ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 35, 270 and 271

[EPA/OSW–FRL–5509–8]

RIN 2050–AD07

Authorization of Indian Tribe's Hazardous Waste Programs Under RCRA Subtitle C

AGENCY: Environmental Protection Agency.

ACTION: Proposed rule.

SUMMARY: Today's proposed rule will further the Policy for the Administration of Environmental Programs on Indian Reservations (Nov. 8, 1984) (''EPA's Indian Policy'') by clarifying the eligibility of Tribal governments to obtain authorization from EPA to implement a Subtitle C hazardous waste program in lieu of EPA under RCRA section 3006, and to obtain Federal grants to support the development and implementation of such a program under RCRA section 3011. This proposal identifies the standards and procedures that would govern the submission and review of Indian Tribes' authorization applications. It also discusses the circumstances under which Tribes could be approved to operate a partial Subtitle C hazardous waste program.

DATES: Comments on this proposed rule must be submitted on or before August 13, 1996.

ADDRESSES: Commenters must send an original and two copies of their comments referencing docket number x-96-xxxx-xxxxx to: (1) If using regular US Postal Service mail: RCRA Docket Information Center, Office of Solid Waste (5305W), U.S. Environmental Protection Agency Headquarters (EPA, HQ), 401 M Street, SW, Washington, DC 20460 or (2) if using special delivery, such as overnight express service: RCRA Docket Information Center (RIC), Crystal Gateway One, 1235 Jefferson Davis Highway, First Floor, Arlington, VA 22202. Comments may also be submitted electronically through the Internet to: RCRA–Docket@epamail.epa.gov. These comments should be identified by the docket number x-96-xxxx-xxxxx, and submitted as an ASCII file to avoid the use of special characters and encryptions.

Please do not submit any Confidential Business Information (CBI) electronically. An original and two copies of CBI must be submitted under separate cover to: RCRA CBI Document Control Officer, Office of Solid Waste (5305W), U.S. EPA, 401 M Street, SW, Washington, DC 20460.

Public comments and supporting materials are available for viewing in the RCRA Information Center (RIC) located at Crystal Gateway One, 1235 Jefferson Davis Highway, First Floor, Arlington, VA. The RIC is open from 9 a.m. to 4 p.m., Monday through Friday, excluding Federal holidays. To review docket materials, please make an appointment by calling (703) 603–9230. The public may copy a maximum of 100 pages from any regulatory docket at no charge. Additional copies will cost $.15/page.

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

For more detailed information, contact Felicia Wright, Office of Solid Waste (5303W), U.S. Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460; telephone (703) 308–8634.

SUPPLEMENTARY INFORMATION: In this document, EPA is proposing amendments to the RCRA Subtitle C regulatory definitions, authorization standards, and authorization procedures, which are codified in subpart A of 40 CFR part 270 and in subpart A of 40 CFR part 271.

The index is available on the Internet. Please follow these instructions to access the information electronically:
Gopher: gopher.epa.gov WWW: http://www.epa.gov
Dial-up: (919) 558–0335.
This report can be accessed from the main EPA Gopher menu in the directory: EPA Offices and Regions/Office of Solid Waste and Emergency Response (OSWER)/Office of Solid Waste (RCRA)/Hazardous Waste/...../.....
FTP: ftp.epa.gov
Login: anonymous
Password: Your Internet Address
Files are located in /pub/gopher/OSWRCRA

The official record for this action will be kept in paper form. Accordingly, EPA will transfer all comments received electronically into paper form and place them in the official record, with all of the comments received in writing. The official record is the paper record maintained at the address in ''ADDRESSES'' at the beginning of this document.

EPA's responses to comments, whether written or electronic, will be printed in the Federal Register, or in a ''response to comments document'' placed in the official record for this rulemaking. EPA will not immediately reply to commenters electronically other than to clarify electronic comments that may be garbled during transmission or conversion to paper form.

I. Overview of This Proposed Rulemaking

This proposal further implements the Agency's 1984 Indian Policy by amending certain definitions, standards, and procedures within the regulations promulgated pursuant to RCRA Subtitle C (42 USC 6921—6939e) that govern EPA's authorization of States' hazardous waste programs. The overall effect of these amendments would be to clarify that Indian Tribes may obtain full or partial authorization from EPA to operate Tribal hazardous waste management programs in lieu of EPA's Federal regulatory program, and to clarify that authorized Indian Tribes, in the same manner as authorized States, may obtain RCRA section 3011 grant funds to aid the development and implementation of their Subtitle C management programs.

This notice proposes to add definitions of ''*Indian Tribes*'' and ''*Indian Country*'' to the Subtitle C program definitions codified at 40 CFR 270.2. Moreover, the existing definition of ''States'' in section 270.2 would be amended to extend to ''Indian Tribes'' the ability to obtain program authorization from EPA under RCRA section 3006, and financial assistance from EPA under RCRA section 3011.

EPA proposes to amend several sections of subpart A of 40 CFR part 271, which contains the standards and procedures for EPA's authorization of ''State'' hazardous waste programs. A new subsection in (§ 271.1(k)) would be added to clarify that the substantive standards and procedures that apply to States' programs and authorization submissions apply to Tribal programs and submissions, unless there is a specific provision that would address Tribal programs differently.

The specific procedures which EPA believes are appropriate for Tribal program authorizations and submissions would be set out in a new § 271.27. Proposed § 271.27(a) identifies several minor changes to the authorization application documents and agreements (i.e., Governor's letter, Program Description, Memorandum of Agreement, and Attorney General's Statement) which EPA requires States to submit in support of their applications

for program authorization. The proposed changes arise from a recognition of tribal sovereignty and differences in the structure of Tribal governments, and from circumstances unique to Indian Tribes.

Proposed § 271.27(b) establishes criteria under which Indian Tribes may be authorized to operate a partial RCRA hazardous waste program. This authority enables a Tribe, for example, to obtain authorization for a program that regulates only generators and transporters of hazardous waste, with EPA retaining responsibility for regulating and enforcing requirements for any hazardous waste treatment, storage, and disposal facilities. Under this proposal, only Indian Tribes would be eligible for partial program authorization. States will continue to be precluded from seeking and obtaining partial authorization. Other provisions in § 271.27 address the core program requirements of a partial program, the sharing of authority with EPA, and other requirements that follow from the inclusion of partial program authority in this proposed rule.

II. Authority

Today's rule is being proposed under the authority of sections 2002, 3006, and 3011 of the Resource Conservation and Recovery Act of 1976 (RCRA or the Act), as amended. Section 2002(a) authorizes the Administrator to prescribe such regulations as are necessary to carry out functions under Subtitle C of RCRA. Section 3006 of RCRA allows EPA to authorize State hazardous waste programs to operate in the State in lieu of the Federal hazardous waste program subject to the authority retained by EPA in accordance with the Hazardous and Solid Waste Amendments of 1984 (HSWA). Section 3011 of RCRA authorizes EPA to make grants to the States for the purpose of assisting the States in the development and implementation of authorized State hazardous waste programs.

III. Background

A. Current Subtitle C Authorization Program

EPA has primary responsibility for implementing and enforcing the RCRA Subtitle C hazardous waste program. Federal law, including the issuance and enforcement of permits for hazardous waste facilities, will be implemented by the Federal EPA until EPA authorizes a State for a hazardous waste program, at which point primary authority rests with the State.

The statute and regulations currently support two types of State program authorization. The first type, ''interim authorization,'' is a temporary authorization which is granted if EPA determines that the State program is ''substantially equivalent'' to the Federal program (section 3006(c), 42 U.S.C. 6926(c)). Interim authorization is currently available only for requirements imposed pursuant to the Hazardous and Solid Waste Amendments (HSWA) of 1984. HSWA Interim Authorization will expire in January, 2003 unless extended by rule.

The second type of authorization is ''final'' (permanent) authorization. Final authorization may be granted by EPA if the Agency determines, among other things, that the State program: (1) Is equivalent to the Federal program; (2) is consistent with the Federal program and other authorized State programs; and (3) provides for adequate enforcement (Section 3006(b), 42 U.S.C. 6926(b)) 7004, 3006(f). States, and now under this proposal, Tribes, need not have obtained interim authorization in order to qualify for final authorization.

To date, 46 States, Guam and the District of Columbia have been authorized for the ''base'' RCRA Subtitle C program (i.e., the program in place before the enactment of HSWA in 1984). In these States, the authorized State programs operate in lieu of the corresponding Federal program and, if Federal enforcement is necessary, EPA must enforce the authorized State program requirements.

B. EPA's 1984 Indian Policy

Today, EPA is proposing to extend to Indian Tribes the opportunity to apply for and receive hazardous waste program authorization similar to that currently available to States. Providing Tribes with this opportunity is consistent with the EPA's Indian Policy. This policy, formally adopted in 1984, and reaffirmed on March 14, 1994 by EPA Administrator Carol M. Browner, ''* * * views Tribal Governments as the appropriate non-Federal parties for making decisions and carrying out program responsibilities affecting Indian reservations, their environments, and the health and welfare of the reservation populace. Just as EPA's deliberations and activities have traditionally involved the interests and/or participation of State governments, EPA will look directly to Tribal Governments to play this lead role for matters affecting reservation environments.''

A major goal of EPA's Indian Policy is to eliminate all statutory and regulatory barriers to Tribal administration of Federal environmental programs. Today's proposal represents another step in the Agency's continuing commitment towards achieving this goal. However, EPA recognizes, in the spirit of Indian self-determination and the government-to-government relationship, that not all Tribes will choose to apply for and receive hazardous waste program authorization 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 hazardous waste management concerns.

C. Legal Basis for Subtitle C Authorization of Indian Tribes

EPA believes that adequate authority exists under the Act to allow Tribes to seek hazardous waste program authorization. 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 hazardous waste program authorization satisfies the *Chevron* test.

RCRA does not explicitly define a role for Tribes under section 3006 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 of solid waste management, *or any Indian tribe or authorized tribal organization or Alaska Native village or organization*[.]

The term ''municipality'', in turn, is used in section 4008(a)(2) of RCRA with specific reference to the availability of certain Federal funds and technical assistance for hazardous and solid waste planning and management activities by municipalities. Section 4008(a)(2) authorizes EPA to provide financial and technical assistance to municipalities on hazardous and solid waste management. Although Congress apparently intended to make explicit that Indian Tribes could receive funds and assistance when available in the same manner as municipal governments (by the inclusion of Tribes in section 1004(13)), 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 hazardous waste program authorization under Subtitle C. 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. *See, California* v. *Cabazon Band of Mission Indians,* 480 U.S. 202 (1987). Indian Tribes are sovereign governments. *See Worcester* v. *Georgia,* 31 U.S. (10 Pet.) 515 (1832); and *United States* v. *Mazurie,* 419 U.S. 544, 557–58 (1975). 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 are ambiguous as to whether they abridge Tribal powers of self-government must be construed narrowly in favor of retaining Tribal rights. F. Cohen, *Handbook of Federal Indian Law,* 224 (1982); *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 section 4008(a)(2) 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 in the 1984 RCRA amendments. In these amendments, while silent on the role for Tribes in implementing any RCRA programs, Congress expressed a strong preference for a State lead for implementing and ensuring compliance with the Federal Subtitle D revised criteria (as it had earlier in providing for State authorization in RCRA Subtitle C).[1] Yet, the legislative history of the 1984 amendments does not suggest that Congress intended to approve States to implement such programs in Indian country or that Congress considered the legal principle that States generally are precluded from such implementation. Similarly, RCRA Subtitle C does not contain an explicit delegation of authority to States to implement hazardous waste programs in Indian country. *Washington Dept. of Ecology* v. *EPA,* 752 F.2d 1465, 1469 (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, while Congress has otherwise put States in a primary role for both Subtitle C hazardous waste program implementation and Subtitle D permit programs, on Indian lands, it 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.

Failure to authorize Tribal hazardous waste programs would deny Tribes the option currently available to States to administer their programs ''in lieu of the Federal program.'' With this proposal, however, Subtitle C regulated activities and facilities in Indian country would be under the jurisdiction of the closest sovereign with permitting and enforcement authority, the Tribe, rather than the Federal government.[2]

EPA has worked to revise other environmental statutes (e.g., the Clean Water Act) to define explicitly the role for Tribes under these programs. 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 in Indian country. 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 reservations 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 in Indian reservations. 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 reservations 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 in Indian reservations. *Id.* at 714.

Today's proposal is analogous to the rule upheld in *Nance.* EPA is proposing to fill a statutory gap regarding the role of Tribes in the implementation of Subtitle C in Indian country. As with the redesignation program, authorizing Tribal hazardous waste programs ensures that the Federal government is not the entity exercising authority that Congress intended to be exercised at a 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 in Indian country, including those of non-Indians on fee lands where the conduct directly threatens the health

[1] *See, e.g.,* Solid Waste Disposal Act Amendments of 1979, 125 Cong. Rec. 13,241, 13,252 (1979) (''one of the real advantages of State assumption of these programs envisioned by Congress in the Act, over a more uniform Federal program, is that States are better able to tailor their programs to meet local circumstances * * *'').

[2] EPA has approved one tribal program under RCRA—the Campo Band of Mission Indian's municipal solid waste landfill permit program (60 FR 21191 (May 1, 1995)). This action has been challenged in the United States Court of Appeals for the D.C. Circuit. See, *Backcountry Against Dumps* v. *E.P.A.,* No. 95–1343 (D.C. Cir. Filed July 6, 1995).

[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.

and safety of the Tribe or its members. *Montana* v. *United States,* 450 U.S. 544, 565 (1981).

Extending the ability to receive program authorization to Tribes is consistent with the general principles of Federal Indian law and the Agency's Indian Policy which states that environmental programs (e.g., RCRA Subtitle C) in Indian country will be implemented to the maximum extent by Tribal governments. Thus, as in *Nance,* EPA believes that allowing Tribes to apply for hazardous waste authorization reflects the sovereign authority of Tribes under Federal law.

A Tribe submitting an application to receive authorization for any or all parts of the RCRA Subtitle C hazardous waste program will be subject to the standards of this rule, when finalized. A Tribe which has received authorization prior to promulgation of the final rule will not lose its authorization status. However, if there are subsequent changes in either the Federal or Tribal program (including, for example, the acquisition of significant amounts of non-reservation land by the Tribe), such a Tribe may be required to revise its authorized program in accordance with the standards set forth in 40 CFR part 271.

IV. Detailed Discussion of the Proposed Rule

A. Overview

This proposed rule announces several changes to the regulatory definitions (40 CFR 270.2) that define the scope of the Subtitle C authorization program. Today's proposal also specifies the standards and procedures that EPA would follow in approving, revising and withdrawing authorization of Tribal hazardous waste programs, as well as the requirements that tribal programs must meet to be authorized by the Administrator under sections 3006(b) of RCRA.

Generally, Tribes would have to meet the same criteria as do the States. Consequently, except where otherwise expressly indicated, the REQUIREMENTS FOR AUTHORIZATION OF STATE HAZARDOUS WASTE PROGRAMS (40 CFR part 271) are applicable to Tribes as well. However, today's proposal recognizes the uniqueness of Tribes and Indian country and revises several existing requirements, and adds appropriate requirements to certain sections of the rule.

This part of the preamble discusses in detail changes in the definitions which EPA believes are necessary to clarify the role of Indian Tribes in Subtitle C authorization, and the other substantive and procedural regulatory amendments which are needed to make the 40 CFR part 271 requirements more suited to the unique circumstances of Tribes and Indian Country.

B. Tribal Regulatory Authority

To have its hazardous waste program authorized by EPA under today's proposal, a Tribe would have to have adequate authority over the regulated activities. The jurisdiction of Tribes clearly extends ''over both their members and their territory.'' *United States* v. *Mazurie,* 419 U.S. 544, 557 (1975). However, Indian reservations may include lands owned in fee by non-members. ''Fee lands'' are privately owned by non-members and title to the lands can be transferred without restriction. The extent of Tribal authority to regulate activities by non-tribal members on fee lands has been the subject of considerable discussion. The Supreme Court has said that there are two situations where a Tribe is able to exercise civil jurisdiction over non-member owned fee lands within Indian reservations. The Court stated, in *Montana* v. *U.S.,* 450 U.S. 544, 566–67 (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.

The Court applied the latter part of this test in *Brendale* v. *Confederated Tribes and Bands of the Yakima Indian Nation,* 492 U.S. 408 (1989). In that case, 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 non-tribal members. 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 did recognize 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 non-members 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. EPA will thus require that a Tribe seeking RCRA Subtitle C authorization demonstrate jurisdiction, i.e., make a showing that the potential impacts on the Tribe from hazardous 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 non-members on fee lands will be determined case-by-case, based on factual findings. The determination as to whether the required effect is present in a particular case depends on the circumstances and will likely vary from Tribe to Tribe.

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 Association* v. *DeBenedictis,* 480 U.S. 470, 476–77 and nn.6, 7 (1987). The Agency may also rely on its special expertise and practical experience regarding the importance of hazardous waste 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. EPA's approach to determining Tribal jurisdiction over the activities of nonmembers on fee lands within reservation boundaries was recently upheld in *Montana* v. *EPA*, No. CV 95–56–M-CCL, 1996 U.S. Dist. LEXIS 4753 (D. Mont. March 27, 1996), which involved an EPA decision to approve a Tribal application to administer the water quality standards program under section 303 of the Clean Water Act.

EPA believes that Congress established a strong Federal interest in effective management of hazardous waste throughout the country by enacting RCRA. For example, one of the primary objectives of the statute is ''to promote the protection of health and the environment and to conserve valuable material and energy resources by * * * assuring that hazardous waste management practices are conducted in a manner which protects human health and the environment.'' RCRA section 1003(a), 42 U.S.C. 6902(a). EPA also notes that many of the environmental problems caused by mismanagement of hazardous waste (e.g., groundwater contamination or the release of hazardous constituents into the air) by their nature present potential direct impacts that are serious and substantial in areas that are outside the place where the hazardous waste management originally occurred. In other words, any environmental hazards that result from hazardous waste management by non-members on fee lands within a reservation are very 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 hazardous 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 hazardous 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 587–89.

Further, management of hazardous 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.[4] 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, hazardous 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 (§ 271.27(a)) explaining the legal basis for the Tribe's regulatory authority. However, EPA will also rely on its generalized findings regarding the relationship of hazardous 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 C engaged in by non-members on fee lands within the territory for which the Tribe is seeking authorization, and that the Tribe or Tribal members could be subject to exposure to hazardous waste from such activities through, e.g., groundwater, soil, air, and/or direct contact. The Tribe must explicitly assert and demonstrate jurisdiction, i.e., make a showing, that improper management of hazardous 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 hazardous 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

[4] 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).

various jurisdictions, it is imperative that all affected sovereigns work cooperatively for environmental protection.

C. Implementing the Government-to-Government Relationship With EPA

Under the Clean Water Act (CWA), the Safe Drinking Water Act (SDWA), the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and the Clean Air Act (CAA), Congress has specified certain criteria by which EPA is to determine whether a Tribe may be treated in the same manner as a State. These criteria generally require that the Tribe (1) be recognized by the Secretary of the Interior; (2) have an existing government exercising substantial governmental duties and powers; (3) have adequate civil regulatory jurisdiction over the subject matter and entities to be regulated; and (4) be reasonably expected to be capable of administering the federal environmental program for which it is seeking approval.

As discussed below, EPA is requiring Tribes seeking grant funds under RCRA 3011 or program authorization under RCRA 3006 to demonstrate in the Program Description that they meet the four criteria listed above. The process EPA is proposing for Tribes to make this showing, however, 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 C programs parallels the simplification rule. Generally, the fact that a Tribe has met the recognition or governmental function requirement 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 it meets those requirements for purposes of RCRA Subtitle C authorization. To facilitate review of tribal applications, EPA therefore requests that the Tribe demonstrate, in proposed 40 CFR 271.27(a)(3)(ii), that it has been approved for ''TAS'' (under the old ''TAS'' process) or been deemed eligible to receive authorization (under the simplified process) for any other program.

If a Tribe has not received ''TAS'' approval or been deemed eligible to receive authorization, the Tribe must demonstrate, pursuant to proposed § 271.27(a)(3)(ii), that it meets the recognition and governmental function criteria described above. A discussion on how to make these showings can be found at 59 FR 64339 (December 14, 1994).

EPA believes, on the other hand, 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 program.

In particular, if the Tribe is asserting jurisdiction over hazardous 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 hazardous waste could have direct effects on the health and welfare of the Tribe that are serious and substantial. Copies of all documents, such as treaties, constitutions, by-laws, charters, executive orders, codes, ordinances, and/or resolutions which support the Tribe's assertions of jurisdiction must also be included. EPA will review this documentation and any comments given during the public comment period, and then will make a determination whether there has been an adequate demonstration of Tribal jurisdiction over Tribal, and if asserted, non-member hazardous waste activities on fee lands within the boundaries of the reservations.

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 C permit program approval submitted by any applicant, Tribal or State, will be sufficient (see the program description requirements under § 271.6 and the discussion on pages 51–55 for the elements of programmatic capability in the context of RCRA Subtitle C authorization). Nevertheless, EPA may request, in individual cases, that the Tribe provide a narrative statement 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).

D. Definitions

The key purpose of this proposed rulemaking is to clarify the ability of Indian Tribes to obtain authorization from EPA of their hazardous waste management programs under RCRA section 3006. The proposal would further clarify that Indian Tribes may obtain Federal grants under RCRA section 3011 to assist Tribes in developing and implementing their authorized programs.

The proposal would provide this clarification through changes to the governing definitions in 40 CFR 270.2 and 40 CFR 35.105. The most significant of the changes is the proposed inclusion of ''Indian Tribes'' within the list of governmental entities defined as ''States'' in 40 CFR 270.2. Under the Statute, both program authorization under section 3006 and financial assistance under section 3011 are available to States. Therefore, the proposed change to the regulatory definition of ''States'' would make it clear that EPA interprets the Act as providing EPA with sufficient authority to authorize and to issue grants to qualified Indian Tribes.

EPA is also proposing to add to § 270.2 new definitions for ''Indian Tribes'' and ''Indian Country.'' The proposed definition of ''Indian Tribe'' or ''Tribe'' would include any Indian Tribe, band, group or community recognized by the Secretary of the Interior and having a governmental body carrying out substantial governmental duties and powers.

Second, ''Indian country'' would be defined as in 18 U.S.C. 1151, to mean (A) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running throughout the reservation, (B) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (C) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same. EPA notes that the meaning of the term ''reservation'' must be determined in light of relevant case law. EPA considers trust lands formally set apart for the use of Indian Tribes to be ''Indian country'' even if the trust land has not been formally designated as a ''reservation.'' *See Oklahoma Tax Comm'n* v. *Citizen Band of Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991).

These definitions are important not only for determining what entities may apply for Subtitle C authorization, but also for determining the territorial and legal reach of a Tribe's authorized program. They are also important in establishing the necessary government-to-government relationship with Tribes, and in addressing the issue of tribal regulatory authority. EPA requests comment on these proposed definitions, and the appropriateness of extending to Tribes the availability of Subtitle C

authorization and RCRA section 3011 grants.

Available Alternatives to Authorization

EPA recognizes that most Tribes will choose not to pursue Subtitle C authorization at this time. Several mechanisms already exist whereby Tribes may engage in a partnership with the Agency in implementing hazardous waste management activities. These mechanisms include cooperative agreements, Memoranda of Understanding and Memoranda of Agreement. Under all these mechanisms, Indian Tribes can develop and implement their hazardous waste regulatory authorities and exercise their sovereign authority with respect to their environments. These mechanisms may also provide Tribes opportunities to increase their capacity to manage environmental programs by participating with EPA in hazardous waste activities, while maintaining the government-to-government relationship described in EPA's Indian Policy. Authorization is distinguished from the other types of relationships, because it would confer on the Tribal government the authority to operate its program in lieu of EPA operating all or part of the Federal hazardous waste program.

E. Funding

EPA recognizes that, assuming current funding levels remain the same, the effect of this proposal could be to make available to Tribes Federal funds that otherwise would be allocated only to State hazardous waste programs. Tribes that assume the burdens of a RCRA hazardous waste program assume these burdens in lieu of EPA acting directly, so the Agency believes it is appropriate for Indian Tribes to obtain RCRA section 3011 funds that are commensurate with these burdens.

While Congress explicitly authorized grants to municipalities (including Tribes) under RCRA subtitle D, EPA does not believe it is precluded from interpreting RCRA to authorize grants to authorized Tribes under RCRA subtitle C section 3011. Section 3011 does not provide for grants to municipalities because of the nature of these grants, which are for the development of broad hazardous waste programs. There is nothing in RCRA or the legislative history to indicate that Congress intended to limit Tribal grants to only those provisions for which municipalities may receive grants. Under the statutory scheme, section 3011 grants are specifically designed to aid in developing and implementing authorized hazardous waste programs. Given the Agency's interpretation that RCRA section 3006 is properly read to allow EPA to authorize qualifying Tribes to administer RCRA programs in lieu of EPA, it follows that these Tribes should also be eligible to receive grant funding under RCRA section 3011 to assist ''in the development and implementation of authorized * * * hazardous waste programs.'' The Agency's interpretation is consistent with the well established general principle of statutory construction that ambiguous statutes should be construed in favor of Tribes. *See, e.g., Ramah Navajo School Board* v. *Bureau of Revenue*, 458 U.S. 832, 846 (1982); *see also*, F. Cohen, *Handbook of Federal Indian Law*, 224–25 (1982).

EPA requests comments that would assist it in allocating RCRA section 3011 funds equitably to authorized States and Tribes. The Agency is especially interested in suggestions that would mitigate any potential negative effects on funding of authorized State programs.

F. Program Application Elements

Because of the uniqueness of Tribal governments, EPA is proposing in this rule to modify some of the program application elements required under § 271.5 for Tribal applications. These modifications are explained in detail below.

1. Program Description

The proposed rule adds a new subsection to § 271.6 which requires a Tribe to include a map, legal description, or other information sufficient to identify the full extent of the lands over which the Tribe is asserting jurisdiction. In addition, the Tribe would identify in the Program Description the location of any generator, storage, treatment or disposal facilities subject to RCRA Subtitle C, including any facilities on fee lands owned by non-members. Finally, in those instances where a Tribe asserts jurisdiction over hazardous waste activities conducted by non-members on fee lands within reservation boundaries, the proposal would require the Program Description to identify clearly the activities and areas affected by such a claim of jurisdiction, and to assert and explain how the activities of non-members will have a serious and substantial effect on the health and welfare of the Tribe.

2. Attorney General's Statement

EPA recognizes that the ''Attorney General'' designation in 40 CFR 271.7 may not be appropriate for all Tribes, since some Tribal governments may not have an Attorney General. Therefore, the proposal would add § 271.27(a)(4), which clarifies that the requirement of an Attorney General's Statement is satisfied for Indian Tribes when the Statement is signed by the Tribal attorney or by an equivalent legal counsel retained by the Indian Tribe for representation in matters before EPA or the courts pertaining to the Indian Tribe's program. This amendment adds sufficient flexibility to the existing procedures to enable the necessary legal certifications to be prepared and reviewed, without imposing the undue rigor of requiring a submission by an attorney with a particular title, office, or position. The essential consideration is that the Statement be signed by an attorney who has been retained to represent the Tribe on matters pertaining to the Tribe's program authorization. The Tribe's attorney should include in the Statement an assertion that he/she has the necessary authority to represent the Tribe with respect to the application, and to certify that the laws of the Tribe provide adequate authority to carry out the program.

3. Memorandum of Agreement

This proposal includes several modifications to the § 271.8 provisions that describe the content of the Memorandum of Agreement that is entered into by EPA and authorized States. This Memorandum generally addresses such matters as the transfer of program documents to the State upon authorization, as well as the type and frequency of coordination and oversight that will occur after authorization of a State.

40 CFR 271.16 requires that, in order to obtain authorization for its hazardous waste program, States must have criminal enforcement authority over ''any person'' committing certain enumerated acts and have the authority to impose a fine of $10,000 per violation. Federal law bars Indian Tribes from trying criminally or punishing non-Indians in the absence of express authority in a treaty or statute to the contrary. *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978). In addition, the Indian Civil Rights Act prohibits any Indian court or Tribunal from imposing for any one offense a criminal penalty greater than $5,000 on Indians within its jurisdiction (25 USC 1302(7)).

The Agency realizes that requiring Tribes to demonstrate the same criminal authority as States would affectively prohibit any Tribe from obtaining program authorization. The Agency therefore proposes to add provision 271.27(a)(5) so that Tribes are not required to exercise comprehensive

criminal enforcement jurisdiction as a condition for hazardous waste program authorization. Under this rule, Tribes are required to provide for the timely and appropriate referral of criminal enforcement matters to the Regional Administrator when Tribal enforcement authority does not exist or is not sufficient (e.g., those concerning non-Indians or violation meriting penalties over $5,000) This section also requires that such procedures be established in the formal Memorandum of Agreement with the Regional Administrator required by 40 CFR 271.8. This approach is the same that the Agency has taken in the context of Tribal programs under the SDWA and CWA.

It should be noted that, as in authorized States, EPA retains the authority to take necessary enforcement action if an authorized Tribe did not (or could not) take such action or did not enforce adequately (e.g., did not or could not impose a sufficient penalty). EPA emphasizes that this referral mechanism is available only in those cases where the limitation on Tribal enforcement arises under Federal law. A Tribe that encumbers its own enforcement authority with limitations based on laws adopted by the Tribe would be subject to the same ''adequacy of enforcement'' review standard that applies to States under RCRA section 3006 and the part 271 regulations.

EPA seeks comment on whether the authorization requirements set out for States in 40 CFR part 271 are appropriate for Tribes and whether any of these requirements will inappropriately restrict Tribes from seeking authorization. EPA also requests comment on proposed § 271.27(a), and particularly, the modifications proposed for an Indian Tribe's Program Description, Attorney General Statement, and Memorandum of Agreement submissions.

G. Partial Authorization Authority

1. Background

Under this proposal, Indian Tribes would be eligible to obtain authorization from EPA to operate partial RCRA hazardous waste programs. This aspect of the proposal introduces authority for Tribes that is not now available to the States and Territories of the United States which currently have or are eligible for RCRA Subtitle C authorization. The proposal would amend 40 CFR § 271.1(h), which currently prohibits partial State hazardous waste programs from operating under RCRA Subtitle C final authorization. The proposed rule would exempt only Tribal hazardous waste programs which meet the proposal's criteria from the effects of the current prohibition. Other ''States'' (i.e., States and Territories) would remain subject to the partial program prohibition.

EPA does not interpret RCRA section 3006 to preclude the operation of partial RCRA programs. The current regulatory prohibition in 40 CFR 271.1(h) was adopted as a policy matter within EPA's discretion in 1979, in the face of the Act's silence on the precise issue.

Indeed, when EPA developed its RCRA authorization regulations, the Agency initially proposed that States could obtain partial authorization. *See* 43 FR 4366 (February 1, 1978). The 1978 proposal would have allowed States ''to receive partial authorization for selected major components of the full hazardous waste program, but only if the State meets the requirements of equivalency, consistency, and enforceability for each such major component.'' Id. at 4368. Commentors on the 1978 proposed rule voiced strong opposition to this proposal, based primarily on the burden and confusion that would result to the regulated community due to shared EPA/State implementation responsibilities over partial programs. In the face of these comments, EPA announced in the 1979 final rule the current partial program prohibition. *See* 44 FR 34259, (June 14, 1979).

In enacting the Hazardous and Solid Waste Amendments (HSWA) of 1984, Congress added revisions to the section 3006 authority for State program authorization. HSWA added language to section 3006(b) of the Act that allows the Administrator to base his or her findings of a state program's equivalency with the Federal program on the Federal program in effect one year prior to the submission of the state's application. While this language could be construed as a mandate that States eventually adopt the entire Federal program, EPA believes that the better view of the 1984 amendment's purpose was to afford States some relief from the need to continually update their applications to reflect recent changes in the Federal program. In effect, this amendment provided states with a grace period, allowing states to defer including Federal changes that occurred within one year of the submission of their applications. Understood in this context, EPA does not believe that the section 3006(b) revision was intended to address the partial program issue. Therefore, EPA believes that it retains the discretion to allow Indian Tribes to obtain partial program authorization.

2. Rationale for Partial Tribal Programs

The Agency believes that there are compelling reasons for allowing Indian Tribes to operate partial RCRA programs. Fundamentally, as set out in the EPA Indian Policy, the Agency is committed to make every reasonable effort to recognize the sovereignty of Indian Tribes and to eliminate any administrative barriers to the Tribes' primary administration of programs such as RCRA Subtitle C. EPA believes that it is a reasonable step in implementing this important policy to remove the barrier imposed by the current regulatory prohibition of partial RCRA programs as it affects authorization of Indian Tribes. Otherwise, EPA believes that few, if any Tribes would participate in RCRA Subtitle C authorization.

Indian Tribes typically have much smaller populations than States, and there are generally limited industrial and commercial operations conducted within the Tribe's jurisdiction. This tends to limit not only the likelihood of substantial hazardous waste generation activities within Indian country, but it also limits the sources of revenues to support the activities of Tribal governments. Therefore, Indian Tribes would not typically possess the resources to develop and carry out a full RCRA Subtitle C program. Particularly in those areas where the full RCRA program requires special expertise (e.g., experts in hydrogeology to oversee RCRA corrective actions), skills and resource shortages common among Indian Tribes would preclude most Tribes from participating in RCRA authorization, if partial authorization were not an option. EPA believes that it would make little sense to require Tribal governments to develop authorities and capabilities to regulate facilities that are not now and are unlikely ever to be present on Tribal lands.

EPA solicits comment on the removal of the § 271.1(h) partial program prohibition only for Indian Tribes. EPA recognizes that some States and the Insular territories may believe that they also should be allowed to obtain partial authorizations, because of their size, limited involvement with hazardous waste operations, or limited need and capability to operate a full RCRA hazardous waste program. While EPA understands these interests, the Agency believes that these factors are present to a greater degree with Indian Tribes than with the States and Territories. In addition, the EPA Indian Policy is a distinguishing factor which supports this limited proposal, since it represents EPA's commitment to eliminate

administrative impediments to authorizing Tribal programs. Finally, EPA is concerned that a more general relaxation of the partial program prohibition would result in many States either electing not to assume new RCRA program requirements which they view as burdensome (thereby leaving EPA with the most significant implementation burdens), or transferring previously authorized program components back to EPA.

3. Criteria for Partial Program Authorization

Today's proposed rule includes criteria that would govern the evaluation of Tribes' requests for partial program authorization. This section explains these criteria.

a. *Composition and size of the regulated community.* EPA believes that the most critical consideration in evaluating the appropriateness of a partial program authorization is the composition and size of the regulated community. The components of a Tribal hazardous waste management program should reflect the types of facilities and the magnitude of hazardous waste operations that are actually present, or likely to establish operations, within the Tribal jurisdiction. This criterion should be considered both in the context of the authorities and capabilities which the Tribe should demonstrate in its application, and in evaluating the allocation of regulatory oversight burdens between a Tribe and EPA.

For example, if a Tribe's regulatory universe consists solely of hazardous waste generators and transporters, this proposal would permit the Tribe to demonstrate in its application the authorities and capability to regulate these types of facilities. Such a Tribe would need to develop regulatory counterparts to EPA's generator standards in 40 CFR parts 262 and 268, as well as transporter standards corresponding to EPA's part 263 requirements. However, the application would not need to include regulatory authorities for hazardous waste landfills, incinerators, or other types of hazardous waste management facilities which do not currently exist, and which are not likely to ever operate within a Tribe's territorial jurisdiction.

EPA believes that partial authorization is warranted only in instances where the Tribe has responsibility for regulating all the facilities within a particular program. For example, Tribes which are authorized solely for generators and transporters would be responsible for all persons or entities that fall into those programs. Although it would be appropriate for EPA to provide limited technical expertise and to implement its statutory responsibilities under HSWA at facilities regulated by the Tribal program, it would not be appropriate for EPA to assume nearly all the regulatory burdens at such sites.

The omission from a Tribe's application of an entire class of existing facilities may raise questions about the appropriateness of a partial program authorization. In such cases, EPA would assess the regulatory burden associated with the Tribe's proposed program, and the burdens which EPA would retain as a result of regulating the class of facilities omitted from the Tribal program. On a case-by-case basis, EPA would determine whether the significant sovereignty interests reflected in authorization and the regulatory burdens being assumed by the Tribe outweigh the circumstances of EPA retaining direct implementation responsibilities for a class of facilities. However, where the omission of such a class of facilities would result in EPA bearing a disproportionate regulatory burden, this proposal would view this as grounds for a negative determination on that Tribe's request for partial authorization. EPA solicits comments on how it should strike the appropriate balance between Tribal and EPA interests when evaluating partial program applications that involve some, but not all, of a Tribe's regulated community.

b. *Extent to which program components are severable.* EPA's 1979 decision to prohibit partial RCRA programs was based primarily on concerns which the regulated community identified about the confusion which would result under a system of joint State and EPA implementation. This concern remains today, and is perhaps even more prominent than in 1979, given the increased growth and complexity of the RCRA Subtitle C management program since that date. On the other hand, the interest of avoiding dual RCRA programs should not become an insurmountable obstacle to EPA's implementation of its Indian Policy, particularly since dual State/EPA implementation of Subtitle C has become fairly commonplace under the mandate of the 1984 HSWA amendments.

EPA believes that the severability of the program elements applied for by a Tribe is an important criterion in evaluating the merits of a Tribe's request for a partial program authorization. In this context, ''severability'' means that there is a distinct set of requirements for which the Tribe is exclusively responsible for program implementation. Severability is important in avoiding or minimizing the confusion and burdens arising from joint Tribal/EPA implementation of RCRA. Therefore, a Tribal application will be evaluated to determine that, as far as possible, the Tribe's application includes the authorities that are needed to fully regulate the class or classes of facilities for which the Tribe is seeking authorization. When this occurs, there should be minimal confusion insofar as the particular roles and responsibilities of the Tribe and EPA.

EPA recognizes that total severability of roles and responsibilities may not be fully achievable. Nevertheless, an acceptable partial program application is one that tends to clarify, not confuse, regulatory responsibilities for hazardous waste management activities that the Tribal program would regulate.

To meet this criterion, a Tribe seeking authorization, for example, to regulate hazardous waste generators would need to include authorities in its program corresponding to regulations found in several distinct parts of Volume 40 of the *Code of Federal Regulations* (CFR). While management standards specific to generators are set forth in 40 CFR part 262, generators also become subject to RCRA permit requirements when they store or treat hazardous wastes in tanks or containers for a period exceeding 90 days (or 180 days for certain small quantity generators). In these cases, counterparts to part 264 general facility, tank, and container permitting standards might also be appropriate. Likewise, generators are subject to certain waste analysis, certification, and other requirements included in EPA's Part 268 Land Disposal Restrictions (LDRs), and these additional generator requirements should also be reflected in the Tribe's legal authorities.

EPA requests comment on the proposed criterion under which maximum severability of Tribal and EPA regulatory responsibility for hazardous waste management activities would be a persuasive factor in evaluating Tribes' requests for partial program authorization. Under this proposal, EPA could recognize exceptions for particular facility requirements (e.g., HSWA corrective action) where direct EPA oversight is needed to ensure the availability of a special technical expertise or resources which a Tribe could not reasonably be expected to develop and retain. This criterion is discussed in the section which follows.

c. *Extent to which EPA-retained elements require special expertise.* As discussed in the preceding section, the

requirement of special implementation expertise may be a circumstance warranting EPA's retention of direct oversight responsibilities for a particular facility, of for a class of facilities. Thus, under this proposal, EPA could approve a Tribal program that lacked regulatory authorities to oversee existing landfills, land treatment units, surface impoundments, or waste piles, where the Tribe's application demonstrates that the regulation of these facilities would require the substantial involvement of hydrogeologists or other specialists that are not reasonably available to the Tribe. These areas of expertise could come into play, for example, in the oversight of Subtitle C facilities' groundwater monitoring and protection requirements, and in overseeing the HSWA corrective action mandates to address releases of hazardous constituents from the solid waste management units of facilities seeking RCRA permits (40 CFR part 264, subpart F). In addition, the need for special EPA expertise could also be present in instances where a treatment facility is seeking authorization to operate treatment processes that require a significant chemical or mechanical engineering expertise to evaluate and permit.

EPA believes that it should scrutinize closely those requests for partial program authorization that propose to exclude authority to regulate an entire class of existing facilities because of a need for special expertise. In many such instances, the special expertise might only be needed occasionally, and could be provided by EPA or by contractor as technical support to the Tribe.

More typically, special EPA expertise may be asserted as a basis for EPA's retention of its HSWA authority for facilities otherwise subject to a Tribe's authorized RCRA Subtitle C program. The special technical expertise associated with the HSWA corrective action and LDR programs may justify joint EPA/Tribal administration of RCRA at facilities with corrective action needs or with significant involvement in highly technical treatment processes. Under this proposal, EPA could authorize partial Tribal programs that excluded HSWA corrective action and LDR treatment standards, and the Tribe could be authorized to regulate the non-HSWA aspects of the facilities' operations.

EPA requests comments on the proposal to include special EPA expertise as a criterion for authorizing a partial Tribal program. The Agency also solicits specific comments that would aid EPA in identifying those elements of the RCRA Subtitle C or HSWA regulatory programs that are suitable candidates for EPA retention, and those that should be included within a Tribe's authorized program.

d. *Extent to which there is a bona-fide waste management program for which the Tribe possesses the necessary capability.*

The final criterion proposed in this notice requires the Tribe to demonstrate to EPA's satisfaction that there is a real and significant presence of regulated hazardous waste management activities within the Tribe's jurisdiction, so that the Tribe's hazardous waste management program will constitute a bona-fide regulatory program. This criterion also requires the Tribe to demonstrate that it has the necessary capability to administer the partial program for which it is seeking authorization.

The requirement of a real and significant involvement with hazardous waste operations is not intended to suggest a quantity threshold on the amount of waste generated or the numbers of facilities that must be present. Rather, this requirement is intended to connote that there must be a real or imminent universe of hazardous waste management activities subject to regulation. As such, a speculative possibility or interest does not meet this criterion.

Further, to be authorized, a program must also be able to demonstrate the necessary capability to oversee the universe of regulated hazardous waste activities, and administer the program's legal authorities and guidance. Capability is a concept that addresses, among other factors, the mix of resources and skills which a Tribe will need to implement successfully its hazardous waste program. EPA currently applies capability criteria to States that seek RCRA Subtitle C authorization. The capability implications of this proposal are discussed below in section IV.H.6 of this preamble.

4. Minimal Program Considerations

EPA believes that there are certain RCRA hazardous waste program elements which, at a minimum, must be present in every application for a partial RCRA program authorization. In other words, there is a ''floor set'' of program elements, which if not included in an application, could constitute grounds for rejection of a Tribal program application.

EPA proposes that Tribal counterparts to the following Federal program elements would constitute the minimal program for which a Tribe could seek partial program authorization:

- The appropriate subset of definitions in 40 CFR part 260 corresponding to the hazardous waste program within the Tribe's application;
- Waste identification requirements in 40 CFR part 261;
- Generator requirements in 40 CFR parts 262 and 268; and
- Transporter requirements in 40 CFR part 263.

Additionally, Interim Status Standards, 40 CFR part 265, cover two types of units, newly regulated units (recently included as a RCRA Subtitle C facility due to new regulations) and non-notifiers (such as those operating as illegal Subtitle C units which become identified through inspections or other means). Units identified as subject to RCRA Subtitle C which were not previously regulated will be subject to parts 264 and 265 closure requirements. U.S. EPA will be responsible for permitting and/or closure of those units subject to part 265 for Tribes that choose not to adopt these regulations as part of their authorized program. Tribes that become authorized for part 265 will be responsible for permitting and/or closure (whichever is appropriate) of these units.

EPA requests comments on the appropriateness of these minimum program elements for defining an acceptable partial RCRA Subtitle C program for Tribes.

5. Financial Assurance Requirements for Tribally Owned and Operated Facilities

RCRA Subtitle C requires owners and operators of hazardous waste treatment, storage, and disposal facilities to provide financial assurance for closure, post-closure care, liability for injury to third persons and corrective action.

The Federal financial assurance regulations exempt State and federally-owned or operated facilities from the financial assurance requirements (See 40 CFR 264.140(c)), because it is EPA's belief that State and Federally-owned or operated facilities will always have adequate resources to conduct closure and post-closure care activities properly (See 45 FR 33154, 33198, May 19, 1980). Notwithstanding that today's proposal would give Tribes, like States, the authority to operate a hazardous waste regulatory program in lieu of the Federal program, it would not change the applicability of the existing requirements by exempting tribally-owned or operated facilities from the financial assurance requirements. Tribally-owned or operated facilities subject to an authorized Tribal hazardous waste regulatory program, therefore, would continue to have to comply with the financial assurance

requirements like all other owners and operators of treatment, storage or disposal facilities, private or public, that are not State or federally-owned or operated facilities.

EPA is not proposing to extend the State/Federal exemption to Tribes because EPA believes that the financial resources that would be available to a specific Tribe in the event closure, post-closure, or liability obligations were triggered should be evaluated. EPA believes that Tribal members will not enjoy an equivalent degree of protection from a tribally operated program unless there are assurances provided that there will be adequate resources to address these obligations. Because at this time many Tribes may not have the tax base or other means of raising revenue as do the States and the Federal government, EPA believes that, as a general matter, it would not be prudent to extend to Tribally owned or operated facilities the financial assurance exemption. The financial assurance requirements ensure that certain protections will be available to persons who might be negatively affected by a facility. EPA believes that financial compensation should be available to members of Indian Tribes (as they are for citizens of States) for third party injuries or for clean-ups if needed. The costs associated with closure and post-closure care activities, not to mention liability compensation to injured parties, could greatly burden Tribal administrations and, if unavailable, could compromise Tribal members' health and environment.

EPA is, however, soliciting comment on the possibility of developing a special financial test for tribally owned/operated facilities subject to RCRA Subtitle C, identical or similar to that developed for MSWLFs Local Government (''LOGO'') Test under § 258.74(f). The ''LOGO'' consists of a (1) financial component, (2) a public notice component, and (3) a record keeping and reporting component. A local government must satisfy each of the three components to pass the test and must pass the test on an annual basis.

EPA is also interested in receiving comments on other options that would provide the same level of protection to tribal citizens currently afforded by the financial requirements of § 264.140(c).

6. EPA's Retained Authority

Under this proposal, EPA would retain responsibility for implementing the RCRA and HSWA program authorities not included in a Tribe's authorized partial program. For example, if a Tribe received authorization for only a generator, transporter, and non-HSWA storage facility program, EPA would retain responsibility for regulating any incinerators, landfills, or other treatment or disposal facilities, and for implementing the HSWA corrective action requirements at all TSD facilities. This situation contrasts significantly from that which occurs in States, where partial program authorizations are not available. In authorized States, for example, the States regulate all types of treatment, storage, or disposal facilities (TSDFs). In these States, EPA implements only the HSWA program, *and only until* the States receive authorization for the HSWA authorities. EPA emphasizes that this proposal would not diminish the scope of the overall RCRA Subtitle C program applicable in Indian Country. A Tribe's approved partial program components, considered together with the program components retained by EPA, would define a complete RCRA hazardous waste program with the authority and flexibility to respond to the full gamut of facilities, releases, or other circumstances.

7. Capability Considerations

In administering the Subtitle C authorization program under RCRA section 3006, EPA realizes that a State or Tribal hazardous waste management program cannot be judged solely by whether it has equivalent legal authorities and whether it can provide acceptable forms of documentation. Indeed, EPA's overarching objective in authorization is to approve quality programs that are protective of health and the environment. Therefore, EPA looks beyond the elements of a State's authorities (i.e., its legal codes, policies, forms) and evaluates the capability of the State agencies to implement and manage their substantive Subtitle C program responsibilities.

Under current policies and procedures, EPA conducts a capability assessment both when a State seeks its initial or ''base program'' authorization, and subsequently when the State adopts program revisions which the EPA Region determines may have major impacts on the State's hazardous waste program. The adoption of rules bringing a significant class of new generators or permitted facilities into the State's program, or the adoption of the HSWA corrective action program, are examples of revisions that would likely trigger a new capability assessment.

Capability is a fluid concept that does not typically lend itself to precise measurement. While capability can fluctuate in the short-term due to a response to budget cuts or loss of key staff, EPA's goal in conducting capability assessments is to focus on the overall, long-term performance of a State's program, and the expected future performance. The emphasis is placed on a program's long-term (typically 3 years or more) effectiveness, its ability to meet its commitments over the long term, indicators of constant improvement over time, as well as consistency in performance. Critical program areas that are assessed include enforcement, permitting, corrective action, and program management. In each area, current guidance suggests factors that are indicative of a capable program, and factors that may be indicative of a capability problem. For example, in the enforcement area, the assessment would examine a State's enforcement strategies, its record for completing quality inspections, its violation classification plan and record, its record of taking timely enforcement responses that are appropriate to the severity of violations, and its proven ability to meet its grant commitments in the enforcement area. In the management area, EPA examines whether sufficient resources are committed to the hazardous waste program, whether there is a proper mix of staff and skills to carry out the program, whether the State provides appropriate training, and whether the State maintains the necessary information management systems to oversee the program. Additional criteria are suggested for the permitting and corrective action areas. See *RCRA State Authorization Capability Assessment Guidance*, revision dated October, 1991.

EPA is proposing to apply the same capability assessment criteria to Tribal programs that it currently applies to States. However, capability will be evaluated only with respect to the program components for which an Indian Tribe is seeking authorization. As is currently the practice with States, the assessment should be conducted at the time of a Tribe's initial authorization application, as well as at subsequent times when the Tribe is adopting program revisions that may have a significant impact on its authorized program.

Because of the availability in this proposal of partial program authorization, capability considerations may have quite different effects for Indian Tribes as they do for States. First, capability may fundamentally affect the scope of the Subtitle C program for which a Tribe seeks authorization. Under this proposal, a Tribe need not develop capabilities to permit or oversee all types of RCRA facilities. In some instances, the Tribe may never need to

concern itself with certain types of facilities, while in other instances, the skills and capabilities may be more appropriately retained and implemented by EPA. In either case, the lack of a particular capability would not necessarily be viewed as an impediment to authorization; rather, it may only affect the scope of the program for which the Tribe would be eligible to obtain authorization. In practice, Tribes would be expected to limit their program applications to those areas where they can demonstrate the requisite capability. EPA would also have the discretion to authorize less than all the program components applied for by a Tribe, where capability issues specific to one or more components of an application are not resolved to EPA's satisfaction.

The relationship of capability to partial programs is a very significant aspect of this proposal. This approach to capability assessments is consistent with the EPA's Indian Policy mandate that EPA remove administrative impediments to Tribal primacy in administering environmental programs such as RCRA.

EPA believes, however, that there are limits on the extent to which it should tailor a program authorization to a Tribe's demonstrated capability. A hazardous waste program that is exceedingly narrow in scope may not be appropriate for authorization, despite the importance attached to authorization as a means of recognizing a Tribe's sovereignty. Therefore, EPA believes that the minimal program considerations discussed above in section IV.H.4 of this preamble are helpful in determining the minimal capabilities that must be present to warrant an authorization review. Likewise, in cases where the allocation of program burdens that would result from a partial authorization would leave EPA with disproportionate and substantial responsibilities, EPA may also withhold partial authorization. This follows from the fact that the investment by EPA of resources in overseeing an approved program of very narrow scope would only drain resources that might be better used by EPA to discharge its own implementation responsibilities.

EPA's evaluation of capability may also consider if applicable, the relationship between the existing or proposed Tribal agency that will implement the hazardous waste program and any potential regulated Tribal entities. It is not uncommon for a Tribe to be both regulator and regulated entity, which may result in a potential conflict of interest. Independence of the regulator and regulated entity best assures effective and fair administration of a hazardous waste program. Tribes will generally not be required to divest themselves of ownership of any regulated entities to address any potential conflict. Nor is the Agency intending to limit Tribal flexibility in creating structures that will ensure adequate separation of the regulator and regulated entity. Instead, this discussion is intended to alert Tribes at an early date about potential problems in obtaining program authorization.

8. Review Standards

While EPA is today proposing to allow Indian Tribes to obtain partial RCRA program authorization, the Agency is not proposing any alteration to the review standards that will be used to evaluate the merits of Tribes' applications. That is, unless otherwise noted, the Tribe's application must demonstrate that each component of the Tribe's partial program meets the statutory authorization criteria. Specifically, the Tribe must show that each program component is equivalent to the corresponding Federal program requirements. Each component must be consistent with the Federal program and with the RCRA Subtitle C programs applicable in other authorized states. In addition, the Tribe must show that the components are no less stringent than the corresponding Federal program requirements, except for those requirements (e.g. civil or criminal enforcement) to which the Tribe agrees in the MOA to transfer to EPA.

To the extent that an Indian Tribe's partial program would include permitting authority for treatment, storage, or disposal facilities (TSDFs), the Tribe's program would also be required to meet the statutory requirements for public participation in the issuance of RCRA permits. RCRA also requires, pursuant to section 3006(f), that the Tribes demonstrate that their program provides for the public availability of information regarding hazardous waste management facilities and sites, in substantially the same manner, and to the same degree, as EPA would provide information to the public under the Federal Freedom of Information Act, 5 U.S.C. 301, 552, 553, 40 CFR part 2.

9. Obligation to Adopt Program Revisions

The current authorization regulations at 40 CFR part 271 impose a continuing obligation on authorized states to update their authorized programs to reflect revisions made to the Federal regulatory program. Under 40 CFR 271.21, there are schedules imposed by which States must adopt counterparts to Federal program changes, and procedures for submitting these program revisions to EPA for authorization. In addition, § 271.21(a) requires that an authorized State notify EPA of any proposed modifications to its basic statutory or regulatory authority, as well as to its forms, procedures, or priorities. The obligation to keep EPA informed of proposed program changes applies both to changes proposed in response to Federal program revisions, and to proposed changes that are initiated solely as a matter of state law or policy.

EPA proposes that these same obligations would apply to Indian Tribes' authorized partial programs. Tribes would be required to notify EPA of any significant, proposed changes to their basic legal authorities, policies, forms, or priorities, and to modify their programs in response to Federal program revisions according to the schedules in § 271.21. However, the obligation to modify a partial program and seek EPA authorization of revisions would be more limited than in the case of other authorized States. An Indian Tribe's obligation would extend only to Federal revisions which directly affect the components of the Tribe's authorized program. For example, a partial program which regulates only RCRA generators and transporters would need to undergo a revision to address a change to the Hazardous Waste Uniform Manifest promulgated by EPA, since that change affects directly the waste management requirements for generators and transporters. However, the same partial program would not need to undergo a revision to address new Federal standards for incinerator emissions, since incinerators are beyond the scope of the approved partial program.

EPA recognizes that there is the potential for some confusion in identifying the extent to which approved partial programs must undergo revision to address Federal program changes. The Agency believes that Tribes and the EPA regions will need to confer closely on Federal program revisions, and reach an understanding on those that will trigger the need for a Tribal program modification. An agreement on the scope of the Tribe's responsibility to modify its approved program should be included in the annual workplan that would be negotiated by EPA and the Tribe in conjunction with the Tribe's receipt of RCRA 3011 grant funds to administer its authorized hazardous waste program. Of course, Federal program changes that are determined

not to affect the Tribe's partial program would remain EPA's responsibility to implement. Therefore, there would be no loss of overall program coverage, since the Tribe's partial program and the program retained by EPA should together constitute a full RCRA Subtitle C program.

EPA requests comment on the proposal to subject Indian Tribe's partial programs to the same review standards and schedules for program modifications that apply currently to States. The Agency is particularly interested in comments that suggest ways to reduce the potential for confusion in implementing the review of partial programs and in defining Tribes' responsibilities to update their partial programs.

V. Other Regulatory Requirements

A. Compliance with Executive Order

Under Executive Order 12866 [58 FR 51735 (October 4, 1993)], EPA must determine whether the regulatory action is ''significant'' and therefore subject to Office of Management and Budget (OMB) review and the requirements of the Executive Order. The order defines ''significant regulatory action'' as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, productivity, competition, jobs, the environment, public health or safety, or state, local or Tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

EPA believes that today's proposed rule raises a novel policy issue, one which arises out of the President's priority to build relationships with Tribal governments.

EPA has concluded that this rule is ''significant'' and is therefore subject to OMB review pursuant to Executive Order 12866. In addition, EPA believes that today's proposed rule is consistent with the regulatory philosophy and principles identified in the Executive Order.

B. Regulatory Flexibility Act

Section 603 of the Regulatory Flexibility Act (the Act) (15 U.S.C. 8091 *et seq.* Pub. L. 96–534, September 19, 1980) requires EPA to prepare and make available for comment a regulatory flexibility analysis in connection with rulemaking. The initial regulatory flexibility analysis must describe the impact of a proposed rule on small business entities. If, however, a regulation will not have a significant impact on a substantial number of small business entities, no such analysis is required.

EPA has determined that this proposal will not impact significantly a substantial number of small business entities. Therefore, a regulatory flexibility analysis is not required.

EPA's determination of no significant impact is based on the fact that this proposal affects only the determination of what government entity shall administer the RCRA program in Indian country. It does not affect the regulatory requirements to which hazardous waste management facilities, including any small business entities, are subject.

This proposed regulation, if promulgated, does not require the Indian Tribes to obtain authorization to operate a hazardous waste program. The decision whether to obtain authorization rests with each individual Indian Tribe. If a Tribe determines that obtaining authorization to operate a hazardous waste program will not be advantageous, including economically advantageous, to the Tribe, the Tribe may decide not to seek authorization. In addition, EPA believes that the number of Indian Tribes that will apply for authorization to operate a hazardous waste program under this proposed rule, if promulgated, will be small as compared with the total number of Indian Tribes potentially eligible for authorization.

Notwithstanding the voluntary nature of the authorization, the Agency also considers alternatives to a full program authorization. As an alternative to obtaining authorization to operate a full hazardous waste program, the Agency is proposing to allow a Tribe to apply for and receive authorization to operate a *partial* hazardous waste program. Allowing a Tribe the option to apply for and obtain authorization to operate a partial hazardous waste program will lessen the impact, if any, on the Tribe as a result of this proposed rule.

The proposed regulation will not have a significant adverse impact on a substantial number of small businesses or small organizations. Since RCRA already imposes requirements on all owners and operators of hazardous waste treatment, storage, and disposal facilities in Indian country, EPA believes that the proposed rule, if promulgated, will not add requirements beyond those already imposed under the Federal RCRA requirements. Although it is conceivable that an Indian Tribe could impose greater requirements upon an owner or operator of a hazardous waste facility, such situations are likely to be rare. Moreover, any additional impacts, including economic impacts, resulting from implementation of this proposed rule, if promulgated, is expected to be negligible, since Tribal regulation of these activities is limited to areas within Tribal jurisdiction.

Therefore, pursuant to section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 605(b), the Administrator certifies that this proposed rule will not have a significant economic impact on a substantial number of small entities.

C. Paperwork Reduction Act

The information collection requirements in this proposed rule have been submitted for approval to the Office of Management and Budget (OMB) under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* An Information Collection Request (ICR) document has been prepared by EPA (ICR No. *1778.01*) and a copy may be obtained from Sandy Farmer, OPPE Regulatory Information Division; U.S. Environmental Protection Agency (2137); 401 M St., SW., Washington, DC 20460 or by calling (202) 260–2740.

In order to extend to Indian Tribes the opportunity to become authorized to administer hazardous waste programs in lieu of EPA, EPA needs to make a determination that the proposed program fully meets federal criteria. In general, to obtain authorization, Tribes must meet the same criteria as the States as outlined in 40 CFR part 271, including a demonstration of capability, which is assessed in the same manner as those from States.

To make a final determination, EPA must collect information in the form of an application from Tribes. Pursuit of authorization is entirely voluntary, and the universe of respondents involved in this information collection will be limited to those Tribes seeking approval of their hazardous waste programs. However, interested Tribes must submit all of the required information to EPA in order for EPA to make a final determination. The information which Tribes would submit is public information; therefore, no problems of confidentiality or sensitive questions arise.

Each respondent would only have to respond once, and the EPA is estimating the number of responses at six per year for the three year period covered by this ICR, for a total of eighteen. The

projected annual cost and hour burden per respondent for the submittal of an application is approximately 358 hours, at a cost of $7,990. The projected totals for all eighteen estimated respondents over three years are approximately 6,444 hours and $143,832. In addition, cost estimates for the annual respondent reporting and recordkeeping per respondent range from $219 (low end) to $6,369 (high end). The projected respondent reporting and recordkeeping total range, also with six respondents a year for three years, is from $3,942 to $114,642.

These costs represent start-up or capital costs. There are no operation and maintenance reporting or purchase of services costs associated with the proposed RCRA Subtitle C Indian Authorization Rule. Given these parameters, the bottom line respondent burden and cost estimate is for 6,444 hours and ranges from $147,774 to $258,474 over three years.

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 ch. 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 (2137); 401 M St., SW., Washington, DC 20460; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th St., NW., 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 June 14, 1996, a comment to OMB is best assured of having its full effect if OMB receives it by July 15, 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), Pub. 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.

The Act generally excludes from the definition of a ''Federal intergovernmental mandate'' (in sections 202, 203, and 205) duties that arise from participation in a voluntary Federal program. Tribal requests for authorization of their RCRA Subtitle C programs are voluntary and impose no Federal intergovernmental mandate within the meaning of the Act. Rather, by having its hazardous waste program authorized, a Tribe gains the authority to implement its hazardous waste program in lieu of the federal hazardous waste program within its jurisdiction. Thus, because today's rule does not constitute a ''Federal intergovernmental mandate'' under the Act, EPA has not conducted the analyses required by section 202 and 205 of the Act.

As to section 203 of the Act, the authorization of a Tribal program will not significantly or uniquely affect small governments other than the applicants. As to the applicants, Tribes have received notice of the requirements of an authorized program (through this rulemaking process), and will have meaningful and timely input into the development of their individual program requirements throughout the authorization process. The Tribes therefore are fully informed as to compliance with the authorized program. Thus, any applicable requirements of section 203 of the Act have been satisfied.

List of Subjects

40 CFR Part 35

Environmental protection, Hazardous waste.

40 Parts 270 and 271

Environmental protection, Administrative practice and procedure, Hazardous waste, Indians-lands, Reporting and recordkeeping requirements.

Dated: May 20, 1996.

Carol M. Browner,

Administrator.

Therefore, it is proposed that 40 CFR parts 35, 270 and 271 be amended as follows:

PART 35—STATE, TRIBAL AND LOCAL ASSISTANCE

Subpart A—Financial Assistance for Containing Environmental Programs

1. The authority citation for part 35, subpart A, continues to read as follows:

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

2. Section 35.105 is amended by adding a sentence to the end of the definition of ''Eligible Indian Tribe,'' and by revising the definition of ''Indian Tribe'' to read as follows:

§ 35.105 Definitions.

* * * * *

Eligible Indian Tribe means, * * * For purposes of the Resource Conservation and Recovery Act Subtitle C, any federally recognized Indian Tribe

that meets the requirements set forth at § 35.515.

* * * * *

Indian Tribe means, for purposes of the Public Water System Supervision, Underground Water Source Protection, or Hazardous Waste Management grants, any Indian Tribe, band, group, or community recognized by the Secretary of the Interior and having a governmental body carrying out substantial governmental duties or powers over a defined area. For purposes of grants under the Clean Water Act, the term ''Indian Tribe'' means any Indian Tribe, band, group, or community recognized by the Secretary of the Interior and having a governmental body exercising substantial governmental duties and powers over a Federal Indian reservation.

* * * * *

§ 35.500 [Amended]

3. In § 35.500 by removing the words ''(as defined in section 1004 of the Act).''

4. Section 35.515 is added under the heading ''Hazardous Waste Management'' (Section 3011) to read as follows:

§ 35.515 Eligible Indian Tribes.

The Regional Administrator may award Resource Conservation and Recovery Act section 3011(a) grants to Indian Tribes that meet the definition of ''Indian Tribe'' set forth in 40 CFR 35.105 and that have submitted the information described at 40 CFR 271.27(a)(3)(ii).

PART 270—EPA ADMINISTERED PERMIT PROGRAMS: THE HAZARDOUS WASTE PERMIT PROGRAM

The authority citation for part 270 continues to read as follows:

Authority: 42 U.S.C. 6905, 6912, 6924, 6925, 6927, 6939, and 6974.

5. In § 270.2, by revising the definition of ''State,'' and by adding in alphabetical order definitions for ''Indian Tribes'' and ''Indian country'' to read as follows:

§ 270.2 Definitions.

* * * * *

Indian country means: (1) All lands within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation;

(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 means any Indian Tribe, band, nation, or community that is recognized by the Secretary of the Interior and that has a governmental body exercising substantial governmental duties and powers.

* * * * *

State means any of the 50 States, the District of Columbia, Guam, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, and the Commonwealth of the Northern Mariana Islands. For purposes of Sections 3006 and 3011 of RCRA, the term State also extends to Indian Tribes.

* * * * *

PART 271—REQUIREMENTS FOR AUTHORIZATION OF STATE AND TRIBAL HAZARDOUS WASTE PROGRAMS

The authority citation for part 271 continues to read as follows:

Authority: 42 U.S.C. 6905, 6912(a) and 6926.

6. In § 271.1 by revising paragraph (h) and adding paragraph (k) to read as follows:

§ 271.1 Purpose and scope.

* * * * *

(h) Partial State programs are not allowed for programs operating under RCRA final authorization, except as provided in § 271.27 for partial programs operated by Indian Tribes. However, in many cases States will lack authority to regulate activities in Indian country. This lack of authority does not impair a State's ability to obtain full program authorization in accordance with this subpart, i.e., inability of a State to regulate activities in Indian country does not constitute a partial State program. EPA will administer the program in Indian country if neither the State or Indian Tribe has program authority.

* * * * *

(k) The substantive provisions and procedures specified in this subpart for State program submissions, and for EPA's approving, revising, and withdrawing authorization of State programs apply to programs operated by Indian Tribes. Additional substantive and procedural requirements that are applicable only to programs operated by Indian Tribes are set forth at § 271.27 of this subpart.

7. By adding § 271.27 to read as follows:

§ 271.27 Requirements for Indian Tribe Programs.

(a) The substantive requirements and procedures established in Subpart A for State hazardous waste programs shall apply to Indian Tribe programs, except that:

(1) The disallowance of partial RCRA programs contained in § 271.1(h) shall not apply to partial Indian Tribe programs that meet the criteria in paragraph (b) of this section.

(2) The Tribal Chairman or equivalent official shall be substituted for the Governor of the State in requesting program authorization under § 271.5(a)(1).

(3) (i) The Program Description discussed in § 271.6 shall also include a map, legal description, or other information sufficient to identify the geographical extent of the Indian country over which the Indian Tribe seeks jurisdiction. This information shall also identify the location of any generator, transporter, and treatment, storage, or disposal facility subject to RCRA Subtitle C requirements.

(ii) The Program Description discussed in § 271.6 shall also include a 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 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 authorization. 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 the RCRA hazardous waste program.

(4) (i) The Tribal Legal Certification (the equivalent to the Attorney General's Statement described in § 271.7) shall be submitted and signed by the Tribal attorney or by an equivalent official retained by the Indian Tribe for representation in matters before EPA or the courts pertaining to the Indian Tribe's program. The Certification shall include an assertion that the attorney has the authority to represent the Tribe with respect to the Tribe's authorization application.

(ii) Where an Indian Tribe asserts its jurisdiction over activities on non-member fee lands within the boundaries of a reservation, the Tribal Legal

Certification shall clearly identify the activities and areas affected by that claim. The Tribal Legal Certification shall also include an analysis of the Tribe's authority to implement the permitting and enforcement provisions of subpart C on those non-member fee lands.

(5) The Memorandum of Agreement described in § 271.8 shall be executed by the Indian Tribe's counterpart to the State Director; e.g. the Director of the Tribal Environmental Office, Program or Agency. Indian Tribes are not required to meet the requirements of § 271.16(a)(3)(ii) for the purposes of criminal authority over non-Indians or for the purposes of imposing criminal fines over $5,000.00. The Memorandum of Agreement required in 271.8 shall include a provision for the timely and appropriate referral to the Regional Administrator for those criminal enforcement matters where that Tribe does not have authority (i.e., those addressing criminal violations by non-Indian or violations meriting penalties over $5,000.00). The Agreement shall also identify any enforcement agreements that may exist between the Tribe and any State.

(b) Indian Tribes may apply for and receive authorization from EPA to operate a partial RCRA program. A partial program may be approved when the Indian Tribe's application demonstrates to EPA's satisfaction that the following factors are present:

(1) The composition and size of the Indian Tribe's regulated community warrant the development and operation of a partial program.

(2) The components for which the Indian Tribe seeks authorization are severable from the remainder of the program retained by EPA, so that the respective roles and responsibilities of the Indian Tribe and EPA will be reasonably ascertainable and implementable.

(3) The program components applicable to the Indian Tribes' regulated community that would be retained by EPA, reasonably require a special expertise that is not readily available to the Indian Tribe.

(4) The program components for which the Indian Tribe seeks authorization define a bona-fide and significant hazardous waste management program for which the Indian Tribe possesses the capability to implement and manage.

(c) A partial RCRA program may not be approved under paragraph (b) of this section, unless it includes, at a minimum, counterparts to the following Federal program requirements:

(1) Appropriate definitions in 40 CFR part 260.

(2) Waste identification requirements of 40 CFR part 261.

(3) Generator requirements set forth in 40 CFR parts 262 and 268.

(4) Transporter requirements contained in 40 CFR part 263.

(5) Facility permitting standards in 40 CFR part 264, appropriate for the types of hazardous waste management facilities within the Indian Tribe's jurisdiction. However, specific facility permitting standards may be waived if EPA has retained permit issuance authority for the treatment, storage, and disposal facilities within the Tribe's jurisdiction.

(d) When a partial RCRA program is approved under this section, EPA retains direct implementation and enforcement responsibilities for those program components which are not included in the Indian Tribe's approved program.

(e) The provisions of § 271.21 on program revisions apply to Indian Tribe programs, except that an Indian Tribe's obligation to modify its authorized program to address subsequent Federal program changes extends only to those Federal program changes that directly affect the components of the Indian Tribe's authorized program. Subsequent Federal program changes promulgated under non-HSWA authority shall not take effect in an authorized Indian Tribe until the Indian Tribe has adopted the change under its laws and EPA has approved the program revision. However, amendments to HSWA provisions for which a Tribe is not authorized shall take effect under Federal authority immediately upon the effective date of the rule.

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