

# NEW FEDERAL INITIATIVES FOR INDIAN COUNTRY ENVIRONMENTAL MANAGEMENT

JAMES M. GRIJALVA\*

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## I. INTRODUCTION

The United States Environmental Protection Agency’s Indian Program is built around the ultimate goal of tribal self-determination through the implementation of federal environmental programs. A number of tribes have developed and are implementing air, water, and other programs in the same fashion that states have. Yet, many tribes do not have comprehensive programs, raising the real possibility that tribal health and welfare, and particularly cultural interests inextricably entwined with the environmental quality of natural environments, are unprotected. Tribes have especially important cultural interests in water quality, and many have treaties and other reserved rights that implicate environmental quality. In 2021, the EPA consulted with tribes and was planning<sup>1</sup> to propose two initiatives addressing these concerns in the summer of 2022. One initiative would promulgate federal standards for Indian country waters, including requirements for protection of cultural uses, so that federal water quality programs function as designed. The second initiative looks beyond Indian country to ensure state

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\*† Friedman Professor of Law and Director, Northern Plains Indian Law Center. My thanks to the North Dakota Law Review for focusing its 2022 Symposium on energy and environmental issues in Indian country.

1. As of this writing, the EPA has made no official announcement on either initiative. Unofficial channels suggest one of them will be proposed this fall.

standards recognize and protect the indigenous uses encompassed by tribal reserved rights. This Article places the two initiatives in context and analyzes how, although based in federal control, they move the EPA's Indian program commitment of tribal environmental self-determination forward.

## II. THE FOUNDATION OF THE EPA'S INDIAN PROGRAM

Understanding the significance of the newest federal Indian country environmental initiative requires some historical context. The modern environmental law era began just over 50 years ago with the enactment of multiple federal statutes setting national regulatory program requirements for activities degrading and/or polluting the natural environment. Congress provided states with the opportunity to adapt these federal programs to local conditions and priorities, and to implement them under the supervision of the United States Environmental Protection Agency ("EPA"), which would ensure minimum national environmental goals and requirements were satisfied. This federal-state partnership was referred to as cooperative federalism. If states elected not to implement programs, or state programs failed to meet federal requirements, the EPA was authorized to directly implement them. In this manner, Congress expected these laws to protect the environment "from border to border, ocean to ocean."<sup>2</sup>

Coincidentally, at nearly the same time that modern environmental law arose, so too began the nation's modern Indian law policy. Reversing course from two centuries of federal control over Indian country and indigenous peoples, the new approach sought tribal self-determination; tribal governments could elect to implement federal programs in Indian country, adapting them to tribal priorities and values. While the United States Supreme Court had divested tribes of some attributes of their inherent sovereignty, it had always recognized Indian tribes as governmental sovereigns with inherent power pre-dating the existence of the United States of America.<sup>3</sup> Inherent tribal sovereignty was the foundation upon which both the Executive Branch and Congress proclaimed support for tribal self-determination.<sup>4</sup>

Oddly, but perhaps not surprisingly, Congress initially forgot about tribal self-determination in designing the modern environmental laws. None

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2. *Phillips Petroleum Co. v. U.S. EPA*, 803 F.2d 545, 553 (10th Cir. 1986) (noting the legislative history of the Safe Drinking Water Act's cooperative federalist paradigm).

3. *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831).

4. *See* Special Message to Congress on Indian Affairs, 213 PUB. PAPERS 564 (July 8, 1970) (President Nixon). Coincidentally, the next day Nixon proposed the reorganization that led to the EPA's creation. *See* Special Message to the Congress About Reorganization Plans To Establish the Environmental Protection Agency and the National Oceanic and Atmospheric Administration, 215 PUB. PAPERS 578 (July 9, 1970); Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, 88 Stat. 2203.

of the statutes spoke directly as to how the environmental programs would be implemented in Indian Country, and in particular, which government would implement them. The cooperative federalist model was explicitly premised on EPA-state partnerships, but the Supreme Court had held that states lacked jurisdiction over Indians in Indian country unless Congress clearly authorized it.<sup>5</sup> The EPA could find no such authorization in the environmental statutes' generic references to the primacy of state environmental authority in the face of statutory silence on Indian country, so it refused to delegate environmental programs to states for implementation in Indian country.<sup>6</sup>

That decision, however, created a conundrum. The EPA could directly implement environmental programs in Indian country to fill the regulatory gap created by states' limited jurisdiction, except that federal control was at odds with both the cooperative federalist model and the emerging tribal self-determination policy. So, taking its cue from the Court, the President, and Congress, the EPA adopted an agency-wide Indian Policy embracing tribal self-determination.<sup>7</sup> The Policy recognized tribes as the primary parties for setting Indian country environmental standards and implementing programs, promised Agency assistance for tribal regulatory capacity-building, and pledged its partnerships with tribes would be conducted on a government-to-government basis. Congress quickly endorsed this approach by authorizing the EPA to "treat tribes as states" in the three major regulatory statutes governing pollution to air, surface water, and groundwater.<sup>8</sup> These treatment-as-states ("TAS") provisions effectively offered Indian tribes implementation responsibility on par with state governments. So long as tribal programs met the minimum federal requirements, tribal governments were free to adapt the programs (just as states were) to suit their specific needs. Because indigenous peoples almost invariably have spiritual and cultural connections to the

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5. See *McClanahan v. State Tax Comm'n of Arizona*, 411 U.S. 164, 170-71 (1973) ("State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply."); see also *Rice v. Olson*, 324 U.S. 786, 789 (1945) ("The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history.").

6. *Wash. Dept. Ecology v. U.S. EPA*, 752 F.2d 1465, 1472 (9th Cir. 1985) (upholding the EPA's refusal to delegate to the State of Washington the federal hazardous waste regulatory program for implementation on Indian reservations).

7. William D. Ruckelshaus, *EPA Policy for the Administration of Environmental Programs on Indian Reservations* (Nov. 8, 1984), <https://perma.cc/R26B-KFHX> [hereinafter EPA INDIAN POLICY].

8. Safe Drinking Water Act Amendments of 1986, Pub. L. No. 99-339, Title III, § 302(c), 100 Stat. 665 (June 19, 1986) (codified at 42 U.S.C. § 300j-11(a)); Water Quality Act of 1987, Pub. L. No. 100-4, Title V, § 506, 101 Stat. 76 (Feb. 4, 1987) (codified at 33 U.S.C. § 1377(e)); Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2464 (Nov. 15, 1990) (codified at 42 U.S.C. § 7601(d)).

natural environment,<sup>9</sup> TAS offered tribal governments the critical opportunity to protect them through their own environmental value judgments, which once approved by the EPA become federally enforceable.

### III. INDIAN COUNTRY WATER QUALITY PROTECTION

While few tribes have major sources of air pollution, hazardous waste disposal facilities, or extensive underground extractive industries, all tribes depend upon the availability of clean water. The TAS program of most interest to tribes is the water quality standards program of the Clean Water Act (“CWA”). Water quality standards (“WQS”) consist of three value judgments for surface waters like rivers and lakes: designation of existing and desired uses of the water; water quality “criteria” adequate to protect the designated uses; and requirements to avoid degradation of existing water quality.<sup>10</sup> Because WQS are site-specific, Congress gave responsibility for setting them to states as the local governments most familiar with and most invested in the quality of particular waterbodies or segments of waterbodies.<sup>11</sup> In 1987, Congress added a TAS provision to the CWA, making Indian tribes the proper local governments for setting WQS for surface waters inside Indian reservations.<sup>12</sup>

WQS are the foundation of the CWA. They are the fundamental measurement for whether waters are adequately clean or “impaired.” The main mechanisms for avoiding water impairment are legally enforceable permit conditions ensuring every pollution discharge and degrading activity meets WQS. All federal permits must be certified by the state, or tribes treated as a state, as consistent with their WQS or the permit cannot be issued.<sup>13</sup> Further, EPA can require that an upstream state or tribe add permit conditions to ensure its polluters comply with more stringent WQS in a downstream jurisdiction.<sup>14</sup> Finally, WQS are used as the goals for restoring impaired waterbodies.

Approximately 300 Indian tribes have reservations eligible for the WQS program. As of this writing, only 47 tribes (or about 15%) have developed

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9. Rebecca Tsosie, *Tribal Environmental Policy in an Era of Self-Determination: The Role of Ethics, Economics and Traditional Ecological Knowledge*, 21 VT. L. REV. 225 (1996).

10. U.S. EPA, EPA-833-K-10-001 NAT’L POLLUTANT DISCHARGE ELIMINATION SYSTEM PERMIT WRITERS’ MANUAL 6-3 (Sept. 2010).

11. 33 U.S.C. § 1313(a).

12. *Id.* at § 1377(e). The TAS provision was not limited to WQS. It entitled tribes to seek delegation of all major CWA programs, including permit issuance.

13. *Id.* at § 1341(a)(1).

14. *Arkansas v. Oklahoma*, 503 U.S. 91, 105 (1992).

and received EPA approval for their WQS.<sup>15</sup> On the remaining 85% of Indian reservations, there are no value judgments as to the water quality needed for preserving existing uses on those reservations. Thus, permit writers have no legally applicable reference points for designing permit conditions based on water quality. Federal agencies issuing permits on Indian reservations are left with only the requirements of nationally uniform technology-based standards that do not account for site-specific water quality.<sup>16</sup> In some cases, agencies may borrow state WQS for shared water bodies like rivers, which supplement the technology requirements but may not reflect tribal values or adequately protect tribal uses. States issuing permits upstream of reservations need not consider tribal interests in reservation water quality where the tribe does not have approved WQS.

For the overwhelming majority of reservation waters that lack WQS, the CWA simply does not function as designed, and that regulatory gap raises significant concerns. It prevents comprehensive protection of the nation's waters, thereby frustrating Congress' primary goal in enacting the CWA. It potentially risks the health and cultural welfare of tribal citizens as well as the health of non-Indian residents of reservations. The WQS gap arguably violates the Equal Protection Clause of the United States Constitution, the federal trust responsibility to Indians, and the EPA's pledge of seeking environmental justice for Indian tribes. The gap also creates uncertainty for states and for regulated firms as to the existence and extent of water quality-based conditions required for valid permits and lawful water pollution discharges upstream from, and inside of, Indian reservations.

#### IV. FEDERAL WQS FOR INDIAN COUNTRY

One of the EPA's newest Indian program initiatives offers a potentially prompt solution to the Indian country WQS gap. In 2021, the EPA initiated formal consultation proceedings<sup>17</sup> seeking input from tribes on the agency's intention to promulgate *federal* WQS for all of Indian country not already

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15. See *EPA Actions on Tribal Water Quality Standards and Contacts*, U.S. EPA, <https://www.epa.gov/wqs-tech/epa-actions-tribal-water-quality-standards-and-contacts> (Aug. 31, 2022).

16. 33 U.S.C. § 1342(b).

17. For a description of EPA's guidelines and goals for tribal consultation, see *EPA Policy on Consultation and Coordination with Indian Tribes*, U.S. EPA (May 4, 2011), <https://www.epa.gov/tribal/epa-policy-consultation-and-coordination-indian-tribes>.

covered by tribal (or state<sup>18</sup>) WQS.<sup>19</sup> The EPA has explicit authority to promulgate federal WQS when “necessary to meet [CWA] requirements.”<sup>20</sup> The simple fact that every state of the union has had approved WQS since the early 1970s, when 85% of eligible tribes have never had WQS and still do not, reveal this clearest of necessities in achieving the CWA’s objective “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”<sup>21</sup>

This is not the first time the EPA has suggested federal WQS as an Indian country gap filler. *Twenty years ago*, the EPA circulated an unofficial proposed rule for “Core” WQS on reservations without approved WQS.<sup>22</sup> Six years ago, the agency issued an Advance Notice of Proposed Rulemaking (“ANPRM”) for “Baseline” WQS<sup>23</sup> for the same purpose. These initial suggestions were made at the tail end of Democratic Administrations, and while tribes and tribal organizations strongly supported them, the incoming Republican Administrations moved neither forward.<sup>24</sup>

When President Joseph Biden took office in January 2021, the National Tribal Water Council (“NTWC”), one of EPA’s advisory committees, quickly communicated to the EPA’s acting administrator that promulgation of federal Baseline WQS (“BWQS”) was one of “five (5) key priority actions which are critical to the protection of tribal waters and communities.”<sup>25</sup> The EPA’s National Tribal Caucus, a national body of high-level tribal representatives who exchange views and advice with the EPA on its tribal programs, included BWQS in its budget priorities for FY 2023.<sup>26</sup> On June

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18. In three limited situations Congress has authorized state environmental management in selected Indian reservations. *See* Federal Baseline Water Quality Standards for Indian Reservations, 81 Fed. Reg. 66900, 66902 (advance notice of proposed rulemaking Sept. 29, 2016) [hereinafter 2016 Baseline WQS Proposal].

19. *See Promulgation of Tribal Baseline Water Quality Standards Under the Clean Water Act*, U.S. EPA, <https://www.epa.gov/wqs-tech/promulgation-tribal-baseline-water-quality-standards-under-clean-water-act> (Sept. 22, 2022).

20. 33 U.S.C. § 1313(c)(4).

21. *Id.* § 1251(a).

22. *Federal Water Quality Standards for Indian Country*, U.S. EPA (Jan. 18, 2001), <https://archive.epa.gov/ow/ost/web/html/indian-country.html>.

23. 2016 Baseline WQS Proposal, *supra* note 18.

24. *See* James M. Grijalva, *Ending the Interminable Gap in Indian Country Water Quality Protection*, 45 HARV. ENVTL. L. REV. 1, 59-60 (2021).

25. Letter from Ken Norton, Chair, Nat’l Tribal Water Council, to Jane Nishida, Acting EPA Adm’x (Mar. 8, 2021) (on file with author).

26. *Federal Baseline Water Quality Standards for Indian Reservations: Proposed Federal Promulgation, Listening Session for Tribal Governments*, U.S. EPA, (July 8, 2021), [https://www.epa.gov/system/files/documents/2021-07/210708\\_baseline-wqs-consultation-overview\\_508.pdf](https://www.epa.gov/system/files/documents/2021-07/210708_baseline-wqs-consultation-overview_508.pdf) (PPT slide 8) [hereinafter BWQS Consultation Presentation].

11, 2021, the EPA initiated formal government-to-government consultation proceedings on BWQS.<sup>27</sup>

Whereas the EPA's 2016 initiative was to gather input on *whether* to promulgate BWQS, the summer 2021 consultation was about "a forthcoming rulemaking that *would establish* tribal baseline water quality standards."<sup>28</sup> The 2016 process had demonstrated significant tribal support for BWQS, and environmental justice was a priority for the Biden administration, so the EPA was moving forward and planning to propose a BWQS rule in early 2022.<sup>29</sup>

The EPA kept the "Baseline" name, indicating a starting point or set of initial standards, filling the Indian country regulatory gap. Because of their broad geographic scale, BWQS would be generic across ecosystems and Indian uses rather than specific to particular reservation waters or specified tribal cultural uses. Nonetheless, BWQS would be focused solely on filling the regulatory gap for Indian reservation waters and protecting the health and welfare of tribal citizens in light of their unique cultural, traditional, and treaty-based water uses. Final BWQS would then provide an enforceable basis for requiring that water pollution permits on-reservation and upstream include conditions ensuring protection of indigenous peoples' unique interests.

## V. DEFINING TRIBAL USES AND SETTING PROTECTIVE CRITERIA

Finally filling the regulatory gap and requiring permits include conditions ensuring protection of indigenous peoples' interests depends upon accurately designating tribal water uses and setting fully protective criteria in the first instance. It seems entirely fair for tribal citizens to have doubts about federal decision makers completing this task effectively. Yet, it is also fair to note that tribal self-determination has been a guiding principle of the EPA's programs since nearly the agency's origin, including being the first federal agency to adopt an official Indian policy embracing self-determination.<sup>30</sup> And, the challenge of building a basic foundation of water quality protection for Indian country may not be as daunting as it seems.

First, the EPA will be benefited by the 2016 and 2021 consultation discussions with tribal governmental representatives about their citizens' water uses and values. Second, tribal organizations and tribal citizens will

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27. Letter from Deborah Nagle, Dir., U.S. Off. of Sci. & Tech., to Tribal Leaders (June 11, 2021) (on file with author).

28. *Id.* (emphasis added).

29. That was pushed to spring and then summer 2022. No official notice has been posted as of September 28, 2022.

30. See James M. Grijalva, *The Origins of EPA's Indian Program*, 15 KAN. J. L. & PUB. POL'Y 191, 225 (2006).

presumably participate in the BWQS rulemaking to express their interests and needs.<sup>31</sup> Third, tribal uses involving the consumption of aquatic wildlife and plants may be protected generally by the minimum federal CWA requirements that all waters protect and propagate aquatic ecosystems and human recreation, like fishing.<sup>32</sup> After many years, the EPA has acknowledged some indigenous peoples eat several times the national average of fish tissue per week, and thus require more stringent WQS standards for contaminants that bioaccumulate in fish.<sup>33</sup> Fourth, the EPA recognizes there is a broad variety of ceremonial and cultural uses made by differing tribes. In order to include as many as possible, the agency is not likely to specifically define covered cultural and traditional uses.

The EPA's 2016 proposal suggested that where Baseline designated uses did not reflect tribe-specific or site-specific conditions, the EPA could use "limited tailoring" to modify or add additional uses in subsequent rulemakings after consulting with tribes.<sup>34</sup> Other ways of efficiently developing more specific BWQS include "batching" designated use modifications that pertain to multiple tribes and delegating this specific rulemaking authority to regional administrators.

Water quality criteria are the enforceable requirements that protect designated uses. Criteria are commonly "numeric": they set a specific allowable amount of a particular pollutant in the ambient water. The CWA requires numeric criteria for toxic pollutants,<sup>35</sup> and the EPA generally expects numeric criteria if they can be established.<sup>36</sup> Where numeric criteria for particular pollutants are infeasible, WQS can be stated in a "narrative" format describing the desired water quality goal for a waterbody. Common examples are requirements that discharges be "free from toxics in toxic amounts," or be "free of objectionable color, odor, taste, and turbidity."<sup>37</sup> In 2016, the EPA

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31. An important caveat here is the understandable hesitation of many indigenous people to describe or explain traditional ceremonies and uses to non-members. *Cf.* *Albuquerque v. Browner*, 865 F. Supp. 733, 740 (D. N.M. 1993) (respecting tribal decision not to detail ceremonial river uses in lawsuit unsuccessfully challenging EPA approval of extremely stringent tribal WQS).

32. Section 101's "interim goal" for water quality has become two de facto minimum use requirements: "water quality which provides for [1] the protection and propagation of fish, shellfish, and wildlife and [2] provides for recreation in and on the water." 33 U.S.C. § 1251(a)(2).

33. *See* 2016 Baseline WQS Proposal, *supra* note 18, at 66,908 (listing three consumption rates alternative to EPA's default rate of 22 grams per day (g/day): 142 g/day (EPA's default subsistence rate); 160 g/day (half of the USDA's recommended daily protein intake); or 175 g/day (based on a survey by the Columbia River Intertribal Fish Commission); *Understanding Tribal Exposures to Toxics*, NATIONAL TRIBAL TOXICS COMMISSION, (2015), <https://perma.cc/BW7Q-Y4CZ> (arguing that current federal risk assessment techniques inadequately consider tribal exposures to toxics leaving them unnecessarily at significant risk).

34. 2016 Baseline WQS Proposal, *supra* note 18, at 66, 905.

35. 33 U.S.C. § 1313(c)(2)(B).

36. 40 C.F.R. § 131.11(b).

37. *See* NAT'L POLLUTANT DISCHARGE ELIMINATION SYSTEM PERMIT WRITERS' MANUAL, *supra* note 10, at 6-8.

suggested using narrative criteria protecting “water-based activities essential to maintaining cultural and traditional practices that might not be adequately covered by the numeric criteria.”<sup>38</sup> Addressing the examples of aquatic plants consumed as traditional foods and plants used in ceremonial products, the EPA suggested a narrative criterion that waters “be free from pollutants in amounts that prevent the growth of aquatic plants regularly harvested by tribes for cultural or traditional activities.”<sup>39</sup> Given the broad spectrum of Indian country environments to which the BWQS would apply, the parameters of water temperature and nutrients may also require narrative criteria.<sup>40</sup>

## VI. PROTECTING TRIBAL WATER QUALITY INTERESTS OUTSIDE INDIAN RESERVATIONS

At nearly the same time last year as the BWQS consultation, the EPA conducted listening sessions for tribal governments and individual tribal consultations on a separate, but closely related Indian country water quality initiative. The BWQS initiative applied inside Indian reservations where the TAS regulatory model was premised on inherent tribal sovereignty. The second 2021 water quality initiative went beyond Indian reservation boundaries into ceded territories where tribal citizens possessed “reserved rights” in aquatic or aquatic-dependent resources.<sup>41</sup>

This initiative followed naturally from the EPA’s 2016 release of new consultation guidance on “discussing” treaty rights with tribes.<sup>42</sup> Tentative in name and substance, the guidance consisted of a simplistic list of three questions for EPA discussions with tribes: do treaty rights exist in the specific geographic area where the EPA proposes to act? What treaty rights or treaty-protected resources are there? How might the proposed action affect them? These basic questions belie the essential importance of the guidance in focusing the EPA’s programmatic attention arguably for the first time on tribal interests *outside* Indian country. The TAS approach, and the EPA’s extensive efforts implementing the approach, necessarily concentrated within Indian country where tribes possessed inherent sovereignty. Yet, in the history of colonization, Indian tribes ceded to the United States tens of

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38. 2016 Baseline WQS Proposal, *supra* note 18, at 66, 906.

39. *Id.*

40. *Id.* at 66, 907.

41. *Protecting Reserved Rights in WQS* (Aug. 23, 2021), [https://www.epa.gov/system/files/documents/2021-08/protecting-reserved-rights-in-wqs-tribal-listening-session-slides\\_508.pdf](https://www.epa.gov/system/files/documents/2021-08/protecting-reserved-rights-in-wqs-tribal-listening-session-slides_508.pdf) [hereinafter *Protecting Reserved Rights*].

42. *EPA Policy on Consultation and Coordination with Indian Tribes: Guidance for Discussing Tribal Treaty Rights*, U.S. EPA (2016), [https://www.epa.gov/sites/default/files/2016-02/documents/tribal\\_treaty\\_rights\\_guidance\\_for\\_discussing\\_tribal\\_treaty\\_rights.pdf](https://www.epa.gov/sites/default/files/2016-02/documents/tribal_treaty_rights_guidance_for_discussing_tribal_treaty_rights.pdf) [hereinafter *EPA TREATY RIGHTS POLICY*].

millions of acres where significant tribal interests continue to exist, and where many tribes reserved rights to use those lands for traditional purposes. The EPA's guidance stated an agency commitment to protecting tribal treaty rights and improving tribal consultations on them. The EPA's first concrete action consistent with the Treaty Rights Guidance was to harmonize WQS in Maine and Washington with tribal reserved rights by incorporating human health criteria at levels protective of indigenous subsistence uses of aquatic resources.<sup>43</sup>

The EPA's second 2021 initiative was more explicit and potentially more impactful. It expanded the agency's geographic focus beyond Indian country by recognizing state governments had primary WQS jurisdiction over areas with reserved tribal rights. In PowerPoint slides displayed during the listening sessions, the agency proposed revising its regulations for approving *state* WQS to require explanations of how tribal reserved rights would be protected when establishing or revising WQS.<sup>44</sup> Treaty-reserved rights to fish, for example, presumably require a level of water quality ensuring healthy fish safe to consume.<sup>45</sup> Three options for approving state WQS are expected to be offered for comment:<sup>46</sup> establishing designated uses explicitly protecting tribal reserved resources; establishing water quality criteria protecting tribal reserved rights; and assigning stringent antidegradation protection in waters currently protective of tribal rights.<sup>47</sup> The EPA's goal is to ensure state WQS do not impair tribal reserved rights. While the EPA's long-standing Indian program has had indirect impacts on state regulatory mechanisms in the past, this is perhaps the first time the EPA has proposed imposing tribe-specific requirements for approval of state standards. Thus, this initiative has the potential to affect water pollution dischargers throughout state territories and not just immediately upstream of Indian reservations.

## VII. CONCLUSION

At first glance, the emphasis on EPA decision-making in the Baseline WQS and Protecting Reserved Rights rulemaking initiatives seems in tension with the EPA's long-standing policy goal of tribal environmental self-determination and Congress' expectation for tribes implementing environmental regulatory programs in the same fashion as states. In reality,

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43. Protecting Reserved Rights, *supra* note 41, at PPT Slide 9.

44. *Id.* at PPT Slide 6.

45. EPA TREATY RIGHTS POLICY, *supra* note 42, at 1-2.

46. Like the BWQS initiative, EPA planned to release the Protecting Reserved Rights initiative as a proposed rule in early 2022. That timing was pushed to late summer 2022. Unofficial communications from EPA to the author indicate proposal is expected late fall 2022.

47. EPA TREATY RIGHTS POLICY, *supra* note 42, at 5.

both are entirely consistent with the EPA's Indian Policy and its practice since the inception of the Indian program almost 50 years ago. The EPA recognized at the outset it would take time to establish the legal and administrative foundations at both the federal and tribal levels for the TAS approach, and for the development of tribal infrastructure and capacity to assume program primacy.<sup>48</sup> The EPA promised direct federal implementation as an interim solution to the Indian country regulatory gap during the time tribes were developing their programs.<sup>49</sup> The BWQS initiative is exactly that type of measure. While it could be argued the agency waited far too long to take it, the initiative holds significant promise for protecting tribal health and cultural welfare.

Lest its intentions be misunderstood, like the 2016 Baseline proposal,<sup>50</sup> the EPA's 2021 consultation on BWQS explicitly encouraged tribes to seek TAS for the WQS program.<sup>51</sup> The EPA noted that BWQS would be superseded by tribal WQS developed and approved after the BWQS became effective.<sup>52</sup> Of course, BWQS would not apply in the first instance to the 47 reservations with approved tribal WQS.<sup>53</sup> It is a curious historical irony that Indian country's first WQS—federal standards promulgated by the EPA for one particular tribe—were announced *over 35 years ago* with a similar message: the EPA developed those federal standards because of extenuating circumstances, so tribes interested in protecting their water quality interests should seek TAS status and develop tribal WQS and not expect federal WQS to fill the regulatory gap in Indian country in the future.<sup>54</sup>

The Protecting Reserved Rights initiative is neither federal direct implementation nor tribal TAS program support. Unlike the BWQS initiative, the EPA has not previously released a rulemaking proposal and explanation, so the details are unknown. But the bare concepts outlined in the EPA's consultation with tribes holds significant promise. States have long been required to consider extraterritorial pollution impacts on downwind and downstream states. The TAS model extends the protections of those provisions to tribes,<sup>55</sup> so it is one of the main benefits of TAS. In the CWA context, water pollution dischargers immediately upstream from Indian

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48. EPA INDIAN POLICY, *supra* note 7, at 2.

49. *Id.*

50. 2016 Baseline WQS Proposal, *supra* note 18, at 66, 902.

51. BWQS Consultation Presentation, *supra* note 26, at PPT slide 10.

52. *Id.*

53. *Id.* at PPT slide 9.

54. Water Quality Standards for the Colville Indian Reservation in the State of Washington, 54 Fed. Reg. 28, 622 (July 6, 1989).

55. *See, e.g.,* Nance v. EPA, 645 F.2d 701, 717 (upholding the EPA's approval of a tribe's reclassification of its airshed, leading to new permit conditions imposed on an upwind facility off-reservation).

reservations can face additional permit conditions where tribes have adopted WQS more stringent than the minimum federal requirements and adjacent state WQS.<sup>56</sup> The Protecting Reserved Rights initiative goes further upstream and beyond shared waterbodies, seeking water quality protection of indigenous reserved rights of aquatic resources throughout states. If the initiative comes to fruition, it may be the first time the EPA has truly embraced principle 5 of its Indian policy, which expressly connected the federal trust responsibility with protection of tribal environmental interests.

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56. *See, e.g.,* Albuquerque v. Browner, 97 F.3d 415, 428 (10th Cir. 1996) (upholding the EPA's approval of a tribe's stringent WQS and incorporated into a proposed permit for a city sewage plant discharge off-reservation).