

same manner as states for purposes of section 4005 is inconsistent with its decision not to waive MSWLF financial assurance requirements for Indian tribes that operate landfills, as EPA had waived for state-operated landfills. (See 56 FR at 51107-08 (Oct. 9, 1991); 40 CFR 258.70(a)). In this commenter's view, EPA's decision suggests that EPA considers tribes to be equivalent to municipalities for RCRA Subtitle D purposes. EPA disagrees. As is explained in detail in the preamble to the Federal Criteria rule, EPA proposed, but ultimately decided against, exempting Indian tribes from the financial assurance requirements imposed on local governments. EPA decided that Indian tribes, "for reasons similar to those" upon which the Agency based its decision not to exempt municipalities from the financial assurance requirements, "do not have the requisite financial strength to ensure funding of their closure, post-closure and corrective action obligations". 56 FR at 51108. EPA did not say anything to suggest a position that Indian tribes were subject to state regulatory control as are local governments or municipalities. Nor did EPA suggest that tribes lack the sovereign regulatory authority over MSWLF activities in Indian country necessary to administer an EPA-approved landfill permit program. Therefore, there is no inconsistency between the Agency's position in that rule and in today's notice.²

5. RCRA Definition of "State"

One commenter asserted that Congress could easily have included Indian tribes in the definition of "state," and that the fact that Congress did not do so indicates that Congress did not want to give tribes a sovereign role for RCRA purposes. While the scant legislative history allows for little comment on Congress' motives in not explicitly allowing Indian tribes to be treated in the same manner as states, EPA believes that, had Congress clearly intended to preclude Indian tribes from operating in the same manner as states for purposes of RCRA Subtitle D, it

² The commenter also asserted that EPA used the terms "local government" and "municipality" interchangeably in the proposed and final landfill criteria rule, and that EPA implicitly asserted that "Indian tribes" should be considered local governments for MSWLF purposes. A close examination of the language makes clear that EPA thought that Indian tribes were similar to local governments, but quite separate from them. For instance, one section of the preamble to the final rule is titled "Concerns Regarding Local Government and Indian Tribe Impacts". 56 FR at 50980; the section discussing the financial assurance issue discusses Indian tribes separately from local governments. *Id.* at 51107.

would have made that clear in the language or legislative history of the 1984 Amendments. This commenter also noted that the regulations in 40 CFR part 258 refer to actions taken by the "State Director", and that no officials of the Campo Band or the Campo Environmental Protection Agency (CEPA) fit EPA's definition of that term. However, EPA believes it has the authority to interpret its own regulations in a manner consistent with the statutory purpose for which those regulations were adopted. As discussed above, *Chevron* gives EPA the authority to interpret RCRA to allow for treatment of tribes in the same manner as states for purposes of program approval. EPA's use of the term "State Director" in the landfill regulations may be read to include tribal officials serving the function of a State Director in order to effectuate EPA's permissible interpretation of RCRA.

6. The Relevance of *Washington Dept. of Ecology v. EPA*

Several commenters challenged EPA's reference to other environmental statutes to support its argument concerning treatment of Indian tribes under RCRA. EPA's reference to other environmental statutes to interpret state and tribal authority in the implementation of solid waste permitting programs was implicitly approved by the Ninth Circuit in *Washington*:

Implementation of hazardous waste management programs on Indian lands raises questions of Indian policy as well as environmental policy. It is appropriate for us to defer to EPA's expertise and experience in reconciling these policies, gained through administration of similar environmental statutes on Indian lands.

One commenter stated that EPA seeks to create a "vacuum" in the implementation and enforcement of Subtitle D of RCRA by asserting that the states are generally precluded from regulating MSWLFs on tribal lands. This commenter stated that *Washington* supports the commenter's assertion that statutes are to be read in a manner that does not find a vacuum, and therefore EPA's interpretation of RCRA's administrative scheme is contrary to *Washington*. EPA disagrees that its position is inconsistent with *Washington*. The Ninth Circuit in *Washington* in fact upheld EPA's denial of the State's application to regulate hazardous waste in Indian country, because under federal Indian law states are generally precluded from exercising civil regulatory authority over Indian country. EPA denied the portion of the State of Washington's application that

sought to regulate hazardous waste in Indian country because the State had failed to demonstrate adequate jurisdiction.

This commenter further argued that the holding in *Washington* that states lack authority to regulate waste activities on Indian lands should be limited to Subtitle C of RCRA because "(w)here hazardous waste is concerned, the state plays no role until the * * * EPA does it out * * * Where solid waste is concerned, the EPA plays no role unless the state fails to give that aspect of the program proper attention." However, this argument does not reach the question of state versus tribal authority. Even if EPA does not issue permits for MSWLFs in Indian country as it does for certain Subtitle C facilities, this does not mean that Indian tribes are not allowed to implement MSWLF permitting programs in the same manner as the states. Approving tribal MSWLF permitting programs would uphold EPA's general policy of encouraging non-federal implementation and enforcement of the Federal Criteria as does states' proper implementation of MSWLF permitting programs on land within the state's jurisdiction.

Further, the argument that *Washington* should be limited to Subtitle C of RCRA ignores the fact that the definitions of section 1004(13) and the corresponding legislative history, as discussed above, are applicable to all of RCRA. The legislative history was insufficient to express Congressional intent to extend state jurisdiction over Indian country with respect to Subtitle C. It is also insufficient to extend state jurisdiction over Indian country with respect to Subtitle D of RCRA.

7. EPA May Properly Allow Tribes to Submit Applications for Approval of Their MSWLF Permit Programs at the Tribes' Discretion

One comment criticizes EPA for allowing Indian tribes to seek approval of their MSWLF permit programs in the same manner as States, but not requiring Indian tribes to submit a program as States are required under section 4005(c). As EPA explained in the proposed approval, Congress did not explicitly specify a role for tribal permit programs under Subtitle D of RCRA. EPA is therefore unwilling to ascribe to Congress the specific intent to *require* tribes to submit landfill permit programs as Congress clearly intended for States. Furthermore, even if EPA were to mandate that tribes submit such programs, the only effects of a failure to submit are: (1) EPA may determine there to be no adequate program in place and