MAR 19 1998

APPENDIX B

MEMORANDUM

SUBJECT: Administrative Records for EPA Determinations on Tribal Eligibility for

FROM: Robert Perciasepe /s/
Assistant Administrator for the National Indian Program

Jonathan Z. Cannon
General Counsel /s/

TO: Regional Administrators
Regional Counsels

This memorandum describes the procedures that the regional offices are to follow in establishing and maintaining administrative records for EPA determinations on tribal applications for eligibility to run regulatory programs.[1] Because of the large number of determinations on tribal applications for regulatory programs expected over the coming years, and because these determinations can be complex and often are controversial, regional offices are to follow these procedures to ensure that the technical, policy, and legal bases for EPA's decisions are articulated in supporting records that are maintained in an orderly fashion. In addition, we ask that regional offices establish a training mechanism to ensure that the guidance and procedures are followed.

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[1]This memorandum addresses EPA determinations on tribal applications for eligibility to run regulatory programs under all relevant statutes; it does not address EPA determinations on tribal grant applications. Although the scope of this memorandum is limited to EPA determinations on tribal eligibility applications for regulatory programs, the procedures and guidance outlined below may be valuable for ensuring sound and defensible decisions regarding other Agency,actions affecting environmental progr ams in Indian country (e.g., PSD redesignations, site-specific rulemakings under RCRA)..

We believe that following the procedures outlined below will foster quality decision-making by the Agency and facilitate the public's understanding of EPA's actions. Moreover, in any litigation challenging EPA's decisions, the administrative record serves as the basis for a reviewing court to determine whether the Agency's action complies with the Administrative Procedure Act -- i.e., whether the action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

In deciding whether an agency decision is "arbitrary or capricious," the courts generally will be limited to reviewing the Agency's administrative record. Except in very rare circumstances, such review does not allow for testimony or after-the-fact explanations of the Agency's decision. Gaps in the record, including the omission of relevant factual material or the failure to articulate crucial steps in the Agency's reasoning, can result in a finding that the Agency has not complied with the Administrative Procedure Act, causing the court to remand and/or invalidate the Agency's action.

To ensure that the administrative record for EPA's decisions is developed in an orderly fashion, each Region is to establish a system for creating and maintaining an official docket for each determination on a tribal application for eligibility to run a regulatory program. A docket is a single repository for documents that comprise the record for an EPA action. The docket is organized chronologically and by type of document (e.g., correspondence, technical documents), and is updated with new record material as it is generated. Each document is assigned an identification number, and access to the docket is monitored to ensure that documents are not lost or misplaced. The documents are listed in an index as they are received or generated. While maintaining a formal docket involves some level of effort, we find that the resources needed to maintain a docketing system are more than justified because it enables the Agency to identify for decision-makers, the public, and the courts the bases for the Agency's decisions. Moreover, the Agency would need to compile an index to all information relied upon by the Agency in any event where EPA's action is the subject of litigation.

Section I, below, summarizes the general contents of an administrative record and discusses specific elements of an administrative record for tribal regulatory program eligibility decisions. Section II contains procedures regarding the establishment of dockets for such decisions in the regional offices.[2]

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[2] This memorandum does not address any requirements regarding the retention of documents under the Agency's records retention schedules.

I. Overview of the Administrative Record

The Administrative Record Generally

Below is a general discussion of the elements of an administrative record.

- The record is a set of documents relied upon by the Agency for its decision. It generally will contain all of the factual material relevant to the Agency's decision, relevant guidance used by the Agency, any comments/correspondence from outside parties and Agency responses, and EPA's explanation of how it arrived at its decision.

- The record generally should not contain internal documents reflecting the deliberations of the Agency (e.g., briefing documents, legal memoranda, drafts of documents).[3] If an internal document contains both factual and privileged information, and the factual information is not otherwise in the record, we can redact the privileged information and include the document in the record.

- Any documents prepared by EPA that are to be part of the administrative record should be dated and signed (if appropriate).

- The record may only include documents that are in existence at the time the Agency makes its decision. In any litigation challenging EPA's action, after-the-fact explanations or justifications of EPA's decisions are not permitted except in very rare circumstances. Therefore, all documentation needed to support the decision must be completed when EPA takes its action.

Elements of an Administrative Record on a Tribal Regulatory Program Eligibility Determination

Below is a list and discussion of the specific types of material that should be included in the administrative record for a determination on a tribal regulatory program application.

- The tribe's application and any post-application information submitted by the tribe.

- All other relevant correspondence between EPA and the tribe

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[3] These documents may, however, be subject to Agency retention schedules.

- Any letters from EPA transmitting the tribe's application to appropriate governmental entities (i.e., adjacent states, tribes and federal agencies).

- Any comments or competing claims of jurisdiction received from appropriate governmental entities. Any other comments received on the application from outside of EPA.

- EPA's response to any comments

- In cases where EPA consults with the Department of the Interior regarding its decision, any non-privileged record of such consultation.

- A decision document signed by the regional official delegated authority to make the decision providing a full explanation of the basis for the regional office's final determination. The Agency's decision document needs to clearly set forth the Agency's process and the data that supported the Agency's decision. The decision document needs to clearly lay out the Agency's determination with regard to each of the treatment in the same manner as a state criteria spelled out in EPA regulations (i.e., federal recognition, government with substantial powers and duties, jurisdiction, and capability).

- If the determination involves a finding of tribal jurisdiction over the activities of non-Indians on fee lands, the decision document should include a detailed, reservation-specific discussion of existing or potential impacts from such activities on the health, welfare, economic security or political integrity of the tribe (see EPA's Montana-test guidance, dated March 19, 1998).

- EPA's 1984 Indian Policy and any other Agency policy documents or Agency guidance that may be relevant to the determination.

- Non-deliberative documents reflecting any required concurrences.

- Any other non-deliberative materials relevant to the Agency's determination.

II. Establishing and Maintaining a Docket

Each region is to establish a docketing system for determinations on tribal applications for eligibility to run regulatory programs. Below is guidance on the operation of a docketing system. The guidance includes information regarding the general procedures that characterize the operation of a docket. It also contains a discussion of specific issues

relating to dockets for EPA tribal regulatory program eligibility determinations.

General Docketing Procedures

- Each regional office should identify a location for the docket and personnel that are responsible for overseeing and maintaining the docketing process.

- Any relevant materials should be forwarded to the docket from Agency personnel as soon as they are available in final form.

- Docket personnel should enter a copy of each document into the docket, indicating the date on which it was entered into the docket and a number identifying the document.

- An updated index to the docket should be maintained at all times.

- When in use for reading or copying, documents in the docket should be checked out to the individual using the documents to ensure that documents are not lost or misplaced. Records should be kept of any outside party that visits the docket.

- In general, documents relied upon by the Agency must themselves be placed in the docket. However, where a document is readily available to the public (e.g., through public libraries) a reference to the document (e.g., a copy of the title page and table of contents) may be placed in the docket in lieu of an actual copy.

Issues Specific to Tribal Eligibility Determination Dockets

- The docket should include the tribal application and all supplementary material submitted by the tribe to support the tribe's application.

- The docket should include all correspondence between EPA and outside parties regarding the tribe's application.

- As comments are received by the Agency, a copy should be placed into the docket as soon as possible. If comments are received after the close of the comment period, they should be placed in the docket in a separate section entitled "Comments received after the close of the comment period."[4]

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[4] It is the Agency's policy to respond to late comments whenever possible. Any decision not to respond to late comments should only be made after consultation with the Office of

- The docket should include any responses to comments prepared by the Agency.

- The decision document explaining the basis for the Agency's decision, along with any other non-deliberative materials relevant to the Agency's decision should be placed in the docket as soon as they are final.

- Non-deliberative documents reflecting any required concurrences should be placed in the docket.

- As noted previously, record documents cannot be generated or modified after EPA takes its action.

- Regions may want to consider establishing a "generic" tribal eligibility determination docket that would include documents (such as EPA's 1984 Indian Policy) that the regional office will rely upon in any tribal eligibility determination rather than including such documents in the docket for each determination.

We hope that this memorandum will assist the Regions in making decisions on tribal eligibility for regulatory programs and in improving EPA's technical, policy, and legal bases for all such decisions.

Regional Counsel.