

thus that it has authority to enforce the 40 CFR part 258 Criteria directly (RCRA section 4005(c)(2)), and (2) the tribe would not be eligible for grant funds to operate its landfill program (RCRA section 4007). If a State (or tribe) elects not to submit a program, it may lose out on federal assistance, but Congress specified no other penalty. In addition, unlike the situation in most States, on some reservations, all solid waste may be disposed off-reservation. Thus, EPA sees no particular benefit to imposing an explicit requirement on tribes to submit a program.

Another comment argued that EPA may not require States to demonstrate their jurisdiction over Indian lands when seeking approval of a landfill permit program, since States "must have jurisdiction in order to meet the statutory mandate." This statement merely begs the question of whether states *do* have such jurisdiction. Nonetheless, EPA believes this issue is more properly addressed in the context of an individual State application for program approval.

8. EPA May Establish Self-implementing Landfill Criteria Where an Approved Adequate State or Tribal Program is Not in Place

The State of Alaska submitted comments that the Agency's tentative determination to approve the Campo Band permit program is invalid because EPA does not have the authority under RCRA Subtitle D to promulgate self-implementing criteria for the disposal of solid waste. EPA's regulations in 40 CFR part 258 are "self-implementing" in that they apply directly to owners and operators of MSWLFs, and need not be imposed through a permit or other agency action. Alaska argued that EPA can only establish guidelines for the disposal of solid waste under RCRA section 1008(a) and that RCRA section 4004(a) only provides the Agency with the authority to provide definitions for what constitutes "open dumping" of solid waste. Alaska also argued that the Hazardous and Solid Waste Amendments of 1984, including RCRA sections 4005(c) and 4010(c), did not broaden EPA's authority with regard to the regulation of solid waste or shift the control of the disposal of such waste from the States to the Agency.

EPA first notes that this comment is not timely. Two Alaska State agencies (the Departments of Environmental Conservation and Transportation and Public Facilities) and the Alaska State legislature submitted comments on the proposed MSWLF Criteria, but none of the comments challenged the Agency's authority to promulgate self-

implementing regulations under RCRA. Contrary to Alaska's assertion, EPA did raise for public comment the issue of how the Criteria would be implemented in States that do not have approved permit programs. 53 FR 33383 (Aug. 30, 1988). Many of the proposed standards were self-implementing in that they could be implemented directly by an owner or operator without State oversight. 53 FR 33382 (Aug. 30, 1988). Because it did not comment on the "self-implementing" issue or file a petition for review of the MSWLF Criteria, Alaska may not now challenge EPA's authority to promulgate self-implementing regulations under RCRA Subtitle D. See 42 U.S.C. 6976(a)(1); *Sierra Club v. EPA*, 992 F.2d 337, 342 n. 5 (D.C. Cir. 1993).

EPA also disagrees with Alaska's substantive comment that the Agency does not have the authority to promulgate self-implementing criteria under RCRA Subtitle D. While EPA agrees with Alaska that the implementation and administration of solid waste disposal is mainly a state-lead function, RCRA Subtitle D provides the Agency with the statutory authority to promulgate criteria for such disposal.

RCRA section 4004(a) authorizes EPA to promulgate regulations containing criteria that distinguish between those facilities classified as sanitary landfills and those which are open dumps. These regulations, found in 40 CFR part 257, are more than "definitional" as suggested by Alaska. They establish criteria, enforceable under RCRA section 7002(a)(1), to ensure that there is "no reasonable probability of adverse effects on health or the environment" from disposal of solid waste. 42 U.S.C. 6944(a). In enacting the Hazardous and Solid Waste Amendments of 1984, Congress made it clear that the prohibitions contained in the open dumping criteria promulgated pursuant to RCRA section 4004(a) were a "direct Federal requirement, not dependent on the approval of a state plan * * *" S. Rep. No. 248, 98th Cong., 2d Sess., at 50 (1984).

In addition, RCRA section 4010(c) requires EPA to "promulgate revisions" of the open dumping criteria for certain solid waste disposal facilities "to protect human health and the environment," and specifies certain minimum elements to be included in those criteria. 42 USC 6949a(c). By using the word "promulgate," which Webster's defines to mean "to put (a law) into action or force," (Webster's New Collegiate Dictionary, at 914 (1979)), EPA believes that Congress intended the Criteria contained in 40 CFR part 258 to have the force and effect

of binding regulations. While states are to play a central role in the implementation of the Criteria by adopting permit programs under RCRA section 4005(c)(1)(B), *Sierra Club v. EPA*, 992 F.2d 337, 339 (D.C. Cir. 1993), such state programs must meet the statutory standard of ensuring that each facility receiving hazardous household waste or conditionally exempt small quantity generator hazardous waste will comply with the Criteria promulgated by EPA.

As fully explained by EPA at the time it promulgated the Criteria under RCRA section 4010(c), the Agency chose a self-implementing approach out of a concern that States may not have the resources available to adopt adequate permit programs within the eighteen month time period provided by the statute (RCRA section 4005(c)(1)(B)). 56 FR 50978, 50991-93 (Oct. 9, 1991). A number of states had submitted comments outlining this concern. *Id.* at 50992.

EPA was also concerned about the appropriate implementation and enforcement of the Criteria in those states that did not adopt an adequate permit program under RCRA section 4005(c)(1)(B). *Id.* at 50993. For example, EPA had proposed that new MSWLFs would need to be constructed in accordance with a design goal (which would have to fall within a risk-based performance range) established by the relevant state. 53 FR 33314, 33410 (Aug. 30, 1988). In response to a number of comments from states that argued that they did not have the resources to establish such design goals or to review design plans to determine whether they met a certain risk range performance standard, EPA decided to promulgate a design requirement that both (1) established a uniform design requirement that could be implemented by owners and operators in unapproved states and (2) allowed approved states to authorize an alternative design which met a performance standard. 56 FR 51058-60 (Oct. 9, 1991). By establishing self-implementing performance standards for design and other requirements contained in the MSWLF Criteria, EPA could ensure that there would be protective implementation of the Criteria in states or in Indian country without approved programs where state or tribal oversight of a landfill design would not be present. *Id.*

Contrary to Alaska's comment, EPA believes that adopting a self-implementing approach in the Criteria is within the statutory authority provided by RCRA Subtitle D. Clearly, by enacting RCRA section 4010(c), Congress was expressing a concern