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RULES and REGULATIONS

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 131

[WH-FRL-4038-8]

Amendments to the Water Quality Standards Regulation That Pertain to Standards
on Indian Reservations

Thursday, December 12, 1991

*64876 AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: This rule amends the water quality standards regulation by adding: (1) The procedures by which an Indian Tribe may qualify for treatment as a State for purposes of the Clean Water Act section 303 water quality standards and section 401 certification programs, and (2) a mechanism to resolve unreasonable consequences that may arise from Indian Tribes and States adopting differing water quality standards on common bodies of water.

EFFECTIVE DATE: The rule shall be effective January 13, 1992.

ADDRESSES: The public may inspect the administrative record for this rulemaking and all comments received on the proposed regulation at the Environmental Protection Agency, Standards and Applied Science Division, Office of Science and Technology, room 919 East Tower, 401 M Street, SW., Washington, DC, between the hours of 8 a.m. and 4:30 p.m. on business days. A reasonable fee will be charged for copying. Inquiries can be made by calling 202-260-1315.

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SUPPLEMENTARY INFORMATION: Information in this preamble is organized as follows:

- A. Background
- B. Changes to the Proposed Rule
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 - 1. Treatment of Tribes as States
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4. Other Comments

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A. Background

Section 303(c) of the Clean Water Act (33 U.S.C. 1313(c)) requires the States to develop, review, and revise water quality standards for all surface waters of the United States. The Environmental Protection Agency's (EPA's) implementing regulations (40 CFR part 131) require that, at a minimum, such standards include designated water uses, in-stream criteria to protect such uses, and an antidegradation policy. EPA's role in the water quality standards program is to review and approve or disapprove the State-adopted water quality standards and, where necessary, to promulgate Federal water quality standards. Section 401 of the CWA provides that States may grant or deny "certification" for Federally permitted or licensed activities that may result in a discharge to the waters of the United States. The decision to grant or deny certification is based on the State's determination regarding whether the proposed activity will comply with the requirements of certain sections of the CWA enumerated in section 401(a)(1). These sections include those requiring water quality standards and effluent limitations. If a State denies certification, the Federal permitting or licensing agency is prohibited from issuing a permit or license. Certifications are subject to objection from downstream States where the downstream State determines that the proposed activity would violate its water quality requirements. Certifications are normally issued by the State in which the discharge originates, but may be issued in certain circumstances by an interstate agency or the Administrator.

The February 4, 1987 Amendments to the Act added a new section 518, which requires EPA to promulgate regulations specifying how the Agency will treat qualified Indian Tribes as States for the purposes of, among others, the section 303 (water quality standards) and section 401 (certification) programs described above. Section 518 also requires EPA, in promulgating these regulations, to establish a mechanism to resolve unreasonable consequences that may result from an Indian Tribe and a State adopting differing water quality standards on common bodies of water.

On September 22, 1989, the Environmental Protection Agency (EPA) proposed amendments to the water quality standards regulations in response to CWA section 518 requirements (see 54 FR 39098). The proposal included amendments that would: (1) Add procedures by which an Indian Tribe could qualify for treatment as a State for purposes of the section 303 water quality standards and section 401 certification programs of the Clean Water Act, and (2) establish a mechanism to resolve unreasonable consequences that may result from an Indian Tribe and a State adopting differing water quality standards on common bodies of water. Pursuant to CWA section 518, the proposal had been prepared in consultation with States and Indian Tribes. The proposal was developed with the assistance of an informal work group composed of representatives from Indian Tribes, States, and EPA. In addition, a national consultation meeting involving States and Tribes was held in Denver, Colorado in June of 1988 for the purpose of obtaining

additional comments. Finally, EPA distributed a number of drafts of the proposal to all States and Tribes (following a mailing list of Federally recognized Tribes obtained by the Office of Water) for review and comment prior to issuing the proposed rule.

Public hearings on the September 22, 1989 proposal were held in Phoenix, Arizona on November 14, 1989, Rapid City, South Dakota on November 16, 1989, and Washington, DC on December 5, 1989. A total of 25 people registered at the three hearings. The public comment period closed on December 22, 1989. EPA received a total of 34 written comments on the proposed rule.

EPA notes that more comments were received on the various drafts of the proposed rule than on the proposed rule which was ultimately published. EPA believes that many of the difficult issues were resolved during the consultation period prior to proposal, and that this explains why relatively few comments were received on the proposal and why relatively few changes to the proposal were required in preparing today's final rule.

Another reason is that EPA had previously published similar procedures under CWA section 518 for the section 106 water quality management and planning program (54 FR 14354; April 11, 1989).

Additional background information was included in the preamble to the proposed rulemaking.

B. Changes to the Proposed Rule

Two changes were made to the rule as a result of the public comments.

EPA received several comments on the provision of the dispute resolution mechanism which specifies how arbitrators should be selected (see § 131.7(f)(2)). These various comments suggested that such persons should be acceptable to all parties, knowledgeable about water quality standards, knowledgeable about Indian law and Tribal governments, and impartial.

The rule was amended to provide that the Regional Administrator select as arbitrators and panel members individuals who: (1) Are agreeable to all *64877 affected parties, (2) are knowledgeable concerning the requirements of the water quality standards program, (3) have a basic understanding of the political and economic interests of affected Tribes and States, and (4) are expected to fulfill the duties fairly and impartially. The regulation provides wide latitude as to who a Regional Administrator may appoint including EPA employees, employees of other Federal agencies, or "other individuals with appropriate qualifications." EPA believes that this regulatory provision should be broad enough to encompass all possibilities.

Section 131.7 (f)(1)(ii) requires that "mediators shall act as neutral facilitators * * *". Implicit in the regulation is the sense that mediators and arbitrators will act fairly and impartially. EPA knows of no regulatory provision that will guarantee impartiality. It should be noted, however, that there is an appeals process included in the regulation (see § 131.7(f)(2)(v)) for those instances where a party believes the arbitrator's recommendation is an action contrary to or inconsistent with the Clean Air Act.

The second suggested change was that EPA should define the terms "promptly" and "reasonable efforts" used in one provision of the dispute resolution mechanism (§ 131.7(d)). The referenced section requires EPA, upon a determination by EPA that a dispute resolution action is required, to "promptly" notify affected parties that EPA is

initiating an action and to make "reasonable efforts" to ensure that all interested groups also have notice that EPA is initiating a dispute resolution action.

EPA revised § 131.7(d) to replace the term "promptly" with "within 30 days," and specified that "reasonable efforts" shall include but not be limited to: (1) Written notice to responsible Indian and State agencies, and other affected Federal agencies, (2) notice to the specific individuals or entity that is alleging that an unreasonable consequence is resulting from differing standards having been adopted on a common body of water, (3) public notice in local newspapers, radio, and television, as appropriate, and (4) publication in trade journal newsletters, and (5) other means as appropriate.

Many of the comments received on the proposed rulemaking were suggestions for clarification which are responded to affirmatively in the Response to Public Comment Section below. Where appropriate, EPA has attempted to provide responses which will also serve as guidance for implementation of today's rule. The substance of these responses and any additional guidance needed will be added to the Water Quality Standards Handbook which contains the program guidance supplementing the requirements of the water quality standards regulation. The Agency's rationale for addressing the few suggestions for revising the regulatory language is also included in the Response to Public Comments Section.

C. Response to Public Comments

The response to public comments is organized into four sections: (1) Treatment of Tribes as States, (2) dispute resolution mechanism, (3) establishing water quality standards on Indian reservations, and (4) other comments. Comments discussed within each of these sections have been further categorized by topic.

1. Treatment of Tribes as States

Comments on the Authority Requirements

a. The Scope of Inherent Tribal Authority

Comment: The issue of whether and how EPA should require Tribes to demonstrate that they meet the requirements of section 518(e)(2) of the CWA, i.e., that they can demonstrate authority to regulate water quality within the boundaries of their reservations, attracted significant comment. Numerous commenters remarked on the significance of the Supreme Court's decision in *Brendale v. Confederated Tribes and Bands of the Yakima Nation*, 492 U.S. 408, (1989) for EPA's programs and today's regulations, although there were widely differing views of how to read the decision. Several commenters asserted that *Brendale* clearly indicates that an Indian Tribe may not enforce its water quality standards against non-members of the Tribe on non-Indian-owned fee lands within the boundaries of the reservation or that, at the very least, the Tribe must include detailed factual information that describes the non-Indian lands the Tribe proposes to regulate and the reasons supporting its jurisdictional assertions. By contrast, other commenters asserted that Tribes invariably possess inherent authority to regulate all reservation waters, and that EPA should presume the existence of such authority and not require Tribes to make any specific factual showing. These commenters

asserted that such authority over environmental matters was recognized in *Montana v. United States*, 450 U.S. 544 (1981), and not diminished by *Brendale*.

Response: EPA does not read the holding in *Brendale* as preventing EPA from recognizing Tribes as States for purposes of regulating water quality on fee lands within the reservation, even if section 518 is not an express delegation of authority (an issue discussed in detail below). In *Brendale*, both the State of Washington and the Yakima Nation asserted authority to zone non-Indian real estate developments on two parcels within the Yakima reservation, one in an area that was primarily Tribal, the other in an area where much of the land was owned in fee by nonmembers. Although the Court analyzed the issues and the appropriate interpretation of *Montana* at considerable length, the nine members split 4:2:3 in reaching the decision that the Tribe should have exclusive zoning authority over property in the Tribal area and the State should have exclusive zoning authority over non-Indian owned property in the fee area. The decision reflects some difficult issues in this area of the law and, as the comments indicated, has generated considerable controversy over the extent of Tribal authority.

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*, which previously had held that:

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.

Montana, 450 U.S. at 565-66 (citations omitted).

In *Brendale*, the Court applied this test, finding 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 or welfare." *Id.* at 432 (White, J., writing for the Court). The Agency therefore disagrees with commenters who argue that *Brendale* somehow overrules *Montana*.

As further discussed below, EPA agrees with certain commenters that pending further judicial or *64878 Congressional guidance on the extent to which section 518 delegates additional authority to Tribes, the ultimate decision regarding Tribal authority must be made on a Tribe-by-Tribe basis and has finalized the proposed process for making those determinations. Thus, EPA rejects the suggestion of other commenters that EPA make a conclusive statement regarding the extent of Tribal jurisdiction over fee lands for all Tribes and all waters or even a statement regarding any particular reservation, except in the context of an actual treatment as a State application. This is consistent with the approach the Agency adopted under the Safe Drinking Water Act, when it determined that it would not "automatically assume," or adopt, in the first instance, a rebuttable presumption of tribal authority over all water within a reservation that would operate even in the absence of any factual evidence. See 53 FR 37396, 37399 (September 26, 1988). Nonetheless, EPA sees no reason in light of *Brendale* to assume that Tribes would

be per se unable to demonstrate authority over water quality management on fee lands within reservation borders. Rather, as discussed below, EPA believes that as a general matter there are substantial legal and factual reasons to assume that Tribes ordinarily have the legal authority to regulate surface water quality within a reservation.

In evaluating whether a tribe has authority to regulate a particular activity on land owned in fee by nonmembers but located within a reservation, EPA will examine the Tribe's authority in light of the evolving case law as reflected in *Montana* and *Brendale*. 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, in *Brendale* several justices argued that for a tribe to have "a protectable interest" in an activity, the activity's effect should be "demonstrably serious." *Brendale*, 1492 U.S. at 431 (White, J.). In addition, in a more recent case involving tribal criminal jurisdiction, a majority of the Court indicated in dicta that a tribe may exercise civil authority "where the exercise of tribal authority is vital to the maintenance of tribal integrity and self-determination." *Duro v. Reina*, 110 S.Ct. 2053, 2061 (1990). See also *Brendale*, 492 U.S. at 450 (Blackmun, J.) (test for inherent tribal authority whether activities "implicate a significant tribal interest"); *id.* at 462 (Blackmun, J.) (test for inherent tribal authority whether exercise of authority "fundamental to the political and economic security of the tribe").

As discussed above, the Supreme Court, in recent cases, has explored several options 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. In response to this uncertainty, the Agency will apply, as an interim operating rule, a formulation of the standard that will require a showing that the potential impacts of regulated activities on the tribe 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. Moreover, as discussed below, the Agency believes that the activities regulated under the various environmental statutes generally have serious and substantial impacts on human health and welfare. As a result, the Agency believes that tribes will usually 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 or create the administratively undesirable result of checkerboarding reservations.

Whether a tribe has jurisdiction over activities by nonmembers 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.

Nonetheless, the Agency may also take into account the provisions of environmental statutes, and any legislative findings that the effects of the activity are serious in making a generalized finding that Tribes are likely to possess sufficient inherent authority to control reservation environmental quality. See, e.g., *Keystone Bituminous Coal Assoc. v. DeBenedictis*, 480 U.S. 470, 476-77 and notes 6, 7 (1987). As a result, in making the required factual findings as to the impact of a water-related activity on a particular tribe, it may not be necessary to develop an extensive and detailed record in each case. The

Agency may also rely on its special expertise and practical experience regarding the importance of water management, recognizing that clean water, including critical habitat (i.e., wetlands, bottom sediments, spawning beds, etc.), is absolutely crucial to the survival of many Indian reservations.

The Agency believes that Congressional enactment of the Clean Water Act establishes a strong federal interest in effective management of water quality. Indeed, the primary objective of the CWA "is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" (section 101(a)) and, to achieve that objective, the Act establishes the goal of eliminating all discharges of pollutants into the navigable waters of the U.S. and attaining a level of water quality which is fishable and swimmable (section 101(a)(1)-(2)). Thus the statute itself constitutes, in effect, a legislative determination that activities which affect surface water and critical habitat quality may have serious and substantial impacts.

EPA also notes that, because of the mobile nature of pollutants in surface waters and the relatively small length/size of stream segments or other water bodies on reservations, it would be practically very difficult to separate out the effects of water quality impairment on non-Indian fee land within a reservation with those on tribal portions. In other words, any impairment that occurs on, or as a result of, activities on non-Indian fee lands are very likely to impair the water and critical habitat quality of the tribal lands. This also suggests that the serious and substantial effects of water quality impairment within the non-Indian portions of a reservation are very likely to affect the tribal interest in water quality. EPA believes that a "checkerboard" system of regulation, whereby the Tribe and State split up regulation of surface water quality on the reservation, would ignore the difficulties of assuring compliance with water quality standards when two different sovereign entities are establishing standards for the same small stream segments.

EPA also believes that Congress has expressed a preference for Tribal regulation of surface water quality to assure compliance with the goals of the CWA. This is confirmed by the text and legislative history of section 518 itself. The CWA establishes a policy of "recogniz[ing], preserv[ing], and protect[ing] the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use (including restoration, preservation, and enhancement) of land and water resources" section 101(b). By extension, *64879 the treatment of Indian Tribes as States means that Tribes are to be primarily responsible for the protection of reservation water resources. As Senator Burdick, floor manager of the 1987 CWA Amendments, explained, the purpose of section 518 was to "provide clean water for the people of this Nation." 133 Cong. Rec. S1018 (daily ed. Jan 21, 1987). This goal was to be accomplished, he asserted, by giving "tribes * * * the primary authority to set water quality standards to assure fishable and swimmable water and to satisfy all beneficial uses." Id.

In light of the Agency's statutory responsibility for implementing the environmental statutes, its interpretations of the intent of Congress in allowing for tribal management of water quality within the reservation are entitled to substantial deference. *Washington Dept. of Ecology v. EPA*, 752 F. 2d 1465, 1469 (9th Cir. 1985); see generally *Chevron, USA 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 the reservation may be easier to establish in the context of water quality management than with regard to zoning, which

was at issue in *Brendale*. There is a significant distinction between land use planning and water quality management. 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 Commission 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, water quality management 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. [FN1] 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*, see, e.g., *Brendale*, 492 U.S. at 420 n.5 (White, J.) (listing broad range of consequences of state zoning decision). Moreover, water pollution is by nature highly 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.

FN1 This special status has been reaffirmed by all nine justices in the context of Fifth Amendment takings law. See *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470, 491 n. 20 (1987); *Id.* at 512, (Rehnquist, C.J., dissenting).

Operationally, EPA's generalized findings regarding the relationship of water quality to tribal health and welfare will affect the legal analysis of a tribal submission by, in effect, supplementing the factual showing a tribe makes in applying for treatment as a State. Thus, a tribal submission meeting the requirements of § 131.8 of this regulation will need to make a relatively simple showing of facts that there are waters within the reservation used by the Tribe or tribal members, (and thus that the Tribe or tribal members could be subject to exposure to pollutants present in, or introduced into, those waters) and that the waters and critical habitat are subject to protection under the Clean Water Act. The Tribe must also explicitly assert that impairment of such waters by the activities of non-Indians, would have a serious and substantial effect on the health and welfare of the Tribe. Once the 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 reservation water quality discussed above, presume that there has been an adequate showing of tribal jurisdiction of 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. However, EPA's ultimate responsibility is protection of the environment. In view of the mobility of environmental problems, and the interdependence of various jurisdictions, it is imperative that all affected sovereigns work cooperatively for environmental protection, rather than engage in confrontations over jurisdiction.

b. The Effect of Section 518 on Tribal Authority over Non-Indian Activities

Comment: EPA has received letters from three members of Congress, Senator Simpson,

Senator Baucus, and Representative Morrison, regarding the impact of *Brendale* on EPA's Indian Policy and the development of "treatment as a State" regulations for EPA water programs in light of the legislative history of section 518. All three commenters asserted that Congress did not intend to expand the scope of Tribal authority over non-Indians on the reservation by the passage of section 518.

Rep. Morrison asserted that he inserted into the Congressional Record a memorandum written by staff on the House Committee on Interior and Insular Affairs regarding section 518 (also inserted into the Congressional Record by Senator Adams at 133 Cong. Rec. S753-54 (daily ed. January 14, 1987)) solely to demonstrate that section 518 was not intended to expand Tribal water quantity rights. 133 Cong. Rec. H184-85 (daily ed. Jan 8, 1987). Rep. Morrison disavowed other statements from that memorandum which might support the proposition that Congress intended to authorize Tribal jurisdiction over non-members on reservations. ("Indian tribes have the right to regulate lands and other natural resources within the reservation, including non-Indian owned fee lands or resources." *Id.* (emphasis added)). Rep. Morrison stated his belief that Congress did not, by the passage of section 518, expand the scope of Tribal authority over non-Indians. In light of this legislative history, Rep. Morrison asserted that, consistent with *Brendale*, EPA should not allow Tribal regulation of non-members on so-called "open" reservations.

Senators Baucus and Simpson also recommended that EPA consider the legislative history of section 518(e) and the *Brendale* decision and determine not to allow Tribal regulation over non-members on the reservation.

Finally, all three of these Congressional commenters asserted that the legislative history of section 518 clearly shows that it was not intended to affect rights to water quantity under State law. The concerns raised by these Members of Congress echo other comments discussed elsewhere in today's notice. Several commenters asserted that section 518(e)(2) should not be read as an express grant of Congressional authority to Indian Tribes to regulate such fee lands, despite indications in *Brendale* to the contrary. By contrast, Senators McCain, Burdick, and Inouye expressed a view that section 518(e) delegates Tribes authority to regulate all waters within reservation boundaries including those on non-Indian fee lands. Some *64880 commenters cited *Brendale* for this proposition. The latter argument of these commenters is based upon the opinion of Justice White in *Brendale*. Justice White indicates that certain statutes may delegate Federal authority to Tribes, thereby providing a basis for authority over all lands within a reservation. As Justice White explained, on the record in *Brendale* there could be no contention * * * that Congress has expressly delegated to the Yakima Nation the power to zone fee lands of nonmembers of the Tribe. Compare 18 U.S.C. 1151, 1161 (1982 ed., and Supp. V); 33 U.S.C. 1377 (e) and (h)(1) (1982 ed., Supp. V) [i.e., sections 518(e) and 518(h)(1) of the CWA].

492 U.S. at 428 (1989) (White, J.) (emphasis added). This language clearly categorizes the two cited statutory schemes as express delegations of Federal authority. Thus, Justice White, *inter alia*, cites the Clean Water Act as an example of an explicit delegation of authority over non-Indian activities to Indian Tribes. Response: EPA has fully considered the Congressional comments and their interpretation of the legislative history of section 518. EPA must, of course, consider contemporaneous legislative history as it is written, and has been cautioned not to rely on subsequent statements by Members of Congress. *Hazardous Waste Treatment Council v. EPA*, 886 F.2d 355 (DC Cir. 1989), cert. denied,

111 S.Ct. 139 (1990).

EPA differs with the Congressional commenters to the extent that they suggest the legislative history of section 518 is clear and expresses an intent to limit the scope of Tribal authority. EPA notes that other legislative history might be interpreted as evincing Congressional intent to confer expanded Tribal authority over non-Indians within the reservation.

In particular, the following colloquy between Senators Inouye and Burdick on this issue is very relevant:

Mr. Inouye: * * * I am concerned about section 518(e)(2). As I read that provision, it enables qualified Indian tribes to exercise the same water quality regulatory jurisdiction with respect to water that traverses, borders, or is otherwise located within their reservations [paraphrasing section 518(h)(1) and 18 U.S.C. 1151(a)] that States have for regulation of water outside Indian reservations. Is my understanding of Section 518(e) correct

Mr. Burdick: Yes. The intent of the conferees was to assure that Indian tribes would be able to exercise the same regulatory jurisdiction over water quality matters with regard to waters within Indian jurisdiction that States have been exercising over their water. 133 Cong. Rec. S1018 (daily ed. Jan. 21, 1987) (emphasis added). Senator Inouye's statement could arguably support a reading that Congress intended to recognize Tribal authority over all waters within the reservation, including those managed by non-Indians. Mr. Burdick, a member of the Conference Committee, agrees with Senator Inouye's statement.

However, in EPA's view this colloquy is ambiguous and inconclusive. Senator Burdick, in responding to Senator Inouye, agrees that under section 518 Tribes may regulate waters only if they are already "within Indian jurisdiction." However, Senator Burdick was only recognizing the status quo, i.e., whatever is within Indian jurisdiction may be regulated via section 518. Senator Burdick's statement does not clearly show that he--or the Congress as a whole--intended to legislate that all waters within the reservation are in fact "within Indian jurisdiction." Thus, the colloquy is circular: Indians have jurisdiction if, but only if, they have jurisdiction from some source other than section 518. It does not clearly indicate whether Congress intended to expand what lies "within Indian jurisdiction."

Further, if this colloquy were to be construed as supporting an expansion of tribal authority, it would arguably conflict with a statement Senator Burdick had made earlier in response to an inquiry from Senator Baucus. In that discussion, Senator Burdick reiterated that section 518 was not intended to affect existing water quantity rights, and added that "[p]rivate lands and water rights owners within boundaries of Indian reservations are not to be additionally affected by this act." 133 Cong. Rec. S753 (daily ed. January 14, 1987) (emphasis added). This could suggest that the Act was not intended to alter the status quo regarding regulatory authority over fee lands.

The legislative history in the House is also unclear as to whether Congress intended to expand tribal power over non-Indians. The statement in the House staff memorandum cited above supports a view that under current case law Tribes already possess regulatory authority over non-Indians within reservation boundaries; thus it would be unnecessary to delegate such authority to tribes. Insertion of this memorandum into the Congressional Record could suggest that the House agreed with that view; however, this aspect of the

memorandum was never the subject of House discussions, which focused almost exclusively on issues relating to water rights.

EPA believes that if Congress had intended to make a change as important as an expansion of Indian authority to regulate nonmembers, it probably would have done so through statutory language and discussed the change in the committee reports. Given that the legislative history ultimately is ambiguous and inconclusive, EPA believes that it should not find that the statute expands or limits the scope of Tribal authority beyond that inherent in the Tribe absent an express indication of Congressional intent to do so. See *Montana*, 450 U.S. at 564. Therefore, EPA has decided that it will, as discussed above, continue to recognize inherent Tribal civil regulatory authority to the full extent permitted under Federal Indian law, in light of *Montana*, *Brendale*, and other applicable case law. EPA believes that Congress only manifested an explicit intent to authorize EPA to treat Indian Tribes as States over any activities within the scope of Tribal authority in light of the relevant principles of Federal Indian law. EPA believes that this approach will best effectuate the overall purposes of the statute.

EPA agrees with those commenters who stated that Justice White's opinion in *Brendale* can be read to suggest a contrary conclusion, and to indicate that at least four justices of the Supreme Court would apparently interpret section 518(e) as expressly delegating to Tribes the authority to regulate water quality on reservations, including those affected by activities on non-Indian fee lands. Nonetheless, EPA recognizes that Justice White's opinion was not a majority opinion of the Court and was not necessary to the decision even of the plurality that joined it, since the issue was not before the Court in *Brendale*. Nor is there any discussion in the opinion about the somewhat confusing legislative history of section 518. The passing reference in that opinion does not finally resolve the question of whether section 518(e) is a delegation of authority, and, as discussed above, EPA does not believe that it can make an absolute determination that Congress in fact expressed a clear intent on the issue.

EPA agrees with the Congressional commenters that section 518 does not affect existing water quantity rights. This has been the Agency's consistent position, based on the language of sections 101(g) and 518(a).

c. Procedural Requirements for Demonstrating Inherent Tribal Authority

Comment: Numerous comments submitted before and after the proposed rule was published have suggested that the provision (see § 131.8(b)(3)(iii)) requiring that Tribes submit a copy of all documents which support the Tribe's assertion of authority is unnecessary, *64881 inappropriate, and flows from a misunderstanding of Indian law. These commenters argued that Tribes have inherent authority unless Congress rescinds that authority. In addition, these commenters stated, since section 518 specifically authorizes Tribal authority, no such demonstration and supporting documentation is needed.

Response: As discussed in detail above, the Agency presumes that, in general, Tribes are likely to possess the authority to regulate activities affecting water quality on the reservation. The Agency does not believe, however, that it would be appropriate to recognize Tribal authority and approve treatment as a State requests in the absence of verifying documentation. In addition, in light of the legislative history of section 518, the question of whether section 518(e) is an explicit delegation of authority over non-Indians is not resolved. Therefore, EPA does not believe it is currently appropriate to eliminate

the requirement that Tribes make an affirmative demonstration of their regulatory authority. EPA will authorize Tribes to exercise responsibility for the water quality standards program once the Tribe shows that, in light of the factual circumstances and the generalized findings EPA has made regarding reservation water quality, it possesses the requisite authority.

EPA would advise Tribes, in their Attorney-General statements, to outline all bases for concluding that the Tribe has adequate authority. This can only help EPA to make a proper determination to treat the Tribe as a State.

As stated in the preamble to the proposal, where the Regional Administrator concludes that a Tribe has not adequately demonstrated its authority with respect to an area in dispute, then Tribal assumption of the standards program would be restricted accordingly. If the authority in dispute were focused on a limited area, this would not necessarily delay the Agency's decision to treat the Tribe as a State for the non-disputed areas.

Comment: Numerous commenters suggested that § 131.8(b)(3)(i), which requires the Tribe to submit a map of legal description of the area over which the Indian Tribe asserts authority to regulate water, should be amended to require that fee lands and lands owned by non-members and non-Indians be shown on the map.

Response: No such amendment was made to the regulations. EPA believes that, in some cases, both States and Tribes may want to identify the location of fee lands on reservations. However, EPA does not believe it is appropriate to specifically require Tribes to submit such information in all cases. EPA also believes that in some cases States are more likely to have ready access to such information than are Tribes. EPA further believes that the regulation clearly requires Tribes to identify the area over which the Tribe asserts authority to regulate water quality, and that requiring an identification of fee lands and lands owned by non-Indians in all cases is unnecessary and unduly burdensome. Finally, EPA notes that § 131.8(b)(5) gives the Regional Administrator the discretion to require whatever additional information is necessary to support a Tribal application on a case-by-case basis.

d. Treatment as a State for Off-Reservation Waters Within Inherent Tribal Authority

Comment: Several comments were received regarding the geographic scope of programs authorized under section 518(e)(2). The provision authorizes EPA to treat a Tribe as a State for water resources which are :

held by an Indian Tribe, held in trust for Indians, held by a member of an Indian Tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of an Indian reservation.

(emphasis added)

EPA has consistently read the phrase "or otherwise within * * *" as a separate category of water resources and also as a modifier of the preceding three categories of water resources, thus limiting the Tribe to acquiring treatment as a State status for the four specified categories of water resources within the borders of the reservation.

Comments received suggested that EPA should alter its reading of this provision to allow Tribes to qualify for treatment as a State over all water resources within its jurisdiction. These comments asserted that limiting Tribes to water resources within the reservation would prevent a Tribe from obtaining treatment as a State status over water resources outside the reservation to which it has legitimate jurisdictional claim. Examples cited included traditional resource areas (known as "usual and accustomed" areas) outside

reservation borders, and all lands held in trust for Tribes by the U.S. Government or held by individual Indians that lie outside reservation borders, lands in "Indian Country" (as defined in 18 U.S.C. 1151) that lie outside reservation borders and, in general, all water resources within the territorial jurisdiction of the Tribe that lie outside reservation borders.

One commenter pointed out that often such lands are subject to Tribal or Federal jurisdiction and are thus beyond the police power and regulatory authority of the State in which they are located. This comment concluded that failure to provide Tribes with an opportunity to obtain treatment as a State status over such lands would create "regulatory voids" in which neither States nor Tribes have clear authority. Several comments suggested that resolving this issue could be accomplished simply by revising the definition of Federal Indian Reservation included in § 131.3(k).

In contrast, other commenters asserted that EPA is correct in reading the phrase "or otherwise within the borders * * *" as a modifier of the preceding three categories of water resources. These commenters pointed out that failure to do so would render the statute nonsensical and contradict congressional intent. However, these commenters also asserted that EPA is not correct in reading the phrase "or otherwise within the borders * * *." as a fourth category of water resources, because to do so would render the three previous clauses superfluous. These commenters therefore conclude that section 518(e)(2) should not be read as authorizing Tribes to regulate non-Indian owned lands within the boundaries of the reservation.

Response: Under today's rule, Tribes are limited to obtaining treatment as a State status for only water resources within the borders of the reservation over which they possess authority to regulate water quality. The meaning of the term "reservation" must, of course, be determined in light of statutory law and with reference to relevant case law. EPA considers trust lands formally set apart for the use of Indians to be "within a reservation" for purposes section 518 (e)(2), even if they have not been formally designated as "reservations." *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 111 S. Ct. 905, 910 (1991). This means it is the status and use of the land that determines if it is to be considered "within a reservation" rather than the label attached to it. EPA believes that it was the intent of Congress to limit Tribes to obtaining treatment as a State status to lands within the reservation. EPA bases this conclusion, in part, on the definition of "Indian Tribe" found in CWA section 518(h)(2). As discussed above, EPA also does not believe that section 518(e)(2) prevents EPA from recognizing Tribal authority over non-Indian water resources located within the reservation *64882 if the Tribe can demonstrate the requisite authority over such water resources.

Comments on the Capability Requirements

Comment: A variety of comments were received concerning the general issue of Tribal capability (§ 131.8(a)(4) and (b)(4)). Comments on this question ranged from suggesting that EPA should require no demonstration of capability at all to making the capability requirements stronger. Several comments asserted that rejecting Tribes based on capability will only heighten the unevenness of experience between States and Tribes.

Response: EPA made no change in the regulation. The provision is not unduly

burdensome and EPA intends to apply similar procedures for Tribes qualifying as States in all CWA programs. The Clean Water Act establishes basic requirements for a Tribe to meet in order to qualify for treatment as a State. Eliminating the requirement to demonstrate capability would fail to meet these statutory requirements. On the other hand, EPA does recognize the fact that for many Tribes the assumption of various Clean Water Act programs is new. Information necessary for EPA to make determinations of capability must be balanced against the need to allow Tribes to gain experience in CWA programs. EPA believes that today's rule provides that balance.

Comment: A comment was received suggesting that since States are required to provide judicial review of section 401 certification rulings, Tribal section 401 certifications should also be subject to judicial review. Related comments asserted that the rule should require, as part of the demonstration of capability, a demonstration of separation of powers for executive, legislative, and judicial functions, or at least describe how bifurcation of Tribal regulatory and proprietary roles will occur.

Response: EPA disagrees that States are required to provide judicial reviews of section 401 certifications. Judicial reviews of section 401 certifications are conducted based on the requirements of State laws, not the Clean Water Act. Therefore, EPA has not required Tribes to provide such judicial review, as it is a matter of Tribal law. Similarly, EPA has not required Tribes to demonstrate separation of powers because such a demonstration is not required by the Clean Water Act. EPA will, however, in the context of deciding to authorize Tribal NPDES programs or 404 permit programs, consider potential conflicts of interest where the Tribe would be in the position of issuing a permit to a Tribal entity.

Comment: Several comments were received requesting that EPA should clarify how the Agency will evaluate whether the Tribe has a history of successful managerial performance of public health or environmental programs, and clarify how much detail is required in describing a Tribe's history of managerial experience (see section 131.8(b)(4)(i)).

Response: In evaluating Tribal experience in public health and environmental programs, EPA will look for indications that the Tribe has participated in such programs, whether the programs be those administered by EPA, other Federal Agencies, or of Tribal origin. For example, several Tribes are known to have participated in developing areas-wide water management plans or Tribal water quality standards. EPA will also look for evidence of historical budget allocations dealing with public health or environmental programs along with any experience in monitoring in related programs. In general, EPA will look favorably on Tribes which have experience in managing environmental programs, because such experience is an indicator of existing capability and commitment to environmental protection. In most cases, EPA anticipates that submission of a brief narrative statement on this topic will be sufficient.

Comment: EPA specifically invited comment on several options pertaining to the proposed demonstration of capability requirement. The proposed requirement (in § 131.8(b)(4)(v)) provided that the Tribe may either demonstrate existing capability, or submit a plan on how it proposes to acquire the capability to administer the program if such capability does not now exist. The alternative options EPA requested comments on were: (1) Exclude the provision to submit a plan detailing steps of acquiring the necessary management and technical skills, (2) include a provision which would allow EPA to withdraw a treatment as a State determination where the Tribe fails to

demonstrate adequate capability (e.g., by failing to submit water quality standards for EPA review within 3 years from the date of qualifying for treatment as a State), and (3) include a provision for Tribes to submit draft water quality standards as part of the demonstration of capability.

Comments on the option to delete the provision allowing Tribes to submit a plan to acquire capability were mixed. Several comments supported deletion of this provision. One comment asserted that treatment as a State should not be granted until capability is achieved; a plan to acquire capability would have little meaning if the Tribe receives authority prior to actually achieving that capability. Other comments supported inclusion of this provision because the plan would provide information on the management and technical skills of Tribes. A related comment was received that EPA should retain the provision but delete the requirement to indicate where Tribal funding would be acquired. Comments on the option to allow EPA to withdraw a treatment as a State determination were also mixed. Several comments supported some provision allowing EPA to withdraw a treatment as a State determination, for example where the Tribe fails to demonstrate acceptable performance or use of the authority. Other comments opposed such a provision (e.g., because it is counter to the Congressional mandate of section 518). One comment opposed such a provision because it would be unfair to withdraw treatment as a State for failure to develop a Tribal program in the absence of adequate Federal financial and technical assistance.

Conflicting comments on the option to require Tribes to submit draft water quality standards as part of the demonstration of capability were received. A number of comments indicated that such a provision would be burdensome, unproductive, and of little practical purpose. Other comments, however, supported such a provision because draft standards would provide evidence of technical skills and would allow review of Tribal water quality standards early in the process.

Response: EPA made no change in the proposed regulation. EPA believes that any Tribe demonstrating sufficient interest in applying for the program and able either to: (1) Demonstrate existing capability, or (2) submit a reasonable plan for acquiring such capability, should not be excluded from consideration. The proposed requirement was therefore retained. EPA notes, however that such plans will be carefully reviewed; EPA will not approve Tribal capability demonstrations where such plans do not include reasonable provisions for acquisition of needed personnel as well as reliable funding sources. This decision will also provide consistency with other Clean Water Act programs.

Although submission of draft water quality standards was not added as a requirement, EPA notes that where Tribes have developed water quality standards programs, submission of the *64883 completed standards with the application will normally be sufficient to satisfy the capability requirements, but only where the Tribe can also demonstrate a continuing commitment (i.e., resources and/or technical expertise) for reviewing and revising their completed standards.

EPA believes that the comment regarding Tribal funding sources raises an important point. Prior to applying for the standards program Tribes should become familiar with and give serious consideration to the requirements and associated resource impacts of assuming the burden of the water quality standards program. This was also mentioned in the preamble to the proposed rule. The water quality standards program, because it

requires standards to be reviewed on a triennial basis, can require substantial annual resource commitments.

For example, EPA is currently developing additional proposed amendments to the water quality standards regulation to require triennial review and adoption of necessary numeric water quality criteria for toxic pollutants and, ultimately criteria based on biological measures of water body health. Tribes that qualify for treatment as States will be subject to the existing requirements as well as these new requirements which will be added to section 131 in the near future.

EPA did not, therefore, remove from the rule the requirement for a Tribe to address how it will obtain the funds necessary to acquire the administrative and technical expertise if not currently available. EPA believes this to be a necessary and important showing in support of the overall capability demonstration. EPA notes that Tribes may wish to apply for CWA section 106 funds to support their water quality standards programs and include this source in any discussion of funding sources under § 131.8(4)(v).

Comment: The discussion of capability requirements included in the preamble to the proposed regulation included a statement that qualifying for the standards program has no bearing on the ability of the Tribe to receive a section 106 grant. A comment was received that a Tribe was told by EPA that it had to apply for treatment as a State in order to be eligible for the section 106 program grants.

Response: The commenter misunderstood the discussion. To receive a CWA section 106 program grant, a Tribe must qualify for treatment as a State for purposes of the section 106 program. Interim final rules specifying how tribes may qualify for the section 106 program were promulgated by EPA on April 11, 1989 (54 FR 14357) and are now codified in 40 CFR parts 35 and 130. The preamble discussion simply indicated that a Tribe does not have to also qualify for the standards program in order to receive a section 106 program grant and noted that, in fact, prior acquisition of such grants may be quite useful to Tribes in developing the capabilities needed to qualify for the standards program.

Comments on the Complexity of the Process

Comment: A variety of comments were received concerning the process EPA has established by which a Tribe may qualify for treatment as a State under both the Clean Water Act and the Safe Drinking Water Act. This process is described in § 131.8 of the rule and covers the requirements for Indian Tribes to be treated as States for purposes of water quality standards.

Various comments indicated that the process was too lengthy, cumbersome, and expensive for the Tribes. Some commenters suggested that EPA should separate the legal and programmatic requirements to allow Tribes to meet the legal requirements for all CWA programs with one application. In general, commenters suggested that the process be streamlined to pose less of a burden to Tribes wishing to qualify.

Response: No changes were made in the regulation to streamline or otherwise alter the § 131.8 requirements (with the exception of those previously discussed in section B-- Changes to the Proposed Rule).

EPA has developed one procedure applicable to all water programs. To have a different procedure for the standards program would not in the Agency's view simplify the

process; rather it would confuse matters. Experience with the initial applications in other programs indicate some delay in the process but EPA believe that is more because the process is new to both EPA and the Tribes rather than because of any inherent fault in the procedure. It is expected that as both parties gain more experience, such delays will be minimal. If a Tribe has already submitted an application for treatment as a State for another program, very little if any new information beyond the request for consideration in the standards program needs to be provided.

Because some programs that potentially may be assumed by Tribes under the Clean Water Act may require specialized information relating to Tribal authorities or capability to administer an effective program, the Agency decided previously to today's rule not to allow Tribes to qualify for treatment as a State for all CWA programs in a single application. However, as stated above, the Agency intends to minimize the impact on a Tribe for qualifying for treatment as a State for various programs by having Tribes submit the basic application once and only submit any additional information that might be required for treatment as a State for another program. In the case of this rule, § 131.8 (b)(iv) and (v) are the provisions which EPA believes are most likely to require information in addition to what is typically submitted with applications for other programs. The two items are the name of the agency of the Indian Tribe charged with establishing, reviewing, implementing and revising water quality standards and a description of the Tribe's technical expertise to administer and manage the program or a plan on how the Tribe intends to acquire such expertise. Section 131.8 (b)(6) of the rule clearly establishes that in seeking qualification as a State, " * * * the Tribe need only provide the required information which has not been submitted in a previous treatment as a State application."

The procedure adopted in today's rule was publicly debated in a rule made final under the Safe Drinking Water Act. Comments on the proposal and changes made may be seen at 53 FR 37408, September 26, 1988, and now codified in 40 CFR part 142. This regulation reflects the procedures established as a result of that rulemaking.

Comment: Several comments asserted that the regulation has redundant and unnecessary requirements, for example that § 131.8(b)(2)(iii) duplicates 131.8(b)(3)(iii) and 131.8(b)(4)(iii), that 131.8(b)(3)(ii) duplicates 131.8(b)(iii), and finally that 131.8(b)(iv) duplicates 131.8(b)(3)(1).

Response: While the Agency concurs that the information in 131.8(b)(2)(iii) is related to that in parts 131.8(b)(3)(iii) and 131.8(b)(4)(iii), it is not necessarily redundant or duplicative. Experience with the standards program with the States has shown that often the administrative and management functions of the standards program are split among various State offices and branches of government. Since this may also hold true for Tribal governments, EPA has maintained the requirements as proposed. However, if the Tribe can cover the requested information in a single response to the Agency, EPA encourages the Tribe to do so. The independent regulatory requirements were maintained not to force Tribes to duplicate information but to ensure that *64884 all information necessary is submitted. In response to a specific comment, EPA notes that submittal of the required "sources of authority" under § 131.8(b)(2)(iii) does not require the same level of detail as the demonstration of authority required under § 131.8(b)(3) and, in general, a brief statement and reference to the assertion of authority under § 131.8(b) (3) will be sufficient.

The Agency reviewed all the referenced paragraphs and does not see that the requirements are either redundant or unnecessary. While they may be related, each requests a different piece of information EPA believes is necessary to make an informed judgment on the Tribal application. Again, however, if the Tribe covers more than one item in a portion of its application, EPA does not see any need for the Tribe to repeat the information--a reference to where EPA may find the information elsewhere in the Tribal application is acceptable.

Comments on the Procedure for Reviewing Tribal Applications

Comment: Several comments were received on the opportunity provided to States to review Tribal assertions of authority (see § 131.8(c)). Various commenters believed this provision to be inappropriate because, for example, Tribes do not review State applications for primacy, States have already established their authority in their primacy applications, and the review is inconsistent with EPA's Indian policy. Other comments suggested that States comment along with everyone else during a general public comment period.

Response: The comments which suggested that States should not be allowed to review Tribal assertions of authority because Tribes do not review State applications for primacy appear to mix primacy requirements under the Safe Drinking Water Act or other CWA programs (such as section 402 NPDES or section 404 dredge and fill) with those established under Clean Water Act section 303. CWA section 303, under which this rule is promulgated, directs States to adopt water quality standards. There is no application process involved, nor is participation by the States optional. However, Indian Tribes, under CWA section 518, must go through a process to qualify for treatment as States. The provision allowing participation by other governmental entities in EPA's review of Tribal authority does not imply that States or Federal agencies (other than EPA) have veto power over Tribal applications for treatment as a State. Rather, the procedure is simply intended to identify any competing jurisdictional claim and thereby ensure that the Tribe has the necessary authority to administer the standards program. The Agency will not rely solely on the assertions of a commenter who challenges the Tribe's assertion of authority; EPA will make an independent evaluation of the Tribal showing and all available information.

In addition, the provision allowing appropriate governmental entities to comment on Tribal assertions of authority is not intended as a barrier to Tribal program assumption. As stated in the preamble to the proposed rulemaking, where disputes regarding Tribal authority are focused on a limited area, this will not necessarily delay the Agency's decision for to treat the Tribe as a State of the non-disputed areas.

Comment: Several commenters suggested that EPA should provide more definition regarding the "governmental entities" which will be provided notice and an opportunity to comment on the Tribe's assertion of authority (see § 131.8(c)(2)).

Response: EPA defines the phrase "governmental entities" as States, Tribes, and other Federal entities located contiguous to the reservation of the Tribe which is applying for treatment as a State. Such "governmental entities" will provide up to 30 days to comment on Tribal assertions of authority. Neighboring Tribes will be treated as "governmental entities" regardless of whether the neighboring Tribe is treated as a State for purposes of

section 303. Where such governmental entities are States, EPA intends to provide notice and an opportunity to comment to the most appropriate State contacts which may include, for example, the Governor, Attorney General, or the appropriate environmental agency head. The rule limits the Agency to only considering comments from such "governmental entities." Local governments such as cities and counties or other local governments are not included in the definition of "governmental entities," and EPA will not consider comments received from such governments in reviewing Tribal assertions of authority. EPA recognizes that city and county governments which may be subject to or affected by Tribal standards may also want to comment on the Tribe's assertion of authority. Although EPA believes that the responsibility to coordinate with local governments falls primarily upon the State, the Agency will make an effort to provide notice to local governments by placing an announcement in appropriate newspapers. Since the rule limits EPA to considering comments from governmental entities, such newspaper announcements will advise interested parties to direct comments on Tribal authority to appropriate State governments.

The process of notifying States and Tribes and consulting with the Department of Interior, as delineated in this and other EPA regulations implementing the Clean Water Act and the Safe Drinking Water Act, was and is intended merely to assist the Agency in making its determination whether a Tribe has adequate authority to justify treatment as a State by EPA. Such notification and consultation procedures were not and are not intended to establish any form of adjudication or arbitration process to resolve differences between State and Tribal governments. Rather, EPA has a duty to determine whether a Tribe has adequate authority, as defined by federal law and EPA policy, to carry out the grant or program under consideration. The notification and consultation procedures assist EPA in making this determination by providing information and perspectives from the points of view of neighboring Tribal and State governments and the federal agency having extensive expertise in federal Indian law.

Comment: It is unlawful to limit public comment to just the Tribal demonstration of authority. Section 131.8 should allow public review of all four statutory criteria.

Response: CWA section 518 provides EPA with the authority to determine whether Indian Tribes are qualified to be treated as States. The CWA does not require EPA to provide for public comment on Tribal applications. For three of the criteria which Tribes must meet, EPA believes that the Agency will be able to make appropriate determinations absent any public comment. EPA believes that providing for public comment on these three criteria would unnecessarily complicate and potentially delay the process. For the authority criterion, EPA has provided for a 30 day comment period by appropriate governmental entities because the Agency believes that it will be important to gather all available information regarding Tribal authority prior to making a determination. EPA believes that providing for comment on the authority criterion is appropriate because this is the only criterion which outside comments might help to address.

Comment: Several comments pointed out that the proposal did not specify in any detail the procedure by which EPA will consult with the Secretary of the *64885 Interior in making a determination concerning challenges to a Tribe's assertion of authority (see § 131.8(c)(4)). It was suggested that the consultation process should provide for notice and opportunities for input (e.g., a hearing) to affected Tribes and States.

Response: EPA did not make changes to the proposed rule in response to these

comments. However, subsequent to publishing the proposed rule EPA did reach agreement with the Department of the Interior regarding the procedures for conducting such consultations. The procedure established as the Secretary of the Interior's designees the Associate Solicitor, Division of Indian Affairs and the Deputy to the Assistant Secretary--Indian Affairs (Trust and Economic Development). EPA will forward a copy of the application and any documents asserting a competing or conflicting claim of authority to such designees as soon as possible. For most applications, an EPA-DOI conference will be scheduled from one to three weeks after the date the Associate Solicitor receives the application. Comments from the Interior Department will be primarily a discussion of the law applicable to the issue to assist EPA in its own deliberations. Responsibility for legal advice to the EPA Administrator or the other EPA decision makers will remain with the EPA General Counsel. EPA does not believe that the consultation process with the Department of Interior should involve notice and opportunities for input by States and Tribes because such parties are elsewhere provided appropriate opportunities to participate in EPA's review of Tribal authority.

Comment: Several comments suggested that, once EPA makes a determination regarding a Tribal application, EPA should provide notice of its decision to State, Tribal, and local governments and all commenters on the Tribal assertion of authority, and should publish a lists of Tribes treated as States in the Federal Register.

Response: EPA will take all reasonable means to advise interested parties of the decision reached regarding challenges to Tribal assertions of authority. At least, written notice will be provided to State(s) and other governmental entities sent notice of the Tribal application. In addition, the current water quality standards regulation (40 CFR part 131) requires that EPA annually publish a list of standards approval actions taken within the preceding year. EPA will expand that listing to include Indian Tribes qualifying for treatment as States in the preceding year.

Comment: EPA should clarify what happens if a Tribe is denied treatment as a State (§ 131.8 (c)(5)). Related comments indicated that it would be unfair to withdraw treatment as a State for failure to develop standards (or for any other reason) because States received unlimited assistance, both technical and dollars, and that withdrawal of recognition is counter to the Congressional mandate. Opposing views were offered that there should be a provision to withdraw recognition as a State from a Tribe.

Response: Rather than formally deny the Tribe's request, EPA will continue to work cooperatively with the Tribe in a continuing effort to resolve deficiencies in the application or the Tribal program so that Tribal recognition as a State may occur. EPA also concurs with the view that the intent of Congress and the EPA Indian Policy is to support Tribal governments in assuming authority to manage various water programs. As previously discussed in the response to comments on the capability criterion, no provision allowing EPA to withdraw a treatment as a State determination was added to the regulation. Authority already exists for EPA to re-assert control over certain water programs due to the failure of the State or Tribe to properly execute the programs. Specifically, in the water quality standards program, the Administrator has authority to promulgate Federal standards. Therefore, no change was needed in the regulation.

Comment: A number of comments suggested that EPA specify a timeframe or change the timeframe associated with the various steps in the application review procedure (§ 131.8(c)).

With regard to the review of the Tribe's assertion of authority (see § 131.8(c)(3)), various comments supported shortening the review period, lengthening the review period, and also adding a provision allowing an extension to the review period.

With regard to final determinations (see § 131.8(c)(5)), several comments suggested that EPA should complete its review and respond to Tribes within 60 days after receipt of an application. Other comments suggested that EPA should conduct a completeness review within 30 days of receipt of a Tribal application. In general, a number of comments advocated some time limit within which EPA would be required to complete the review process.

Response: No timeframes in the review procedure were changed in the regulation in response to comments. The time frames assigned are consistent with regulations promulgated for other EPA Water programs. Because EPA has no reasonable way to predetermine how complete initial applications for treatment as a State might be, what challenges might arise or how numerous or complex the issues might be, the Agency deems it inappropriate to attempt to establish timeframes that may not allow sufficient time for resolution. Also, several of the comments appear to be based on early experience with the "treatment as a State" process. EPA believes that as both Tribes, States, and EPA become more familiar with working together that the delays associated with approval of early applications will cease. Thus, EPA believes it unnecessary to establish additional deadlines in the regulation.

Other Comments on Treatment of Tribes as States

Comment: Several commenters suggested that, as part of the treatment as a State process, EPA require Indian Tribes to protect constitutional rights of non-Tribal members, that Tribes waive their sovereign immunity, and provide for voting rights for non-members.

Response: EPA notes that constitutional rights of both Indians and non-Indians exist without explicit recognition in a Federal regulation. The regulation provides a mechanism for a Tribe to demonstrate that it meets the criteria of CWA section 518(e). EPA believes it is inappropriate to consider any other factors. The issues raised by these comments are far beyond the purview of EPA. Such issues must be properly dealt with in the Courts or by Congress.

Comment: EPA should make clear that qualification for treatment as a State under one program is not dispositive for applications under other programs.

Response: That is the correct interpretation of this rule. As discussed previously, however, EPA expects that once a Tribe has qualified for one program, the key step toward assumption of other programs, in most cases, will be demonstrating appropriate capability.

2. Dispute Resolution Mechanism

Comments on CWA Section 510/EPA Authority

Comment: In the proposed rule, EPA announced its tentative determination that the provisions of section 510 of the CWA apply with equal force to water quality standards adopted by both States and Tribes, that is, nothing in the Act precludes either a State or a

Tribe from adopting water quality standards more stringent than required by the Act. EPA expressed its view that, because of section 510, it may not disapprove either Tribal or State standards solely on the *64886 grounds that the standard is too stringent, nor may it resolve a standards "dispute" by disapproving either a Tribal or State standard and Federally promulgating a less stringent standard.

Tribal commenters supported EPA's interpretation of the effect of section 510 on standards adopted by Tribes treated as States. State commenters disagreed with EPA's reading. In essence, these commenters argue that because section 510 is not one of those mentioned in section 518(e)(2) (which lists the sections of the CWA for which EPA is authorized to treat Tribes as States), EPA is precluded from reading section 510 as applying to standards set by Tribes. Therefore, Tribes may not set standards more stringent than required by section 303.

Response: EPA disagrees that the statute should be read in such a crabbed manner. A careful examination of the CWA sections referenced in section 518(e)(2) reveals that all of these provisions are CWA regulatory program elements or grant authorizations that are implemented by/funded for States. The sections of the CWA not mentioned in 518(e)(2), with very few exceptions, either do not involve States or are grant programs which have expired long ago. [FN2] Indeed, section 510 is virtually the only provision of the CWA that discusses a role for State governments that is not a regulatory program provision or grant.

FN2 One notable exception is section 405, which establishes a Federal/State permit program for the disposal of sewage sludge. EPA has already determined that it is appropriate to treat Tribes as States for purposes of sludge programs, despite the omission of section 405 from section 518(e)(2).

Section 510 is instead a savings provision that indicates that existing State authority to regulate effluent discharges and/or set water quality standards is not preempted by the CWA, as long as the State standards/regulations are at least as stringent as required by the CWA. Thus, EPA does not believe that the failure of section 518(e)(2) to reference section 510 is conclusive.

Indeed, EPA believes that section 518(e) and its accompanying legislative history suggests that Congress intended for section 510 to apply to Tribes treated as States. For instance, Senator Burdick, a member of the Conference Committee on the Water Quality Act of 1987, stated that:

The intent of the conferees was to assure that Indian tribes would be able to exercise the same regulatory jurisdiction over water quality matters with regard to waters within Indian jurisdiction that States have over their water. The conferees believe that tribes should have the primary authority to set water quality standards to assure fishable and swimmable water and to satisfy all beneficial uses. The act also provides a mechanism for resolving any conflict between tribal standards and upstream uses or activities.

133 Cong. Reg. S 1018 (daily ed. Jan 21, 1987) (emphasis added). Were Tribes prohibited from establishing standards more stringent than minimally approvable by EPA, there would be little need for the dispute resolution mechanism required by section 518(e)(2) and established by today's regulation.

EPA also believes there are strong policy reasons to allow Tribes to set any water quality standards consistent with 40 CFR 131.10. First of all, it puts Tribes and States on an

equal footing with respect to standard setting. There is no indication that Congress intended to treat Tribes as "second class" States under the CWA. Furthermore, treating Tribes as essentially equivalent to States is consistent with EPA's 1984 Indian Policy. Third, EPA believes it would be unfeasible to require Tribes to adopt the "minimum" standards allowed under Federal law. EPA has developed water quality criteria under the authority of section 304(a) of the CWA; these criteria, however, are only guidance for use by States in developing their own standards. The Federal recommendations are not enforceable absent State or Federal water quality standards implementing them under section 303. EPA has no procedures in place for defining a "minimum" level of standards beyond which a Tribe would not be allowed to go.

For all these reasons, EPA believes its interpretation of section 510 is reasonable and fully consistent with the legislative intent of Section 518.

Comment: EPA specifically invited comments regarding whether the Agency should attempt to establish scientific factors by which overly-stringent water quality criteria may be identified. EPA requested comments on this issue to address a pre-proposal comment that, CWA section 510 notwithstanding, EPA has the authority to disapprove overly stringent water quality criteria as a means of resolving a dispute between a State and a Tribe.

Numerous comments were received on this topic. Various commenters suggested that proposed water quality standards/criteria should not be considered scientifically defensible and thus should be disapproved when: (1) The controls necessary to meet the specified levels are not cost-effective, (2) the resulting effluent limits are beyond existing technology to measure or treat, (3) the criteria are based on inadequate data, (4) the criteria are more stringent than necessary to meet designated uses, and (5) the criteria are more stringent than natural background water quality.

Other commenters were vigorously opposed to any effort by EPA to restrict Tribal adoption of numeric criteria more stringent than required to meet the CWA's fishable and swimmable goals. A number of these comments asserted that Indian Tribes have legitimate needs to set criteria more stringent than State criteria and/or criteria required by the CWA (e.g., because of cultural/religious needs, because some Tribal members have high fish consumption rates, etc.). Several commenters pointed out that Tribes do not use cultural and religious needs to obtain political or economic ends and that, in fact, Tribes tend to be reluctant to deal in public arenas regarding cultural and religious needs. EPA notes that most comments which opposed setting limits on the stringency of Tribal criteria nevertheless also asserted that all criteria must be scientifically defensible and not more stringent than natural background water quality.

Response: EPA has made no changes to the proposal. As discussed in the preamble discussion to the proposal, EPA's water quality standards regulation already requires that criteria be developed based on scientifically defensible methods. EPA also does not advocate the adoption of water quality criteria more stringent than natural background water quality. However, EPA believes that criteria sufficiently stringent to meet the fishable and swimmable goals may not be disapproved under the CWA, on the grounds that such criteria are more stringent than natural background water quality. This belief is premised on the Agency's legal interpretation of CWA section 510 (discussed above). Thus, EPA does not require justification or other evaluation of the scientific merit of criteria which, based on a comparison with EPA's CWA section 304(a) criteria

recommendations, meet or exceed levels of water quality necessary to support the fishable and swimmable goals.

In response to the comments suggesting that EPA may disapprove criteria based on economic and/or technological achievability factors, EPA notes that CWA section 303 explicitly requires that criteria be developed to support designated uses. Consideration of cost-effectiveness and achievability cannot override this requirement. Under the CWA, economic factors may be considered in conjunction with designating appropriate water uses.

In reviewing water quality standards submitted by States and Tribes, EPA will continue to evaluate the adequacy *64887 of numeric criteria. Where EPA determines that such criteria are substantially more stringent than necessary to meet the fishable and swimmable goals of the CWA and are more stringent than presently existing water quality conditions, EPA will advise the State or Tribe, and affected adjacent States or Tribes of this finding. EPA will use best professional judgment to make such determinations. Such determinations will not be grounds for disapproval because, as explained above, EPA does not believe the Agency has the legal authority to disapprove a State or Tribal water quality criterion solely on the basis that EPA considers the standard to be more stringent than required by the Act.

Comment: EPA should set a time limit (e.g., 12 months, 18 months) after receipt of the request for dispute resolution within which a mutually acceptable agreement must be reached via either mediation or arbitration (§ 131.7(f) (1) and (2)). If after 18 months the parties do not seem close to an agreement the Agency should act to resolve the dispute. EPA has the authority to act in some situations (e.g., where an upstream discharger is violating the water quality standards in a downstream jurisdiction). Lack of time tables may allow disputes to continue for indefinite periods of time and to be intentionally prolonged by uncooperative parties.

Response: No time limit was added to the rule. While EPA intends to proceed as quickly as possible and to encourage the parties to the dispute to resolve it quickly and to establish informal time frames, the variety of potential disputes to be resolved would appear to preclude EPA specifying a single regulatory time limit. It is expected that some disputes will be resolved very quickly while others may take longer than the suggested 18 months. EPA believes it is better to obtain a reasonable agreement/decision than to arbitrarily establish a time frame within which an agreement/decision must be made. EPA notes that the dispute resolution mechanism included in today's rule provides the Regional Administrator with several alternative courses of action. EPA believes that having a variety of alternative options may help to prevent delays because the Regional Administrator will be able to select the option most appropriate to the task and, where necessary, proceed from one option to another to conclude a dispute resolution action in a timely manner. An example would be where an arbitration panel is unable to reach a unanimous finding. In such a situation the Regional Administrator may, after a reasonable period of time, direct the panel to issue a nonbinding decision by majority vote.

EPA also believes that specifying such a time limit would be ineffective in those cases where at the end of the time limit the Agency would have insufficient authority to "act to resolve that dispute," because of CWA section 510 which, as discussed above, would prohibit EPA from disapproving standards solely on the basis that EPA considers the

standard to be more stringent than required by the Act.

In some cases, EPA recognizes that the Agency will have authority to "act to resolve the dispute." An example would be a situation where a National Pollutant Discharge Elimination System (NPDES) permit for an upstream discharger does not provide for the attainment of the water quality standards for a downstream jurisdiction. EPA notes that the existing NPDES permitting and certification processes under the CWA may be utilized by the downstream jurisdiction to address such situations, and that today's rule does not alter or minimize the role of these processes in establishing appropriate permit limits that ensure attainment of water quality standards. States and Tribes are encouraged to participate in these permitting and certification processes rather than to wait for unreasonable consequences to occur.

In such cases, as was asserted in the proposal, EPA believes that the Agency has the authority to object to the upstream NPDES permit and, if necessary, to assume permitting authority. This authority was upheld in a case in which EPA assumed authority to issue a permit for a North Carolina discharge that, among other factors, did not meet Tennessee's downstream water quality standards (*Champion International Corp. v. EPA*, 850 F.2d 182 (4th Cir. 1988)).

EPA also anticipates that many of the disputes which will require EPA dispute resolution under 131.7 of today's rule will arise over such situations (i.e., in which an upstream discharge is creating alleged unreasonable consequences in a downstream jurisdiction). EPA recognizes that such situations are likely to occur, and that not all such situations are likely to be resolved to the satisfaction of all parties during the permit issuance and certification processes.

Where such cases proceed to dispute resolution, the Agency's first course of action will be to conduct a dispute resolution action as provided in 131.7 of today's rule and required by CWA section 518. In situations where the dispute resolution action does not result in a satisfactory agreement or other resolution (e.g., the upstream jurisdiction agrees to revise the limits of the permit), EPA would then give due consideration to any possible further Agency actions, where authorized by the CWA.

Comment: Several commenters supported EPA's statement that the Agency does not have the authority to compel parties to enter binding arbitration.

Response: EPA agrees with these comments and has retained the proposed language making entry into binding arbitration strictly a voluntary act.

Comments on the Selection of Mediators/Arbitrators

Comment: Both Tribes and States should have the opportunity to approve a mediator/arbitrator and to remove anyone showing bias.

Response: Section 131.7(f)(2) was modified (as discussed in section B-- Changes to the Proposed Rule) to provide that arbitrators and arbitration panel members shall be selected to only include individuals that: (1) Are agreeable to all affected parties, (2) are knowledgeable concerning the requirements of the water quality standards program, (3) have a basic understanding of the political and economic interests of Tribes, and (4) is expected to fulfill the duties fairly and impartially. No such provision is included in § 131.7(f)(1) dealing with mediation. EPA did not provide for Tribal approval of mediators because: (1) EPA believes that such an approval process would provide too great an

opportunity to delay the initiation of the mediation process, and (2) the role of the mediator is limited to acting as a neutral facilitator. That is significantly less of a role than being an arbitrator or member of an arbitration panel.

There is no prohibition against the Regional Administrator consulting with the parties regarding a mediator; there is just no requirement to do so. Although not specifically covered in the rule, EPA believes it is well within the powers of the Regional Administrator to remove any mediator or arbitrator for any reason including showing bias or unfairness, or taking illegal/unethical actions.

Comment: EPA should clarify how its Indian Policy, which is to give special consideration to Tribal interests, will affect its role in dispute resolution actions (see § 131.7(f)(ii)).

Response: EPA believes that its role in dispute resolution is to work with all parties to the dispute in an effort to reach an agreement that resolves the *64888 dispute. The Agency shall not have a predisposition to support any party's position in disputes over water quality standards. Rather, EPA employees serving as mediators or arbitrators will serve outside the normal Agency chain of command and are expected to act in a neutral fashion. EPA notes that § 131.7(f)(1)(i) specifies that:

Where the State and Tribe agree to participate in the dispute resolution process, mediation with the intent to establish Tribal-State agreements, consistent with the Clean Water Action section 518(d), shall normally be pursued as a first effort.

Although EPA believes that Tribes should be provided every opportunity to regulate water quality and to participate in environmental control programs, during dispute resolution actions the appointed mediator/arbitrator will act first and foremost as a neutral facilitator of discussions between parties.

Comments on the Default Procedure

Comment: Several comments were received recommending that EPA should clarify the default procedure in § 137.7(f)(3). For example, comments were received suggesting that EPA explain: (1) When it will be used, (2) how the procedure will help resolve disputes, (3) who will receive the Agency's recommendation, and (4) that the Agency will first encourage participation by all parties and use the default procedure only as a last resort. One comment suggested that the default procedure should be deleted because it would provide a means for any party to exclude itself from the resolution process.

Response: EPA intends that the default procedure come into play only as a last resort, after all other avenues of resolving the dispute have been exhausted. EPA believes that no change to the regulation is needed to reflect this intent. Section 131.7(f)(1)(i) already indicates that where the State and Tribe agree to participate, mediation shall be pursued as a first course of action. EPA also notes that § 131.7(f)(3) provides that the default procedure may only be used where one or more parties refuse to participate in either mediation or arbitration.

Since EPA believes it does not have the authority to force a Tribe or State into arbitration or mediation, or to overrule either a State or Tribe which adopts standards that are more stringent than necessary to meet the requirements of the Act, EPA developed this default procedure as a means to place before the public an Agency position/recommendation regarding resolution.

The default procedure is simply the Agency reviewing available information and issuing a recommendation for resolving the dispute. EPA's recommendation in this situation would have no enforceable impact. It is hoped that by publicly presenting an Agency position that either through public pressure or reconsideration by either of the affected parties that negotiations to resolve the dispute may continue. The provision as written clearly articulates that the default procedure is a last resort. Any written recommendation emanating from this process would be provided, at least, to all parties to the dispute. EPA sees no need to alter the rule or to delete the default procedure.

Comments on Definitions Used in the Dispute Resolution Mechanism

Comment: With regard to the question of who should be parties to the dispute resolution process (§ 131.7(g)(2)) EPA received diametrically opposed comments. Some comments suggested that EPA clarify that any person with a vested property interest must be a required party to the dispute resolution process while others suggested that EPA should limit the definition of parties to just the State and Tribe. Also, a comment was made that EPA should segregate the role of government regulators from that of permittees in the dispute resolution process.

Response: EPA does not concur with either view and retained the provision that the Regional Administrator may include other parties besides Tribes and States in the process. As stated in the preamble to the proposal, EPA believes that in some cases, inclusion of permittees or landowners subject to non-point source restrictions may be needed in order to resolve certain disputes. EPA notes that, in many cases, nonpoint source control actions (which may be necessary to implement a resolution to a dispute) are voluntary on the part of landowners. However, EPA believes that the Regional Administrator should retain discretion to decide when to include parties other than the Tribe and State. Only the Tribe and State are in a position to implement a change to water quality standards, and are thus the only parties which must be included in all dispute resolution actions. However, other parties may be included in certain cases upon a determination by the Regional Administrator. EPA notes that formal requests for a dispute resolution action may only be made by a State or Tribe (see § 131.7(c)).

Comment: EPA should define "unreasonable consequences" as it is a required condition for initiating a dispute resolution action (see § 131.7(b)(1)).

Response: EPA has not defined this term in the regulatory language. There are several reasons for this including: (1) It would be a presumptuous and unjustified Federal intrusion into local and State concerns for EPA to define what an unreasonable consequence might be as a basis for a national rule, (2) EPA does not want to unnecessarily narrow the scope of problems to be addressed by the dispute resolution mechanism, and (3) the possibilities of what might constitute an unreasonable consequence are so numerous as to defy a logical regulatory requirement. As stated in the preamble to the proposed rule, what might be viewed as an unreasonable consequence on a stream segment in a large, relatively unpopulated, water poor area with a single discharge would likely be viewed quite differently in or near an area characterized by numerous discharges and/or large water resources. EPA believes the Regional Administrator should retain discretion to decide when the consequences warrant initiating a dispute resolution action.

Comments on the Conditions Requiring EPA Dispute Resolution

Comment: A statement is needed on the criteria a Regional Administrator can use in denying a request for EPA dispute resolution.

Response: Section 131.7 (b), (c), and (d) describe the basis upon which a dispute may be initiated, the procedure for filing a request to initiate EPA action, and notice of the EPA decision to initiate a resolution action. The basis for denying a request would be that the requesting party is not able to fulfill any or all of the requirements established in § 131.7 (b) or (c). This was clear in the proposed rule and EPA has made no change.

Other Comments on the Dispute Resolution Mechanism

Comment: Section 131.7(b)(2) limits the dispute resolution mechanism to a dispute between Tribes and States. A comment was received that this should be expanded to cover disputes between two Tribes (or, by extension) between two States.

Response: The rule was written in this manner because section 518 of the Clean Water Act specified that a dispute resolution mechanism be developed to resolve disputes arising between a Tribe and a State. EPA believes that the requirement that State standards provide for the protection of downstream standards in § 131.10(b) of *64889 the water quality standards regulation, supported by a 25 year history of informal negotiation of issues between States, provides sufficient basis for resolving disputes between two States or two Tribes. That informal process was described in the response to public comments on the basic standards regulation (48 FR 51400 and 51412, November 8, 1983).

Comment: What is the basis for requiring EPA approval of any State-Tribal agreement to resolve disputes under § 131.7(e)

Response: EPA is charged with the responsibility of reviewing and either approving or disapproving State or Tribal-adopted standards as being consistent with the requirements of the Clean Water Act. Since EPA recommends that such agreements be entered into as a basic means of resolving disputes, that such agreements must comport with the requirements of the Act, and that the result of such agreements likely will influence standards, it appears necessary that the Agency approve such State-Tribal agreements. Also, the Act provides in section 518(d) that Tribal/State agreements in general for water quality management are to be approved by EPA. The water quality standards program is, in the view of EPA, part of a Tribe or State's overall water quality management plan.

Comment: It is not clear how two EPA Regions will work together when a reservation overlays more than one EPA Region.

Response: No regulatory change was made nor suggested. Often in the standards program issues cross Regional and State boundaries. The lead EPA region (determined via OMB circular A-95) is expected to routinely enlist the aid of other affected regions in resolving the dispute. EPA Headquarters will also oversee the process to ensure that the interests of both Regions are represented. Being designated as the lead Region for resolving a dispute or programmatic issue within EPA does not carry the license for the lead Region to act unilaterally. Rather it assigns the responsibility to ensure that the process leading to a decision is fair to all parties.

3. Establishing Water Quality Standards on Reservations

Comments on Tribal Options for Establishing Standards

Comment: In the preamble to the proposal, EPA discussed three acceptable options by which a Tribe may develop and adopt standards. These options are: (1) Negotiation of cooperative agreements with an adjoining State to apply the State's standards to the Indian lands, (2) incorporation of the standards from an adjacent State as the Tribe's own, with or without revision, or (3) independent Tribal adoption of water quality standards that may account for unique site-specific conditions and water body uses. These three options represent a range of resource commitments, with option 1 being the least resource intensive and option 3 the most intensive. One comment was received that the first option described (i.e., negotiating a cooperative agreement with an adjoining State to apply the State's standards to the Indian lands) is illegal.

Response: There is nothing inherently illegal about the option. If a Tribe, as a sovereign government, negotiates a cooperative agreement with the State to apply the State's standards to waters on the reservation, that is a legal and acceptable option for establishing CWA water quality standards on Indian lands. It is also legal if a Tribe uses standards of a State as a basis for Tribal standards (i.e., option 2). Nothing in option 1 suggests that the Tribe relinquish its sovereign powers or enforcement authority, or that the State can unilaterally apply its standards. The option is a legitimate means for an Indian Tribe to make use of the resources and experience of an adjacent State to quickly establish, at minimal cost, Tribal standards for the reservation.

Comment: In the preamble to the proposal, EPA indicated that, where Tribes qualify to be treated as States for purposes of water quality standards, the Agency would expect Tribal standards to be adopted and submitted to EPA within 180 days. Several comments were received on this deadline indicating that EPA should allow a longer period of time (e.g., because Tribes will be working to establish programs in other media besides water).

Response: The rationale for the deadline included in the proposal was that the 180 days was the same period of time provided to States to adopt standards under the 1972 Federal Water Pollution Control Act Amendments. However, the proposal also discussed a difference between the situation in 1972 for States versus the current situation for Tribes. In 1972, most States already had interstate water quality standards in place. By contrast, many Tribes have not yet developed any standards for reservation waters. EPA also believed 180 days to be an appropriate period of time because of the importance of establishing Tribal standards quickly in order to address any NPDES permit issues, section 401 certifications or nonpoint source management decisions. Without standards, Tribes are unable to influence such decisions. EPA notes that the proposal indicated that the Agency would be willing to grant extensions to the 180 day deadline if the Tribe could submit a reasonable rationale to the Regional Administrator.

The comments submitted on this issue have persuaded EPA that Tribes should be allowed longer than 180 days to adopt and submit standards to the Agency for review and approval. EPA believes that Tribes should be allowed a full three year review cycle to adopt and submit standards, similar to what States were originally provided when the standards program was created in 1965. The three year period will be measured from the

date that EPA notifies the Tribe that the Tribe has qualified to be treated as a State for purposes of the standards program. EPA believes that this is an equitable arrangement and that Tribes should be allowed sufficient time to develop their programs and adopt appropriate standards for reservation waters. EPA reiterates that a Tribe is not required by sections 303 and 518 to seek treatment as a State and to establish Tribal standards; today's rule asserts only that Tribes who elect to do so will be expected to have such standards in place within three years.

EPA continues to believe that the development of Tribal standards can be an iterative process and that the option initially selected by the Tribe can change in subsequent triennial reviews. Initially, a Tribe may choose option 1 or 2. This initial decision does not preclude the Tribe from developing their own standards for subsequent triennial review cycles. Tribal standards may evolve from essentially a codification of existing State standards to a rule entirely of Tribal design.

Comments on Federal Assistance to Indian Tribes

Comment: Several comments were received concerning EPA's commitment to funding Tribal programs and providing technical assistance. Commenters suggested that the allocation of funds to implement standards programs must be apportioned equitably between States and Tribes and that EPA make a stronger commitment to technical and financial assistance to the Tribes. One suggestion was that EPA should be required to provide technical assistance necessary to bring Tribal programs into compliance with the regulations.

Response: The water quality standards program is not a grant *64890 program, therefore no Federal funds are available directly from the standards program. Tribes are eligible to receive funds from other Agency grant programs and are encouraged to apply, particularly for section 106 program grants. EPA will provide as much technical assistance as the Agency's resources will allow. However, under the 1987 CWA Amendments the Agency received no additional resources to support Indian programs. Program grants can only be made available by reallocating resources from within current budget allocations. EPA set aside 3% of the total FY 1990 section 106 funds for Indian programs, and is planning a similar set-aside for FY 1991.

In a continuing effort to provide assistance to Tribes on the standards program, EPA issued a Reference Guide to Water Quality Standards for Indian Tribes, in January 1990. This document summarizes the standards review and adoption process including program requirements and the EPA review procedure. The document also identifies available information and contacts to assist Tribes in becoming familiar with the requirements of the water quality standards program.

The Agency also held a national meeting/seminar at which Tribes received information on the regulatory requirements, technical elements and procedures, and resource needs for developing water quality standards and implementing a standards program. The meeting was held on August 28-30, 1990 in Denver, Colorado. Further information about this workshop and plans for additional meetings may be obtained from the contact listed at the beginning of today's rule.

Comments on Extraterritorial Effects

Comment: A number of comments were received on this topic. One comment pointed out that the extraterritorial effects of discharges upstream of a State or Indian reservation should be considered during the standards review and adoption process to ensure that water quality standards provide for the attainment of standards in downstream jurisdictions. This comment also suggested that EPA needs to place more emphasis on the importance of such considerations. Suggestions for how such effects could be considered included requiring upstream jurisdictions to meet with downstream jurisdictions to discuss potential conflicts or, alternatively, that if EPA is to decide such issues, that the affected jurisdictions should be allowed to have input. Related comments were received (as discussed previously in the response to comments on CWA section 510/EPA Authority) asserting that EPA must, where needed, assume permitting authority for upstream discharges that violate the water quality standards of downstream jurisdictions. One comment was received advocating that the regulation be revised to prevent any extraterritorial effect of any Tribal regulatory action taken pursuant to CWA section 518.

Response: The existing standards program regulation, to which this rule is simply an amendment, includes the following requirement:

In designating uses of a water body and the appropriate criteria for those uses, the State shall take into consideration the water quality standards of downstream waters and shall ensure that its water quality standards provide for the attainment and maintenance of the water quality standards of downstream waters.

(see § 131.10(b)).

EPA agrees with the comment which pointed out that, pursuant to the above regulatory requirement, extraterritorial effects of water quality standards should be considered during the standards review and adoption process. Once Tribes qualify for treatment as States and adopt standards pursuant to the requirements of today's rule, upstream jurisdictions would be required, when revising their standards, to provide for the attainment and maintenance of the downstream Tribal standards. Likewise, Tribes qualifying for treatment as States would be required to develop their standards to provide for the attainment and maintenance of the standards for downstream jurisdictions.

EPA recognizes that some extraterritorial effects of Tribal participation in the standards program are likely to occur, but the Agency believes that the number of such incidences will be small and the effects relatively minor. EPA believes that Congress also recognized the likelihood of such effects in passing CWA section 518, and that such effects were the driving force behind including in section 518 the requirement for EPA to establish a mechanism for resolution of disputes over water quality standards.

EPA emphasizes, however, that under the CWA there are a number of opportunities for such problems to be considered and resolved prior to being a subject for the dispute resolution mechanism included in today's rule.

First, as discussed above, States and Tribes qualifying for treatment as States are required under 40 CFR 131.10(b) to develop their standards to ensure the attainment and maintenance of downstream water quality standards. One opportunity to prevent such problems is thus to consider any potential extraterritorial effects during the water quality review process and to adopt standards consistent with the requirements of 40 CFR 131.10(b). EPA notes that the water quality standards review process includes

opportunities for public participation (see the response to comments on public participation elsewhere in this section).

Second, permit limits under the National Pollutant Discharge Elimination System (NPDES) program (see CWA section 402) are required to be developed such that applicable water quality standards are achieved. The permit issuance process, which also includes public participation, thus presents a second opportunity to consider and resolve potential problems regarding extraterritorial effects of water quality standards.

Third, all permits are subject to certification under the requirements of CWA section 401. Section 401 requires that States and Tribes qualifying for treatment as States grant or deny "certification" for Federally permitted or licensed activities that may result in a discharge to waters of the United States. The decision to grant or deny certification is based on a State determination regarding whether the proposed activity will comply with, among other things, applicable water quality standards. States and Tribes qualifying for treatment as States may thus deny certification and prohibit the federal permitting or licensing agency from issuing a permit or license for activities that will violate water quality standards. Section 401 also allows a State or Tribe to participate in extraterritorial actions that will affect its waters if a Federal license or permit is involved (see section 401(a)(2)).

EPA has included the above discussion to indicate that there are a number of opportunities for resolving/preventing problems resulting from extraterritorial effects of water quality standards besides the dispute resolution mechanism included in today's rule. EPA believes that the dispute resolution mechanism will be most appropriately used as a final course of action after the other available courses of action have been exhausted.

Comments on EPA's Policy Regarding Applicable Standards Prior to Tribal Qualification for Treatment as a State

Comment: EPA received several comments regarding the policy wherein EPA stated that until a Tribe is treated as a State and establishes its own standards, or EPA otherwise decides in *64891 consultation with the Tribe and State that a State lacks jurisdiction, that EPA will assume that existing State standards are applicable to reservation waters (see 54 FR 39104). State commenters generally supported EPA's statements, while Tribal commenters objected to the policy on a variety of grounds. First, certain Tribes noted that they may want to apply standards more stringent than State standards. Commenters also asserted that, to be consistent with EPA's Indian Policy, Federal, not State standards should apply on reservation waters; and that assuming State standards apply is at odds with the Agency's duty to promulgate. One commenter urged EPA to consider developing a program to promulgate Federal standards for reservation waters where the Tribe is unable or chooses not to adopt its own standards.

Response: In response to these comments, EPA wishes to further clarify the interim statements made in former General Counsel Jensen's September 9, 1988 letter. EPA agrees that, as a legal matter, there may be some question as to whether State standards apply to reservation waters. (See the discussion of the Brendale case above). The policy in question is not an assertion that State standards do necessarily apply as a matter of law. Rather it is a mere recognition that fully implementing a role for Tribes under the CWA will require a transition period. As explained earlier, there are no enforceable Federal

standards that apply generally. EPA develops non-binding water quality criteria for use by States and Tribes in developing their standards. However, Federal standards do not apply unless EPA promulgates them upon a finding, pursuant to CWA section 303(c), that State/Tribal standards are inadequate or that new standards are otherwise necessary (see EPA's response to comments on Federal promulgation below).

Were EPA to simply ignore previously developed State standards in the interim period before Tribes develop their own standards, there would be a regulatory void which EPA believes would not be beneficial to reservation water quality. Thus, EPA believes that the Agency's policy is the best approach to an intractable problem, and one that best protects reservation environments in the interim period. Thus, it is fully consistent with EPA's Indian Policy. To the extent that the interim guidance given in the Jensen letter implies a different intent behind EPA's policy, today's response supersedes it. EPA will give serious consideration to Federal promulgation of water quality standards on Indian lands where it finds a particular need. Finally, in response to one specific comment, EPA agrees that where the Tribe endorses applying State standards in the interim, that EPA should ensure enforcement of those standards in permits issued to reservation dischargers.

Comments on EPA Promulgation of Water Quality Standards

Comment: Reflecting CWA section 303(c)(4), the water quality standards regulation specifies that the EPA Administrator may promulgate Federal water quality standards in any case: (1) Where the State standards do not meet the requirements of the Act, or (2) where the Administrator determines that new or revised standards are necessary (see 40 CFR 131.22). A number of comments were received regarding this authority, which will apply to Indian Tribes qualifying for treatment as a State, and potentially where a Tribe does not seek to assume the program and it is determined that State standards do not apply. Federal promulgation was discussed in the preamble to the proposal. It is not mentioned in the rule.

Comments on the preamble discussion generally expressed concern with EPA promulgation of standards. Included were suggestions that the Agency should clarify how it intends to determine that a Tribe has declined to seek qualification as a State. One comment suggested that such a clarification should include specific requirements/criteria and that such requirements/criteria should include lengthy discussions with the Tribe and a formal statement of declination from the Tribal government. In general, these comments cautioned EPA not to make the decision for Tribes. Several comments were received asserting that Federal promulgation should only be pursued as a last resort. One comment asserted that EPA promulgation is: (1) Contrary to the legal status of Indian lands being exempt from State laws, (2) unilaterally discretionary, and (3) contrary to EPA's Indian policy.

Other comments asserted that where EPA promulgates Federal standards the Agency should devote adequate resources to the task and not simply use adjacent State standards. One comment was received supporting EPA's acknowledgment of responsibility to promulgate standards.

Response: EPA's entire policy with respect to Federal promulgation is straightforward. EPA much prefers to work with the States and have them adopt standards which comply

with CWA requirements. Where Federal promulgation is necessary to achieve CWA compliance, however, EPA will act. This same philosophy will apply to Indian Tribes qualifying for treatment as a State.

EPA did not add criteria to the rule to help determine when a Tribe has declined to seek treatment as a State. There is no required time frame for a Tribe to make that decision and there may be no pressing need for a Tribe to decide quickly.

Should EPA find it necessary to promulgate Federal standards for a Tribe or more than one Tribe (e.g., where necessary to address needed water quality based permit actions), EPA re-asserts its belief that the standards of the adjacent State will be a logical beginning step for EPA if for no other reason than the consistency required by 40 CFR 131.10(b). Practical considerations of available resources dictate that the Agency cannot and would not attempt to use attainability analyses or attempt to develop site-specific criteria. That is to say, a Federal proposed rulemaking would likely be very straightforward, all streams would be classified fishable/swimmable and the criteria to protect the uses would be those guidance values established by EPA under section 304(a) of the Act. Any changes in a final rule would depend on information submitted during the public comment period.

EPA concurs with the view that Federal promulgation should be a last resort. The Agency much prefers that Indian Tribes qualify for the standards program and adopt standards that comply with CWA requirements. However, Federal promulgation of water quality standards on Indian lands is authorized by the CWA (see CWA section 303(c)(4)). The question of Federal promulgation of standards for Indian Tribes has no relationship to Indian lands being exempt from State laws. A Federal promulgation results in establishing Federal standards--standards that cannot be amended by the jurisdiction to which they apply (although EPA generally withdraws such Federal standards upon adoption of fully acceptable State standards). We agree that the EPA Indian Policy dictates that Federal promulgation should only be pursued as a final course of action, as the Agency indicated in the preamble to the proposed rule. However, it does remain an option, where necessary, for setting standards for water resources located in Tribal lands.

Comments on Public Participation

Comment: Several comments were received regarding the processes for *64892 public participation in water quality standards development. Commenters questioned whether public participation in the adoption of standards by Indian Tribes would be limited to just Indians, just residents of the reservation, or whether the hearing process would be open to interested parties in the areas surrounding the reservation. In general, these commenters requested additional clarification of public participation requirements.

Response: Public participation is not limited in any way to only residents of the area or just Indians. EPA expects that Tribes and States will make every reasonable effort to ensure that possible interested parties are made aware of the hearings on standards. This may require a direct written notice to State or Indian agencies or other Federal agencies. One of the responsibilities of EPA in reviewing State or Indian adopted standards is to assure that a full range of public participation occurred. EPA expects that State representatives will participate in public hearings on the reservation concerning water quality standards and that Tribal representatives will do the same in State hearings.

Standards adopted by either States or Indian Tribes that appear to be based on improper or unduly limited public participation may be disapproved by EPA solely on that basis since the Clean Water Act requires that standards may only be revised or adopted with public participation (see section 303(c)(1) of the Clean Water Act and §§ 131.6(e) and 131.20 (a) and (b) of the Water Quality Standards Regulation in 40 CFR part 131).

Comments on Enforcement of Standards

Comment: Several comments were received on enforcement of Tribal water quality standards. These commenters generally asserted that additional clarification should be provided by EPA. Several commenters noted that EPA should enforce Tribal standards. One commenter assumed that, based on the limited scope of CWA section 518, Tribal standards would be enforced by either EPA or the State.

Response: Enforcement of standards is not directly a component of the standards program regulation. Enforcement is the responsibility of the permitting agency or, in some cases, the agency which adopted the standards, which may be the Tribe, if it qualifies for treatment as a State for administering the NPDES permit program, or EPA or the State if the Tribe does not (see 40 CFR 123.1(h)). Where Tribes lack the requisite criminal enforcement authority, EPA may exercise certain criminal enforcement powers on behalf of Indian Tribes that seek to operate NPDES or State Sludge Management Programs.

4. Other Comments

Comments on Trust Responsibility

Comment: EPA received several comments regarding its assertion that the "Federal trust responsibility" owed to Indian Tribes, as it applies to EPA actions under the CWA, is defined by the terms of the CWA. EPA went on to explain that "the Agency's responsibility is clearly to attempt to resolve * * * disputes [between States and Tribes over standards] consistent with the provision of the [CWA]." 54 FR 39101.

Certain commenters asserted that EPA should explicitly clarify whether the CWA defines any trust obligations to tribes and, if so, where and how that obligation will be expressed. In particular, EPA should explicitly define how the trust responsibility will affect its role in the dispute resolution process. Other commenters not only asked for clarification, but asserted that EPA must state that the Federal-Tribal trust relationship "exists independently of and informs EPA decision making" concerning the CWA and State-Tribal disputes. Still another commenter asked EPA to clarify that the proposed regulations are not to be read as modifying or abrogating EPA's trust responsibility.

Response: EPA believes that the preamble to the proposed rule stated the applicable principles clearly and that no further clarification is needed. EPA recognizes the responsibility owed by the Federal government as trustee for the affairs of Indian Tribes. However, the Agency does not believe the trust responsibility precludes EPA from playing an impartial role in the dispute resolution process.

Furthermore, EPA believes that the concerns of both Tribal and State commenters regarding the trust responsibility's impact on the dispute resolution process and EPA's other activities under today's regulation are likely unfounded. If so appointed by the

Regional Administrator, EPA employees will be acting solely as mediators or non-binding arbitrators in the process. Thus, they will not have the power to impose a binding decision on either the Tribe or the State absent prior consent from both sides. Furthermore, if both the Tribe and the State have adopted valid water quality standards approved by EPA, the dispute resolution process would not be able to supersede those standards. Thus, the "trust responsibility" would not affect the outcome of the dispute resolution process and any EPA statements regarding its overall scope would be strictly hypothetical. By the same token, EPA recognizes its duty to work with Tribes who wish to develop and adopt standards and to eliminate all potential barriers to Tribes accomplishing this goal.

Comments on Definitions Proposed for Section 131.3

Comment: EPA should change the proposed definition of a Tribe in section 131.3 to mean any Indian Tribe, band, group, or community recognized by the Secretary of the Interior and exercising governmental powers and functions over a Federal Indian Reservation.

Response: No change was made. The rule reflects the statutory definition.

Comment: What role do standards play in subsurface flows emanating from one jurisdiction that flow into and impact the surface waters of another jurisdiction

Response: Notwithstanding the strong language in the legislative history of the Clean Water Act to the effect that the Act does not grant EPA authority to regulate pollution of groundwaters, EPA and most courts addressing the issues have recognized two limited instances where, for the purpose of protecting surface waters and their uses, EPA may exercise authorities that may affect underground waters. First, the Act requires NPDES permits for discharges to groundwater where there is a direct hydrological connection between groundwaters and surface waters. In these situations, the affected groundwaters are not considered "waters of the United States" but discharges to them are regulated because such discharges are effectively discharges to the directly connected surface waters. Second, it is EPA's long-established position that water quality standards are required for certain underground segments of surface waters. See *Kentucky v. Train*, 9 ERC 1280 (E.D. Kentucky 1972). In such streams, the subterranean component must be sufficiently stream-like so as to possibly allow the passage of fish and other aquatic organisms from a surface segment of the stream into the underground segment.

Comments on Water Quantity Rights

Comment: Several comments were received regarding water quantity issues. These comments generally asserted that the statement in the preamble to the proposal (54 FR 39101) which indicates that all section 518 *64893 programs shall be carried out in accordance with CWA section 101(g) should be added to the final regulation. CWA section 101(g) asserts that nothing in the CWA shall supersede or abrogate rights to quantities of water which have been established by any State.

Response: Since sections 101(g) and 518(a) are clear in the Clean Water Act, EPA believes it unnecessary to restate such language in the regulation. Nevertheless, a brief reference is made to them in § 131.4 of these regulations.

Comments on Applicability of Standards to Federal Projects

Comment: EPA should clarify that Tribal water quality standards cannot be applied to Federal projects.

Response: EPA disagrees with that view. Federal agencies are required to comply to the same extent as other persons or entities with duly adopted State standards (see CWA section 313). This will apply likewise to any standards duly adopted by Indian Tribes that EPA determines qualify for treatment as a State for the standards program.

D. Regulatory Flexibility Act

For the reasons stated in the preamble to the proposed rule, 54 FR 39105, September 22, 1989, EPA concludes that this rule will not have a significant impact on a substantial number of small entities, and thus a Regulatory Flexibility Analysis is unnecessary.

Comments on EPA's Determination Regarding Regulatory Flexibility Act Requirements

Comment: Within one reservation in Utah a substantial number of small businesses may be required to provide additional treatment of wastewaters to meet Tribal water quality standards. EPA should investigate and acknowledge this result before asserting a lack of substantial impact on small entities.

Response: As stated in the proposal, EPA recognizes that an Indian Tribe which qualifies for treatment as a State could adopt water quality standards that might impose additional treatment requirements on discharges with NPDES permits. However, EPA continues to believe that such situations will be rare and that the rule will not have a significant impact on a substantial number of small entities.

While it is entirely possible that some small entities in Utah may be affected by a Tribe adopting water quality standards, it is difficult for EPA to make conclusive findings when the Agency does not know if any Tribe in Utah will attempt to qualify for treatment as a State or what standards may be adopted. EPA also has no evidence to support a conclusion that Tribal standards will necessarily require more stringent NPDES permit limits than contained in existing permits.

In adopting standards, EPA notes that economic consequences are appropriately considered in setting the use classifications on a water body. For example, economics may be used as a basis for not designating uses in support of the fishable-swimmable goal cited in section 101(a)(2) of the Act (see §§ 131.10 (a) and (j) of the Water Quality Standards Regulation, 40 CFR part 131). In addition, the water quality standards regulation provides for the allowance of variances to standards based on substantial and widespread economic and social impact (see §§ 131.10(6) and 131.13).

E. Paperwork Reduction Act

The information collection requirements in this rule were approved by the Office of Management and Budget under the Paperwork Reduction Act, 44 U.S.C. 3501 et seq, on October 17, 1989, approval number 2040-0049, with an expiration date of October 31,

1992. A copy of the Information Collection Request document may be obtained from the Information Policy Branch (PM-223Y), Environmental Protection Agency, 401 M Street, SW., Washington, DC, 20460, or by calling (202)-475-9498.

F. Regulatory Impact Analysis

Under Executive Order 12291, EPA must judge whether a regulation is "major" and therefore subject to the requirement of a Regulatory Impact Analysis. It should be noted that the basic water quality standards regulation published at 48 FR 51400 on November 8, 1983 contains a finding that the regulation is not a major rule under Executive Order 12291. It is difficult for EPA to assess the net cost of this amendment to the basic regulation because of the offsetting character of the basic provisions of the standards program and the fact that there is no good means of estimating how many Tribes may seek to qualify for treatment as a State. While qualifying for treatment as a State will place burdens on the Tribes, the basic regulation also provides the ability of the Tribes to determine the attainability of stream uses, to set site-specific criteria sufficient to protect those uses, and to focus limited Tribal resources on reviewing or adopting standards on priority water bodies. For these reasons, the Agency judges this amendment to the basic standards regulation not to be a major rule.

List of Subjects in 40 CFR Part 131

Indian reservation water quality standards, Water pollution control, Water quality standards.

Dated: November 22, 1991.

William K. Reilly,

Administrator.

For the reasons set out in the SUPPLEMENTARY INFORMATION section, part 131, subpart A, of title 40 of the Code of Federal Regulations is amended as follows:

1. The authority citation for part 131 continues to read as follows:

Authority: Clean Water Act, Pub. L. 92-500, as amended; 33 U.S.C. 1251 et seq.
40 CFR § 131.3

2. Section 131.3 is amended by revising paragraph (j) and adding paragraphs (k) and (l) to read as follows:
40 CFR § 131.3

§ 131.3 Definitions.

* * * * *

(j) States include: The 50 States, the District of Columbia, Guam, the Commonwealth of Puerto Rico, Virgin Islands, American Samoa, the Trust Territory of the Pacific Islands,

the Commonwealth of the Northern Mariana Islands, and Indian Tribes that EPA determines qualify for treatment as States for purposes of water quality standards.

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

(l) Indian Tribe or Tribe means any Indian Tribe, band, group, or community recognized by the Secretary of the Interior and exercising governmental authority over a Federal Indian reservation.

40 CFR § 131.4

3. Section 131.4 is revised to read as follows:

40 CFR § 131.4

§ 131.4 State authority.

(a) States (as defined in § 131.3) are responsible for reviewing, establishing, and revising water quality standards. As recognized by section 510 of the Clean Water Act, States may develop water quality standards more stringent than required by this regulation.

Consistent with section 101(g) and 518(a) of the Clean Water Act, water quality standards shall not be construed to supersede or abrogate rights to quantities of water.

(b) States (as defined in § 131.3) may issue certifications pursuant to the requirements of Clean Water Act section 401. Revisions adopted by States *64894 shall be applicable for use in issuing State certifications consistent with the provisions of § 131.21(c).

(c) Where EPA determines that a Tribe qualifies for treatment as a State for purposes of water quality standards, the Tribe likewise qualifies for treatment as a State for purposes of certifications conducted under Clean Water Act section 401.

40 CFR § 131.5

4. In § 131.5 paragraphs (a) through (e) are redesignated as paragraphs (a)(1) through (a)(5), the introductory paragraph is designated as paragraph (a), and a new paragraph (b) is added to read as follows:

40 CFR § 131.5

§ 131.5 EPA authority.

* * * * *

(b) Section 401 of the Clean Water Act authorizes EPA to issue certifications pursuant to the requirements of section 401 in any case where a State or interstate agency has no authority for issuing such certifications.

40 CFR § 131.7

5. Section 131.7 is added to read as follows:

40 CFR § 131.7

§ 131.7 Dispute resolution mechanism.

- (a) Where disputes between States and Indian Tribes arise as a result of differing water quality standards on common bodies of water, the lead EPA Regional Administrator, as determined based upon OMB circular A-105, shall be responsible for acting in accordance with the provisions of this section.
- (b) The Regional Administrator shall attempt to resolve such disputes where:
- (1) The difference in water quality standards results in unreasonable consequences;
 - (2) The dispute is between a State (as defined in § 131.3(j) but exclusive of all Indian Tribes) and a Tribe which EPA has determined qualifies to be treated as a State for purposes of water quality standards;
 - (3) A reasonable effort to resolve the dispute without EPA involvement has been made;
 - (4) The requested relief is consistent with the provisions of the Clean Water Act and other relevant law;
 - (5) The differing State and Tribal water quality standards have been adopted pursuant to State and Tribal law and approved by EPA; and
 - (6) A valid written request has been submitted by either the Tribe or the State.
- (c) Either a State or a Tribe may request EPA to resolve any dispute which satisfies the criteria of paragraph (b) of this section. Written requests for EPA involvement should be submitted to the lead Regional Administrator and must include:
- (1) A concise statement of the unreasonable consequences that are alleged to have arisen because of differing water quality standards;
 - (2) A concise description of the actions which have been taken to resolve the dispute without EPA involvement;
 - (3) A concise indication of the water quality standards provision which has resulted in the alleged unreasonable consequences;
 - (4) Factual data to support the alleged unreasonable consequences; and
 - (5) A statement of the relief sought from the alleged unreasonable consequences.
- (d) Where, in the Regional Administrator's judgment, EPA involvement is appropriate based on the factors of paragraph (b) of this section, the Regional Administrator shall, within 30 days, notify the parties in writing that he/she is initiating an EPA dispute resolution action and solicit their written response. The Regional Administrator shall also make reasonable efforts to ensure that other interested individuals or groups have notice of this action. Such efforts shall include but not be limited to the following:
- (1) Written notice to responsible Tribal and State Agencies, and other affected Federal agencies,
 - (2) Notice to the specific individual or entity that is alleging that an unreasonable consequence is resulting from differing standards having been adopted on a common body of water,
 - (3) Public notice in local newspapers, radio, and television, as appropriate,
 - (4) Publication in trade journal newsletters, and
 - (5) Other means as appropriate.
- (e) If in accordance with applicable State and Tribal law an Indian Tribe and State have entered into an agreement that resolves the dispute or establishes a mechanism for resolving a dispute, EPA shall defer to this agreement where it is consistent with the Clean Water Act and where it has been approved by EPA.
- (f) EPA dispute resolution actions shall be consistent with one or a combination of the

following options:

(1) Mediation. The Regional Administrator may appoint a mediator to mediate the dispute. Mediators shall be EPA employees, employees from other Federal agencies, or other individuals with appropriate qualifications.

(i) Where the State and Tribe agree to participate in the dispute resolution process, mediation with the intent to establish Tribal-State agreements, consistent with Clean Water Act section 518(d), shall normally be pursued as a first effort.

(ii) Mediators shall act as neutral facilitators whose function is to encourage communication and negotiation between all parties to the dispute.

(iii) Mediators may establish advisory panels, to consist in part of representatives from the affected parties, to study the problem and recommend an appropriate solution.

(iv) The procedure and schedule for mediation of individual disputes shall be determined by the mediator in consultation with the parties.

(v) If formal public hearings are held in connection with the actions taken under this paragraph, Agency requirements at 40 CFR 25.5 shall be followed.

(2) Arbitration. Where the parties to the dispute agree to participate in the dispute resolution process, the Regional Administrator may appoint an arbitrator or arbitration panel to arbitrate the dispute. Arbitrators and panel members shall be EPA employees, employees from other Federal agencies, or other individuals with appropriate qualifications. The Regional administrator shall select as arbitrators and arbitration panel members individuals who are agreeable to all parties, are knowledgeable concerning the requirements of the water quality standards program, have a basic understanding of the political and economic interests of Tribes and States involved, and are expected to fulfill the duties fairly and impartially.

(i) The arbitrator or arbitration panel shall conduct one or more private or public meetings with the parties and actively solicit information pertaining to the effects of differing water quality permit requirements on upstream and downstream dischargers, comparative risks to public health and the environment, economic impacts, present and historical water uses, the quality of the waters subject to such standards, and other factors relevant to the dispute, such as whether proposed water quality criteria are more stringent than necessary to support designated uses, more stringent than natural background water quality or whether designated uses are reasonable given natural background water quality.

(ii) Following consideration of relevant factors as defined in paragraph (f)(2)(i) of this section, the arbitrator or arbitration panel shall have the authority and responsibility to provide all parties and the Regional Administrator with a written recommendation for resolution of the *64895 dispute. Arbitration panel recommendations shall, in general, be reached by majority vote. However, where the parties agree to binding arbitration, or where required by the Regional Administrator, recommendations of such arbitration panels may be unanimous decisions. Where binding or non-binding arbitration panels cannot reach a unanimous recommendation after a reasonable period of time, the Regional Administrator may direct the panel to issue a non-binding decision by majority vote.

(iii) The arbitrator or arbitration panel members may consult with EPA's Office of General Counsel on legal issues, but otherwise shall have no ex parte communications pertaining to the dispute. Federal employees who are arbitrators or arbitration panel members shall be neutral and shall not be predisposed for or against the position of any

disputing party based on any Federal Trust responsibilities which their employers may have with respect to the Tribe. In addition, arbitrators or arbitration panel members who are Federal employees shall act independently from the normal hierarchy within their agency.

(iv) The parties are not obligated to abide by the arbitrator's or arbitration panel's recommendation unless they voluntarily entered into a binding agreement to do so.

(v) If a party to the dispute believes that the arbitrator or arbitration panel has recommended an action contrary to or inconsistent with the Clean Water Act, the party may appeal the arbitrator's recommendation to the Regional Administrator. The request for appeal must be in writing and must include a description of the statutory basis for altering the arbitrator's recommendation.

(vi) The procedure and schedule for arbitration of individual disputes shall be determined by the arbitrator or arbitration panel in consultation with parties.

(vii) If formal public hearings are held in connection with the actions taken under this paragraph, Agency requirements at 40 CFR 25.5 shall be followed.

(3) Dispute Resolution Default Procedure. Where one or more parties (as defined in paragraph (g) of this section) refuse to participate in either the mediation or arbitration dispute resolution processes, the Regional Administrator may appoint a single official or panel to review available information pertaining to the dispute and to issue a written recommendation for resolving the dispute. Review officials shall be EPA employees, employees from other Federal agencies, or other individuals with appropriate qualifications. Review panels shall include appropriate members to be selected by the Regional Administrator in consultation with the participating parties. Recommendations of such review officials or panels shall, to the extent possible given the lack of participation by one or more parties, be reached in a manner identical to that for arbitration of disputes specified in paragraphs (f)(2)(i) through (f)(2)(vii) of this section.

(g) Definitions. For the purposes of this section:

(1) Dispute Resolution Mechanism means the EPA mechanism established pursuant to the requirements of Clean Water Act section 518(e) for resolving unreasonable consequences that arise as a result of differing water quality standards that may be set by States and Indian Tribes located on common bodies of water.

(2) Parties to a State-Tribal dispute include the State and the Tribe and may, at the discretion of the Regional Administrator, include an NPDES permittee, citizen, citizen group, or other affected entity.

40 CFR § 131.8

6. Section 131.8 is added to read as follows:

40 CFR § 131.8

§ 131.8 Requirements for Indian Tribes to be treated as States for purposes of water quality standards.

(a) The Regional Administrator, as determined based on OMB Circular A-105, may treat an Indian Tribe as a State for purposes of the water quality standards program if the Tribe meets the following criteria:

(1) The Indian Tribe is recognized by the Secretary of the Interior and meets the

definitions in § 131.3 (k) and (l),

(2) The Indian Tribe has a governing body carrying out substantial governmental duties and powers,

(3) The water quality standards program to be administered by the Indian Tribe pertains to the management and protection of water resources which are within the borders of the Indian reservation and held by the Indian Tribe, within the borders of the Indian reservation and held by the United States in trust for Indians, within the borders of the Indian reservation and held by a member of the Indian Tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of the Indian reservation, and

(4) The Indian Tribe is reasonably expected to be capable, in the Regional Administrator's judgment, of carrying out the functions of an effective water quality standards program in a manner consistent with the terms and purposes of the Act and applicable regulations.

(b) Requests by Indian Tribes for treatment as States for purposes of water quality standards should be submitted to the lead EPA Regional Administrator. The application shall include the following information:

(1) A statement that the Tribe is recognized by the Secretary of the Interior.

(2) A descriptive statement demonstrating that the Tribal governing body is currently carrying out substantial governmental duties and powers over a defined area. The statement shall:

(i) Describe the form of the Tribal government;

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

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

(3) A descriptive statement of the Indian Tribe's authority to regulate water quality. The statement shall include:

(i) A map or legal description of the area over which the Indian Tribe asserts authority to regulate surface water quality;

(ii) A statement by the Tribe's legal counsel (or equivalent official) which describes the basis for the Tribes assertion of authority;

(iii) A copy of all documents such as Tribal constitutions, by-laws, charters, executive orders, codes, ordinances, and/or resolutions which support the Tribe's assertion of authority; and

(iv) an identification of the surface waters for which the Tribe proposes to establish water quality standards.

(4) A narrative statement describing the capability of the Indian Tribe to administer an effective water quality standards program. The narrative statement shall include:

(i) A description of the Indian Tribe's previous management experience including, but not limited to, the administration of programs and services authorized by the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.), the Indian Mineral Development Act (25 U.S.C. 2101 et seq.), or the Indian *64896 Sanitation Facility Construction Activity Act (42 U.S.C. 2004a);

- (ii) A list of existing environmental or public health programs administered by the Tribal governing body and copies of related Tribal laws, policies, and regulations;
 - (iii) A description of the entity (or entities) which exercise the executive, legislative, and judicial functions of the Tribal government;
 - (iv) A description of the existing, or proposed, agency of the Indian Tribe which will assume primary responsibility for establishing, reviewing, implementing and revising water quality standards;
 - (v) A description of the technical and administrative capabilities of the staff to administer and manage an effective water quality standards program or a plan which proposes how the Tribe will acquire additional administrative and technical expertise. The plan must address how the Tribe will obtain the funds to acquire the administrative and technical expertise.
- (5) Additional documentation required by the Regional Administrator which, in the judgment of the Regional Administrator, is necessary to support a Tribal request for treatment as a State.
- (6) Where the Tribe has previously qualified for treatment as a State under a Clean Water Act or Safe Drinking Water Act program, the Tribe need only provide the required information which has not been submitted in a previous treatment as a State application.
- (c) Procedure for processing an Indian Tribe's application for treatment as a State.
- (1) The Regional Administrator shall process an application of an Indian Tribe for treatment as a State submitted pursuant to § 131.8(b) in a timely manner. He shall promptly notify the Indian Tribe of receipt of the application.
- (2) Within 30 days after receipt of the Indian Tribe's application for treatment as a State, the Regional Administrator shall provide appropriate notice. Notice shall:
- (i) Include information on the substance and basis of the Tribe's assertion of authority to regulate the quality of reservation waters; and
 - (ii) Be provided to all appropriate governmental entities.
- (3) The Regional Administrator shall provide 30 days for comments to be submitted on the Tribal application. Comments shall be limited to the Tribe's assertion of authority.
- (4) If a Tribe's asserted authority is subject to a competing or conflicting claim, the Regional Administrator, after consultation with the Secretary of the Interior, or his designee, and in consideration of other comments received, shall determine whether the Tribe has adequately demonstrated that it meets the requirements of § 131.8(a)(3).
- (5) Where the Regional Administrator determines that a Tribe meets the requirements of this section, he shall promptly provide written notification to the Indian Tribe that the Tribe has qualified to be treated as a State for purposes of water quality standards and that the Tribe may initiate the formulation and adoption of water quality standards approvable under this part.

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