

U.S. Environmental Protection Agency
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EPA's Direct Implementation of
Federal Environmental Programs in
Indian Country

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Preface

This document was created to support United States Environmental Protection Agency (EPA) staff in achieving EPA's objective to protect human health and the environment in Indian country through EPA-led direct implementation activities. Direct implementation is the process by which EPA takes action to carry out its programs in Indian country in the absence of an EPA-approved program. The resulting document is intended to be used as a prioritization and planning tool by EPA program and regional staff for assessing resource needs, assisting EPA in a comprehensive programmatic evaluation of the scope and breadth of EPA's work in Indian country, and as a discussion tool with federally recognized tribes across the country. This document will also help EPA work with individual tribes to develop EPA Tribal Environmental Plans (ETEPs). ETEPs are long-term plans that describe how EPA and a tribe will best implement federal environmental programs in particular areas of Indian country. Because each tribe has a unique set of environmental conditions, facilities and land types, not all EPA direct implementation activities will be applicable to every tribe.

This document describes EPA's direct implementation responsibilities and activities under nine major federal environmental statutes, and includes an additional section on emergency response activities. The statutes are the: Clean Air Act; Clean Water Act; Comprehensive Environmental Response, Compensation, and Liability Act; Federal Insecticide, Fungicide, and Rodenticide Act; Federal Food, Drug, and Cosmetic Act; Pollution Prevention Act; Resource Conservation and Recovery Act; Safe Drinking Water Act; and Toxic Substances Control Act. Each section that follows describes the key direct implementation responsibilities EPA maintains under an individual statute in the absence of an EPA-approved program, followed by a description of the individual programs for which tribes may be eligible to seek approval to administer themselves.

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Introduction

The mission of the EPA is to protect human health and the environment. EPA accomplishes this mission through authorities provided to EPA under environmental statutes. Consistent with its authorities, EPA largely implements its congressionally mandated responsibilities through cooperative federalism approaches, such as through established partnerships with tribes, states, and other federal agencies. As set forth in EPA's 1984 Indian Policy, EPA works with interested tribal governments in developing environmental programs and in preparing tribes to assume regulatory and program management responsibilities for Indian country.¹ Where EPA's authorities provide, and where tribes are eligible, willing, and able, and apply to EPA for such authority, EPA may approve tribes to assume regulatory and program management responsibilities in Indian country through the treatment in a similar manner as a state (TAS) process. However, until tribal governments are willing and able to assume full responsibility for delegable programs, EPA generally retains responsibility for managing federal environmental programs in Indian country. This responsibility of the EPA is known as direct implementation.

Current EPA planning documents affirm the importance of direct implementation in fulfilling the Agency's mission in Indian country. As stated in the Fiscal Year 2014-2018 EPA Strategic Plan (Strategic Plan), "EPA will ensure that its environmental protection programs are implemented in Indian country either by EPA or through implementation of environmental programs by tribes themselves."² To ensure environmental protection for tribes, the Strategic Plan states that the Agency will "[ensure] that our national programs are as effective in Indian country as they are throughout the rest of the nation."³ EPA's dedication to fulfilling this objective is further reflected in the Office of International and Tribal Affairs' Fiscal Year 2016-2017 National Program Manager Guidance, which lists implementation of federal environmental programs in Indian country, whether by EPA or tribes themselves, as a national focus area for the Agency.⁴ Successful and efficient direct implementation of environmental programs in Indian country is a priority for the Agency because EPA retains responsibility for implementing the vast majority of federal environmental programs in Indian country.

In addition to the specific direct implementation activities listed in the sections that follow, EPA regularly consults with federally recognized tribes under *Executive Order 13175: Consultation and Coordination with Indian Tribal Governments*⁵ (Executive Order) and the *EPA Policy on Consultation and Coordination with Indian Tribes*⁶ (Consultation Policy). EPA's direct implementation activities oftentimes meet the threshold consultation criteria of the Executive Order and/or Consultation Policy.

¹ Defined as Indian reservations, dependent Indian communities, and Indian allotments, 18 U.S.C. § 1151.

² *FY 2014-2018 EPA Strategic Plan*, page 29. Available at http://www2.epa.gov/sites/production/files/2014-09/documents/epa_strategic_plan_fy14-18.pdf

³ *Id.*, at 49.

⁴ *Office of International and Tribal Affairs (OITA) FY 2016-2017 National Program Manager Guidance*, available at http://www2.epa.gov/sites/production/files/2015-04/documents/oita_fy16-17_npm_guidance_final_april_-_for_web.pdf

⁵ Available at <http://www.gpo.gov/fdsys/pkg/FR-2000-11-09/pdf/00-29003.pdf>

⁶ Available at <http://www2.epa.gov/sites/production/files/2013-08/documents/cons-and-coord-with-indian-tribes-policy.pdf>

As a result, in fulfilling its direct implementation responsibilities EPA typically consults with tribes on actions it is taking that may affect tribes or tribal interests. Additional information on the Executive Order and Consultation Policy is available on EPA's tribal consultation website.⁷

⁷ Available at <http://www2.epa.gov/tribal/forms/consultation-and-coordination-tribes>

Clean Air Act

The Clean Air Act (CAA) protects and enhances the quality of the nation’s air resources so as to promote the public health and welfare. Under the CAA, EPA sets specific air quality standards, known as the National Ambient Air Quality Standards (NAAQS), to help ensure public health and environmental protection from pollution. The CAA requires states to adopt enforceable plans (state implementation plans, or SIPs), which are overseen by EPA, to achieve and maintain ambient air concentrations at or below the NAAQS. If EPA determines that a plan to achieve NAAQS is necessary or appropriate, EPA will create a federal plan and directly implement CAA programs in Indian country. EPA also limits emissions of air pollutants coming from stationary, mobile, and area sources.

The following are a few of the key provisions of the CAA for which EPA has direct implementation responsibilities:

<u>EPA Direct Implementation Responsibility</u>
Section 107(d) National Ambient Air Quality Standards Designations (NAAQS)
Section 111 Standards of Performance
Section 112 National Emission Standards for Hazardous Air Pollutants (NESHAP)
Federal Implementation Plans
Permitting
Air Mobile Sources Program
Compliance Assurance and Enforcement

Implementation of the Clean Air Act

Designations Under CAA Section 107(d), EPA is responsible for designating all areas of the nation as meeting or not meeting the NAAQS for each of the six established common air pollutants, known as “criteria pollutants.” The six criteria pollutants are particle pollution (often referred to as particulate matter), ground-level ozone, carbon monoxide, sulfur dioxide, nitrogen dioxide, and lead. Every five years, EPA is required to review the science upon which the standards for a particular pollutant are based and revise them, as necessary, to protect human health and the environment with an adequate margin of safety.

Establishing an area designation is the first step in determining whether further emissions reductions are needed in a particular area to attain or maintain the NAAQS. The CAA identifies three designation categories: (1) nonattainment – air quality is worse than the level of the NAAQS; states with nonattainment areas must include provisions in their SIPs that are designed to improve air quality and attain the NAAQS within a certain period of time; (2) attainment – air quality is equal to or better than the level of the NAAQS; SIPs covering attainment areas must contain provisions designed to maintain air quality; and (3) unclassifiable – there is insufficient data on air quality for the area; the area is treated as in attainment. Each area designation is for a specific standard and criteria pollutant. An area can be in attainment for one standard and nonattainment or unclassifiable for another. EPA will create a federal implementation plan (FIP) for areas of Indian country where there is no EPA-approved tribal implementation plan (TIP) to improve air quality (in the case of nonattainment) or maintain air quality

(in the case of attainment) without unreasonable delay when it determines that it is necessary or appropriate to do so.

Standards of Performance CAA Section 111 directs EPA to establish pollution control requirements for certain sources which cause or contribute significantly to air pollution which may reasonably be anticipated to endanger public health or welfare. These requirements are known as new source performance standards (NSPS) and regulate pollutants such as particulate matter, sulfur dioxide, carbon monoxide, nitrogen oxides, volatile organic compounds, acid mist, total reduced sulfur and fluorides. NSPS are detailed in 40 CFR Part 60, and are intended primarily to establish minimum nationwide requirements for new and modified existing facilities. Section 111(d) may also apply to existing facilities; for existing facilities EPA establishes Emissions Guidelines for which states develop and implement plans. EPA (via a FIP) or a tribe (via a TIP) may also implement Section 111(d) for existing sources in Indian country.

In addition, CAA Sections 111 and 112 allow EPA to transfer primary implementation and enforcement authority for most of the federal standards to state, tribal, or local regulatory agencies. This transfer of authority is called delegation. Upon delegation of a standard, sources must send any required notifications or reports directly to the delegated agency. The delegated agency may also receive authority to make certain source-specific decisions that reflect flexibility allowed by the standard.

National Emission Standards for Hazardous Air Pollutants Under CAA Section 112, EPA is responsible for developing National Emission Standards for Hazardous Air Pollutants (NESHAP) for the control of Hazardous Air Pollutants (HAP) from both new and existing major or area sources in various categories of sources. The CAA requires the standard to reflect the maximum achievable reduction in HAP emissions, taking into consideration the cost of achieving the emission reduction, and any non-air quality health and environmental impacts and energy requirements. This level of control is commonly referred to as maximum achievable control technology (MACT). NESHAP apply nationally and the owner/operator of a source subject to a particular NESHAP must ensure that the source is operated in compliance with the requirements of the NESHAP without the need for an implementation plan. Every eight years, EPA is required to review and revise as necessary standards of performance in the NSPS program and emissions standards in the NESHAP program.

Federal Implementation Plans Under CAA Section 301(a), (d), EPA may promulgate and enforce a FIP, as necessary or appropriate. FIPs are a regulation for a specific source of air emissions, or a collection of regulations (including emission limits, monitoring requirements, compliance evaluations, and enforcement programs) that are used to achieve and maintain NAAQS or implement other federal regulations.

Permitting EPA issues preconstruction air permits in reservation areas of Indian country in the absence of an EPA-approved permitting program. Under the New Source Review (NSR) program, stationary sources of air pollution are required to get permits before they begin construction. These permits focus primarily on the NAAQS six criteria pollutants. There are three types of NSR permits: (1) Prevention of Significant Deterioration (PSD) permits which are required for new major sources or major modifications at existing sources for pollutants where the area the source is locating or located is in attainment or unclassifiable with the NAAQS; (2) Nonattainment NSR permits that are required for

new major sources or major modifications at existing major sources located in nonattainment areas; and (3) Minor source permits that are required to prevent the construction of sources that would interfere with attainment or maintenance of a NAAQS.

In addition to preconstruction permits, Title V of the CAA requires that all major sources apply for an operating permit (also known as a Title V permit) within a year of commencing operations or becoming subject to a requirement triggering the need for such a permit. Operating permits contain all the applicable requirements for a source, including NSR permit terms. These permits are designed to improve compliance and must be renewed every five years. EPA generally issues Title V permits in Indian country pursuant to 40 CFR Part 71.

Air Mobile Sources Program Under Title II of the CAA, EPA implements the air mobile sources program and conducts inspections and takes enforcement as appropriate. This program mandates emissions standards for all motor vehicles and mobile engines, and establishes formulation requirements for the fuels that are used in vehicles and engines. The mobile source standards apply to vehicles and engines of all sizes, and the fuels standards apply to all gasoline and diesel fuel used nationwide. Vehicles and engines used in the United States must be manufactured under the terms issued by EPA which are generally nationally enforced and not delegated to states or tribes.

Compliance Assurance and Enforcement Acting pursuant to its authority under CAA Section 114, EPA conducts Full Compliance Evaluations (FCE), Partial Compliance Evaluations (PCE), and investigations in Indian country to determine a facility's compliance status. EPA can provide compliance assistance to help facilities understand the regulatory obligations and maintain compliance. EPA takes appropriate civil or criminal enforcement action to address noncompliance.

Opportunities for Tribal Participation The CAA provides tribes with express authority to manage air quality in reservation areas of Indian country and in other areas of Indian country over which a tribe has jurisdiction. The Tribal Authority Rule (TAR), 40 CFR Part 49, identifies and defines the CAA provisions that tribes can implement and participate in with EPA approval. Neither the CAA nor the TAR, however, require tribes to adopt enforceable plans to achieve and maintain the NAAQS. Of the EPA direct implementation responsibilities mentioned above, tribes may participate in the following:

- **Treatment in a Similar Manner as a State** Under the TAR, tribes may apply to EPA for treatment in a similar manner as a state (TAS) approval with respect to all provisions of the CAA, except those provisions identified in 40 CFR § 49.4. As of February 2016, there are 45 individual TAS approvals for Sections 110, 126, 505, and Title V of the CAA.
- **Tribal Implementation Plans** Under CAA Section 110(a) and the TAR, a tribe with TAS may develop its own air quality control plan (TIP), for approval by EPA. A TIP is a set of regulatory programs developed and adopted by tribes to help attain and/or maintain the NAAQS.
- **Standards of Performance** Tribes may implement and enforce new and existing standards of performance by adopting regulations under their authority and upon approval from EPA, or by being delegated the federal program.

- **National Emission Standards for Hazardous Air Pollutants** Tribes can implement and enforce NESHAP by accepting delegation under the CAA (and/or by having an approved Title V operating permit program). Section 112(l) allows for EPA to approve state, tribal, and local programs to implement and enforce emission standards for pollutants subject to Section 112 regulations, such as the hazardous waste combustion NESHAP.
- **Permitting** TAS-eligible tribes can apply for permitting authority under the CAA for the Federal Minor New Source Review Program in Indian Country, the Federal Major New Source Review Program for Nonattainment Areas in Indian Country, and the Federal Prevention of Significant Deterioration Program. In addition, tribes may apply for permitting authority for either Part 71 (Title V federal operating permits), which provides for delegation to eligible tribes, or Part 70, to run their own program.
- **Compliance Assurance and Enforcement** Tribes that implement the CAA under a TIP conduct FCEs, PCEs, and investigations and take civil enforcement with EPA program oversight. EPA may enter into written agreements with tribes to allow properly trained employees to obtain and use a federal CAA credential to conduct inspections on behalf of the Agency; inspection reports are sent to EPA and the Agency makes all compliance determinations and initiates, if appropriate, any subsequent enforcement activity

Clean Water Act

The Clean Water Act (CWA) establishes the basic structure for regulating discharges of pollutants into the waters of the United States and regulating quality standards for surface waters (the CWA does not deal directly with groundwater nor with water quantity issues). The CWA employs a variety of regulatory and non-regulatory tools to reduce direct pollutant discharges into waterways, finance municipal wastewater treatment facilities, and manage polluted runoff. These tools are employed to achieve the broader goal of restoring and maintaining the chemical, physical, and biological integrity of the nation's waters so that they can support the protection and propagation of fish, shellfish, and wildlife and recreation in and on the water.

The following are a few of the key provisions of the CWA for which EPA has direct implementation responsibilities:

<u>EPA Direct Implementation Responsibility</u>
Section 303(c) Water Quality Standards
Section 303(d) Impaired Water Listing and Total Maximum Daily Loads (TMDLs)
Section 309 Compliance Assurance and Enforcement
Section 401 Water Quality Certification
Section 402 National Pollutant Discharge Elimination System (NPDES) Permitting
Section 404 Permitting for Dredged or Fill Material

Implementation of the Clean Water Act

Water Quality Standards Under CWA Section 303(c), EPA is responsible for overseeing the efforts of states and authorized tribes to set water quality standards (WQS) for all waters of the United States. WQS consist of designated uses for waters, water quality criteria to protect the uses, and antidegradation requirements. WQS establish water quality goals for specific water bodies and provide the regulatory basis for establishing certain treatment controls and strategies under the CWA. WQS establish the environmental baselines used for adequate protection of fish and wildlife, recreational uses, and sources of drinking water. The CWA requires EPA to review new and revised state or tribal standards, and approve or disapprove them. EPA's oversight role can lead to direct implementation if EPA decides to correct deficiencies in the state or tribal standards by issuing federal replacement standards where necessary.⁸

Impaired Water Listing and Total Maximum Daily Loads Under CWA Section 303(d), EPA supports and oversees the efforts of states and authorized tribes in developing and implementing Section 303(d) listing and total maximum daily load (TMDL) requirements. Under CWA Section 303(d), authorized states and tribes develop lists of impaired waters for which technology-based

⁸ For further discussion of EPA's authority to promulgate water quality standards, see CWA Section 303(a)(2)(C), *Final Guidance on Awards of Grants to Indian Tribes under Section 106 of the Clean Water Act*, EPA Office of Wastewater Management, October 2006, p. 7-3; and *Plan EJ 2014: EJ Legal Tools*, EPA Office of General Counsel, December 2011, pp. 28-29.

limitations and other required controls are not stringent enough to meet applicable WQS. A TMDL is the calculation and allocation to point and nonpoint sources of the maximum amount of a pollutant that a water body can receive and still meet applicable WQS, with a margin of safety.

EPA reviews and approves/disapproves CWA Section 303(d) lists and TMDLs. Once EPA receives a list or TMDL, it must either approve or disapprove the list or TMDL within thirty days.⁹ EPA's oversight role can lead to direct implementation if EPA disapproves the list or TMDL. If EPA disapproves the list or TMDL, EPA must establish a replacement list or TMDL within thirty days of disapproval.¹⁰

Water Quality Certification Under CWA Section 401, states or authorized tribes are responsible for issuing water quality certifications. In any case where a state, interstate agency, or tribe has no authority to give such a certification, EPA issues the water quality certification. CWA Section 401 requires any applicant for a federal license or permit to conduct an activity that may result in a discharge into navigable waters to obtain certification from the state in which the discharge originates or will originate that such discharge will comply with the applicable provisions of the CWA, including EPA-approved WQS and federally issued NPDES, Section 404, or other federal permits or licenses. These conditions become part of the federal permit or license.

EPA may determine that a discharge subject to CWA Section 401 certification "may affect" the water quality of other states or tribes. If EPA makes such a determination, EPA is required to notify those jurisdictions whose water quality may be affected. Section 401(a)(2) provides an opportunity for such jurisdictions to raise objections to, and comment on, the federal permit or license.

National Pollutant Discharge Elimination System (NPDES) Individual and General Permits Under CWA Section 402, EPA is responsible for developing and issuing NPDES permits for point sources discharging pollutants into surface waters. In general, NPDES permits are required for point sources discharging pollutants into surface waters. These permits typically include effluent limitations, facility operational requirements, and monitoring and reporting requirements. A NPDES permit can apply to an individual discharger, or cover multiple dischargers via a general permit (40 CFR § 122.28) for specific categories of discharges or for sludge disposal practices. NPDES permits have, at most, five-year terms.

Compliance Assurance and Enforcement of NPDES Permits EPA is responsible for evaluating compliance with NPDES permits through reviews of discharge monitoring reports (DMRs), inspections, and other compliance monitoring activities that verify that permit requirements are met. EPA may also conduct inspections at unpermitted facilities in Indian country to determine if the facility must seek permit coverage. EPA's Clean Water Act National Pollutant Discharge Elimination System Compliance Monitoring Strategy sets forth national compliance monitoring goals, including goals for EPA direct implementation in Indian country. Unless and until a tribe has primacy for the inspection and enforcement program, EPA makes compliance determinations for facilities in Indian country, and, if appropriate, initiates subsequent enforcement actions.

⁹ 33 U.S.C. 1313(d)(2)

¹⁰ 40 CFR § 130.7(d)(1)

Dredge and Fill Permits

Under CWA Section 404, a permit is required for all discharges of dredge or fill material to all waters of the United States, including adjacent wetlands. The Army Corps of Engineers (Corps) is the federal permitting authority for Section 404. In this process, EPA, in coordination with the Corps, is responsible for reviewing and providing comments on proposed Section 404 permits. EPA's review includes a CWA Section 401 certification determination that such a discharge will comply with the applicable provisions of the CWA (see *Water Quality Certification* above).

Compliance Assurance and Enforcement of 402 and 404 Permits Unless and until a tribe has primacy for the inspection and enforcement program, EPA makes compliance determinations for facilities in Indian country, and, if appropriate, initiates subsequent enforcement actions when there is noncompliance with CWA Section 402 and/or 404 permits.

Spill Prevention, Control, and Countermeasure Plans Under CWA Section 311, a Spill Prevention, Control and Countermeasure (SPCC) Plan is required if a facility has aggregate oil storage capacity equal to or greater than 1,320 gallons and there is a reasonable expectation that an oil spill at the facility could reach waters of the United States. The Oil Pollution Prevention regulations set forth requirements for prevention of, preparedness for, and response to oil discharges at specific non-transportation-related facilities.

Compliance Assurance and Enforcement of SPCC Plans EPA is responsible for inspections and taking enforcement action in Indian country, as appropriate, when there is noncompliance with the SPCC regulations. This is a federal-only program and is not delegated to tribes or states. EPA may enter into written agreements with tribes to allow properly trained employees to obtain and use a federal credential to conduct inspections on behalf of the Agency; inspection reports are sent to EPA and the Agency makes all compliance determinations and initiates, if appropriate, any subsequent enforcement activity.

Opportunities for Tribal Participation Under CWA Section 518(e), tribes may apply to EPA for treatment in a similar manner as a state (TAS) approval to administer the following programs of the CWA in lieu of, or in coordination with, EPA:

- **Section 303(c) Water Quality Standards Program** A tribe may apply for TAS to seek EPA approval to administer their own WQS program and establish their own WQS under the CWA. As of February 2016, EPA has approved 50 tribes for TAS to administer a WQS program, and 42 of those tribes have adopted EPA-approved WQS.
- **Section 303(d) Impaired Waters Listing and Total Maximum Daily Load Program** A tribe may apply for TAS to seek EPA approval to administer an Impaired Waters Listing and Total Maximum Daily Load program under the CWA. As of February 2016, no tribes have TAS for the 303(d) program. EPA proposed a rulemaking in January 2016 to provide more opportunities for tribes to participate in the Section 303(d) Impaired Water Listing and TMDL Program, primarily by clarifying the process for tribes to obtain TAS approval for Section 303(d).

- **Section 401 Water Quality Certification** A tribe approved by EPA to administer the Section 303(c) WQS program is simultaneously approved for the Section 401 certification program. As of February 2016, 50 tribes have TAS for 401 Water Quality Certification. Where a tribe has TAS for Section 401, the tribe prepares its own Section 401 Water Quality Certifications or waivers for federal permits or licenses discharging into reservation waters.
- **Section 402 National Pollution Discharge Elimination System Individual and General Permits** A tribe may apply for TAS for the NPDES program. As of February 2016, no tribes have TAS for the NPDES program. If a tribe seeks to obtain partial authorization (e.g., only seeks authorization to administer the Base NPDES program), EPA would implement the other NPDES program components, which may include activities such as issuing a separate NPDES permit or negotiating with a tribe on joint issuance of NPDES permits.
- **Section 404 Dredge and Fill Permitting** A tribe may apply for TAS for the Dredge and Fill permitting program (40 CFR § 233.61). As of February 2016, no tribes have TAS for the Section 404 program. If a tribe assumes administration of the Section 404 program, the Corps no longer processes Section 404 permits for those waters for which the tribe has assumed permitting authority.¹¹ EPA maintains oversight responsibilities for all approved CWA Section 404 programs to ensure program consistency with the CWA and applicable laws and regulations. This oversight includes review of a subset of permits which generally includes larger discharges with serious impacts or those which may affect threatened or endangered species. EPA and other federal agencies review individual permit applications and general permits. EPA provides comments to the administering tribe on the permit application; if EPA objects to or places conditions on the permit, the tribe cannot issue the permit.
- **Compliance Assurance** EPA may enter into written agreements with tribes to allow properly trained employees to obtain and use a federal credential to conduct CWA inspections on behalf of the Agency; inspection reports are sent to EPA and the Agency makes all compliance determinations and initiates, if appropriate, any subsequent enforcement activity.

¹¹ Even where a tribe has an approved tribal Section 404 program, pursuant to CWA Section 404(g)(1), the Corps always retains permitting authority under Section 10 of the Rivers and Harbors Act of 1899 for dredge and fill activities into tidal waters and their adjacent wetlands, and in waters presently used, or susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce and their adjacent wetlands.

Comprehensive Environmental Response, Compensation, and Liability Act

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), commonly referred to as Superfund, authorizes the federal government to respond to releases and threats of releases into the environment of hazardous substances or pollutants or contaminants. EPA does so by taking response measures, generally consistent with the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), deemed “necessary to protect the public health or welfare or the environment.” All response activities, which include removal actions and remedial actions, must be generally consistent with the NCP.

The following are a few of the key provisions of CERCLA for which EPA has direct implementation responsibilities:

<u>EPA Direct Implementation Responsibility</u>
Superfund Enterprise Management System Database and the National Priorities List
Removal Actions
Remedial Actions

Implementation of the Comprehensive Environmental Response, Compensation, and Liability Act

Superfund Enterprise Management System Database and the National Priorities List Under CERCLA Section 116, EPA is responsible for collecting, reporting and tracking locations where hazardous wastes are believed to have been released or represent a risk of release. EPA places this inventory of information in the Superfund Enterprise Management System database, formerly known as CERCLIS. Under CERCLA Section 116(b), EPA evaluates, on the basis of a site inspection or preliminary assessment, each site in the database for potential placement on the National Priorities List (NPL). The NPL is the list of sites in the United States and its territories with known releases or threatened releases of hazardous substances, pollutants, or contaminants. In general, the NPL represents sites that are priorities for long-term remedial evaluation and potential response. EPA has multiple direct implementation responsibilities regarding the NPL: for example, under CERCLA Section 105(a)(8)(B), EPA determines which sites to place on the NPL.

Removal Actions Under CERCLA Section 104, EPA may conduct removal actions at Superfund sites to address a release or threat of release of hazardous substances, or a release or threat of release of a pollutant or contaminant which may pose an imminent and substantial danger to public health. In most cases the tribe, county, or state is the first responder. EPA may participate in the removal if a state or tribe requests assistance, although the response authority is not dependent on a request. EPA may take command of a removal should the responsible party, state or tribe lack the ability and resources to carry out the appropriate action.

Remedial Actions Under CERCLA Section 104, EPA has discretionary response authority to conduct long-term remedial actions to address a release or threat of release of hazardous substances, or

a release or threat of release of a pollutant or contaminant which may pose an imminent and substantial danger to public health. CERCLA Section 121(a) includes a number of provisions related to selection of cleanups that ensure protection of human health and the environment. Under CERCLA Section 121(c), EPA reviews no less often than every five years any remedial action previously taken where contamination remains on site, to assure human health and the environment continue to be protected.

Opportunities for Tribal Participation CERCLA Section 126 provides for a tribal role in Superfund actions for certain purposes. It specifies that “[t]he governing body of an Indian tribe shall be afforded substantially the same treatment as a State” with respect to various provisions of CERCLA, including Section 103(a) (notification of releases), Section 104(c)(2) (consultation on remedial actions), Section 104(e) (access to information), Section 104(i) (health authorities) and Section 105 (roles and responsibilities under the NCP and submittal of priorities for remedial action).

CERCLA also authorizes tribes to enter into cooperative agreements and receive financial assistance to carry out response actions, if the tribe has the appropriate expertise, pursuant to Section 104(d).

Specifically, regarding the CERCLA cleanup process, tribes may participate in the following activities:

- **National Priority List Listings** Tribes can identify sites they believe EPA should investigate for possible NPL listing, and if necessary, submit a petition that would generally require EPA to conduct a preliminary assessment (PA) of the potential hazard and determine whether listing is appropriate.
- **Preliminary Assessments and Site Inspections** Tribes may be able to perform PAs and Site Inspections (SIs) and provide the information obtained to EPA for NPL consideration if the tribe has the appropriate expertise.
- **Site Cleanups** Tribes may participate in the site cleanup process, including review of documents and commenting to EPA regarding response selection. Tribes may also perform CERCLA cleanup actions pursuant to a Section 104(d) cooperative agreement with EPA if they have the appropriate expertise.

Federal Insecticide, Fungicide, and Rodenticide Act and the Federal Food, Drug, and Cosmetic Act

EPA regulates the use of pesticides under the authority of two federal statutes: the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and the Federal Food, Drug, and Cosmetic Act (FFDCA). These statutes have been amended by the Food Quality Protection Act and the Pesticide Registration Improvement Act.

FIFRA requires all pesticides imported, sold or distributed in the United States to be registered (licensed) by EPA. Pesticidal devices do not require EPA registration but must be labeled in accordance to FIFRA prior to importation, distribution or sale. EPA also has the authority to suspend or cancel the registration of a pesticide if subsequent information shows that continued use would pose unreasonable risks. EPA must review each pesticide registration at least once every 15 years. The FFDCA requires EPA to set pesticide residue tolerances for all pesticides used in or on food or in a manner that will result in a residue in or on food or animal feed. A tolerance is the maximum permissible level for pesticide residues allowed in or on human food and animal feed.

Under the Food Quality Protection Act of 1996, which amended both FIFRA and FFDCA, EPA must find a “reasonable certainty of no harm” from a pesticide’s residues before such residues can be permitted on food or feed.

The following are a few of the key provisions of FIFRA for which EPA has direct implementation responsibilities:

<u>EPA Direct Implementation Responsibility</u>
Section 3 Pesticide Registration and Use
Section 8 Registration of Pesticide Producing Establishments
Section 8, 9, 12, 13 and 14 Compliance Assurance and Enforcement
Section 11 and 23(a)(2) Certification of Restricted Use Pesticide Applicators

The following is a key provision of the FFDCA for which EPA has direct implementation responsibilities:

<u>EPA Direct Implementation Responsibility</u>
Section 408 Tolerances and Exemptions for Pesticide Chemical Residues

Implementation of the Federal Insecticide, Fungicide, and Rodenticide Act

Pesticide Registration and Use Under FIFRA Section 3, EPA has the responsibility to register pesticide products before they can be imported, distributed, or sold in the United States. EPA follows a scientific, legal, and administrative procedure when registering pesticides. Data provided by the registrant must include the ingredients, the particular site or crop where it is to be used, the amount,

frequency, and time of use, and storage and disposal practices. A variety of potential human health and environment effects associated with the product are evaluated. Once the pesticide is registered, FIFRA also imposes reporting and recordkeeping requirements.

Registration of Pesticide Producing Establishments Any establishment that produces a pesticide or pesticide active ingredient must be registered with EPA under FIFRA Section 7, and must record and report annual production to EPA.

Compliance Assurance and Enforcement Under FIFRA Sections 8 and 9, EPA is responsible for conducting inspections at producing and retail establishments, and any other establishment that distributes pesticides, to ensure proper registration, labeling, formulation, reporting, and recordkeeping, and for taking appropriate enforcement action under FIFRA Sections 12, 13 and 14. EPA is responsible for enforcing when pesticides are not used in accordance with their labels. If states have adopted adequate pesticide use laws and regulations, FIFRA Section 26 gives primary enforcement responsibility for such use violations to states. In Indian country, EPA generally has pesticide program implementation and enforcement responsibility and seeks tribal partnerships to support such work.

Certify Applicators of Restricted Use Pesticides If a product is classified as a restricted use pesticide (RUP) under FIFRA Section 11, applicators must be certified as competent to apply RUPs in a manner that will not harm human health or the environment. EPA has developed a plan to certify RUP applicators in Indian country¹² and is responsible for assuring that RUP applicators in Indian country are certified where no other EPA-approved certification mechanism exists.

Opportunities for Tribal Participation (FIFRA) EPA's direct implementation responsibilities cannot be delegated to states or tribes. However, all states and some tribes regulate pesticides through state or tribal laws issued under their own authorities. Under FIFRA Section 23, EPA is authorized to enter into cooperative agreements with states and tribes to cooperate in the enforcement of FIFRA in the following ways:

- **Cooperative Agreements** EPA may enter into cooperative agreements with tribes to allow properly trained employees to obtain and use a federal credential to conduct FIFRA inspections on behalf of the Agency; inspection reports are sent to EPA and the Agency makes all compliance determinations and initiates, if appropriate, any subsequent enforcement activity.
- **Training and Certification of RUP Applicators** A tribe can certify RUP applicators under an EPA-approved certification plan. As of February 2016, four tribes have received EPA approval for plans for certification of applicators of RUPs. In addition, a tribe can enter into agreements with states that are operating certification programs to utilize the state program for certification of applicators who will apply RUPs in Indian country.
- **Pesticide Program Development and Implementation** EPA provides wide-ranging support for tribes in the form of technical assistance, education and outreach on the safe use of

¹² See <http://www.epa.gov/pesticide-applicator-certification-indian-country/about-epa-plan-certify-applicators-indian-country>

pesticides and pest-control alternatives. EPA-tribal cooperative agreements can support tribes' development of their own pesticide programs and may provide for technical assistance, education and outreach on the safe use of pesticides and pest-control alternatives in Indian country.

Implementation of the Federal Food, Drug, and Cosmetic Act

Tolerances and Exemptions for Pesticide Chemical Residues FFDCA Section 408 authorizes EPA to set tolerances, or maximum residue limits, for pesticide residues on foods. In the absence of a tolerance for a pesticide residue, a food containing such a residue is subject to seizure by the United States Food and Drug Administration or the United States Department of Agriculture. Once a tolerance is established, the residue level in the tolerance is the trigger for enforcement actions. That is, if residues are found above that level, the commodity will be subject to seizure. In setting tolerances, EPA must make a finding that the tolerance is "safe." Safe is defined as meaning that there is a "reasonable certainty that no harm will result from aggregate exposure to the pesticide residue." To make the safety finding, EPA considers, among other things: the toxicity of the pesticide and its breakdown products, aggregate exposure to the pesticide in foods and from other sources of exposure, and any special risks posed to infants and children. Some pesticides are exempt from the requirement to have a tolerance. EPA may grant exemptions in cases where the pesticide residues do not pose a dietary risk under reasonably foreseeable circumstances. These responsibilities cannot be delegated to tribes.

Pollution Prevention Act

The Pollution Prevention Act (PPA) requires EPA to establish a source reduction program, which, among other things, collects and disseminates information and implements various activities. The PPA defines “source reduction” to mean: (1) any practice which reduces the amount of hazardous substance, pollutant, or contaminant entering any waste stream or otherwise released into the environment (including fugitive emissions) prior to recycling, treatment or disposal; and (2) any practice which reduces the hazard to human health and the environment associated with the release of such substances, pollutants or contaminants.

The following are a few of the key provisions of the PPA for which EPA has direct implementation responsibilities:

<u>EPA Direct Implementation Responsibility</u>
Section 6604 EPA Activities
Section 6606 Source Reduction Clearinghouse
Section 6607 Source Reduction and Recycling Data Collection

EPA Activities EPA implements a strategy to promote source reduction and established standard methods of measurement of source reduction. EPA continues to coordinate source reduction activities; develop improved methods of coordinating, streamlining and assuring public access to data; facilitate the adoption of source reduction techniques by business; and establish training programs.

Source Reduction Clearinghouse Under PPA Section 6606, EPA is required to establish a Source Reduction Clearinghouse to compile information, including a computer database which contains information on management, technical, and operating approaches to source reduction. The clearinghouse serves as a center for source reduction technology transfer; supports outreach and education programs to further the adoption of source reduction technologies; collects and compiles information reported by entities receiving grants under Section 6605 on the operation and success of source reduction programs; and ensures such information is made available to the public.

Opportunities for Tribal Participation Under PPA Section 6605, pollution prevention grants are available to tribes to support projects under the sector focus areas in EPA’s Pollution Prevention Strategic Plan. Grant opportunities encompass efforts targeting specific pollution prevention opportunities; efforts targeting specific pollution prevention opportunities for small business, communities, and tribes that can be scaled up to statewide, regional or national levels; and support programs or projects that promote product redesign, green product standards, environmentally preferable purchasing, or green chemistry with potential to influence regional or national markets.

Resource Conservation and Recovery Act

The Resource Conservation and Recovery Act (RCRA) is designed to ensure the safe management and cleanup of solid and hazardous waste, and includes programs that encourage source reduction and beneficial reuse. Subtitle C of RCRA focuses on hazardous solid waste and Subtitle D of RCRA is dedicated to non-hazardous solid waste requirements. Solid waste includes solids, liquids and gases, and must be discarded to be considered waste. Subtitle I of RCRA is dedicated to regulating underground storage tanks (USTs).

The following are a few of the key provisions of RCRA for which EPA has direct implementation responsibilities:

<u>EPA Direct Implementation Responsibility</u>
Subtitle C Reporting and Notification
Subtitle C Permitting
Subtitle C Compliance Assurance and Enforcement
Subtitle D Site-specific Rules (some facilities)
Subtitle D Compliance Assurance and Enforcement
Subtitle I Compliance Assurance and Enforcement
Subtitle I Corrective Action and Oversight

Implementation of the Resource Conservation and Recovery Act

Subtitle C – Hazardous Waste

Reporting and Notification Under RCRA Sections 3002-3003, EPA is responsible for maintaining a database of hazardous waste management facilities. Facilities that manage (ex: generate, store, transport) hazardous wastes must notify EPA and receive a RCRA identification number. Under EPA’s Subtitle C regulations, a waste is regulated as hazardous if it possesses at least one of four characteristics (ignitability, corrosivity, reactivity, or toxicity), or EPA has included it in its list of hazardous wastes.

Permitting Under RCRA Section 3005, facilities that treat, store, or dispose of hazardous waste are responsible for obtaining operating permits which specify requirements for, among other things, operating conditions, closure, post-closure, financial responsibility, and necessary corrective action. EPA issues these permits in Indian country.

Compliance Assurance and Enforcement Under RCRA Section 3007, EPA is authorized to conduct inspections, obtain samples, and review records to verify that generators and other waste management facilities are meeting RCRA requirements. EPA can offer assistance to help facilities understand the regulatory obligations and maintain compliance. Under RCRA Section 3008, EPA is authorized to take appropriate civil and criminal enforcement action to address noncompliance with RCRA requirements. EPA can also issue orders requiring corrective action at non-permitted “interim status” treatment, storage or disposal facilities. Under Section 3013, EPA can require monitoring, testing, analysis, and reporting in situations that may present a substantial hazard to human health or

the environment. EPA can also take action under RCRA Section 7003 to respond to situations that may present an imminent and substantial endangerment.

Subtitle D – Solid Waste

Permitting Under RCRA Subtitle D, state and local governments have primary planning, regulating, and implementing responsibilities for the management of nonhazardous solid waste. EPA does not issue permits for Subtitle D facilities. However, EPA does set national minimum facility standards. These regulations apply to facilities directly, including to facilities in Indian country. By their terms, EPA’s regulations for certain types of facilities (those taking conditionally-exempt small quantity generator waste and municipal solid waste landfills) can apply more flexibly where the facility is subject to an EPA-approved *state* permit program. EPA lacks statutory authority to approve a tribal permit program as it does state programs. Instead, EPA can issue site-specific rules that allow owners or operators of solid waste facilities located in Indian country to achieve similar flexibility.¹³

Compliance Assurance and Enforcement RCRA Section 4005(c)(2) allows EPA to use inspection and administrative enforcement authorities under RCRA Sections 3007 and 3008 to address uncontrolled waste dumps in Indian country, in limited circumstances. EPA can offer assistance to help facilities understand their regulatory obligations and maintain compliance. EPA can also take action under RCRA Section 7003 to respond to situations that may present an imminent and substantial endangerment.

Subtitle I – Underground Storage Tanks

Compliance Assurance and Enforcement Under RCRA Subtitle I, EPA implements and enforces requirements concerning USTs located, among other places, in Indian country. Under Section 1523 of the Energy Policy Act, EPA is required to inspect each UST in Indian country at least once every three years. EPA provides compliance assistance to owners and operators of USTs to increase their understanding of applicable requirements and maintain compliance. When necessary and appropriate EPA takes civil and criminal enforcement actions to address noncompliance.

Corrective Action (Cleanup) and Oversight Under RCRA Subtitle I, EPA oversees the cleanup of UST petroleum contaminated sites by owners and operators in Indian country. EPA also cleans up sites (i.e., performs “corrective action”) when the UST owner or operator is unknown, unwilling, or unable to perform corrective action or when prompt action is necessary to protect human health and the environment. “Corrective action” refers to the cleanup process or program and all activities related to the investigation, characterization, and cleanup/remediation, monitoring and closure of a release.

Subtitles C, D, and I – Opportunities for Tribal Participation While other federal environmental statutes may provide treatment in a similar manner as a state (TAS) authority for Indian tribes to implement programs, RCRA lacks such a provision. Therefore, EPA implements RCRA Subtitle C, D and I programs in Indian country. However, under all three subtitles tribes are able to enter into

¹³ See *Site-Specific Flexibility Requests for Municipal Solid Waste Landfills in Indian Country, Draft Guidance*, available at <http://www3.epa.gov/epawaste/nonhaz/municipal/landfill/indian/siteflex.pdf>

cooperative agreements with EPA to help implement these programs. EPA may enter into written agreements with tribes to allow properly trained employees to obtain and use a federal credential to conduct RCRA C and I inspections on behalf of the Agency; inspection reports are sent to EPA and the Agency makes all compliance determinations and initiates, if appropriate, any subsequent enforcement activity.

Safe Drinking Water Act

The Safe Drinking Water Act (SDWA) protects public health by regulating the nation’s public drinking water supply and drinking water sources. Under the SDWA, EPA sets nationally-applicable federal standards for drinking water quality, oversees public water system (PWS)¹⁴ drinking water providers, and works collaboratively with tribes, states, and PWS providers to ensure drinking water is safe and surface and underground sources of drinking water are protected.

The following are the key provisions of SDWA for which EPA has direct implementation responsibilities:

<u>EPA Direct Implementation Responsibility</u>
Section 1401 Public Water System Supervision Program
Section 1421 Underground Injection Control Program

Implementation of the Safe Drinking Water Act

Public Water System Supervision Under SDWA Section 1412, EPA promulgates the National Primary Drinking Water Regulations (NPDWRs) that are the basis of the Public Water System Supervision (PWSS) program. NPDWRs are legally enforceable standards that apply to all public drinking water systems throughout the country (regardless of ownership, agency with enforcement authority, or geographical location), and protect public health by limiting the levels of contaminants in drinking water. Under SDWA Section 1413, EPA has primary enforcement authority (known as primacy) to directly implement the PWSS program in Indian country in the absence of an EPA-approved program. As the primacy agency, EPA acts to:

- **Provide Training and Technical Assistance for Capacity Development of Water Systems** EPA provides compliance guidance and other tools to help the owners and operators of PWSs meet environmental regulatory requirements. In addition, EPA implements the National Tribal Drinking Water Operator Certification program to train and certify staff operating tribally owned and operated PWSs. In conjunction with the Tribal PWSS program, EPA implements the Drinking Water Infrastructure Grant Tribal Set-Aside Program (DWIG-TSA), which provides financial support for infrastructure projects to help PWSs comply with the NPDWRs.
- **Compliance Assurance and Enforcement** EPA provides compliance assistance to help tribes meet the federal standards, including conducting on-site visits by qualified experts, maintaining drinking water compliance data (such as water samples collected by PWSs), and analyzing the data to determine tribal PWS compliance.¹⁵ As the primary enforcement authority

¹⁴ Public water systems are defined as public systems that regularly serve (at least 60 days a year) at least 15 service connections or 25 persons. The SDWA does not regulate private wells that serve fewer than 25 individuals.

¹⁵ EPA stores drinking water compliance information in the Safe Drinking Water Information System (SDWIS) for the approximately 1,000 PWSs that EPA oversees on Indian lands.

for most public water systems in Indian country, EPA is responsible for taking enforcement actions against those systems that do not comply with federal drinking water regulations.

- **Conduct Sanitary Surveys and Source Water Assessments for Public Water Systems** Sanitary surveys are required on-site reviews of a PWS's source, facilities, equipment, operation and maintenance, and administration. Sanitary surveys are compliance assistance visits that can reveal deficiencies and technical needs, assess a system's capacity and structural integrity, and identify actions that must be taken to lower the risk of contamination and waterborne disease. EPA regulations require sanitary surveys for all PWSs. Where EPA is the primary enforcement authority, the Agency is responsible for performing sanitary surveys for PWSs. Source water assessments are another integral part in ensuring that a water system is providing safe drinking water to the community. These assessments analyze existing and potential threats to the quality of PWS drinking water sources, and identify protective measures to address them. EPA Regions may perform a source water assessment or help establish Source Water Assessment Programs (SWAPs) for a tribal PWS.

Underground Injection Control Program SDWA Section 1423 gives EPA primacy and responsibility to implement the Underground Injection Control (UIC) provisions of the SDWA in Indian country in the absence of an EPA-approved program. Underground injection is the technology of placing fluids underground through wells or similar conveyance systems for storage or disposal. The UIC program regulates the construction, operation, permitting and closure of injection wells. It is designed to ensure that underground injection wells do not endanger any current and future underground sources of drinking water (USDWs). The program does this by requiring all injection wells to be either authorized by permit or rule, setting requirements for injection wells, and enforcing program requirements.

As the agency with primacy for the UIC program in most of Indian country, EPA acts to:

- **Implement Permitting Programs for Underground Injection Control Wells** EPA reviews and issues injection permits, issues rules and guidance on well construction and operation, inspects for compliance with permit conditions on-site at UIC facilities, and provides technical assistance to injection well operators. EPA maintains compliance data systems and inventories of wells.
- **Compliance Assurance and Enforcement** EPA is generally responsible for reviewing reports and initiating enforcement/compliance assistance activities. EPA's compliance assurance actions include inspecting and testing injection wells, notifying injection well operators of violations, issuing administrative orders, and assisting the Department of Justice in civil and criminal enforcement activities.

Opportunities for Tribal Participation Tribes may apply to EPA for TAS approval to administer the following programs of the SDWA:

- **Public Water Supervision System** Under SDWA Section 1451 and applicable regulations,

an eligible tribe may seek TAS for primary enforcement authority for the PWSS program. As of February 2016, the only tribe with primacy for the drinking water PWSS program is the Navajo Nation. Where a tribe has primacy, EPA is still responsible for developing national drinking water regulations, overseeing the approved tribal primacy program, providing enforcement oversight, and implementing programs for tribes without primacy. EPA provides financial assistance to tribes with primacy to carry out their PWSS program. EPA also allocates PWSS funding among EPA regions for direct implementation activities based on SDWA criteria, with a focus on addressing the highest risks in order to achieve the maximum level of public health protection. EPA can also use Direct Implementation Tribal Cooperative Agreements (DITCAs) for tribal PWSS programs to build capacity. Either through a DITCA or other written agreement, EPA may allow properly trained employees to obtain and use a federal credential to conduct SDWA inspections on behalf of the Agency; inspection reports are sent to EPA, and the Agency makes all compliance determinations and initiates, if appropriate, any subsequent enforcement activity.

- **Underground Injection Control Program** Under SDWA Sections 1451, 1422(e), and 1425, and applicable regulations, an eligible tribe may seek TAS approval for primary enforcement authority for the UIC permitting program. As of February 2016, two tribes have primacy for the UIC program: the Navajo Nation and the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation. EPA provides financial assistance to tribes with primacy to carry out their UIC Program. EPA also allocates UIC funding among EPA regions for direct implementation activities based on SDWA criteria, with a focus on addressing the highest risks in order to achieve the maximum level of public health protection. EPA can also use DITCAs for tribal UIC programs to build capacity. Either through a DITCA or other written agreement, EPA may allow properly trained employees to obtain and use a federal credential to conduct SDWA inspections on behalf of the Agency; inspection reports are sent to EPA, and the Agency makes all compliance determinations and initiates, if appropriate, any subsequent enforcement activity.

Toxic Substances Control Act

The Toxic Substances Control Act (TSCA) provides EPA with authority to collect or require the development of data to assess the hazards, exposures, and risks of new and existing chemical substances or mixtures and, where necessary, to regulate the manufacture, importation, processing, distribution in commerce, use, or disposal of chemical substances and mixtures that present unreasonable risks to human health or the environment.

TSCA provides EPA with authority to require reporting, record-keeping and test requirements, and restrictions relating to chemical substances and/or mixtures. TSCA addresses the production, importation, use and disposal of specific chemicals including polychlorinated biphenyls (PCBs), asbestos, radon and lead-based paint. Certain substances are generally excluded from TSCA, including, among others, food, drugs, cosmetics and pesticides.

The following are a few of the key provisions of TSCA for which EPA has direct implementation responsibilities:

<u>EPA Direct Implementation Responsibility</u>
Section 4 Testing
Section 5 Reviewing New Chemicals and New Uses
Section 6(a) Regulation of Hazardous Chemical Substances and Mixtures
Section 6(e) Polychlorinated Biphenyls (PCBs)
Section 8 Recordkeeping and Reporting
Section 203 Asbestos Hazardous Emergency Response Act (AHERA)
Section 303-305(a) Indoor Radon Abatement
Section 402 Lead Exposure Reduction

Implementation of the Toxic Substances Control Act

Testing TSCA Section 4 gives EPA authority to require manufacturers, importers, and processors of chemicals to test them for health and environmental effects. EPA uses this authority when it can make certain findings about the substance involved, including: (1) there is insufficient data available to determine the effects of the substance on health and/or the environment; (2) testing is necessary to provide such data; and (3) (a) the chemical may present an unreasonable risk of injury to health or the environment and/or (b) the chemical is or will be produced in substantial quantities and it enters or may be anticipated to enter the environment in substantial quantities, or there may be significant or substantial human exposure to the substance.

Reviewing New Chemicals and New Uses In order to address potential health and environmental considerations before a chemical is commercially manufactured, TSCA Section 5 requires manufacturers (including importers) to give EPA a 90-day advance notice of their intent to manufacture or import a new chemical. Chemicals not listed on the TSCA Inventory of Chemical Substances are considered “new” for purposes of this premanufacture (PMN) notice requirement. In

addition to reviewing new chemicals, EPA may designate a specific use of an existing chemical as a “significant new use” through a significant new use rule (SNUR). If EPA determines that the PMN or SNUR notice contains insufficient information to evaluate potential risk, the Agency may prohibit the manufacture or importation of the chemical until adequate data are developed. If EPA determines that the notice contains sufficient data and that the new chemical or use presents or will present an unreasonable risk of injury to health or the environment, the Agency can take a variety of actions to protect against that risk, including prohibiting the manufacturing, processing, or distribution in commerce of that chemical.

Regulation of Hazardous Chemical Substances and Mixtures Under TSCA Section 6(a), EPA has authority to regulate the manufacture, distribution, use, and/or disposal of a chemical substance if there is a reasonable basis to conclude that regulation will prevent unreasonable risk of injury to health or environment. Section 6(a) includes a menu of possible regulatory options, ranging from a total ban of a chemical substance to requiring notices and warnings. TSCA requires that the Administrator find that a substance presents or will present an unreasonable risk and that the Agency impose the least burdensome regulatory measure that provides adequate protection.

Polychlorinated Biphenyls Under TSCA Section 6(e), EPA has a responsibility to promulgate rules (see 40 CFR Part 761) for the marking, storage, use, and disposal of PCBs. No person may manufacture, process, or distribute in commerce, or use any PCBs in any manner other than a totally enclosed manner, except as provided for in TSCA Section 6(e)(2)(B). EPA also has a responsibility to issue regulations for the proper disposal of PCB material and to promulgate regulations regarding the remediation of PCBs that are improperly disposed of or spilled. EPA may conduct inspections and take enforcement to ensure compliance with regulations governing bans on the manufacture, processing, and distribution in commerce of specified PCBs, as well as requirements for proper use, storage, cleanup, disposal, recordkeeping, and labeling of PCBs.

Recordkeeping and Reporting Under TSCA Section 8(b), EPA has the authority to compile an initial inventory of existing chemical substances and to supplement the inventory with additional information. TSCA Sections 8(a),(c)-(e) provide various means to EPA to acquire information on the manufacture, use, release, or distribution of chemical substances and information concerning substantial risks to health or the environment associated with such chemicals.

Asbestos Hazardous Emergency Response Act TSCA Title II: Asbestos Hazard Emergency Response Act (AHERA) requires EPA to promulgate regulations requiring local educational agencies to inspect their school buildings for asbestos-containing building materials, prepare asbestos management plans and perform asbestos response actions to prevent or reduce asbestos hazards.

Under TSCA Section 203, EPA is responsible for issuing regulations requiring that: (1) schools are inspected for asbestos-containing building materials; (2) schools have developed asbestos management plans; and (3) appropriate asbestos response actions are carried out in K-12 schools. EPA oversees compliance with AHERA via compliance assurance and appropriate enforcement action.

Under EPA’s asbestos in schools regulations, 40 CFR Part 763, EPA approves programs providing accreditation and training for all person who inspect and who design and conduct response actions

regarding asbestos-containing building materials in schools. Training and accreditation can be obtained through multiple sources: EPA-approved tribal accreditation program, EPA-approved state accreditation program, and EPA-approved accreditation program administered by private companies. EPA conducts inspections and enforces AHERA and its implementing regulations.

Indoor Radon Abatement Under TSCA Sections 303, 304, and 305(a), EPA is directed to publish an updated version of its document *A Citizen's Guide to Radon*. EPA is also responsible for developing model construction standards and techniques for controlling radon levels in new buildings. EPA develops and implements activities to assist state, tribal and local radon programs, including establishing a radon information clearing house, designing and implementing training seminars for state, tribal and local officials, and developing and demonstrating radon measurement and mitigation techniques.

Lead Exposure Reduction Under TSCA Title IV, EPA has multiple direct implementation responsibilities in Indian country associated with the dangers posed by lead-based paint. Under TSCA Sections 402(a)-(c), EPA has the responsibility to issue and enforce regulations to ensure that individuals and firms conducting lead-based paint activities (inspections, risk assessments and abatement), as well as renovation and remodeling, in Indian country have the required training and certification and follow work practice standards for performing such activities. Under TSCA Section 406(b), EPA has the responsibility to issue and enforce regulations to ensure that compensated renovators distribute information on lead-based paint and lead-based paint hazards to owners and occupants of most pre-1978 residential housing before beginning renovations. In addition, under Section 1018 of the Residential Lead-Based Paint Hazard Reduction Act of 1992, (42 U.S.C. Section 4851), EPA and HUD issue regulations requiring the disclosure of known information on lead-based paint and/or lead-based paint hazards by persons selling or leasing housing constructed before 1978 and enforce this requirement under TSCA.

Opportunities for Tribal Participation Tribes, if authorized by EPA, may directly implement TSCA Title II (Asbestos Hazardous Emergency Response) and TSCA Title IV (Lead Exposure Reduction). EPA may enter into a written agreement with tribes to allow properly trained employees to obtain and use a federal credential to conduct inspections on behalf of the Agency; inspection reports are sent to EPA and the Agency makes all compliance determinations and initiates, if appropriate, any subsequent enforcement activity.

Emergency Response

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), the Emergency Planning and Community Right-to-Know Act (EPCRA), the Oil Pollution Act of 1990 (OPA), the Clean Water Act (CWA), and the Clean Air Act (CAA) each contain provisions designed to prevent, prepare for and respond to releases of oil and hazardous substances. Under each statute, EPA implements the emergency prevention, preparedness, and response activity. EPA works with tribes to increase compliance at regulated facilities, improve local emergency response plans and increase chemical and oil spill prevention awareness and preparedness for response.

The following are several of the key emergency response direct implementation responsibilities of EPA under the various environmental statutes:

<u>EPA Direct Implementation Responsibility</u>
CERCLA Emergency Response
EPCRA Emergency Planning
EPCRA Facility Reporting
EPCRA Toxics Release Inventory
OPA Area Contingency Planning
CWA Compliance Assurance and Enforcement
CWA Oil Spill Response
CAA Risk Management Plan Oversight

Implementation of the Comprehensive Environmental Response, Compensation, and Liability Act

Emergency Response As stated in the CERCLA section above, EPA may coordinate an immediate response to clean-up and/or contain hazardous substances releases. In most cases the tribe, county, or state is the first responder. EPA may participate in the response if a state or tribe requests assistance, although a request is not required to exercise this authority. EPA may take command of a response should the responsible party, state or tribe lack the ability and resources to carry out the appropriate response.

Implementation of the Emergency Planning and Community Right-to-Know Act

Emergency Planning Emergency Planning and Community Right-to-Know Act (EPCRA) Sections 301-303 require local governments to prepare chemical emergency response plans and to review plans at least annually. Tribes are the implementing authority in Indian country. Tribes can establish Tribal Emergency Response Commissions (TERCS) and appoint Tribal Emergency Planning Committees (TEPCs), allowing for the development of an emergency planning and implementation structure attuned to community needs. A tribe may choose to sign a cooperative agreement authorizing the state to conduct emergency planning in Indian country. If a TERC is not established and a tribe does not enter into a cooperative agreement with the state, the tribal executive branch operates as the TERC and

is responsible for the planning committee's function.

Facility Reporting EPA may take an enforcement action against a facility for failure to notify or submit reports required under EPCRA. EPCRA Section 312 requires certain facilities to report certain chemicals held on-site, via either a Tier I or Tier II inventory form, and notify TERCs and the local fire departments of chemical releases (40 CFR Parts 355, 370). Tier I inventory forms provide local officials and the public with information on the general hazard types and locations of hazardous chemicals present at regulated facility during the previous calendar year. Tier II inventory forms contain similar information as Tier I, but also provide specific information about each listed hazardous chemical.

Toxics Release Inventory EPA conducts inspections and issues enforcement actions to ensure compliance with EPCRA Section 313 (the Toxics Release Inventory (TRI) program). The TRI program tracks the management and release of certain toxic chemicals that may pose a threat to human health and the environment. Section 313 requires an owner or operator of a facility to submit a TRI report if a business meets three criteria in a calendar year: (1) the facility is in a covered industry; (2) the facility has 10 or more full-time employees; and (3) the facility has manufactured, processed, or otherwise used a toxic chemical in excess of the threshold quantity. Such a facility must report to EPA and the appropriate state or tribal official on environmental releases to air, land, and water, off-site transfers, and other information, including certain information required by the Pollution Prevention Act. Such reports must be filed by July 1st for the preceding calendar year.

Implementation of the Oil Pollution Act of 1990

Area Contingency Planning Under the OPA and the National Contingency Plan, EPA is the designated lead agency for environmental emergencies for inland areas. EPA also has a role in the coastal zone, particularly regarding oil spill counter-measure concurrence and approvals. In planning for environmental emergencies, EPA will chair an Area Committee (AC), comprised of members from qualified personnel of federal, state, tribal, and local agencies.

Implementation of the Clean Water Act

Compliance Assurance and Enforcement Under CWA Section 311, EPA is responsible for verifying that applicable oil storage facilities prepare a Spill Prevention, Control and Countermeasures (SPCC) plan and, if required, a Facility Response Plan (FRP). EPA has the authority to inspect SPCC and FRP facilities, verify that the SPCC plans are adequate and contain the necessary components, and has the responsibility to verify that FRPs are adequate and contain the necessary components, including consistency with relevant Area Contingency Plans (ACPs). EPA conducts inspections and may take appropriate civil and criminal enforcement action. EPA may enter into written agreements with tribes to allow properly trained employees to obtain and use a federal credential to conduct inspections on behalf of the Agency; inspection reports are sent to EPA and the Agency makes all compliance determinations and initiates, if appropriate, any subsequent enforcement activity.

Oil Spill Response Under CWA Section 311, EPA or the Coast Guard is required to ensure effective and immediate removal of a discharge, and mitigation or prevention of a substantial threat of a

discharge, of oil or a hazardous substance into navigable waters and adjoining shorelines, and other jurisdictional waters under the CWA. On-Scene Coordinators are the federal officials responsible for monitoring, assessing and/or directing responses for all oil spills and hazardous substance releases reported to the federal government in Indian country.

Implementation of the Clean Air Act

Compliance Assurance and Enforcement for Risk Management Plans Under CAA Section 112(r), EPA is responsible for verifying that facilities with more than a threshold quantity of any covered regulated substance have implemented a risk management program and submitted a risk management plan (RMP) to EPA. EPA has the responsibility to verify that RMPs contain the necessary components. To determine compliance, EPA conducts audits of RMPs and performs inspections of regulated facilities.

Opportunities for Tribal Participation in Emergency Response Tribes can take on key roles in several aspects of emergency planning and emergency response. Tribes may be the first responders for emergency response actions under CERCLA. Tribes also establish TERCs and TEPCs under EPCRA. In addition to these roles described above, tribes may participate in the following actions:

- **Clean Water Act, as amended by the Oil Pollution Act of 1990** Tribes may be given co-chair roles and voluntarily participate in an Area Committee and/or Regional Response Teams. Tribal environmental staff may receive federal accreditations to perform inspections, and if violations are found may forward information to the EPA to take enforcement action. In case of an oil discharge (spill) or chemical release, trained tribal members may participate in spill management as part of the incident's Unified Command.
- **Clean Air Act** A tribe may be delegated authority to oversee Section 112(r) requirements, provided they meet the requirements of CAA Section 112(l) and 40 CFR §§ 63.91 and 63.95.