § 518, the CWA authorized the EPA Administrator to "promulgate Federal water quality standards for . . . waters on Indian lands").

lands were necessary to meet the requirements of the CWA.⁶² However, a shift in the federal government's policy toward tribes led to the inclusion of tribes in the CWA.⁶³

In 1983, President Reagan issued a Federal Indian Policy statement, reaffirming the federal government's policy of "dealing with Indian tribes on a government-to-government basis and [pursuing] the policy of self-government for Indian tribes."⁶⁴ As a response to the President's statement, EPA implemented the Administration of Environmental Programs on Indian Reservations (Indian Policy) in 1984, which established EPA's policy to "give special consideration to Tribal interests in making Agency policy, and to insure the close involvement of Tribal Governments in making decisions and managing environmental programs affecting reservation lands."⁶⁵ To meet its objectives, EPA resolved to "work directly with Indian Tribal Governments," "recognize Tribal Governments as the primary parties for setting standards," and "assure compliance with environmental statutes and regulations on Indian reservations."⁶⁶ Finally in 1987, Congress amended the CWA to provide tribes the opportunity to administer certain CWA programs.⁶⁷ The 1987 CWA amendments added § 518, which allowed tribes to obtain TAS status for certain CWA purposes, including administering WQS and NPDES permits, where certain criteria are met.⁶⁸

To receive TAS status, a tribe must apply to the Regional Administrator of EPA for the specific CWA provision for which it seeks TAS status.⁶⁹ To apply, a tribe must provide documentation demonstrating that it satisfies four criteria. The tribe must prove it: (1) is an Indian tribe recognized by the Secretary of the Interior; (2) has a "governing body carrying out substantial governmental duties and powers"; (3) seeks to manage and protect water resources "held by

⁶² *See id.*

⁶³ *See infra* notes 64–68 and accompanying text.

⁶⁴ Presidential Statement on Indian Policy, 1 PUB. PAPERS 96, 96 (Jan. 24, 1983).

⁶⁵ WILLIAM D. RUCKELSHAUS, EPA, EPA POLICY FOR THE ADMINISTRATION OF ENVIRONMENTAL PROGRAMS ON INDIAN RESERVATIONS (1984), <http://www2.epa.gov/sites/production/files/2015-04/documents/indian-policy-84.pdf>.

⁶⁶ *Id.* §§ 1, 2, 4.

⁶⁷ 1989 Proposed WQS Amendments, *supra* note 10, at 39,098.

⁶⁸ Water Quality Act of 1987, Pub. L. No. 100-4, § 518, 101 Stat. 7, 77 (1987) (codified as 33 U.S.C. § 1377(e) (2012)).

⁶⁹ *See* Memorandum from Marcus Peacock, Deputy Adm'r, EPA, to Assistant & Reg'l Adm'rs, EPA on Strategy for Reviewing Tribal Eligibility Applications to Administer EPA Regulatory Programs 23–24 (Jan. 23, 2008) [hereinafter EPA TAS Strategy] (stating that EPA's approval of TAS applications only apply to the specific program and reservation waters for which the tribe seeks approval).

the Indian tribe, . . . by the United States in trust for Indians, . . . 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) is “reasonably expected to be capable, in the Regional Administrator’s judgment, of carrying out the functions . . . in a manner consistent with the terms and purposes of the Act and applicable regulations.”⁷⁰

A tribe that seeks TAS status typically has no issue meeting the first, second, or fourth criteria. The first criterion is easily satisfied by providing a statement that the tribe is included on the Department of Interior’s (DOI) list of federally recognized tribes.⁷¹ The second criterion is easily satisfied by providing a statement that (1) describes the form of tribal government, (2) describes the types of governmental functions performed (e.g., power to tax, power of eminent domain, police power), and (3) identifies the source of tribal authority to perform these functions (e.g., tribal constitution).⁷² The fourth criterion is satisfied by including a statement describing previous management experiences, listing environmental or public health programs, and describing technical and administrative capabilities of managing a WQS program.⁷³ Submission of a draft WQS “will normally be sufficient to satisfy the capability requirements, but only where the Tribe can also demonstrate a continuing commitment . . . for reviewing and revising their completed standards.”⁷⁴

The third criterion requires a tribe to show documentation of inherent tribal authority over the bodies of water at issue.⁷⁵ A tribe may establish its inherent tribal authority over the bodies of water at issue 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 such waters . . . would have a serious and substantial effect on the health and welfare of the tribe.”⁷⁶

⁷⁰ 40 C.F.R. § 131.8(a) (2014); *see also* 33 U.S.C. § 1377(e)(1)–(3) (2012).

⁷¹ EPA TAS Strategy, *supra* note 69, at 13.

⁷² 40 C.F.R. § 131.8(b)(2)(i)–(iii).

⁷³ *Id.* § 131.8(b)(4)(i)–(ii), (v).

⁷⁴ 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. § 131); *see also* Revised Interpretation of Clean Water Act Tribal Provision, 80 Fed. Reg. 47,430, 47,436 (Aug. 7, 2015) (stating that many authorized tribes have informed EPA that meeting the third requirement of inherent tribal authority constituted “the single greatest administrative burden in their application process”).

⁷⁵ 40 C.F.R. § 131.8(b)(3).

⁷⁶ 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 1135, 1139 (9th Cir. 1998).

Until May 2016, EPA did not interpret § 518 as an express delegation from Congress of tribal authority over CWA regulations.⁷⁷ Therefore, tribes were required to provide specific evidence of tribal authority over nonmember fee lands within a tribal reservation.⁷⁸ Upholding EPA's pre-2016 interpretation, the Court in *Montana v. United States* held that tribes lacked inherent sovereign authority to regulate WQS for nonmember activities on nonmember fee lands⁷⁹ unless tribes demonstrated their inherent authority to regulate WQS.⁸⁰ The Court held that tribes may establish inherent authority by showing that either (1) nonmembers entered into "consensual relationships with the tribe" by signing contracts, or (2) nonmembers' activities "threaten[ed] or ha[d] some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."⁸¹ This requirement is known as the *Montana* test.⁸²

EPA set a low bar for a tribe to prove its authority to regulate water quality by presuming tribal authority to regulate water quality on or within the borders of its reservation.⁸³ However, this criterion of meeting the *Montana* test deterred tribes from applying for TAS status because of the time-consuming nature of showing inherent authority over nonmember lands and because of the potential for litigation on this issue.⁸⁴

The inclusion of these criteria in § 518 adds a layer of requirements for tribes, which exceeds the requirements for states establishing WQS. Because this additional step is not required for states, EPA will not formally deny a tribe's request for TAS status.⁸⁵ Rather, EPA will work with the tribe to resolve the problem even if the Regional Administrator finds that a tribe does not satisfy the four criteria outlined in 40 C.F.R. § 131.8.⁸⁶

⁷⁷ Revised Interpretation of Clean Water Act Tribal Provision, 81 Fed. Reg. 30,183, 30,184 (May 16, 2016).

⁷⁸ See *Montana v. United States*, 450 U.S. 544, 564–66 (1981).

⁷⁹ Nonmember fee lands are lands owned by nontribal members in fee within a reservation. Revised Interpretation of Clean Water Act Tribal Provision, 80 Fed. Reg. at 47,434.

⁸⁰ 450 U.S. at 565–66.

⁸¹ *Id.*

⁸² *Montana v. EPA*, 941 F. Supp. 945, 957 (D. Mont. 1996), *aff'd*, 137 F.3d 1135 (9th Cir. 1998).

⁸³ See Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,876, 64,878–79 (Dec. 12, 1991) (codified at 40 C.F.R. § 131).

⁸⁴ See *infra* notes 118–22 and accompanying text.

⁸⁵ Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations, 56 Fed. Reg. at 64,885 ("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 . . .").

⁸⁶ *Id.*

Acquiring TAS status is just the first step for a tribe to get its WQS approved. TAS status only puts tribes on equal footing with a state to administer a WQS program.⁸⁷ Upon receiving TAS status, a tribe must then satisfy the same procedural requirements a state must satisfy for EPA to approve that tribe's WQS.⁸⁸ In establishing its WQS, a tribe may impose more stringent standards than the EPA requirements although § 518 does not expressly permit TAS-designated tribes to do so,⁸⁹ because it is "in accord with powers inherent in Indian tribal sovereignty."⁹⁰

Having discussed the development of § 518 and the criteria tribes must satisfy to obtain TAS status, Part II discusses the impact of § 518 on tribes' regulation over their water quality.

II. THE CURRENT STATUS OF WQS WITHIN INDIAN RESERVATIONS

A. *WQS Within Indian Reservations*

Although § 518 seeks to promote tribal sovereignty and provide tribes the opportunity to administer WQS within the boundaries of their reservations, many tribes continue to lack applicable WQS for surface waters within their reservations.⁹¹ The reasons are twofold and are explored in more detail in the subsections below. First, EPA, adhering to its Indian Policy, does not require tribes to obtain TAS status and will not promulgate federal WQS unless absolutely necessary.⁹² Second, because obtaining TAS status is not mandatory, tribes have the choice to apply for TAS status. Many tribes choose not to apply for TAS status due to frustrations with the application process stemming from the EPA's interpretation of § 518 and the *Montana* test.⁹³

⁸⁷ 40 C.F.R. § 131.8(c)(5) (2014); Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations, 56 Fed. Reg. at 64,890.

⁸⁸ EPA TAS Strategy, *supra* note 69, at 24.

⁸⁹ Amendments to the Water Quality Standards Regulations That Pertain to Standards on Indian Reservations, 54 Fed. Reg. 39,098, 39,099 (Sept. 22, 1989) (stating that § 518 implicitly encompasses § 510, which permits authorized states to set more stringent WQS than EPA requirements).

⁹⁰ *City of Albuquerque v. Browner*, 97 F.3d 415, 423 (10th Cir. 1996).

⁹¹ See Water Quality Act of 1987, Pub. L. No. 100-4, § 518, 101 Stat. 7, 77 (1987) (codified as 33 U.S.C. § 1377(e) (2012)).

⁹² Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,876, 64,891 (Dec. 12, 1991) (codified at 40 C.F.R. § 131).

⁹³ See *infra* notes 113–22 and accompanying text.

1. *Impact of Tribal Sovereignty and the EPA's Indian Policy on Implementation of § 518*

The principles of tribal sovereignty and EPA's Indian Policy of Indian self-determination affect how EPA interprets and enforces § 518. Because EPA seeks "to support Tribal governments in assuming authority to manage various water programs," EPA prefers "to work cooperatively with [tribes]" on water quality standards issues.⁹⁴ Therefore, EPA will not promulgate federal WQS within an Indian reservation unless EPA "determines that the Tribe possesses authority to regulate water quality on the reservation and the Tribe declines to seek treatment as a State for purposes of water quality standards."⁹⁵ Unless a tribe affirmatively communicates to EPA that it refuses to seek TAS status for the purposes of administering WQS, EPA will not promulgate federal WQS. Therefore, unlike states, EPA does not require tribes to promulgate WQS for CWA purposes.⁹⁶

Additionally, unlike with states, EPA maintains federal promulgation of WQS within an Indian reservation as an absolute last resort.⁹⁷ EPA presumes tribes will one day seek TAS status and submit WQS for EPA approval. Therefore, EPA will only promulgate federal standards if EPA "find[s] it necessary" to do so.⁹⁸ As an example of a necessary instance when EPA would need to promulgate federal WQS within an Indian reservation, EPA noted a situation where WQS were necessary "to address needed water quality based permit actions," such as an NPDES permit.⁹⁹ If EPA determines it must promulgate federal WQS, EPA stated it will likely develop "very straightforward" WQS, having all streams "be classified fishable/swimmable"

⁹⁴ Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations, 56 Fed. Reg. at 64,885.

⁹⁵ Amendments to the Water Quality Standards Regulations that Pertain to Standards on Indian Reservations, 54 Fed. Reg. 39,098, 39,102-03 (Sept. 22, 1989).

⁹⁶ See 33 U.S.C. § 1313(a)(3)(A) (2012) (stating that States shall submit WQS within a certain period of time); Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations, 56 Fed. Reg. at 64,891 (explaining that "[t]here is no required time frame" for a tribe to make a decision to seek TAS status).

⁹⁷ See Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations, 56 Fed. Reg. at 64,891; see also 33 U.S.C. § 1313(a)(3)(C) (stating that EPA will promulgate federal WQS for a state if the state fails to submit WQS that comply with the CWA).

⁹⁸ See Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations, 56 Fed. Reg. at 64,891.

⁹⁹ *Id.*

and having water quality criteria based on “guidance values established by EPA under Section 304(a) of the [CWA].”¹⁰⁰

However, EPA has not promulgated federal WQS for surface waters on Indian reservations where EPA was required to issue NPDES permits.¹⁰¹ Rather, Regions—tasked with issuing NPDES permits on Indian reservations where the tribe lacks TAS status—have found alternative means of issuing NPDES permits without promulgating federal WQS.¹⁰² In fact, as of 2016, EPA has only issued federal WQS for one tribe, which was issued prior to Congress passing § 518.¹⁰³ In that case, the tribe explicitly requested EPA to issue federal WQS based on the tribe’s WQS because it wanted to ensure protection of its surface waters.¹⁰⁴ Additionally, states lack jurisdiction to regulate water quality within Indian reservations.¹⁰⁵

EPA’s Indian Policy, by promoting tribal sovereignty, has left many Indian reservations without applicable WQS.¹⁰⁶ Yet even when EPA actions do not promote tribal sovereignty, Indian reservations remain lacking applicable WQS. EPA’s interpretation of § 518 limited tribal sovereignty by asserting that tribes are assumed to lack inherent authority over nonmember fee lands that reside within their reservation.¹⁰⁷ The next subsection explains how EPA’s interpretation of § 518, and the resulting *Montana* test, deterred tribes from seeking TAS status to administer WQS.

¹⁰⁰ *Id.*; EPA, EPA POLICY ON CONSULTATION AND COORDINATION WITH INDIAN TRIBES 5 (2011), <http://www.epa.gov/tribal/pdf/cons-and-coord-with-indian-tribes-policy.pdf> (stating that permits are a category of EPA activity that is normally appropriate for tribal consultation).

¹⁰¹ *See infra* Charts 1, 2 (showing that Regions have applied other WQS when issuing NPDES permits on Indian reservations).

¹⁰² *See infra* Charts 1, 2.

¹⁰³ *See Federally Promulgated Water Quality Standards for Specific States, Territories, and Tribes*, EPA, <http://water.epa.gov/scitech/swguidance/standards/wqsregs.cfm> (last visited Feb. 5, 2017) (listing only one set of federal WQS as applicable to Indian country).

¹⁰⁴ Water Quality Standards for the Colville Indian Reservation in the State of Washington, 54 Fed. Reg. 28,622 (July 6, 1989) (codified at 40 C.F.R. § 131).

¹⁰⁵ *See Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 594 (1832) (stating that states may not infringe upon tribal authority); *see also California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987) (“State jurisdiction is pre-empted . . . unless the state interests at stake are sufficient to justify the assertion of state authority.” (quoting *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333–34 (1983))).

¹⁰⁶ There are over 500 federally recognized tribes in the United States. Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, *supra* note 9. However, EPA has only approved forty-two tribal WQS. *Indian Tribal Approvals*, *supra* note 9.

¹⁰⁷ *See Revised Interpretation of Clean Water Act Tribal Provision*, 80 Fed. Reg. 47,430, 47,434 (Aug. 7, 2015) (Nonmember fee lands are lands owned by nontribal members in fee within a reservation).

2. *Impact of the Montana Test Requirement on Establishing Applicable WQS Within Indian Reservations*

Many tribes lack applicable WQS within their reservations because EPA did not interpret § 518 as an express delegation from Congress of tribal authority over CWA regulations until May 2016.¹⁰⁸ EPA's pre-2016 interpretation resulted in the *Montana* test, which created an administrative hurdle that has left many tribes choosing not to seek TAS status to administer WQS.¹⁰⁹ Currently, 566 tribes may seek TAS status.¹¹⁰ However, only fifty-four tribes have been approved as TAS-designated tribes for the purposes of administering WQS.¹¹¹ Out of the fifty-four tribes with TAS status, EPA has approved forty-two tribes' WQS.¹¹²

One of the main reasons for the lack of TAS-designated tribes is that the process is time-consuming.¹¹³ The Government Accountability Office (GAO) reviewed twenty TAS requests¹¹⁴ and found that, although EPA regulations require EPA to review TAS applications within thirty days,¹¹⁵ EPA can take one year to more than four years to review TAS applications.¹¹⁶ This extensive delay deters some tribes from submitting TAS requests.¹¹⁷ Tribes have also noted frustration from the lack of transparency about the status of pending TAS applications.¹¹⁸ The delay is particularly severe for tribes that must satisfy the *Montana* test.¹¹⁹ EPA reported that tribal applications that included

¹⁰⁸ Revised Interpretation of Clean Water Act Tribal Provision, 81 Fed. Reg. 30,183, 30,183–84 (May 16, 2016).

¹⁰⁹ See *infra* notes 113–22 and accompanying text.

¹¹⁰ See Indian Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs, 80 Fed. Reg. 1942, 1942–43 (Jan. 14, 2015).

¹¹¹ *Indian Tribal Approvals*, *supra* note 9.

¹¹² *Id.*

¹¹³ Additionally, tribes may not seek TAS status because they may “not be in a position to develop [a regulatory authority when acting under TAS status],” may want “to avoid jurisdictional conflicts with states,” and may lack “adequate financial and human resources.” Elizabeth Ann Kronk Warner, *Tribes as Innovative Environmental “Laboratories”*, 86 U. COLO. L. REV. 789, 811–12 (2015).

¹¹⁴ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-95, INDIAN TRIBES: EPA SHOULD REDUCE THE REVIEW TIME FOR TRIBAL REQUESTS TO MANAGE ENVIRONMENTAL PROGRAMS 30 (2005).

¹¹⁵ 40 C.F.R. § 131.8(c)(2)(i)–(ii) (2014).

¹¹⁶ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-95, INDIAN TRIBES: EPA SHOULD REDUCE THE REVIEW TIME FOR TRIBAL REQUESTS TO MANAGE ENVIRONMENTAL PROGRAMS 5 (2005).

¹¹⁷ *Id.* at 20 (stating that some tribes have not submitted TAS requests because “the process has become so lengthy,” and they “question[] the value of spending time and resources for such a lengthy process”).

¹¹⁸ *Id.* (stating that lack of transparency “may hinder a tribe’s understanding of what issues are delaying EPA’s approval” and discourage a tribe’s TAS request).

¹¹⁹ Revised Interpretation of Clean Water Act Tribal Provision, 80 Fed. Reg. 47,430, 47,436 (Aug. 7, 2015).

nonmember fee lands, which require satisfying the *Montana* test, “took 1.6 years longer to be approved, on average, than applications for reservations without such lands.”¹²⁰ Many tribes contended that satisfying the *Montana* test “has prevented [them] from establishing federally approved [WQS] for the waters of their Reservations.”¹²¹

Moreover, although litigation regarding tribes seeking TAS status is rare, when litigation has occurred, the disputes have centered on whether EPA properly concluded the tribe satisfied the *Montana* test.¹²² This potential for litigation may be an additional deterrent for tribes.

The combination of EPA’s promotion of tribal sovereignty and conservatism in interpreting § 518 resulted in less than ten percent of tribes with applicable WQS. Because WQS are an essential component of issuing NPDES permits and achieving the goals of the CWA,¹²³ the lack of applicable WQS has been problematic when parties seek NPDES permits within Indian reservations. Section B, below, explores how the Regions have dealt with the lack of applicable WQS when issuing NPDES permits within Indian reservations.

B. Implementation of NPDES Permits on Indian Reservations: Which WQS Apply?

The lack of applicable WQS within Indian reservations has left Regions to independently determine which WQS apply for surface waters within Indian reservations when issuing NPDES permits.¹²⁴ Regions have been inconsistent in their issuing of NPDES permits for point sources discharging on tribal reservations where a tribe does not have an EPA-approved WQS.¹²⁵ The two

¹²⁰ *Id.*

¹²¹ National Tribal Water Council, *Equal Treatment for Tribes in Seeking Eligibility Under EPA Regulatory Programs*, <https://ntwctestsite.files.wordpress.com/2013/08/equal-treatment-for-tribes-in-determining-eligibility-for-cwa-regulatory-programs-3-4-13.pdf> (last visited Sept. 16, 2015).

¹²² *See Wisconsin v. EPA*, 266 F.3d 741, 743–45 (7th Cir. 2001) (whether the tribe showed it had inherent authority over off-reservation activities that bordered the reservation); *Montana v. EPA*, 137 F.3d 1135, 1139 (9th Cir. 1998) (discussing whether the tribe showed it had inherent authority over the facilities on fee lands within the reservation).

¹²³ *See supra* notes 31–35 and accompanying text.

¹²⁴ *See infra* Charts 1, 2.

¹²⁵ *Id.*

charts below highlight the various approaches four of the Regions have taken when required to issue NPDES permits on Indian reservations.¹²⁶

Chart 1.¹²⁷

NPDES Permits Issued on Indian Reservation Where Tribes Lacked Tribal WQS				
WQS Applied	Region 6	Region 8	Region 9	Region 10
Applied downstream states' WQS, providing minimal justification for doing so	X			X
Applied federally recommended water quality criteria to protect the beneficial uses of the receiving waters		X		

Chart 1 identifies the Regions' actions where the tribe lacked tribal WQS.¹²⁸ Regions took one of two actions.¹²⁹ They either applied the downstream state's WQS or applied federally recommended water quality criteria.¹³⁰

Chart 2.¹³¹

NPDES Permits Issued on Indian Reservations Where Tribes Had Tribal WQS				
WQS Applied	Region 6	Region 8	Region 9	Region 10
Applied Tribal WQS (the various justifications Regions gave are listed below)		X		X

¹²⁶ Only Regions 6, 8, 9, and 10 have been documented because they had NPDES permits available for the public. NPDES permits issued by the other Regions could not be found on EPA's website. However, the information is likely representative of a majority of the actions EPA has taken on issuing NPDES permits on Indian reservations as most Indian tribes are located in the western Regions. See National Park Service, Dept. of the Interior, *Indian Reservations in the Continental United States*, <http://www.nps.gov/nagpra/DOCUMENTS/ResMAP.HTM> (last visited Nov. 6, 2015).

¹²⁷ See *infra* Appendix A for a reference list of the NPDES permits that corresponds to the Regions' actions where tribes lacked tribal WQS.

¹²⁸ See *supra* Chart 1.

¹²⁹ See *supra* Chart 1.

¹³⁰ See *supra* Chart 1.

¹³¹ See *infra* Appendix B for a reference list of the NPDES permits that corresponds to the Regions' actions where tribal WQS existed.

1993 EPA Guidance Document ¹³²		X		X
Tribal WQS were the same as the federally recommended water quality criteria		X		
Tribal WQS would be protective of the downstream State WQS		X		X
Applied Tribal WQS based on principles of tribal sovereignty		X		
Applied Tribal WQS because the tribe expected dischargers to comply with their tribal WQS		X		
Did Not Apply Tribal WQS. Instead, Regions . . .	X	X	X	X
Considered Tribal WQS and set effluent limits sufficient to protect the Tribe's designated uses		X		
Considered Tribal WQS, but decided to use State WQS				X
Applied State WQS	X	X	X	
Applied State WQS or federally recommended water quality criteria, but included a reopener provision to reopen and modify the permit if tribal WQS were approved by EPA		X		

Chart 2 identifies the Regions' actions where tribal WQS existed for the Indian reservation.¹³³ In this scenario, some Regions chose to apply tribal WQS; however, Regions lack consistency in choosing to apply tribal WQS.¹³⁴ The same Regions that applied tribal WQS in its NPDES permits also issued NPDES permits within Indian reservations applying state WQS or federally recommended water quality criteria.¹³⁵ Not only is there a lack of Regional consistency in the WQS each Region chose to apply, the justifications given for each decision vary, even within a Region.¹³⁶

¹³² See EPA, GUIDANCE ON EPA'S NPDES AND SLUDGE MANAGEMENT PERMIT PROCEDURES ON FEDERAL INDIAN RESERVATIONS (1993) [hereinafter 1993 GUIDANCE DOCUMENT]. The guidance document stated that "Regions should work with Tribes who have adopted [WQS] not yet approved by EPA to ensure that, to the extent practicable, NPDES permits issued on the reservation achieve compliance with those standards." *Id.* at 6.

¹³³ See *supra* Chart 2.

¹³⁴ See *supra* Chart 2.

¹³⁵ See *supra* Chart 2; *infra* Appendix B.

¹³⁶ See *supra* Chart 2; *infra* Appendix B.

As Chart 2 shows, the Regions took a total of nine different approaches when an applicant sought an NPDES permit for discharges into an Indian reservation that had tribally adopted, yet unapproved WQS.¹³⁷ All nine approaches can be justified by EPA, albeit by different sources of authority. Section C details how the various approaches are supported by EPA documents and court holdings.

C. Justification of the Regions' Approaches

Although the Regions have taken multiple approaches, they can be condensed into three main ones. The Regions either applied (1) state WQS, (2) federally recommended water quality criteria, or (3) tribally adopted, yet unapproved WQS. As the following subsections explain, these three actions are all justifiable by different EPA guidance documents, regulations, and court holdings.

1. Application of State WQS

In certain instances, the Regions chose not to apply tribally adopted, yet unapproved WQS.¹³⁸ Instead, the Regions applied the downstream state's WQS.¹³⁹ When a downstream state's WQS were applied, many Regions did not provide much of an explanation, except that the tribes lacked EPA-approved WQS.¹⁴⁰ However, some Regions cited 40 C.F.R. § 122.4(d), which requires EPA to “ensure [NPDES permits comply] with the applicable water quality requirements of all affected states.”¹⁴¹ The Regions followed EPA regulations by applying the downstream state's WQS. It is uncertain whether the Regions considered whether tribal WQS was protective of the downstream states' WQS in deciding to apply the downstream state's WQS.¹⁴² If tribal WQS was as stringent as the downstream states' WQS, and thus protective of the downstream waters, then the Regions also could have applied tribal WQS without violating 40 C.F.R. § 122.4(d).¹⁴³ In fact, Region 10 explicitly

¹³⁷ See *supra* Chart 2.

¹³⁸ See *infra* Appendix B.2.

¹³⁹ See *infra* Appendix B.2.b–d.

¹⁴⁰ See *infra* Appendix B.2.b–d.

¹⁴¹ REGION 10, EPA, PERMIT NO. WA0026123, FACT SHEET: CITY OF TOPPENISH WASTEWATER TREATMENT PLANT 9–10 (2012); see REGION 9, EPA, PERMIT NO. CA0050008, FACT SHEET: SANTA YNEZ BAND OF CHUMASH INDIANS 8 (2014).

¹⁴² See sources cited *supra* note 141.

¹⁴³ See, e.g., REGION 10, EPA, PERMIT NO. WA0026743, FACT SHEET: YAKAMA NATION LEGENDS CASINO WASTEWATER TREATMENT PLANT 7 (2013); REGION 10, EPA, PERMIT NO. WA-005022-9, FACT

addressed § 122.4(d) in the NPDES permits it issued and stated application of tribal WQS did not violate § 122.4(d).¹⁴⁴ Although the NPDES permits fail to thoroughly rationalize the Regions' application of state WQS on Indian reservations, § 122.4(d) does provide justification for the Regions' decision.

2. Application of Federally Recommended Water Quality Criteria

Regions were also likely justified in applying federally recommended water quality criteria even though EPA regulations do not explicitly state that Regions may take such action. Federally recommended water quality criteria serve three purposes. First, they assist states in establishing their own water quality criteria.¹⁴⁵ Second, they establish the floor for water quality criteria because they are set to protect aquatic life and recreation,¹⁴⁶ the minimum requirement for establishing designated uses for a body of water.¹⁴⁷ Third, EPA held as its policy that it would apply federally recommended water quality criteria when it finds it necessary to promulgate federal WQS for a tribe.¹⁴⁸ Needing to address water quality-based permit actions—such as NPDES permits—was identified as an instance where EPA may find it necessary to promulgate federal standards for a tribe.¹⁴⁹ Based on this policy, the Regions could have applied federally recommended water quality criteria if EPA had promulgated federal WQS for the tribes. However, none of the tribes where NPDES permits were issued had federal WQS.¹⁵⁰

Even though EPA's policy does not specifically address whether the Regions may apply federally recommended water quality criteria where no federal WQS exist, the Regions were likely justified in doing so based upon

SHEET: CITY OF WAPATO 7 (2011); REGION 10, EPA, PERMIT NO. WA-005020-2, FACT SHEET: WASHINGTON BEEF LLC 12 (Sept. 30, 2009). In all three NPDES permits, Region 10 stated that, although 40 C.F.R. § 122.4(d) prohibits EPA from “issuing a permit when the ‘imposition of conditions cannot ensure compliance with the applicable water quality requirement of all affected states,’” discharge was not likely to affect the downstream state's WQS. FACT SHEET: YAKAMA NATION LEGENDS CASINO WASTEWATER TREATMENT PLANT, *supra*; FACT SHEET: CITY OF WAPATO, *SUPRA*; FACT SHEET WASHINGTON BEEF LLC, *supra*. Therefore, Region 10 applied tribal WQS. *Id.*

¹⁴⁴ See *supra* note 143.

¹⁴⁵ 33 U.S.C. § 1314(a) (2012); see also OFFICE OF WATER, EPA, WATER QUALITY STANDARDS HANDBOOK § 3.1.1 (2014).

¹⁴⁶ 33 U.S.C. § 1314(a)(1).

¹⁴⁷ *Id.* § 1313(c)(2)(A) (2012).

¹⁴⁸ Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,876, 64,891 (Dec. 12, 1991) (codified at 40 C.F.R. § 131).

¹⁴⁹ *Id.*

¹⁵⁰ See *supra* note 103 and Appendix A–B. EPA only promulgated federal WQS for the Colville Confederated Tribe, and did not issue an NPDES permit for surface water discharge within that reservation. *Id.*

the second function of federally recommended water quality criteria. By setting the floor for water quality criteria, the federally recommended water quality criteria adequately protect the federally required designated uses for all surface waters within the United States, including the receiving waters within Indian reservations.¹⁵¹ Even if tribal WQS existed, for the Regions to issue a federal NPDES permit, the Regions are obliged to ensure the federally recommended water quality criteria are met.¹⁵² As a result of this obligation, the Regions may have decided to simply apply the federally recommended water quality criteria rather than take the time to determine whether tribally adopted, yet unapproved WQS met the federally recommended water quality criteria.

Therefore, the Regions could be justified in applying the federally recommended water quality criteria for surface waters within Indian reservations. However, as the following subsection illustrates, the Regions could also be justified in applying tribally adopted, yet unapproved WQS.

3. Application of Tribally Adopted, yet Unapproved WQS

In other instances, the Regions applied tribally adopted, yet unapproved WQS.¹⁵³ EPA regulations and guidance establish that until EPA approves a state or authorized tribe's WQS, state or tribal WQS are not applicable.¹⁵⁴ However, two potential exceptions justify the Regions' use of tribally adopted, yet unapproved WQS. First, a loophole in the CWA allows EPA to apply unapproved WQS through a process known as 401 certification.¹⁵⁵ Second, the principles of tribal sovereignty may justify the Regions' application of tribally adopted, yet unapproved WQS. This subsection explores these two exceptions, respectively. First, it explores the role of the 401 certification process and how it may justify the Regions' use of tribally adopted, yet unapproved WQS. It then discusses how the principles of tribal sovereignty permit tribal establishment of WQS and how the federal government may be obligated to protect them.

¹⁵¹ 33 U.S.C. § 1314(a)(1).

¹⁵² *Id.*

¹⁵³ *See infra* Appendix B.1.

¹⁵⁴ *See supra* notes 56–57, 88.

¹⁵⁵ 33 U.S.C. § 1341(a) (2012).

A 401 certification is required for all NPDES permits by the NPDES permit-issuing authority.¹⁵⁶ This certification requirement serves the purpose of assuring that federal permits do not undermine a state or tribe's water quality requirements.¹⁵⁷ The certification sets forth the requirements necessary to assure that NPDES permits issued "will comply with any applicable effluent limitations and . . . any other appropriate requirement of State law set forth in such certification."¹⁵⁸ When EPA is held responsible for issuing NPDES permits, EPA has noted it will assure that the permit complies with the state or authorized tribe's 401 certification requirements.¹⁵⁹

EPA's interpretation of § 401 allows states and authorized tribes to develop limitations in addition to their WQS, which may be broad as long as they relate to water quality.¹⁶⁰ Courts have upheld this broad interpretation, holding that 401 certification provides states veto power over federal permits that fail to meet the conditions imposed by a state's 401 certification.¹⁶¹ As a result, if a state or authorized tribe incorporated its unapproved WQS as state or tribal law and included the unapproved WQS in its 401 certification requirements, EPA would be obligated to ensure the NPDES permit complies with unapproved WQS.¹⁶²

For tribes lacking TAS status, EPA assumes authority over 401 certifications.¹⁶³ Because such tribes lack authority to make 401 requirements,¹⁶⁴ the Regions are not obligated to comply with any water

¹⁵⁶ *Id.* § 1341(a)(1); *see also* OFFICE OF WETLANDS, OCEANS, AND WATERSHEDS, EPA, CLEAN WATER ACT SECTION 401 WATER QUALITY CERTIFICATION: A WATER QUALITY PROTECTION TOOL FOR STATES AND TRIBES 1 (2010), <http://pbadupws.nrc.gov/docs/ML1121/ML112160635.pdf> (last visited Aug. 9, 2016).

¹⁵⁷ STAFF OF S. COMM. ON PUB. WORKS, 93D CONG., 1ST SESS., A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 1487 (Comm. Print 1973).

¹⁵⁸ 33 U.S.C. § 1341(d).

¹⁵⁹ EPA Review and Approval of State and Tribal Water Quality Standards, 65 Fed. Reg. 24,641, 24,644 (Apr. 27, 2000) (codified at 40 C.F.R. § 131.21(c)).

¹⁶⁰ CLEAN WATER ACT SECTION 401 WATER QUALITY CERTIFICATION, *supra* note 156, at 10.

¹⁶¹ *See* Lake Carriers Ass'n v. EPA, 652 F.3d 1, 10 (D.C. Cir. 2011) (*per curiam*) (holding that EPA did not "have the ability to amend or reject conditions in a [state's] CWA 401 certification"); *American Rivers, Inc. v. FERC*, 129 F.3d 99, 110–11 (2d Cir. 1997); *United States v. Marathon Dev. Corp.*, 867 F.2d 96, 101–02 (1st Cir. 1989).

¹⁶² EPA Review and Approval of State and Tribal Water Quality Standards, 65 Fed. Reg. 24,641, 24,644 (Apr. 27, 2000) (codified at 40 C.F.R. § 131.21(c)) (applicable to state WQS adopted after May 30, 2000).

¹⁶³ EPA TAS Strategy, *supra* note 69, at 21.

¹⁶⁴ Only TAS-designated tribes have the authority to make 401 certification requirements. 40 C.F.R. § 124.51(c) (2016). Because unauthorized tribes may not make 401 certification requirements, EPA will give the certification. 33 U.S.C. § 1341(a)(1) (2012).

quality requirements tribes may impose in their tribal laws.¹⁶⁵ Although EPA is not obligated to comply with tribal requirements, the Regions may find two justifications for applying tribally adopted, yet unapproved WQS. First, EPA's Indian Policy states that EPA will "give special consideration to Tribal interests" and involve "Tribal Governments in making decisions and managing environmental programs affecting reservation lands."¹⁶⁶ Therefore, the Regions, in considering tribal interests, may have applied unapproved tribal WQS as conditions of their 401 certification. Second, EPA's Guidance on Sludge Management Permit Procedures on Federal Indian Reservations (1993 Guidance Document), which many Regions cited as support, states that "Regions should work with Tribes who have adopted water quality standards not yet approved by EPA to ensure that . . . NPDES permits issued on the reservation achieve compliance with [tribal WQS]."¹⁶⁷ As a result, the Regions may have applied unapproved tribal WQS as conditions of their 401 certification if the WQS were incorporated as tribal law.

An alternative justification for the Regions' application of tribally adopted, yet unapproved WQS is the principles of tribal sovereignty. Region 8 issued several NPDES permits in accordance with these principles.¹⁶⁸ Under the principles of tribal sovereignty, tribes have exclusive authority within Indian territory—unless precluded by the federal government—and the United States is responsible for protecting tribal resources.¹⁶⁹ In the context of setting WQS, tribes are not precluded from establishing their own WQS independent of the CWA—the CWA does not require tribes to promulgate WQS pursuant to its guidelines.¹⁷⁰ Rather, in accordance with its Indian Policy, EPA will only promulgate WQS for tribes if tribes affirmatively decline to seek TAS status for the administration of WQS, or if EPA determines federal WQS are necessary for an Indian reservation.¹⁷¹

¹⁶⁵ 1993 GUIDANCE DOCUMENT, *supra* note 132, at 5–6 ("Tribes not approved under CWA section 303 have no section 401(a)(2) right to object.").

¹⁶⁶ RUCKELSHAUS, *supra* note 65, at 1.

¹⁶⁷ 1993 GUIDANCE DOCUMENT, *supra* note 132, at 6. For the list of NPDES permits where the Regions justified applying tribal WQS based on the 1993 Guidance Document, see Appendix B.1.a.

¹⁶⁸ See *infra* Appendix B.1.d.

¹⁶⁹ See *supra* note 17.

¹⁷⁰ See *supra* note 94.

¹⁷¹ See Water Quality Standards for the Colville Indian Reservation in the State of Washington, 54 Fed. Reg. 28,622, 28,624 (July 6, 1989) (codified at 40 C.F.R. § 131).

Not only does the CWA permit tribes to establish their own WQS, but the Supreme Court held tribes had sovereignty to establish tribal WQS.¹⁷² The Supreme Court held that tribes have a right to water, an implied reservation of water sufficient to meet the purposes of the reservation in any lawful manner as they see fit.¹⁷³ This implied reservation of water authorizes tribes to establish WQS for surface waters within their reservations because the purposes of a tribe's reservation cannot be accomplished if tribal WQS are not met. WQS include designated uses, which classify water bodies based on how tribes expect to use their sources of surface water.¹⁷⁴ Therefore, tribal WQS, which include designated uses, outline tribal rights to water and are not precluded by EPA.

Tribal WQS are safeguarded by the United States. As trustee, the principles of tribal sovereignty obligate the United States to protect tribal rights to water.¹⁷⁵ The United States Claims Court upheld the United States' obligation to tribal rights to water in *Gila River Pima-Maricopa Indian Community v. United States*.¹⁷⁶ In *Gila River*, non-Indian water users diverted water and detrimentally affected an Indian tribe's right to use the water within its reservation.¹⁷⁷ The court found that the United States, as trustee of Indian water rights, was obligated to protect the Tribe's water resources and "to take legal action either to attempt to end the diversions or to restore an alternative equivalent supply."¹⁷⁸

Because Congress delegated water-resource protection to EPA, EPA is responsible for protecting tribes' right to water.¹⁷⁹ Thus, the Regions could be justified in applying tribally adopted, yet unapproved WQS under the principles of tribal sovereignty because such action protects tribal rights to their implied reservation of water.

Although the Regions were justified in taking the various approaches to issuing NPDES permits for surface waters within Indian reservations, EPA

¹⁷² See *Cappaert v. United States*, 426 U.S. 128, 138 (1976); see also *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 48 (1981).

¹⁷³ See *Winters v. United States*, 207 U.S. 564, 567, 576 (1908).

¹⁷⁴ See NPDES MANUAL, *supra* note 39.

¹⁷⁵ See *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

¹⁷⁶ 231 Ct. Cl. 193, 208–09 (Ct. Cl. 1982) (per curiam).

¹⁷⁷ *Id.* at 200.

¹⁷⁸ *Id.* at 211 (footnote omitted); see also *White Mountain Apache Tribe v. United States*, 11 Cl. Ct. 614, 620 (Cl. Ct. 1987), *aff'd*, 5 F.3d 1506 (Fed. Cir. 1993) (holding that the U.S. government's "failure to protect water resources can be actionable").

¹⁷⁹ 33 U.S.C. § 1251(d) (2012).

ought to prescribe a consistent approach.¹⁸⁰ Consistency ensures fairness and equitable treatment.¹⁸¹ EPA expects some variation in certain Regional actions.¹⁸² However, expected variations are for issues that are regional in nature.¹⁸³ For example, the impact of two similar violations may differ based on the location of the violation.¹⁸⁴ The procedure of issuing NPDES permits on Indian reservations is not a regional issue. All permittees and tribes ought to have notice of how effluent limitations will be established in an NPDES permit issued on an Indian reservation. This requires EPA to take a consistent approach to determining which WQS apply for NPDES permits within Indian reservations. More troublesome is the fact that variations exist not only among Regions, but also within a Region.¹⁸⁵ Variations within a Region provide no guidance to a tribe with a point source discharge on how the Region will implement a NPDES permit. Part III provides a solution that promotes Regional consistency and protects tribal waters.

III. EPA SHOULD PROMULGATE A NEW RULE STATING THAT REGIONS OUGHT TO APPLY TRIBALLY ADOPTED, YET UNAPPROVED WQS AS LONG AS THE TRIBAL WQS ARE AT LEAST PROTECTIVE OF THE DOWNSTREAM STATE'S WQS

Part III proposes how EPA ought to address the lack of applicable WQS for surface waters within Indian reservations and the piecemeal approaches the Regions have taken. This Comment proposes that EPA ought to promulgate a new rule stating that tribally adopted, yet unapproved WQS will be applicable for CWA purposes as long as tribal WQS are at least protective of downstream states' WQS.¹⁸⁶ To support this claim, section A explains why EPA was

¹⁸⁰ See EPA POLICY ON CONSULTATION AND COORDINATION WITH TRIBES, *supra* note 100, at 1 (establishing guidance to achieve consistency in tribal consultation for environmental matters); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/RCED-00-108, ENVIRONMENTAL PROTECTION: MORE CONSISTENCY NEEDED AMONG EPA REGIONS IN APPROACH TO ENFORCEMENT 4 (2000) (acknowledging that "core enforcement requirements must nonetheless be consistently implemented . . . to ensure fairness and equitable treatment").

¹⁸¹ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/RCED-00-108, ENVIRONMENTAL PROTECTION: MORE CONSISTENCY NEEDED AMONG EPA REGIONS IN APPROACH TO ENFORCEMENT 4 (2000).

¹⁸² *Id.* at 20. EPA expects and encourages variations in how Regions prioritize enforcement and compliance issues, how Regions determine severity of an environmental problem, and how much oversight Regions take over state enforcement programs. *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ See *supra* Chart 2.

¹⁸⁶ By ensuring that tribal WQS are at least protective of downstream state's WQS, tribal WQS meet the federal minimum floor because state WQS may not be less stringent than federal standards. 33 U.S.C. § 1370 (2012).

correct to reinterpret § 518 as expressly delegating eligible Indian tribes to administer regulatory programs over their entire reservation. The following sections illustrate how this new rule would be most consistent with EPA's Indian Policy and guidance documents concerning tribes, the principles of tribal sovereignty, and the purposes of the CWA. Section E explains why this Comment's proposed rule aligns better with EPA's Indian Policy, the principles of tribal sovereignty, and the CWA than EPA's most recent proposed rule concerning tribal WQS.

A. *EPA Correctly Reinterpreted § 518*

In May 2016, EPA reinterpreted § 518, concluding that § 518 is an “express delegation of authority by Congress to [eligible] Indian tribes to administer regulatory programs over their entire reservation.”¹⁸⁷ Not only does this new rule eliminate the need for tribes to satisfy the *Montana* test,¹⁸⁸ but it is more consistent with EPA's internal documents and the principles of tribal sovereignty.

EPA's 1993 Guidance Document, Indian Policy, interpretation of 401 certification and the principles of tribal sovereignty permit Regions to apply tribally adopted, yet unapproved WQS.¹⁸⁹ As a result, Regions have applied tribally adopted, yet unapproved WQS without considering whether tribes had inherent authority over the surface waters in their reservations.¹⁹⁰ However, such actions by the Regions directly contradicted EPA's prior interpretation of § 518, which required Regions to determine that the tribes satisfied the *Montana* test prior to applying tribally adopted, yet unapproved WQS.¹⁹¹

¹⁸⁷ Revised Interpretation of Clean Water Act Tribal Provision, 81 Fed. Reg. 30,183, 30,184 (May 16, 2016).

¹⁸⁸ *Id.* at 30,190.

¹⁸⁹ *See supra* Part II.C.

¹⁹⁰ None of the Fact Sheets for NPDES permits that applied tribally adopted, yet unapproved WQS determined that the receiving waters would have a serious and substantial effect on the health and welfare of the tribes. *See* Appendix B.1. In one instance, the Region applied tribally adopted, yet unapproved WQS even though the land where the point source was located was on nonmember fee lands, subject to state jurisdiction, in direct contradiction to *Montana*. *See* Region 10, EPA, *Response to Comments on the Draft NPDES Permit for the City of Wapato*, NPDES Permit No. WA-005022-9, at 1 (2011).

¹⁹¹ *See Montana v. EPA*, 137 F.3d 1135, 1141 (9th Cir. 1998) (upholding tribes' TAS status because EPA determined that “activities of the non-members posed such serious and substantial threats to Tribal health and welfare that Tribal regulation was essential”); *see also Wisconsin v. EPA*, 266 F.3d 741, 750 (7th Cir. 2001) (upholding a tribe's TAS status because EPA found the tribe had “demonstrated that its water resources [were] essential to its survival”).

Moreover, the reinterpretation furthers tribal sovereignty by encouraging tribes to seek TAS status. Many tribes choose not to seek TAS status because the application process, which required satisfying the *Montana* test, was time-consuming.¹⁹² By removing this barrier to applying for and being granted TAS status, tribes may be more likely to seek TAS status, which will promote tribal sovereignty by providing tribes a formal recognition of authority.

Because States have often sought to infringe on tribal sovereignty,¹⁹³ formal recognition of authority by the federal government promotes tribal sovereignty by reducing the probability and success of state imposition of authority. A TAS-designated tribe may have the ability to affect the activity in neighboring states and ensure its WQS are properly protected.¹⁹⁴ With this formal recognition of authority, tribes are less likely to litigate their water rights¹⁹⁵ because states will be prevented from seeking authority to regulate WQS within Indian reservations.¹⁹⁶ Therefore, EPA appropriately reinterpreted § 518 to align with its other internal documents, interpretations of other sections of the CWA, and the principles of tribal sovereignty.

Although this reinterpretation seeks to “encourage more tribes to apply for TAS for CWA regulatory programs,” some tribes may continue to choose not to seek TAS status.¹⁹⁷ Moreover, the new rule does not provide the Regions guidance on which WQS to apply within an Indian reservation when a tribe has its own WQS, but has not yet been approved as a TAS-designated tribe. This Comment’s proposal—promulgating a new rule stating that tribally adopted, yet unapproved WQS will be applicable for CWA purposes as long as tribal WQS are at least protective of the downstream state’s WQS—resolves these two issues, while remaining consistent with EPA’s Indian Policy and guidance documents concerning tribes, the principles of tribal sovereignty, and the purposes of the CWA.

¹⁹² See *supra* notes 113–21.

¹⁹³ See, e.g., *Wisconsin*, 266 F.3d at 750; *Montana*, 137 F.3d at 1140; *City of Albuquerque v. Browner*, 97 F.3d 415, 427 (10th Cir. 1996); see also Merianne A. Stansbury, *Negotiating Winters: A Comparative Case Study of the Montana Reserved Water Rights Compact Commission*, 27 PUB. LAND & RESOURCES L. REV. 131, 132 & n.4 (2006) (“Most tribal water rights are quantified through litigation and adjudication . . .”).

¹⁹⁴ See *supra* note 90.

¹⁹⁵ See, e.g., Marren Sanders, *Indian Law: Clean Water in Indian Country: The Risks (And Rewards) of Being Treated in the Same Manner as a State*, 36 WM. MITCHELL L. REV. 533, 548 (2010).

¹⁹⁶ See Warner, *supra* note 113, at 808 (stating that TAS status “would pre-empt any state regulatory assertions” because states “would likely be unable to demonstrate sufficient interests to justify regulation”).

¹⁹⁷ Revised Interpretation of Clean Water Act Tribal Provision, 81 Fed. Reg. 30,183, 30,195 (May 16, 2016); see *infra* notes 238–41 and accompanying text.

B. Consistent with EPA's Indian Policy and Guidance Documents Concerning Tribes

EPA's Indian Policy established that EPA will "give special consideration to Tribal interests" and "involve[] . . . Tribal Governments in making decisions and managing environmental programs affecting reservation lands."¹⁹⁸ The 1993 Guidance Document establishes that Regions "should work with Tribes who have adopted water quality standards not yet approved by EPA to ensure that . . . NPDES permits issued on the reservation achieve compliance with [tribal WQS]."¹⁹⁹ These two documents have been cited in many NPDES permits justifying the application of tribally adopted, yet unapproved WQS.²⁰⁰ In addition to these two documents, more recent EPA documents further establish EPA's stance toward tribes and support the application of tribally adopted, yet unapproved WQS.

In 2011, EPA issued guidance on EPA consultation and coordination with tribes to help implement its policy "[to] recognize[] and work[] directly with federally recognized tribes as sovereign entities with primary authority and responsibility for each tribe's land" and to give "special consideration to [tribal] interests whenever EPA's actions may affect Indian country or other tribal interests."²⁰¹ EPA listed permits as an example of a category of activities appropriate for tribal consultation.²⁰² Noting that "much of the actual consultation activity occurs in EPA's . . . regional offices," EPA established it was the role of the Regions to carry out consultation if the Regions found it necessary.²⁰³ This policy of tribal consultation has been reiterated and highlighted as a key method for promoting environmental justice principles in tribal environmental protection programs.²⁰⁴

Emphasizing the values of public consultation and environmental justice, EPA published a notice in the Federal Register providing agency-wide guidelines for the Regions on EPA-issued permits on overburdened

¹⁹⁸ RUCKELSHAUS, *supra* note 65, at 1.

¹⁹⁹ 1993 GUIDANCE DOCUMENT, *supra* note 132.

²⁰⁰ *See infra* Appendix B.1.a.

²⁰¹ EPA POLICY ON CONSULTATION AND COORDINATION WITH INDIAN TRIBES, *supra* note 100, at 3–4.

²⁰² *Id.* at 5.

²⁰³ *Id.* at 7.

²⁰⁴ *See* EPA, EPA POLICY ON ENVIRONMENTAL JUSTICE FOR WORKING WITH FEDERALLY RECOGNIZED TRIBES AND INDIGENOUS PEOPLES 3 (2014), <https://archive.epa.gov/partners/web/pdf/ej-indigenous-policy.pdf>.

communities, including tribes.²⁰⁵ EPA identified NPDES permitting as having significant public health and environmental impacts, such that Regions should prioritize reaching out to and consulting with overburdened communities.²⁰⁶

Therefore, applying tribally adopted, yet unapproved WQS is most consistent with EPA's policy concerning tribes. Working directly with a tribe that has developed its own WQS and ensuring that tribal interests in water are protected through applying tribal WQS fall in line with EPA's policy on consultation and coordination with Indian tribes and its notice in the Federal Register.

C. *Consistent with the Principles of Tribal Sovereignty*

Under the principles of tribal sovereignty, tribes have exclusive authority within Indian territory—unless precluded by the federal government—and the United States is responsible for protecting tribal resources.²⁰⁷ This sovereignty allows tribes to establish WQS for surface waters within their reservations. In establishing WQS for their reservations, the implied reservation of water residing within the boundaries of their tribal reservations gives tribes a vested right to ensure tribal WQS meet the purposes of their reservations.²⁰⁸ Because tribal WQS help define tribal rights to water and are a component of tribal sovereignty to establish WQS, the United States is obligated to protect tribes' implied reservation of water.²⁰⁹ Therefore, application of tribally adopted, yet unapproved WQS for CWA purposes upholds the principles of tribal sovereignty. Not only is this Comment's proposal consistent with court-established federal common law of tribal sovereignty, but, as Part IV.B will elaborate, it further promotes tribal sovereignty by formally recognizing tribal rights to water quality protection.²¹⁰

D. *Consistent with the Purposes of the CWA*

The purpose of the CWA is “to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.”²¹¹ To meet the CWA's

²⁰⁵ EPA Activities to Promote Environmental Justice in the Permit Application Process, 78 Fed. Reg. 27,220, 27,223 (May 9, 2013).

²⁰⁶ *Id.*

²⁰⁷ See *supra* note 21 and accompanying text.

²⁰⁸ See *supra* notes 27–28 and accompanying text.

²⁰⁹ See *supra* note 175–78 and accompanying text.

²¹⁰ See *infra* Part IV.B.

²¹¹ 33 U.S.C. § 1251(a) (2012).

purpose, states or EPA are required to set WQS for waters within their jurisdiction.²¹² Because states lack jurisdiction within reservation boundaries, states do not set WQS on waters within reservation boundaries.²¹³ Additionally, EPA has not set federal WQS on Indian reservations because doing so would contradict EPA's Indian Policy of tribal self-determination.²¹⁴ This results in a lack of applicable WQS on Indian reservations.

The lack of applicable WQS on Indian reservations does not defeat the purpose of the CWA. EPA, as the administrating authority of NPDES permits, ensures that the waters are protected by applying some WQS.²¹⁵ Rather than defeat the purpose of the CWA, applying tribally adopted WQS that are at least protective of downstream state's WQS would further the purpose of the CWA for two reasons.

First, applying tribally adopted WQS with this floor would allow waters to be protected for the actual purposes the waters serve for the public.²¹⁶ Tribes, as users of the waters within their Indian reservations, would set applicable designated uses. Applying state WQS would not ensure protection of public health or welfare because what a state considers public concern does not necessarily include the needs of a tribe. Applying federally recommended water quality criteria also fails to ensure protection of tribal needs for the waters because federal law just sets a minimum.²¹⁷ A tribe may require a more protective standard to protect its use of the waters.²¹⁸

Second, applying tribally adopted WQS would leave the potential for tribes to establish more stringent WQS than downstream states or federal standards.²¹⁹ EPA regulations would prohibit Regions from imposing less stringent tribal WQS than downstream states or federal standards.²²⁰ Thus, applying tribally adopted WQS that are at least protective of downstream

²¹² See 40 C.F.R. § 131.2 (2014).

²¹³ See *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 170–71 (1973) (“State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has explicitly provided that State law shall apply.”); *Water Quality Standards for the Colville Indian Reservation in the State of Washington*, *supra* note 61, at 28,622 (“The CWA does not, by itself, authorize States to implement or enforce water quality management programs on Indian lands.”).

²¹⁴ See *supra* notes 94–95 and accompanying text.

²¹⁵ See *supra* note 34 and accompanying text.

²¹⁶ 33 U.S.C. § 1251(a).

²¹⁷ See *id.* § 1314(a)(1) (2012); 40 C.F.R. § 131.5(b) (2014).

²¹⁸ See *supra* note 89 and accompanying text.

²¹⁹ *Id.*

²²⁰ See 40 C.F.R. §§ 122.4(d) (2015), 131.5(b).

states' WQS furthers the purpose of the CWA by setting standards to establish cleaner waters.

Although these WQS would not yet have been approved by EPA, as long as they are protective of downstream states' WQS, the purpose of the CWA will not be undermined. EPA already permits states to apply unapproved WQS if they are at least as stringent as federal standards because the CWA does not preempt more stringent WQS.²²¹ Moreover, applying tribal WQS would not be a default approval of the tribe's WQS. A tribe would still be required to apply for TAS status for the administration of WQS and submit its WQS to EPA for approval. The new rule would be analogous to EPA's solution for delays in approving a state's WQS.²²² Therefore, the new rule would not violate § 303(c) of the CWA, which requires EPA to review and affirmatively approve or disapprove a state's or authorized tribe's new or revised WQS.²²³

For these reasons, EPA should require the Regions to apply tribally adopted, yet unapproved WQS as long as they protect downstream states' WQS.

E. EPA's Proposed Rule: Federal Baseline WQS for Indian Reservations

On September 29, 2016, EPA proposed a new rule "establishing federal baseline [WQS] for certain Indian reservation waters to narrow a long-standing gap in coverage of [CWA] protections."²²⁴ With the federal baseline WQS, EPA sought to ensure Indian reservations have direct water quality-based protections under the CWA.²²⁵ In line with EPA's Indian Policy, EPA sought input from tribes on "which components of WQS to include," what designated uses should be protected, what the narrative and numeric WQS should be, among other criteria involved in a WQS.²²⁶ Although EPA is considering whether it should establish federal baseline WQS "that offer limited tailoring opportunities," EPA is concerned that such an approach "could present a very

²²¹ See *supra* note 58 and accompanying text.

²²² See *supra* notes 57–58 and accompanying text.

²²³ 33 U.S.C. § 1313(c) (2012).

²²⁴ Federal Baseline Water Quality Standards for Indian Reservations, 81 Fed. Reg. 66,900 (Sept. 29, 2016) (to be codified at 40 C.F.R. § 131).

²²⁵ *Id.* at 66,903.

²²⁶ *Id.* at 66,903–11 (evaluating what would be included in the federal baseline WQS efforts and requested tribal inputs).

large workload that could substantially delay proposal and finalization of any federal baseline WQS effort.”²²⁷

Although EPA’s proposed rule is a novel idea to ensure all surface waters within Indian reservations are protected, it is not sufficient to address the administrative delays and individual reservations’ needs in water quality protection. EPA’s proposed rule continues to require that tribes undergo the TAS and WQS adoption process to individually protect the surface waters within their reservation.²²⁸ Thus, the federal baseline WQS would override tribal WQS that already exist on Indian reservations, which inhibits tribal sovereignty. The federal baseline WQS encroaches on the sovereignty of tribes to establish their own water codes.²²⁹ Tribal water codes would lack any force of law and no Region would utilize them to set WQS for surface waters within Indian reservations.

Moreover, by precluding tribally adopted WQS, the proposed federal baseline WQS would be less effective at meeting the purposes of the CWA. EPA’s proposed rule suggests the federal baseline WQS would be generally tailored for all tribes.²³⁰ This fails to adequately ensure WQS sufficiently protect tribal health and welfare.²³¹ Certain tribes may use their waters for purposes that require greater protection than the federal baseline. EPA notes that certain tribes consume fish at greater quantities and may require a higher numeric WQS criteria to protect their health.²³² Additionally, the temperature range and nutrients necessary to set a protective WQS for fish differ significantly based on where the surface waters are located.²³³

EPA recognizes these limitations to setting a broad federal baseline WQS applicable to all tribes that lack TAS status and applicable WQS. As water quality needs differ significantly even within a reservation, applying available tribal water codes as the WQS for CWA purposes better protects water quality by imposing stringent standards necessary to protect the tribes’ public health and welfare. This Comment’s proposed rule also better promotes tribal

²²⁷ *Id.* at 66,903, 66,908.

²²⁸ *Id.* at 66,908.

²²⁹ *See infra* Part IV.B.

²³⁰ *See* Federal Baseline Water Quality Standards for Indian Reservations, 81 Fed. Reg. at 66,908.

²³¹ *See supra* notes 216–18 and accompanying text.

²³² *See* Federal Baseline Water Quality Standards for Indian Reservations, 81 Fed. Reg. at 66,908. (“[G]iven the broad geographic scope of this potential federal baseline WQS rule, it could be challenging to identify reservation-, water-, [sic] or even region-specific fish consumption rates . . .”).

²³³ *Id.* at 66,907 (recognizing that the appropriate criteria for nutrients and temperature varies significantly among and within reservations).

sovereignty by recognizing that tribes have the sovereign power to establish their own water codes.

This section does not argue that EPA erred in proposing federal baseline WQS for Indian reservations. It is uncertain how many of the 556 federally recognized tribes have their own water codes. For the tribes that lack their own water codes, EPA's proposed rule achieves its goal of ensuring the tribes have coverage in CWA protections. It does not severely encroach upon tribal sovereignty because the tribes do not have their own rules and regulations on water. Therefore, EPA's proposed rule could benefit those tribes that lack their own water codes. However, this Comment finds that applying federal baseline WQS for all Indian reservations that lack TAS status and EPA-approved WQS infringes upon tribal sovereignty and provides less protection to tribes than this Comment's proposed rule.

IV. IMPLICATIONS

This Comment argues that EPA ought to promulgate a new rule requiring the Regions to apply tribally adopted, yet unapproved WQS as long as the standards are protective of downstream states' WQS. Not only will this proposal help resolve the issue of which WQS to apply when no applicable WQS exist within a tribal reservation, but it will have three additional beneficial effects. First, the two rules will likely afford greater protection to tribal surface waters. Second, they will promote tribal sovereignty even if tribes decide not to apply for TAS status. Third, they will promote environmental justice efforts on Indian reservations. Each effect is addressed in turn.

A. *Greater Protection of Tribal Waters*

By establishing applicable WQS for surface waters within Indian reservations where none existed before, this Comment's proposal will properly protect tribal water uses and promote the purposes of the CWA.²³⁴ Tribes may use surface waters within their reservations differently than downstream states. Often, tribes place high value on water, encompassing more than just health and economic values but also "spiritual and cultural values."²³⁵ Application of

²³⁴ See *supra* Part III.

²³⁵ Kathleen A. Kannler, Note, *The Struggle Among States, The Federal Government, and Federally Recognized Indian Tribes to Establish Water Quality Standards for Waters Located on Reservations*, 15 GEO.

tribal WQS will ensure waters are protected for the public purposes they serve.²³⁶ Additionally, tribes are more likely to set more stringent WQS than downstream states for the federally recommended water quality criteria due to the high value tribes place on water.²³⁷ Applying tribally adopted WQS will further the purpose of the CWA by setting standards to establish cleaner waters.

B. Further Respect for Tribal Sovereignty

As a justification for the new rule, this Comment illustrates how the application of tribally adopted, yet unapproved WQS aligns with the principles of tribal sovereignty. This Comment's proposal expands tribal sovereignty by assuring that the federal government will protect tribal rights to water even for tribes that do not seek TAS status.

Some tribes may continue not to seek TAS status even after EPA's reinterpretation of § 518. Tribes may believe that submitting to another government's laws infringes upon their sovereignty.²³⁸ Additionally, some tribes may not seek TAS status because they lack the resources necessary to administer WQS on their reservations.²³⁹ As part of the TAS application, a tribe must show it is capable of carrying out the functions for which it seeks TAS status.²⁴⁰ Many tribes do not have the capability to do so due to limited funding.²⁴¹

INT'L ENVTL. L. REV. 53, 63–64 (2002); *see also* City of Albuquerque v. Browner, 97 F.3d 415, 428 (10th Cir. 1996) (stating that the tribe set WQS for ceremonial use that was much more stringent than the state's WQS).

²³⁶ *See supra* Part III.

²³⁷ *See* Kannler, *supra* note 235, at 63–64 (noting that “no activity on the reservation has more potential for significantly affecting” tribal life “than water use, quality, and regulation” (citing Jana L. Walker & Susan M. Williams, *Indian Reserved Water Rights*, in THE NATURAL RESOURCES LAW MANUAL 433, 437 (Richard J. Fink ed., 1995))).

²³⁸ *See* Anna Fleder & Darren J. Ranco, *Tribal Environmental Sovereignty: Culturally Appropriate Protection or Paternalism?*, 19 J. NAT. RESOURCES & ENVTL. L. 35, 45 (2004) (stating that TAS status diminishes tribal sovereignty by “maintain[ing] that [tribes] must fix WQS as a state, rather than as a nation, in accordance with federal laws”).

²³⁹ OFFICE OF INSPECTOR GENERAL, EPA, REPORT NO. 2007-P-00022, PROMOTING TRIBAL SUCCESS IN EPA PROGRAMS 2 (2007) (listing limited funding as a barrier to tribes successfully managing environmental programs); *see also* Jana L. Walker, Jennifer L. Bradley & Timothy J. Humphrey, Sr., *A Closer Look at Environmental Injustice in Indian Country*, 1 SEATTLE J. SOC. JUST. 379, 393 (2002) (“[N]ot many Tribes have sufficient resources to implement strong regulatory schemes for the protection of the environment.”).

²⁴⁰ 40 C.F.R. § 131.8(b)(4) (2014).

²⁴¹ *See supra* note 239.

Even if tribes lack TAS status, this Comment's proposal promotes tribal sovereignty because many tribes regulate water use on their reservation through comprehensive water codes.²⁴² These tribal water laws can be used for issuing NPDES permits as long as they pertain to water quality and are protective of downstream states' WQS. In the event that tribes lack tribal WQS, this Comment's proposal would still promote such tribes' sovereignty over water quality because it recognizes that tribes have the right to establish and administer WQS over surface waters within their reservations.

EPA's new rule will uphold the *Winters* doctrine²⁴³ and recognize tribes as sovereigns with the authority to set WQS on their reservations. It will reaffirm and expand upon the court's holding in *Colville* by establishing that tribes have an implied reservation of the right to protect, not just water quantity, but also water quality within their reservations.²⁴⁴

C. Advance Environmental Justice for Indians

Environmental justice seeks to minimize environmental inequality because "underprivileged and people of color bear a disproportionate share of society's environmental burdens."²⁴⁵ EPA has defined environmental justice as "the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies."²⁴⁶ Tribes have been subject to environmental injustice because many Native Americans live in "vulnerable communities, beset by a multitude of hazardous conditions."²⁴⁷ Injustices arise because tribes are not supported in their efforts to improve their reservation environments.²⁴⁸ The federal government's "paternalistic federal management policies" and "failure to acknowledge the

²⁴² Michael C. Blumm, *Unconventional Waters: The Quiet Revolution in Federal and Tribal Minimum Streamflows*, 19 *ECOLOGY L. Q.* 445, 477–78 (1992).

²⁴³ *Winters v. United States*, 207 U.S. 564, 576–77 (1908).

²⁴⁴ See *supra* note 28 and accompanying text.

²⁴⁵ Sean J. Wright, "Good Fences Make Good Neighbors": An Environmental Justice Framework to Protect Prohibition Beyond Reservation Borders, 79 *BROOK. L. REV.* 1197, 1203 (2014).

²⁴⁶ EPA, EPA POLICY ON ENVIRONMENTAL JUSTICE FOR WORKING WITH FEDERALLY RECOGNIZED TRIBES AND INDIGENOUS PEOPLES: FREQUENTLY-ASKED QUESTIONS 2 (2015), <https://archive.epa.gov/compliance/environmentaljustice/archive-032216/web/pdf/2015-10-15-faqs.pdf>.

²⁴⁷ Rebecca Tsosie, *Indigenous People and Environmental Justice: The Impact of Climate Change*, 78 *U. COLO. L. REV.* 1625, 1630 (2007).

²⁴⁸ Sarah Krakoff, *Tribal Sovereignty and Environmental Justice*, in *JUSTICE AND NATURAL RESOURCES: CONCEPTS, STRATEGIES, AND APPLICATIONS* 161, 163 (Kathryn M. Mutz, Gary C. Bryner & Douglas S. Kenney eds., 2002).

tribes' sovereign powers" has allowed others to exploit tribal reservations.²⁴⁹ Thus, tribal claims to environmental justice rest upon claims for environmental self-determination.²⁵⁰

EPA has recognized the causes of environmental injustice on tribes and has established as one of its strategic objectives the strengthening of environmental protection on Indian reservations.²⁵¹ To achieve its objective, EPA maintained it would "support federally recognized tribes to build environmental management capacity, assess environmental conditions and measure results, and implement environmental programs in Indian Country."²⁵² To assess environmental conditions, EPA planned to "clearly identify problems, prioritize issues, and address the gaps in environmental protection in Indian Country."²⁵³

This Comment's proposal furthers environmental justice for tribes by promoting tribal self-determination. It recognizes that tribes have the right to administer WQS for surface waters on their reservations even if tribes do not seek TAS status.²⁵⁴ It assures that tribal water needs are properly protected and meet EPA's goals in promoting environmental justice on tribal reservations. A clear problem exists on Indian reservations. The lack of applicable WQS has led the Regions to issue NPDES permits through inconsistent methods.²⁵⁵ This gap in WQS regulation hinders tribal efforts to protect WQS because tribes cannot predict which WQS a Region will apply when it issues an NPDES permit on their reservations.²⁵⁶ Thus, promulgating a new rule requiring Regions to apply tribal WQS will fill in the regulatory gap, enhance tribal sovereignty, and promote environmental justice.

CONCLUSION

Water is an important natural resource for all communities, including Indian tribes. Because surface waters flow through multiple states and

²⁴⁹ Tsosie, *supra* note 247, at 1632.

²⁵⁰ *Id.* at 1628.

²⁵¹ EPA, EPA-190-R-15-001, FISCAL YEAR 2016: JUSTIFICATION OF APPROPRIATION ESTIMATES FOR THE COMMITTEE ON APPROPRIATIONS 1126 (2015).

²⁵² *Id.*

²⁵³ *Id.* at 1129.

²⁵⁴ *See supra* Part IV.B.

²⁵⁵ *See supra* Chart 2.

²⁵⁶ *See supra* Part II. Even within a Region, Regions have taken multiple approaches to establishing NPDES permits on Indian reservations. *See supra* Chart 2.

sovereigns, proper WQS are necessary to ensure that no community suffers from unclean water. This Comment's proposal addresses this need by offering a solution to the lack of applicable WQS on Indian reservations. The proposal combines the sources of various legal authority the Regions have likely taken to justify their approaches to addressing the lack of applicable WQS on Indian reservations. It ultimately prescribes a more cohesive method for the Regions to take when put into such a situation. Although this proposal may require time, it will pave the way for cleaner water quality levels and further tribal sovereignty, both of which provide lasting benefits to the general public.

APPENDIX A. REFERENCE LIST OF NPDES PERMITS ISSUED ON INDIAN
RESERVATIONS WHERE NO TRIBAL WQS EXISTED

1. NPDES Permit applied downstream states' WQS.
 - REGION 6, EPA, NPDES PERMIT NO. NM0030520 FACT SHEET, 3 (2014) (no justification provided for applying state WQS to Jicarilla Apache Utility Authority).
 - REGION 10, EPA, NPDES PERMIT NO. WA0023434 FACT SHEET 12 (2015) (state WQS applied to protect downstream uses for Taholah Wastewater Treatment Plant—Quinault Indian Nation).
 - REGION 10, EPA, NPDES PERMIT NO. OR-003409-6 FACT SHEET (2004) (state WQS applied to assure “downstream standards [were] met” for the Cow Creek Gaming Center Wastewater Treatment Plant).
2. NPDES Permit applied federally recommended water quality criteria.
 - REGION 8, EPA, PERMIT NO. SD-0034584, STATEMENT OF BASIS: ROSEBUD CASINO AND HOTEL 7 (2011).

APPENDIX B. REFERENCE LIST OF NPDES PERMITS ISSUED ON INDIAN
RESERVATIONS WHERE TRIBAL WQS EXISTED

1. WQS Applied

a. 1993 Guidance Document

- REGION 8, EPA, PERMIT NO. ND-0030988, FACT SHEET: THUNDER BUTTE PETROLEUM SERVICES, INC. 17 (2012).
- REGION 10, EPA, PERMIT NO. WA0026743, FACT SHEET: YAKAMA NATION LEGENDS CASINO WASTEWATER TREATMENT PLANT 8 (2013).
- REGION 10, EPA, PERMIT NO. WA-005022-9, FACT SHEET: CITY OF WAPATO 7 (2011).
- REGION 10, EPA, PERMIT NO. WA-005020-2, FACT SHEET: WASHINGTON BEEF LLC 12 (2009).

b. Tribal WQS were the same as federally recommended water quality criteria

- REGION 8, EPA, PERMIT NO. WY-0044580, STATEMENT OF BASIS: SHOSHONE UTILITY ORGANIZATION 4 (2008).

c. Tribal WQS would be protective of downstream state's WQS

- REGION 10, EPA, PERMIT NO. WA0026743, FACT SHEET: YAKAMA NATION LEGENDS CASINO WASTEWATER TREATMENT PLANT 8-9 (2013).
- REGION 10, EPA, PERMIT NO. WA-005022-9, FACT SHEET: CITY OF WAPATO 8 (2011).
- REGION 8, EPA, PERMIT NO. MT-0030783, STATEMENT OF BASIS: ABSALOKA MINE SOUTH EXTENSION 2 (2014).

d. Applying tribal WQS would be consistent with the principles of tribal sovereignty

- REGION 8, EPA, PERMIT NO. WY-0020338, STATEMENT OF BASIS: EAGLE OIL AND GAS COMPANY 3 (2015).
- REGION 8, EPA, PERMIT NO. WY-0024945, STATEMENT OF BASIS: PHOENIX PRODUCTION 5 (2015).

- REGION 8, EPA, PERMIT NO. WY-0024953, STATEMENT OF BASIS: PHOENIX PRODUCTION COMPANY 7 (2015).
 - REGION 8, EPA, PERMIT NO. WY-0025607, STATEMENT OF BASIS: WESCO OPERATING, INC. 4 (2015).
 - REGION 8, EPA, PERMIT NO. WY-0025232, STATEMENT OF BASIS: WESCO OPERATING, INC. 5 (2015).
- e. Tribe expected dischargers to comply with their tribal WQS
- REGION 8, EPA, PERMIT NO. CO-0022853, STATEMENT OF BASIS: SOUTHERN UTE INDIAN TRIBE (SUIT) 13 (2010). The Southern Ute Indian Tribe withdrew their submitted WQS to EPA, but stated it expected dischargers to comply with their adopted WQS.
2. Did not apply tribal WQS, but . . .
- a. Considered tribal WQS and set effluent limits sufficient to protect the tribe's designated uses
- REGION 8, EPA, PERMIT NO. MT0030538, STATEMENT OF BASIS: CROW AGENCY WATER TREATMENT PLANTS 5 (2013).
 - REGION 8, EPA, PERMIT NO. SD-0020192, STATEMENT OF BASIS: CITY OF EAGLE BUTTE 5 (2011).
 - REGION 8, EPA, PERMIT NO. SD-0034606, STATEMENT OF BASIS: WULF CATTLE DEPOT 1 (2013).
- b. Considered WQS, but used State WQS
- REGION 10, EPA, PERMIT NO. WA0026123, FACT SHEET: CITY OF TOPPENISH WASTEWATER TREATMENT PLANT 16 (2012) (applying State WQS).
- c. Applied state WQS
- REGION 6, EPA, PERMIT NO. NM0030520, FACT SHEET: JICARILLA APACHE UTILITY AUTHORITY 3 (2014).
 - REGION 8, EPA, PERMIT NO. WY-0034207, STATEMENT OF BASIS: CHEMTRADE REFINERY SERVICES, INC. 4 (2010) (relying on Wyoming Water Quality Rules and Regulations).

- REGION 9, EPA, PERMIT NO. CA0050008, FACT SHEET: SANTA YNEZ BAND OF CHUMASH INDIANS 2 (2014).
 - REGION 9, EPA, PERMIT NO. AZ0020524, FACT SHEET: CITY OF PHOENIX 91ST AVENUE WASTEWATER TREATMENT PLANT 6 (2010).
 - REGION 9, EPA, PERMIT NO. AZ0024635, FACT SHEET: ASARCO LLC—MISSION COMPLEX 3 (2008).
 - REGION 9, EPA, PERMIT NO. AZ0024627, FACT SHEET: CITY OF MESA UTILITIES DEPARTMENT 3 (2011).
 - REGION 9, EPA, PERMIT NO. AZ0024601, FACT SHEET: CYPRUS TOHONO CORPORATION MINE 2 (2013).
- d. Applied state WQS or federally recommended water quality criteria, but included reopener provision
- REGION 8, EPA, PERMIT NO. MT0030562, STATEMENT OF BASIS: CITY OF CUT BANK WATER TREATMENT PLANT 3 (2010) (applying State WQS).
 - REGION 8, EPA, PERMIT NO. WY-0000671, STATEMENT OF BASIS: DEVON SFS OPERATING, INC. 3 (2008) (applying federally recommended water quality criteria).
 - REGION 8, EPA, PERMIT NO. MT0023183, STATEMENT OF BASIS: SOAP CREEK ASSOCIATES, INC. 4 (2008) (applying State WQS).

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