CHAPTER FIVE
NATIONAL ENVIRONMENTAL POLICIES, MULTIPLE SOVEREIGNS, AND SOLID WASTE MANAGEMENT IN INDIAN COUNTRY

Introduction

National environmental policy, in the form of federal environmental statutes and regulations, has sought to address a wide range of environmental problem areas. The creation of the U.S. Environmental Protection Agency (EPA) in 1970 and the passage by Congress of many environmental statutes radically changed the management of the environment that had traditionally been the responsibility of state and local governments. Over the last twenty-five years, environmental regulations have experienced tremendous growth. Clean air, clean drinking water, nuclear waste, ocean pollution, solid waste management, and the protection of fish and wildlife species have become areas of increasing concern. For some states, complex federal statutes replaced highly developed bodies of state administrative law; for others, the complex federal laws meant building an administrative mechanism that did not necessarily fit existing state institutions.

Federal environmental statutes and regulations establish certain uniform nationwide environmental quality standards as a floor or baseline and serve to define the scope of the problems and to find ways to contain and remedy existing and worsening conditions. However, tribal interests have traditionally had little voice at the various points of influence that strike the balance necessary to get environmental protection laws enacted, regulations promulgated, and enforcement actions initiated.

Until recently, the implications of environmental protection laws for tribes have not been a focal point of concern for either the federal and state governments or any of the national environmental advocacy organizations. However, the web of federal interactions within environmental policy is becoming increasingly complex. Therefore, it is important to understand how relationships between multiple sovereigns work on the implementation of such policies, which is the focus of this chapter.
Part I of this chapter provides an overview of how federal environmental statutes and regulations affect multiple sovereigns. Also, one particular environmental statute, the Resource Conservation and Recovery Act, will be examined closely since it is the foundation of solid waste management and is relevant to this study. Part II of this chapter expands on this discussion by examining environmental problems and solid waste management in Indian country.

Part I – Effects of Federal Environmental Statutes and Regulations on Multiple Sovereigns

Compliance with federal environmental statutes and regulations is one of the most difficult challenges facing both the public and private sectors today. There are more than twenty major environmental statutes today and each of these environmental statutes has an equally complicated enforcement scheme. The EPA’s Office of Enforcement and Compliance Assurance, the Department of Justice’s Environment and Natural Resources Division, and state and local environmental authorities carry out enforcement. Since its inception, EPA has relied on a strong, aggressive enforcement program as the centerpiece of its efforts to ensure compliance with national environmental laws.

Most environmental statutes also have citizen suit provisions, which enable environmental advocacy groups to sue in order to enforce compliance with environmental regulations. Enforcement takes the form of administrative, civil, and criminal actions against regulated entities for violations of the many environmental requirements. In recent years, the number of federal actions has skyrocketed, as has the cost of compliance. These traditional, adversarial enforcement strategies have played a part in achieving compliance with environmental statutes. However, with limited resources available there are constraints on the extent of compliance, and, ultimately, the environmental benefits that can be attained.

The division of governmental power into smaller units complicates environmental protection because environmental problems recognize no such boundaries. Frequently, an environmental problem in one area (e.g., a state) is caused by conduct in another.
When one sovereign attempts to engage in environmental regulation, its actions may well have repercussions on another sovereign. For example, individual states in which the public is highly motivated to deal with environmental problems may take action without being deterred by the less-interested citizens of other states. This allows the state government to be more responsive to the desires of the population.\footnote{10} Also, states may act as laboratories in which various forms of environmental regulation may be tested before application.\footnote{11}

In the above context, federalism is both a problem and a solution. For example, Congress may be reluctant to enact legislation that infringes on the traditional prerogatives of the states.\footnote{12} Therefore, the importance of a balanced relationship between sovereigns such as the federal and state governments cannot be overemphasized. In Trust and the Politics of Implementation: Federalism and Environmental Policy, Denise Scheberle notes that:

Federalism is not only a constitutional principle – it strikes at the very core of policy implementation. Formal federal-state arrangements (such as granting a state primacy or providing federal funding for a state program through a cooperative agreement) represent one level of federal-state interactions. Regular interactions between federal and state personnel form the grist of federal-state working relationships. Failing to appreciate the complexities of federal-state working relationships is to miss an important element of implementation. Moreover, the potential range of relationships moves from confrontational (if federal implementers adopt unyielding role orientations toward their state counterparts) to strategic (when federal and state implementers come together to preserve a program).\footnote{13}

Professor David Haddock, however, argues that the plethora of federal environmental laws has produced a one-size-fits-all policy that he refers to as a “delegation model” that has left too many problems unsolved and has led to a huge environmental bureaucracy.\footnote{14} According to Haddock, this “delegation model” typifies environmental laws and regulations today. In Using Federalism to Improve Environmental Policy, authors Henry Butler and Jonathan Macey focus on the institutional settings in which environmental polices are adopted.\footnote{15} Butler and Macey contend that the current centralization of environmental regulation has led to inflexibility
and inertia in the federal government as it attempts to respond to widely diverse problems. These arguments indicate that the area of environmental regulation is fraught with complexities for all sovereigns due to a variety of concerns such as different statutory wordings and intents as well as complex intergovernmental relationships.

**Federal Environmental Statutes and the Federal Government**

In 1990, federal agencies were given a rude awakening. The U. S. Court of Appeals for the Fourth Circuit affirmed the criminal felony conviction of three high level federal managers at the U.S. Army Proving Ground in Aberdeen, Maryland because of illegally handling, storing, and disposing of hazardous wastes in violation of the Resource Conservation Recovery Act. These multiple violations occurred between 1983 and 1986 as stated in the court transcripts of *U.S. v. Dee*, 912 F.2d 741 (1990). Although the defendants were not imprisoned, this one court case sent shock waves throughout the federal community and highlighted the fact that all was not well environmentally on federally owned and operated facilities. In response, Congress modified existing laws and enacted new ones to demand that federal agencies comply with all environmental requirements. Federal agencies, just like the private sector, are required to comply with environmental requirements.

One of the more significant statutes that was enacted and which affects federal facilities is the Federal Facilities Compliance Act of 1992. This statute requires that federal facilities must comply with all applicable federal, state, interstate, and local solid and hazardous waste requirements. Facilities are defined for the federal government in the following manner:

Any building, installation, structure, land, and other property owned or operated by, or constructed or manufactured and leased to, the federal government, where the federal government is formally accountable for compliance under environmental regulation (e.g., permits, reports/records and/or planning requirements) with requirements pertaining to discharge, emission, release, spill, or management of any waste, contaminant, hazardous chemical, or pollutant. This term includes a group of facilities at a single location managed as an integrated operation, as well as government owned contractor operated facilities.
The statute provides EPA and states with authority to assess fines and penalties against federal facilities under the Resource Conservation and Recovery Act.\textsuperscript{6} Also, EPA and states gained additional federal facility enforcement authorities as a result of the Safe Drinking Water Act Amendments of 1996.\textsuperscript{7} More recently, EPA’s enforcement and penalty authorities for federal facilities have been clarified for the Clean Air Act and Underground Storage Tank programs. To ensure that federal agencies adhere to environmental requirements, EPA monitors federal agency compliance, issues and assesses fines and penalties, and develops federal agency enforcement and compliance policy and guidance.

Federal agencies are also subject to the requirements of Executive Orders (E.O.) that address environmental issues. E.O. 12088, “Federal Compliance with Pollution Control Standards,” not only makes the head of each federal agency responsible for compliance with applicable pollution control standards, it also directs EPA to provide technical advice and assistance to those agencies to ensure effective and timely compliance.\textsuperscript{8} E.O. 12856, “Federal Compliance with Right-to-Know Laws and Pollution Prevention Requirements,” directs federal agencies to practice pollution prevention by developing agency strategies and facility plans that promote source reduction and also directs EPA to provide technical assistance to federal agencies to meet those requirements.\textsuperscript{9}

On April 22, 2000, President Clinton signed a new Executive Order on “Greening the Government Through Leadership in Environmental Management.”\textsuperscript{10} The order requires that the head of each federal agency integrate environmental accountability into agency day-to-day decision making and long-term planning processes across all agency missions, activities, and functions. Furthermore, the order requires that environmental management considerations must be a fundamental and integral component of federal government management, policies, operations, and planning. Therefore, the federal government must not only “tow the line” but also demonstrate leadership in terms of overall environmental management of its own house. These executive orders coincide with one of EPA’s core tenets that the federal government should equal or surpass the
rest of the regulated community and that federal facilities should lead the way in minimizing environmental contamination and impacts to public health.

Some types of activities that subject federal facilities to environmental requirements include construction, facility and laboratory operation, material storage and shipment, and vehicle fleet management. Many Department of Energy and Department of Defense activities involve large-scale manufacturing of an industrial nature. Some military installations are the equivalent of small cities that may include hospitals, sewage treatment plants, roads, and airports. Other federal agencies, however, have entirely different missions. For example, the U. S. Department of the Interior manages over 450 million acres of federal lands including national parks and seashores, fish and wildlife refuges, Indian trust lands, and offshore jurisdiction of approximately 3 billion acres of the Outer Continental Shelf. The Department employs more than 66,000 employees who work at more than 4,000 sites across the United States, all of which have various forms of facilities on them.

For Fiscal Year 2001, federal agencies submitted nearly $4.5 billion in budget requests to fund 10,420 environmental cleanup projects. In Fiscal Year 2000, civilian federal agencies submitted $7.25 billion to fund 17,270 projects. These included more than 2,500 Resource Conservation and Recovery Act regulated facilities, approximately 4,500 Federal Safe Drinking Water Act regulated facilities, and nearly 5,000 federal facilities with Clean Air Act and National Pollution Discharge Elimination System permits.

Federal Environmental Statutes and States

As previously discussed in the introductory section of this chapter, the states were performing the overwhelming majority of environmental protection functions long before EPA. States administer most federal environmental programs. Generally, a state petitions EPA to administer a program (e.g., hazardous waste), a process, known as “delegation,” or more legally as “assumption,” or “primacy.” The governor files a petition after the legislature has passed authorizing legislation that must be at least as
...stringent as the federal standard and after the state has shown that it has adequate resources. Following these requirements, states will then issue most of the permits and initiate most of the enforcement and compliance actions for delegated federal programs and state-developed programs.²⁹

Most federal environmental programs are actually delegated in a piecemeal fashion. For example, a state may have created a program for new air pollutant performance standards but may not have everything in place yet to run the hazardous air pollutant part of the Clean Air Act. This allows a state to proceed incrementally, but it complicates the discussion about what is delegated and which level of government runs which program.³⁰

States are the primary enforcers of environmental regulations for delegated programs. They are allowed to enforce their own environmental regulations that may be more stringent than federal statutes.³¹ States performed 97 percent of all inspections in 1997 and 1998 for the Clean Air Act, Clean Water Act, and the Resource Conservation and Recovery Act.³² Many states have also developed programs for providing compliance assistance to regulated entities rather than rely strictly on enforcement measures.

The increasingly high costs of environmental protection have to be borne by the federal, state, and local governments, tribes, and the private sector. States, however, do receive assistance from the federal government in the form of grants to carry out specific environmental programs such as clean drinking water. In 1995, EPA established Performance Partnership Grants to give states the option of combining multiple grants into a single grant and to target their resources towards their most pressing environmental problems.³³ State environmental personnel who were interviewed repeatedly emphasized the need for such resources to fund critical environmental programs administered by them. They asserted otherwise that such environmental programs turn into unfunded mandates. States are then challenged to fund the federal requirements from very limited tax based revenues or to divert funds from other state programs that may be equally critical.
Some states, such as California and New Jersey, have taken initiatives to provide their citizens and their environment with protection beyond that generally available under the federal statutes. Examples of such initiatives include toxic waste minimization laws in Massachusetts, that impose mandatory waste reduction on companies that use or generate toxic wastes; environmental disclosure laws (e.g., Proposition 65) in California that require efforts to make the public aware of health risks with products or environments to that they are exposed; property transfer environmental laws in New Jersey, that require extensive investigation and cleanup of contaminated sites before they are sold or transferred, and, finally, state groundwater protection laws, that are very strict in many states. Although the federal government has not adopted comprehensive groundwater protection legislation, many states have detailed permit programs.

Federal and state environmental statutes rely on a multitude of governmental structures for implementation, including regional organizations such as river basin commissions, international joint commissions, and air quality management districts. Municipalities, counties, and special districts have played especially important roles in the implementation of various environmental laws. “Local” does not necessarily mean trivial and the repercussions can be as immediate and severe as those from actions taken at the state or federal level. Localities can have great power to control the location and operation of facilities within their jurisdictions and are often able to utilize this authority effectively. Active community involvement and participation in consideration of local ordinances is, for a number of businesses, essential to continued ability to operate profitably. Environmental issues of concern include the operation of local waterworks, waste treatment plants, local recycling initiatives, zoning, noise control ordinances, air emission requirements, landfill restrictions, and local emergency planning initiatives.

**Federal Environmental Statutes and Tribes**

Tribes, like states, can be delegated or authorized to manage environmental laws. Delegation allows a state or tribe to apply federal environmental statutes in the place of the federal government. Under delegation, a tribe implements the federal law in precisely...
the same way as the EPA. Authorized status allows a state or tribe to apply its own laws. In the case of tribes, usually this is in the form of tribal codes and ordinances. For authorization, tribal codes or ordinances must meet the applicable statute requirements, and their laws must be at least as stringent as federal environmental statutes. Authorized tribes may administer their own environmental programs, which may vary from tribe to tribe. To-date, three environmental statutes that have been amended to allow for EPA authorization of tribal programs include the Clean Air Act, Clean Water Act, and the Safe Drinking Water Act.

The EPA has discretion to allow for tribal programs under other environmental laws, e.g., the Toxic Substances Control Act. EPA policy recognizes the government-to-government relationship between EPA and tribal governments. EPA policy also recognizes the federal government’s trust responsibility and the role of tribes as the most appropriate party for regulating their own environment.

Each statute, however, defines somewhat differently the conditions under which EPA may authorize or delegate such authority to either states or tribes. Therefore, questions always exist over the appropriate allocation of state and tribal regulatory authority. Jurisdictional complexity is compounded by the fact that states and tribes often address environmental concerns through laws that operate independently and at times concurrently with federal statutes. In the case of tribes, this is especially important because the applicability of such laws must then be carefully determined as to the scope of civil regulatory jurisdiction within Indian country.

Relying on their inherent powers, an increasing number of tribes are enacting their own laws and programs to regulate environmental quality. Within the context of federal environmental statutes, we now turn to the Resource Conservation and Recovery Act, whose features have implications for all sovereigns, especially tribes.

The Resource Conservation and Recovery Act

The EPA’s statutory definition of “solid waste” has evolved over time. In general, solid waste means materials ranging from non-hazardous wastes, such as
municipal garbage, to hazardous wastes, such as mercury generated from industrial processes. The waste does not have to be in solid form. Under the Resource Conservation and Recovery Act (RCRA), the statutory definition of solid waste is as follows:

Solid waste means any garbage, refuse, or sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities, but does not include solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows or industrial discharges which are point sources subject to permits under § 402 of the Clean Water Act, or certain radioactive wastes regulated under the Atomic Energy Act of 1954.

The statutory definition is often a matter of great confusion and a source of continuing legal debate in cases involving violations of solid waste management requirements.

RCRA was enacted in 1976 to address the huge volumes of municipal and industrial solid waste generated nationwide. After several amendments, the Act as it stands today governs the management of solid and hazardous waste and underground storage tanks. RCRA’s overall goals are described as follows: (1) to protect human health and the environment from the hazards posed by waste disposal; (2) to conserve energy and natural resources through waste recycling and recovery; (3) to reduce or eliminate the amount of waste generated, including hazardous waste; and, (4) to ensure that wastes are managed in an environmentally safe manner.

The provisions of RCRA for the purposes of this study are divided into two major parts: one deals with managing hazardous waste (Subtitle C) and the other deals with managing nonhazardous waste (Subtitle D). Although this study will focus primarily on nonhazardous waste (Subtitle D), the lines of demarcation between hazardous and nonhazardous waste are often unclear, and so some aspects of hazardous waste management are also covered.

A third part of RCRA concerns the management of underground storage tanks (Subtitle I), and a fourth relates to medical wastes (Subtitle J). Neither Subtitle I or
Subtitle J will be part of this discussion. The EPA may delegate Subtitles C and I in whole or in part to the states and tribes for enforcement purposes, Subtitle D is exclusively administered by the states for enforcement purposes. However, EPA still administers Subtitle D delegations for tribes.

When first enacted, RCRA was silent on tribes, and as an afterthought, Congress inserted language into the amended statute that treated tribes as municipalities. Although this may have little meaning for Congress, it has great significance among the tribes because they view themselves at a level beyond state governments. As discussed in Chapter Three, tribes believe themselves to be unique sovereign nations based on case law, treaties, and executive agreements and orders. Currently, RCRA is the only federal environmental statute that does not have specific provisions to treat tribes in the same manner as states. Attempts to insert this newer language into RCRA have failed because legislative attempts by Congress to amend RCRA in its entirety have failed.

The EPA, however, has attempted to extend the opportunity to address tribes under RCRA. Specifically, EPA planned to offer permitting program approval for municipal solid waste landfills to tribes as well as states. On October 26, 1996, the U.S. Court of Appeals for the District of Columbia Circuit in *Backcountry Against Dumps v. EPA* ruled that EPA could not approve tribal permitting programs. However, the court noted that EPA and the tribe did not need to wait for Congress to amend RCRA to obtain flexibility in complying with municipal solid waste landfill criteria. Instead, the court suggested that EPA could issue a site-specific rule satisfying both the intent of RCRA and an owner or operator’s need for flexibility. EPA published such a guidance document for tribes in August 1997. The decision by the court addressed the question of EPA’s authority to treat a tribe as a state in absence of a statutory provision. The EPA believes, however, that it still has the authority to review and approve tribal programs under other statutes, such as the Toxic Substances Control Act, which are silent with respect to tribes.
RCRA’s Citizen Suit Provision

One provision in RCRA is of major concern to tribes. Section 7002 of RCRA allows anyone, including a tribal member or a tribe, to file a civil law suit in federal district court against any person or governmental entity, including a tribe, which is alleged to be in violation of any requirement of RCRA. This section of RCRA is commonly referred to as the “citizen suit provision.” For example, a local community outside of tribal lands can sue EPA to seek enforcement of RCRA requirements, such as the prohibition against open dumping on tribal lands, and asking the court to order compliance by the tribe with RCRA requirements.

The following two court cases illustrate the citizen suit provision under RCRA. In *Blue Legs v. U.S. Bureau of Indian Affairs*, 901 F. Supp. 1481 (N.D. Cal. 1995), members of the Ogala Sioux Tribe brought suit against the tribe, BIA, and the IHS, alleging that garbage dumps located on the reservation violated RCRA. The court held that the RCRA statutory definition of “person” included all municipalities, and municipalities are defined to include an Indian tribe or authorized tribal organization. A similar decision was reached in *Atlantic States Legal Foundation v. Salt River Pima – Maricopa Indians*, 827 F. Supp. 608 (D. Ariz. 1993). In this case the Foundation filed an action under RCRA and the CWA, alleging that the Indian community’s landfill discharged pollutants into the Salt River. The court held that the term “person” in the relevant portions of RCRA and the CWA included Indian tribes and that the Indian community’s sovereign immunity was waived.

When the alleged violation concerns hazardous waste and takes place within reservation boundaries (whether trust or fee lands) or on other land under the tribe’s jurisdiction or concerning open dumping of solid waste, an individual can seek enforcement of federal standards contained in RCRA. A party bringing a suit to enforce hazardous waste requirements can seek civil penalties payable to the United States of up to $25,000 per day per RCRA violation. When a federal statute, such as RCRA, indicates that it applies to tribes, tribal sovereign immunity cannot bar enforcement of the statute. Other parties, including non-Indians, may sue tribes in federal court. Therefore, Indian
tribes are responsible for compliance and share responsibility as any other governmental entity or person under the provisions of RCRA.

Part II – Environmental Problems and Solid Waste Management in Indian Country

There are many environmental problems in Indian country. Some of these were not caused by the tribes themselves, but by federal agencies working on tribal lands. For example, some Department of Energy facilities in Indian country have uranium mines that make a significant impact on tribal watersheds. These sites need to be carefully cleaned up in order to prevent serious human health and environmental effects. In other cases, there are environmental problems with facilities that were built by the federal government to assist tribes. For example, the BIA operates facilities and schools that have contamination problems with asbestos. Other concerns include environmental issues resulting from road construction by the Department of Transportation and noise pollution from overflights that are regulated by the Federal Aviation Administration.

In the 1930s, both the BIA and the IHS encouraged tribes to develop designated areas on tribal lands to dispose of their municipal solid waste (e.g., household trash). The belief at the time was that if municipal solid waste were deposited in designated areas, the waste could then be collected and periodically burned to prevent overcapacity and potential disease vectors (e.g., vermin). Unfortunately, many of these designated areas developed into nothing more than open dumps. Also, many federal agencies dumped their wastes on Indian lands and there was often commingling of non-hazardous municipal solid waste with hazardous waste (e.g., pesticides) in these designated areas. Solid waste landfills and open dumps are the most common sources of land pollution. One important consequence of land pollution from solid wastes is that they can contaminate a community’s source of drinking water.

The EPA promulgated criteria to designate conditions under which solid waste disposal facilities and practices would not pose adverse effects to human health and the environment. Facilities that failed to satisfy the criteria were considered “open dumps”
requiring attention. As a result, open dumps had either to be closed or upgraded to meet the criteria for sanitary landfills.

Solid waste management and reduction laws have caused a significant change in the role of tribal governments in handling their solid waste. Prior to the passage of RCRA at the federal level, most tribes disposed of their own solid waste on their own lands. However, federal regulation forced many tribal governments to close landfills or turn them over to other local governments or private entities. This raised a significant dilemma in terms of prioritizing tribal needs throughout Indian country, such as community employment initiatives versus solid waste management. Today, tribes face unique challenges in terms of solid waste management since there are issues related to remoteness of sites, funding, jurisdiction and staffing. A tribal environmental manager summed up the situation this way:

Only five percent of tribes, like mine, enjoy the wealth of gaming. Many tribes are in need of basic resource management tools – whether it is a forest management are plan or drinking water protection.51

In the early part of 1993, the Indian Health Service (IHS) of the U.S. Department of Health and Human Services compiled a list of open dumps in Indian Country based upon surveys obtained by IHS area offices.52 They found that there were at least 600 open dumps on American Indian lands. These open dumps threatened the health and safety of residents and contiguous areas. Many of these dumps were established or used by federal agencies such as the BIA and the IHS.53

Since tribes lacked the financial and technical resources necessary to close and maintain these open dumps in compliance with RCRA, the Congress responded by enacting legislation. The “Indian Lands Open Dump Cleanup Act of 1994” provided for: (1) the identification and location of open dumps on Indian lands, (2) the assessment of health and environmental hazards posed by open dumps, and (3) financial and technical assistance to tribes to close these dumps.54 Starting in 1994, the IHS prepared annual reports on open dumps on Indian lands. These reports are current as of December 31st of each year.
There is a significant lag time on issuing these reports and they are generally issued sometime in the following year and usually coincide with a new fiscal year for the federal government. For example, the 1998 IHS Report on Open Dumps on Indian Lands is the most current report at the time of this writing.\textsuperscript{55} It is important to note, however, that the data within such a report quickly become out-of-date as new open dumpsites are discovered or others closed. This has a direct impact on funding decisions for open dump cleanup projects, which may become the victims of old data. Furthermore, intergovernmental rivalries and turf battles between federal agencies like the BIA and the IHS can often compound the problem.

The 1998 IHS Report inventoried 1,104 open dumpsites on Indian lands.\textsuperscript{56} This was slightly less than the 1,162 open dumpsites inventoried in the 1997 IHS Report but still represents a substantial increase from the 722 open dumpsites inventoried in 1996, when the report began.\textsuperscript{57} In its 1998 Report, the IHS estimated that over $126 million was needed for cleanup of these open dumpsites.\textsuperscript{58}

Tribes continue to be faced with the problems of the past and significant numbers of open dumps remain and are particularly acute in remote access sites (e.g., Alaska) where there is lack of infrastructure (e.g., roads). Also, many tribes are at different stages in the development of their respective solid waste management programs. While many tribes have made considerable progress and developed very sophisticated programs, their economic status and ability to obtain government grants seem to determine a large part of their solid waste management efforts. As mentioned earlier in this chapter, some tribes take the position that without assistance from the federal government solid waste management on tribal lands is an unfunded mandate from Congress.

In some cases, due to their remoteness, tribes have few options other than landfilling on the reservation, while other tribes may have more options, such as sending waste to nearby off-reservation landfills. Also, participation and support by all tribal members (e.g., tribal council, tribal elders, tribal schools, etc.) are extremely important for environmental programs to work in Indian country. These must be generated from
within the tribal community itself. One interviewee confirmed this and further commented that tribal communities have to “own up” to their problems.

The EPA Office of General Counsel has been involved in a significant amount of litigation related to the implementation of environmental programs and regulations in Indian country. According to information obtained from that office, there are two methods of implementing regulations and programs on tribal lands: (1) direct implementation, in which EPA is responsible for enforcing environmental laws and regulations on tribal lands, as well as directly implementing programs and, (2) approval of tribal programs by EPA, a method under which the tribe implements its own programs. The EPA’s Policy for the Administration of Environmental Programs on Indian Reservations, issued in 1984 and reaffirmed in 1994, recognizes that tribes should implement their own environmental programs. If there are barriers that prevent a tribe from implementing its own program, EPA will help assist them to remove such barriers.

If tribes are to assume responsibility for many of EPA’s major regulatory programs, they must go through an administrative process described as “treatment in the same manner as a state,” otherwise called TAS. The term was first used in the 1986 and 1987 amendments to the Safe Drinking Water Act (SDWA) and the Clean Water Act (CWA). EPA changed “treatment-as-states,” to “treatment in the same manner as a state” in 1994 because many tribes objected to the original phase, commenting that they are not states; rather, they are sovereigns and have a government-to-government relationship with the United States.

The 1986, 1987, and 1999 amendments to the SDWA and the CWA requested that the EPA develop a process by which tribes could apply for grants and program authority. The EPA established a process for TAS eligibility under various programs, according to the criteria identified in SDWA and CWA. In 1999, Congress also included TAS provisions in the Clean Air Act Amendments.

Generally, the criteria for TAS designation of a tribe are as follows:

1. The tribe must be federally recognized.
2. The tribe must have or be able to exercise delegated jurisdiction over the area in question.

3. The tribe must have or be able to exercise substantial governmental powers.

4. The tribe must be expected to have the financial, physical, and human resource capability to effectively implement a program.

Except for RCRA, tribes now have the means to assume nearly all responsibility for the enforcement of federal environmental programs throughout Indian country and about 130 tribes are so designated. However, assuming such functions means that a tribe must have both funding and technical resources in-house in order to administer such programs. Some tribes, like the Gila River Indian Community in Arizona, have their own Department of Environmental Quality with highly technical staffs to administer their various environmental programs. Other tribes, like the Lac du Flambeau Band of the Lake Chippewa Indians located in Wisconsin, have contracted with environmental consultants for such work and have developed a solid waste tribal code. Still, other tribes do not have the means or resources to handle such programs.

Environmental Conditions in Indian Country Today

Of all the federal agencies, EPA is at the forefront in dealing with environmental conditions in Indian country. Although conditions have improved over the years, more needs to be done as indicated in the following statement made at a training conference in 1999 by EPA’s American Indian Environmental Office Director.

Tribal lands include some of our country’s most cherished and pristine land, but they are also located near some significant sources of pollution... There are hundreds of sources of air pollution in Indian country. The vast majority of surface and ground water is not being monitored, and there are no established water quality standards for many areas. There are still many tribes that have not yet been able to receive a basic grant for their capacity building. In the last few years, another major issue identified is waste management. Unfortunately, EPA has funding to assist tribes, but only with technical assistance. EPA does not have the authority or funding to do actual construction work such as cleaning up open dumps.
This statement by an EPA official confirms the overall environmental conditions in Indian country and especially solid waste. Certainly more resources would assist in correcting these environmental conditions. At the same meeting, the Director of the National Environmental Tribal Council linked the issue of sovereignty to environmental conditions in Indian country in the following manner:

EPA continues to lead the way for government-to-government relationships within the federal agencies. Tribes are sovereigns with inherent authority. They are legitimate governments that can exercise authority in their own right. Tribes are not given those rights, they are inherent rights. This should be remembered in dealing with federal and state governments. These rights serve as a backdrop for much of the litigation that has come about. The tribes’ and their attorneys know for the best what the individual tribe’s status is, but nonetheless, tribes are sovereign. Oftentimes they are not treated as such. Sometimes they are treated as some sort of second-class people or some subordinate government. In fact, our relationship with this country, this fledgling country, goes back here in the state of Maine to when it was the district of Maine, long before the state came into existence.67

The Director’s statement is important because what this really means is that federal environmental statutes and regulations have affected all sovereigns at many levels. In seeking to provide uniform national environmental standards, multiple relationships between multiple sovereigns have emerged in order to remedy environmental problems and to effectively work the numerous political arrangements that have emerged in the environmental area. Initially, other sovereigns left tribes out of the process in terms of participating in environmental decision-making. However, that situation is now changing and tribes are being brought into the policy process. Environmental problems in Indian country are numerous, as we have seen in solid waste management. It is only fair that tribes, as sovereigns, specify the levels of protection for their lands under RCRA.

Summary

National environmental policies are of concern to all sovereigns and solid waste management provides a lens to view these various arrangements across the divide of
federalism and tribal governance. In particular, solid waste management is a major concern on tribal lands because of co-mingling of hazardous and non-hazardous wastes in open dumps, old landfills and by illegal dumping which has caused contamination of drinking water supplies both on tribal lands and in surrounding communities. We have seen that various relationships between multiple sovereigns are often very complex and unclear. These arrangements present unique challenges for public administrators at all levels of governance.

In the next three chapters, we examine specific tribal solid waste management projects and programs within the context of uncooperative, cooperative formal, and cooperative informal relationships respectively. These patterns of relationships are complex for both tribes as well as for federal and state governments. In more than one instance, a particular tribal solid waste management project or program may cause relationships between sovereigns to be entirely uncooperative. Yet, another tribal solid waste management project or program may result in such relationships to be entirely cooperative and successful. We now turn to Chapter Six, which will focus on multiple sovereigns and uncooperative relationships.
NOTES


10 Ibid, 221.

11 Ibid, 222.

12 Ibid, 223.

13 Scheberle, 16.


16 Ibid, 4.


18 42 U.S.C.A. § 6961.


26 Ibid, 10 April 2000.

27 Ibid, 10 April 2000.


29 Ibid, 224.

31 Ibid, 3.

32 Personal communication, EPA Office of Enforcement and Compliance Assistance, 18 February 2000.


36 Ibid, 199-200.

37 Sullivan, 66.


39 “EPA Indian Policy” Administrator Carol Browner’s Memorandum (March 14, 1994).

40 “Indian Tribes: Air Quality Planning and Management,” 12 February 1998, 63 Federal Register 7255-7256.

41 Ibid, 7255.

42 42 U.S.C.A. § 6903 (27).

43 Hall and Davis, 6-13.

44 Ibid, 15

45 42 U.S.C.A. § 6903 (13).

46 Backcountry Against Dumps v. Environmental Protection Agency, 100F.3d 147 (D.C.Cir.1996).

48 Getches et. al., 628-629.

49 42 U.S.C.A § 6972.

50 Hall and Davis, 63-66.

51 Personal communication, 8 June 1999.

52 Personal communication, 16 November 1998.

53 Ibid.


56 Ibid, 1.


58 Ibid, 6.

59 Interview, Senior Environmental Engineer, Alaska Departmental of Environmental Conservation, 5 May 1999.

60 Personal contact, 15 November 1999.


62 See Note 38.

63 100 F. 3d 147 (D.C.Cir. 1996).

64 “TAS Simplification Rule,” 59 Federal Register 33469 (1994)

65 Ibid, 33471-33474.

67 Presentation by Jerry Pardilla, Executive Director, National Tribal Environmental Council, 8 June 1999, Second Annual New England Regional Environmental Training Conference.