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Environmental Protection Agency

40 CFR Parts 239 and 258

State/Tribal Permit Program Adequacy Determination: Municipal Solid Waste Facilities; Proposed Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 239 and 258

[FRL–5400–5/EPA/530–Z–95–010]

RIN 2050–AD03

Subtitle D Regulated Facilities; State/Tribal Permit Program Determination of Adequacy; State/Tribal Implementation Rule (STIR)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: This proposed rule is designed to guide States and Indian Tribes in developing, implementing, and revising programs to issue and enforce permits for facilities which landfill discarded materials known as "municipal solid waste (MSW)".

On October 9, 1991, the Environmental Protection Agency (EPA) published the "Solid Waste Disposal Facility Criteria," a set of standards prescribing how MSW landfills are to be constructed and operated. States are to adopt and implement permit programs to ensure that MSW landfills comply with these standards. EPA is to review the State permit programs and determine whether they are adequate.

The STIR establishes criteria and procedures which EPA will use to determine whether the State permit programs are adequate to ensure compliance with the Solid Waste Disposal Facility Criteria. While the Disposal Facility Criteria automatically apply to all MSW landfills, States with permit programs deemed adequate have the authority to provide some flexibility to landfill owners and operators in meeting the criteria. To date, using the draft STIR as guidance, EPA has approved more than 40 state permit programs. This proposal is designed to minimize disruption of existing state/Tribal programs. Eventual promulgation of a final STIR is not expected to disrupt approved programs, and will provide a flexible framework for future program modifications.

The Resource Conservation and Recovery Act (RCRA) is the legal basis for the proposed STIR. RCRA requires States to adopt and implement permit programs to ensure compliance with the Federal Disposal Facility Criteria and requires EPA to determine the adequacy of the State permit programs. So that management of MSW is equally protective on Indian lands, the STIR also gives Indian Tribes the right to apply for EPA approval of their landfill permit programs.

DATES: Comments on this proposed rule must be submitted on or before April 25, 1996.

ADDRESSES: Commentors must send an original and two copies of their comments to: Docket Clerk, mailcode: 5305w, Docket No. F–96–STIP–FFFFF, U.S. Environmental Protection Agency Headquarters, 401 M Street SW.; Washington, D.C. 20460. Comments should include the docket number F–96–STIP–FFFFF. The public docket is located at Crystal Gateway, North #1, 1235 Jefferson Davis Highway, First Floor, Arlington , VA and is available for viewing from 9 a.m. to 4 p.m., Monday through Friday, excluding Federal holidays. Appointments may be made by calling (703) 603–9230. Copies cost $0.15/page. Charges under $25.00 are waived.

FOR FURTHER INFORMATION CONTACT: For general information contact the RCRA Hotline, Office of Solid Waste, U.S. Environmental Protection Agency Headquarters, 401 M Street SW.; Washington, D.C. 20460, (800) 424–9346; TDD (800) 553–7672 (hearing impaired); in Washington, D.C. metropolitan area the number is (703) 412–9810, TDD (703) 486–3323.

For more detailed information contact Mia Zmud, Office of Solid Waste (mailcode 5306W), U.S. Environmental Protection Agency Headquarters, 401 M Street SW., Washington, D.C. 20460; (703) 308–7263.

SUPPLEMENTARY INFORMATION: Copies of the following document are available from the Docket Clerk, mailcode 5305, U.S. Environmental Protection Agency Headquarters, 401 M Street SW.; Washington, D.C. 20460, (202) 475–9327.

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I. Authority

EPA is proposing these regulations under the authority of sections 2002(a)(1) and 4005(c) of the Resource Conservation and Recovery Act of 1976, as amended by HSWA (RCRA or the Act). Section 4005(c)(1)(B) requires each State to develop and implement a permit program to ensure that facilities that may receive hazardous household waste or hazardous waste from conditionally exempt small quantity generators are in compliance with the Subtitle D Federal revised criteria promulgated under section 4010(c). Section 4005(c)(1)(C) further directs EPA to determine whether State permit programs are adequate to ensure compliance with the Subtitle D Federal revised criteria. Section 2002(a)(1) of RCRA authorizes EPA to promulgate regulations necessary to carry out its functions under the Act.

II. Background

A. Approach

The regulation of solid waste management historically has been a State and local concern. EPA fully intends that States/Tribes will maintain the lead role in implementing the Subtitle D Federal revised criteria as promulgated. This proposal is consistent with general EPA policy that places primary responsibility for coordinating and implementing many environmental protection programs with the States/Tribes. While a State/Tribe may simply adopt the Federal standards, they also may choose to take advantage of the significant flexibility designed into today's proposal.

Following are three illustrations of how today's proposal is designed to cause a minimum disruption of existing State/Tribal permit programs.

First, EPA's goal is for States/Tribes to apply for and receive approval of their Subtitle D permit programs. Today's proposal reflects this policy by requiring elements of basic authority, rather than prescriptive programmatic elements. This approach establishes a framework that allows States/Tribes flexibility in the structure of their individual permit programs, while requiring that States/Tribes have the necessary authority to ensure that Subtitle D facilities comply with the Federal revised criteria. Further, today's proposal does not define how a State/Tribe must implement the basic elements required in the Federal revised criteria for Subtitle D facilities and today's proposal. States/Tribes may use their

own design standards (e.g., develop an alternative liner design), performance standards (e.g., specify a performance standard for a liner design such as setting the maximum allowable contaminant level at a relevant point of compliance), or a combination of these two approaches.

Second, in assessing the States'/Tribes' authorities, EPA generally will defer to the State/Tribal certifications of legal authority and not "second guess" the applicants. However, if EPA receives information indicating that the applicant's legal certification is inaccurate, EPA reserves the right to conduct its own review of the applicant's legal certification and authorities.

Third, a State's/Tribe's guidance documents may be used to supplement laws and regulations if the State's/Tribe's legal certification demonstrates that the guidance can be used to develop enforceable permits which will ensure compliance with the Subtitle D Federal revised criteria. Thus, in some cases, the specific technical requirements of the Subtitle D Federal revised criteria need not be contained in State/Tribal law or regulations. By allowing the States/Tribes to use guidance in the development of enforceable permits where allowed by State/Tribal law, today's proposal mitigates the problem of States/Tribes unnecessarily having to restructure their existing laws/regulations.

B. Part 258 Revised Criteria

On October 9, 1991, EPA promulgated the Subtitle D Federal revised criteria for MSWLFs (40 CFR Parts 257 and 258 Solid Waste Disposal Facility Criteria; Final Rule). These Federal revised criteria establish minimum Federal standards to ensure that MSWLFs are designed and managed in a manner that is protective of human health and the environment. The Part 258 Federal revised criteria include location restrictions and standards for design, operation, ground-water monitoring, corrective action, financial assurance, and closure/post-closure care of MSWLFs.

The 40 CFR Part 258 Federal revised criteria are self-implementing on their effective date for all MSWLFs within the jurisdiction of the United States. Every standard in 40 CFR Part 258 is designed to be implemented by the owner or operator with or without oversight or participation by a regulatory agency (i.e., through a permit program). RCRA Section 4005(c)(2)(A) authorizes EPA to enforce 40 CFR Part 258 in those cases where the Agency has determined the State/Tribal permit program to be inadequate. RCRA Section 7002 also authorizes citizen suits to ensure compliance with the Federal revised criteria.[1]

The Federal revised criteria for MSWLFs recognize the regulatory value of the permitting system which provides a mechanism for States/Tribes to interact with the public and with owners/operators on site-specific issues before and after permit issuance. Within the bounds established by authorizing statutes and regulations, permitting agencies are able to interact with facility owners/operators, provide opportunity for public review and input and, at the discretion of the State/Tribe, tailor protective permit conditions and requirements to facility-specific characteristics. Once EPA has determined that State/Tribal permit programs are adequate to ensure compliance with 40 CFR Part 258, the Part 258 Federal revised criteria provide approved States/Tribes the option of allowing MSWLF owners/operators flexibility in meeting the requirements of Part 258.

The Part 258 MSWLF regulations thus provide approved States/Tribes the option of making site-specific determinations regarding MSWLF design and other requirements of Part 258 under specific conditions. For example, approved States/Tribes that adopt the Federal performance standard may allow any final cover design if the owner/operator demonstrates that the design meets the performance standard of 40 CFR Part 258. Another example of such broad flexibility is the option to approve an alternative liner design instead of the prescribed composite design specified in § 258.40(a)(2), as long as the alternative design meets the performance standard described in § 258.40(a)(1).

In addition, the flexibility afforded to an approved State/Tribe allows the application of an alternative liner design on a State/Tribal-wide basis, so long as that design meets the performance standard in all locations throughout the State/Tribe. This demonstration, by necessity, would require the use of fate and transport modeling to demonstrate that the alternative design could meet the performance standard in "worst-case" scenarios. Where there is no approved permit program, there is no mechanism by which a regulatory agency can exercise flexibility in developing facility-specific conditions and requirements adequate to ensure compliance with 40 CFR Part 258.

[1] Nothing in this preamble or rule proposed today is intended to affect the extent of a State or Tribe's sovereign immunity to suit under RCRA.

C. Non-Municipal Solid Waste Criteria

EPA plans to amend existing regulations to address all non-municipal solid waste facilities that may receive conditionally exempt small quantity generator (CESQG) waste. In accordance with a settlement agreement with the Sierra Club filed with the court on January 31, 1994, the Agency proposed these regulations on June 12, 1995 and will publish final regulations by July 1, 1996. *Sierra Club* v. *Browner*, Civ. No. 93–2167 (D.DC). Specific requirements relating to the approval of State/Tribal non-municipal solid waste permit programs needed to implement these amendments may be included in that rulemaking as appropriate.

D. Rationale for Today's Proposed Rule

Due to the significant flexibility that is only available in approved States/Tribes, the Agency made active efforts to encourage States/Tribes to seek early approval of their MSWLF permit programs. EPA conducted a pilot program with four States and EPA Regions to streamline the approval process and obtain early feedback from States and EPA Regions. The draft STIR was used as guidance in interpreting the statutory authorities and requirements, in identifying the necessary components of an application, and in making adequacy determinations of State/Tribal MSWLF permit programs. These early efforts by EPA were successful in encouraging States/Tribes to apply for approval of their MSWLF permit programs. To date, EPA has approved over 40 State/Tribal MSWLF permit programs and anticipates approval of the remaining States in the near future.

While EPA has proceeded to approve State/Tribal permit programs using the draft STIR as guidance, the Agency believes it remains necessary to promulgate today's proposal to provide a framework for modifications of approved permit programs, to establish procedures for withdrawal of approvals allowing ample opportunity for EPA and the State/Tribe to resolve problems, and to establish the process for future program approvals (e.g., non-municipal solid waste facilities that may receive conditionally exempt small quantity generator waste).

The Agency provided opportunities for public comments and public hearings on the State/Tribal MSWLF permit programs that have been approved to date and received few significant comments on the criteria used as a basis for approval. Today's proposal establishes the same approval procedures and standards used by the Agency in approving those States/

Tribes. Therefore, the Agency believes that States/Tribes with approved permit programs will not have to reapply upon promulgation of today's proposal in final form.

E. Part 239 Determination of Permit Program Adequacy

1. Approval Procedures for State/Tribal Permit Programs

Today's proposed rule establishes the criteria and process for determining whether State/Tribal permit programs are adequate to ensure that regulated facilities are in compliance with the Subtitle D Federal revised criteria. EPA Regional Administrators will make this determination.

To secure an EPA determination of adequacy under RCRA section 4005(c), a State/Tribe must submit an application for permit program approval to the appropriate EPA Regional Administrator for review. This proposed rule describes the program elements to be included in such an application and sets forth the criteria EPA will use in determining whether a State/Tribal permit program is adequate. A more detailed explanation of what EPA is proposing to require of a State/Tribe seeking a determination is found in the following sections of this preamble.

2. Approval Procedures for Partial State/Tribal Permit Programs

In view of the comprehensive nature of Subtitle D Federal revised criteria, it is likely that some State/Tribal permit programs will meet the procedural and legal requirements of Part 239 but not all of the technical requirements of the Subtitle D Federal revised criteria promulgated under § 4010(c) of RCRA. These State/Tribal programs would require a few revisions before the entire program could be approved. As a result, they would need to delay submittal of program approval applications until the limited number of required statutory, regulatory, and/or guidance changes were complete. This delay concerns the Agency, because a delay of the final adequacy determination while these revisions were being made could place a substantial, and often unnecessary, financial burden on owners/operators by withholding the flexibility provided by the Subtitle D Federal revised criteria in approved States/Tribes.

To mitigate this problem, EPA included procedures for partial program approval in this proposal. This allows the Agency to approve those provisions of the State/Tribal permit program that meet today's proposed requirements and provides the State/Tribe time to make necessary changes to the remaining portions of its program. As a result, owners/operators will be able to work with the State/Tribal permitting agency to take advantage of the Subtitle D Federal revised criteria's flexibility for those portions of the program which have been approved. For example, if a State/Tribe does not prohibit the open burning of municipal solid waste, but the remainder of the program is approvable, the Agency could partially approve that State/Tribal program. Under this partial approval, the State/Tribe would be approved for everything but the open burning provisions. Generally, the open burning provisions may be enforced through citizen suits against owners/operators. In addition, where a citizen brings a concern to EPA's attention, the Agency will respond in an appropriate manner on a case-by-case basis. In addition to the enforcement authority the Agency assumes upon determining that a State/Tribal permit program is inadequate, EPA retains enforcement authority under RCRA Section 7003 to address situations that may pose an imminent and substantial endangerment to human health or the environment. In addition, EPA may also exercise enforcement authority under Section 104(e) of the Comprehensive Environmental Response and Liability Act (CERCLA) in situations where there is a reasonable basis to believe there may be a release or threat of release of a hazardous substance, pollutant, or contaminant.

Section 239.11 of today's proposal allows the Agency to approve either partial or complete State/Tribal permit programs. EPA intends to approve partial permit programs only when the State/Tribe has a few discrete technical requirements to revise. Those States/Tribes that need to make substantial changes to their permit program are encouraged to complete all necessary program modifications before submitting an application for approval. In establishing the partial approval process, EPA does not intend to create a two-step process by which every State/Tribe would first gain approval for those parts of their permit program that are currently adequate and then revise the remainder of the program. A State/Tribal permit program may be eligible for partial approval if it meets all the procedural and legal Part 239 requirements (i.e., application components, enforcement, public participation, compliance monitoring) but does not meet all of the Part 239 technical requirements (e.g., requirements in 239.6). States/Tribes applying for partial approval also must include a schedule, agreed to by the State/Tribe and the appropriate Regional Administrator, for completing the necessary changes to the laws, regulations, and/or guidance to comply with the remaining technical requirements.

Part 239.11(a)(2) of today's proposal asserts that States/Tribes with partially approved permit programs are approved to implement only those portions of the technical requirements included in the partial approval. This means that any flexibility provided by the Subtitle D Federal revised criteria to approved States/Tribes is not available to owners/operators unless the partial program approval includes those technical provisions.

EPA is proposing an expiration date for partial approvals in order to assure that States/Tribes will pursue full program approval in a timely manner. As such, the Agency views the partial approval process as a temporary measure to accelerate State/Tribal program approval. The Agency believes that providing two years is necessary, because the time required to make changes in laws, regulations, and/or guidance would differ on a case-by-case basis. Also, some State legislatures meet on a biennial basis, and two years would provide States/Tribes additional time to make required statutory changes. The Agency believes that allowing two years provides ample time for States/Tribes to execute the limited changes to their laws, regulations, and/or guidance necessary to achieve full program approval. However, the Agency believes it would be counterproductive to determine an entire program inadequate if a State/Tribe has cause to miss the two-year deadline by a few weeks or months. For this reason, the Agency is proposing to accommodate State/Tribal program development by providing a mechanism to allow partial programs to extend beyond the two-year deadline if the State/Tribe can demonstrate cause to their EPA Region.

States/Tribes that receive partial approval should submit an amended application meeting all requirements of Part 239 and have that application approved within two years of the effective date of the final determination for partial program adequacy. States/Tribes should be sensitive to this deadline and submit an amended and complete application well in advance to allow Regions ample time to provide opportunities for public participation, to make tentative and final adequacy determinations, and to publish these determinations in the **Federal Register**. If the State/Tribe can demonstrate that it has sufficient cause for not meeting the two-year deadline, the appropriate

Regional Administrator may extend the expiration date of the partial approval. The Regional Administrator will publish the expiration date extension for the partial approval and a new date for expiration in the Federal Register.

EPA believes that partial approvals of State/Tribal permit programs achieve the goals of avoiding disruption of existing State/Tribal permit programs, providing flexibility to owners/operators as soon as possible, and ensuring that owners/operators comply with the relevant technical criteria.

While States/Tribes must have the authority to issue, monitor compliance with, and enforce permits adequate to ensure compliance with 40 CFR Part 258, the specific operating, design, ground-water monitoring, and corrective action requirements, as well as the location restrictions and the other requirements of the Part 258 Federal revised criteria, need not be contained in State/Tribal law or regulations. A State's/Tribe's guidance documents may be used to supplement laws and regulations.

State/Tribal guidance may be used if the State/Tribe demonstrates in its legal certification that the guidance will be used to develop enforceable permits which will ensure compliance with 40 CFR Part 258. Also, guidance only may be used to supplement State/Tribal laws and regulations; it cannot correct laws and regulations that are inconsistent with the guidance. For example, if a State's/Tribe's laws or regulations required three inches of earthen material daily as a cover, the State/Tribe could not meet the daily cover requirement of 40 CFR Part 258.21 by issuing guidance that owner/operators apply six inches of earthen material at the end of each operating day. The narrative description of the State/Tribal program, discussed below in the section-by-section analysis of today's proposal, must explain how the State/Tribe will use guidance to develop enforceable permits. This option gives the States/Tribes added flexibility in meeting the requirements of Part 239, yet maintains the requirement that States/Tribes have the authority to ensure MSWLF owner/operator compliance with Part 258. The flexibility afforded the States/Tribes should help limit the need to restructure existing State/Tribal laws/regulations.

F. Differences From the Subtitle C Authorization Process

Today's proposed approach for determining the adequacy of State/Tribal permit programs under § 4005(c) of Subtitle D of RCRA differs from the current approach taken for authorizing State hazardous waste programs under RCRA section 3006 of Subtitle C. These differences in approach reflect differences in the statutory framework of each Subtitle.

Under Subtitle C, prior to authorization of a State program, EPA has primary responsibility for permitting of hazardous waste facilities. Federal law, including the issuance and enforcement of permits, applies until EPA authorizes a State to operate the State program in lieu of EPA operating the Federal program. Subtitle C requires authorized State programs to be at least equivalent to and consistent with the Federal program and other authorized State programs and to have requirements that are no less stringent than the Federal Subtitle C requirements. Once authorized, State programs operate in lieu of the Federal program and, if Federal enforcement of requirements is necessary, EPA must enforce the approved State's requirements. EPA retains enforcement authority under RCRA sections 3008, 3013, and 7003 although authorized States have primary enforcement responsibility.

In contrast, under Subtitle D Congress intended facility permitting to be a State responsibility. Subtitle D does not specifically authorize EPA to issue Federal permits. EPA's current role includes establishing technical design and operating criteria for facilities, determining the adequacy of State/Tribal permit programs and enforcing compliance with the Subtitle D Federal revised criteria only after EPA determines that the State/Tribal permit program is inadequate. Subtitle D does not provide EPA with enforcement authority in States/Tribes pending an adequacy determination or in States/Tribes whose permit programs are deemed adequate by EPA. In addition, Subtitle D does not provide for State/Tribal requirements to operate "in lieu of" the Subtitle D Federal revised criteria. Therefore, the Subtitle D Federal revised criteria and State/Tribal requirements operate concurrently regardless of whether a State/Tribal permit program is deemed adequate or inadequate. Generally, the Subtitle D Federal revised criteria may be enforced through citizen suits against owners/operators under Section 7002 of RCRA even in approved States/Tribes. In addition, where a citizen brings a concern to EPA's attention, the Agency will respond in an appropriate manner on a case-by-case basis. In addition to the enforcement authority the Agency assumes upon determining that a State/Tribal permit program is inadequate, EPA retains enforcement authority under RCRA Section 7003 to address situations that may pose an imminent and substantial endangerment to human health or the environment. In addition, EPA may also exercise enforcement authority under Section 104(e) of CERCLA in situations where there is a reasonable basis to believe there may be a release or threat of release of a hazardous substance, pollutant, or contaminant.

G. Indian Lands

EPA is extending to Indian Tribes the same opportunity to apply for permit program approval as is available to States. To date, EPA has approved one Tribal MSWLF permit program and proposed approval for a second Tribal program using the same review process used in the State approvals. The draft STIR was used as guidance in making these early proposals, and the Agency published a notice for each decision in the **Federal Register** that included much of the language found in today's proposed rule (final approval for the Campo Band of Mission Indians was published on May 1, 1995, 60 FR at 21191; tentative approval for the Cheyenne River Sioux Tribe was published on April 7, 1994, 59 FR at 16642).

Providing Tribes with the opportunity to apply for approval of their MSWLF permit programs is consistent with EPA's Indian policy. This policy, formally adopted in 1984, recognizes Indian Tribes as the primary sovereign entities for regulating the reservation environment and commits the Agency to working with Tribes on a "government-to-government" basis to effectuate that recognition. A major goal of EPA's Indian Policy is to eliminate all statutory and regulatory barriers to Tribal implementation of Federal environmental programs. Today's proposal represents another facet of the Agency's continuing commitment to the implementation of this long-standing policy.

In the spirit of Indian self-determination and the government-to-government relationship, EPA recognizes that not all Tribes will choose to exercise this option at this time. Regardless of the choice made, the Agency remains committed to providing technical assistance and training when possible to Tribal entities as they work to resolve their solid waste management concerns.

Under Section 4005, EPA may enforce 40 CFR Part 258 only after it determines that a State permit program is inadequate. However, Congress did not specifically address implementation of Subtitle D on Indian lands.

1. Authority

States generally are precluded from enforcing their civil regulatory programs on Indian lands, absent an explicit Congressional authorization. *California* v. *Cabazon Band of Mission Indians,* 480 U.S. 202 (1987). Yet, under RCRA Subtitle D, EPA generally is precluded from enforcing the Federal revised criteria as well unless EPA determines that a State or Tribal permit program is inadequate to ensure compliance with the Federal revised criteria. Furthermore, Congress has not yet created an explicit role for Tribes to implement the Subtitle D program, as it has done under most other major environmental statutes amended since 1986 (Safe Drinking Water Act, CERCLA, Clean Water Act, Clean Air Act).

There exist three principal approaches for effectively ensuring comprehensive, flexible, and efficient implementation of the Subtitle D Federal revised criteria on Indian lands: (1) Allow Tribes to demonstrate the existence of adequate Subtitle D permit programs in the same manner as States under today's proposed rule; (2) make determinations on a case-by-case basis on whether a Tribe or a State has adequate authority to ensure compliance with Subtitle D Federal revised criteria on Indian lands; or, (3) make a blanket determination as appropriate that States lack the authority to implement their programs on Indian lands, that there are no adequate permit programs in place on Indian lands, and that EPA may enforce Subtitle D Federal revised criteria directly on Indian lands in light of this determination.

EPA prefers the first approach, under which an Indian Tribe may seek approval by demonstrating the existence of an adequate permit program in the same manner as a State pursuant to the procedures specified in today's proposal, including a demonstration of jurisdiction. Where no adequate permit program is demonstrated, EPA may enforce the Subtitle D Federal revised criteria directly upon determination that the Tribal program is not adequate to ensure compliance with the Subtitle D Federal revised criteria.

Tribes that are seeking approval may opt to enter into a memoranda of agreement, or other agreement mechanisms, with another governmental entity (State, Tribe, or local government) to provide additional necessary expertise or resources to the Tribe. For example, a Tribe may arrange to use a ground-water monitoring expert the other governmental entity has on board, rather than hiring a Tribal ground-water monitoring expert. Even though a Tribe in this case would be relying in part on another governmental entity's expertise, as it would in any other contractor or agency relationship, the Tribe would seek approval of its program and would continue to exercise its permitting authority. This type of agreement must specify the relevant roles of each party to the agreement. The Tribe seeking approval would need to meet all other requirements outlined in this proposed rule and include copies of all relevant agreements in its application for program approval. In the context of making adequacy determinations, EPA will review such agreements to assure that they will ensure compliance with 40 CFR Part 258.

EPA recognizes, however, that there may be circumstances where a State seeks to assert jurisdiction in Indian Country. Where a State can demonstrate jurisdiction on Indian lands, the State seeking approval may propose, as part of its permit program approval application, to ensure compliance on Indian lands. However, the burden a State must meet to demonstrate its authority to regulate Subtitle D regulated facilities on Indian lands is a high one. *See, e.g.,* 53 FR 43080 (October 25, 1988).

EPA does not favor the third approach, because it requires EPA to step in to enforce the program without consideration of whether the Tribe can adequately do so. Under this approach, owners/operators of MSWLFs on Indian lands would not be able to obtain the flexibility and lower costs available in jurisdictions with approved permit programs.

EPA believes that adequate authority exists under RCRA to allow Tribes to seek an adequacy determination for purposes of Sections 4005 and 4010. EPA's interpretation of RCRA is governed by the principles of *Chevron, USA* v. *NRDC,* 467 U.S. 837 (1984). Where Congress has not explicitly stated its intent in adopting a statutory provision, the Agency charged with implementing that statute may adopt any interpretation which, in the Agency's expert judgment, is reasonable in light of the goals and purposes of the statute as a whole. *Id.* at 844. Interpreting RCRA to allow Tribes to apply for an adequacy determination satisfies the *Chevron* test.

RCRA does not explicitly define a role for Tribes under Sections 4005 and 4010 and reflects an undeniable ambiguity in Congressional intent. Indeed, the only mention of Indian Tribes anywhere in RCRA is in Section 1004(13), a part of the "Definitions" of key terms in RCRA. Section 1004(13) defines the term "municipality" to mean:

> A city, town, borough, county, parish, district or other public body created by or pursuant to State law, with responsibility for the planning or administration or solid waste management, *or any Indian tribe or authorized tribal organization or Alaska Native village or organization*[.]

Id. (emphasis added). The term "municipality", in turn, is used in Sections 4003(c)(1)(C), 4008(a)(2), and 4009(a) of RCRA with reference to the availability of certain Federal funds and technical assistance for solid waste planning and management activities by municipalities. Section 4003(c)(1)(C) specifies that States are to use Subtitle D grant funds to, among others, assist municipalities in developing municipal waste programs; Sections 4008(a)(2) and 4008(d)(3) authorizes EPA to provide financial and technical assistance to municipalities on solid waste management; Section 4009(a) authorizes EPA to make grants to States to provide financial assistance to small municipalities. Thus, Congress apparently intended to make explicit that Indian Tribes could receive funds and assistance when available in the same manner as municipal governments. However, Congress did not explicitly recognize any other role for Tribes under other provisions. There is no accompanying legislative history which explains why Indian Tribes were included in Section 1004(13) and nowhere else.

EPA does not believe that Congress, by including Indian Tribes in Section 1004(13), intended to prohibit EPA from allowing Tribes to apply for an adequacy determination under Subtitle D. First of all, it is clear that Indian Tribes are not "municipalities" in the traditional sense. Indian Tribes are not "public bodies created by or pursuant to State law." Indeed, Indian Tribes are not subject to State law except in very limited circumstances. *Cabazon, supra.* Indian Tribes are sovereign governments. *Worcester* v. *Georgia,* 31 U.S. (10 Pet.) 515 (1832). There is no indication in the legislative history that Congress intended to abrogate any sovereign Tribal authority by defining them as "municipalities" under RCRA, i.e., that Congress intended Section 1004(13) to subject Indian Tribes to State law for RCRA purposes. Moreover, it is a well-established principle of statutory construction that Federal statutes which might arguably abridge Tribal powers of self-government must be construed narrowly in favor of retaining Tribal rights. F. Cohen,

Handbook of Federal Indian Law, 224 (1981); *See, e.g., Ramah Navajo School Board* v. *Bureau of Revenue*, 458 U.S. 832, 846 (1982).

EPA believes that inclusion of Indian Tribes in Section 1004(13) was a definitional expedient, to avoid having to include the phrase "and Indian tribes or tribal organizations or Alaska Native villages or organizations" wherever the term "municipality" appeared, *not* to change the sovereign status of Tribes for RCRA purposes. In particular, the references in Sections 4003(c) and 4009(a) to state "assistance" to municipalities does not suggest that Congress intended Indian Tribes to be subject to State governmental control. Furthermore, given the limited number of times the term "municipality" appears in RCRA, it does not appear that Congress was attempting to define a role for Tribes for all potential statutory purposes.

The ambiguity in RCRA regarding Indian Tribes also is evident from the structure of the 1984 Amendments. As mentioned earlier, Congress expressed a strong preference for a State lead in ensuring compliance with the Subtitle D Federal revised criteria, in that Section 4005(c) allows EPA to enforce the criteria only after a finding of inadequacy of the State permit program. Yet, the legislative history of the 1984 Amendments does not suggest that Congress intended to authorize States to implement such programs on Indian lands or that Congress considered the legal principle that States generally are precluded from such implementation. *Cf. Washington Dept. of Ecology* v. *EPA*, 752 F.2d 1465 (9th Cir. 1985) (RCRA Subtitle C does not constitute an explicit delegation of authority to States to implement hazardous waste programs on Indian lands); *accord, Nance* v. *EPA*, 745 F.2d 701 (9th Cir. 1981). Thus, Congress has otherwise put States in a primary role for Subtitle D permit programs, yet on Indian lands has failed to define how Tribes participate where States lack authority. EPA believes it necessary to harmonize the conflicts and resolve the ambiguities created by these provisions.

EPA concludes that interpreting Sections 4005, 4008, and 4010 to allow Indian Tribes to seek an adequacy determination is reasonable.[2] Several factors enter into this determination. First, as discussed in the previous paragraph, this approach is consistent with Subtitle D, because it preserves Congressional intent to limit the Federal government's role in Subtitle D permit programs. Absent the opportunity for Tribes to seek a determination of adequacy, there would be few or no adequate permit programs in place on Indian lands (because the State lacked the authority and the Tribe could not apply for program approval).

Failure to approve Tribal programs would deny Tribes the option available to approved States of granting their owners and operators flexibility in meeting the requirements of the Subtitle D Federal revised criteria. Under Part 258, the Federal revised criteria would be implemented without benefit of an EPA approved permit process and EPA would take enforcement actions as appropriate. With this proposal, however, Subtitle D regulated facilities on Indian Lands could be under the jurisdiction of the closest sovereign with permitting and enforcement authority, the Tribe, rather than the Federal government.

In the case of other environmental statutes (e.g., the Clean Water Act), EPA has worked to revise them to define explicitly the role for Tribes under these programs. Yet, EPA also has stepped in on at least two occasions to allow Tribes to seek program approval despite the lack of an explicit Congressional mandate. Most recently, EPA recognized Indian Tribes as the appropriate authority under the Emergency Planning and Community Right-to-Know Act (EPCRA), despite silence on the Tribal role under EPCRA. 55 FR 30632 (July 26, 1990). EPA reasoned that since EPCRA has no federal role to backup State planning activities, failure to recognize Tribes as the authority under EPCRA would leave gaps in emergency planning on Indian lands. 54 FR 13000–01 (March 29, 1989).

EPA filled a similar statutory gap much earlier as well, even before development of its formal Indian Policy. In 1974, EPA promulgated regulations which authorized Indian Tribes to redesignate the level of air quality applicable to Indian Lands under the Prevention of Significant Deterioration (PSD) program of the Clean Air Act in the same manner that States could redesignate for other lands. *See Nance* v. *EPA* (upholding regulations). EPA promulgated this regulation despite the fact that the Clean Air Act at that time made no reference whatsoever to Indian Tribes or their status under the Act.[3]

One Court already has recognized the reasonableness of EPA's actions in filling such regulatory gaps on Indian lands. In *Nance*, the U.S. Court of Appeals for the Ninth Circuit affirmed EPA's PSD redesignation regulations described in the previous paragraph. The Court found that EPA could reasonably interpret the Clean Air Act to allow for Tribal redesignation, rather than allowing the States to exercise that authority or exempting Indian lands from the redesignation process. 745 F.2d 713. The Court noted that EPA's rule was reasonable in light of the general existence of Tribal sovereignty over activities on Indian Lands. *Id.* at 714.

Today's proposal is analogous to the rule upheld in *Nance*. EPA is proposing to fill a gap in jurisdiction on Indian lands. As with the redesignation program, approving Tribal MSWLF permit programs ensures that the Federal government is not the entity exercising authority that Congress intended to be exercised at a more local level. Furthermore, the case law supporting EPA's interpretation is even stronger today than at the time of the *Nance* decision. First, the Supreme Court reaffirmed EPA's authority to develop reasonable controlling interpretations of environmental statutes. *Chevron, supra*. Second, the Supreme Court emphasized since *Nance* that Indian Tribes may regulate activities on Indian Lands, including those of non-Indians, where the conduct directly threatens the health and safety of the Tribe or its members. *Montana* v. *United States*, 450 U.S. 544, 565 (1981).

In the case of Subtitle D regulated facilities, EPA believes that improperly maintained facilities would not be protective of human health (including that of Tribal members) and the environment (including Indian lands). Tribes are likely to be able to assert regulatory authority over facilities on Indian lands to protect these interests. Allowing Tribes to seek adequacy would reflect general principles of Federal Indian law. Thus, as in *Nance*, EPA believes that allowing Tribes to apply for program approval reflects the sovereign authority of Tribes under Federal law.

2. Jurisdiction

To have its Subtitle D permit program deemed adequate by EPA, a Tribe must

[2] EPA notes that the arguments set forth below also may apply to other RCRA programs/statutory sections, including Section 3006 (EPA authorization of State hazardous waste programs), although there are unique considerations associated with each program. EPA currently is considering whether to allow Tribes to apply for authorization to implement other RCRA programs and will revisit the issue in future Federal Register notices.

[3] Congress ratified EPA's regulation in 1977 by explicitly authorizing Tribes to make PSD redesignations; the 1990 Amendments to the Act authorize EPA to allow Tribes to apply for approval to implement any programs EPA deems appropriate.

have adequate authority over the regulated activities. Indian reservations include lands owned in fee by non-Indians. Pursuant to *Montana* v. *U.S.*, 450 U.S. 544 (1981), Tribes have jurisdiction over Indian lands owned by Indians. However, the extent of Tribal authority to regulate activities by non-Indians on fee lands has been the subject of considerable discussion. The test for civil regulatory authority over non-member owned fee lands within Indian reservations was stated in *Montana* v. *U.S.*, 450 U.S. 544, 565–66 (1981) (citations omitted):

> To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate . . . the activities of non-members who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. . . . A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

In *Brendale* v. *Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989), the Court applied this test. Both the State of Washington and the Yakima Nation asserted authority to zone non-Indian real estate developments on two parcels within the Yakima reservation, one in an area that was primarily Tribal, the other in an area where much of the land was owned in fee by nonmembers. Although the Court analyzed the issues and the appropriate interpretation of *Montana* at considerable length, the nine members split 4:2:3 in reaching the decision that the Tribe should have exclusive zoning authority over property in the Tribal area and the State should have exclusive zoning authority over non-Indian owned property in the fee area.

Specifically, the Court recognized Tribal authority over activities that would threaten the health and welfare of the Tribe, 492 U.S. at 443–444 (Stevens, J., writing for the Court); *id.* at 449–450 (Blackmun, J. concurring). Conversely, the Court found no Tribal jurisdiction where the proposed activities "would not threaten the Tribe's * * * health and welfare." *Id.* at 432 (White, J., writing for the Court). Given the lack of a majority rationale, the primary significance of *Brendale* is in its result, which was fully consistent with *Montana* v. *United States.*

In evaluating whether a Tribe has authority to regulate a particular activity on land owned in fee by nonmembers but located within a reservation, EPA will examine the Tribe's authority in light of the evolving case law as reflected in *Montana* and *Brendale* and applicable Federal law. The extent of such Tribal authority depends on the effect of that activity on the Tribe. As discussed above, in the absence of a contrary statutory policy, a Tribe may regulate the activities of non-Indians on fee lands within its reservation when those activities threaten or have a direct effect on the political integrity, the economic security, or the health or welfare of the Tribe. *Montana*, 450 U.S. at 565–66.

However, as discussed by EPA in the context of the Clean Water Act, the Supreme Court, in a number of post-*Montana* cases, has explored several criteria to assure that the impacts upon Tribes of the activities of non-Indians on fee land, under the *Montana* test, are more than *de minimis*, although to date the Court has not agreed, in a case on point, on any one reformulation of the test. *See* 56 FR 64876, 64878 (December 12, 1991). In response to this uncertainty, the Agency will apply, as an interim operating rule, a formulation of the *Montana* standard that will require a showing that the potential impacts of regulated activities of non-members on the Tribe are serious and substantial. *See* 56 FR at 64878. Thus, EPA will require that a Tribe seeking RCRA Subtitle D permit program approval demonstrate jurisdiction, i.e., make a showing that the potential impacts on the Tribe from solid waste management activities of non-members on fee lands are serious and substantial.

The choice of an Agency operating rule containing this standard is taken solely as a matter of prudence in light of judicial uncertainty and does not reflect an Agency endorsement of this standard *per se*. *See* 56 FR at 64878. Moreover, as discussed below, the Agency believes that the activities regulated under the various environmental statutes, including RCRA, generally have potential direct impacts on human health and welfare that are serious and substantial. As a result, the Agency believes that Tribes usually will be able to meet the Agency's operating rule, and that use of such a rule by the Agency should not create an improper burden of proof on Tribes.

Whether a Tribe has jurisdiction over activities by nonmembers will be determined case-by-case, based on factual, Tribal-specific findings. The determination as to whether the required effect is present in a particular case depends on the circumstances.

Nonetheless, the Agency also may take into account the provisions of environmental statutes and any legislative findings that the effects of the activity are serious and substantial in making a generalized finding that Tribes are likely to possess sufficient inherent authority to control environmental quality in Indian Country. *See, e.g., Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 476–77 and nn.6, 7 (1987). The Agency also may rely on its special expertise and practical experience regarding the importance of proper solid waste management to the protection of Tribal environments and the health and welfare of Tribal members. As a result, the reservation-specific demonstration required of a Tribe may, in many cases, be relatively simple.

The Agency believes that Congressional enactment of RCRA establishes a strong Federal interest in effective management of solid waste. For example, Congress has stated that "the disposal of solid waste * * * in or on the land without careful planning and management can present a danger to human health and the environment" and that unsound solid waste disposal practices "have created greater amounts of air and water pollution and other problems for the environment and health." RCRA § 1002(b)(2), (3), 42 U.S.C. 6901(b) (2), (3). Congress recognized that potential hazards from mismanagement of solid waste disposal facilities include "fire hazards; air pollution (including reduced visibility); explosive gas migration; surface and ground-water contamination; disease transfer (via vectors such as rats and flies); personal injury (to unauthorized scavengers); and, aesthetic blight." House Report to accompany H.R. 14496, September 9, 1976 at 37. EPA has confirmed these Congressional observations.[4]

EPA notes that, where solid waste affects ground water which has pathways that allow it to migrate readily, it would be practically very difficult to separate out the effects of solid waste disposal on non-Indian fee land within a reservation from those on Tribal portions. In addition, EPA notes that many of the environmental problems caused by mismanagement of solid waste (e.g., ground-water

[4] See, e.g., USEPA, OSW, Case Studies on Ground-Water and Surface Water Contamination from Municipal Solid Waste Landfills—Criteria for Solid Waste Landfills (40 CFR Part 258) Subtitle D of RCRA, July 1988, EPA//530–SW–88–040; USEPA, OSW, Operating Criteria (Subpart C)—Criteria for Solid Waste Landfills (400 CFR Part 258) Subtitle D of RCRA, July 1988, EPA/530–SW–88–037.

contamination or the contamination of surface water through uncontrolled run-off) by their nature present potential direct impacts that are serious and substantial in areas that are outside the place where the solid waste activity originally occurred. In other words, any environmental impairment that occurs on, or as a result of, solid waste activities by non-members on fee lands within the reservation is likely to present direct impacts to Tribal environments, health, and welfare that are serious and substantial. EPA also believes that a "checkerboard" system of regulation, whereby the Tribe and State split up regulation of solid waste on Indian lands, would exacerbate the difficulties of assuring compliance with RCRA requirements.

In light of the Agency's statutory responsibility for implementing the environmental statutes, its interpretations of the intent of Congress regarding Tribal management of solid waste within the reservation are entitled to substantial deference. *Washington Dep't of Ecology* v. *EPA*, 752 F.2d 1465, 1469 (9th Cir. 1985); *see generally Chevron, USA, Inc.* v. *NRDC*, 467 U.S. 837, 843–45 (1984).

The Agency also believes that the effects on Tribal health and welfare necessary to support Tribal regulation of non-Indian activities on Indian lands may be easier to establish in the context of environmental regulation than with regard to zoning, which was at issue in Brendale. There is a significant distinction between land use planning and environmental regulation of solid waste under RCRA. The Supreme Court has explicitly recognized such a distinction: "Land use planning in essence chooses particular uses for the land; environmental regulation * * * does not mandate particular uses of the land but requires only that, however the land is used, damage to the environment is kept within prescribed limits." *California Coastal Comm'n* v. *Granite Rock Co.*, 480 U.S. 572, 587 (1987). The Court has relied on this distinction to support a finding that States retain authority to carry out environmental regulation even in cases where their ability to carry out general land use regulation is preempted by federal law. *Id.* at 587–589.

Further, management of solid waste serves the purpose of protecting public health and safety, which is a core governmental function, whose exercise is critical to self-government. The special status of governmental actions to protect public health and safety is well established.[5] By contrast, the power to zone can be exercised to achieve purposes which have little or no direct nexus to public health and safety. *See, e.g., Brendale*, 492 U.S. at 420 n.5 (White, J.) (listing broad range of consequences of state zoning decision). Moreover, solid waste may affect ground water, which is mobile, freely migrating from one local jurisdiction to another, sometimes over large distances. By contrast, zoning regulates the uses of particular properties with impacts that are much more likely to be contained within a given local jurisdiction.

The process that the Agency will use for Tribes to demonstrate their authority over non-members on fee lands includes a submission of a statement in the Tribal legal Certification (section 239.5(c)) explaining the legal basis for the Tribe's regulatory authority. However, EPA also will rely on its generalized findings regarding the relationship of solid waste management to Tribal health and welfare. Thus, the Tribal submission will need to make a showing of facts that there are or may be activities regulated under RCRA Subtitle D engaged in by non-members on fee lands within the territory for which the Tribe is seeking approval, and that the Tribe or Tribal members could be subject to exposure to solid waste from such activities through, e.g., ground water, surface water, soil, and/or direct contact. The Tribe must explicitly assert jurisdiction, i.e., make a showing that improper management of solid waste by non-members on fee lands could have direct impacts on the health and welfare of the Tribe and its members that are serious and substantial. Once a Tribe meets this initial burden, EPA will, in light of the facts presented by the Tribe and the generalized statutory and factual findings regarding the importance of proper solid waste management in Indian country, presume that the Tribe has made an adequate showing of jurisdiction over non-member activities on fee lands, unless an appropriate governmental entity (e.g., an adjacent Tribe or State) demonstrates a lack of jurisdiction on the part of the Tribe.

The Agency recognizes that jurisdictional disputes between Tribes and States can be complex and difficult and that it will, in some circumstances, be forced to address such disputes by attempting to work with the parties in a mediative fashion. However, EPA's ultimate responsibility is protection of human health and the environment. In view of the mobility of environmental problems, and the interdependence of various jurisdictions, it is imperative that all affected sovereigns work cooperatively for environmental protection.

3. Permit Program Approval

EPA wishes to emphasize that Tribes are not required to seek approval of their Subtitle D permit programs. Today's proposed rule states that a Tribe may, by submitting an application for EPA review, seek approval of its permit program. If the Tribe does not wish to seek adequacy, it simply need not submit an application for that purpose. This is in contrast to the requirement of Section 4005(c)(1)(B), which requires States to adopt and implement adequate permit programs. EPA does not believe it should impose a mandatory duty on Tribes to adopt and implement permit programs simply because some Tribes may seek and receive a determination of adequacy. Given that Congress has not explicitly defined the Tribal role under Subtitle D, EPA doubts that Congress intended to impose a mandatory duty on all Tribes. The decision of whether or not to seek approval is an individual Tribal determination based upon a number of factors such as whether the flexibility available to approved programs offers the Tribe any advantage and whether the Tribe has the infrastructure and resources to apply for and administer such a program.

Generally, Tribes that opt to seek program approval must meet the same approval criteria EPA requires States to meet. Today's proposal recognizes the uniqueness of Tribes and Indian lands, however, and includes appropriate requirements in certain sections of the proposed rule. For example, due to the lack of clarity of Tribal boundaries (or lands over which the Tribe asserts jurisdiction) in some cases, the proposed rule requires Tribes to include a map or legal description of these lands. A more detailed explanation of the requirements Tribes must meet to be deemed adequate by EPA follows.

Under the Clean Water Act, Safe Drinking Water Act, CERCLA, and the Clean Air Act, Congress has specified certain criteria by which EPA is to determine whether Tribes should be allowed to seek program approval. These criteria generally require that: (1) The Tribe be recognized by the Secretary of the Interior; (2) the Tribe has an existing government exercising substantial governmental duties and powers; (3) the Tribe has adequate civil regulatory jurisdiction over the subject matter and entities to be regulated; and

[5] This special status has been reaffirmed by all nine justices in the context of Fifth Amendment takings law. See *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 491 n. 20 (1987); *id.* at 512 (Rehnquist, C.J., dissenting).

(4) the Tribe is reasonably expected to be capable of administering the federal environmental program.

Today's proposal recognizes the importance and fully agrees with the substance of these criteria. Therefore, EPA has integrated the four criteria used in other statutes into today's proposed State/Tribal Implementation Rule and has not established a pre-approval process for Indian Tribes. Under proposed Section 239.4(g), a Tribe seeking approval of its permit program would address three of the above criteria in its Narrative Description. As proposed in Section 239.5(c), the Tribe would address the fourth criterion, adequacy of civil regulatory jurisdiction, in its Legal Certification.

The process EPA is proposing for Tribes to make this showing generally is not an onerous one. The Agency has simplified its process for determining Tribal eligibility to administer environmental programs under several other environmental statutes. See 59 FR 64339 (December 14, 1994) ("Treatment as a State (TAS) Simplification Rule"). The proposed process for determining eligibility for RCRA Subtitle D Programs parallels the simplification rule.

Generally, the fact that a Tribe has met the recognition or governmental function requirements under another environmental statute allowing for Tribal assumption of environmental programs or grants (e.g., the Clean Water Act, Safe Drinking Water Act, Clean Air Act) will establish that the Tribe meets those requirements for purpose of RCRA Subtitle D permit program approval. To facilitate review of Tribal applications, EPA therefore requests that the Tribe, in responding to proposed Section 239.4(g), demonstrate that it has been approved for "TAS" (under the old "TAS" process) or has been deemed eligible to receive authorization (under the simplified process) for any other program. If a Tribe has not received "TAS" approval or has not been deemed eligible to receive authorization for any other program, the Tribe must demonstrate, pursuant to proposed Section 239.4(g), that it meets the recognition and governmental function criteria described above. Discussion on how to make these showings can be found at 59 FR 64339 (December 14, 1994).

Section 239.2 of today's proposal defines Tribes to mean any Indian Tribe, band, nation, or other organized group or community which is recognized by the Secretary of the Interior or Congress and which exercises substantial governmental duties and powers. While the definition of Tribes in today's proposal does not explicitly include Alaska Native Villages, Alaska Native entities (e.g., villages) may apply for permit program approval. Alaska Native Villages that are Federally-recognized Tribes should not be excluded *per se* from seeking EPA program approval, although EPA does not mean to imply that it has determined that any village possesses the adequate civil regulatory authority to operate a permit program. Rather, such a determination would be made on a case-by-case basis. Alaska Native Villages that demonstrate that their permit programs meet the jurisdictional capacity and other requirements of today's proposal will be deemed adequate.

EPA believes that the Agency must make a separate determination that a Tribe has adequate jurisdictional authority and administrative and programmatic capability before it approves each Tribal permit program. Thus, today's proposal requires, under proposed Section 239.5(c), that a Tribe seeking program approval provide an analysis of jurisdictional authorities in the Tribal Legal Certification. The legal certification must include a map or legal description of the lands over which the Tribe asserts jurisdiction and documents supporting the Tribe's assertion of jurisdiction. In addition, as noted above, if the Tribe is asserting jurisdiction over solid waste activities conducted by non-members on fee lands within Reservation boundaries, it must explicitly show in its submission that the activities of non-members on fee lands regarding solid waste could have direct effects on the health and welfare of the Tribe that are serious and substantial.

Finally, capability is a determination that will be made on a case-by-case basis. Ordinarily, the information provided in the application for RCRA Subtitle D permit program approval submitted by any applicant, Tribal or State, will be sufficient. For example, today's proposal requires both States and Tribes to discuss the staff resources available to carry out the program. Section 239.3 requires that States/Tribes list the number of Subtitle D regulated facilities under their jurisdiction and discuss staff resources available to carry out and enforce the program. However, EPA may request, in individual cases, that a Tribe provide additional narrative or other documents showing that the Tribe is capable of administering the program for which it is seeking approval. See 59 FR 44339 (December 14, 1994).

4. Financial Assurance for Tribally owned MSWLFs

Part 258 exempts States that are MSWLF owner/operators from the financial assurance requirements contained in 40 CFR Part Section 258.74. While today's proposal extends to Tribes the same opportunity to apply for permit program approval as it does to States, EPA has no basis for believing that Indian Tribes are exactly like States in terms of their financial capabilities. Thus, EPA is proposing that the financial assurance requirement contained in 40 CFR § 258.74 remain applicable to Tribes.

EPA considered, during the development of 40 CFR Part 258, whether to exempt Tribes from financial responsibility requirements and whether Tribes have the requisite financial strength and incentives to cover the costs of closure, post-closure care, and corrective action for known releases. The Agency found that, due to the variation among Tribes in terms of size, financial capacity, and function performed, exempting all Tribes from the requirements would provide insufficient protection of human health and the environment. Requiring all Tribes to demonstrate financial assurance should encourage appropriate advanced planning for the costs of closure, post-closure care, and corrective action for known releases by these entities. See 56 FR 51106–07 (October 9, 1991).

The Agency does not believe that the financial assurance requirements generally will be burdensome to Tribes due to the relatively small part of the total cost of compliance with today's proposal imposed by the financial assurance requirements. Mechanisms that could be used to make this demonstration, such as trust funds, surety bonds, and letters of credit, are discussed in 40 CFR Part 258.74. The Agency is developing a special financial test for local governments that also may be utilized by Tribes (proposed on December 27, 1993, 58 FR at 68353). Financially strong Tribes, like financially strong municipalities, will be able to comply with the requirement using the local government financial test. EPA intends to issue the financial assurance test for local governments in October 1995, well before the effective date of the financial assurance requirement (April 9, 1997).

EPA solicits comment on whether today's proposal incorporates the appropriate criteria and procedures in general for determining whether a Tribe's permit program should be deemed adequate by EPA. EPA also

invites comment on appropriate terms for Tribal positions equivalent to State positions, such as Governor, Attorney General, Agency, and Director.

H. Enforcement

Approved States/Tribes have primary responsibility for ensuring compliance with the Subtitle D Federal revised criteria through the enforcement element of their permit programs. Because RCRA does not give EPA the authority to take enforcement actions in approved States/Tribes, adequate State/Tribal enforcement authorities are crucial to ensuring compliance. Under RCRA 4005(c)(2)(A), the Agency has the authority to enforce the Subtitle D Federal revised criteria where it determines the State/Tribal permit program to be inadequate.

Independent of any governmental enforcement program, citizens may seek enforcement of the Subtitle D Federal revised criteria by means of citizen suits against owners/operators under Section 7002 of RCRA. Section 7002 provides that any person may commence a civil action on his or her own behalf against any person who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to RCRA. The self-implementing Subtitle D Federal revised criteria constitute the basis for enforcement actions through potential citizen suits against facilities that fail to comply. In addition, where a citizen brings a concern to EPA's attention, the Agency will respond in an appropriate manner on a case-by-case basis. In addition to the enforcement authority the Agency assumes upon determining that a State/Tribal permit program is inadequate, EPA retains enforcement authority under RCRA Section 7003 to address situations that may pose an imminent and substantial endangerment to human health or the environment. In addition, EPA may also exercise enforcement authority under Section 104(e) of CERCLA in situations where there is a reasonable basis to believe there may be a release or threat of release of a hazardous substance, pollutant, or contaminant.

Unlike Subtitles C and I of RCRA, the statute does not provide that State programs deemed adequate by EPA operate in lieu of the Federal program. Absent such a statutory provision, the Subtitle D Federal revised criteria are applicable to all Subtitle D regulated facilities, regardless of whether EPA has approved the State/Tribal permit program. Violation of the Subtitle D Federal revised criteria may subject the violator to a citizen suit in Federal court. In the event of a citizen suit against an owner/operator permitted by an approved State/Tribe, however, EPA expects the owner/operator who complies with the requirements of an approved State's/Tribe's permit program will be found by Federal courts to have complied with the requirements in the Subtitle D Federal revised criteria. EPA expects this result because EPA will have reviewed and explicitly approved the State's/Tribe's design or performance standard approach as ensuring compliance with the Subtitle D Federal revised criteria.

This citizen suit authority under RCRA is an important addition to State/Tribal and Federal enforcement which EPA believes will help ensure compliance with Subtitle D Federal revised criteria. For example, the citizen suit authority provides an incentive for owners and operators to comply with the Subtitle D Federal revised criteria. In addition, citizens may bring action against a State (to the extent permitted by the eleventh amendment to the Constitution) for failure to develop and implement an adequate permit program as required by RCRA Section 4005(c)(1)(B). (Such suits would not be appropriate against Indian Tribes, who are not specifically required to comply with RCRA Section 4005.)

III. Section-by-Section Analysis of 40 CFR Part 239

The following sections of this preamble include discussions of the major issues and present the rationale for the specific regulations being proposed today. The preamble is organized in a section-by-section sequence for ease of reference.

A. Purpose and Scope (Subpart A, §§ 239.1 and 239.2)

Sections 239.1 and 239.2 outline the purpose and scope of today's proposal and provide definitions of key terms used in the requirements. Today's proposal specifies the requirements that State/Tribal permit programs must meet to be determined adequate to ensure that Subtitle D facilities regulated under RCRA section 4010(c) comply with the Subtitle D Federal revised criteria. The proposed rule also sets forth the procedures EPA will follow in determining the adequacy of State/Tribal permit programs. Nothing in today's proposal precludes States/Tribes from requiring more stringent levels of protection than those required by the Subtitle D Federal revised criteria. The definitions proposed in § 239.2 are consistent with definitions in other RCRA regulations where appropriate. For this Part, the Agency defines "permit" to include other systems of prior approval and conditions (e.g., licenses). The Agency is proposing this definition to be consistent with RCRA § 4005(c) which requires States to "adopt and implement a permit program or other system of prior approval and conditions" and to accommodate existing State/Tribal programs that function as "permit" programs but are not so designated.

B. Components of a Permit Program Application (Subpart B, §§ 239.3–239.5)

1. State/Tribal Permit Program Application (§ 239.3)

Section 239.3 of today's proposed rule identifies the components that the State/Tribe must include in its program application to obtain an adequacy determination under this Part. Under the proposed rule, a State/Tribe must submit an application containing the following: (1) A transmittal letter requesting permit program approval, (2) a description of the State/Tribal permit program, (3) a written legal certification demonstrating that the State/Tribal authorities cited in the permit program application are fully enacted and effective, (4) copies of all applicable State/Tribal laws, regulations and guidance that the State/Tribe will use to ensure that Subtitle D regulated facilities comply with the Subtitle D Federal revised criteria, and (5) copies of any Tribal-State agreements if a Tribe and State have negotiated agreements for the implementation of the Subtitle D permit program on Indian lands. Copies of all applicable State/Tribal laws, regulations, and guidance or other policy documents submitted with the State's/Tribe's application will be used by EPA to evaluate the adequacy of a State/Tribal program's scope and technical requirements.

A transmittal letter signed by the State/Tribal Director must accompany the official State/Tribal application. If more than one State/Tribal agency has implementation responsibilities, the transmittal letter must designate a lead agency and be jointly signed by all State/Tribal agencies with implementation responsibilities or by the State Governor/Tribal authority exercising powers substantially similar to those of a State Governor. This letter is the State's/Tribe's formal request for determination of adequacy. The designation of a lead agency will provide EPA with a single point of contact in the State/Tribe and will facilitate communication between EPA and the State/Tribe. Under today's proposal, EPA only will approve adequate programs with jurisdiction

throughout a State/Tribe. Independent sub-State or sub-Tribal agencies that do not have jurisdiction throughout the State/Tribe are not eligible for adequacy determinations but can have implementation roles as outlined in the next section.

2. Narrative Description of a State/Tribal Program (§ 239.4)

Under proposed § 239.4, any State/Tribe that seeks approval for its Subtitle D permit program must submit a narrative description of the State/Tribal permit program as part of its application. The narrative description provides an overview of the State/Tribal permit program and demonstrates how the program meets the statutory requirement to ensure that owners/operators comply with the Subtitle D Federal revised criteria under RCRA section 4010(c). The narrative must demonstrate that the State/Tribal program ensures the protection of human health and the environment through the implementation of permit standards that ensure compliance with the Subtitle D Federal revised criteria.

The narrative description is the component of the application wherein the State/Tribe describes how its permit program satisfies the requirements of Subpart C of today's proposed rule. The specific elements of the program narrative which must be included in a State's/Tribe's application and are being proposed today are listed in § 239.4 and are described briefly below. The narrative must include a discussion of the jurisdiction and responsibilities of all State/Tribal and local agencies implementing the permit program. The narrative also must provide a description of State/Tribal procedures for permitting, compliance monitoring, and enforcement as specified in §§ 239.6 through 239.9 of today's proposal and any applicable State-Tribal agreements.

Many State, Tribal, and local agencies have begun to address the Subtitle D Federal revised criteria, and the Agency does not wish to disrupt these on-going efforts. The nature of the problem and the work involved in implementing the regulatory program dictate that the actual day-to-day work take place at the State, Tribal, and local levels. Therefore, today's proposal does not require implementation only by State/Tribal agencies with State/Tribal-wide jurisdiction and authorities. Rather, EPA is allowing sub-State/Tribal agencies an implementation role where lead State/Tribal agencies demonstrate in the application for permit program approval that the local agencies will ensure compliance and will operate under State/Tribal-wide authorities. The Agency encourages States/Tribes to work closely with local implementing agencies and provide oversight so that problems, such as local conflicts of interest, are prevented.

The program narrative also must provide a discussion of how the State's/Tribe's permit program will provide for the permitting of new and existing Subtitle D regulated facilities to ensure compliance with the Subtitle D Federal revised criteria. Under today's proposal, new Subtitle D regulated facilities must have permits prior to construction and operation. States/Tribes may meet this requirement with a multi-stage permitting process (e.g., issuing a permit to construct and a separate permit to operate) if all requirements relevant to each stage are incorporated into the permit for that stage and if new Subtitle D regulated facilities have permits incorporating all the requirements of the Subtitle D Federal revised criteria before operating. If a State/Tribe uses a multi-stage permitting process it must ensure that the public participation elements of today's proposal in § 239.6(a) and § 239.6(b) are met during each stage.

Strategies for ensuring that existing Subtitle D regulated facilities are permitted to ensure compliance are likely to vary depending on the composition of the regulated community in a State/Tribe and on whether the State/Tribe has a pre-existing permit program. Among the strategies a State/Tribe may wish to consider are: (1) Putting existing facilities on a schedule to receive a permit where no permits have yet been issued; (2) scheduling review of existing permits; (3) scheduling closure of existing facilities that are unlikely to come into compliance with new requirements; or (4) a combination of these approaches. Regardless of which strategy is selected, eventually all facilities in approved States/Tribes must receive permits that ensure compliance with the Subtitle D Federal revised criteria or they must close.

The total number of regulated facilities within the State/Tribal jurisdiction must be indicated in the narrative. EPA believes that information pertaining to the number of facilities within the State/Tribal jurisdiction will be useful in assessing whether the State's/Tribe's available resources are adequate to ensure compliance. As explained below, however, resource information is not likely to be a central factor in the determination of State/Tribal permit program adequacy.

Finally, the program narrative must address the staff resources that the State/Tribe has available to carry out its program. The Agency has not proposed specific resource and staffing requirements for approved programs due to the site-specific nature of ensuring compliance with the Subtitle D Federal revised criteria. Each State/Tribe will have different resource requirements and strategies for ensuring compliance. The Agency intends to allow States/Tribes flexibility in determining the best use of their resources. Such information is not likely to be a central factor in the determination of State/Tribal permit program adequacy. However, EPA intends that, in certain cases (e.g., where EPA determines that State/Tribal resources clearly are insufficient), this information may be used to make a determination of inadequacy. The resource estimates will not be judged with any upper or lower bounds for approval or disapproval, yet EPA wants to ensure that funding and staffing exist.

2.a. MSWLF Permit Program Approval

The total number of MSWLFs within the State/Tribal jurisdiction that received municipal solid waste on or after October 9, 1991, must be indicated in the narrative. The October 9, 1991, date was chosen, because MSWLFs receiving waste after this date must, at a minimum, comply with the final cover requirements in 40 CFR Part 258.60(a)(2). The MSWLFs included in this number are those units which may receive hazardous household waste or conditionally exempt small quantity generator hazardous waste. Land application units, surface impoundments, injection wells, or waste piles, as those terms are defined under Part 257.2, do not have to be addressed in the narrative for approval of MSWLF permit programs.

3. State/Tribal Legal Certification (§ 239.5)

Section 239.5 of the proposed rule would require any State/Tribe that seeks a determination of adequacy to submit a written statement from the State/Tribal Attorney General certifying that the laws, regulations, and guidance cited in the State's/Tribe's permit program application are fully enacted and fully effective when the State/Tribal permit program is approved. The State/Tribal legal certification serves as the foundation for ensuring that the State/Tribal permit program has adequate authority to ensure compliance with the Subtitle D Federal revised criteria and to meet the requirements of this rule.

If guidance is to be used to supplement statutes and regulations, the State/Tribal legal certification must state that the State/Tribe has the authority to

use guidance to develop enforceable permits which will ensure compliance with the Subtitle D Federal revised criteria and that the guidance was duly issued in accordance with State/Tribal law. Guidance only may be used to supplement State/Tribal laws and regulations; it cannot correct laws and regulations that are inconsistent with the Subtitle D Federal revised criteria. The narrative description of the State/Tribal program must explain how the State/Tribe will use guidance to develop enforceable permits. The Agency emphasizes that guidance is not a substitute for regulations and statutes and that the applicant must have the necessary authorities to ensure compliance with the Subtitle D Federal revised criteria.

This certification may be signed by the independent legal counsel for the State/Tribe, rather than the Attorney General or equivalent Tribal official, provided that such counsel has full authority to represent independently the lead State/Tribal Agency in court on all matters pertaining to the State/Tribal program.

Applicants seeking approval of permit programs on Indian lands also must include in the legal certification an analysis of the applicant's authority to regulate all facilities covered by the relevant Subtitle D Federal revised criteria on Indian lands. The applicant shall include: a map or legal description of the Indian lands over which the applicant asserts jurisdiction and a copy of all documents such as constitutions, by-laws, charters, executive orders, codes, ordinances, and/or resolutions which support the applicant's assertions of authority. States asserting jurisdiction over Indian lands also must submit the same information, as well as copies of applicable State-Tribal agreements.

To facilitate greater flexibility in the approval process, the Agency intends to allow legal certifications that cite statutes, rules, or guidance that are still in the legislative or rulemaking process and are not yet fully enacted or fully effective. The Agency will make tentative determinations of adequacy based on these types of legal certifications but will request copies of the revised laws and regulations and a revised legal certification stating all laws and regulations are fully enacted and fully effective prior to any final adequacy determination by EPA. It may occur that the statutes, regulations, or guidance originally submitted with the application are modified so that they no longer ensure compliance with the Subtitle D Federal revised criteria. Should this happen, the Regional Administrator will publish a new tentative adequacy determination in the **Federal Register** to provide for adequate public participation, including an opportunity for the public to provide comments.

C. Requirements for Adequate Permit Programs (Subpart C, § 239.6–239.9)

Under § 239.6–239.9 the Agency is proposing requirements for State/Tribal permit programs to ensure that all new and existing Subtitle D facilities which are subject to regulation under RCRA section 4010(c) have a permit and comply with the Subtitle D Federal revised criteria. Strategies for permitting existing facilities are discussed in section B.2 above. Section 239.6 of the proposed rule requires States/Tribes to have legal authority to require permits ensuring compliance with the Subtitle D Federal revised criteria. A State/Tribe must have adequate authority to collect all information it needs to issue permits that implement the technical requirements.

Sections 239.7 through 239.9 of the proposed rule outline the minimum components of an adequate compliance monitoring and enforcement program to ensure compliance with the Subtitle D Federal revised criteria. In general, the proposed rule requires that States/Tribes have the authority to effectively ensure and enforce ongoing compliance with their approved State/Tribal permit requirements. These sections describe the general legal and procedural program elements that are necessary: compliance monitoring authorities, enforcement authorities, and provisions for public intervention in civil enforcement proceedings.

The rule does not prescribe specific permitting procedures or enforcement and compliance monitoring activity levels or tasks. In proposing these requirements, EPA is emphasizing elements of basic authority, rather than detailed programmatic elements. This emphasis allows sufficient State/Tribal flexibility while requiring that the approved State/Tribal programs have adequate authorities and procedures that will allow them to take action as needed to ensure compliance with the technical requirements. A detailed discussion of the permitting, compliance, and enforcement provisions of today's proposal follows.

1. Permitting Requirements (§ 239.6)

The Agency recognizes public involvement in permit decisions as an essential component of an effective permit program. In light of the recognized importance of public participation, EPA is requiring that the permit application process must provide for public review of and input to permit documents containing the applicable site-specific design and operating conditions and must provide for consideration of comments received and notification to the public of the final permit decision.

The Agency believes that it is essential for an effective permit program to provide opportunities for public involvement in permit decisions made after the initial permit issuance (e.g., permit modifications). States/Tribes must provide a full description of their public participation procedures, including procedures for permit actions after initial permit issuance, in the narrative and include a copy of the procedures in the permit program application.

The public participation requirements are intended to ensure that approved permit programs avail the public of needed information and the opportunity to provide input on decisions affecting the management of regulated Subtitle D facilities located in their community. Although EPA is not proposing prescriptive public participation requirements, EPA expects the States/Tribes to have comprehensive and effective procedures for public involvement in key permitting decisions, in accordance with RCRA Section 7004(b)(1).

The Agency believes that it is particularly important to provide for review and comment (including the opportunity for public hearings or meetings) on permits. It also is important to provide public notice and sufficient time for the public to review technical, often complex, permit documents. In addition, EPA has found that notice of opportunities for public review of and input to key post-permit decisions (e.g., significant permit modifications) is essential to an effective public participation program. While some States/Tribes may distinguish between minor permit actions (e.g., increasing the gas monitoring frequency) and major permit actions (e.g., selecting a corrective action remedy), the public should be involved in key decisions which affect their health and their community. For example, public notice of remedial actions and opportunity to comment on the selection of remedies is recommended.

EPA believes the ultimate success of a permit program depends in large part on the effectiveness of a State's/Tribe's public participation program. The additional up-front time a State/Tribe takes involving the public in key permit decisions will result in long-term improvements to the permit program.

While post-permit issuance public participation procedures will not be a determining factor in an adequacy determination, EPA is concerned with ensuring effective public participation. To that end, if, after reviewing the State's/Tribe's public participation narrative and procedures, the Regional Administrator determines that the State's/Tribe's procedures could be improved, he/she will direct Regional staff to work with the State/Tribe to improve the effectiveness of its public participation procedures.

States/Tribes also must demonstrate that they have the authority to require permit conditions that ensure compliance with the Subtitle D Federal revised criteria. Section 239.6 outlines the authorities States/Tribes must have for their permit programs to be deemed adequate.

In order to demonstrate that they will ensure compliance with the Subtitle D Federal revised criteria, States/Tribes must describe and explain substantive differences between the State/Tribal requirements and the Subtitle D Federal revised criteria. States/Tribes may, in any case, impose requirements which are more stringent than the Federal requirements.

1.a. Permitting Requirements for MSWLFs

As discussed earlier in the Approach section of today's proposal, States/Tribes may use any combination of design and performance standards as long as the State/Tribal standards ensure compliance with the Subtitle D Federal revised criteria for MSWLFs. Where 40 CFR Part 258 has a performance standard (e.g., Subpart B Location Restrictions), the State/Tribe may use any performance standard that is at least as stringent as the Federal performance standard. The State/Tribe also may use its own design standard or a combination of a performance standard and a design standard which achieves the Federal performance standard.

Where Part 258 has both a performance standard and design standard (e.g., section 258.21—cover material requirements), the State/Tribe need only demonstrate technical comparability with one of the standards. For example, if the State/Tribe requires MSWLF owners and operators to use a specific daily cover material that the State/Tribe demonstrates to the satisfaction of the Regional Administrator meets the Federal performance standard of Part 258.21 (i.e., controlling disease vectors, fires, odors, blowing litter, and scavenging without presenting a threat to human health and the environment), the Regional Administrator may accept that design as adequate. States/Tribes also may use design or performance standards that the Regional Administrator deems to be clearly more stringent than those found in Part 258.

EPA has received a number of questions concerning the Agency's standard for determining the adequacy of the design portion of a state's permit program. In Subpart D of 40 CFR Part 258, the Agency promulgated both a performance standard (section 258.40(a)(1)) and a uniform composite liner requirement (sections 258.40(a)(2) and 258.40(b)). Under the performance standard provision, a new MSWLF unit or a lateral expansion of an existing unit must be constructed using a design approved by the Director of an approved state, and this design must ensure that concentration values listed in Table 1 of section 258.40 (Maximum Contaminant Levels ("MCLs")) will not be exceeded at the relevant point of compliance, as specified by the approved State Director under section 258.40(d).

Section 258.40(c) sets forth criteria for the Director of an approved state to utilize in evaluating designs. Section 258.40(d) provides that the relevant point of compliance shall be no more than 150 meters from the waste management unit boundary and shall be located on land owned by the owner of the MSWLF unit. This section also establishes the factors which the Director of an approved state must consider in determining what the relevant point of compliance should be.

As the Agency stated when the MSWLF final rule was promulgated, EPA's approach to state program approval recognizes the traditional lead role that states take in implementing landfill standards and protecting ground water. 56 FR 50994 (Oct. 9, 1991). More specifically, EPA stated that, "[i]n selecting a design to meet this performance standard, an approved State may adopt its own performance standard, it may use the rule's specific liner design, or it may use any design it determines would be capable of preventing contamination of ground water beyond the drinking water standards [the MCLs]." *Id.*

In evaluating the design requirements for new units and lateral expansions in State permit programs, EPA has provided states with various approaches for developing adequate programs. For example, States can develop design requirements that only include a performance standard that is at least as stringent as the performance standard in 40 CFR section 258.40(a)(1), i.e., not exceeding the MCLs at the relevant point of compliance. In such States, the Director could approve alternative designs on a site-specific basis as long as the alternative design satisfied the performance standard. The vast majority of the 44 State/Tribal permit programs which EPA has approved as adequate have included a performance standard that is at least as stringent (in certain cases more stringent, e.g., by specifying a relevant point of compliance closer than 150 meters from the unit boundary) than the performance standard in section 258.40(a)(1). EPA believes that state adoption of a design performance standard that is at least as stringent as the one adopted in the MSWLF rule will ensure that owners and operators of new MSWLF units and lateral expansions will comply with the design requirements of the revised criteria. Except as specified in 40 CFR section 258.40(e), i.e., in situations where an unapproved state determines that an alternative liner meets the performance standard and submits a petition to EPA, the Agency never intended to review and/or approve alternative liner designs on a site-specific basis.

EPA has also approved State programs as being adequate under RCRA section 4005(c)(1)(C) if the State has adopted one alternative design or various liner designs which have been shown to satisfy the performance standard in 40 CFR section 258.40(a)(1) in all locations in the State. In these situations, states may perform modeling and associated analysis to show that the alternative design(s) satisfy the performance standard contained in 40 CFR section 258.40(a)(1). The Agency has issued technical guidance which provides states and the public information as to how such modeling and analysis can be done. In approving such state alternative designs, EPA has ensured that the modeling done by the state and any done by the Agency was contained in the public record for review and comment. If the modeling and analysis show that the performance standard in 40 CFR section 258.40(a)(1) will be met in the various locations throughout the state, then the Agency believes the State's alternative design(s) will ensure compliance with the revised criteria, and, thus, is adequate under RCRA section 4005(c)(1)(C). EPA has approved at least six state permit programs which incorporate these alternative design(s) on a state-wide basis.

States are not required to utilize one particular model to show that an alternative liner design will satisfy the performance standard on a state-wide basis. In fact, EPA's technical guidance document identifies a number of models that States may use to assess alternative

designs. In certain situations, however, e.g., where a state adopts a state-wide double composite liner design which is clearly more stringent than the MSWLF single composite design set forth in 40 CFR 258.40(b), EPA believes that modeling and associated analysis may not be necessary.

States may also adopt a combination of a performance standard that is at least as stringent as the performance standard in section 258.40(a)(1) and either the composite liner design contained in sections 258.40(a)(2) and 258.40(b) or alternative designs (discussed above) that meet the performance standard of ensuring that the MCLs will not be exceeded at the relevant point of compliance. In such states, owners and operators of facilities have maximum flexibility in constructing new units and lateral expansions of existing units, while still ensuring that the design standards in Part 258 are satisfied.

2. Requirements for Compliance Monitoring (§ 239.7)

Section 239.7 requires States/Tribes to demonstrate the authority to require compliance monitoring and testing. Paragraph (a) requires that the State/Tribe have the authority to obtain all relevant compliance information. More specifically, the proposed rule requires that the State/Tribe have the authority to: obtain any and all information from an owner or operator necessary to determine whether the owner/operator is in compliance with the State/Tribal program requirements; conduct monitoring or testing to ensure that owners/operators are in compliance with the State/Tribal program requirements; and enter any site or premises subject to the permit program or in which records relevant to the operation of the regulated facilities or activities are kept. A State/Tribe also must demonstrate that its compliance monitoring program provides for inspections adequate to determine compliance with State/Tribal program requirements.

Finally, a State/Tribe must demonstrate that its compliance monitoring program provides mechanisms and processes to: verify the accuracy of information submitted by owners or operators; ensure proper consideration of information submitted by the public; verify adequacy of methods (including sampling) used by owners or operators in developing that information; and produce evidence admissible in an enforcement proceeding.

EPA believes that these compliance monitoring authorities and procedures are central to a State's/Tribe's ability to ensure compliance with the Subtitle D Federal revised criteria. Monitoring and testing programs help ensure that States/Tribes are able to detect permit violations and collect the necessary evidence to support case development and enforcement actions. These authorities play an integral role in the overall determination of adequate permit programs.

The compliance monitoring requirements proposed today are designed to ensure that approved State/Tribal representatives have the authorities and procedures to conduct facility inspections and obtain information necessary to determine owner/operator compliance with approved State/Tribal permit programs. These authorities and procedures provide a basis for State/Tribal agencies to effectively take enforcement actions and help ensure that the regulated community complies with applicable requirements.

3. Requirements for Enforcement Authority (§ 239.8)

Section 239.8 outlines enforcement authority requirements that are necessary for adequate State/Tribal permit programs. A strong State/Tribal enforcement presence is critical to ensuring compliance. The State/Tribe must have the legal authority to take specific actions against any owner/operator that fails to comply with the approved State's/Tribe's requirements. Each of these actions is discussed in detail below.

Paragraph 239.8(a) requires that States/Tribes have the ability to use an administrative or court order to restrain any person from conducting an activity that threatens human health or the environment. Under proposed paragraph 239.8(b), States/Tribes must have the authority to sue in court to enjoin any party from violating State/Tribal program statutes, regulations, orders, or permits. Paragraph 239.8(c) requires that States/Tribes demonstrate the authority to sue in a court of competent jurisdiction to recover civil penalties for violations of permit or order conditions as well as for failure to comply with laws and regulations.

Although the rule being proposed today does not require that States/Tribes have authority to assess criminal penalties, other State/Tribal-delegated programs, such as programs under the Clean Water Act, do require this authority. In fact, there are at least 30 States which already have criminal authority for enforcement of municipal solid waste requirements.[6]

The Agency solicits comment on whether the rule should require that States/Tribes have criminal penalty authority for their permit programs. The Agency realizes that such a criminal requirement could raise impediments to Tribal permit program approval. Federal law bars Indian Tribes from criminally trying or punishing non-Indians in the absence of a treaty or other agreement to the contrary. *Oliphant* v. *Suquamish Indian Tribe* 435 U.S. 191 (1978). In addition, the Federal Indian Civil Rights Act prohibits any Indian court or tribunal from imposing any criminal fine greater than $5,000 (25 U.S.C. 1302(7)). To address this problem, EPA has traditionally asserted that it would exercise criminal enforcement authority where the Tribe is incapable of doing so pursuant to a Memorandum of Agreement (MOA) between EPA and the Tribe specifying procedures for referral of cases. See, e.g., 40 CFR 123.34. The Agency is interested in receiving comments on employing the "MOA referral" approach for Tribal MSWLF permit programs and any other suggestions as to how Tribes could meet a criminal penalty authority requirement in light of the limitations on their authority to assert criminal jurisdiction over non-Indians on Tribal lands.

4. Intervention in Civil Enforcement Proceedings (§ 239.9)

Today's proposal provides that State/Tribal civil enforcement proceedings must ensure adequate opportunity for public participation through either of two options: (1) authority to allow intervention as a right; or, (2) assurances that the State/Tribal authority will provide notice and opportunity for public comment in all proposed settlements of civil enforcement actions, investigate and provide responses to citizen complaints about violations, and not oppose citizen intervention when permissive intervention is allowed by statute, rule, or regulation.

Each of these options separately provides an adequate opportunity for public participation. Thus, States/Tribes need only provide one of the options. The options ensure that the opportunity for public participation in civil enforcement proceedings is provided with minimal intrusion into the States'/Tribes' judicial systems. The purpose for the intervention requirement is

[6] Review of State Enforcement Powers and Authorities Under RCRA Subtitle D: Final Report. U.S. Environmental Protection Agency, March 31, 1987.

outlined below followed by a detailed discussion of the two options.

The purpose of providing public participation in the decision making process is to promote public involvement in the enforcement of Subtitle D Federal revised criteria. Without intervention requirements, citizens may be precluded from participating in civil enforcement proceedings even if they have pertinent information that would support State/Tribal enforcement cases. Also, citizens that have an interest in or that may be affected by the outcome of the enforcement action may not be able to intervene in enforcement proceedings.

Citizen intervention provisions are mandatory for other EPA programs, such as the Underground Storage Tank, Hazardous Waste, Underground Injection Control, and National Pollutant Discharge Elimination System programs. EPA first required citizen intervention as a result of the decision in *Citizens for a Better Environment* v. *Environmental Protection Agency*, 596 F.2d 720 (7th Cir. 1979). That decision interpreted section 101(e) of the Federal Water Pollution Control Act Amendments (FWPCA) of 1972 to require EPA to establish State program guidelines and evaluate State programs to ensure that there is public participation in the enforcement of the Clean Water Act. This principle has been extended to RCRA, because the language of FWPCA section 101(e) is quite similar to RCRA section 7004(b)(1). Section 7004 of RCRA requires EPA and the States to provide for, encourage, and assist with public participation in the development, revision, implementation, and enforcement of any regulation, guideline, information, or program under RCRA.

Under today's proposal, the State/Tribe would be required to provide for intervention using either of two options. The first option, paragraph 239.9(a), requires that the State/Tribe allow intervention by any citizen having an interest that is or may be adversely affected. Under this option, the State/Tribe allows intervention as a right in any civil action to enforce this Part. The second option requires the State/Tribe to assure that it would: provide opportunity for public involvement or comment on all proposed civil settlements; respond to citizen complaints about violations; and not oppose citizen action when intervention is legally allowed. The public involvement or comment requirement of this last option may be satisfied by a variety of means: from a formal notice and hearing to less formal public review.

D. Adequacy Determination Procedures (Subpart D, §§ 239.10–239.12)

1. Adequacy Determination Procedures (§ 239.10)

To encourage early and close working relationships between the States/Tribes and the EPA Regions, approval authority has been delegated to EPA's Regional Administrators. EPA Regional Offices will review State/Tribal applications to determine if a State's/Tribe's application is complete and whether the State/Tribal permit program meets the requirements of this Part.

For those States/Tribes that have submitted a permit program application, the Regional Administrator will have 30 days to make an administrative review of each application and request additional information from the State/Tribe or notify the State/Tribe that the application is administratively complete.

Upon review of a complete application, EPA will make a tentative determination of the adequacy of the permit program. After publication of the **Federal Register** notice of this tentative determination, a public comment period, and review and consideration of comments received, the Regional Administrator will make a final adequacy determination and publish it in the **Federal Register**. At the discretion of the Regional Administrator, a public hearing may be held if sufficient public interest exists or if such a hearing might clarify substantive issues. A final determination of adequacy will be made within 180 days of EPA's determination that the application is complete unless a delay is agreed to by the Regional Administrator after consultation with the State/Tribal Director.

The Agency designed this process to ensure that permit program adequacy is determined in a timely manner, while simultaneously affording the public and EPA sufficient opportunity for review and comment.

2. Partial Approval Procedures for State/Tribal Permit Programs (§ 239.11)

Section 239.11 proposes procedures for partial approval of State/Tribal permit programs. A State/Tribal permit program is eligible for partial approval if it meets all of the procedural and legal Part 239 requirements (i.e., but not limited to, enforcement, public participation, compliance monitoring) and meets essentially all of the technical Part 239 requirements (e.g., 40 CFR Part 258 requirements). States/Tribes applying for partial approval also must include a schedule, agreed to by the State/Tribe and the appropriate Regional Administrator, for completing the necessary changes to the laws, regulations, and/or guidance to comply with the remaining technical requirements. For an additional explanation of the partial approval process refer to section II.E.2 in the background portion of this preamble.

3. Procedures for Review of Modified State/Tribal Programs (§ 239.12)

Section 239.12 proposes procedures for submittal and review of revised applications for State/Tribal program adequacy determinations, should a State/Tribe revise its permit program once deemed adequate. Program revision may result from changes in the pertinent Federal statutory or regulatory authority, changes in State/Tribal statutory or regulatory authority or relevant guidance, or when responsibility for the State/Tribal program is shifted within the lead agency or to a new or different State/Tribal agency or agencies.

States/Tribes may be required to revise their permit program if the Federal statutory or regulatory authorities which have significant implications for State/Tribal permit programs change. These changes also may require revision to a State's/Tribe's permit program application. Such a change at the Federal level, and resultant requirements for States/Tribes, would be made known to the States/Tribes either in the **Federal Register** containing the change or through the appropriate EPA Regional Office.

Changes to parts of the State/Tribal permit program, as described in its application, which may result in the permit program becoming inadequate must be reported to the appropriate Regional Administrator. In cases where the State/Tribal statutory or regulatory authority or relevant guidance changes, or when responsibility for the State/Tribal program is shifted within the lead agency or to a new or different State/Tribal agency or agencies, the State/Tribal Director must inform the Regional Administrator of these modifications. In addition, changes to a State's/Tribe's statutes, regulations, or guidance which were not part of the State's/Tribe's initial application, but which may have a significant impact on the adequacy of the State's/Tribe's permit program, also shall be reported to the EPA. An example of a change in State/Tribal statutes or regulations which may have a significant effect on the adequacy of a State's/Tribe's permit program is the passage of a new law

which disallows the use of guidance in environmental regulatory programs, where a State/Tribe has submitted guidance as part of its application.

The Regional Administrator will determine, on a case-by-case basis, whether changes at the State/Tribal level warrant re-examination of the State/Tribal program adequacy determination, including submission of a revised application. In re-examining the adequacy determination, the Regional Administrator will follow the adequacy determination procedures outlined in today's rule under § 239.12.

This process is necessary to ensure that State/Tribal permit programs remain current with Federal requirements and continue to be adequate to ensure compliance with the Subtitle D Federal revised criteria. There are no mandatory time-frames for submitting modifications or re-examining adequacy determinations. Rather, schedules for approved States/Tribes to submit modifications to the Regional Administrator and for State/Tribal submission of a revised application are to be negotiated by the State/Tribal Director and the Regional Administrator. This arrangement should minimize potential disruption to ongoing program activities.

Section 239.12(g) and 239.12(h) of today's proposal refer to "additional classifications of Subtitle D regulated facilities" and specify that streamlined approval procedures will not be followed in this case. This language has been included in anticipation of future EPA regulation of other types of facilities under Subtitle D. An example of a potential additional class of Subtitle D facilities is industrial landfills that accept conditionally exempt small quantity generator waste.

EPA anticipates maintaining a continued informal dialogue with approved States/Tribes as States/Tribes make changes to their permit programs or as Federal statutes or regulations change. State/Tribal permitting is a dynamic process and EPA anticipates State/Tribal Directors and the respective EPA Regional Administrators will continue to communicate on a variety of solid waste issues. These types of routine communications between the States/Tribes and the EPA Regions are important in maintaining good information exchange and should be encouraged. EPA notes that the majority of communications between States/Tribes and the Regions are part of normal operations and should not be construed as part of the adequacy withdrawal process or program modification process. The procedures for modification of State/Tribal permit programs and for withdrawal of determination of adequacy require formal notifications to the State/Tribe and any such correspondence shall be clearly identified to differentiate it from other correspondence.

4. Withdrawal of Determination of Adequacy of State/Tribal Permit Programs (§ 239.13)

Section 239.13 lays out specific conditions and procedures for the withdrawal of State/Tribal permit program determinations of adequacy. Withdrawal procedures may be initiated where it appears that the State/Tribal permit program may no longer be adequate to ensure compliance with the Subtitle D Federal revised criteria. The withdrawal of the Agency's adequacy determination will require completion of several steps including: (1) receipt of substantive information sufficient to indicate that the State's/Tribe's permit program may no longer be adequate; (2) a 45-day period allowing the State/Tribe to demonstrate its permit program adequacy; (3) a determination of any measures needed to correct program deficiencies and an opportunity for the State/Tribe to address these program deficiencies; (4) initiation of proceedings for withdrawal of adequacy determination (i.e., notice of tentative determination of inadequacy), if the State/Tribe fails to appropriately resolve the deficiency; (5) public involvement; and, (6) a final determination.

The first step is EPA receipt of substantive information sufficient to indicate program inadequacy, after which the Regional Administrator will inform the State/Tribe of the information. It is EPA's intent that a program withdrawal would not be triggered by minor complaints. Today's proposed rule will allow a State/Tribe 45 days to demonstrate that its permit program remains adequate.

If, after reviewing the State's/Tribe's response, the Regional Administrator believes there is reason to revise the permit program, the State/Tribe and Region will negotiate a schedule for the resolution of the deficiency(ies). If the State/Tribal Director and Regional Administrator fail to agree to a time period for resolving the deficiency(ies), the Regional Administrator will set a time period and inform the State/Tribal Director of the time period.

If, within the established time frame, the State/Tribe has not adequately addressed the identified program deficiencies, the Regional Administrator may initiate adequacy determination withdrawal by publishing a notice of tentative adequacy withdrawal in the **Federal Register**. This notice will outline the deficiency and will allow for a period of public comment and opportunity for a public hearing. At the conclusion of the public comment period and after the public hearing (if any), the Regional Administrator will consider all comments received, reevaluate the State/Tribal permit program, and determine whether the State/Tribal permit program can ensure compliance with the Subtitle D Federal revised criteria.

If the Regional Administrator finds that the State/Tribal program remains adequate, he/she will publish a notice in the **Federal Register** which explains the reasons for the decision and terminate the withdrawal process. However, if the Regional Administrator finds that the permit program is no longer adequate to ensure compliance with the Subtitle D Federal revised criteria, he/she will publish a notice in the **Federal Register** withdrawing the Agency's determination of State/Tribal permit program adequacy and declaring the State/Tribal permit program inadequate to ensure compliance with the Subtitle D Federal revised criteria.

The Agency proposes these specific withdrawal procedures to ensure that citizens have the opportunity to bring alleged State/Tribal deficiencies to the attention of the Regional Administrators and that States/Tribes have the opportunity to refute or correct alleged problems as they arise. Any State/Tribe whose permit program has been deemed inadequate to ensure compliance with the Subtitle D Federal revised criteria may seek another adequacy determination at any time.

E. Changes to Part 258

For the sole purpose of applying the Federal revised criteria to approved Tribal programs, the rule proposes to include Indian Tribes in the definition of "State" and Tribal Director in the definition of "State Director." The Agency proposes to do this as a means of efficiency and not to imply any other substantive effect on the character, authority, and/or rights of Tribes.

IV. Economic and Regulatory Impacts

A. Regulatory Impact Analysis

Pursuant to the terms of executive order 12866, the Office of Management and Budget (OMB) has notified EPA that it considers this a "significant regulatory action." EPA has submitted this action to OMB for review. Changes made in response to OMB suggestions or recommendations will be documented in the public record.

Requirements for State/Tribal permit programs as outlined in this proposal

will not add substantial costs beyond those already imposed under the Subtitle D Federal revised criteria. Regardless of this regulation, RCRA section 4005(c)(1)(B) requires all States to develop and implement permit programs to ensure compliance with the Subtitle D Federal revised criteria. EPA believes that the proposed STIR does not impose a major increase in costs over and above any costs which RCRA section 4005(c)(1)(B) already imposes on States/Tribes.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires an agency to prepare, and make available for public comment, a regulatory flexibility analysis that describes the impact of a proposed or final rule on small entities (i.e., small businesses, small organizations, and small governmental jurisdictions). No regulatory flexibility analysis is required if the head of an agency certifies the rule will not have significant economic impact on a substantial number of small entities.

This proposal, in itself, will not have a significant impact on a substantial number of small entities, since the proposal has direct effects only on State/Tribal Agencies. Therefore, no regulatory flexibility analysis has been prepared.

C. Paperwork Reduction Act

The information collection requirements in today's proposed rule have been submitted for approval to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.* An Information Collection Request (ICR) document has been prepared by EPA (ICR No. 1608), and a copy may be obtained from Sandy Farmer, OPPE Regulatory Information Division, U.S. EPA (2136), 401 M Street SW., Washington, D.C., 20460 or by calling (202) 260–2740.

'The need for this collection of information from the States/Tribes derives from Section 4005(c) of RCRA. This section requires the EPA Administrator to review State/Tribal permit programs to determine if they are adequate to ensure compliance with the Federal MSWLF criteria. To carry out this mandate, and thus make a determination, EPA must collect information in the form of an application for MSWLF permit program approval from States/Tribes. The universe of respondents involved in this information collection will be limited to those States/Tribes seeking approval of their municipal solid waste permit programs. The information which States/Tribes would submit is public information; therefore, no problems of confidentiality or sensitive questions arise.

The projected cost and hour burden for the submittal of a schedule or an application by the estimated 41 respondents within a three year time frame is 9,236 Hours. Given these parameters, the bottom line cost estimate is $318,280.00. This cost estimate reflects total capital costs and operation and maintenance costs. 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.

Comments are requested on the Agency's need for this information, the accuracy of the provided burden estimates, and any suggested methods for minimizing respondent burden, including through the use of automated collection techniques. Send comments on the ICR to the Director, OPPE Regulatory Information Division; U.S. Environmental Protection Agency (2136); 401 M St., S.W.; Washington, DC 20460; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th St., N.W., Washington, DC 20503, marked "Attention: Desk Officer for EPA." Include the ICR number in any correspondence. Since OMB is required to make a decision concerning the ICR between 30 and 60 days after January 26, 1996, a comment to OMB is best assured of having its full effect if OMB receives it by February 26, 1996. The final rule will respond to any OMB or public comments on the information collection requirements contained in this proposal.

D. Unfunded Mandates Reform Act

Under section 202 of the Unfunded Mandates Reform Act of 1995 (the Act), P.L. 104–4, which was signed into law on March 22, 1995, EPA generally must prepare a written statement for rules with federal mandates that may result in estimated costs to state, local, and tribal governments in the aggregate, or to the private sector, of $100 million or more in any one year. When such a statement is required for EPA rules, under section 205 of the Act, EPA must identify and consider alternatives, including the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. EPA must select that alternative, unless the Administrator explains in the final rule why it was not selected or it is inconsistent with law. Before EPA establishes regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must develop under section 203 of the Act a small government agency plan. The plan must provide for notifying potentially affected small governments, giving them meaningful and timely input in the development of EPA regulatory proposals with significant federal intergovernmental mandates, and informing, educating, and advising them on compliance with the regulatory requirements.

EPA has determined that the proposed STIR does not include a federal mandate that may result in estimated costs of $100 million or more to state, local, or tribal governments in the aggregate, or to the private sector, in any one year. Under the authority of RCRA section 4005(c)(1)(C), EPA has already approved 42 state MSWLF permit programs. The Agency also has approved one tribal MSWLF program. EPA does not anticipate that the approval of MSWLF permit programs under the proposed STIR for the few remaining states (or any tribes which submit their programs voluntarily for approval) will result in annual costs of $100 million or more. EPA estimates that it costs a state approximately $15,000 to develop and submit to EPA an application for approval of a state permit program. The Agency also has estimated that tribal governments may spend approximately $8,000 to prepare and submit a permit program application.

EPA's approval of state and tribal programs generally have a deregulatory effect on the private sector because once a state or tribal MSWLF permit program is determined to be "adequate" under RCRA section 4005(c)(1)(C), owners and

operators of MSWLFs may take advantage of the flexibility that an approved state or Indian tribe may exercise. Such flexibility will reduce, not increase, compliance costs for the private sector.

As to section 203 of the Act, EPA has determined that the proposed STIR will not significantly or uniquely affect small governments, including tribal governments. The Agency recognizes that small governments may own and/or operate solid waste disposal facilities, including MSWLFs, that will become subject to the requirements of a state permit program that is approved under the STIR, once it is promulgated. However, such small governments which own and/or operate MSWLFs are already subject to the requirements in 40 CFR Part 258. Once EPA approves state permit programs under the STIR, these same small governments will be able to own and operate their MSWLFs with increased levels of flexibility provided under the approved state program.

EPA has, however, worked closely with states and small governments in the development of the proposed STIR. EPA distributed drafts of the proposed rule to 14 states for their review and comments. The Agency also provided copies of the draft proposed STIR to the Association of State and Territorial Solid Waste Management Officials, which distributed the draft rule to all of its state and territorial members. In addition, EPA conducted a pilot program where the Agency worked with the states of California, Connecticut, Virginia, and Wisconsin to develop their applications for program approval using the draft STIR as guidance.

EPA also distributed the draft STIR at the National Tribal Conference on Environmental Management and at EPA Regional-Tribal conferences. Although tribal governments are not required to submit applications for program approval under RCRA section 4005(c)(1)(B), EPA has utilized the draft proposed STIR as guidance in working with particular tribal governments which have chosen to seek EPA's approval, e.g., the Campo Band tribe in California and the Cheyenne River Sioux in South Dakota.

As owners and/or operators of municipal landfills, small governments have been more directly impacted by the MSWLF rule (40 CFR Part 258) than they will be by the STIR. Indeed, the STIR will provide small governments with additional flexibility, resulting in a cost reduction, once their state permit program is approved. The Agency has worked closely with small governments in the implementation of the MSWLF rule and provided them with information concerning the flexibility which it provides to owners/operators in approved states. EPA has supported training workshops for small governments and has prepared and distributed an extensive amount of information, including fact sheets and brochures about the MSWLF rule.

In working with these various tribal governments, states, state organizations, and local governments, EPA has provided notice to small governments of the requirements of the MSWLF rule and the STIR; obtained meaningful and timely input from them; and informed, educated, and advised small governments on how to comply with the requirements of the STIR and the MSWLF rule. Through this notice, EPA seeks input from small governments during this rulemaking process. Thus, any application requirements of section 203 of the Act will have been met.

List of Subjects

40 CFR Part 239

Environmental protection, Administrative practice and procedure, municipal solid waste landfills, non-municipal solid waste, State/Tribal permit program approval, and adequacy.

40 CFR Part 258

Environmental protection, Reporting and recordkeeping requirements, Waste treatment and disposal, Water pollution control.

Authority: These regulations are issued under authority of the Resource Conservation and Recovery Act, 42 U.S.C. 6901.

Dated: December 12, 1995.

Carol M. Browner,

Administrator.

For the reasons set out in the preamble, 40 CFR Chap. I is proposed to be amended as follows:

1. Part 239 is added to read as follows:

PART 239—REQUIREMENTS FOR STATE/TRIBAL PERMIT PROGRAM DETERMINATION OF ADEQUACY

Subpart A—General

Sec.
239.1 Purpose.
239.2 Scope and definitions.

Subpart B—State/Tribal Program Application

239.3 Components of program application.
239.4 Narrative description of State/Tribal permit program.
239.5 State/Tribal legal certification.

Subpart C—Requirements for Adequate Permit Programs

239.6 Permitting requirements.
239.7 Requirements for compliance monitoring authority.
239.8 Requirements for enforcement authority.
239.9 Intervention in civil enforcement proceedings.

Subpart D—Adequacy Determination Procedures

239.10 Criteria and procedures for making adequacy determinations.
239.11 Approval procedures for partial approval.
239.12 Modifications of State/Tribal programs.
239.13 Criteria and procedures for withdrawal of determination of adequacy.

Authority: 42 U.S.C. 6901.

Subpart A—General

§ 239.1 Purpose.

This Part specifies the requirements that State/Tribal permit programs must meet to be determined adequate by the EPA under section 4005(c)(1)(C) of the Resource Conservation and Recovery Act (RCRA or the Act) and the procedures EPA will follow in determining the adequacy of State/Tribal Subtitle D permit programs or other systems of prior approval and conditions required to be adopted and implemented by States under RCRA section 4005(c)(1)(B).

§ 239.2 Scope and definitions.

(a) Scope. (1) Nothing in this Part precludes a State/Tribe from adopting or enforcing requirements that are more stringent or more extensive than those required under this Part or from operating a permit program or other system of prior approval and conditions with more stringent requirements or a broader scope of coverage than that required under this Part.

(2) All States shall submit a Subtitle D permit program application for an adequacy determination for purposes of this Part.

(3) An Indian Tribe may, within its discretion, submit a Subtitle D permit program application for an adequacy determination for purposes of this Part.

(4) If EPA determines that a State/Tribal Subtitle D permit program is inadequate, EPA will have the authority to enforce the Subtitle D Federal revised criteria on the RCRA section 4010(c) regulated facilities under the State's/Tribe's jurisdiction.

(b) Definitions. (1) For purposes of this part:

Administrator means the Administrator of the United States Environmental Protection Agency or any authorized representative.

Approved permit program or *approved program* means a State/Tribal Subtitle D permit program or other system of prior approval and conditions

that has been determined to be adequate by EPA under this part.

Approved State/Tribe means a State/Tribe whose Subtitle D permit program or other system of prior approval and conditions has been determined to be adequate by EPA under this part.

Guidance means policy memorandum, an application for approval under this Part, or other technical or policy documents that supplement State/Tribal laws and regulations. These documents provide direction with regard to how State/Tribal agencies should interpret their permit program requirements and are consistent with State/Tribal laws and regulations.

Implementing agency means the State/Tribal and/or local agency(ies) responsible for carrying out an approved State/Tribal permit program.

Indian lands or *Indian country* means: (1) 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 throughout the reservation; (2) 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, (3) all Indian allotments, the Indian titles to which have not been extinguished, including rights of way running through the same.

Indian Tribe or *Tribe* means any Indian Tribe, band, nation, or community recognized by the Secretary of the Interior and exercising substantial governmental duties and powers.

Lead State/Tribal Agency means the State/Tribal agency which has the legal authority and oversight responsibilities to implement the permit program or other system of prior approval and conditions to ensure that Subtitle D regulated facilities comply with the requirements of the approved State/Tribal permit program and/or has been designated as lead agency.

Permit documents means permit applications, draft and final permits, or other documents that include applicable design and management conditions in accordance with the Subtitle D Federal revised criteria and the technical and administrative information used to explain the basis of permit conditions.

Permit or *prior approval and conditions* means any authorization, license, or equivalent control document issued under the authority of the State/Tribe regulating the location, design, operation, ground-water monitoring, closure, post-closure care, corrective action, and financial assurance of Subtitle D facilities.

Regional Administrator means any one of the ten Regional Administrators of the United States Environmental Protection Agency or any authorized representative.

State/Tribal Director means the chief administrative officer of the lead State/Tribal agency responsible for implementing the State/Tribal permit program for Subtitle D regulated facilities.

State/Tribal program or *permit program* means all the authorities, activities, and procedures that comprise the State's/Tribe's system of prior approval and conditions for regulating the location, design, operation, ground-water monitoring, closure, post-closure care, corrective action, and financial assurance of Subtitle D regulated facilities.

Subtitle D regulated facilities means all solid waste disposal facilities subject to the revised criteria promulgated by EPA under RCRA section 4010(c).

(2) The definitions in Part 258 apply to all Subparts of this Part.

Subpart B—State/Tribal Program Application

§ 239.3 Components of program application.

Any State/Tribe that seeks a determination of adequacy under this Part must submit an application to the Regional Administrator, in the appropriate EPA Region. The application must identify the scope of the program for which the State/Tribe is seeking approval (i.e., which class of Subtitle D regulated facilities are covered by the application). The application also must demonstrate that the State's/Tribe's authorities and procedures are adequate to ensure compliance with the relevant Subtitle D Federal revised criteria and that its permit program is uniformly applicable to all the relevant Subtitle D regulated facilities within the State's/Tribe's jurisdiction. The application must contain the following parts:

(a) A transmittal letter, signed by the State/Tribal Director, requesting program approval. If more than one State/Tribal agency has implementation responsibilities, the transmittal letter must designate a lead agency and be jointly signed by all State/Tribal agencies with implementation responsibilities or by the State Governor/Tribal authority exercising powers substantially similar to those of a State Governor;

(b) A narrative description of the State/Tribal permit program in accordance with § 239.4;

(c) A legal certification in accordance with § 239.5;

(d) Copies of all applicable State/Tribal statutes, regulations, and guidance; and,

(e) Copies of any State-Tribal agreements, if a State and Indian Tribe have negotiated agreements for the implementation of the permit program on Indian lands.

§ 239.4 Narrative Description of State/Tribal Permit Program.

The description of a State's/Tribe's program must include:

(a) An explanation of the jurisdiction and responsibilities of all State/Tribal agencies and local agencies implementing the permit program and description of the coordination and communication responsibilities of the lead State/Tribal agency to facilitate communications between EPA and the State/Tribe if more than one State/Tribal agency has implementation responsibilities;

(b) An explanation of how the State/Tribe will ensure that existing and new facilities are permitted or otherwise approved and in compliance with the relevant Subtitle D Federal revised criteria;

(c) A demonstration that the State/Tribe meets the requirements in §§ 239.6, 239.7, 239.8, and 239.9;

(d) The number of facilities within the State's/Tribe's jurisdiction that received waste on or after the date specified below:

(1) For municipal solid waste landfill units, October 9, 1991.

(2) [Reserved.]

(e) A discussion of staff resources available to carry out and enforce the State/Tribal relevant permit program.

(f) A description of the State's/Tribe's public participation procedures as specified in § 239.6(a) through (c).

(g) For Indian Tribes, an assertion and demonstration that the Tribe is recognized by the Secretary of the Interior; has an existing government exercising substantial governmental duties and powers; has adequate civil regulatory jurisdiction (as shown in the Tribal Legal Certification under 239.5(c)) over the subject matter and entities to be regulated; and is reasonably expected to be capable of administering the federal environmental program for which it is seeking approval. If the Administrator has previously determined that a Tribe has met these prerequisites for another EPA program authorization, then that Tribe need provide only that information

unique to RCRA Subtitle D permit program approval.

§ 239.5 State/Tribal legal certification.

(a) A State/Tribe must submit a written certification from the Attorney General or equivalent Tribal official that the laws, regulations, and any applicable guidance cited in the application are enacted at the time the certification is signed and are fully effective when the State/Tribal permit program is approved. This certification may be signed by the independent legal counsel for the State/Tribe, rather than the Attorney General or equivalent Tribal official, provided that such counsel has full authority to independently represent the lead State/Tribal Agency in court on all matters pertaining to the State/Tribal program.

(b) If guidance is to be used to supplement statutes and regulations, the State/Tribal legal certification must state that the State/Tribe has the authority to use guidance to develop enforceable permits which will ensure compliance with relevant Subtitle D Federal revised criteria and that the guidance was duly issued in accordance with State/Tribal law.

(c) If an applicant seeks approval of its permit program on Indian lands, the required legal certification shall include an analysis of the applicant's authority to implement the permitting and enforcement provisions of this Part (Subparts C and D) on those Indian lands. The applicant shall include: a map or legal description of the Indian lands over which it asserts jurisdiction and a copy of all documents such as constitutions, by-laws, charters, executive orders, codes, ordinances, court decisions, and/or resolutions which support the applicant's assertions of authority.

(d) If any laws, regulations, or guidance are not enacted or fully effective when the legal certification is signed, the certification should specify what portion(s) of laws, regulations, or guidance are not yet enacted or fully effective and when they are expected to be enacted or fully effective.

The Agency may make a tentative determination of adequacy using this legal certification. The State/Tribe must submit a revised legal certification meeting the requirements of paragraph (a) of this section and, if appropriate, paragraph (b) of this section along with all the applicable fully enacted and effective statutes, regulations, or guidance, prior to the Agency making a final determination of adequacy. If the statutes, regulations or guidance originally submitted under § 239.3(d) and certified to under this section are modified in a significant way, the Regional Administrator will publish a new tentative determination to ensure adequate public participation.

Subpart C—Requirements for Adequate Permit Programs

§ 239.6 Permitting requirements.

(a) State/Tribal law must require that:

(1) Permit documents for permit determinations are made available for public review and comment; and,

(2) Final permit determinations on permit applications are made known to the public.

(b) The State/Tribe shall have procedures that ensure that public comments on permit determinations are considered.

(c) The State/Tribe must fully describe its public participation procedures for permit issuance and post-permit actions in the narrative description required under § 239.4 and include a copy of these procedures in its permit program application.

(d) The State/Tribe shall have the authority to collect all information necessary to issue permits that are adequate to ensure compliance with the relevant Subtitle D Federal revised criteria.

(e) For municipal solid waste landfill units, State/Tribal law must require that:

(1) Prior to construction and operation, all new municipal solid waste landfill units shall have a permit incorporating the conditions identified in paragraph (e)(3) of this section;

(2) All existing municipal solid waste landfill units shall have a permit incorporating the conditions identified in paragraph (e)(3) of this section;

(3) The State/Tribe shall have the authority to impose requirements for municipal solid waste landfill units adequate to ensure compliance with 40 CFR part 258. These requirements shall include:

(i) General standards which achieve compliance with 40 CFR part 258 subpart A;

(ii) Location restrictions for municipal solid waste landfill units which achieve compliance with 40 CFR part 258 subpart B;

(iii) Operating criteria for municipal solid waste landfill units which achieve compliance with 40 CFR part 258 subpart C;

(iv) Design criteria for municipal solid waste landfill units which achieve compliance with 40 CFR part 258 subpart D;

(v) Ground-water monitoring and corrective action standards for municipal solid waste landfill units which achieve compliance with 40 CFR part 258 subpart E;

(vi) Closure and post-closure care standards for municipal solid waste landfill units which achieve compliance with 40 CFR part 258 subpart F; and,

(vii) Financial assurance standards for municipal solid waste landfill units which achieve compliance with 40 CFR part 258 subpart G.

§ 239.7 Requirements for compliance monitoring authority.

(a) The State/Tribe must have the authority to:

(1) Obtain any and all information, including records and reports, from an owner or operator of a Subtitle D regulated facility necessary to determine whether the owner/operator is in compliance with the State/Tribal requirements;

(2) Conduct monitoring or testing to ensure that owners/operators are in compliance with the State/Tribal requirements; and,

(3) Enter any site or premise subject to the permit program or in which records relevant to the operation of Subtitle D regulated facilities or activities are kept.

(b) A State/Tribe must demonstrate that its compliance monitoring program provides for inspections adequate to determine compliance with the approved State/Tribal permit program.

(c) A State/Tribe must demonstrate that its compliance monitoring program provides mechanisms or processes to:

(1) Verify the accuracy of information submitted by owners or operators of Subtitle D regulated facilities;

(2) Verify the adequacy of methods (including sampling) used by owners or operators in developing that information;

(3) Produce evidence admissible in an enforcement proceeding; and,

(4) Receive and ensure proper consideration of information submitted by the public.

§ 239.8 Requirements for enforcement authority.

Any State/Tribe seeking approval must have the authority to impose the following remedies for violation of State/Tribal program requirements:

(a) To restrain immediately and effectively any person by administrative or court order or by suit in a court of competent jurisdiction from engaging in any activity which may endanger or cause damage to human health or the environment.

(b) To sue in a court of competent jurisdiction to enjoin any threatened or continuing activity which violates any statute, regulation, order, or permit

which is part of or issued pursuant to the State/Tribal program.

(c) To sue in a court of competent jurisdiction to recover civil penalties for violations of a statute or regulation which is part of the State/Tribal program or of an order or permit which is issued pursuant to the State/Tribal program.

§ 239.9 Intervention in civil enforcement proceedings.

Any State/Tribe seeking approval must provide for intervention in the State/Tribal civil enforcement process by providing either:

(a) Authority that allows intervention as a right in any civil action to obtain remedies specified in Section 239.8 by any citizen having an interest that is or may be adversely affected; or,

(b) Assurance by the appropriate State/Tribal agency that:

(1) It will provide notice and opportunity for public involvement in all proposed settlements of civil enforcement actions (except where immediate action is necessary to adequately protect human health and the environment); and,

(2) It will investigate and provide responses to citizen complaints about violations; and,

(3) It will not oppose citizen intervention when permissive intervention is allowed by statute, rule, or regulation.

Subpart D—Adequacy Determination Procedures

§ 239.10 Criteria and procedures for making adequacy determinations.

(a) The State/Tribal Director seeking an adequacy determination must submit to the appropriate Regional Administrator an application in accordance with § 239.3.

(b) Within 30 days of receipt of a State/Tribal program application, the Regional Administrator will review the application and notify the State/Tribe whether its application is administratively complete in accordance with the application components required in § 239.3. The 180-day review period for final determination of adequacy, described in paragraph (d) of this section, begins when the Regional Administrator deems a State/Tribal application to be administratively complete.

(c) After receipt and review of a complete application, the Regional Administrator will make a tentative determination on the adequacy of the State/Tribal program. The Regional Administrator shall publish the tentative determination on the adequacy of the State/Tribal program in the **Federal Register**. Notice of the tentative determination must:

(1) Specify the Regional Administrator's tentative determination;

(2) Afford the public at least 30 days after the notice to comment on the State/Tribal application and the Regional Administrator's tentative determination;

(3) Include a specific statement of the areas of concern, if the Regional Administrator indicates the State/Tribal program may not be adequate;

(4) Note the availability for inspection by the public of the State/Tribal permit program application;

(5) Indicate that a public hearing will be held by EPA if sufficient public interest is expressed during the comment period. The Regional Administrator may determine when such a hearing is necessary to clarify issues involved in the tentative adequacy determination. If held, the public hearing will be scheduled at least 45 days from public notice of such hearing. The public comment period may be continued after the hearing at the discretion of the Regional Administrator.

(d) Within 180 days of determining that a State/Tribal program application is administratively complete, the Regional Administrator will make a final determination of adequacy after review and consideration of all public comments, unless the Regional Administrator after consultation with the State/Tribal Director agrees to extend the review period. The Regional Administrator will give notice of the final determination in the **Federal Register**. The notice must include a statement of the reasons for the determination and a response to significant comments received.

(e) For all States/Tribes that do not submit an application, the Administrator or Regional Administrator may issue a final determination of inadequacy in the **Federal Register** declaring those State/Tribal permit programs inadequate to ensure compliance with the relevant Subtitle D Federal revised criteria. Such States/Tribes may apply later for a determination of adequacy.

§ 239.11 Approval procedures for partial approval.

(a) The EPA may partially approve State/Tribal permit programs that do not meet all of the requirements in § 239.6 (e)(3) (i.e., do not incorporate all of the relevant Subtitle D Federal revised criteria). Such permit programs may be partially approved if:

(1) The appropriate Regional Administrator determines that the State's/Tribe's permit program largely meets the technical requirements of Section 239.6 and meets all other requirements of this rule;

(2) Changes to a specific part(s) of the State/Tribal permit program are required in order for the State/Tribal program to fully meet the requirements of Section 239.6; and,

(3) Provisions not included in the partially approved portions of the State/Tribal permit program are clearly identifiable and separable subsets of the relevant Subtitle D Federal revised criteria.

(b) A State/Tribe applying for partial approval must include in its application a schedule to revise the necessary laws, regulations, and/or guidance to obtain full approval within two years of final approval of the partial permit program. The Regional Administrator and the State/Tribal Director must agree to the schedule.

(c) The application for partial approval must fully meet the requirements of subparts B and C of this part.

(d) States/Tribes with partially approved permit programs are only approved for those relevant provisions of the Subtitle D Federal revised criteria included in the partial approval.

(e) Any partial approval adequacy determination made by the Regional Administrator pursuant to this section and § 239.10 shall expire two years from the effective date of the final partial program adequacy determination unless the Regional Administrator grants an extension. States/Tribes seeking an extension must submit a request to the appropriate Regional Administrator, must provide cause for missing the deadline, and must supply a new schedule to revise necessary laws, regulations, and/or guidance to obtain full approval. The appropriate Regional Administrator will decide if there is cause and the new schedule is realistic. If the Regional Administrator extends the expiration date, the Region will publish a notice in the **Federal Register** along with the new expiration date. A State/Tribe with partial approval shall submit an amended application meeting all of the requirements of part 239 and have that application approved by the two-year deadline or the amended date set by the Regional Administrator.

(f) The Regional Administrator will follow the adequacy determination procedures in § 239.10 for all initial applications for partial program approval and follow the adequacy determination procedures in § 239.12(f) for any amendments for approval for

unapproved sections of the relevant Subtitle D Federal revised criteria.

§ 239.12 Modifications of State/Tribal programs.

(a) Approved State/Tribal permit programs may be modified for various reasons, such as changes in Federal or State/Tribal statutory or regulatory authority.

(b) If the Federal statutory or regulatory authorities that have significant implications for State/Tribal permit programs change, approved State/Tribes may be required to revise their permit programs. These changes may necessitate submission of a revised application. Such a change at the Federal level and resultant State/Tribal requirements would be made known to the States/Tribes either in the **Federal Register** containing the change or through the appropriate EPA Regional Office.

(c) States/Tribes that modify their programs must notify the Regional Administrator of the modifications. Program modifications include changes in State/Tribal statutory or regulatory authority or relevant guidance or shifting of responsibility for the State/Tribal program within the lead agency or to a new or different State/Tribal agency or agencies. Changes to the State's/Tribe's permit program as described in its application which may result in the program becoming inadequate must be reported to the Regional Administrator. In addition, changes to a State's/Tribe's basic statutory or regulatory authority or guidance which were not part of the State's/Tribe's initial application, but may have a significant impact on the adequacy of the State's/Tribe's permit program, also must be reported to the Regional Administrator.

(d) States/Tribes must notify the appropriate Regional Administrator of all permit program modifications within a time-frame agreed to by the State/Tribal Director and the Regional Administrator.

(e) The Regional Administrator will review the modifications and determine whether the State/Tribal Director must submit a revised application. If a revised application is necessary, the Regional Administrator will inform the State/Tribal Director in writing that a revised application is necessary, specifying the required revisions and establishing a schedule for submission of the revised application.

(f) For all revised applications, and amended applications in the case of partially approved programs, the State/Tribe must submit to the appropriate Regional Administrator an amended application that addresses those portions of its program that have changed or are being amended. The Regional Administrator will make an adequacy determination using the same criteria as used for the initial application.

(g) For revised applications that do not incorporate permit programs for additional classifications of Subtitle D regulated facilities and for all amended applications in the case of partially approved programs, the appropriate Regional Administrator shall provide for public participation using the procedures outlined in § 239.10 or, at the Regional Administrator's discretion, using the following procedures.

(1) The Regional Administrator will publish an adequacy determination in the **Federal Register** summarizing the Agency's decision and the portion(s) of the State/Tribal permit program affected and providing an opportunity to comment for a period of at least 30 days.

(2) The adequacy determination will become effective sixty (60) days following publication if no adverse comments are received. If EPA receives comments opposing its adequacy determination, the Regional Administrator will review these comments and publish another **Federal Register** notice either affirming or revising the initial decision and responding to public comments.

(h) For revised applications that incorporate permit programs for additional classifications of Subtitle D regulated facilities, the appropriate Regional Administrator will follow the procedures in § 239.10.

§ 239.13 Criteria and procedures for withdrawal of determination of adequacy.

(a) The Regional Administrator may initiate withdrawal of a determination of adequacy when the Regional Administrator has reason to believe that a State/Tribe no longer has an adequate permit program or adequate authority to administer and enforce an approved program in accordance with this Part.

(b) Upon receipt of substantive information sufficient to indicate that a State/Tribal program may no longer be adequate, the Regional Administrator shall inform the State/Tribe in writing of the information.

(c) If, within 45 days of the State's/Tribe's receipt of the information in paragraph (b) of this section, the State/Tribe demonstrates to the satisfaction of the Regional Administrator that the State/Tribal program is adequate (i.e., in compliance with this part), the Regional Administrator shall take no further action toward adequacy withdrawal and shall so notify the State/Tribe and any person(s) who submitted information regarding the adequacy of the State's/Tribe's program and authorities.

(d) If the State/Tribal Director does not demonstrate the State's/Tribe's compliance with this Part to the satisfaction of the Regional Administrator, the Regional Administrator shall list the deficiencies in the program and negotiate with the State/Tribe a reasonable time for the State/Tribe to complete such action to correct deficiencies as the Regional Administrator determines necessary. If these negotiations reach an impasse, the Regional Administrator shall establish a time period within which the State/Tribe must correct any program deficiencies and inform the State/Tribal Director of the time period in writing.

(e) Within the schedule negotiated by the Regional Administrator and the State/Tribal Director, or set by the Regional Administrator, the State/Tribe shall take appropriate action to correct deficiencies and shall file with the Regional Administrator a statement certified by the State/Tribal Director describing the steps taken to correct the deficiencies.

(f) If the State/Tribe takes appropriate action to correct deficiencies, the Regional Administrator shall take no further action toward adequacy withdrawal and shall so notify the State/Tribe and any person(s) who submitted information regarding the adequacy of the State's/Tribe's permit program. If the State/Tribe has not demonstrated its compliance with this Part to the satisfaction of the Regional Administrator, the Regional Administrator shall inform the State/Tribal Director and may initiate withdrawal of determination of adequacy.

(g) The Regional Administrator shall initiate withdrawal of determination of adequacy by publishing the tentative withdrawal of adequacy of the State/Tribal program in the **Federal Register**. Notice of the tentative determination must:

(1) Afford the public at least 30 days after the notice to comment on the Regional Administrator's tentative determination;

(2) Include a specific statement of the Regional Administrator's areas of concern and reason to believe the State/Tribal program may no longer be adequate; and,

(3) Indicate that a public hearing will be held by EPA if sufficient public interest is expressed during the comment period or when the Regional Administrator determines that such a hearing might clarify issues involved in the tentative adequacy determination. If

held, the public hearing will be scheduled at least 45 days from notice of such hearing. The public comment period may be continued after the hearing at the discretion of the Regional Administrator.

(h) If the Regional Administrator finds, after the public hearing (if any) and review and consideration of all public comments, that the State/Tribe is in compliance with this Part, the withdrawal proceedings shall be terminated and the decision shall be published in the **Federal Register**. The notice must include a statement of the reasons for this determination and a response to significant comments received. If the Regional Administrator finds that the State/Tribal program is not in compliance with this Part by the date prescribed by the Regional Administrator or any extension approved by the Regional Administrator, a final notice of inadequacy shall be published in the **Federal Register** declaring the State/Tribal permit program inadequate to ensure compliance with the relevant Subtitle D Federal revised criteria. The notice will include a statement of the reasons for this determination and response to significant comments received.

(i) States/Tribes may seek a determination of adequacy any time after a determination of inadequacy.

PART 258—SOLID WASTE DISPOSAL CRITERIA

2. The authority cite for part 258 continues to read as follows:

Authority: 42 U.S.C. 6907(a)(3), 6912(a), 6944(a) and 6949(c); 33 U.S.C. 1345 (d) and (e).

3. Section 258.2 is amended by revising the definitions for "Director of an approved State", "State" and "State Director" to read as follows:

§ 258.2 Definitions.

* * * * *

Director of an approved State means the chief administrative officer of a State/Tribal agency responsible for implementing the State/Tribal permit program that is deemed to be adequate by EPA under regulations published pursuant to sections 2002 and 4005 of RCRA.

* * * * *

State means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and Indian Tribes, although Tribes are excluded from the definition for purposes of Subpart G of Part 258 (Financial Assurance).

State Director means the chief administrative officer of the lead State/Tribal agency responsible for implementing the State/Tribal permit program for Subtitle D regulated facilities.

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