



Indian Policies

<http://www.epa.gov/indian/basicinfo/presidential-docs.html>

Executive Orders

Executive orders are official documents through which the President of the United States manages the operations of the Federal Government. The Executive Orders listed below may be of interest to tribal governments. For a more in-depth listing of Executive Orders, please visit the [U.S. National Archives & Records Administration \(NARA\) site](#).

- Executive Order 13175 - Consultation and Coordination With Indian Tribal Governments (November 2000) (PDF) (4 pp, 144K)
- Statement on Signing the Executive Order 13175, (PDF) (1 pg, 180K)
- Executive Order 13007 on Sacred Sites (May 1996), (PDF) (2 pp, 87K)
- Executive Order 12898 on Environmental Justice (February 1994)

EPA Policies

The 1984 EPA Indian Policy outlines nine principles to guide the Agency in dealing with tribal governments and in responding to the problems of environmental management in Indian country in order to protect human health and the environment. Subsequently, this policy has been formally reaffirmed by each EPA Administrator.

- The 1984 EPA Indian Policy, (PDF) (4 pp, 213K)
- Administrator Jackson Reaffirmation of the EPA Indian Policy 2009, (PDF) (1 pp, 1.39MB)
- Administrator Johnson Reaffirmation EPA Indian Policy 2005, (PDF) (4 pp, 527K)
- Administrator Leavitt Reaffirmation EPA Indian Policy 2004, (PDF) (5 pp, 107K)
- Administrator Whitman Reaffirmation of the EPA Indian Policy 2001, (PDF) (5 pp, 286K)
- EPA Region 4 Policy and Practice for Environmental Protection in Indian Country 2001
- EPA Region 8 Policy for Environmental Protection in Indian Country 1996

Presidential Documents

Here you can find the Presidential documents reaffirming the government-to-government relationship between the federal government and tribal governments.

- President Barack Obama's 2009 Indian Policy, (PDF) (2 pp, 23K, About PDF Files)
- President George W. Bush's 2004 Indian Policy, (PDF) (1 pp, 126K, About PDF Files)
- President William Clinton's 1994 Indian Policy, (PDF) (2 pp, 23K, About PDF Files)
- President George H.W. Bush's 1991 Indian Policy, (PDF) (1 pg, 13K, About PDF Files)
- President Ronald Reagan's 1983 Indian Policy, (PDF) (4 pp, 55K, About PDF Files)
- President Richard Nixon's 1970 Indian Policy, (PDF) (2 pp, 25K, About PDF Files)



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUL 22 2009

THE ADMINISTRATOR

MEMORANDUM

SUBJECT: EPA Indian Policy

TO: All EPA Employees

In 1984, the U.S. Environmental Protection Agency became the first federal agency to adopt a formal Indian Policy. Today, 25 years later, I am proud to formally reaffirm that policy. By my action, EPA reiterates its recognition that the United States has a unique legal relationship with tribal governments based on the Constitution, treaties, statutes, Executive Orders, and court decisions. EPA recognizes the right of tribes as sovereign governments to self-determination and acknowledges the federal government's trust responsibility to tribes. EPA works with tribes on a government-to-government basis to protect the land, air, and water in Indian country.

EPA's tribal program has evolved since the Indian Policy was first adopted. Many significant milestones and successes in the EPA-tribal environmental partnership during these years can be directly traced to the EPA Indian Policy and the EPA-staff commitment to the EPA Indian Policy.

Today, EPA faces unique challenges that both the President and I believe require a full commitment to our nation's environmental and energy future: leading the world in reversing our collective greenhouse gas emissions' growth, decreasing our dependency on foreign oil, creating millions of new jobs in emerging clean-energy technologies, and reducing the pollution that can endanger our children. A clean energy environment is to this decade and the next what the Space Race was to the 1950s and 1960s, and, as America moves forward, tribes are essential partners in this future.

It is an important day in our partnership with tribes as EPA builds on past successes and strives to meet current and future environmental challenges in Indian country. Please join me in continuing to build a strong partnership with tribal governments to protect human health and the environment in Indian country.

A handwritten signature in black ink, appearing to read "Lisa P. Jackson".

Lisa P. Jackson

Attachment

11/8/84

EPA POLICY FOR THE ADMINISTRATION OF ENVIRONMENTAL
PROGRAMS ON INDIAN RESERVATIONS

INTRODUCTION

The President published a Federal Indian Policy on January 24, 1983, supporting the primary role of Tribal Governments in matters affecting American Indian reservations. That policy stressed two related themes: (1) that the Federal Government will pursue the principle of Indian "self-government" and (2) that it will work directly with Tribal Governments on a "government-to-government" basis.

The Environmental Protection Agency (EPA) has previously issued general statements of policy which recognize the importance of Tribal Governments in regulatory activities that impact reservation environments. It is the purpose of this statement to consolidate and expand on existing EPA Indian Policy statements in a manner consistent with the overall Federal position in support of Tribal "self-government" and "government-to-government" relations between Federal and Tribal Governments. This statement sets forth the principles that will guide the Agency in dealing with Tribal Governments and in responding to the problems of environmental management on American Indian reservations in order to protect human health and the environment. The Policy is intended to provide guidance for EPA program managers in the conduct of the Agency's congressionally mandated responsibilities. As such, it applies to EPA only and does not articulate policy for other Agencies in the conduct of their respective responsibilities.

It is important to emphasize that the implementation of regulatory programs which will realize these principles on Indian Reservations cannot be accomplished immediately. Effective implementation will take careful and conscientious work by EPA, the Tribes and many others. In many cases, it will require changes in applicable statutory authorities and regulations. It will be necessary to proceed in a carefully phased way, to learn from successes and failures, and to gain experience. Nonetheless, by beginning work on the priority problems that exist now and continuing in the direction established under these principles, over time we can significantly enhance environmental quality on reservation lands.

POLICY

In carrying out our responsibilities on Indian reservations, the fundamental objective of the Environmental Protection Agency is to protect human health and the environment. The keynote of this effort will be 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. To meet this objective, the Agency will pursue the following principles:

EPA 1984 Federal Indian Policy

1. THE AGENCY STANDS READY TO WORK DIRECTLY WITH INDIAN TRIBAL GOVERNMENTS ON A ONE-TO-ONE BASIS (THE "GOVERNMENT-TO-GOVERNMENT" RELATIONSHIP), RATHER THAN AS SUBDIVISIONS OF OTHER GOVERNMENTS.

EPA recognizes Tribal Governments as sovereign entities with primary authority and responsibility for the reservation populace. Accordingly, EPA will work directly with Tribal Governments as the independent authority for reservation affairs, and not as political subdivisions of States or other governmental units.

2. THE AGENCY WILL RECOGNIZE TRIBAL GOVERNMENTS AS THE PRIMARY PARTIES FOR SETTING STANDARDS, MAKING ENVIRONMENTAL POLICY DECISIONS AND MANAGING PROGRAMS FOR RESERVATIONS, CONSISTENT WITH AGENCY STANDARDS AND REGULATIONS.

In keeping with the principle of Indian self-government, the Agency will view Tribal Governments as the appropriate non-Federal parties for making decisions and carrying out program responsibilities affecting Indian reservations, their environments, and the health and welfare of the reservation populace. Just as EPA's deliberations and activities have traditionally involved the interests and/or participation of State Governments, EPA will look directly to Tribal Governments to play this lead role for matters affecting reservation environments.

3. THE AGENCY WILL TAKE AFFIRMATIVE STEPS TO ENCOURAGE AND ASSIST TRIBES IN ASSUMING REGULATORY AND PROGRAM MANAGEMENT RESPONSIBILITIES FOR RESERVATION LANDS.

The Agency will assist interested Tribal Governments in developing programs and in preparing to assume regulatory and program management responsibilities for reservation lands. Within the constraints of EPA's authority and resources, this aid will include providing grants and other assistance to Tribes similar to that we provide State Governments. The Agency will encourage Tribes to assume delegable responsibilities, (i.e. responsibilities which the Agency has traditionally delegated to State Governments for non-reservation lands) under terms similar to those governing delegations to States.

Until Tribal Governments are willing and able to assume full responsibility for delegable programs, the Agency will retain responsibility for managing programs for reservations (unless the State has an express grant of jurisdiction from Congress sufficient to support delegation to the State Government). Where EPA retains such responsibility, the Agency will encourage the Tribe to participate in policy-making and to assume appropriate lesser or partial roles in the management of reservation programs.

4. THE AGENCY WILL TAKE APPROPRIATE STEPS TO REMOVE EXISTING LEGAL AND PROCEDURAL IMPEDIMENTS TO WORKING DIRECTLY AND EFFECTIVELY WITH TRIBAL GOVERNMENTS ON RESERVATION PROGRAMS.

A number of serious constraints and uncertainties in the language of our statutes and regulations have limited our ability to work directly and effectively with Tribal Governments on reservation problems. As impediments in our procedures, regulations or statutes are identified which limit our ability to work effectively with Tribes consistent with this Policy, we will seek to remove those impediments.

5. THE AGENCY, IN KEEPING WITH THE FEDERAL TRUST RESPONSIBILITY, WILL ASSURE THAT TRIBAL CONCERNS AND INTERESTS ARE CONSIDERED WHENEVER EPA'S ACTIONS AND/OR DECISIONS MAY AFFECT RESERVATION ENVIRONMENTS.

EPA recognizes that a trust responsibility derives from the historical relationship between the Federal Government and Indian Tribes as expressed in certain treaties and Federal Indian Law. In keeping with that trust responsibility, the Agency will endeavor to protect the environmental interests of Indian Tribes when carrying out its responsibilities that may affect the reservations.

6. THE AGENCY WILL ENCOURAGE COOPERATION BETWEEN TRIBAL, STATE AND LOCAL GOVERNMENTS TO RESOLVE ENVIRONMENTAL PROBLEMS OF MUTUAL CONCERN.

Sound environmental planning and management require the cooperation and mutual consideration of neighboring governments, whether those governments be neighboring States, Tribes, or local units of government. Accordingly, EPA will encourage early communication and cooperation among Tribes, States and local governments. This is not intended to lend Federal support to any one party to the jeopardy of the interests of the other. Rather, it recognizes that in the field of environmental regulation, problems are often shared and the principle of comity between equals and neighbors often serves the best interests of both.

7. THE AGENCY WILL WORK WITH OTHER FEDERAL AGENCIES WHICH HAVE RELATED RESPONSIBILITIES ON INDIAN RESERVATIONS TO ENLIST THEIR INTEREST AND SUPPORT IN COOPERATIVE EFFORTS TO HELP TRIBES ASSUME ENVIRONMENTAL PROGRAM RESPONSIBILITIES FOR RESERVATIONS.

EPA will seek and promote cooperation between Federal agencies to protect human health and the environment on reservations. We will work with other agencies to clearly identify and delineate the roles, responsibilities and relationships of our respective organizations and to assist Tribes in developing and managing environmental programs for reservation lands.

8. THE AGENCY WILL STRIVE TO ASSURE COMPLIANCE WITH ENVIRONMENTAL STATUTES AND REGULATIONS ON INDIAN RESERVATIONS.

In those cases where facilities owned or managed by Tribal Governments are not in compliance with Federal environmental statutes, EPA will work cooperatively with Tribal leadership to develop means to achieve compliance, providing technical support and consultation as necessary to enable Tribal facilities to comply. Because of the distinct status of Indian Tribes and the complex legal issues involved, direct EPA action through the judicial or administrative process will be considered where the Agency determines, in its judgment, that: (1) a significant threat to human health or the environment exists, (2) such action would reasonably be expected to achieve effective results in a timely manner, and (3) the Federal Government cannot utilize other alternatives to correct the problem in a timely fashion.

In those cases where reservation facilities are clearly owned or managed by private parties and there is no substantial Tribal interest or control involved, the Agency will endeavor to act in cooperation with the affected Tribal Government, but will otherwise respond to noncompliance by private parties on Indian reservations as the Agency would to noncompliance by the private sector elsewhere in the country. Where the Tribe has a substantial proprietary interest in, or control over, the privately owned or managed facility, EPA will respond as described in the first paragraph above.

9. THE AGENCY WILL INCORPORATE THESE INDIAN POLICY GOALS INTO ITS PLANNING AND MANAGEMENT ACTIVITIES, INCLUDING ITS BUDGET, OPERATING GUIDANCE, LEGISLATIVE INITIATIVES, MANAGEMENT ACCOUNTABILITY SYSTEM AND ONGOING POLICY AND REGULATION DEVELOPMENT PROCESSES.

It is a central purpose of this effort to ensure that the principles of this Policy are effectively institutionalized by incorporating them into the Agency's ongoing and long-term planning and management processes. Agency managers will include specific programmatic actions designed to resolve problems on Indian reservations in the Agency's existing fiscal year and long-term planning and management processes.



William D. Ruckelshaus

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release

November 5, 2009

November 5, 2009

MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

SUBJECT: Tribal Consultation

The United States has a unique legal and political relationship with Indian tribal governments, established through and confirmed by the Constitution of the United States, treaties, statutes, executive orders, and judicial decisions. In recognition of that special relationship, pursuant to Executive Order 13175 of November 6, 2000, executive departments and agencies (agencies) are charged with engaging in regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications, and are responsible for strengthening the government-to-government relationship between the United States and Indian tribes.

History has shown that failure to include the voices of tribal officials in formulating policy affecting their communities has all too often led to undesirable and, at times, devastating and tragic results. By contrast, meaningful dialogue between Federal officials and tribal officials has greatly improved Federal policy toward Indian tribes. Consultation is a critical ingredient of a sound and productive Federal-tribal relationship.

My Administration is committed to regular and meaningful consultation and collaboration with tribal officials in policy decisions that have tribal implications including, as an initial step, through complete and consistent implementation of Executive Order 13175. Accordingly, I hereby direct each agency head to submit to the Director of the Office of Management and Budget (OMB), within 90 days after the date of this memorandum, a detailed plan of actions the agency will take to implement the policies and directives of Executive Order 13175. This plan shall be developed after consultation by the agency with Indian tribes and tribal officials as defined in Executive Order 13175. I also direct each agency head to submit to the Director of the OMB, within 270 days after the date of this memorandum, and annually thereafter, a progress report on the status of each action included in its plan together with any proposed updates to its plan.

Each agency's plan and subsequent reports shall designate an appropriate official to coordinate implementation of the plan and preparation of progress reports required by this memorandum. The Assistant to the President for Domestic Policy and the Director of the OMB shall review agency plans and subsequent reports for consistency with the policies and directives of Executive Order 13175.

In addition, the Director of the OMB, in coordination with the Assistant to the President for Domestic Policy, shall submit to me, within 1 year from the date of this memorandum, a report on

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the implementation of Executive Order 13175 across the executive branch based on the review of agency plans and progress reports. Recommendations for improving the plans and making the tribal consultation process more effective, if any, should be included in this report.

The terms "Indian tribe," "tribal officials," and "policies that have tribal implications" as used in this memorandum are as defined in Executive Order 13175.

The Director of the OMB is hereby authorized and directed to publish this memorandum in the *Federal Register*.

This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person. Executive departments and agencies shall carry out the provisions of this memorandum to the extent permitted by law and consistent with their statutory and regulatory authorities and their enforcement mechanisms.

BARACK OBAMA

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Federal Register

Monday,
November 9, 2009

Part IV

The President

Memorandum of November 5, 2009—
Tribal Consultation

Presidential Documents

Title 3—

Memorandum of November 5, 2009

The President

Tribal Consultation

Memorandum for the Heads of Executive Departments And Agencies

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History has shown that failure to include the voices of tribal officials in formulating policy affecting their communities has all too often led to undesirable and, at times, devastating and tragic results. By contrast, meaningful dialogue between Federal officials and tribal officials has greatly improved Federal policy toward Indian tribes. Consultation is a critical ingredient of a sound and productive Federal-tribal relationship.

My Administration is committed to regular and meaningful consultation and collaboration with tribal officials in policy decisions that have tribal implications including, as an initial step, through complete and consistent implementation of Executive Order 13175. Accordingly, I hereby direct each agency head to submit to the Director of the Office of Management and Budget (OMB), within 90 days after the date of this memorandum, a detailed plan of actions the agency will take to implement the policies and directives of Executive Order 13175. This plan shall be developed after consultation by the agency with Indian tribes and tribal officials as defined in Executive Order 13175. I also direct each agency head to submit to the Director of the OMB, within 270 days after the date of this memorandum, and annually thereafter, a progress report on the status of each action included in its plan together with any proposed updates to its plan.

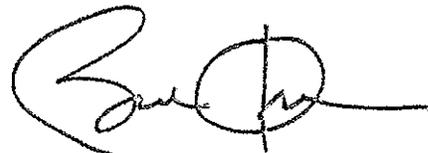
Each agency's plan and subsequent reports shall designate an appropriate official to coordinate implementation of the plan and preparation of progress reports required by this memorandum. The Assistant to the President for Domestic Policy and the Director of the OMB shall review agency plans and subsequent reports for consistency with the policies and directives of Executive Order 13175.

In addition, the Director of the OMB, in coordination with the Assistant to the President for Domestic Policy, shall submit to me, within 1 year from the date of this memorandum, a report on the implementation of Executive Order 13175 across the executive branch based on the review of agency plans and progress reports. Recommendations for improving the plans and making the tribal consultation process more effective, if any, should be included in this report.

The terms "Indian tribe," "tribal officials," and "policies that have tribal implications" as used in this memorandum are as defined in Executive Order 13175.

The Director of the OMB is hereby authorized and directed to publish this memorandum in the *Federal Register*.

This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person. Executive departments and agencies shall carry out the provisions of this memorandum to the extent permitted by law and consistent with their statutory and regulatory authorities and their enforcement mechanisms.

A handwritten signature in black ink, appearing to be Barack Obama's signature, consisting of a large 'B' followed by a circle and a horizontal line.

THE WHITE HOUSE,
Washington, November 5, 2009.

Presidential Documents

Title 3—

Executive Order 13175 of November 6, 2000

The President

Consultation and Coordination With Indian Tribal Governments

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to establish regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications, to strengthen the United States government-to-government relationships with Indian tribes, and to reduce the imposition of unfunded mandates upon Indian tribes; it is hereby ordered as follows:

Section 1. Definitions. For purposes of this order:

(a) "Policies that have tribal implications" refers to regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

(b) "Indian tribe" means an Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. 479a.

(c) "Agency" means any authority of the United States that is an "agency" under 44 U.S.C. 3502(1), other than those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(5).

(d) "Tribal officials" means elected or duly appointed officials of Indian tribal governments or authorized intertribal organizations.

Sec. 2. Fundamental Principles. In formulating or implementing policies that have tribal implications, agencies shall be guided by the following fundamental principles:

(a) The United States has a unique legal relationship with Indian tribal governments as set forth in the Constitution of the United States, treaties, statutes, Executive Orders, and court decisions. Since the formation of the Union, the United States has recognized Indian tribes as domestic dependent nations under its protection. The Federal Government has enacted numerous statutes and promulgated numerous regulations that establish and define a trust relationship with Indian tribes.

(b) Our Nation, under the law of the United States, in accordance with treaties, statutes, Executive Orders, and judicial decisions, has recognized the right of Indian tribes to self-government. As domestic dependent nations, Indian tribes exercise inherent sovereign powers over their members and territory. The United States continues to work with Indian tribes on a government-to-government basis to address issues concerning Indian tribal self-government, tribal trust resources, and Indian tribal treaty and other rights.

(c) The United States recognizes the right of Indian tribes to self-government and supports tribal sovereignty and self-determination.

Sec. 3. Policymaking Criteria. In addition to adhering to the fundamental principles set forth in section 2, agencies shall adhere, to the extent permitted by law, to the following criteria when formulating and implementing policies that have tribal implications:

(a) Agencies shall respect Indian tribal self-government and sovereignty, honor tribal treaty and other rights, and strive to meet the responsibilities that arise from the unique legal relationship between the Federal Government and Indian tribal governments.

(b) With respect to Federal statutes and regulations administered by Indian tribal governments, the Federal Government shall grant Indian tribal governments the maximum administrative discretion possible.

(c) When undertaking to formulate and implement policies that have tribal implications, agencies shall:

(1) encourage Indian tribes to develop their own policies to achieve program objectives;

(2) where possible, defer to Indian tribes to establish standards; and

(3) in determining whether to establish Federal standards, consult with tribal officials as to the need for Federal standards and any alternatives that would limit the scope of Federal standards or otherwise preserve the prerogatives and authority of Indian tribes.

Sec. 4. *Special Requirements for Legislative Proposals.* Agencies shall not submit to the Congress legislation that would be inconsistent with the policy-making criteria in Section 3.

Sec. 5. *Consultation.* (a) Each agency shall have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications. Within 30 days after the effective date of this order, the head of each agency shall designate an official with principal responsibility for the agency's implementation of this order. Within 60 days of the effective date of this order, the designated official shall submit to the Office of Management and Budget (OMB) a description of the agency's consultation process.

(b) To the extent practicable and permitted by law, no agency shall promulgate any regulation that has tribal implications, that imposes substantial direct compliance costs on Indian tribal governments, and that is not required by statute, unless:

(1) funds necessary to pay the direct costs incurred by the Indian tribal government or the tribe in complying with the regulation are provided by the Federal Government; or

(2) the agency, prior to the formal promulgation of the regulation,

(A) consulted with tribal officials early in the process of developing the proposed regulation;

(B) in a separately identified portion of the preamble to the regulation as it is to be issued in the **Federal Register**, provides to the Director of OMB a tribal summary impact statement, which consists of a description of the extent of the agency's prior consultation with tribal officials, a summary of the nature of their concerns and the agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of tribal officials have been met; and

(C) makes available to the Director of OMB any written communications submitted to the agency by tribal officials.

(c) To the extent practicable and permitted by law, no agency shall promulgate any regulation that has tribal implications and that preempts tribal law unless the agency, prior to the formal promulgation of the regulation,

(1) consulted with tribal officials early in the process of developing the proposed regulation;

(2) in a separately identified portion of the preamble to the regulation as it is to be issued in the **Federal Register**, provides to the Director of OMB a tribal summary impact statement, which consists of a description of the extent of the agency's prior consultation with tribal officials, a summary of the nature of their concerns and the agency's position supporting the

need to issue the regulation, and a statement of the extent to which the concerns of tribal officials have been met; and

(3) makes available to the Director of OMB any written communications submitted to the agency by tribal officials.

(d) On issues relating to tribal self-government, tribal trust resources, or Indian tribal treaty and other rights, each agency should explore and, where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking.

Sec. 6. Increasing Flexibility for Indian Tribal Waivers.

(a) Agencies shall review the processes under which Indian tribes apply for waivers of statutory and regulatory requirements and take appropriate steps to streamline those processes.

(b) Each agency shall, to the extent practicable and permitted by law, consider any application by an Indian tribe for a waiver of statutory or regulatory requirements in connection with any program administered by the agency with a general view toward increasing opportunities for utilizing flexible policy approaches at the Indian tribal level in cases in which the proposed waiver is consistent with the applicable Federal policy objectives and is otherwise appropriate.

(c) Each agency shall, to the extent practicable and permitted by law, render a decision upon a complete application for a waiver within 120 days of receipt of such application by the agency, or as otherwise provided by law or regulation. If the application for waiver is not granted, the agency shall provide the applicant with timely written notice of the decision and the reasons therefor.

(d) This section applies only to statutory or regulatory requirements that are discretionary and subject to waiver by the agency.

Sec. 7. Accountability.

(a) In transmitting any draft final regulation that has tribal implications to OMB pursuant to Executive Order 12866 of September 30, 1993, each agency shall include a certification from the official designated to ensure compliance with this order stating that the requirements of this order have been met in a meaningful and timely manner.

(b) In transmitting proposed legislation that has tribal implications to OMB, each agency shall include a certification from the official designated to ensure compliance with this order that all relevant requirements of this order have been met.

(c) Within 180 days after the effective date of this order the Director of OMB and the Assistant to the President for Intergovernmental Affairs shall confer with tribal officials to ensure that this order is being properly and effectively implemented.

Sec. 8. Independent Agencies. Independent regulatory agencies are encouraged to comply with the provisions of this order.

Sec. 9. General Provisions. (a) This order shall supplement but not supersede the requirements contained in Executive Order 12866 (Regulatory Planning and Review), Executive Order 12988 (Civil Justice Reform), OMB Circular A-19, and the Executive Memorandum of April 29, 1994, on Government-to-Government Relations with Native American Tribal Governments.

(b) This order shall complement the consultation and waiver provisions in sections 6 and 7 of Executive Order 13132 (Federalism).

(c) Executive Order 13084 (Consultation and Coordination with Indian Tribal Governments) is revoked at the time this order takes effect.

(d) This order shall be effective 60 days after the date of this order.

Sec. 10. *Judicial Review.* This order is intended only to improve the internal management of the executive branch, and is not intended to create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law by a party against the United States, its agencies, or any person.

William J. Clinton

THE WHITE HOUSE,
November 6, 2000.

[FR Doc. 00-29003
Filed 11-8-00; 8:45 am]
Billing code 3195-01-P

September 15, 2010

David Guest, Senior Policy Advisor
American Indian Environmental Office, MC 2690M
USEPA
1200 Pennsylvania Ave, NW
Washington, DC 20460

RE: Draft EPA Consultation Policy

Dear Mr. Guest:

The Fond du Lac Reservation was established by the Treaty of LaPointe (1854) between the Lake Superior Chippewa and the United States Government, with established boundaries located in Northeastern Minnesota. The Reservation covers approximately 101,000 acres of land, and is mostly forested. The Reservation supports populations of white tail deer, black bear, ruffed grouse, and various species of waterfowl. It is also home to such animals as river otter, pine marten, fisher, moose, gray wolf, bald eagle, osprey, great gray owl and northern boreal owl. Many rare and culturally significant plants, such as wild rice, blueberries, and paper birch, also occur within the Reservation boundaries.

For several years, the Band has worked on a government-to-government basis with the EPA for the environmental protection of the Reservation. During this time, the Band has worked to provide input and to help improve the EPA's consultation policy. I am pleased that the EPA has now issued a new draft document on consultation practices with tribes, per President Obama's direction to all federal agencies to develop plans to assure regular and meaningful consultation with tribal officials. Please accept the Band's comments on the following specific points of the consultation document.

- Page 4 of the document states EPA's intention of "using existing EPA structures to the extent possible". This includes the Action Development Process, National and Regional Tribal Operations Committees ("NTOC/RTOC"), and tribal partnership groups. This approach seems reasonable, but please note that the EPA should depend on *all* of these organizations equally to work with tribes and should continue to find new ways to perform outreach and consultation. Not all tribal technical staff attend NTOC or RTOC meetings regularly, and information may not always find its way to the appropriate staff through these groups. While the NTOC and RTOC provide a great deal of information on general tribal programs and on items that concern tribal leaders, the tribal partnership groups do a better job of informing technical staff of day-to-day technical policy undertakings by the EPA. These groups include the National Tribal Water Council, the National Tribal Environmental Committee and its sub-organization the National Tribal Air Association, the Institute for Tribal Environmental Professionals through Northern Arizona University, and the Tribal Air Monitoring Support Center in Las Vegas. It

would also be helpful to have more specifics on how the EPA will work with these organizations. Will calls or meetings occur on a regularly (monthly or quarterly) basis to provide updates? Will tribes be included on these calls? The earlier tribes can be involved, the better the end result will be.

- Please make sure that consultation materials are available in a manner and format that is widely accessible to tribes. Likewise, tribes should be encouraged to provide feedback in a manner and format that is appropriate and widely accessible for them. For instance, tribes may wish to provide comments orally, rather than in written form with a certain format and certain number of copies. Tribes should be provided with clear information regarding the purpose of the consultation and the scope of the decision to be reached. They should be informed as to opportunities for providing input, deadlines, and specifically which items are open to comment and input and which are mandated by law. Tribes should also be given clear reasons explaining why their recommendations were not incorporated, if applicable.

- On pages 6-7, the document talks about the Identification Phase, where the EPA will perform an “initial identification of the potentially affected tribe(s)”. The Band believes that tribes should be approached and asked if they wish to be consulted on issues, rather than having the EPA decide what matters may or may not have tribal implications, thereby triggering consultation. The Band has many times expressed its belief that the EPA’s current criteria for what constitutes tribal implications often miss the mark. The current EPA definition holds that tribal implications are those that would require tribes to take regulatory action for a source on the Reservation, or those that require tribally-owned sources to meet emission limits. Since tribes are not obligated to adopt federal rules, but can allow the EPA to enforce those rules on the Reservation, an assumption is made that there are no tribal implications resulting from EPA rule-making, whereas many tribes believe that activities from nearby sources affecting their lands definitely have tribal implications. Acid rain, mercury deposition, and the disposal of hazardous materials that can find their way onto the Reservation all affect our Reservations and the cultural and spiritual lives of Band members. Too often the tribes have no input in the way that surrounding facilities are regulated, to the detriment of their Reservations’ environmental quality. Tribes should have full input in this first step of consultation in order to self-identify themselves as parties to be consulted.

Tribes may also be affected by actions that affect their Ceded lands. Tribes retain usufructuary rights, which are property right, within these lands. These include hunting, fishing, and gathering. Actions that affect these lands have tribal implications. Please also note that the appropriate time for consultation is in the scoping stage of any activity. Since tribal staff sizes are small, it is particularly important that tribes be contacted at the earliest possible date so they can become familiar with the issues, and have time to develop meaningful comments. Please note that when performing outreach, the EPA should be careful to not only present their preliminary views on the topic, but to give any relevant information as to how those views were reached, such as studies, scientific data or cost/benefit analysis information. When predicting impacts to tribes, the EPA should try to consider how those impacts will look *from the perspective of the tribes*. The loss of a certain amount of habitat, or the imposition of a certain amount of environmental degradation may not seem important to the EPA, but could be of great concern to tribes.

- On page 8, a list of EPA activity categories for consultation is given. Please clarify whether “Permits” means permits for on-Reservation sources, off-Reservation sources, or both. The Band wishes to be consulted about permits for off-Reservation sources that may affect environmental quality on the Reservation or in Ceded lands, as well as for those sources that are located directly on-Reservation.

- On page 9, item 2a., please identify whom tribes need to contact in order to request consultation. If there are steps or requirements that need to be fulfilled in making a request for consultation, please list them so that we may provide comments. Item 2b. mentions a number of terms that may be unfamiliar to tribes. The Regulatory Steering Committee, the Comprehensive Regulatory Data Form, the semiannual Regulatory Agenda, and the Regulatory Gateway do not have wide tribal recognition. Since these items, and the Action Development Process itself, are important in the consultation identification process, please provide some education and outreach to tribes about them. Without having any familiarity with the terms above, it is difficult for my staff to comment on their use in the consultation process. Also, Item 2b. mentions that the Regulatory Gateway may be accessed through the EPA website. While some tribes may check the website regularly, please also set up a list serve option to alert tribes when something new is posted to the site.

 - Item VI.A on page 11 states that some consultation responsibilities will be undertaken by EPA's regional and program offices. While this arrangement may be appropriate in instances where the Region is taking the lead (for example, in consulting with a tribe on the issuance of a permit), many times the final decisions made by the EPA take place at the Headquarters level. Please create a list of situations in which consultation will take place with the regions and when it will take place with Headquarters or the program offices so that tribes can review and comment.

 - Item VI.A.3 on page 12 directs regions to provide a semi-annual agenda of matters appropriate for consultation to the AIEO. Please also provide this agenda to the tribes, so they can prepare for upcoming items of interest. Item VI.A.4 on the same page calls for the appointment of a Tribal Consultation Advisor for each Region. It is unclear where in the EPA organizational chart these advisors will exist. Will they be under the authority of the American Indian Environmental Office? Additionally, it is important that this position is established as a full-time, dedicated one, since this employee will likely be kept very busy working on consultation matters. Lastly, please provide some kind of mechanism to get feedback from tribes as to how the final policy is working so that it can be improved if necessary. A regularly scheduled review of the policy would be helpful.
- On a more general note, I would ask the EPA to keep in mind the reserved rights doctrine, which states that tribes generally retain those rights of a sovereign government not expressly extinguished by a federal treaty or statute, as well as the following directions for consultation, based on Stephen L. Pevar's *The Rights of Indians and Tribes*:

1. Inform the tribe of all relevant facts, and do so as early in the process as possible. Please establish a time period in which this will occur.

2. Give the tribe sufficient time to consider the situation, and provide the tribe with technical assistance and data, if the tribe requests it.

3. Maintain a dialogue with the tribe. Address the tribe's concerns in a timely manner, and keep the tribe informed of developments. Consider alternatives. Act in good faith, and be open to looking at things from the tribe's perspective.

4. Document the consultation process. Send letters after phone calls or meetings documenting the status of the situation, and request responses and comments.

5. Accept the tribe's recommendation unless compelling reasons require otherwise.

In conclusion, I'd like to offer a few words about the traditional tribal approach to reaching consensus. In years past, most tribal societies in North America maintained harmony through inclusive ways of building community agreement and balancing the needs and concerns of the individual against those of the community as a whole. Decisions were not made without the input of all those concerned. In these communities, leaders acted as facilitators and consensus builders rather than as decision makers. Another way to describe the values apparent in this process is through the modern-day concept of mediation, which is often used as a less confrontational and adversarial alternative to litigation. Native American wisdom emphasizes working to heal relationships, not just to reach a mutually acceptable legal outcome. Traditional communication values include: listening (without pens and paper), respect (getting to know someone different than you), generosity (letting both sides gain something), humor (acknowledging the humanness of the situation), compassion (walk the other person's path), silence (listening without interrupting, taking time to reflect before speaking), non-verbal communication (facial and body language), atonement (taking responsibility), trust (building a relationship), healing (trying to empathize with others), wisdom (understanding both sides and the situation as a whole), and the responsibility to be a peacemaker. These are values that are not often included in Western views of negotiation or consultation; however, we encourage the EPA to keep them in mind in finalizing this document.

Sincerely,

Reginald K. DeFoe
Director, Fond du Lac Resource Management Division

c.c. Karen R. Diver, Chairwoman, FdL Reservation Business Committee
Ferdinand Martineau, Jr., Secretary/Treasurer, FdL Reservation Business Committee
Chuck Walt, FdL Executive Director
Dennis Peterson, FdL Legal Counsel
Wayne Dupuis, FdL Environmental Program Manager
Darrel Harmon, Senior Indian Policy Advisor - EPA



Nez Perce

TRIBAL EXECUTIVE COMMITTEE
P.O. BOX 305 • LAPWAI, IDAHO 83540 • (208) 843-2259

January 14, 2010

Janice K. DiPietro
U.S. Environmental Protection Agency, 4104M
American Indian Environmental Office
1200 Pennsylvania Ave., NW
Washington, DC 20460

Dear Ms DiPietro:

The Nez Perce Tribe would like to thank you for the opportunity to provide comments and input on the Environmental Protection Agency's (EPA) efforts to formulate an action plan to comply with President Obama's memorandum on consultation and to formulate a tribal consultation plan. The Nez Perce Tribe appreciates the efforts of EPA to implement a responsive consultation policy with Indian tribes. Many decisions and actions by EPA and its regional offices have an impact on the sovereign rights of tribes and it is important that these decisions are made within a framework of consultation with the affected tribes. This will help insure that the federal government upholds and honors its trust responsibilities to all tribes.

The Nez Perce Tribe has participated in several consultations with other federal agencies on this issue including one held by the Department of Interior in Portland, Oregon on December 9, 2009. The Nez Perce Tribe is providing these written comments so that they may be considered by EPA prior to it formulating a final action plan. EPA already has a good track record in working with tribes and it is hoped that other agencies can follow EPA's lead in this area. The Nez Perce Tribe has worked extensively with Region 10 on many issues including the successful air quality program that is implemented by the Tribe.

The Nez Perce Tribe has had an opportunity to make a preliminary evaluation of the draft of the EPA Region 10 Tribal Consultation Procedures and believes that this draft is a very good foundation for how EPA should conduct consultation with tribes. The Nez Perce Tribe believes that several of the components of the plan should be a part of any tribal consultation plan. First the plan provides a comprehensive definition of "tribal consultation" and what actions by an agency or a tribe qualify as consultation. What is just as important is how the draft plan clarifies what actions should not be considered to be consultation. This is an important distinction that should be made in any consultation plan. In addition, the plan outlines and explains the different triggers for tribal consultation. The description and categorization of the different triggers is very thorough and helpful in making sure that all applicable actions by EPA that merit

consultation fall under the plan. Finally, the plan attempts to address the situation of state delegated programs. It should be noted that the Nez Perce Tribe recommend that the plan should provide more detail and make sure that EPA does not relinquish its duty to consult with tribes simply because a program has been delegated to a state. Finally, the Tribe commends EPA for having tribal specialists, tribal coordinators and tribal policy advisors on staff. These are essential tools of any governmental agency hoping to maintain a productive relationship with tribes.

During the other consultations, the Tribe has heard many different ideas that it believes would be useful in helping an agency with compliance with the consultation requirements of Executive Order 13175. Those ideas include:

1. Having a dedicated liaison for tribes;
2. Having a dedicated resource page for tribes on a website;
3. Formulating a training program for employees regarding tribes and sovereignty of tribal governments and the unique government to government relationship between tribes and the federal government; and
4. Having regularly scheduled or annual consultations with tribes.

EPA has already implemented to good effect the first two suggestions. However, the Nez Perce Tribe believes that items 3 and 4 have some merit and if used would help EPA meet the consultation requirements expressed in Executive Order 13175. Those items as well as the general view of the Nez Perce Tribe on consultation are expressed below.

The importance of consultation cannot be overstated and can and should occur in different ways. The first step in consultation is need for proper notice. The amount of time needed to give notice to tribes of EPA's intent for consultation will depend on the number of tribes that are being affected by a federal action. If a federal action affects all or a majority of Indian Country than it would be necessary to provide as much notice as possible for travel arrangements. If the federal action will affect a smaller area, the notice can be shorter as long as the consultation comes prior to any decision making. The elected officials for the Tribes should be involved with the consultation. However, the Nez Perce Tribe has found it very beneficial to have tribal staff work with corresponding federal employees to further define the issues that need to be addressed under a federal action. In addition, the most effective consultation efforts in which the Nez Perce Tribe have been involved are when the tribal elected officials are able to meet one on one with the appropriate federal staff and have a two-way dialogue.

An important element of this success can also be attributed to the federal agencies having an established tribal liaison position. The importance of the role that such a person can play in helping both parties navigate through the bureaucratic maze that makes up the federal government as well as an understanding of the tribal government process cannot be overstated. The Tribe strongly supports EPA's current used of these positions.

The Tribe also strongly supports any efforts by EPA to formulate and implement a training program for employees that will help educate and inform employees about tribal governments, treaty rights and the federal trust responsibility of the United States to tribes. Such education

efforts will be beneficial and help strengthen the working relationship between tribes and EPA. It is important to note that regional employees should also take the time to learn specific information about the tribes that are in a particular region. The nature and structure of a tribal government can vary greatly from tribe to tribe. It is also important for an employee to be aware of some of the cultural and history (both political and chronological history) of a tribe.

In addition, it is important that EPA properly implement consultation anytime any federal action will or could affect a single tribe or Indian Country in general. Given the vast nature of treaty reserved rights and the increasing work and responsibilities that have been assumed by tribal governments, a presumption that a federal action will affect a tribe is the most prudent measure an agency can take. Such a presumption will force a person making a decision to take the analytical steps necessary to build a case that either supports or rebuts that presumption. In doing this analysis it is important that more than just federal statutes are considered. A working knowledge of tribal treaty rights, the Indian Trust Doctrine and Public Trust Doctrine and case law interpreting those rights is imperative.

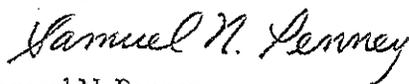
If the presumption is supported, it is then prudent to begin to directly involve the tribe or tribes affected by the action at the earliest stage possible and prior to any decisions being made. Involvement at this stage will allow most tribes to begin to utilize its staff to further assess and evaluate what responses or actions are required from a tribal perspective. It is at this stage that most obstacles or barriers can be identified that would likely affect the proposed federal action. It also begins the collaborative process at the formation stage of the action before any decisions.

In contacting tribes for large consultations on issues or in requesting comments, some preliminary attention should be made to the manner in which the tribes are contacted about consultation. It is important that any information that is being transmitted to tribes arrive to the correct persons in a timely manner. Maintaining a current database of tribal leaders and the primary contact information and procedures for each tribal government is important so that information is not lost in the massive amounts of information and mail received by tribes each day.

Finally, it would be helpful to develop with tribes alternative methods of hosting consultation meetings to alleviate some of the travel burden. Some resources should be provided to help tribes shoulder the travel burden as well as aide in establishing or promoting the technology of video, computer or audio conferencing.

Hopefully these comments will prove useful to EPA while it formulates its action plan regarding consultation. Thank you again for providing this opportunity to provide comments.

Sincerely,



Samuel N. Penney
Chairman

tribal representatives and the EPA Region 10 Tribal Operations Committee. The purpose of this revision is to provide more clarity and uniformity to the EPA Region 10 consultation process, as well as strengthen shared understanding of how EPA Region 10 and tribes will engage in future tribal consultations.

Document Supersession

These Region 10 Tribal Consultation Procedures supersede the 2001 EPA Region 10 Consultation Framework, as well as all EPA Region 10 individual program, sector, and unit/team consultation procedures, except policy and procedures of EPA's Enforcement and Emergency Response Programs. The document does not replace any individual EPA-tribal Memorandums of Agreement, individual EPA-tribal consultation plans, or other types of specific agreements that EPA Region 10 has previously negotiated with tribes.⁴

In the future, individual EPA Region 10 programs may develop more detailed sets of procedures that support, but do not conflict, with this overarching set of procedures. For example, the Region's National Pollutant Discharge Elimination System (NPDES) Unit may reissue program specific procedures to provide detailed guidance on the various types of actions undertaken within that program. Future sets of supporting procedures will be attached to this document in the appendix.

Definition of Tribal Consultation

EPA Region 10 recognizes that EPA and its regions, other federal agencies, and tribes may sometimes interpret the term "consultation" differently. Officially, the EPA agency-wide view is that all types of communication with tribes might be considered components of the consultation process. However, here in Region 10, we understand that most Region 10 tribes consider consultation to only include planned, structured meetings between officials of EPA and the tribe or their designees. In order to meet expectations and understandings of tribes within EPA Region 10, the Region will use the term "tribal consultation" to refer to meetings, either in person or via phone/video teleconference, between officials of EPA and the tribe or its designees, which are planned, structured and understood by both the tribe and EPA as consultation. Communications outside of consultation meetings may be part of the overall consultation process but EPA Region 10 does not interpret these communications as the consultation in itself.

In 2001, EPA Region 10 put forth a definition of tribal consultation that remains appropriate today:

"Consultation" means the process of seeking, discussing, and considering the views of federally recognized tribal governments at the earliest time in EPA

⁴ Other types of agreements could include cooperative agreements and/or an Administrative Order on Consent for Remedial Investigation/Feasibility Study under the Comprehensive Environmental Response, Compensation, and Liability Act (Superfund), which may include discussion of how tribal consultation occurs for that particular project.

Regions 10's decision-making. Consultation generally means more than simply providing information about what the Agency is planning to do and allowing comment. Rather, consultation means respectful, meaningful, and effective two-way communication that works toward the goal of consensus reflecting the concerns of the affected federally recognized tribe(s) before EPA makes its decision or moves forward with its action.⁵

EPA Region 10 may invite consultation from a single tribe or multiple tribes simultaneously and these tribal consultation procedures apply to either situation. In the interest of readability, from this point on, this document refers to consultation with a single tribe although procedures outlined in this document also apply to consultations involving multiple tribes.

Applicability to Federally Recognized Tribes in EPA Region 10

These EPA Region 10 Tribal Consultation Procedures apply consistently and evenly to Region 10 interactions with federally recognized tribes. The U.S. Bureau of Indian Affairs (BIA) maintains the list of all federally-recognized tribes. Information from the section "Determining when EPA will Invite Tribes to Consult" (pages 4-6) should be used to understand what triggers an invitation to consult by EPA Region 10.

Working with Tribes without Federal Recognition Status

Some tribal groups within EPA Region 10 do not have formal federal recognition as tribes. EPA will normally respond to requests for communication from these tribal groups and will sometimes initiate communication; however, these communications will not constitute tribal consultation.

Communications Outside of Tribal Consultation – Effective Working Relationships

While this document focuses on government-to-government consultation between tribes and EPA, the value of other types of communication between EPA and tribes can not be over-emphasized. Most tribal-EPA communications take the form of information sharing, technical discussion, and joint planning, and involve staff and management of both EPA and a tribe. These exchanges generally improve the ability of EPA to work in partnership with tribes to protect the environment and human health.

EPA Region 10 has invested significant resources into strengthening its communication on tribal issues, both internally and with tribes. The Region encourages internal communication between the program offices through the Tribal Specialist Team and has developed initiatives

⁵ 2001 U.S. Environmental Protection Agency – Region 10 Tribal Consultation Framework

such as the North Slope Communications Protocol, which provides EPA Region 10 staff with communication guidelines to support meaningful involvement of the Alaska North Slope communities in EPA decision-making. Additionally, EPA Region 10 has helped organize working groups on specific environmental issues with tribes, and the Region supports and co-chairs the Regional Tribal Operations Committee, to improve exchange of information all around.

When EPA and tribes are effectively communicating, in an early, meaningful way, conflict is reduced or avoided and in some cases tribal consultation may not be needed. Although EPA Region 10 sends an invitation to consult letter on actions that may affect tribes, a tribe may decide to decline the invitation or elect not to respond if it determines its interests have been addressed through early meaningful involvement. If tribal consultation is still needed, earlier communications will still bolster the consultation dialogue as both sides will better understand how to communicate with one another and how to balance the views and interests of all.

Communications with tribes should be documented by EPA Region 10 staff and shared with other relevant staff within EPA Region 10 when appropriate, so that everyone can be informed and benefit from knowledge gained and lessons learned.

II. Tribal Consultation Procedures

Quick Reference Flowchart – Tribal Consultation Action Steps

[Process flowcharts for EPA initiated consultation and tribal initiated consultation will be included]

Determining when EPA will Invite Tribes to Consult

It is EPA Region 10's policy to extend an invitation to tribes to consult when it anticipates or proposes an EPA Region 10 action that could potentially affect a federally recognized tribe. EPA defines "actions" as final regulatory decisions or final policy decisions, not necessarily every step taken within a decision-making process. For example, EPA will offer consultation on issuance of a permit where it holds regulatory authority; however it need not offer consultation on all of the correspondence it writes as part of that permit decision.

At the beginning of a proposed project or action, a designated EPA program staff member, hereafter referred to as the Project Lead, should make an initial determination whether a tribe or multiple tribes might be affected by the action. The following factors should be considered when determining whether EPA Region 10 will extend an invitation to consult:

Geographic Triggers

- action on or adjacent to Indian Country or an Alaskan Native Village, or nearby if the action could potentially affect a tribe's resources, rights, or traditional way of life
- action within the "usual and accustomed areas" of a federally recognized tribe that could potentially affect a tribe's resources, rights, or traditional way of life

Tribal Resource Triggers

- action that may impact treaty-reserved resources of a tribe
- action that may impact the cultural, traditional or subsistence resources of a tribe or a tribe's traditional way of life

Tribal Ownership Triggers

- action related to a facility owned or managed by a tribal government, except during certain stages of the EPA enforcement process (see Appendix B for EPA and EPA Region 10 Enforcement Procedures in Indian Country)

Policy, Rulemaking, and Adjudication⁶ Triggers

- changes to EPA regional policy that affect tribes, especially when policy is specifically about tribes (e.g. tribal policy)
- rulemaking or adjudication by EPA Region 10 that may affect tribes or their rights or resources

The Project Lead may review maps of federally recognized tribal government locations, Indian Country⁷, "usual and accustomed" areas⁸, Alaska Native Village locations, and Alaska Native Corporation lands to assist in the initial determination of whether a tribe or multiple tribes might be affected by the action. Natural resource and subsistence maps, and other maps depicting tribal use areas, may also be reviewed if available. Links to some of these resources can be found in Appendix C.

However, one cannot rely solely on maps to adequately assess whether a tribe might be potentially affected by an EPA action because most traditional use areas of tribes within EPA Region 10 are not mapped. For example, a tribal family's berry picking or hunting/fishing areas may not be well known to others, especially to those outside of the tribe. The Project Lead should work with the EPA Tribal Coordinator⁹ assigned to that particular tribe to determine

⁶ Adjudication actions include program delegation and setting of environmental standards (e.g. water quality standards).

⁷ In 1948 Congress codified the definition of "Indian Country"...means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same (18 U.S.C. § 1151).

⁸ In some cases, tribes not only hold reserved fishing, hunting and gathering rights within reservation areas but also retain rights in ceded territories that were their "usual and accustomed" hunting, fishing or gathering places.

⁹ A list of Tribal Coordinators and the tribes they work with can be found at:
<http://yosemite.epa.gov/R10/tribal.NSF/webpage/tribal+coordinators>.

NEZ PERCE TRIBE

GUIDANCE ON GOVERNMENT-TO-GOVERNMENT CONSULTATION

As a fiduciary, the United States and all its agencies owe a trust duty to the Nez Perce Tribe and other federally-recognized tribes. See *United States v. Cherokee Nation of Oklahoma*, 480 U.S. 700, 707 (1987); *United States v. Mitchell*, 463 U.S. 206, 225 (1983); *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942). This trust relationship has been described as "one of the primary cornerstones of Indian law," Felix Cohen, *Handbook of Federal Indian Law* 221 (1982), and has been compared to one existing under the common law of trusts, with the United States as trustee, the tribes as beneficiaries, and the property and natural resources managed by the United States as the trust corpus. See, e.g., *Mitchell*, 463 U.S. at 225.

The United States' trust obligation includes a substantive duty to consult with a tribe in decision-making to avoid adverse impacts on treaty resources and a duty to protect tribal treaty-reserved rights "and the resources on which those rights depend." *Klamath Tribes v. U.S.*, 24 Ind. Law Rep. 3017, 3020 (D.Or. 1996). The duty ensures that the United States conduct meaningful consultation "in advance with the decision maker or with intermediaries with clear authority to present tribal views to the . . . decision maker." *Lower Brule Sioux Tribe v. Deer*, 911 F.Supp 395, 401 (D. S.D. 1995).

Further, Executive Order 13175 provides that each "agency shall have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." According to the President's April 29, 1994 memorandum regarding Government-to-Government Relations with Native American Tribal Governments, federal agencies "shall assess the impacts of Federal Government plans, projects, programs, and activities on tribal trust resources and assure that Tribal government rights and concerns are considered during the development of such plans, projects, programs, and activities." As a result, Federal agencies must proactively protect tribal interests, including those associated with tribal culture, religion, subsistence, and commerce. Meaningful consultation with the Nez Perce Tribe is a vital component of this process.

Consultation is the formal process of negotiation, cooperation, and mutual decision-making between two sovereigns: the Nez Perce Tribe (NPT) and the United States (including all federal agencies). Consultation is the process that ultimately leads to the development of a decision, not just a process or a means to an end. The most important component of consultation is the ultimate decision.

Consultation does not mean notifying the Tribe that an action will occur, requesting written comments on that prospective action, and then proceeding with the action. In this scenario the decision is not affected. "Dear Interested Party" letters are not consultation. It is equally important to understand that as a sovereign government, a Tribe may elect not to conduct government-to-government consultation or may decide to limit the scope of their consultation as needed.

Objectives of Consultation:

1. Assure that the Nez Perce Tribal Executive Committee (NPTEC) understands the technical and legal issues necessary to make an informed policy decision;
2. Assure federal compliance with treaty and trust obligations, as well as other applicable federal laws and policies impacting tribal culture, religion, subsistence, and commerce;
3. Improve policy-level decision-making of both NPTEC and federal government;
4. Bilateral decision-making among two sovereigns (co-management of resources);
5. Ensure the protection of NPT resources, culture, religion, and economy;
6. Ensure compliance with tribal laws and policies;
7. Develop and achieve mutual decisions through a complete understanding of technical and legal issues; and
8. Improve the integrity of federal-tribal decisions.

Process of Consultation:

Consultation works through both technical and policy-level meetings to differentiate between technical and policy issues allowing for proper technical level staff consultation and then policy-level consultation for those issues that remain unresolved or for those issues that are clearly only resolvable at the policy level. Consultation is the process of coming to common understanding of the technical and legal issues that affect, or are affected by, a decision and then using this understanding to formulate a decision.

Meaningful consultation requires that federal agencies and Tribes their understand respective roles and have a basic understanding of the legal underpinnings of the government-to-government relationship, including the responsibility of the federal government under the Trust doctrine. In addition, federal agencies will benefit from some understanding of tribal culture, perspectives, world view, and treaty rights. Tribal governments must understand the policy decision-making authority of the federal agency. Tribal governments must understand the non-tribal politics of the federal agency decision that consultation will affect.

In these examples, it is critical to note that a tribal government cannot understand the politics of the federal agency decision without personal communications. Similarly, the federal agency cannot understand the Tribe's issues and concerns unless agency staff met with the Tribe to discuss those issues and concerns. Without communication, consultation is meaningless and a mutual decision is difficult or impossible.

The consultation process works like this:

1. Federal agency contacts NPTEC or its appointed point-of-contact to notify of an impending project proposal or to conduct an activity that may or may not impact a tribal resource.
2. NPTEC responds back that this issue is important and that it would like to initiate consultation. NPTEC requests federal agency technical experts meet with tribal technical staff (or NPTEC requests a policy level meeting).
3. Consultation has been initiated. Technical staffs meet. Technical and legal issues are discussed; the result is that tribal staff understand the proposal and federal agency staff understand at technical level why this proposed activity is of concern to the Tribe. This allows respective technical staff to brief respective policy entities and to provide informed opinions and recommendations.
4. Tribal staff briefs NPTEC. Consultation is initiated between policy-level decision-makers from both the Tribe and the federal agency.
5. Additional meetings are held, if necessary, leading up to the decision.
6. Federal agency and Tribe formulate a decision. Assurances are made that the decision is consistent with federal laws and tribal laws and policies. This means the decision is consistent with applicable natural and cultural resource laws and policies. For the NPT specifically, it means the decision protects the resources to which the NPT has specific treaty-reserved rights and enables continued practice of tribal religious, cultural, and subsistence activities.

These steps may be adapted to suit the needs of the decision-making process leading to the formulation of a decision.

MEMORANDUM - FOR IMMEDIATE RELEASE: January 12, 2010

From: Lisa P. Jackson, Administrator

To: All EPA Employees

Colleagues

Almost one year ago, I began my work as Administrator. It has been a deeply fulfilling 12 months and a wonderful homecoming for me. As our first year together draws to a close, we must now look to the tasks ahead.

In my First Day Memo, I outlined five priorities for my time as Administrator. We have made enormous strides on all five, and our achievements reflect your hard work and dedication. By working with our senior policy team, listening to your input and learning from the experiences of the last 12 months, we have strengthened our focus and expanded the list of priorities. Listed below are seven key themes to focus the work of our agency.

Taking Action on Climate Change: 2009 saw historic progress in the fight against climate change, with a range of greenhouse gas reduction initiatives. We must continue this critical effort and ensure compliance with the law. We will continue to support the President and Congress in enacting clean energy and climate legislation. Using the Clean Air Act, we will finalize our mobile source rules and provide a framework for continued improvements in that sector. We will build on the success of Energy Star to expand cost-saving energy conservation and efficiency programs. And, we will continue to develop common-sense solutions for reducing GHG emissions from large stationary sources like power plants. In all of this, we must also recognize that climate change will affect other parts of our core mission, such as protecting air and water quality, and we must include those considerations in our future plans.

Improving Air Quality: American communities face serious health and environmental challenges from air pollution. We have already proposed stronger ambient air quality standards for ozone, which will help millions of American breathe easier and live healthier. Building on that, EPA will develop a comprehensive strategy for a cleaner and more efficient power sector, with strong but achievable emission reduction goals for SO₂, NO_x, mercury and other air toxics. We will strengthen our ambient air quality standards for pollutants such as PM, SO₂ and NO₂ and will achieve additional reductions in air toxics from a range of industrial facilities. Improved monitoring, permitting and enforcement will be critical building blocks for air quality improvement.

Assuring the Safety of Chemicals: One of my highest priorities is to make significant and long overdue progress in assuring the safety of chemicals in our products, our environment and our bodies. Last year I announced principles for modernizing the Toxic Substances Control Act. Separately, we are shifting EPA's focus to address high-concern chemicals and filling data gaps on widely produced chemicals in commerce. At the end of 2009, we released our first-ever chemical management plans for four groups of substances, and more plans are in the pipeline for 2010. Using our streamlined Integrated Risk Information System, we will continue strong progress toward rigorous, peer-reviewed health assessments on dioxins, arsenic, formaldehyde, TCE and other substances of concern.

Cleaning Up Our Communities: In 2009 EPA made strong cleanup progress by accelerating our Superfund program and confronting significant local environmental challenges like the asbestos Public Health Emergency in Libby, Montana and the coal ash spill in Kingston, Tennessee. Using all the tools at our disposal, including enforcement and compliance efforts, we will continue to focus on making safer,

healthier communities. I am committed to maximizing the potential of our brownfields program, particularly to spur environmental cleanup and job creation in disadvantaged communities. We are also developing enhanced strategies for risk reduction in our Superfund program, with stronger partnerships with stakeholders affected by our cleanups.

Protecting America's Waters: America's waterbodies are imperiled as never before. Water quality and enforcement programs face complex challenges, from nutrient loadings and stormwater runoff, to invasive species and drinking water contaminants. These challenges demand both traditional and innovative strategies. We will continue comprehensive watershed protection programs for the Chesapeake Bay and Great Lakes. We will initiate measures to address post-construction runoff, water quality impairment from surface mining and stronger drinking water protection. Recovery Act funding will expand construction of water infrastructure, and we will work with states to develop nutrient limits and launch an Urban Waters initiative. We will also revamp enforcement strategies to achieve greater compliance across the board.

Expanding the Conversation on Environmentalism and Working for Environmental Justice: We have begun a new era of outreach and protection for communities historically underrepresented in EPA decision-making. We are building strong working relationships with tribes, communities of color, economically distressed cities and towns, young people and others, but this is just a start. We must include environmental justice principles in all of our decisions. This is an area that calls for innovation and bold thinking, and I am challenging all of our employees to bring vision and creativity to our programs. The protection of vulnerable subpopulations is a top priority, especially with regard to children. Our revitalized Children's Health Office is bringing a new energy to safeguarding children through all of our enforcement efforts. We will ensure that children's health protection continues to guide the path forward.

Building Strong State and Tribal Partnerships: States and tribal nations bear important responsibilities for the day-to-day mission of environmental protection, but declining tax revenues and fiscal challenges are pressuring state agencies and tribal governments to do more with fewer resources. Strong partnerships and accountability are more important than ever. EPA must do its part to support state and tribal capacity and, through strengthened oversight, ensure that programs are consistently delivered nationwide. Where appropriate, we will use our own expertise and capacity to bolster state and tribal efforts.

We will also focus on improving EPA's internal operations, from performance measures to agency processes. We have a complex organization -- which is both an asset and a challenge. We will strive to ensure that EPA is a workplace worthy of our top notch workforce. Our success will depend on supporting innovation and creativity in both what we do and how we do it, and I encourage everyone to be part of constructively improving our agency.

These priorities will guide our work in 2010 and the years ahead. They are built around the challenges and opportunities inherent in our mission to protect human health and the environment for all Americans. We will carry out our mission by respecting our core values of science, transparency and the rule of law. I have unlimited confidence in the talent and spirit of our workforce, and I will look to your energy, ideas and passion in the days ahead. I know we will meet these challenges head on, as one EPA.

Sincerely,
Lisa P. Jackson



Tribal Air

<http://www.epa.gov/air/tribal/backgrnd.html>
Last updated on Wednesday, March 4th, 2009.

You are here: [EPA Home](#) [Tribal Air](#) Basic Information

Basic Information

EPA's Office of Air and Radiation (OAR) recognizes the primary role of tribes in protecting air resources in Indian country. Indian tribes have express authority under the Clean Air Act (see the [Plain English Guide to the Clean Air Act](#)) to manage air quality on their reservations.

Tribal Authority and the Clean Air Act

The [Tribal Authority Rule](#), or TAR, is the key to tribal implementation of the Clean Air Act. The TAR identifies those provisions of the Clean Air Act for which it is appropriate to treat eligible federally-recognized tribes in the same manner as a state (TAS). The TAR also defines the eligibility requirements for a tribe to apply to participate in many Clean Air Act programs. In addition, the TAR describes the kinds of financial assistance available to tribes interested in pursuing an air quality program.

Voluntary Programs

Many tribes also participate in voluntary network monitoring efforts, monitoring for visibility, as well as for pollutants such as ammonia and mercury, and wet and dry acid deposition.

A number of tribes are also pursuing voluntary programs to implement non-Clean Air Act activities that protect the health and welfare of their communities and citizens. These include smoke management programs, often conducted in cooperation with air quality agencies in surrounding states; indoor air quality programs, addressing issues like environmental tobacco smoke and mold; replacing woodstoves with much cleaner new models; and many tribes have tested homes in their communities for radon and one tribe has implemented a diesel retrofit program.

The EPA and tribal governments have also successfully collaborated in the past to provide lower emitting diesel vehicles and school buses to tribal nations. The Diesel Emissions Reduction Program (authorized by Title VII, Subtitle G Sections 791 to 797 of the EPAct 2005) enables EPA to offer awards to eligible organizations and entities to fund projects that achieve significant reductions in diesel emissions from on-highway or non-road sources. The EPA will start to accept applications for fiscal year 2009 DERA grants in spring 2009. EPA encourages tribal governments to apply for eligible grants to help tribes improve air quality and protect tribal health. Please visit <http://www.epa.gov/cleandiesel/grantfund.htm> for information and the latest news on the application process and timeline for DERA fiscal year 2009 grants.

The American Recovery and Reinvestment Act of 2009 includes \$300 million to support clean diesel activities. [Please visit](#) <http://www.epa.gov/otaq/eparecovery/index.htm> for additional information.

Tribal Implementation Plans

Although not required to do so, a tribe with TAS eligibility may develop its own air quality

Tribal Authority Rule

control plan, called a Tribal Implementation Plan (TIP), for approval by EPA. A TIP enacted by a tribal government and approved by the EPA is legally binding under both tribal and federal law and may be enforced by the Tribe, EPA, and the public.

Besides TIPs, there are other Clean Air Act programs for which tribes may receive approval or delegation, such as Title V permit program, New Source Performance Standards, and National Emission Standards for Hazardous Air Pollutants.

Technical Assistance and Air Program Resources

OAR provides technical assistance and air program resources to help tribes build their tribal program capacity directly through headquarters and Regional Offices, as well as through Northern Arizona University's Institute for Tribal Environmental Professionals which provides air quality training and technical assistance to tribes. OAR is also developing federal programs like the Tribal New Source Review rules, that will help EPA address air quality problems in Indian Country in cases where a tribe may be unable to do so themselves.

Tribal Air Quality Management Progress

In 2008, the good work of tribal air quality program management continued:

- 98 tribes were receiving air grant support;
- 68 tribes were monitoring air quality and reporting data to EPA's Air Quality System;
- 25 tribes are implementing programs to address toxic air pollutants
- 1 tribe completed a diesel retrofit project, and 2 others undertook other projects to address diesel emissions
- 11 tribal governments and organizations participate in the "Communities in Action for Asthma Friendly Environments" Network.
<http://www.asthmacommunitynetwork.org/communityprofiles.aspx>
- 3 tribes received grants to assess radon gas in homes, and 16 tribes participated in the radon testing program to evaluate radon levels in tribal housing
- 38 tribes have completed inventories of emissions sources on their reservations; and
- Over 50 tribes participated actively in Regional Planning Organizations.

In addition, 30 tribes have received eligibility determinations (TAS) under the Tribal Authority Rule; two tribes have been approved to implement TIPs to address air quality issues on their reservations, with several more under development; and, one tribe has received permission (under Clean Air Act Part 71) to implement a Title V operating permit program for their reservation.

More tribal environmental professionals receive training in various aspects of air quality management and take further steps toward the development of comprehensive tribal air quality programs with each passing year. In addition, tribal officials and the National Tribal Air Association continue to participate on the national level through policy workgroups and advisory committees.

For more information on EPA Tribal Programs, visit EPA's American Indian Environmental Office.

Thursday
February 12, 1998



Part III

**Environmental
Protection Agency**

40 CFR Parts 9, 35, 49, 50, and 81
Indian Tribes: Air Quality Planning and
Management; Final Rule

**ENVIRONMENTAL PROTECTION
AGENCY**

40 CFR Parts 9, 35, 49, 50, and 81

[OAR-FRL-5964-2]

RIN 2060-AF79

**Indian Tribes: Air Quality Planning and
Management**

AGENCY: Environmental Protection
Agency (EPA).

ACTION: Final rule.

SUMMARY: The Clean Air Act (CAA) directs EPA to promulgate regulations specifying those provisions of the Act for which it is appropriate to treat Indian tribes in the same manner as states. For those provisions specified, a tribe may develop and implement one or more of its own air quality programs under the Act. This final rule sets forth the CAA provisions for which it is appropriate to treat Indian tribes in the same manner as states, establishes the requirements that Indian tribes must meet if they choose to seek such treatment, and provides for awards of federal financial assistance to tribes to address air quality problems.

EFFECTIVE DATE: March 16, 1998.

FOR FURTHER INFORMATION CONTACT:

David R. LaRoche, Office of Air and Radiation (OAR 6102), U.S. Environmental Protection Agency, 401 M Street, S.W., Washington D.C. 20460 at (202) 260-7652.

SUPPLEMENTARY INFORMATION:

Supporting information used in developing the final rule is contained in Docket No. A-93-3087. The docket is available for public inspection and copying between 8:30 a.m. and 3:30 p.m. Monday through Friday, at EPA's Air Docket, Room M-1500, Waterside Mall, 401 M Street SW, Washington, D.C. 20460. A reasonable fee may be charged for copying.

This preamble is organized according to the following outline:

- I. Background of the Final Rule
- II. Analysis of Major Issues Raised by Commenters
 - A. Jurisdiction
 - B. Sovereign Immunity and Citizen Suit
 - C. Air Program Implementation in Indian Country
 - D. CAA Sections 110(c)(1) and 502(d)(3) Authority
- III. Significant Changes from the Proposed Regulations
- IV. Miscellaneous
 - A. Executive Order (EO) 12866
 - B. Regulatory Flexibility Act (RFA)
 - C. Executive Order (EO) 12875 and the Unfunded Mandates Reform Act (UMRA)
 - D. Paperwork Reduction Act
 - E. Submission to Congress and the General Accounting Office

I. Background of the Final Rule

Summary of Issues Raised by the Proposal

EPA proposed rules on August 25, 1994 (59 FR 43956) to implement section 301(d) of the Act. The proposal elicited many comments from state and tribal officials, private industry, and the general public. A total of 69 comments were received, of which 44 were from tribes or tribal representatives; 13 from state and local governments or associations; 10 from industry (primarily utilities and mining); and 1 from Department of Energy (DOE) and 1 from an environmental interest group in Southern California. The tribes and several other commenters generally express support for the proposed rule and the delegation of CAA authority to eligible tribes to manage reservation air resources. Tribes especially urge EPA to expedite the finalization of this rule to enable tribes to begin to implement their air quality management programs and encourage EPA to recognize that the development of tribal air programs will be an evolving process requiring both time and significant assistance from EPA.

Most of the tribal commenters express concern with the inclusion of the citizen suit provisions which, they believed, effected a waiver of their sovereign immunity; they recommend that this provision be deleted in the final rule. This is a major issue for tribes. State and local government and industry commenters are primarily concerned that the proposed rule would create an unworkable scheme for implementing tribal air quality programs, and many of these commenters question the scope of tribal regulatory jurisdiction.

Responses to many of the comments related to issues of jurisdiction and sovereign immunity are included in sections II.A and II.B in the analysis of comments below. Responses to comments on the issues raised concerning federal implementation in Indian country are addressed in sections II.C and II.D of this document. All other comments are addressed in a document entitled "response to comments" that can be found in the docket for this rule cited above.

II. Analysis of Major Issues Raised by Commenters

A. Jurisdiction

1. Delegation of CAA Authority to Tribes

It is a settled point of law that Congress may, by statute, expressly delegate federal authority to a tribe. *United States v. Mazurie*, 419 U.S. 544,

554 (1975). See also *South Dakota v. Bourland*, 113 S. Ct. 2309, 2319-20 (1993); *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, 426-28 (1989) (White, J., for four Justice plurality). Such a delegation or grant of authority can provide a federal statutory source of tribal authority over designated areas, whether or not the tribe's inherent authority would extend to all such areas. In the August 25, 1994 proposed tribal authority rule, EPA set forth its interpretation that the CAA is a delegation of federal authority, to tribes approved by EPA to administer CAA programs in the same manner as states, over all air resources within the exterior boundaries of a reservation for such programs. Today, EPA is finalizing this approach. This grant of authority by Congress enables eligible tribes to address conduct relating to air quality on all lands, including non-Indian-owned fee lands, within the exterior boundaries of a reservation.

EPA's position that the CAA constitutes a statutory grant of jurisdictional authority to tribes is consistent with the language of the Act, which authorizes EPA to treat a tribe in the same manner as a state for the regulation of "air resources within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction." CAA section 301(d)(2)(B). EPA believes that this statutory provision, viewed within the overall framework of the CAA, establishes a territorial view of tribal jurisdiction and authorizes a tribal role for all air resources within the exterior boundaries of Indian reservations without distinguishing among various categories of on-reservation land. See also CAA sections 110(o), 164(c).

In light of the statutory language and the overall statutory scheme, EPA is exercising the rulemaking authority entrusted to it by Congress to implement the CAA provisions granting approved tribes authority over all air resources within the exterior boundaries of a reservation. See generally *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-45 (1984). This interpretation of the CAA as generally delegating such authority to approved tribes is also supported by the legislative history, which provides additional evidence of Congressional intention regarding this issue. See S. Rep. No. 228, 101st Cong., 1st Sess. 79 (1989) ("the Act constitutes an express delegation of power to Indian tribes to administer and enforce the Clean Air Act in Indian lands" (citation to *Brendale* omitted)) (hereinafter

referred to as "Senate Report").¹ EPA also believes this territorial approach to air quality regulation best advances rational, sound, air quality management.

(a) *Support for the delegation approach.* Tribal commenters and several industry commenters support EPA's interpretation that the CAA constitutes a delegation of Congressional authority to eligible tribes to implement CAA programs over their entire reservations. Numerous tribal commenters assert that EPA's territorial delegation approach is consistent with federal Indian law and the intent of Congress as expressed in several provisions of the CAA. Several tribal commenters note that, while tribes have inherent sovereign authority over all air resources within the exterior boundaries of their reservations, EPA should finalize the delegation approach to avoid case-by-case litigation concerning inherent authority and to eliminate the disruptive potential of a "checkerboarded" pattern of tribal and state jurisdiction on reservations. Several tribal commenters assert that the delegation approach is compelled by the language of the CAA and federal Indian law principles. One tribal commenter states that the delegation approach is consistent with the federal government's trust responsibility to federally-recognized Indian tribes.

(b) *Statutory Interpretation.* Several state commenters assert that the CAA does not constitute an "express congressional delegation" of authority to tribes as required by the Supreme Court's decisions in *Montana v. United States*, 450 U.S. 544 (1981) and *Brendale*, 492 U.S. 408. Several state and industry commenters dispute EPA's interpretation of CAA section 301(d)(2)(B), which states that EPA may treat a tribe in the same manner as a state if, among other things, "the functions to be exercised by the Indian tribe pertain to the management and protection of air resources within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction." One commenter asserts that the "or" in "or other areas within the tribe's jurisdiction" means that treatment of a state is authorized for a tribe as to air resources over which the

tribe has jurisdiction, whether or not those areas fall within its reservation boundaries. In other words, tribes would not necessarily have jurisdiction over all sources within reservation boundaries. The commenter states that EPA has improperly read the "or" in section 301(d)(2)(B) as an "and."

EPA believes the plain meaning of section 301(d)(2)(B) is that a tribe can implement a CAA program for air resources if: (1) the air resources are within a reservation; or (2) the air resources are within a non-reservation area over which the tribe can demonstrate jurisdiction. The most plausible reading of the phrase "within * * * the reservation or other areas within the tribe's jurisdiction" is that Congress intended to grant to an eligible tribe jurisdiction over its reservation without requiring the tribe to demonstrate its own jurisdiction, but to require a tribe to demonstrate jurisdiction over any other areas, i.e., non-reservation areas, over which it seeks to implement a CAA program. Under section 301(d)(2)(B), eligible tribes may be treated in the same manner as states for protecting "air resources" within "the reservation" or in "other areas within the tribe's jurisdiction." Both the term "reservation" and the phrase "other areas within the tribe's jurisdiction" modify the phrase "air resources." In addition, it is clear from the structure of the provision and the CAA and legislative history taken as a whole that the phrase "within the tribe's jurisdiction" modifies the phrase "other areas" and not the term "reservation" or the phrase "air resources." If Congress intended to require tribes to demonstrate jurisdiction over reservations, Congress would have simply stated that EPA may approve a tribal program only for air resources over which the tribe can demonstrate jurisdiction.²

One commenter states that EPA's interpretation of CAA section 301(d)(2)(B) has made CAA section 301(d)(4), which allows EPA to administer provisions of the Act directly if treatment of a tribe as identical to a state is found to be "inappropriate or administratively infeasible," extraneous.

The commenter asserts that if CAA section 301(d)(2)(B) is a delegation of authority to a tribe, EPA would never have cause to find treatment of a tribe as a state "inappropriate or administratively infeasible." EPA disagrees that its interpretation has made section 301(d)(2)(B) superfluous because, even with the delegation of federal authority to tribes for reservation areas, it is not appropriate or administratively feasible to treat tribes as states for all purposes. In such cases, section 301(d)(4) allows EPA, through rulemaking, to "directly administer such provisions [of the Act] so as to achieve the appropriate purpose" either by tailoring the provisions to tribes or conducting a federal program.

An industry commenter states that CAA section 110(o), which provides that when a tribal implementation plan (TIP) becomes effective under CAA section 301(d) "the plan shall become applicable to all areas (except as expressly provided otherwise in the plan) located within the exterior boundaries of the reservation * * *," does not support EPA's interpretation of the CAA as a delegation because section 110(o) is only applicable to plans EPA approved pursuant to regulations under section 301(d).

EPA believes that section 110(o) recognizes that approved tribes are authorized to exercise authority over all areas within the exterior boundaries of a reservation for the purposes of TIPs. EPA notes that the commenter omitted the following remaining language in the quoted sentence from CAA section 110(o): "located within the exterior boundaries of the reservation, notwithstanding the issuance of any patent and including rights-of-way running through the reservation." EPA believes that this additional language makes clear that TIPs may apply to all areas within the exterior boundaries of reservations. EPA believes that the phrase "except as expressly provided otherwise in the plan" refers to a situation where a tribe seeks to have its TIP apply only to specific areas within a reservation.

An industry commenter states that the CAA does not depart from other Congressional provisions regarding "treatment as a state" in the Clean Water Act (CWA) and the Safe Drinking Water Act (SDWA) and EPA has already determined that these other statutes do not constitute a delegation of authority to tribes. EPA notes that the CAA "treatment as a state" provision is notably different from the SDWA "treatment as a state" provision. Compare CAA § 301(d)(2) ("the functions to be exercised by the Indian

¹ Further, it is a well-established principle of statutory construction that statutes should be construed liberally in favor of Indians, with ambiguous provisions interpreted in ways that benefit tribes. *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 112 S.Ct. 683, 693 (1992). In addition, statutes should be interpreted so as to comport with tribal sovereignty and the federal policy of encouraging tribal independence. *Ramah Navajo School Board, Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832, 846 (1982).

² Contrary to the commenter's assertion, EPA does not interpret the "or" in this section as an "and". If the "or" were an "and", under section 301(d)(2) EPA would be authorized to approve a tribal program "only if" the functions to be exercised by the tribe pertain to air resources that are both within a reservation and within non-reservation areas over which the tribe can demonstrate jurisdiction. This interpretation is nonsensical. Moreover, nothing in the Act or legislative history suggests that Congress intended to limit so severely the universe of tribes eligible for CAA programs.

tribe [must] pertain to the management and protection of air resources within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction") with SDWA § 1451(b)(1)(B) ("the functions to be exercised by the Indian tribes [must be] within the area of the Tribal Government's jurisdiction"). In addition, although CWA section 518(e) and CAA section 301(d) both contain language regarding tribal programs over "Indian reservations," EPA believes that the overall statutory scheme and legislative history of the CAA represent a clearer expression than that of the CWA that Congress intended to effectuate a delegation to tribes over reservations.³ EPA notes that, except for the provisions in CWA section 518(e) and SDWA section 1451(b)(1)(B), the Water Acts do not otherwise indicate what areas are subject to tribal regulatory authority. By contrast, several provisions of the CAA expressly recognize that tribes may exercise CAA authority over all areas within the exterior boundaries of the reservation. See CAA sections 110(o) and 164(c).

One industry commenter states that EPA should make clear that the CAA does not supersede other laws that may define or limit the extent of tribal regulatory jurisdiction.⁴ The commenter states that, given that the CAA does not supersede all other laws regarding tribal jurisdiction, EPA should follow a case-by-case approach for addressing jurisdiction within reservation boundaries. One state association notes that some states have statutory jurisdiction over non-Indian fee lands located on reservations and EPA does not address how conflicts between the CAA and these statutes will be addressed.

³ EPA also notes that a federal district court has stated that CWA section 518(e) may be read as an express delegation of authority to tribes over all reservation water resources. *Montana v. EPA*, 941 F. Supp. 945, 951, 957 n.10 & n.12 (D. Mont. 1996) citing *Brendale*, 492 U.S. at 428 (White, J.). In the preamble to its 1991 CWA regulation, EPA found the statutory language and legislative history of the CWA too inconclusive for the Agency to rely on the delegation theory, but noted that "the question of whether section 518(e) is an explicit delegation of authority over non-Indians is not resolved." 56 FR 64876, 64880-881 (December 12, 1991).

⁴ This commenter also asserts that the *Chevron* doctrine does not support EPA's interpretation that the CAA settles all jurisdictional issues on lands within reservations. While EPA believes that the CAA represents a clear delegation of authority to eligible tribes over reservation resources, EPA notes that, to the extent the statute is ambiguous, EPA's interpretation would be entitled to deference. In addition, the Agency has broad expertise in reconciling federal environmental and Indian policies. *Washington Department of Ecology*, 752 F.2d 1465, 1469 (9th Cir. 1985).

EPA believes that the CAA delegation of authority to eligible tribes over reservations represents a more recent expression of Congressional intent and will generally supersede other federal statutes. See *Adkins v. Arnold*, 235 U.S. 417, 420 (1914) (noting that "later in time" statutes should take precedence). There may be, however, rare instances where special circumstances may preclude EPA from approving a tribal program over a reservation area. For example, in rare cases, there may be another federal statute granting a state exclusive jurisdiction over a reservation area that may not be overridden by the CAA. There may also be cases where a current tribal constitution may limit tribal exercise of authority.⁵

EPA will consider on a case-by-case basis whether special circumstances exist that would prevent a tribe from implementing a CAA program over its reservation. Appropriate governmental entities will have an opportunity to raise these unique issues on a case-by-case basis during EPA's review of a tribal application. Where tribes are aware of such issues, they should bring the issues to EPA's attention by including them in the tribe's "descriptive statement of the Indian tribe's authority to regulate air quality" under 40 CFR 49.7(a)(3). If EPA determines that there are special circumstances that would preclude the Agency from approving a tribal program over a reservation area, the Regional Administrator would limit the tribal approval accordingly under 40 CFR 49.9(e) and (g).

(c) *Legislative History.* Several industry and local government commenters assert that the legislative history does not support EPA's interpretation of the CAA as a delegation. They state that Senate Report No. 101-228, pp. 78-79, 1990 U.S. Code Cong. & Admin. News at 3464-65 (Senate Report) evidences Congress' intent that the CAA authorizes tribal programs in the same manner as had been authorized under the CWA and SDWA, both of which EPA has interpreted to authorize tribal programs only in areas over which a tribe can demonstrate inherent jurisdiction. The commenter also states that the Senate Report made clear that treatment as a state is only authorized for areas within a tribe's jurisdiction. In addition, one commenter states that Congress in 1990 knew how similar

⁵ Among other things, the commenter questions whether pre-existing treaties or binding agreements may limit the extent of regulatory jurisdiction. EPA believes that the CAA generally would supersede pre-existing treaties or binding agreements that may limit the scope of tribal authority over reservations.

provisions of the CWA and SDWA had been interpreted and "Congress can normally be presumed to have had knowledge of the interpretation given to the incorporated law." * * * citing *St. Regis Mohawk Tribe, New York v. Brock*, 769 F.2d 37, 50 (2nd Cir. 1985). One commenter further argues that the Senate Report refers to *Brendale*, which requires a case-by-case approach to tribal inherent jurisdiction.

EPA acknowledges that the summary of the treatment as a state provisions in the Senate Report contains a general statement suggesting that tribes are to demonstrate jurisdiction for all areas for which they seek a program, including reservation areas. However, the summary is followed by a detailed discussion that makes clear that Congress intended to provide an express delegation of power to Indian tribes for all reservation areas and to require a jurisdictional showing only for non-reservation areas. Senate Report at 79.

In addition, the Senate Report cited *Brendale* for the proposition that Congress may delegate federal authority to tribes. Moreover, although *Brendale* does support a case-by-case approach to evaluating tribal inherent authority over non-members of the tribe, EPA notes that the Senate Report cites the section of the *Brendale* opinion (pages 3006-07) in which Justice White recognizes that Congress may expressly delegate to a tribe authority over non-members. See *Brendale*, 109 S.Ct. 2994, 3006-07 (1989). EPA believes that this statement in the Senate Report further supports EPA's view that the CAA was intended to be a delegation. EPA also notes that in 1989, when the Senate Report was written, EPA had not yet finalized its interpretation that Congress, in the CWA, did not clearly intend a delegation to tribes. See 56 FR 64876, 64880-881 (December 12, 1991); see also *Montana v. EPA*, 941 F. Supp. 945, 951, 957 n.10 & n.12 (noting that the CWA may be read as a delegation of CWA authority to tribes over reservations). Thus, read as a whole, the Senate Report supports EPA's interpretation that the CAA is a delegation.

(d) *Limitations on Congressional delegations of authority.* Several state and municipal commenters state that *Montana*, *Brendale*, and *Bourland* establish that tribes generally do not have authority to regulate the activities of nonmembers on nonmember-owned fee lands. Several commenters also assert that tribes generally will not have inherent authority over sources of air pollution on non-Indian owned fee lands within a reservation. As discussed in detail in the preamble to the

proposed rule (59 FR 43958 *et seq.*), EPA believes that tribes generally will have inherent authority over air pollution sources on fee lands. 59 FR at 43958 n.5; see also *Montana v. EPA*, 941 F.Supp. 945 (D. Mont. 1996) (upholding EPA's determination that the Confederated Salish and Kootenai Tribes possess inherent authority over nonmember activities on fee lands for purposes of establishing water quality standards under the CWA). Nonetheless, because the Agency is interpreting the CAA as an explicit delegation of federal authority to eligible tribes, it is not necessary for EPA to determine whether tribes have inherent authority over all sources of air pollution on their reservations.

Several commenters state that only delegations over lands and activities subject to inherent tribal power are permissible. One commenter states that the proposed rule should be modified to require tribes to establish preexisting authority for on-reservation CAA programs, at least with regard to fee lands held by nonmembers within reservations. Two commenters, one citing the United States Constitution and the other citing *U.S. v. Morgan*, 614 F.2d 166 (8th Cir. 1980), also assert that a tribe cannot have delegated authority over nonmembers on fee lands living in a non-Indian community within a reservation. A state commenter asserts that these two factors, i.e., whether a tribe possesses inherent authority and whether the delegation is over nonmembers living on fee lands within a non-Indian community, were factors considered by the Supreme Court in *Mazurie* in evaluating whether Congress had validly delegated federal authority to tribes to regulate the introduction of alcoholic beverages into Indian country.

EPA believes that Indian tribes have sufficient independent authority to assume a Congressional delegation of authority to implement CAA programs. The Supreme Court in *Mazurie* acknowledged that Indian tribes have sovereignty over "both their members and their territory." 419 U.S. at 557. As discussed above, EPA believes that tribes generally will have inherent authority to regulate sources of air pollution on nonmember-owned fee lands within reservations as well. However, EPA notes that the Court in *Mazurie* held that it is not necessary for a tribe to have independent authority over all matters that would be subject to the delegated authority; rather "[i]t is necessary only to state that the independent tribal authority is quite sufficient to protect Congress' decision to vest in tribal councils this portion of its own authority to regulate Commerce

* * * with the Indian tribes." 419 U.S. at 557 (citation omitted).

In addition, while the Court in *Mazurie* noted that Constitutional limits on the authority of Congress to delegate its legislative power are "less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter," the Court did not say that some independent source of authority was an absolute prerequisite for a Congressional delegation. 419 U.S. at 556-57.⁶ Even in a case where a particular tribe's inherent authority is markedly limited, the detailed parameters outlined in the CAA and EPA's oversight role over tribal exercise of authority delegated by the CAA are sufficient to ensure that Constitutional limitations on the delegated authority have not been exceeded.

Furthermore, EPA disagrees with the commenter's assertion that the United States Constitution and federal court precedent prohibit Congress from delegating authority to a tribe over nonmembers on fee land living in a non-Indian community within a reservation. See *City of Timber Lake v. Cheyenne River Sioux Tribe*, 10 F.3d 554 (8th Cir. 1993), *reh'g en banc denied*, 1994 U.S. App. Lexis 501 (1994), *cert denied*, 512 U.S. 1236 (1994); see also *Rice v. Rehner*, 463 U.S. 713, 715 (1983) (noting that Congress, in 18 U.S.C. 1161, delegated to tribes authority to regulate liquor throughout Indian country, including in non-Indian communities). The discussion in *Morgan* and *Mazurie* about "non-Indian communities" was centered around the specific language of 18 U.S.C. sections 1154 and 1156 regarding introduction of alcoholic beverages into Indian country, and is not relevant to an interpretation of the CAA. In addition, EPA notes that the Eighth Circuit Court of Appeals, in *City of Timber Lake*, 10 F.3d 554, declined to follow its prior decision in *Morgan*, and concluded that 18 U.S.C. section 1161 delegated authority to tribes to

⁶ One industry commenter asserts that delegations of federal authority from Congress must "clearly delineate" policy and standards to be effective or valid, citing *American Power & Light Co. v. Securities and Exchange Commission*, 329 U.S. 90, 105 (1946). According to this commenter, EPA's proposed interpretation does not meet this standard. EPA agrees that the non-delegation doctrine does include a limitation on the devolution of legislative power under terms so vague as to be standardless, but that limitation has become a very low threshold, see *Mistretta v. United States*, 488 U.S. 361 (1989) (Scalia, J., dissenting); *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607 (1980) (Rehnquist, J., concurring in the judgment), and is easily met by the CAA. The CAA provides detailed direction to tribes on the parameters under which CAA programs are to be implemented.

regulate liquor in all of Indian country, including non-Indian communities.

One industry commenter asserts that, if EPA finalizes its position that Congress has delegated federal authority to tribes, EPA should state explicitly in its rule that the Bill of Rights and other federal protections for regulated entities apply to tribal air programs. EPA notes that the Indian Civil Rights Act imposes on tribal governments restrictions similar to those contained in the Bill of Rights and the Fourteenth Amendment, including the prohibitions against the denial of due process and equal protection, and the taking of private property without just compensation. 25 U.S.C. 1302; *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 57 (1978). These protections extend to all persons subject to tribal jurisdiction, whether Indians or non-Indians. *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9, 19 (1987). EPA believes that whether or not the Bill of Rights applies to tribes implementing the CAA on reservations is an issue for the courts to decide when and if the issue arises in a particular case. See *Mazurie*, 419 U.S. at 558 n. 12.

(e) *Use of the word "reservation."* Several tribal commenters supported EPA's proposal to construe the term "reservation" to include trust land that has been validly set apart for use by a tribe, even though that land has not been formally designated as a "reservation." See 59 FR at 43960; 56 FR at 64881; see also *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 111 S.Ct. 905, 910 (1991). Some tribal commenters suggested that the definition of "reservation" in proposed § 49.2 be broadened specifically to include "trust land that has been validly set apart for use by a Tribe, even though the land has not been formally designated as a reservation."

A state commenter states that EPA has not provided an analysis of relevant provisions in the CAA to support its proposition that the term "reservation" includes "trust land that has been validly set apart for the use of a Tribe." In addition, this commenter questions EPA's reliance on *Oklahoma Tax Comm'n* because that case deals with trust lands in Oklahoma and may not be universally applicable. Several commenters express concern that the phrase "exterior boundaries of the reservation" could encompass lands held in fee by nonmembers outside of areas formally designated as "reservations." A state commenter suggests that EPA should require a case-by-case demonstration in cases where non-Indian-owned lands exist which may be surrounded by the exterior

boundaries of a Pueblo. The commenter asserts that in these circumstances there is no evidence that the non-Indian lands were "validly set apart for the use of the Indians as such, under the superintendence of the Government." The State of Oklahoma objects to EPA's use of the word "reservation" because, by federal law, the term "reservation" can include former reservations in Oklahoma, which include approximately the entire State. See 25 U.S.C. 1425. The State suggests that EPA should limit the term reservation to include only tribal trust land in Oklahoma; lands held in trust for individual Indians, Oklahoma asserts, should not be considered "reservations."

It is the Agency's position that the term "reservation" in CAA section 301(d)(2)(B) should be interpreted in light of Supreme Court case law, including *Oklahoma Tax Comm'n*, in which the Supreme Court held that a "reservation," in addition to the common understanding of the term, also includes trust lands that have been validly set apart for the use of a tribe even though the land has not been formally designated as a reservation. In applying this precedent to construe the term "reservation" in the context of the CWA, the Agency has only recognized two categories of lands that, even though they are not formally designated as "reservations," nonetheless qualify as "reservations": Pueblos and tribal trust lands. EPA will consider lands held in fee by nonmembers within a Pueblo to be part of a "reservation" under 40 CFR 49.6(e) and 49.7(a)(3). EPA will consider on a case-by-case basis whether other types of lands other than Pueblos and tribal trust lands may be considered "reservations" under federal Indian law even though they are not formally designated as such. Appropriate governmental entities will have an opportunity to comment on whether a particular area is a "reservation" during EPA's review of a tribal application. The Agency does not believe that additional, more specific language should be added to the regulatory definition of "reservation," because the Agency's interpretation of the term "reservation" will depend on the particular status of the land in question and on the interpretation of relevant Supreme Court precedent.

A tribal consortium states that the proposed requirement in § 49.7(a)(3) that tribes "must identify with clarity and precision the exterior boundaries of the reservation * * *" precludes Alaska Native villages from applying for EPA-approved CAA programs. The full language of the proposed requirement in

§ 49.7(a)(3) is "[f]or applications covering areas within the exterior boundaries of the applicant's Reservation the statement must identify with clarity and precision the exterior boundaries of the reservation * * * ." If a tribe is seeking program approval for non-reservation areas, the tribe need not provide a reservation description. As noted below, EPA is finalizing its proposed position, under section 301(d)(2)(B), that an eligible tribe may implement its air quality programs in non-reservation areas provided the tribe can adequately demonstrate authority to regulate air quality in the non-reservation areas in question under general principles of Indian law. Thus, if an Alaska Native village can demonstrate authority to regulate air resources in non-reservation areas, the areas will be considered "other areas within the tribe's jurisdiction" under section 301(d)(2)(B) of the Act.

(f) *Policy Rationales*. Industry and municipal commenters state that it is improper for EPA to base its interpretation of the CAA regarding tribal jurisdiction on policy arguments seeking to avoid "jurisdictional entanglements" and checkerboarding. A state comments that given the intense controversy surrounding the issue of authority over the activities of nonmembers on fee lands, litigation is likely. The commenter states that litigation would cause long-term jurisdictional uncertainties, which will erode effective implementation of the Act, and that EPA should address and resolve jurisdictional issues in the reservation program planning stage. One industry commenter asserts that EPA's proposal to interpret the CAA as a delegation is inconsistent with EPA policy statements that EPA will authorize tribal programs only where tribes "can demonstrate adequate jurisdiction over pollution sources throughout the jurisdiction," July 10, 1991 EPA/State/Tribal relations memorandum, signed by Administrator Reilly.

EPA's interpretation of the CAA is based on the language, structure, and intent of the statute. The Agency believes that Congress, in the CAA, chose to adopt a territorial approach to the protection of air resources within reservations—an approach that will have the effect of minimizing jurisdictional entanglements and checkerboarding within reservations. EPA expects that the delegation approach will minimize the number of case-specific jurisdictional disputes that will arise and enhance the effectiveness of CAA implementation. EPA notes that its interpretation of the CAA does not

conflict with the Agency's general Indian policy statements regarding tribal jurisdiction. Under the CAA, EPA will not approve a tribe unless it has the authority to implement the program either by virtue of delegated federal authority over reservation areas, or a demonstration of authority under principles of federal Indian law over other areas on a case-by-case basis.

(g) *Current and historical application of state laws on parts of reservations*. State and industry commenters assert that states have historically regulated non-member CAA-related activities on fee lands within reservation boundaries and the proposal ignores this historical treatment and the transition issues it raises. The commenters suggest that EPA consider changing the proposed regulations to "grandfather" existing facilities subject to state authority, so that states continue to regulate those facilities until the affected parties all agree cooperatively to a transition from state to tribal jurisdiction. One commenter states that both the affected state and EPA would need to approve any necessary state implementation plan (SIP) revisions.

It is EPA's position that, unless a state has explicitly demonstrated its authority and been expressly approved by EPA to implement CAA programs in Indian country, EPA is the appropriate entity to be implementing CAA programs prior to tribal primacy. See preamble section II.C. and II.D. for a discussion of federal implementation of CAA programs in Indian country. EPA will not and cannot "grandfather" any state authority over Indian country where no explicit demonstration and approval of such authority has been made. EPA, as appropriate, will address any need for SIP revisions on a case-by-case basis.

2. Authority in Non-Reservation Areas Within a Tribe's Jurisdiction

CAA section 301(d)(2)(B) provides that a tribe may be treated in the same manner as a state for functions regarding air resources "within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction" (emphasis added). In the August 25, 1994 proposed tribal authority rule, EPA set forth its interpretation that this provision authorizes an eligible tribe to develop and implement tribal air quality programs in non-reservation areas that are determined to be within the tribe's jurisdiction. Today, EPA is finalizing this approach.

(a) *Support for EPA's approach*. Several tribal commenters support EPA's interpretation that "other areas within the Tribe's jurisdiction" in CAA section 301(d)(2)(B) means that a tribe

may implement its air quality programs in non-reservation areas under its jurisdiction, generally including all non-reservation areas of Indian country. One tribal commenter asserts that the "Indian country" standard is the standard consistently used by courts in determining a tribe's jurisdiction.

(b) Request for Clarification. Several commenters request that EPA clarify what is meant by the phrase "other areas within a Tribe's jurisdiction." Some commenters state that this phrase must be clarified to avoid conflicts between states and tribes in interpreting their own jurisdiction and uncertainty for regulated sources. One commenter urges EPA to develop published criteria by which the Agency will decide whether a tribe may develop and implement a CAA program in areas outside the exterior boundaries of a reservation. Some commenters also request that EPA clarify what is meant by "Indian country."

EPA notes that the phrase "other areas within the tribe's jurisdiction" contained in CAA section 301(d)(2)(B) and 40 CFR 49.6 is meant to include all non-reservation areas over which a tribe can demonstrate authority, generally including all non-reservation areas of Indian country. As noted above, it is EPA's interpretation that Congress has not delegated authority to otherwise eligible tribes to implement CAA programs over non-reservation areas as it has done for reservation areas. Rather, a tribe seeking to implement a CAA program over non-reservation areas may do so only if it has authority over such areas under general principles of federal Indian law.

EPA notes that the definition of "Indian country" contained in 18 U.S.C. section 1151, while it appears in a criminal code, provides the general parameters under federal Indian law of the areas over which a tribe may have jurisdiction, including civil judicial and regulatory jurisdiction. See *DeCoteau v. District County Court*, 420 U.S. 425, 427 n. 2 (1975). EPA acknowledges that there may be controversy over whether a particular non-reservation area is within a tribe's jurisdiction. However, EPA believes that these questions should be addressed on a case-by-case basis in the context of particular tribal applications. EPA has established a process under section 49.9 for appropriate governmental entities to comment on assertions of authority in individual tribal applications. More discussion of the parameters of "Indian country" is provided in the detailed response to comment document.

Some tribal commenters object to EPA's description of the proposed

requirement in § 49.7(a)(3)(ii) that, where a tribe seeks to have its program cover areas outside the boundaries of a reservation, the tribe must demonstrate its "inherent authority" over those areas. These commenters assert that the term "inherent authority" must be clarified because it may inappropriately limit the potential sources of tribal authority to regulate non-reservation air resources. EPA agrees that there may be cases where a tribe has authority to regulate a non-reservation area that derives from a federal statute or some other source of federal Indian law that is not based on "inherent authority." Section 49.7(a)(3)(ii) only asks a tribe seeking to implement a CAA program in a non-reservation area to "describe the basis for the tribe's assertion of authority * * *." Under this provision, a tribe may include any basis for its assertion of authority.

Some tribal commenters ask EPA to take the position that the phrase "other areas within the tribe's jurisdiction" means that tribes will have control over sources in close proximity to a reservation. One tribe comments that EPA has a trust responsibility to ensure that tribes have authority to control sources of air pollution outside of reservation boundaries that affect the health and welfare of tribal members living within reservation boundaries. One tribe asks whether non-reservation jurisdictional areas include ceded lands where tribes retain the right to hunt and fish.

As noted above, it is EPA's position that, while Congress delegated CAA authority to eligible tribes for reservation areas, the CAA authorizes a tribe to implement a program in non-reservation areas only if it can demonstrate authority over such areas under federal Indian law. Thus, a tribe may implement a CAA program over sources in non-reservation areas, including ceded territories, if the tribe can demonstrate its authority over such sources under federal Indian law. CAA provisions regarding cross-boundary impacts are the appropriate mechanisms for addressing cases where sources outside of tribal authority affect tribal health and environments. See, e.g., CAA sections 110(a)(2)(D), 126, and 164(e). The issue of cross-boundary impacts is discussed further in the response to comments document.

(c) *Comments challenging EPA's interpretation of the CAA.* Some commenters state that CAA section 110(o) limits the jurisdictional reach of a TIP to areas located within the boundaries of a reservation. One commenter asserts that since a tribe can only implement its TIP within a

reservation, to allow a tribe to implement other parts of the CAA in non-reservation areas would be unmanageable and unreasonable.

EPA believes that the reference in CAA section 110(o) to "reservation" is simply a description of the type of area over which a TIP may apply. EPA does not believe the provision was intended to limit the scope of TIPs to reservations. CAA section 301(d)(1) authorizes EPA to treat a tribe in the same manner as a state for any provision of the Act (except with regard to appropriations under section 105) as long as the requirements in section 301(d)(2) are met. EPA has decided to include most of the provisions of section 110 in the group of provisions for which treatment of tribes in the same manner as a state is appropriate. Section 301(d)(2) permits EPA to approve eligible tribes to implement CAA programs, including TIPs, over non-reservation areas that are within a tribe's jurisdiction.

An industry commenter asserts that the Senate Report evidences that Congress intended to provide tribes the same opportunity to adopt programs as provided under the CWA and SDWA. This commenter asserts that tribal jurisdiction under those statutes is limited to reservations. EPA notes that the SDWA does not limit tribal programs to reservations. See 42 U.S.C. 300j-11(b)(1)(B) (authorizing a tribal role "within the area of the Tribal Government's jurisdiction."). EPA also notes that there is evidence in the Senate Report that Congress intended to authorize EPA to approve eligible tribes for CAA programs in non-reservation areas of Indian country that are within a tribe's jurisdiction. The report states that section 301(d) is designed "to improve the environmental quality of the air wit[h]in Indian country in a manner consistent with EPA Indian Policy and the overall Federal position in support of Tribal self-government and the government-to-government relations between Federal and Tribal Governments' * * *." Senate Report at 79 (emphasis added) (citing EPA's 1984 Indian Policy); see also, *id.* at 80.

3. Other Jurisdictional Issues

Several local governments comment that the final rule should ensure that tribes with very small reservations do not have authority under an air program to adversely affect economic development in adjacent areas, intrude upon the jurisdiction of local governments, or create checkerboarded regulation. One commenter asserts that the proposal would allow for EPA approval of "islands" of Indian

programs and "will create the same problems for states and local governments which EPA believes will be eliminated by granting tribes full regulatory power over all land within reservation borders." In addition, a state commenter states that extending tribal programs to non-reservation areas within the parameters of 18 U.S.C. section 1151 conflicts with EPA's goal under the CAA of increasing cohesive air quality management. Several commenters state that regulation by tribes with very small reservations or other very small areas of Indian country would be administratively impractical.

Several local governments state that a minimum size should be placed on areas to be considered for tribal jurisdiction. An industry commenter suggests that the final rule limit non-reservation tribal programs to those areas under tribal jurisdiction that are contiguous with reservations. Some local government commenters also state that EPA, instead of a tribe, should consider enforcing programs on small areas of Indian country.

EPA acknowledges that there may be cases where the Agency may approve a tribe's application to implement a CAA program over a relatively small land area. EPA also recognizes that approval of a tribal program over a small area that is surrounded by land covered by a state CAA program could lead to less uniform regulation. However, EPA believes it would be inappropriate to place a blanket limitation on the geographic size of an approvable tribal program. EPA notes that Congress, in the CAA, authorized the Agency to approve tribal CAA programs when a tribe meets the criteria contained in CAA section 301(d)(2)(B) without regard to size of area. In addition, it is long-standing federal Indian policy to support tribal self-government and a government-to-government relationship with federally recognized Indian tribes. See Senate Report at 79; April 29, 1994 Presidential Memorandum, "Government-to-Government Relations with Native American Tribal Governments," 59 FR 22,951 (May 4, 1994). Furthermore, EPA policy favors tribal over federal implementation of environmental programs in areas under tribal jurisdiction. See 59 FR at 43962; November 8, 1984 "EPA Policy for the Administration of Environmental Programs on Indian Reservations." EPA also recognizes that under the realities of federal Indian law, there are some small pockets of Indian country under tribal and federal jurisdiction that lie among lands under state jurisdiction. While EPA recognizes that its approval of tribal programs over small areas may

result in less uniform regulation in some cases, the Agency believes that the approach to tribal jurisdiction outlined in this Tribal Authority Rule best reconciles federal Indian and environmental policies. See *Washington Department of Ecology*, 752 F.2d at 1469. The Agency's overall approach minimizes the potential for checkerboarded regulation within Indian reservations (see preamble at II.A.1.(a)), while promoting tribal sovereignty and self-determination.

One tribal commenter states that pollution from air sources outside a tribe's jurisdiction must be addressed. This commenter states that section 126 of the CAA, while designed to address this issue, is awkward and probably difficult to administer. In addition, local government commenters state that the off-site effect of approving tribal programs for Indian lands should be considered. One local commenter states that "mutual protection for air quality goals, health values and customs should be assured for all within any physical air basin to the extent workable."

EPA notes that several provisions of the CAA are designed to address cross-boundary air impacts. EPA is finalizing its proposed approach that the CAA protections against interstate pollutant transport apply with equal force to states and tribes. Thus, EPA is taking the position that the prohibitions and authority contained in sections 110(a)(2)(D) and 126 of the CAA apply to tribes in the same manner as states. As EPA noted in the preamble to its proposed rule, section 110(a)(2)(D), among other things, requires states to include provisions in their SIPs that prohibit any emissions activity within the state from significantly contributing to nonattainment, interfering with maintenance of the national ambient air quality standards (NAAQS), or interfering with measures under the Prevention of Significant Deterioration (PSD) or visibility protection programs in another state or tribal area. In addition, section 126 authorizes any state or tribe to petition EPA to enforce these prohibitions against a state containing an allegedly offending source or group of sources. The issue of cross-boundary impacts is discussed further in the response to comment document.

Several tribal commenters note that, in the preamble to the proposed rule, EPA misstated the dollar limitation contained in the Indian Civil Rights Act on criminal fines that may be imposed by tribes. EPA agrees that the dollar limitation in the Indian Civil Rights Act on criminal fines is \$5,000 as opposed to \$500.

B. Sovereign Immunity and Citizen Suit

1. Section 304

In its August 25, 1994 Notice of Proposed Rulemaking (NPR) EPA proposed, under the CAA's section 301(d) rulemaking authority, that the citizen suit provisions contained in section 304 of the Act should apply to tribes in the same manner in which they apply to states. See 59 FR at 43978. In today's final action, EPA is declining to announce a position, in the context of the rulemaking required under section 301(d) of the Act, regarding whether tribes are subject to the citizen suit provisions contained in section 304, and therefore is not finalizing the position stated in the NPR. In order to facilitate tribal adoption and implementation of air quality programs in a manner similar to state-implemented programs, section 301(d) requires EPA to specify through rulemaking those provisions of the Act which the Agency believes are appropriate to apply to tribes. EPA's rulemaking approach has been to deem all CAA provisions appropriate for tribes, except for those provisions specifically listed in the rule regarding which EPA, for various reasons, believes it may be inappropriate for the Agency, solely in the context of its 301(d) authority, to make such a determination. Thus, the direct consequence for today's final action of EPA's decision not to adopt the position presented in the NPR regarding the provisions of section 304 is that section 304 has been added to the list of those CAA provisions which, for section 301(d) purposes, EPA has concluded it is not appropriate to determine that tribes should be treated as states. That list is contained in section 49.4 of today's rule. EPA is also clarifying the relationship of this final action regarding section 304 to the right that tribes enjoy, as sovereign powers, to be immune from suit. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978).

The Agency received a number of comments on the section 304 citizen suit issue. One group of industry commenters appears to be in favor of tribes being subject to citizen suits, and is particularly concerned that non-tribal members be provided with similar enforcement opportunities for TIPS as are required for SIPs. The majority of comments received on this issue came from tribal governments, mainly disputing EPA's claim that section 301(d), as a legal matter, provided EPA with the authority to apply the section 304 citizen suit provisions to tribes since doing so would appear to have the effect of administratively waiving tribal sovereign immunity. These commenters

argue that only the tribes themselves or Congress may waive tribal sovereign immunity and, further, that Congressional intent to waive tribal sovereign immunity may not be implied but must be express and unequivocal. They do not believe that the CAA, including section 301(d), contains such an express waiver. Several of the commenters also state that because states are subject to section 304 only "to the extent permitted by the Eleventh Amendment to the Constitution," applying it to tribes would likely make the requirement more burdensome than it would be for states. Several tribal commenters also express the view that citizen suit recourse is unnecessary since EPA retains enforcement authority under various other CAA provisions, for example, sections 110(m), 179(a)(4), and 502(i). Finally, concern is expressed that adopting a policy of subjecting tribes to citizen suits could hinder development of tribal air programs because it could add significant resource constraints, financial and otherwise, particularly with respect to potential litigation.

Section 304 of the CAA reflects the general principle underlying all environmental citizen suit provisions, namely that actors who accept responsibility for regulating health-based standards and who voluntarily commit themselves to undertake control programs in furtherance of such goals, ought to be accountable to the citizens those programs are designed to benefit. However, EPA agrees, as several commenters pointed out, that section 304 only applies to states to the extent permitted by the Eleventh Amendment to the Constitution. The Supreme Court has interpreted the provisions of the Eleventh Amendment as generally serving to protect a state from liability to suit where the state does not consent to be sued. EPA believes that, just as states implementing air quality programs are not subject to citizen suits except to the extent permitted by the Eleventh Amendment of the Constitution and the provisions of the Clean Air Act, by analogy, in the context of air program implementation in Indian country, the issue of citizen suit liability would be determined based on established principles of tribal sovereign immunity and the provisions of the Clean Air Act. This is meant to emphasize that no EPA action in this final rule either enhances or limits the immunity from suit traditionally enjoyed by Indian tribes as sovereign powers.

Because the Eleventh Amendment does not apply to tribes (by its terms, the Eleventh Amendment only addresses suits brought "against one of

the United States"), and because the provisions of section 304 (and the applicable definitions in section 302) do not expressly refer to tribes, EPA has been concerned that the action it proposed to take may have subjected tribes to citizen suit liability in situations in which citizens could not sue states. Because of this uncertainty, EPA believes it is not appropriate to attempt to resolve this significant issue in the context of the limited scope of the rulemaking required under section 301(d).

EPA also notes that courts have long recognized that citizen plaintiffs may bring actions for prospective injunctive relief against state officials under the CAA section 304 citizen suit provisions, as well as under other environmental statutes with similar citizen suit provisions. See *Council of Commuter Organizations v. Metro. Transp.*, 683 F.2d 663, 672 (2nd Cir. 1982). See also *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114, 1133 n.17 (1996) (acknowledging that lower courts have entertained suits against state officials pursuant to citizen suit provisions in environmental statutes substantially identical to CAA section 304(a)(1)). While this raises the question of whether such actions could be brought against "tribal officials," EPA believes this issue is also outside the scope of this rulemaking.

2. Judicial Review Provisions of Title V

In its proposed rulemaking, EPA proposed to treat tribes in the exact same manner as states for purposes of the provisions of CAA sections 502(b)(6) and 502(b)(7) addressing judicial review under the Title V Operating Permits Program. 59 FR at 43972. For the reasons discussed below, in today's final action EPA is withdrawing its proposal to treat tribes in the exact same manner as states for purposes of these judicial review provisions. As described below, however, tribes that opt to establish a Title V program will still need to meet all requirements of sections 502(b)(6) and 502(b)(7) except those provisions that specify that review of final action under the Title V permitting program be "judicial" and "in State court."

As noted above in the discussion regarding the applicability of CAA section 304 to tribes, tribal commenters express concern over waivers of tribal sovereign immunity to judicial review. Several tribal commenters also note that requiring tribes to waive sovereign immunity in order to run a Title V program will be a strong disincentive for tribes to assume these programs. Two industry commenters state that

nonmembers that are regulated by tribes must have access to tribal courts for judicial review. Several commenters express concern that some tribal governments may lack a distinct judicial system.⁷

EPA recognizes the importance of providing citizens the ability to hold accountable those responsible for regulating air resources. Nonetheless, EPA also acknowledges that applying the judicial review provisions of Title V to tribes through this rule would raise unique issues regarding federal Indian policy and law. EPA is mindful of the vital importance of sovereign immunity to tribes. In addition, EPA is aware that in some instances tribes do not have distinct judicial systems. Finally, EPA has long recognized the importance of encouraging tribal implementation of environmental programs and avoiding the establishment of unnecessary barriers to the development of such programs. E.g., EPA's 1984 Indian Policy; see also Senate Report at 8419 (noting that section 301(d) is generally intended to be consistent with EPA's 1984 Indian Policy). EPA seeks to strike a balance among these various considerations. See *Washington Department of Ecology v. EPA*, 752 F.2d 1465, 1469 (9th Cir. 1985).

In order to ensure a meaningful opportunity for public participation in the permitting process, it is EPA's position that some form of citizen recourse be available for applicants and other persons affected by permits issued under tribal Title V programs. One option for review of final actions taken under a tribal Title V program is for tribes to consent to suit through voluntary waiver of their sovereign immunity in tribal court. EPA supports the continued development and strengthening of tribal courts and encourages those tribes that will implement Title V permitting programs to consent to challenges by permit applicants and other affected persons in tribal court. For the reasons discussed

⁷Two industry commenters stated that tribal courts "lack many procedural, substantive law and constitutional protection[s] for non-members." EPA is aware that tribal governments are not subject to the requirements of the Bill of Rights and the Fourteenth Amendment of the U.S. Constitution, and that review of tribal court decisions in federal court may be limited. However, EPA notes that the Indian Civil Rights Act requires tribes to provide several protections similar to those contained in the Bill of Rights and the Fourteenth Amendment, including due process of law, equal protection of the laws, and the right not to have property taken without just compensation. 25 U.S.C. § 1302; *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 57 (1978). These protections extend to all persons subject to tribal jurisdiction, whether Indians or non-Indians. See *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9, 19 (1987).

above, however, requiring tribes to provide for review in the exact same manner as states pursuant to section 502(b)(6) is not appropriate.

In some cases, well-qualified tribes seeking approval of Title V programs may not have a distinct judiciary, but rather may use non-judicial mechanisms for citizen recourse. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65-66 (1978) ("Non-judicial tribal institutions have * * * been recognized as competent law-applying bodies."). In addition, a requirement that tribes waive their sovereign immunity to judicial review, in some cases, may discourage tribal assumption of Title V programs. Thus, EPA is willing to consider alternative options, developed and proposed by a tribe in the context of a tribal CAA Title V program submittal, that would not require tribes to waive their sovereign immunity to judicial review but, at the same time, would provide for an avenue for appeal of tribal government action or inaction to an independent review body and for injunctive-type relief to which the Tribe would agree to be bound.

EPA has consistently stressed the importance of judicial review under state Title V programs. E.g., *Virginia v. Browner*, 80 F.3d 869, 875 (4th Cir. 1996) ("EPA interprets the statute and regulation to require, at a minimum, that states provide judicial review of permitting decisions to any person who would have standing under Article III of the United States Constitution. Notice of Proposed Disapproval, 59 Fed. Reg. 31183, 31184 (June 17, 1994)"), *cert denied* 117 S.Ct. 764 (1997). However, the statutory scheme regarding tribal clean air programs is quite different from that of states. Section 301(d)(2) of the Act explicitly provides EPA with the discretion to "specify * * * those provisions for which it is appropriate to treat Indian tribes as States." 42 U.S.C. 7601(d)(1). In addition, section 301(d)(4) of the Act states that where EPA "determines that treatment of tribes as identical to states is inappropriate or administratively infeasible, [EPA] may provide, by regulation, other means by which [EPA] will directly administer such provisions so as to achieve the appropriate purpose," 42 U.S.C. 7610(d)(4). As EPA noted in the preamble to the proposed rule, tribes have a "unique legal status and relationship to the Federal government that is significantly different from that of States. [C]ongress did not intend to alter this when it authorized treatment of Tribes 'as States' under the CAA." 59 FR at 43962, n.11.

In addition, there is ample precedent for treating tribes and states differently

under federal Indian law. E.g., U.S. Const. amend. XIV; Indian Civil Rights Act, 25 U.S.C. 1301 *et. seq.*; and *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). In *Santa Clara*, the Supreme Court addressed the availability of federal court review of tribal action under the Indian Civil Rights Act (ICRA), which requires tribal governments to provide several protections similar to those contained in the Bill of Rights and the Fourteenth Amendment. In finding that no additional federal court remedies beyond habeas corpus were provided by Congress for review of tribal compliance with the ICRA, the Court noted that Congress had struck a balance between the dual statutory objectives of enhancing individual rights without undue interference with tribal sovereignty. *Santa Clara*, 436 U.S. at 65-66. EPA has concluded that in enacting section 301(d) of the Act, Congress provided EPA with the discretion to balance the goals of ensuring meaningful opportunities for public participation under the CAA and avoiding undue interference with tribal sovereignty when determining those provisions for which it is appropriate to treat tribes in the same manner as states. See *Washington Department of Ecology v. EPA*, 752 F.2d 1465, 1469 (9th Cir. 1985) ("it is appropriate for us to defer to EPA's expertise and experience in reconciling [Indian policy and environmental policy], gained through administration of similar environmental statutes on Indian lands.").

In addition to the requirement that tribal Title V programs provide some avenue for appeal of tribal government action or inaction and for injunctive-type relief, EPA may use several oversight mechanisms to ensure that tribal Title V programs provide adequate opportunities for citizen recourse. E.g., CAA sections 502(b)(requiring EPA assumption of state or tribal Title V programs that EPA finds are not being adequately implemented or enforced), 505(b) (requiring EPA objection to state or tribal Title V permits that EPA finds do not meet applicable requirements).

Thus, under today's final rulemaking, EPA is not requiring tribes to provide for judicial review in the same manner as states under CAA section 502(b)(6). EPA will develop guidance in the future on acceptable alternatives to judicial review. In reviewing the Title V program submission of any tribe proposing an alternative to judicial review, EPA will apply such guidance to determine, pursuant to its section 301(d) authority, whether the tribe has provided for adequate citizen recourse consistent with the requirement in CAA

section 502(b)(6) that there be review of final permit actions and the guidance and principles discussed above.

EPA emphasizes that tribes seeking to implement the Title V program will still need to meet all the requirements of CAA section 502(b)(6), except the requirements that review of final permit actions be "judicial" and "in state court." Specifically, tribes seeking to implement the Title V program, will need to provide:

[a]dequate, streamlined, and reasonable procedures for expeditiously determining when applications are complete, for processing such applications, for public notice, including offering an opportunity for public comment and a hearing, and for expeditious review of permit actions, including applications, renewals, or revisions, and including an opportunity for * * * review * * * of the final permit action by the applicant, any person who participated in the public comment process, and any other person who could obtain judicial review of that action under applicable law.

CAA section 502(b)(6). In addition, all provisions of CAA section 502(b)(7) will apply to tribal programs except the requirements that the review be "judicial" and in "State court."

C. Air Program Implementation in Indian Country

The August 25, 1994, proposed tribal authority rule set forth EPA's view that, based on the general purpose and scope of the CAA, the requirements of which apply nationally, and on the specific language of sections 301(a) and 301(d)(4), Congress intended to give to the Agency broad authority to protect tribal air resources. The proposal went on to state that EPA intended to use its authority under the CAA "to protect air quality throughout Indian country" by directly implementing the Act's requirements in instances where tribes choose not to develop a program, fail to adopt an adequate program or fail to adequately implement an air program." *Id.* at 43960. Comments on this issue were received from tribes, state and local government representatives, and industry.

The comments generally support the discussion of EPA's authority under the CAA to protect air quality throughout Indian country, but, overall, seek specific clarification with respect to the time frame and scope of federal implementation. In addition, several commenters, although focusing on different aspects of the issue, express a general concern that there be no diminution or interruption in tribal air resource protection while tribal programs are being developed. EPA

acknowledges the seriousness of the concerns identified by the commenters and agrees that a clearer presentation of the Agency's intentions is appropriate.

Most tribal commenters support establishing federal air programs under the circumstances outlined in the proposal, but many are concerned with the past lack of enforcement of environmental programs on tribal lands. Almost all commenters express concern with the lack of a definite timetable for federal initiation of air programs to protect tribal air resources and prevent gaps in protection. Tribal commenters generally support the provision in the proposal to develop an implementation strategy and a plan for reservation air program implementation; however, they request that EPA develop time frames and establish dates for developing the implementation strategy. A state commenter argues that the proposal did not sufficiently allow for state comment or input in the development of the implementation strategy, asserting that both state and tribal involvement will be necessary to avoid regulatory conflicts. A number of government and industry commenters suggest that EPA elaborate on the process for developing tribal air programs in light of the interrelationship between existing air programs and new tribal programs. Another commenter requests that EPA resolve the process for transition from existing programs to tribal programs as part of this rulemaking. One state comments that the transfer must be accomplished without leaving sources of air pollution and the states in air quality "limbo" pending development of either tribal or EPA programs to regulate sources under the jurisdiction of a tribe. Another state argues that if a tribe has no approved program and EPA has no reason for enforcement, section 116 preserves the state's inherent authority to regulate non-member sources on a reservation. One tribe asks that the process for transferring administration of an EPA-issued permit for a source on tribal lands to the tribe be made more explicit. Many tribal commenters request technical and administrative support in the form of guidance documents, training, sufficient financial resources, and EPA staff assigned to work with tribes on tribal CAA programs who are knowledgeable about tribal law and concerns. These commenters also express concern that limited resources might prevent EPA from providing this critical support.

As indicated above, EPA recognizes the seriousness of the concerns expressed in these comments and has undertaken an initiative to develop a comprehensive strategy for

implementing the Clean Air Act in Indian country. The strategy will articulate specific steps the Agency will take to ensure that air quality problems in Indian country are addressed, either by EPA or by the tribes themselves. This strategy [a draft of which is available in the docket referenced above] addresses two major concerns: (1) Gaps in Federal regulatory programs that need to be filled in order for EPA to implement the CAA effectively in Indian country where tribes opt not to implement their own CAA programs; (2) identifying and providing resources, tools, and technical support that tribes will need to develop their own CAA programs.

EPA believes that the strategy being developed addresses many of the concerns expressed by the commenters. Once tribal programs are approved by EPA, tribes will have authority to regulate all sources within the exterior boundaries of the reservation under such programs. One of the most prevalent concerns is the status of sources (current and future) in Indian country not yet subject to the limits of an implementation plan. Commenters want assurance that EPA would step in to fill this gap and ensure adequate control. The Agency has consistently recognized the primary role for tribes in protecting air resources in Indian country and has expressed its continued commitment to work with tribes to protect these resources in the absence of approved tribal programs. The Agency has issued permits and undertaken the development of Federal Implementation Plans (FIP) to control sources locating in Indian country. For example, the Agency is working with both the Shoshone-Bannock and the Navajo Tribes to address pollution control of major sources on their Reservations. The Agency has also issued PSD preconstruction permits to new sources proposing to locate in Indian country. The Agency has started to explore options for promulgating new measures to ensure that EPA has a full range of programs and Federal regulatory mechanisms to implement the CAA in Indian country.

Since the 1994 proposal, EPA has tried specifically to identify the primary sources of air pollution emissions in Indian country, and evaluate the CAA statutory authorities for EPA to regulate those sources pending submission and approval of a TIP. EPA has determined that the CAA provides the Agency with very broad statutory authority to regulate sources of pollution in Indian country, but there are instances in which EPA has not yet promulgated regulations to implement its statutory authority.

One example is the absence of complete air permitting programs in Indian country. EPA has promulgated regulations establishing permit requirements for major sources in attainment areas, and issued Prevention of Significant Deterioration permits to new or modifying major sources. See 40 CFR 52.21. However, EPA has not promulgated regulations for a permitting program in Indian country for either minor or major sources of air pollution emissions in nonattainment areas. Therefore, EPA is currently drafting nationally applicable regulations for such minor and major source permitting programs. The permitting programs are expected to apply to construction or modification of all minor sources and to major sources in nonattainment areas. In addition, the planned permitting program would allow existing sources to voluntarily participate in the permitting program and accept enforceable permit limits. EPA regional offices would be the permitting authority for this program. With respect to Title V operating permits, EPA has proposed to include Indian country within the scope of 40 CFR Part 71. Therefore, the Part 71 regulations would apply to all major stationary sources of air pollution located in Indian country.

Many CAA requirements apply in Indian country without any further action by the EPA. For example, the standards and requirements of the Standards of Performance for New Sources, 42 U.S.C. 7411 and 40 CFR Part 60, apply to all sources in Indian country. Similarly, the National Emissions Standards for Hazardous Air Pollutants, 42 U.S.C. 7412 and 40 CFR Part 63 apply in Indian country.

EPA has, however, identified categories of sources of air pollution, such as open burning and fugitive dust, that are not covered by those regulations. For these categorical sources, EPA believes that it has the authority to promulgate regulations on a national basis that would apply until a TIP has been submitted and approved. EPA has also identified a number of general air quality rules, such as the prohibition against emitting greater than 20 percent opacity, which could be promulgated nationally for application in Indian country pending TIP approval. EPA is optimistic that any additional regulations can be promulgated and implemented relatively quickly, since, along with the protections they would provide, such regulations can also serve as models which tribes can use in drafting TIPs.

EPA wishes to emphasize that the national rules it intends to promulgate will be analogous to, but not the same

in all respects, as the types of rules generally approved into State Implementation Plans. For example, EPA's federal rules are likely to represent an average program, potentially more stringent than some SIP rules and less stringent than others. However, by promulgating such rules, EPA would not be establishing, and should not be interpreted by States as setting, new minimal criteria or standards that would govern its approval of SIP rules. EPA encourages and will work closely with all tribes wishing to replace the future federal regulations with TIPS. EPA intends that its federal regulations will apply only in those situations in which a tribe does not have an approved TIP.

EPA will actively encourage tribes to provide assistance in the development of the proposed regulations referenced above to ensure that tribal considerations are addressed and development of the regulations will be subject to notice and comment rulemaking procedures.

The case-by-case nature of program implementation in Indian country makes it difficult to address concerns about plans and time lines. The Agency's strategy for implementing the CAA in Indian country proposes a multi-pronged approach, one prong of which is federal implementation described above. The other prongs derive from a "grass-roots" approach in which staff in the EPA regional offices work with individual tribes to assess the air quality problems and develop, in consultation with the tribes, either tribal or federal strategies for addressing the problems.

1. *Building Tribal Capacity.* An essential component of the Agency's CAA implementation strategy is to assess the extent to which tribes have developed an environmental protection infrastructure and determine how best to build tribal capacity to implement their own CAA programs. The assessment will be done in cooperation with the tribes and may include any or all of the following:

a. *Needs Assessment.* An initial step for effectively implementing the CAA in Indian country is to identify the air quality concerns and determine how well the tribes are able to address them. EPA will work with the tribes to develop emission inventories and air monitoring studies (where appropriate) to determine the nature of the problem and identify a range of potential control strategies. From this information, EPA and the tribes will jointly develop, as needed, tribal or federal implementation plans (TIPs/FIPs) to address the problem. These TIPs/FIPs may include,

for example, controls on minor sources, categorical prohibitory rules, area source controls (e.g., vapor recovery, open burning ordinances).

b. *Communication.* A critical part of the Agency's strategy to build tribal capacity is outreach and communication. Outreach has already begun as EPA regional staff worked with tribes in their service area to draft the Strategy for Implementing the CAA in Indian Country. Outreach will continue with the promulgation of this rule; staff will meet with Tribes in regional meetings held throughout the country to talk about implementing the rule and answer questions. In follow-up to these initial meetings, EPA will adopt a multi-media approach to communicating with the Tribes and other stakeholders (conferences, conference calls, newsletters, Internet, etc.) to ensure timely access to information and guidance developed in support of this rule.

c. *Training.* The third component for building tribal capacity is training, providing in various forms and through various media the skills and knowledge needed to implement an air quality protection program in Indian country. EPA already supports a training program at Northern Arizona University (NAU) that offers basic introductory workshops on air quality program management and administration and a more in-depth course in air pollution control technology. This program, offered at no cost to tribes, helps tribal environmental professionals develop competence in air quality management. The program also prepares these professionals for enrollment in more advanced courses in EPA's Air Pollution Training Institute (APTI). In addition to these formal training opportunities, EPA offers internships to college students interested in pursuing an environmental career and supports an outreach program in high schools in Indian country to encourage these students' interest in environmental protection careers. EPA plans to encourage other options for promoting tribal professional development, including peer-to-peer support, temporary assignments with other government (state, tribal, or federal) environmental programs, and cooperative agreements to provide technical assistance.

As these individual tribal assessments are completed, the information will be compiled in order to determine to what extent commonalities exist among the air quality problems that might be amenable to common solutions (e.g., Title V, minor sources, etc.). The Agency will work in concert to develop other common solutions, as needed. At

the same time, EPA is developing guidance documents, templates, and model analyses to assist tribes in developing Tribal Air Programs.

Finally, EPA recognizes that air quality problems in Indian country do not exist in isolation and that often they are part of a broader spectrum of environmental problems, the solutions for which may be best developed through an integrated approach to environmental protection. EPA's Office of Air & Radiation will continue to work with other media offices to develop overall environmental assessments (through the Tribal/EPA Environmental Agreement process) for Indian country and develop integrated approaches where appropriate. One approach, for example, might be to focus on ways to simultaneously protect air quality, water quality, and other public health and environmental values through control strategies that reduce atmospheric deposition of air pollutants in Indian country.

D. CAA Sections 110(c)(1) and 502(d)(3) Authority

In the proposed tribal rule, EPA stated that it was not proposing to treat tribes in the same manner as states under its section 301(d) authority with respect to the specific provision in section 110(c)(1) that directs EPA to promulgate, "within 2 years," a Federal Implementation Plan (FIP) after EPA finds that a state has failed to submit a required plan, or has submitted an incomplete plan, or within 2 years after EPA has disapproved all or a portion of a plan. 59 FR at 43965. The proposed exception applied only for that provision of section 110(c)(1) that sets a specified date by which EPA must issue a FIP. The proposal went on to state that "EPA would continue to be subject to the basic requirement to issue a FIP for affected [tribal] areas within some reasonable time." In today's action, EPA is finalizing the general approach discussed in the proposal, but has altered the method for implementing that approach. Therefore, although the result that was intended by the proposal remains unchanged, after further review, EPA is modifying the regulatory procedure by which it achieves that result, and is also clarifying the statutory basis it is relying upon for doing so.

The proposed rule set forth EPA's view that one of the principal goals of the rulemaking required under section 301(d) is to allow tribes the flexibility to develop and administer their own CAA programs to as full an extent as possible, while at the same time ensuring that the health and safety of the public is

protected. However, since, among other things, tribal authority for establishing CAA programs was expressly addressed for the first time in the 1990 CAA Amendments, in comparison to states, tribes in general are in the early stages of developing air planning and implementation expertise. Accordingly, EPA determined that it would be infeasible and inappropriate to subject tribes to the mandatory submittal deadlines imposed by the Act on states, and to the related federal oversight mechanisms in the Act which are triggered when EPA makes a finding that states have failed to meet required deadlines or acts to disapprove a plan submittal. As the proposal noted, section 301(d)(2) provides for EPA to promulgate regulations specifying those provisions for which it is appropriate to treat tribes as states, but does not compel tribes to develop and seek approval of air programs. In other words, there is no date certain submittal requirement imposed by the Act for tribes as there is for states. Thus, since the FIP obligation under section 110(c)(1) is keyed to plan submission failures by states that are contemplated with respect to "a required submission," and to plan disapprovals that have not been cured within a specified time frame, the discussion in the proposal regarding section 110(c)(1) was consistent with the approach summarized above. However, given that the statutory basis underlying section 110(c)(1) is either expressly inapplicable to tribal plans or is linked to submittal deadlines that the Agency is today determining are inappropriate or infeasible to apply to tribal plan submissions, that section as a whole—not merely the provision setting a specific date by which EPA must issue a FIP—should have been included on the list of proposed CAA provisions for which EPA would not treat tribes in the same manner as states.

Consequently, in this final action, EPA has added section 110(c)(1) in its entirety to the list of CAA provisions in the rule portion of this action (§ 49.4) for which EPA is not treating tribes in the same manner as states. However, by including the specific FIP obligation under section 110(c)(1) on the list in section 49.4 of this final rule, EPA is not relieved of its general obligation under the CAA to ensure the protection of air quality throughout the nation, including throughout Indian country. In the absence of an express statutory requirement, EPA may act to protect air quality pursuant to its "gap-filling" authority under the Act as a whole. See, e.g., CAA section 301(a). Moreover,

section 301(d)(4) provides EPA with discretionary authority, in cases where it has determined that treatment of tribes as identical to states is "inappropriate or administratively infeasible," to provide for direct administration through other regulatory means. EPA is exercising this discretionary authority and has created a new section (§ 49.11) to this final rule which provides that the Agency will promulgate a FIP to protect tribal air quality within a reasonable time if tribal efforts do not result in adoption and approval of tribal plans or programs. Thus, EPA will continue to be subject to the basic requirement to issue a FIP for affected tribal areas within some reasonable time.

The proposal notice made clear that even while the Agency was proposing not to treat tribes as states for purposes of the specified date in section 110(c)(1), it was always EPA's intention to retain the requirement to issue a FIP, as necessary and appropriate, for affected tribal areas. The bases and rationale for that determination are thoroughly set forth in 59 FR 43956 (especially at pages 43964 through 43966) and remain the same. The only change between the proposal and this final notice regards the methodology used to achieve the intended result, i.e., using the Agency's section 301(d)(4) discretionary authority in conjunction with its general "gap-filling" CAA authority.

Similarly, EPA is taking final action on its proposal not to treat tribes in a manner similar to states for the provision of section 502(d)(3) which requires issuance by EPA, within two years of the statutory submittal deadline, of a federal operating permit program if EPA has not approved a state program. The Agency has proposed, pursuant to its section 301(d)(4) authority, to include in its final rule addressing federal implementation of operating permit programs in Indian country a commitment to implement such programs by a date certain in instances where a tribe chooses not to implement a program or does not receive EPA approval of a submitted program. 62 FR 13748. In light of this commitment, EPA does not believe it is necessary to retain the text in § 49.4(j) acknowledging its federal authority.

III. Significant Changes to the Proposed Regulations

A. Part 35—State and Local Assistance

Section 35.205 Maximum Federal Share and Section 35.220 Eligible Indian Tribe. In its proposed rule, EPA sought comment on the appropriate level of tribal cost share for a section

105 grant, from a minimum of five percent to a maximum of 40 percent. The proposal also asked for comments on the establishment of a phase-in period for tribes to meet whatever match is ultimately required for section 105 grants. Tribes universally comment that the level of matching funds should be kept to a minimum, i.e., five percent, if not waived altogether, especially during the early stages of developing an air quality program. One tribe asserts that Title V cannot be viewed as the solution to funding tribal air programs; other financial resources must also be made available. In addition, EPA notes that only a small number of tribes have applied for section 105 grants despite being eligible to receive such grants as air pollution control agencies under section 302(b)(5) and section 301(d)(5). EPA attributes much of the tribes' reluctance to apply for these grants to the match requirement of forty percent that has been applicable to all section 105 grants.

EPA agrees with the commenters that tribal resources generally are not adequate to warrant the level of match required of states and that equivalent resources are unlikely to become available in the foreseeable future. A high match requirement would likely discourage interested tribes from developing and implementing air programs. It is not appropriate to compare the resources available for the development of state programs to that of tribes because tribes often lack the resources or tax infrastructure available to states for meeting cost share requirements. Furthermore, a low match requirement, with a hardship waiver, is consistent with federal Indian policy which encourages the removal of obstacles to self-government and impediments to tribes implementing their own programs.

Accordingly, EPA has determined that it is inappropriate to treat tribes identically to states for the purpose of the match requirement of section 105 grants. Therefore, pursuant to its authority under section 301(d)(4), EPA will provide a maximum federal contribution of 95 percent for financial assistance under section 105 to those tribes eligible for treatment in the same manner as states for two years from the initial grant award. After the initial two-year period of 5 percent match, EPA will increase each tribe's minimum cost share to 10 percent, as long as EPA determines that the tribe meets certain objective and readily-available economic indicators that would provide an objective assessment of the tribe's ability to increase its share. Within eighteen months of the promulgation of

this rule, the Agency will, with public input, develop guidance setting forth the precise procedures for evaluating tribal economic circumstances and will identify those economic indicators (for example, tribal per capita income, tribal unemployment rates, etc.) that will be used to support its determinations.

The tribal match will not be waived unless the tribe can demonstrate in writing to the satisfaction of the Regional Administrator that fiscal circumstances within the tribe are constrained to such an extent that fulfilling the match would impose undue hardship. This waiver provision is designed to be very rarely used. The Agency does not foresee any circumstances that would justify eliminating this waiver provision for those eligible tribes that are able to demonstrate that meeting the match requirement would result in undue financial hardship. This waiver provision is not available to tribes that establish eligibility for a section 105 grant pursuant to § 35.220(b).

The EPA will examine the experience of this program and other relevant information to determine appropriate long-term cost share rates within five years of the date of publication of this rule.

Finally, the definition of Indian Tribe in § 35.105 has been changed to make it consistent with the definition found in the CAA at section 302(r) and the definition in § 49.2.

B. Title V Operating Permits Program: Operational Flexibility

The Agency received comments that objected to the proposed rule's position that tribal part 70 programs would not be required to include the same operational flexibility provisions required of state part 70 programs. The proposal preamble suggested that the three operational flexibility provisions at 40 CFR 70.4(b)(12) would be optional for tribes as would 40 CFR 70.6(a)(8), 40 CFR 70.6(a)(10), and 40 CFR 70.6(a)(9). A brief description of each of these provisions follows.

The three operational flexibility provisions in § 70.4(b)(12) require permitting authorities to: (1) allow certain changes within a facility without requiring a permit revision; (2) allow for trading increases and decreases in emissions in the facility where the applicable implementation plan provides for such trading; and (3) allow trading of emissions increases and decreases in the facility for the purposes of complying with a federally-enforceable emissions cap that is established in the permit. These provisions implement section 502(b)(10)

of the Act. EPA has proposed to modify these provisions, by deleting the first provision and making some technical clarifications to the third provision. See 60 FR 45529 (August 31, 1995).

Section 70.6(a)(8) requires as a standard condition that permits contain a provision stating that no permit revision shall be required under any approved economic incentives, marketable permits, emissions trading and other similar programs or processes for changes that are provided for in the permit.

Section 70.6(a)(10) requires a standard condition (upon request of the applicant) that allows for emissions trading at a source if the applicable requirement provides for trading without a case-by-case approval of each emission trade.

Section 70.6(a)(9) requires as a standard condition (upon request of the applicant and approval by the permitting authority) terms that describe reasonably anticipated operating scenarios.

Initially, EPA believed that the technical expertise required to implement operational flexibility provisions would make it too difficult for tribal programs to obtain EPA approval. Accordingly, the Agency proposed that, for purposes of these provisions, tribes would not be treated in the same manner as states. However, EPA now believes that a better approach would be to treat tribes in the same manner as states for purposes of these provisions, while providing sufficient technical assistance, if needed, to enable tribes to issue permits that meet these operational flexibility requirements. Such an approach will assure that sources will be provided maximum flexibility regardless of whether the permitting agency is a tribal or state agency. In addition, it will afford sources that are subject to tribal part 70 programs the benefit of streamlined provisions that have been proposed for part 70.

C. Section 49.4 Clean Air Act Provisions for Which Tribes Will Not Be Treated in the Same Manner as States

Based on the comments received regarding tribal sovereign immunity and citizen suits (see discussion at II.B), EPA is withdrawing its proposal to treat tribes as states for purposes of section 304 and the judicial review provisions of sections 502(b)(6) and 502(b)(7) of the Act and has revised § 49.4 accordingly.

D. Section 49.8 Provisions for Tribal Criminal Enforcement Authority

EPA is modifying the language under this provision to clarify the federal role

in criminal enforcement of tribal programs. Where tribes are precluded by law from asserting criminal enforcement authority, the federal government will exercise criminal enforcement responsibility. To facilitate this process, the Criminal Investigation Division office located at the appropriate EPA regional office and the tribe will establish a procedure by which any duly authorized agency of the tribe (tribal environmental program, tribal police force, tribal rangers, tribal fish and wildlife agents, tribal natural resources office, etc.) shall provide timely and appropriate investigative leads to any agency of the federal government (EPA, U.S. Attorney, BIA, FBI, etc.) which has authority to enforce the criminal provisions of federal environmental statutes. This procedure will be incorporated into the Memorandum of Agreement between the tribe and EPA. Nothing in the agreement shall be construed to limit the exercise of criminal enforcement authority by the tribe under any circumstances where the tribe may possess such authority.

E. Section 49.9 EPA Review of Tribal Clean Air Act Applications

New Process for Determining Eligibility of Tribes for CAA Programs

Many state, local government and industry commenters suggest that the proposed 15-day review period provided by EPA to identify potential disputes regarding a tribal applicant's assertion of reservation boundaries and jurisdiction over non-reservation areas should be extended. Suggested changes to the proposed 15-day review period range from 30 to 120 days. Commenters cite the potential complexity of jurisdictional issues and the amount of time required to respond adequately, especially for non-reservation areas. These commenters also express concern that notice and an opportunity for comment regarding reservation boundaries and tribal jurisdiction over non-reservation areas is being limited to "appropriate governmental entities." Industry commenters suggest that notice and opportunity for comment also be provided to the regulated community, as well as other interested parties (e.g., landowners whose property could potentially fall under tribal jurisdiction). In addition, one industry commenter states that such determinations should be viewed as rulemakings under the Administrative Procedures Act (APA) and, thus, subject to public notice and comment.

Consistent with the TAS process which EPA has historically implemented under the Clean Water

and Safe Drinking Water Acts, the preamble to EPA's proposed rule on tribal CAA programs stated that the CAA TAS process "will provide States with an opportunity to notify EPA of boundary disputes and enable EPA to obtain relevant information as needed[.]" 59 FR at 43963. The proposal also indicated that a principal concern in developing the eligibility process was to streamline the process to eliminate needless delay. *Id.* In proposing to limit the notice and comment provision to "appropriate governmental entities" and the period within which to respond to 15 days with the possibility of a one-time extension of another 15 days, EPA was generally affirming prior "treatment as state" (TAS) practice. EPA notes that neither the Water statutes nor the CAA mandates a specific process regarding TAS determinations, including jurisdiction. Under CAA section 301(d)(2)(B), EPA must evaluate whether a tribe has demonstrated that the air resource activities it seeks to regulate are either within a reservation area, or within a non-reservation area over which the tribe has jurisdiction. In doing so, the Agency has provided for notice and a limited opportunity for input respecting the existence of competing claims over tribes' reservation boundary assertions and assertions of jurisdiction over non-reservation areas to "appropriate governmental entities," which the Agency has defined as states, tribes and other federal entities located contiguous to the tribe applying for eligibility. See generally, 56 FR 64876, 64884 (Dec. 12, 1991). This practice recognizes, in part, that to the extent genuine reservation boundary or non-reservation jurisdictional disputes exist, the assertion of such are an inherently government-to-government process. Nonetheless, EPA seeks to make its notification sufficiently prominent to inform local governmental entities, industry and the general public, and will consider relevant factual information from these sources as well, provided (for the reason given above) they are submitted through the identified "appropriate governmental entities." In making determinations regarding eligibility in the context of the Water Acts, EPA has explained that the part of the process that involves notifying "appropriate governmental entities" and inviting them to review the tribal applicant's jurisdictional assertion is designed to be a fact-finding procedure to assist EPA in making these statutorily-prescribed determinations regarding the tribes' jurisdiction; it is not in any way to be understood as

creating or approving a state or non-tribal oversight role for a statutory decision entrusted to EPA. For these reasons, EPA also disagrees with the industry commenter about the status of these decisions under the APA. Given that there is no particular process specified under EPA governing statutes for TAS eligibility determinations, they are in the nature of informal adjudications for APA purposes. As such, EPA does not believe there is a legal requirement for any additional process than what the Agency already provides. By contrast, EPA decisions regarding tribal authority to implement CAA programs generally are rulemaking actions involving public notice and comment in the *Federal Register*. The approach in the proposed CAA rule was intended to follow the above process, including its imposed limitations (such as a 15-day review period), to ensure that overall eligibility decisions should not be delayed unduly.

In today's rulemaking, EPA recognizes that the potential complexities of reservation boundary and non-reservation jurisdictional issues may require additional review time and is finalizing an initial notice and comment period of 30 days with the option for a one-time extension of 30 days for disputes over non-reservation areas, should the issues identified by the commenters warrant such extension. EPA agrees that in some cases issues regarding tribal jurisdiction over non-reservation areas may be complex and may require more extensive analysis. However, EPA believes that many jurisdictional claims will be non-controversial and will not elicit adverse comments. In these instances, a comment period in excess of 30 days is not warranted. If, however, the tribal claims involve non-reservation areas and require more extensive analysis, an extension to the comment period may be warranted. In all cases, comments from appropriate governmental entities must be offered in a timely manner, and must be limited to the tribe's jurisdictional assertion.

State and industry commenters question the appropriateness of the language in § 49.9 of the regulatory portion of the proposal which states that eligibility decisions regarding a tribe's jurisdiction will be made by EPA Regional Administrators, as it appears to imply that jurisdictional disputes will always be resolvable at the Agency level. EPA continues to believe that the Regional Administrators are the appropriate decision makers for tribal eligibility purposes, including jurisdictional assertions. However, the Agency does agree that the language, as

written, may have been confusing. Consequently, EPA has modified the first sentence of § 49.9(e). As explained previously, EPA has been making eligibility decisions pursuant to the TAS process under other environmental statutes for some time now. The TAS process set forth in this rule, including the process for making tribal jurisdictional determinations, is consistent with the approach followed by EPA in related regulatory contexts. EPA notes again that it believes that many submissions regarding jurisdiction by tribes requesting eligibility determinations will be non-controversial.

This final rule allows tribes to submit simultaneously to EPA a request for an eligibility determination and a request for approval of a CAA program. In such circumstances, EPA will likely announce its decision with respect to eligibility and program approval in the same *Federal Register* notice, for purposes of administrative convenience. However, EPA does not intend this simultaneous decision process of itself to be interpreted as altering the Agency's view (described above) regarding APA applicability with respect to notice and review opportunities provided to appropriate governmental entities with respect to tribal reservation boundary and non-reservation jurisdictional assertions.

F. Section 49.11 Actions Under Section 301(d)(4) Authority

This section addresses the regulatory provisions being added to this rule pursuant to CAA section 301(d)(4). See discussion at Part II.D above.

IV. Miscellaneous

A. Executive Order (EO) 12866

Section 3(f) of EO 12866 defines "significant regulatory action" to mean any regulatory action that is likely to result in a rule that may:

- (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local or tribal governments or communities;
- (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
- (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or
- (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order.

This rule was determined to be a significant regulatory action. A draft of this rule was reviewed by the Office of Management and Budget (OMB) prior to publication because of anticipated public interest in this action including potential interest by Indian tribes and state/local governments.

EPA has placed the following information related to OMB's review of this proposed rule in the public docket referenced at the beginning of this notice:

(1) Materials provided to OMB in conjunction with OMB's review of this rule; and

(2) Materials that identify substantive changes made between the substantive of a draft rule to OMB and this notice, and that identify those changes that were made at the suggestion or recommendation of OMB.

B. Regulatory Flexibility Act (RFA)

Under the RFA, 5 U.S.C. 601-612, EPA must prepare, for rules subject to notice-and-comment rulemaking, initial and final Regulatory Flexibility Analyses describing the impact on small entities. The RFA defines small entities as follows:

- Small businesses. Any business which is independently owned and operated and is not dominant in its field as defined by Small Business Administration regulations under section 3 of the Small Business Act.
- Small governmental jurisdictions. Governments of cities, counties, towns, townships, villages, school districts or special districts, with a population of less than fifty thousand.
- Small organizations. Any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

However, the requirement of preparing such analyses is inapplicable if the Administrator certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. 5 U.S.C. 605(b).

The rule will not have a significant economic impact on a substantial number of small entities. Many Indian tribes may meet the definition of small governmental jurisdiction provided above. However, the rule does not place any mandates on Indian tribes. Rather, it authorizes Indian tribes at their own initiative to demonstrate their eligibility to be treated in the same manner as states under the Clean Air Act, to submit CAA programs for specified provisions and to request federal financial assistance as described elsewhere in this preamble. Further, the

rule calls for the minimum information necessary to effectively evaluate tribal applications for eligibility, CAA program approval and federal financial assistance. Thus, EPA has attempted to minimize the burden for any tribe that chooses to participate in the programs provided in this rule.

The regulation will not have a significant impact on a substantial number of small businesses. Any additional economic impact on the public resulting from implementation of this regulation is expected to be negligible, since tribal regulation of these activities is limited to areas within reservations and non-reservation areas within tribal jurisdiction and, in any event, EPA has regulated or may regulate these activities in the absence of tribal CAA programs.

The regulation will not have a significant impact on a substantial number of small organizations for the same reasons that the regulation will not have a significant impact on a substantial number of small businesses.

Accordingly, I certify that this regulation will not have a significant economic impact on a number of small entities.

C. Executive Order (EO) 12875 and the Unfunded Mandates Reform Act

EO 12875 is intended to reduce the imposition of unfunded mandates upon state, local and tribal governments. To that end, it calls for federal agencies to refrain, to the extent feasible and permitted by law, from promulgating any regulation that is not required by statute and that creates a mandate upon a state, local, or tribal government, unless funds for complying with the mandate are provided by the federal government or the Agency first consults with affected state, local and tribal governments.

The issuance of this rule is required by statute. Section 301(d) of the CAA directs the Administrator to promulgate regulations specifying those provisions of the Act for which it is appropriate to treat Indian tribes as states. Moreover, this rule will not place mandates on Indian tribes. Rather, as discussed in section IV.B above, this rule authorizes or enables tribes to demonstrate their eligibility to be treated in the same manner as states under the Clean Air Act and to submit CAA programs for the provisions specified by the Administrator. Further, the rule also explains how tribes seeking to develop and submit CAA programs to EPA for approval may qualify for federal financial assistance.

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), P.L. 104-

4, signed into law on March 22, 1995, establishes requirements for federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments and the private sector. Under sections 202 and 205 of the UMRA, EPA generally must prepare a written statement of economic and regulatory alternatives analyses for proposed or final rules with federal mandates, as defined by the UMRA, that may result in expenditures to state, local, or tribal governments, in the aggregate, or to the private sector, of \$100 million or more in any one year. The section 202 and 205 requirements do not apply to today's action because it is not a "Federal Mandate" and because it does not impose annual costs of \$100 million or more.

Today's rule contains no federal mandates for state, local or tribal governments or the private sector for two reasons. First, today's action does not impose any enforceable duties on any state, local or tribal governments or the private sector. Second, the Act also generally excludes from the definition of a "federal mandate" duties that arise from participation in a voluntary federal program. As discussed above and in Section IV.B., the rule that is being promulgated today merely authorizes eligible tribes to seek, at their own election, approval from EPA to implement CAA programs for the provisions specified by the Administrator. Moreover, EPA has regulated or may regulate these activities in the absence of Tribal CAA programs.

Even if today's rule did contain a federal mandate, this rule will not result in annual expenditures of \$100 million or more for state, local, and tribal governments, in the aggregate, or the private sector. This rule only addresses CAA authorizations that pertain to tribal governments, not to state or local governments, and calls for tribal governments to submit the minimum information necessary to effectively evaluate applications for eligibility and CAA program approval. The rule also explains how tribes seeking to develop and submit CAA programs for approval may qualify for federal financial assistance and, thus, minimize any economic burden. Finally, any economic impact on the public resulting from implementation of this regulation is expected to be negligible, since tribal regulation of CAA activities is limited to reservation areas and non-reservation areas over which a tribe can demonstrate jurisdiction.

Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments,

including tribal governments, section 203 of the UMRA requires EPA to develop a plan for informing and advising any small government. EPA consulted with tribal governments periodically throughout the development of the proposed rule, and met directly with tribal representatives at three major outreach meetings. Since issuance of the proposed rule, EPA also received extensive comments from, and has been in communication with, tribal governments regarding all aspects of this rule. The Agency is also committed to providing ongoing assistance to tribal governments seeking to develop and submit CAA programs for approval.

D. Paperwork Reduction Act

OMB has approved the information collection requirements pertaining to grants applications contained in this rule under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501, *et seq.* and has assigned OMB control number 2030-0020.

This collection of information pertaining to the grants application process has an estimated reporting burden averaging 29 hours per response and an estimated annual record keeping burden averaging 3 hours per respondent. These estimates include time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

The Office of Management and Budget has also approved the information collection requirements pertaining to an Indian tribe's application for eligibility to be treated in the same manner as a state or "treatment as state" as provided by this rule under the *Paperwork Reduction Act*, 44 U.S.C. 3501, *et seq.* and has assigned OMB control number 2060-0306. This rule provides that each tribe voluntarily choosing to apply for eligibility is to meet eligibility by demonstrating it: (1) Is a federally recognized tribe; (2) has a governing body carrying out substantial governmental duties and powers; and (3) is reasonably expected to be capable of carrying out the program for which it is seeking approval in a manner consistent with the CAA and applicable regulations. If a tribe is asserting jurisdiction over non-reservation areas, it must demonstrate that the legal and factual basis for its jurisdiction is consistent with applicable principles of federal Indian law.

This collection of information for treatment in the same manner as states to carry out the Clean Air Act has an estimated reporting burden of 20 annual responses, averaging 40 hours per

response and an estimated annual record keeping burden averaging 800 hours. These estimates include time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations are listed in 40 CFR Part 9 and 48 CFR Chapter 15. EPA is amending the table in 40 CFR Part 9 of currently approved ICR control numbers issued by OMB for various regulations to list the information requirements contained in this final rule.

E. Submission to Congress and the General Accounting Office

Under 5 U.S.C. 801(a)(1)(A) as added by the Small Business Regulatory Enforcement Fairness Act of 1996, EPA submitted a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives and the Comptroller General of the General Accounting Office prior to publication of the rule in today's *Federal Register*. This rule is not a "major rule" as defined by 5 U.S.C. 804(2).

List of Subjects

40 CFR Part 9

Environmental protection, Reporting and recordkeeping requirements.

40 CFR Part 35

Environmental protection, Air pollution control, Coastal zone, Grant programs—environmental protection, Grant programs—Indians, Hazardous waste, Indians, Intergovernmental relations, Pesticides and pests,

Reporting and recordkeeping requirements, Superfund, Waste treatment and disposal, Water pollution control, Water supply.

40 CFR Part 49

Environmental protection, Air pollution control, Administrative practice and procedure, Indians, Intergovernmental relations, Reporting and recordkeeping requirements.

40 CFR Part 50

Air pollution control, Carbon monoxide, Lead, Nitrogen dioxide, Ozone, Particulate matter, Sulfur oxides.

40 CFR Part 81

Environmental protection, Air pollution control, National parks, Wilderness areas.

Dated: February 3, 1998.

Carol M. Browner,
Administrator.

For the reasons set out in the Preamble, title 40, chapter I of the Code of Federal Regulations is amended as set forth below:

PART 9—OMB APPROVALS UNDER THE PAPERWORK REDUCTION ACT

1. The authority citation for part 9 continues to read as follows:

Authority: 7 U.S.C. 135 *et seq.*, 136-136y; 15 U.S.C. 2001, 2003, 2005, 2006, 2601-2671; 21 U.S.C. 331j, 346a, 348; 31 U.S.C. 9701; 33 U.S.C. 1251 *et seq.*, 1311, 1313d, 1314, 1318, 1321, 1326, 1330, 1342, 1344, 1345 (d) and (e), 1361; E.O. 11735, 38 FR 21243, 3 CFR, 1971-1975 Comp., p. 973; 42 U.S.C. 241, 242b, 243, 246, 300f, 300g, 300g-1, 300g-2, 300g-3, 300g-4, 300g-5, 300g-6, 300j-1, 300j-2, 300j-3, 300j-4, 300j-9, 1857 *et seq.*, 6901-6992k, 7401-7671g, 7542, 9601-9657, 11023, 11048.

2. In § 9.1 the table is amended by adding a heading and entries in numerical order to read as follows:

§ 9.1 OMB approvals under the Paperwork Reduction Act.

40 CFR citation	OMB control No.
Indian Tribes:	
Air Quality Planning and Management	
49.6	2060-0306
49.7	2060-0306

PART 35—STATE AND LOCAL ASSISTANCE

3. The authority cite for part 35, subpart a, continues to read as follows:

Authority: Secs. 105 and 301(a) of the Clean Air Act, as amended (42 U.S.C. 7405 and 7601(a)); Secs. 106, 205(g), 205(j), 208, 319, 501(a), and 518 of the Clean Water Act, as amended (33 U.S.C. 1256, 1285(g), 1285(j), 1288, 1361(a) and 1377); secs. 1443, 1450, and 1451 of the Safe Drinking Water Act (42 U.S.C. 300j-2, 300j-9 and 300j-11); secs. 2002(a) and 3011 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976 (42 U.S.C. 6912(a), 6931, 6947, and 6949); and secs. 4, 23, and 25(a) of the Federal Insecticide, Fungicide and Rodenticide Act, as amended (7 U.S.C. 136(b), 136(u) and 136w(a)).

4. Section 35.105 is amended by revising the definitions for "Eligible Indian Tribe," "Federal Indian Reservation," and the first definition for "Indian Tribe," and by removing the second definition for "Indian Tribe" to read as follows:

§ 35.105 Definitions.

Eligible Indian Tribe means:

(1) For purposes of the Clean Water Act, any federally recognized Indian Tribe that meets the requirements set forth at 40 CFR 130.6(d); and

(2) For purposes of the Clean Air Act, any federally recognized Indian Tribe that meets the requirements set forth at § 35.220.

Federal Indian Reservation means for purposes of the Clean Water Act or the Clean Air Act, all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation.

Indian Tribe means:

(1) Within the context of the Public Water System Supervision and Underground Water Source Protection grants, any Indian Tribe having a federally recognized governing body carrying out substantial governmental duties and powers over a defined area.

(2) For purposes of the Clean Water Act, any Indian Tribe, band, group, or community recognized by the Secretary of the Interior and exercising governmental authority over a federal Indian reservation.

(3) For purposes of the Clean Air Act, any Indian Tribe, band, nation, or other organized group or community, including any Alaskan Native Village, which is federally recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

5. Section 35.205 is amended by adding new paragraphs (c), (d), and (e) to read as follows:

§ 35.205 Maximum Federal share.

* * * * *

(c) For Indian Tribes establishing eligibility pursuant to § 35.220(a), the Regional Administrator may provide financial assistance in an amount up to 95 percent of the approved costs of planning, developing, establishing, or improving an air pollution control program, and up to 95 percent of the approved costs of maintaining that program. After two years from the date of each Tribe's initial grant award, the Regional Administrator will reduce the maximum federal share to 90 percent, as long as the Regional Administrator determines that the Tribe meets certain economic indicators that would provide an objective assessment of the Tribe's ability to increase its share. The EPA will examine the experience of this program and other relevant information to determine appropriate long-term cost share rates within five years of February 12, 1998. For Indian Tribes establishing eligibility pursuant to § 35.220(a), the Regional Administrator may increase the maximum federal share if the Tribe can demonstrate in writing to the satisfaction of the Regional Administrator that fiscal circumstances within the Tribe are constrained to such an extent that fulfilling the match would impose undue hardship. This waiver provision is designed to be very rarely used.

(d) The Regional Administrator may provide financial assistance in an amount up to 95 percent of the approved costs of planning, developing, establishing, or approving an air pollution control program and up to 95 percent of the approved costs of maintaining that program to an intertribal agency of two or more Tribes that have established eligibility pursuant to § 35.220(a), which has substantial responsibility for carrying out an applicable implementation plan under section 110 of the Clean Air Act, when such intertribal agency is authorized by the governing bodies of those Tribes to apply for and receive financial assistance. After two years from the date of each intertribal agency's initial grant award, the Regional Administrator will reduce the maximum federal share to 90 percent, as long as the Regional Administrator determines that the tribal members of the intertribal agency meet certain economic indicators that would provide an objective assessment of the Tribes' ability to increase the non-federal share. For intertribal agencies made up of Indian Tribes establishing eligibility pursuant to § 35.220(a), which have substantial responsibility for carrying

out an applicable implementation plan under section 110 of the Clean Air Act, the Regional Administrator may increase the maximum federal share if the intertribal agency can demonstrate in writing to the satisfaction of the Regional Administrator that fiscal circumstances within the member Tribes are constrained to such an extent that fulfilling the match would impose undue hardship. This waiver provision is designed to be very rarely used.

(e) The Regional Administrator may provide financial assistance in an amount up to 60 percent of the approved costs of planning, developing, establishing, or improving an air pollution control program, and up to sixty percent of the approved costs of maintaining that program to Tribes that have not made a demonstration that they are eligible for treatment in the same manner as a state under 40 CFR 49.6, but are eligible for financial assistance under § 35.220(b).

6. Section 35.210 is amended by adding paragraph (c) to read as follows:

§ 35.210 Maintenance of effort.

* * * * *

(c) The requirements of paragraphs (a) and (b) of this section shall not apply to Indian Tribes that have established eligibility pursuant to § 35.220(a) and intertribal agencies made up of such Tribes.

7. Section 35.215 is revised to read as follows:

§ 35.215 Limitations.

(a) The Regional Administrator will not award section 105 funds to an interstate, intertribal or intermunicipal agency which does not provide assurance that it can develop a comprehensive plan for the air quality control region which includes representation of appropriate state, interstate, tribal, local, and international interests.

(b) The Regional Administrator will not award section 105 funds to a local, interstate, intermunicipal, or intertribal agency without consulting with the appropriate official designated by the Governor or Governors of the state or states affected or the appropriate official of any affected Indian Tribe or Tribes.

(c) The Regional Administrator will not disapprove an application for or terminate or annul an award of section 105 funds without prior notice and opportunity for a public hearing in the affected state or area within tribal jurisdiction or in one of the affected states or areas within tribal jurisdiction if several are affected.

8. Section 35.220 is added just before the center heading "Water Pollution

Control (section 106)" to read as follows:

§ 35.220 Eligible Indian Tribes.

The Regional Administrator may make Clean Air Act section 105 grants to Indian Tribes establishing eligibility under paragraph (a) of this section, without requiring the same cost share that would be required if such grants were made to states. Instead grants to eligible Tribes will include a tribal cost share of five percent for two years from the date of each Tribe's initial grant award. After two years, the Regional Administrator will increase the tribal cost share to ten percent, as long as the Regional Administrator determines that the Tribe meets certain economic indicators that would provide an objective assessment of the Tribe's ability to increase its cost share. Notwithstanding the above, the Regional Administrator may reduce the required cost share of grants to Tribes that establish eligibility under paragraph (a) of this section if the Tribe can demonstrate in writing to the satisfaction of the Regional Administrator that fiscal circumstances within the Tribe are constrained to such an extent that fulfilling the match would impose undue hardship. This waiver provision is designed to be very rarely used.

(a) An Indian Tribe is eligible to receive financial assistance if it has demonstrated eligibility to be treated in the same manner as a state under 40 CFR 49.6.

(b) An Indian Tribe that has not made a demonstration under 40 CFR 49.6 is eligible for financial assistance under 42 U.S.C. 7405 and 7602(b)(5).

(c) The Administrator shall process a tribal application for financial assistance under this section in a timely manner.

9. Part 49 is added to read as follows:

PART 49—TRIBAL CLEAN AIR ACT AUTHORITY

Sec.

- 49.1 Program overview.
- 49.2 Definitions.
- 49.3 General Tribal Clean Air Act authority.
- 49.4 Clean Air Act provisions for which it is not appropriate to treat tribes in the same manner as states.
- 49.5 Tribal requests for additional Clean Air Act provisions for which it is not appropriate to treat tribes in the same manner as states.
- 49.6 Tribal eligibility requirements.
- 49.7 Request by an Indian tribe for eligibility determination and Clean Air Act program approval.
- 49.8 Provisions for tribal criminal enforcement authority.

49.9 EPA review of tribal Clean Air Act applications.

49.10 EPA review of state Clean Air Act programs.

49.11 Actions under section 301(d)(4) authority.

Authority: 42 U.S.C. 7401, *et seq.*

§ 49.1 Program overview.

(a) The regulations in this part identify those provisions of the Clean Air Act (Act) for which Indian tribes are or may be treated in the same manner as states. In general, these regulations authorize eligible tribes to have the same rights and responsibilities as states under the Clean Air Act and authorize EPA approval of tribal air quality programs meeting the applicable minimum requirements of the Act.

(b) Nothing in this part shall prevent an Indian tribe from establishing additional or more stringent air quality protection requirements not inconsistent with the Act.

§ 49.2 Definitions.

(a) *Clean Air Act* or *Act* means those statutory provisions in the United States Code at 42 U.S.C. 7401, *et seq.*

(b) *Federal Indian Reservation, Indian Reservation* or *Reservation* means all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation.

(c) *Indian tribe* or *tribe* means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village, which is federally recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(d) *Indian Tribe Consortium* or *Tribal Consortium* means a group of two or more Indian tribes.

(e) *State* means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and American Samoa and includes the Commonwealth of the Northern Mariana Islands.

§ 49.3 General Tribal Clean Air Act authority.

Tribes meeting the eligibility criteria of § 49.6 shall be treated in the same manner as states with respect to all provisions of the Clean Air Act and implementing regulations, except for those provisions identified in § 49.4 and the regulations that implement those provisions.

§ 49.4 Clean Air Act provisions for which it is not appropriate to treat tribes in the same manner as states.

Tribes will not be treated as states with respect to the following provisions of the Clean Air Act and any implementing regulations thereunder:

(a) Specific plan submittal and implementation deadlines for NAAQS-related requirements, including but not limited to such deadlines in sections 110(a)(1), 172(a)(2), 182, 187, 189, and 191 of the Act.

(b) The specific deadlines associated with the review and revision of implementation plans related to major fuel burning sources in section 124 of the Act.

(c) The mandatory imposition of sanctions under section 179 of the Act because of a failure to submit an implementation plan or required plan element by a specific deadline, or the submittal of an incomplete or disapproved plan or element.

(d) The provisions of section 110(c)(1) of the Act.

(e) Specific visibility implementation plan submittal deadlines established under section 169A of the Act.

(f) Specific implementation plan submittal deadlines related to interstate commissions under sections 169B(c)(2), 184(b)(1) & (c)(5) of the Act. For eligible tribes participating as members of such commissions, the Administrator shall establish those submittal deadlines that are determined to be practicable or, as with other non-participating tribes in an affected transport region, provide for federal implementation of necessary measures.

(g) Any provisions of the Act requiring as a condition of program approval the demonstration of criminal enforcement authority or any provisions of the Act providing for the delegation of such criminal enforcement authority. Tribes seeking approval of a Clean Air Act program requiring such demonstration may receive program approval if they meet the requirements of § 49.8.

(h) The specific deadline for the submittal of operating permit programs in section 502(d)(1) of the Act.

(i) The mandatory imposition of sanctions under section 502(d)(2)(B) because of failure to submit an operating permit program or EPA disapproval of an operating permit program submittal in whole or part.

(j) The "2 years after the date required for submission of such a program under paragraph (1)" provision in section 502(d)(3) of the Act.

(k) Section 502(g) of the Act, which authorizes a limited interim approval of an operating permit program that

substantially meets the requirements of Title V, but is not fully approvable.

(l) The provisions of section 503(c) of the Act that direct permitting authorities to establish a phased schedule assuring that at least one-third of the permit applications submitted within the first full year after the effective date of an operating permit program (or a partial or interim program) will be acted on by the permitting authority over a period not to exceed three years after the effective date.

(m) The provisions of section 507(a) of the Act that specify a deadline for the submittal of plans for establishing a small business stationary source technical and environmental compliance assistance program.

(n) The provisions of section 507(e) of the Act that direct the establishment of a Compliance Advisory Panel.

(o) The provisions of section 304 of the Act that, read together with section 302(e) of the Act, authorize any person who provides the minimum required advance notice to bring certain civil actions in the federal district courts against states in their capacity as states.

(p) The provisions of section 502(b)(6) of the Act that require that review of a final permit action under the Title V permitting program be "judicial" and "in State court," and the provisions of section 502(b)(7) of the Act that require that review of a failure on the part of the permitting authority to act on permit applications or renewals by the time periods specified in section 503 of the Act be "judicial" and "in State court."

(q) The provision of section 105(a)(1) that limits the maximum federal share for grants to pollution control agencies to three-fifths of the cost of implementing programs for the prevention and control of air pollution or implementation of national primary and secondary ambient air quality standards.

§ 49.5 Tribal requests for additional Clean Air Act provisions for which it is not appropriate to treat tribes in the same manner as states.

Any tribe may request that the Administrator specify additional provisions of the Clean Air Act for which it would be inappropriate to treat tribes in general in the same manner as states. Such request should clearly identify the provisions at issue and should be accompanied with a statement explaining why it is inappropriate to treat tribes in the same manner as states with respect to such provisions.

§ 49.6 Tribal eligibility requirements.

Sections 301(d)(2) and 302(r), 42 U.S.C. 7601(d)(2) and 7602(r), authorize

the Administrator to treat an Indian tribe in the same manner as a state for the Clean Air Act provisions identified in § 49.3 if the Indian tribe meets the following criteria:

(a) The applicant is an Indian tribe recognized by the Secretary of the Interior;

(b) The Indian tribe has a governing body carrying out substantial governmental duties and functions;

(c) The functions to be exercised by the Indian tribe pertain to the management and protection of air resources within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction; and

(d) The Indian tribe is reasonably expected to be capable, in the EPA Regional Administrator's judgment, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of the Clean Air Act and all applicable regulations.

§ 49.7 Request by an Indian tribe for eligibility determination and Clean Air Act program approval.

(a) An Indian tribe may apply to the EPA Regional Administrator for a determination that it meets the eligibility requirements of § 49.6 for Clean Air Act program approval. The application shall concisely describe how the Indian tribe will meet each of the requirements of § 49.6 and should include the following information:

(1) A statement that the applicant is an Indian tribe recognized by the Secretary of the Interior.

(2) A descriptive statement demonstrating that the applicant is currently carrying out substantial governmental duties and powers over a defined area. This statement should:

(i) Describe the form of the tribal government;

(ii) Describe the types of government functions currently performed by the tribal governing body such as, but not limited to, the exercise of police powers affecting (or relating to) the health, safety, and welfare of the affected population; taxation; and the exercise of the power of eminent domain; and

(iii) Identify the source of the tribal government's authority to carry out the governmental functions currently being performed.

(3) A descriptive statement of the Indian tribe's authority to regulate air quality. For applications covering areas within the exterior boundaries of the applicant's reservation the statement must identify with clarity and precision the exterior boundaries of the reservation including, for example, a map and a legal description of the area. For tribal applications covering areas

outside the boundaries of a reservation the statement should include:

(i) A map or legal description of the area over which the application asserts authority; and

(ii) A statement by the applicant's legal counsel (or equivalent official) that describes the basis for the tribe's assertion of authority (including the nature or subject matter of the asserted regulatory authority) which may include a copy of documents such as tribal constitutions, by-laws, charters, executive orders, codes, ordinances, and/or resolutions that support the tribe's assertion of authority.

(4) A narrative statement describing the capability of the applicant to administer effectively any Clean Air Act program for which the tribe is seeking approval. The narrative statement must demonstrate the applicant's capability consistent with the applicable provisions of the Clean Air Act and implementing regulations and, if requested by the Regional Administrator, may include:

(i) A description of the Indian tribe's previous management experience which may include the administration of programs and services authorized by the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450, *et seq.*), the Indian Mineral Development Act (25 U.S.C. 2101, *et seq.*), or the Indian Sanitation Facility Construction Activity Act (42 U.S.C. 2004a);

(ii) A list of existing environmental or public health programs administered by the tribal governing body and a copy of related tribal laws, policies, and regulations;

(iii) A description of the entity (or entities) that exercise the executive, legislative, and judicial functions of the tribal government;

(iv) A description of the existing, or proposed, agency of the Indian tribe that will assume primary responsibility for administering a Clean Air Act program (including a description of the relationship between the existing or proposed agency and its regulated entities);

(v) A description of the technical and administrative capabilities of the staff to administer and manage an effective air quality program or a plan which proposes how the tribe will acquire administrative and technical expertise. The plan should address how the tribe will obtain the funds to acquire the administrative and technical expertise.

(5) A tribe that is a member of a tribal consortium may rely on the expertise and resources of the consortium in demonstrating under paragraph (a)(4) of this section that the tribe is reasonably

expected to be capable of carrying out the functions to be exercised consistent with § 49.6(d). A tribe relying on a consortium in this manner must provide reasonable assurances that the tribe has responsibility for carrying out necessary functions in the event the consortium fails to.

(6) Where applicable Clean Air Act or implementing regulatory requirements mandate criminal enforcement authority, an application submitted by an Indian tribe may be approved if it meets the requirements of § 49.8.

(7) Additional information required by the EPA Regional Administrator which, in the judgment of the EPA Regional Administrator, is necessary to support an application.

(8) Where the applicant has previously received authorization for a Clean Air Act program or for any other EPA-administered program, the applicant need only identify the prior authorization and provide the required information which has not been submitted in the previous application.

(b) A tribe may simultaneously submit a request for an eligibility determination and a request for approval of a Clean Air Act program.

(c) A request for Clean Air Act program approval must meet any applicable Clean Air Act statutory and regulatory requirements. A program approval request may be comprised of only partial elements of a Clean Air Act program, provided that any such elements are reasonably severable, that is, not integrally related to program elements that are not included in the plan submittal, and are consistent with applicable statutory and regulatory requirements.

§ 49.8 Provisions for tribal criminal enforcement authority.

To the extent that an Indian tribe is precluded from asserting criminal enforcement authority, the federal government will exercise primary criminal enforcement responsibility. The tribe, with the EPA Region, shall develop a procedure by which the tribe will provide potential investigative leads to EPA and/or other appropriate federal agencies, as agreed to by the parties, in an appropriate and timely manner. This procedure shall encompass all circumstances in which the tribe is incapable of exercising applicable enforcement requirements as provided in § 49.7(a)(6). This agreement shall be incorporated into a Memorandum of Agreement with the EPA Region.

§ 49.9 EPA review of tribal Clean Air Act applications.

(a) The EPA Regional Administrator shall process a request of an Indian tribe submitted under § 49.7 in a timely manner. The EPA Regional Administrator shall promptly notify the Indian tribe of receipt of the application.

(b) Within 30 days of receipt of an Indian tribe's initial, complete application, the EPA Regional Administrator shall notify all appropriate governmental entities.

(1) For tribal applications addressing air resources within the exterior boundaries of the reservation, EPA's notification of other governmental entities shall specify the geographic boundaries of the reservation.

(2) For tribal applications addressing non-reservation areas, EPA's notification of other governmental entities shall include the substance and bases of the tribe's jurisdictional assertions.

(c) The governmental entities shall have 30 days to provide written comments to EPA's Regional Administrator regarding any dispute concerning the boundary of the reservation. Where a tribe has asserted jurisdiction over non-reservation areas, appropriate governmental entities may request a single 30-day extension to the general 30-day comment period.

(d) In all cases, comments must be timely, limited to the scope of the tribe's jurisdictional assertion, and clearly explain the substance, bases, and extent of any objections. If a tribe's assertion is subject to a conflicting claim, the EPA Regional Administrator may request additional information from the tribe and may consult with the Department of the Interior.

(e) The EPA Regional Administrator shall decide the jurisdictional scope of the tribe's program. If a conflicting claim cannot be promptly resolved, the EPA Regional Administrator may approve that portion of an application addressing all undisputed areas.

(f) A determination by the EPA Regional Administrator concerning the boundaries of a reservation or tribal jurisdiction over non-reservation areas shall apply to all future Clean Air Act applications from that tribe or tribal consortium and no further notice to governmental entities, as described in paragraph (b) of this section, shall be provided, unless the application presents different jurisdictional issues or significant new factual or legal information relevant to jurisdiction to the EPA Regional Administrator.

(g) If the EPA Regional Administrator determines that a tribe meets the requirements of § 49.6 for purposes of a

Clean Air Act provision, the Indian tribe is eligible to be treated in the same manner as a state with respect to that provision, to the extent that the provision is identified in § 49.3. The eligibility will extend to all areas within the exterior boundaries of the tribe's reservation, as determined by the EPA Regional Administrator, and any other areas the EPA Regional Administrator has determined to be within the tribe's jurisdiction.

(h) Consistent with the exceptions listed in § 49.4, a tribal application containing a Clean Air Act program submittal will be reviewed by EPA in accordance with applicable statutory and regulatory criteria in a manner similar to the way EPA would review a similar state submittal.

(i) The EPA Regional Administrator shall return an incomplete or disapproved application to the tribe with a summary of the deficiencies.

§ 49.10 EPA review of state Clean Air Act programs.

A state Clean Air Act program submittal shall not be disapproved because of failure to address air resources within the exterior boundaries of an Indian Reservation or other areas within the jurisdiction of an Indian tribe.

§ 49.11 Actions under section 301(d)(4) authority.

Notwithstanding any determination made on the basis of authorities granted the Administrator under any other provision of this section, the Administrator, pursuant to the discretionary authority explicitly granted to the Administrator under sections 301(a) and 301(d)(4):

(a) Shall promulgate without unreasonable delay such federal implementation plan provisions as are necessary or appropriate to protect air quality, consistent with the provisions of sections 304(a) and 301(d)(4), if a tribe does not submit a tribal implementation plan meeting the completeness criteria of 40 CFR part 51, Appendix V, or does not receive EPA approval of a submitted tribal implementation plan.

(b) May provide up to 95 percent of the cost of implementing programs for the prevention and control of air pollution or implementation of national primary and secondary ambient air quality standards. After two years from the date of each tribe's initial grant award, the maximum federal share will be reduced to 90 percent, as long as the Regional Administrator determines that the tribe meets certain economic indicators that would provide an

objective assessment of the tribe's ability to increase its share. The Regional Administrator may increase the maximum federal share to 100 percent if the tribe can demonstrate in writing to the satisfaction of the Regional Administrator that fiscal circumstances within the tribe are constrained to such an extent that fulfilling the match would impose undue hardship.

PART 50—NATIONAL PRIMARY AND SECONDARY AMBIENT AIR QUALITY STANDARDS

10. The authority citation for part 50 is revised to read as follows:

Authority: 42 U.S.C. 7401, *et seq.*

11. Section 50.1 is amended by adding paragraph (i) to read as follows:

§ 50.1 Definitions.

* * * * *

(i) *Indian country* is as defined in 18 U.S.C. 1151.

12. Section 50.2 is amended by revising paragraphs (c) and (d) to read as follows:

§ 50.2 Scope.

* * * * *

(c) The promulgation of national primary and secondary ambient air quality standards shall not be considered in any manner to allow significant deterioration of existing air

quality in any portion of any state or Indian country.

(d) The proposal, promulgation, or revision of national primary and secondary ambient air quality standards shall not prohibit any state or Indian tribe from establishing ambient air quality standards for that state or area under a tribal CAA program or any portion thereof which are more stringent than the national standards.

* * * * *

PART 81—DESIGNATION OF AREAS FOR AIR QUALITY PLANNING PURPOSES

13. The authority citation for part 81 is revised to read as follows:

Authority: 42 U.S.C. 7401, *et seq.*

14. Section 81.1 is amended by revising paragraph (a) and adding new paragraphs (c), (d) and (e) to read as follows:

§ 81.1 Definitions.

* * * * *

(a) *Act* means the Clean Air Act as amended (42 U.S.C. 7401, *et seq.*).

* * * * *

(c) *Federal Indian Reservation, Indian Reservation or Reservation* means all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any

patent, and including rights-of-way running through the reservation.

(d) *Indian tribe or tribe* means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village, which is federally recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(e) *State* means a state, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and American Samoa and includes the Commonwealth of the Northern Mariana Islands.

Subpart C—Section 107 Attainment Status Designations

15. The authority citation for subpart C, part 81 is revised to read as follows:

Authority: 42 U.S.C. 7401, *et seq.*

§ 81.300 [Amended]

16. Section 81.300(a) is amended by revising the third sentence to read "A state, an Indian tribe determined eligible for such functions under 40 CFR part 49, and EPA can initiate changes to these designations, but any proposed state or tribal redesignation must be submitted to EPA for concurrence."

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