

Date Signed: April 25, 1989

MEMORANDUM

SUBJECT: Additional Guidance on Implementing the Indian Primacy Rule for the PWSS and UIC Programs

FROM: Robert J. Blanco, Director (signed by Robert J. Blanco)
State Programs Division

TO: Drinking Water Branch Chiefs
Regions I - II and IV - X

In earlier guidance documents, I have asked that you work with the Tribes in your Region which you feel have the most potential for meeting the treatment as a State criteria as set forth in the Indian Primacy regulations. Further, I have sent you a copy of our draft guidance on the regulation which explains in some detail the treatment as a State requirement as the documentation/information a Tribe would need to submit. We have not, however, given you any specific guidance on several important issues including how to target Tribes for your attention, how to evaluate certain aspects of Tribal capability or potential capability, the delegation of authority for treatment as a State determinations, and funding available to Tribes. This memorandum and its attachments address these questions.

My staff will be contacting you shortly to discuss how the implementation of this rule is proceeding. We will need some specific information including:

- (a) a list of the Tribes that have submitted treatment as a State application so far and those that you anticipate will submit them during the remainder of FY 1989;
- (b) a list of the Tribes that have submitted development grant applications and the amounts;
- (c) a list of the Tribes that you anticipate will submit grant applications this fiscal year and, if available, an estimate of the amount;
- (d) activities carried out to implement the rule; e.g., meetings held, training conducted.

We are anticipating oversight hearings on Indian issues in May and we must be able to explain how we are implementing the rule.

Thank you for your cooperation in these efforts. Should you have any questions or wish to discuss this further, please call Betsy Devlin (FTS 382-2303) for the PWSS program or Don

Olson (FTS 382-5558) for the UIC program.

Attachments

cc: Jeffrey Hass
Randy Hill, OGC
Rich Freeman, Region V

Attachment A

Targeting Tribes and Evaluating Tribal Capability

In order to decide which Tribes to target for your efforts this fiscal year, I encourage you to carefully read the Preamble to the final Indian Primacy regulation (53 FR 37396, September 26, 1988), the regulation itself, and the draft guidance on the Indian primacy rule. These discussions in these documents describe the criteria for meeting treatment as a State and the development grant requirements as well as EPA's rationale for these. The Preamble also contains a good discussion of the issues surrounding the rule and may answer many of the questions which are arising as we begin to implement this rule. In addition, based on your work with the Tribes you may have an idea of which ones are in fact interested in applying for treatment as a State and a development grant in the PWSS or UIC programs.

Since funding for development grants is limited, I believe that you should prioritize the Tribes in your Regions for your attention. I suggest that in your deliberations on which Tribes to target, you consider the following:

1. Size of the Tribe, including land area, population, and number of public water systems and/or number and class of injection wells;
2. Existing administrative and political structure -- for example, the existence of a department dealing with environmental issues;
3. Previous experience dealing with the federal government, including experience with federal grants;
4. Extent of drinking water problems which could be more efficiently solved if the local authorities (and not the federal government) were running the PWSS program;
5. Existing technical expertise;
6. Tribal interest in administering a PWSS and/or UIC program; and
7. Anticipated grant award date and number of months remaining in the fiscal year.

Those Tribes with the highest rating on these factors will be the best candidates for treatment as a State and for receiving grants to develop PWSS or UIC programs.

Attachment B

Discussions Required by the Indian Primacy Regulation and Delegations of Authority to Make those Determinations

In implementing the Indian primacy rule, there are three separate determinations which may be made:

- (1) Whether or not a Tribe meets the criteria for treatment as a State;
- (2) Whether or not a Tribe will receive a development grant; or
- (3) Whether or not a Tribe meets the requirements for primary enforcement responsibility for the PWSS or UIC programs.

The authority to determine whether a Tribe meets the treatment as a State criteria has been delegated to the Regional Administrator. Headquarters will review and concur on the first determination for each program (i.e, the first PWSS and the first UIC in each Region).

Please remember that a determination that a Tribe meets the treatment as a State criteria does not require EPA to award a grant to a Tribe nor to grant it primary enforcement responsibility. However, under the PWSS and UIC Indian primacy regulations a Tribe must meet treatment as a State criteria in order to be eligible to receive a development grant.

The second decision is whether or not to award a Tribe a development grant. According to our regulations, a development grant may only be awarded if a Tribe: (1) has met the treatment as a State criteria; (2) has or agrees to establish a PWSS or UIC program within the required timeframes (three years for PWSS and four years for UIC); and (3) agrees to assume primacy within that time period. Further, we stated in the preamble that in reviewing applications for development grants, we would evaluate a Tribe's capability to administer a program and we would require a development plan. Consistent with this, you should review all aspects of a Tribe's capability -- including financial capability -- at this time. You may make a determination that such a Tribe is too small or lacks so much of the technical expertise needed to administer a program that it is not possible for EPA to award them a development grant. Such a decision is within your discretion as the authority to award development grants is already delegated to the Regional Administrators.

The final decision to be made in this process is on the application for primary enforcement responsibility itself. These applications should be reviewed in the same manner and with the same degree of stringency as we would review State applications. A Tribe must meet all primacy requirements for the program for which it is applying as specified in the statute or regulations. As with State primacy applications, Headquarters concurrence is required.

Attachment C

Funding for PWSS and UIC Grants to Indian Tribes

As you know, the Indian primacy regulations state that up to 3 % of the PWSS State grant funds and up to 5 % of the UIC State grant funds shall be reserved each year for use on Indian lands. It is our policy that these funds should remain available as long as possible for use in grants to Tribes. Therefore, we will hold funds until June of the year in which the appropriation expires. At that time, unused funds will be reallocated for other purposes. For example, FY 1988 funds will be reallocated in June 1989 and FY 1989 appropriation funds will be reallocated in June 1990. Additional details on the reallocation process will be sent to you under separate cover.

We have been asked many questions about the appropriate size of a development grant. At this time, it is not possible to give definitive guidance on this subject. However, you should keep in mind the factors listed on page 2 of this memorandum (land area, population, number of water systems or injection wells, previous experience in managing an environmental program, etc.). In addition, from your experience in working with the States and with the Tribes, you should be in a good position of determining the level of funding it will take to develop a primacy program. Finally, you should keep in mind the amount of money the existing State grant formula would allocate to Tribes. This is not an upper limit, but may give some idea as to what may be expected in federal funding if all Tribes applied for and received primacy.

In the future when we gain some experience with development grants for Tribes, we may be able to lay out more definitive criteria for determining the size of development grants.