



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

OFFICE OF  
WATER

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**MEMORANDUM**

SUBJECT: Guidance on EPA's NPDES and Sludge Management Permit Procedures on Federal Indian Reservations

FROM: *Cynthia C. Dougherty*  
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TO: Water Management Division Directors  
Regions I and II, and IV - X

**Introduction**

Until Tribes qualify for the NPDES or sludge management programs, EPA will administer those programs on Federal Indian Reservations (FIRs or reservations); i.e., within the exterior boundaries of a reservation as defined by Clean Water Act (CWA) section 518(h).<sup>1</sup>

The purpose of this memorandum is to articulate key points for EPA's implementation of the NPDES and sludge management programs on FIRs. Federal Indian Reservation (in the case of NPDES and sludge programs) 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.

This guidance memorandum pertains to EPA issuance of permits to all permitted facilities on FIRs and situations where EPA is the permit authority upstream of the FIR. The memorandum addresses three primary areas:

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<sup>1</sup> EPA regulations contemplate that States may be able to demonstrate authority to issue NPDES or sludge permits on Federal Indian Reservations. However, the threshold for such a demonstration is very high, and, absent explicit Congressional authorization, it is unlikely that EPA would authorize a State to do so. We are unaware of any State for which we have made such an explicit authorization.

- 1) EPA's role and responsibilities where:
  - a) Tribes are the authorized permitting authority for activities on the reservation
  - b) States have, in fact, issued permits for activities on the reservation
- 2) Applicable water quality standards and certification considerations for EPA permitting activities in:
  - a) Situations where Tribe is CWA section 303-approved and:
    - i) The discharge is on the FIR
    - ii) The discharge is upstream of the FIR
  - b) Situations where the Tribe has not obtained EPA approval of water quality standards and the discharge is on the FIR
- 3) Role of permits other than authorized NPDES or sludge management permits issued by Tribes on FIRs

#### Discussion

- 1) EPA's role and responsibilities where:
  - a) Tribes are the authorized permitting authority for activities on the reservation

EPA is in the process of finalizing regulations to allow authorization of NPDES and sludge management programs for Federally-recognized Indian Tribes which meet the statutory criteria for EPA recognition contained in section 518(e)(2). The draft proposed regulation is published at 57 FR 8522, March 10, 1992. The final regulation has cleared OMB and will be published shortly.

At present, EPA is aware of interest on the part of several Tribes in NPDES and/or sludge program authorization. Upon EPA approval, the Tribe would take over responsibility for issuance of permits and administration of the NPDES and/or sludge programs on the reservation. Existing regulations already contain provisions addressing transition from EPA-issued permits to State-issued permits. 40 CFR 123.1(d); 123.24(b); 501.1(f) and 501.14(b)(1). Once the regulation is finalized, these regulations should also enable the transition of permitting authority from EPA to an Indian Tribe.

After approving Tribal authorization, EPA:

- o evaluates and oversees the Tribe's NPDES or sludge program,
  - o provides enforcement as necessary, including accepting referral of criminal enforcement cases involving nonmembers of the Tribe,
  - o oversees grant programs, and
  - o continues to provide administrative and legal support plus technical assistance and training.
- b) States have, in fact, issued permits for activities on the reservation

Under 40 CFR 123.23(b) and 501.13, in order to be authorized by EPA to issue permits on Indian lands as part of a State NPDES or State sludge management program, the State seeking to carry out either the NPDES or sludge management programs on Indian lands must provide a specific analysis of its authority to do so in the Attorney General's statement supporting its program submission. We are not aware of any cases where EPA has approved a State's demonstration of NPDES permit authority on FIRs, although some have asserted such a claim.

In a number of cases, a State has operated as the de facto NPDES permitting authority on FIRs in that it has issued permits to sources on the reservation and EPA has not issued a separate permit to these sources. EPA will, whenever possible, assume, without deciding, that such existing permits on FIRs issued by States without specific authorization under §§123.23(b) or 501.13 contain enforceable limits. EPA's preliminary position on this issue was expressed in a September 9, 1988 letter from EPA's then General Counsel, Lawrence Jensen, to Dave Frohnmayer, Attorney General for the State of Oregon. That letter provides:

EPA is aware that some states have issued NPDES permits to certain dischargers on reservation lands. Until the NPDES program is delegated to a tribe, or until EPA otherwise determines in consultation with a state and tribe that a state lacks jurisdiction to issue NPDES permits on Indian lands, we will assume without deciding that those permits contain applicable effluent limits, in order to ensure that controls on discharges to reservation waters remain in place.

Additionally, the Office of Water issued a memorandum to the Regional Administrators on October 26, 1988 reiterating this position.

In several proposed CWA rulemakings, EPA received comments on the interim statements made in Jensen's letter. Note that

this policy is not an assertion that all State permits for reservations are necessarily valid as a matter of law. Rather, it is a mere recognition that fully implementing a role for Tribes under the CWA will require a period of transition. Were EPA simply to ignore all previously issued State permits in the interim period before the Tribes develop NPDES or sludge management programs (or EPA issues a federal permit), there would be a regulatory void which EPA believes would not be beneficial to preservation of water quality.

In the absence of State-Tribal agreements regarding permitting, EPA Regions must ensure in the future that NPDES States which are not authorized by EPA on Indian lands are not acting as the NPDES permit authority on reservations for any discharges (whether Tribally-owned or not). Prior to Tribal assumption of the NPDES or sludge management programs where a State had previously issued permits on the reservation, only EPA should issue or reissue permits to dischargers on FIRs. In most cases, application of 40 CFR Part 503 regulations is appropriate for sludge management activities.

2) Applicable water quality standards and certification considerations for EPA permitting activities

EPA must establish permit conditions necessary to achieve compliance with the Clean Water Act whether permits are issued on or off FIRs. NPDES regulations require NPDES permits to include any limits which are necessary to ensure compliance with applicable State or Tribal water quality standards established under section 303 (40 CFR 122.44(d)(1)), plus limits contained in a State or Tribal certification under section 401 (40 CFR 122.44(d)(3)), and applicable water quality requirements under section 401(a)(2) where a discharge affects States or Tribes other than the certifying State or Tribe (40 CFR 122.44(d)(4)).

A number of different considerations apply depending upon whether a Tribe has obtained EPA approval for its water quality standards under section 303, as discussed below.

a) Situations where Tribal standards are approved and:

i) The discharge is on the FIR

In some cases, there may be a discharge on the FIR for which the Tribal water quality standards have been approved by EPA. The Agency will apply EPA-approved section 303 Tribal water quality standards to develop permits. Tribes qualified under the section 303 program are also qualified to provide water quality certification under section 401(a). EPA then sends the permit to the Tribe for certification.

Under section 401(a)(1), EPA may not issue the permit unless the 303-approved Tribe certifies conformance with its water quality standards, or waives its authority to act on a request for certification [40 CFR Parts 121.16, 124.53(a), and 124.55(a)(1).]

ii) The discharge is upstream of the FIR

In some cases, there may be a discharge upstream of the FIR, and reason to believe that water quality on the FIR may be affected. If EPA is the permitting authority, EPA must include limits necessary to achieve compliance with any applicable State or Tribal 303 water quality standards at the State or reservation boundary.

In situations where a State is the upstream NPDES permitting authority and downstream FIR Tribal water quality standards have been approved by EPA, the State will provide notice of the preparation of a draft permit to the affected Tribe pursuant to CWA sections 401 and 402. Under CWA sections 402(b)(3) and 40 CFR 124.12(a), the upstream NPDES State must provide an opportunity for public hearing on the issuance of the draft permit where there is significant public interest in so doing. Under CWA section 402(b)(5), the affected Tribe may submit written recommendations to the permitting State and EPA, and the permitting State must notify the affected Tribe and EPA of its failure to accept the recommendations and the reasons for doing so. EPA can object to the upstream State permit where EPA believes that the reasons for rejecting the recommendations are inadequate (40 CFR 123.44(c)(2)).

b) Situations where the Tribe has not obtained EPA approval of water quality standards and the discharge is on the FIR

Regions are encouraged to meet with Tribes and encourage adoption, at least as a matter of Tribal law, of some initial water quality standards, even if based in part on preexisting State standards. In the absence of approved Tribal water quality standards, EPA will establish permit conditions necessary to achieve water quality standards as discussed below.

Some States have issued standards for waters located on FIRs, although such standards may not apply as a matter of law to Indian lands. Nevertheless, unless and until the Tribe adopts its own standards or EPA promulgates standards for the waters, EPA will use such preexisting State standards (including the narrative "no toxics" criteria) case-by-case as the starting point in developing water quality-based limitations for discharges on FIRs.

Until a Tribe is authorized under section 303, EPA is the certification authority [40 CFR 121.1(e)]. Tribes not approved

under CWA section 303 have no section 401(a)(2) right to object. However, a Tribe can comment to the permit authority, arguing that limits are not adequate to assure compliance with State water quality standards at the State/reservation boundary, or preexisting State standards (including the narrative criteria.) In addition, Regions should work with Tribes who have adopted water quality standards not yet approved by EPA to ensure that, to the extent practicable, NPDES permits issued on the reservation achieve compliance with those standards.

3) Role of permits other than authorized NPDES or sludge management permits issued by Tribes on FIRs

Tribes which are not authorized NPDES and/or sludge management authorities may undertake Tribal surface water discharge or sludge management permitting activities on the FIR. Such permits may be authorized under Tribal law and/or regulation, but are not considered Federal NPDES permits. In this case, to develop the NPDES permit, the EPA Region should work closely with the Tribe to apply Tribal permitting considerations and conditions (e.g., monitoring and reporting frequencies, terms, etc.) as much as possible, as long as these meet or exceed Federal requirements.

We hope that this guidance is helpful. Please let us know if you have any questions.

cc: Al Morris, Region III  
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