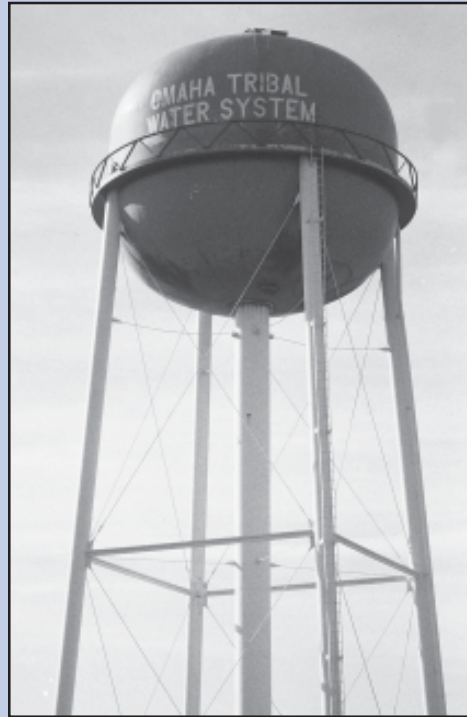




# Tribal Primacy: An Overview



For the Safe Drinking Water Act's  
Public Water System Supervision Program

Office of Water (4606M)  
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[www.epa.gov/safewater](http://www.epa.gov/safewater)  
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# Introduction

In 1974, the United States Congress passed the Safe Drinking Water Act (SDWA) to maintain and improve the quality of the nation's drinking waters. The Act included three major programs:

- 1 Public Water System Supervision Program (PWSS)
- 2 Underground Injection Control Program (UIC)
- 3 Sole Source Aquifer Program



Congress understood that authority alone cannot implement a program; enforcement is a crucial aspect of any regulatory program. Congress also recognized that the most effective way to administer the PWSS regulatory Program was

to assign some of the regulation, implementation and enforcement functions to other responsible entities. Therefore, the Act included provisions for States to gain primary enforcement authority, or Primacy, over public water systems through the PWSS Program. The Environmental Protection Agency (EPA) continued to develop regulations, but assigned enforcement authority to individual States that qualified for this responsibility. EPA then oversaw the enforcement programs run by the States. The Primacy program has been very successful for States implementing SDWA programs.

Because of their unique status as autonomous domestic nations, Tribes were not included with the same consideration as States when the SDWA was initially passed. Tribal drinking water systems were directly regulated by EPA. Tribes were not eligible to assume the enforcement functions that EPA assigned to States.



In the 1986 SDWA Amendments, Congress added provisions that allowed each federally-recognized Tribe to assume primary enforcement authority for the public water supplies within its jurisdiction. To date, one Tribe has applied for and obtained Primacy status for the PWSS Program.

This pamphlet will enable Tribal representatives to make informed decisions on whether or not to apply for Primacy. Tribes seeking Primacy must be prepared to develop and maintain the following necessary components of a successful environmental program:

- ★ *Organizational structures*
- ★ *Technical and administrative expertise*
- ★ *Financial resources*

# What is Primary Enforcement Authority, or “Primacy”?

**Primacy:** The process through which States and Tribes implement and enforce federal environmental regulations.

## *“Primacy”*

- Gives States and Tribes primary enforcement responsibility for environmental programs under SDWA
- Allows a Tribe to more fully exercise its sovereign powers by assuming the responsibility for establishing and enforcing environmental rules and regulations
- Expands a Tribe's role in the environmental regulation of its lands

For most Tribes, enforcement is currently the responsibility of EPA's regional offices. Since the development of the 1986 SDWA Amendments, Tribes have had the option of attaining Primacy for the PWSS Program.

Components of a Primacy program include:

- Legal authority to enforce regulations, and
- Staffing and financial resources to implement the program.

## *Implementation Involves:*

- Identifying regulated entities
- Informing each regulated entity of the requirements of the rules
- Tracking and verifying compliance
- Taking enforcement action in response to non-compliance
- Reporting each regulated entity's compliance to EPA
- Adequate staffing to effectively run the program



EPA maintains oversight responsibility over all Primacy programs, and must ensure that each Primacy Agency is meeting its enforcement responsibilities on an ongoing basis.

## *Primacy is not:*

- A source of funds to construct, expand, or repair a public water system
- A program to subsidize water bills
- Authority to regulate water systems outside of tribal jurisdiction
- Funding to purchase equipment
- Authority to operate a program without EPA oversight



In seeking Primacy, a Tribe must review its environmental protection strategy, evaluate its governmental and administrative organization and capabilities, and consider its available resources. The formation and administration of an independent Tribal agency to enforce drinking water codes and regulations can be very costly. EPA assistance is limited and is not sufficient to cover all program costs.

# Important Considerations Regarding Primacy

*Before a Tribe considers pursuing Primacy for the PWSS program, it should fully explore the implications of Primacy. Key points to consider include:*

## Sovereignty and Self-Determination

For Tribes, the greatest advantage of attaining Primacy is the opportunity for expanded self-rule. Like States, many Tribes would prefer to address environmental issues at a local level rather than have EPA administer these programs.

↑ Tribes exercising Primacy will be able to make decisions regarding resource development on lands under their jurisdiction. Primacy brings regulatory control closer to home.

↑ The Tribe would have the authority to establish drinking water rules and regulations, at least as strict as EPA's, for Tribal lands.



↓ Adopting and maintaining rules and regulations at least as strict as EPA's can be difficult. These rules are amended often, and Primacy Agencies are required to maintain compliance with amendments. Primacy Agencies must also revise their programs each time a new rule is promulgated.

↔ A Tribal Primacy program would be responsible for regulating and enforcing compliance violations by water utilities or water purveyors. If violations occur, enforcement action must be taken in order for Tribes to maintain Primacy. If this does not occur, EPA may rescind Primacy and conduct enforcement actions.



↔ Tribes would regulate civil jurisdiction over the actions of both Tribal and non-Tribal members. This would include establishing administrative procedures for civil enforcement.

↓ Enforcement against non-Tribal members can pose problems and may require Federal assistance.

↑ Tribal governments would be able to provide direct services to owners/operators of public water systems. Regulation at a local level allows for more responsive enforcement.

↓ This responsibility requires that the Tribe maintain a staff with adequate technical expertise.

# Important Considerations Regarding Primacy (continued)

## Tribal Administration and Organization

Primacy over the PWSS Program could help to strengthen Tribal governments.

↔ A Tribe that has Primacy will have to establish an independent Tribal regulatory organization consisting of a professional staff that will enforce drinking water rules and regulations.



↓ A major concern for Tribes considering Primacy is the potential conflict of interest that could develop if the Tribe owns and operates public water systems. A situation in which the Tribe directly regulates itself would be undesirable. Tribes would have to establish a separation between their water utility group and their enforcement group, to ensure there is no conflict of interest.

## Indian Country Environmental Resources

Primacy would give Tribes an opportunity to play a more prominent role in the protection of public health and the environment on Tribal lands. This could enhance a Tribe's role in regional environmental management decisions.

↑ Primacy can aid Tribes in asserting jurisdictional authority over their land and water.

↑ Tribal codes could be enhanced through the development of Tribal environmental laws specifically designed to meet reservation needs. Tribal regulatory enforcers would be in a position to identify environmental problems specific to their land and to seek solutions to these problems.

↑ Primacy can provide an opportunity to develop data useful to long-term natural resource management decision-making.


↓ Data acquisition, data management, and reporting are costly and may be beyond the level of EPA grant assistance available. Monitoring and environmental protection requires obtaining and retaining technical expertise, which would be beneficial yet costly.




# Important Considerations Regarding Primacy (continued)


## Cost of Establishing and Maintaining Program


The most substantial obstacle to obtaining and maintaining Primacy over the PWSS Program is cost.

 Primacy for the PWSS Program will require the Tribe to develop technical expertise and maintain staff and funding necessary to properly administer the Program.



 Although grant funding is available for administration of this Program, it is not adequate to meet the total costs. Grants require matching funds from the Tribe. Because of limited grant funds, the Tribe may need to provide funding beyond the match requirement.

 Development of additional administrative structures and programs may pose both organizational and financial problems, especially for small Tribes.

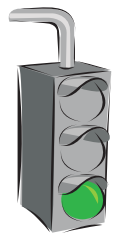
 The legal costs of developing a program and enforcing regulations, as well as resolving potential issues with affected non-Tribal landowners and other affected parties, can be substantial.

## Choosing Whether to Seek Primacy

A thorough weighing of costs and benefits must be part of the decision-making process when considering Primacy.

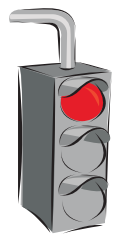
*A Tribe may consider seeking Primacy if they have:*

- ◆ The desire, commitment, and ability to enhance Tribal autonomy and self-determination
- ◆ The desire to strengthen Tribal government
- ◆ The desire to play a stronger role in the protection of the public health on Tribal lands
- ◆ Carefully considered all the advantages and disadvantages of Primacy discussed in this pamphlet.



*A Tribe may decide against Primacy if:*

- ◆ The level of public health and environmental protection currently provided by existing agencies is deemed adequate to protect the drinking water delivered to Tribal consumers and to ensure an acceptable quality of source water.
- ◆ The availability of financial resources, technical expertise, and the Tribe's ability to develop and maintain a regulatory and enforcement program are insufficient.
- ◆ It could adversely impact Tribal budgets, possibly diverting funds from other essential Tribal programs.
- ◆ The costs of operating a Primacy program, which are greater than the grant funds available from the federal government, are more than the Tribe can afford to maintain.
- ◆ The potential for political or legal conflict over jurisdictional issues exists.



# How to Attain Primacy

## Three steps toward achieving Primacy:

### Step 1: Eligibility

The first step toward Primacy for the PWSS Program is for a Tribe to be approved as "eligible" by EPA. Eligibility indicates that the federal government agrees that the Tribe has the same right as any State to apply for enforcement authority.



#### *An application for eligibility must contain:*

- A statement that the Tribe is recognized by the Secretary of the Interior
- A narrative statement demonstrating that the Tribe has a governing body carrying out governmental duties and powers over a defined area
- Identification of a legal jurisdiction
- Documentation illustrating that the Tribe is capable of administering an effective PWSS Program
- Any additional documentation that EPA may request

### Step 2: Program Development

Once the Tribe has received eligibility status, its next step is to develop a Primacy program for the PWSS Program. Program development is a costly, time-intensive endeavor. At the beginning of this process, the Tribe should consider seeking grant funding to help with the cost of developing the Program. The Tribe should also study and evaluate the different Primacy requirements for the PWSS Program (keeping in mind the Tribe's current capabilities), and develop an appropriate timeline for meeting these requirements. Tribes should refer to the regulations and contact their regional EPA representative to obtain program-specific information.



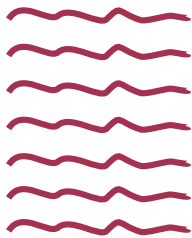


# How to Attain Primacy (continued)

## Step 3: Application Submission

Once a PWSS Program is developed, an eligible Tribe can submit an application for Primacy to EPA. If the application meets all the regulatory criteria, demonstrating that the Tribe has the ability to adequately protect the public health by regulating public water systems, Primacy may be delegated.

### Application



## Next Step: Retaining Primacy

Once Primacy is achieved, the ongoing responsibilities associated with maintaining a Primacy program are substantial. Primacy is not granted permanently—it is a status that must be maintained. EPA conducts annual Primacy Agency program reviews to assess the success and adequacy of each program. Under these reviews, the Tribe's regulatory actions will be closely examined.

### *Continuation of Primacy is dependent on:*

- Maintaining an adequate program that complies with existing as well as new and revised EPA rules
- System oversight
- Supervision and enforcement of violations of regulations

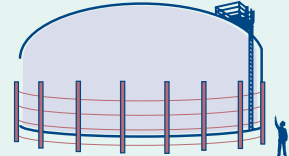
SDWA regulations are becoming more comprehensive; it will require a great effort on the part of the Tribe to develop and maintain regulations at least as stringent as EPA's. If a Tribe is not able to fulfill its Primacy obligations, EPA may revoke the Tribe's Primacy status and take over the program's supervision and enforcement responsibilities. A high standard of performance is placed on Tribes and States that are granted Primacy.

# How Can EPA Help?

## Technical Assistance

*EPA provides technical assistance to States and Tribes by:*

- developing programs
- conducting surveys
- developing regulations
- organizing data-collecting, data-storage, data retrieval and reporting procedures
- providing on-going training seminars



- publication of technical guidance documents
- publication of implementation guidance documents for regulations.

## Grant Funding

EPA provides financial assistance to Tribes through:

1. **SDWA grants**
2. **General Assistance Program (GAP) grants**
3. **Performance Partnership Grants (PPG)**

**Direct implementation:** These funds are provided to EPA Regions for direct implementation of the PWSS Program for States and Tribes that do not have Primacy.

### 1 SDWA Grants

Through the SDWA (Section 1443), Congress appropriates funding for the PWSS Program. These funds are awarded to States and Tribes to carry out PWSS Programs. The PWSS funds are provided to each State and Indian Tribe based on population, area, number of public systems, and need. The grants provide funding for:

**Primacy program:** These are annual grants to States and Tribes that have Primacy for the purpose of maintaining their Primacy program.

**Primacy development:** These grants are for States or Tribes that are in the process of developing programs for a Primacy application.

### SDWA Grant Funding

Funding for Tribes	FY2006	FY2007
PWSS	\$6,325,400	\$6,325,500

### 2 GAP Grants

GAP Grants (40 CFR §35.540-547) are intended to enhance Tribal capacity for developing and administering core environmental protection programs.

### 3 PPGs

PPGs (40 CFR §35.530-538) can be used for EPA-delegated, authorized, or approved activities, such as primary enforcement, and for any environmental project permitted under 40 CFR §35.501.

**For more information on GAP Grants and PPGs, see EPA's American Indian Environmental Office's website at: <http://www.epa.gov/indian/laws3.htm>**

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