

“Proposed Rules” section. Alaska also asserted that EPA has violated the Freedom of Information Act (FOIA) requirement to “separately state and currently publish * * * substantive rules” by “*de facto*” promulgation of the STIR in the same notice in which the Agency determines the adequacy of the Campo Band’s program. EPA disagrees with Alaska’s characterization of the tentative determination. EPA acknowledges that the preamble to the tentative determination makes reference to EPA’s policy that “Alaska Native entities * * * may apply for permit program approval.” 59 FR 24422, 24426 (May 11, 1994). It is clear from the context of the discussion, however, that EPA was not trying to propose a rule with respect to Alaska Natives, but merely was observing that RCRA does not expressly preclude Alaska Native Villages from applying for program approval. EPA has not proposed to approve any Native Village program and, although the tentative determination may have been ambiguous on this point, the Agency has not determined that any village would necessarily satisfy the requirements for program approval. The determination whether any Alaska Native Village will qualify to operate a MSWLF permitting program will be made when such application, if any, is submitted. Thus, the statement in EPA’s tentative determination does not give rights that Alaska Natives did not previously hold, nor does it purport to divest the State of Alaska of any authority it may have to regulate MSWLFs in Native Villages. The tentative determination and today’s action are intended to affect only the Campo Band. In addition, EPA does not hereby purport to adopt the STIR; discussions of tribal jurisdiction in both the tentative determination and today’s action are included for the purpose of explaining EPA’s determination of the adequacy of the Campo Band’s program. If and when EPA proposes the STIR and/or proposes to approve a Native Village program, as discussed above, Alaska may raise its jurisdictional and other concerns at that time and EPA will give them due consideration.

One commenter stated that Congress never intended to have EPA delegate the authority to regulate municipal solid waste landfills to every or any Indian tribe in the nation, because the burden on EPA would be overwhelming. The same commenter suggested that EPA should retain authority over Indian country. Alternatively, the commenter suggested that EPA delegate this authority to states. EPA notes that EPA

permitting and enforcement of solid waste management in Indian country could result in a far greater burden on the Agency than determination of the adequacy of tribal programs. More importantly, under Subtitle D of RCRA, EPA has no authority to enforce the Federal Criteria, unless it determines that the applicable program is inadequate, in which case EPA would have discretion to take enforcement actions for violations of RCRA (RCRA section 4005(c)(2)(A)). Therefore, EPA cannot “delegate” authority to states or tribes. EPA’s role, as prescribed by Congress, is limited to determining whether the solid waste programs adopted by states or tribes are adequate to assure compliance with the federal regulations (RCRA section 4005(c)(1)(C).) Finally, as discussed above, under federal law EPA does not have the power to give states jurisdiction over Indian country.

One commenter stated that the best interest of the people and environmental laws are met by consistent yet flexible regulations covering municipal solid waste landfills. This commenter expressed concern that allowing hundreds of tribes to regulate solid waste will result in inconsistency. As the comment itself noted, flexibility as well as consistency is important in protecting human health and the environment. Congress required EPA to set minimum standards for landfills, and required states to adopt and implement permit programs which would assure compliance with the federal standards. Both RCRA and the federal regulations take into account the history of local regulation of solid waste and the need to have solid waste requirements be flexible enough to accommodate local needs. EPA will not approve a state or tribal program unless it is adequate to ensure that all MSWLFs within the state’s or tribe’s jurisdiction will comply with the Criteria in 40 CFR part 258. Therefore, EPA believes that approval of tribal solid waste programs will not result in any inconsistency that would violate the requirements of 40 CFR part 258. It is possible, however, that owners or operators of landfills in more than one jurisdiction may have to meet different requirements in different jurisdictions. This was the case prior to the federal requirements, which merely set new national minimum standards for landfills.

One commenter questioned EPA’s motives and its purpose in providing a program adequacy ruling. RCRA itself establishes EPA’s role. Section 4005(c)(1)(C) provides that “[t]he Administrator shall determine whether each state has developed an adequate

program”. Congress mandated that EPA determine the adequacy of state programs. EPA’s motive and purpose in providing a program adequacy determination for tribal solid waste programs are the same as for providing such a determination for state programs: to ensure that the appropriate government entity is ensuring the proper management of solid waste within its jurisdiction. As discussed above, EPA’s approval of tribal solid waste programs is consistent with federal Indian law and EPA’s Indian Policy.

One commenter stated that non-tribal regulation of the land on which a proposed landfill would be situated is critical because contaminated groundwater could migrate off the Reservation. In support of this position, the commenter quoted from the **Federal Register** notice in which EPA published its tentative approval of the Campo Band’s program. In the tentative determination, EPA stated that where groundwater can migrate, “it would be practically very difficult to separate out the effects of solid waste disposal on non-Indian fee land within a reservation from those on Tribal portions”. 59 FR 24422, 24425–26 (May 11, 1994). The quoted statement supports tribes’ assertions of jurisdiction to regulate solid waste management on non-Indian fee land within a reservation. As discussed above, EPA does not have authority to grant states jurisdiction over Indian country; in fact, federal law limits the jurisdiction of states over Indian country. The Campo Reservation is entirely tribal trust land.

One commenter stated that none of the statutory sections cited by EPA in the tentative determination provides authority for EPA’s action of approving the Campo Band’s program. The comment questioned the appropriate forum for judicial challenges to EPA’s action. The statutory sections—RCRA sections 2002, 4005 and 4010—authorize promulgation of regulations and provision of technical assistance and provide for review and approval of state programs. Although all three of these statutory sections support EPA’s action today, EPA has the authority to approve tribal programs under RCRA section 4005 using its discretion to fill gaps pursuant to *Chevron*. The appropriate forum for such judicial challenges is ultimately a decision for a court. However, EPA currently believes that the appropriate forum may be the U.S. Court of Appeals for the District of Columbia Circuit, pursuant to RCRA section 7006(a), 42 U.S.C. 6976(a).