PROPOSED DECISION DOCUMENT:

THE NAVAJO NATION
APPROVAL OF TRIBAL APPLICATION FOR PRIMACY
CLASS II UNDERGROUND INJECTION CONTROL PROGRAM
SAFE DRINKING WATER ACT

APRIL 2008

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I. Introduction

A. Purpose

The purpose of this Decision Document is to provide the basis and supporting data for the United States Environmental Protection Agency's (EPA) decision under Sections 1451 and 1425 of the Safe Drinking Water Act (SDWA) to approve the application of the Navajo Nation (Tribe) for primary enforcement responsibility (or primacy) of the Class II (i.e., oil and gas production-related) underground injection control (UIC) program. EPA's approval applies to the Navajo Nation's Class II UIC program for Class II wells located (1) within the exterior boundaries of the formal Navajo Reservation, including the three satellite reservations (Alamo, Canoncito and Ramah), but excluding the former Bennett Freeze Area, the Four Corners Power Plant, and the Navajo Generating Station, and (2) on Navajo Nation tribal trust and allotted lands outside those exterior boundaries. Except as expressly noted, these areas are collectively referred to hereinafter as "areas covered by the Tribe's Primacy Application". (See definition of Primacy Application in Section I.B below of this document.)

B. Application

The Tribe's application for primacy for the SDWA Class II UIC program (Primacy Application) consists of the following:

1. October 18, 2001: Cover letter and Primacy Application from Kelsey A. Begaye, President, Navajo Nation, to Wayne Nastri, Regional Administrator, United States EPA Region IX, including:

    A. Application for Eligibility to Administer a UIC Program for Class II Wells in Navajo Nation Indian County
    B. Statement of the Attorney General of the Navajo Nation Regarding the Regulatory Authority and Jurisdiction of the Navajo Nation with Respect to Its Underground Injection Control Program (signed by Levon B. Henry, Attorney General Navajo Nation, August 27, 2001; revised July 3, 2002)
    C. Statement of the Attorney General of the Navajo Nation Pursuant to 40 C.F.R. § 145.24 (signed by Levon B. Henry, Attorney General Navajo Nation, August 27, 2001)
    D. Navajo Nation Environmental Protection Agency (NNEPA) UIC Program Staff Resumes (revised December 2006)
    E. Navajo Nation PWSS Primary Enforcement Responsibility Approval (January 18, 2001)
    F. Navajo Nation's TAS for Water Pollution Control Program CWA 106 (June 30, 1993)
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U. Groundwater Pollution Control Program, Navajo Nation Environmental Protection Agency, Special Revenue Account Fund Management Plan
V. Uniform Regulations for Permit Review, Administrative Enforcement Orders, Hearings, and Rulemakings under Navajo Nation Environmental Acts
W. Memorandum of Agreement between Navajo Nation Acting Through the Navajo Nation Environmental Protection Agency and Region IX, U.S. Environmental Protection Agency for Underground Injection Control Regulation (August 21, 2001)
X. Memorandum of Understanding between the United States Environmental Protection Agency - Region 9, Bureau of Land Management, Bureau of Indian Affairs, and the Navajo Nation acting through the Navajo Nation Environmental Protection Agency (May 2000)
Y. Intergovernmental Relations and Resources Committees Approvals of the Primacy Application
Z. Public Notice documentation pursuant to 40 C.F.R. § 145.31(a)

2. February 18, 2004: Letter from Joe Shirley, Jr., President, Navajo Nation, to Wayne Nastri, Regional Administrator, US EPA Region 9, clarifying that the Tribe is requesting primacy of the Class II UIC program under Section 1425 of the SDWA.

3. October 14, 2006: Supplemental Statement of the Navajo Nation Attorney General Regarding the Regulatory Authority and Jurisdiction of the Navajo Nation with Respect to Underground Injection Control Wells on “Split Estates.”

4. October 30, 2006: Memorandum of Agreement between Navajo Nation Environmental Protection Agency and U.S. Environmental Protection Agency Regarding Criminal Enforcement of the Underground Injection Control Program Pursuant to 40 C.F.R. 145.

5. November 17, 2006: Letter from S. Deb Misra, Director Surface and Ground Water Protection Department, Navajo Nation Environmental Protection Agency, to David Albright, Manager Ground Water Office, EPA Region 9, enclosing 13 NNEPA-issued UIC permits to include in the Primacy Application.

6. May 2, 2007: NNEPA-submitted package to Kate Rao, Ground Water Office, EPA Region 9, with 3 NNEPA-issued UIC permits to include in the Primacy Application.

7. Oct. 1, 2007: NNEPA-submitted package to Kate Rao, Ground Water Office, EPA Region 9, with 1 NNEPA-issued UIC permit to include in the Primacy Application.

8. March 3, 2008: NNEPA-submitted package to Kate Rao, Ground Water Office, EPA Region 9, with 1 NNEPA-issued UIC permit to include in the Primacy Application.

II. Requirements for Tribal Eligibility and UIC Program Approval

A. Tribal Eligibility Requirements

Section 1451(a) of the SDWA provides that the EPA Administrator is authorized to treat Indian Tribes as States for the SDWA UIC program, and the EPA Administrator may delegate to such Tribes primary enforcement responsibility, or primacy, for the UIC program. SDWA Section 1451(b) provides that EPA shall promulgate final regulations specifying the provisions for which it is appropriate to treat Tribes as States, and sets out certain requirements that a Tribe must meet, which are as follows: "(A) the Indian Tribe is recognized by the Secretary of the Interior and has a governing body carrying out substantial governmental duties and powers; (B) the functions to be exercised by the Indian Tribe are within the area of the Tribal Government's jurisdiction; and (C) the Indian Tribe is reasonably expected to be capable, in the EPA Administrator's judgment, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of this subchapter and of all applicable regulations."

The implementing regulations contemplated by SDWA Section 1451(b) are found at 40 CFR part 145, Subpart E. These implementing regulations describe the requirements for Tribal eligibility (40 CFR § 145.52), the necessary documentation to accompany a Tribe's request for a determination of eligibility (40 CFR § 145.56), and the procedure for processing an Indian Tribe's application (40 CFR § 145.58). Similar to Section 1451(b), § 145.52 states that EPA is authorized to treat an Indian Tribe as eligible to apply for primary enforcement responsibility for the UIC program if it meets the following criteria: (a) the Indian Tribe is recognized by the Secretary of the Interior; (b) the Indian Tribe has a tribal governing body which is currently "carrying out substantial governmental duties and powers" over a defined area (*i.e.*, is currently performing governmental functions to promote the health, safety, and welfare of the affected

population within a defined geographic area); (c) the Indian Tribe demonstrates that the functions to be performed in regulating the underground injection wells that the applicant intends to regulate are within the area of the Indian Tribal government's jurisdiction; and (d) the Indian Tribe is reasonably expected to be capable, in the Administrator's judgment, of administering an effective UIC program in a manner consistent with the terms and purposes of the SDWA and all applicable regulations.

Additionally, 40 CFR § 145.58(b) states that a Tribe can apply for primacy under either or both of SDWA Sections 1422 and 1425 if all four eligibility requirements of § 145.52 are met.[1]

B. SDWA Section 1422 / 1425 Programs

Section 1421 of the SDWA requires the EPA Administrator to promulgate minimum requirements for effective State UIC programs to prevent underground injection activities that endanger underground sources of drinking water (USDWs). Sections 1422 and 1425 of the SDWA establish requirements for States seeking EPA approval for State UIC program primacy.

For States that seek primacy for UIC programs under Section 1422 of the SDWA, the EPA has promulgated regulations setting forth the applicable procedures and substantive requirements. These regulations are codified in the Code of Federal Regulations (40 CFR part 145). They include requirements for State permitting programs (by reference to certain provisions of 40 CFR parts 124 and 144), compliance evaluation programs, enforcement authority, and information sharing.

Section 1425 of the SDWA describes alternative requirements for States to obtain primacy for UIC programs that relate solely to Class II wells. Section 1425 allows a State, in lieu of the showing required under SDWA Section 1422(b)(1)(A), to demonstrate that the proposed Class II UIC program meets the requirements of SDWA Sections 1421(b)(1)(A)-(D), and represents an "effective program (including adequate recordkeeping and reporting) to prevent underground injection which endangers drinking water sources." EPA published interim guidance entitled, "Guidance for State Submissions Under Section 1425 of the Safe Drinking Water Act, Ground Water Program Guidance #19" (Guidance 19) in the Federal Register (46 FR 27333-27339, May 19, 1981), which sets forth the criteria EPA generally considers in approving or disapproving applications under Section 1425.

III. Tribal Eligibility Determination

After reviewing the Navajo Nation's initial application for Treatment as a State (TAS)[2]

[1] 40 CFR § 145.1(h) states that all requirements of parts 124, 144, 145, and 146 that apply to States with UIC primary enforcement responsibility also apply to eligible Indian Tribes, except where specifically noted.

[2] We note that EPA has discontinued use of the term ``treatment as a state'' to the extent possible and now generally refers to "tribal eligibility" or "treatment in a manner similar to a State"; however, since the phrase is included in

with respect to the SDWA UIC program under SDWA Section 1451, in September 1994, EPA determined that the Navajo Nation satisfied the statutory and regulatory requirements contained in Section 1451(b)(1) and 40 CFR § 145.52 and approved the TAS application, qualifying the Tribe for grants to develop its UIC program. The Tribe has also applied for and received TAS approval for a number of EPA programs under other statutes that authorize EPA to treat tribes in a manner similar to that in which it treats states. Pursuant to 40 CFR § 145.56(f), through prior TAS applications, the Tribe submitted much of the information necessary for this determination of tribal eligibility for the Class II UIC Program.

As explained in detail below, EPA proposes to find that the Navajo Nation has fulfilled all UIC tribal eligibility and application requirements in 40 CFR §§ 145.52 and 145.56, thereby fulfilling the provisions of SDWA Section 1451.

A. Federal Recognition

40 CFR § 145.52(a) requires a tribe to be recognized by the Secretary of the Interior, and § 145.56(a) requires that a tribe provide a statement to that effect as part of its SDWA primacy application. EPA finds that the Navajo Nation has met these requirements under several previous TAS applications, including the following: SDWA UIC grants program TAS application; Clean Water Act (CWA) Section 303/401 TAS application; CWA Section 106 TAS application; CWA Section 319 TAS application; SDWA Public Water System Supervision (PWSS) primacy application; and Clean Air Act (CAA) Part 71 application. As EPA described during promulgation of regulations regarding "Indian Tribes; Eligibility for Program Authorization," the fact that a tribe has previously met the federal recognition requirement for the CWA, CAA, or SDWA establishes that it meets that requirement for its current application. *See* 59 FR 64340, December 14, 1994. In addition, the Navajo Nation is listed in the most recent list of federally recognized tribes. *See* 72 FR 13648, 13649, March 22, 2007. Thus, the Navajo Nation has satisfied the requirements at 40 CFR §§ 145.52(a) and 145.56(a) pertaining to federal recognition by the Secretary of the Interior.

B. Substantial Governmental Duties

40 CFR § 145.52(b) requires a tribe to have "a Tribal governing body which is currently carrying out substantial governmental duties and powers over a defined area, (*i.e.*, is currently performing governmental functions to promote the health, safety, and welfare of the affected population within a defined geographic area)." 40 CFR § 145.56(b) further requires, among other things, that a tribe provide the following information as part of its TAS application: "A descriptive statement demonstrating that the Tribal governing body is currently carrying out substantial governmental duties and powers over a defined area. The statement should: (1) Describe the form of the Tribal government; (2) Describe the types of governmental functions

several statutes, its continued use may sometimes be necessary. *See* 59 FR 64339, December 14, 1994 (simplifying the TAS process).

currently performed by the Tribal governing body, such as, but not limited to, the exercise of police powers affecting (or relating to) the health, safety, and welfare of the affected population; taxation, and the exercise of the power of eminent domain; and (3) Identify the sources of the Tribal government's authority to carry out the governmental functions currently being performed."

The Tribe's Primacy Application relies in part on EPA's 1994 approval of the Tribe's TAS Application for the UIC grants program. When EPA approved that Application, it found the Tribe had adequately described the form of Tribal government, the governmental functions the government performs, and the source of Tribal authority to carry out those functions. In addition to the UIC grants program approval, EPA's review and approval of the Tribe's CWA Section 106 TAS grants application described the basis for EPA's determination that the statement supporting the Section 106 application established that the Tribe meets the "governmental functions" requirements, as follows:

> According to that statement, the Navajo Nation has a large and elaborate tripartite government, with executive, legislative, and judicial branches. The Application also describes numerous governmental functions which the Tribe performs. One of the primary functions specified by the Tribe is the use of its police powers to protect the health, safety, and welfare of the Navajo people. The Application also indicates that the Nation possesses eminent domain authority, criminal enforcement authority, and the power to tax both individuals and corporations.

Moreover, the Tribe was previously found by EPA to have met the governmental duties and powers requirement by making a demonstration of such duties and powers over a defined area in the previous TAS applications described in Section III.A above. As EPA described during promulgation of regulations regarding "Indian Tribes; Eligibility for Program Authorization," the fact that a tribe has previously met the governmental duties and powers requirement for the CWA, CAA, or SDWA ordinarily establishes that it meets that requirement for its current application. *See* 59 FR 64339, 64340, December 14, 1994.

Thus, the Navajo Nation has satisfied the requirements at 40 CFR §§ 145.52(b) and 145.56(b) pertaining to its showing that it has a governing body carrying out substantial governmental duties and powers over a defined area.

C. Adequate Jurisdiction

40 CFR § 145.52(c) requires that the Tribe demonstrate that "the functions to be performed in regulating the underground injection wells that the applicant intends to regulate are within the area of the Indian Tribal government's jurisdiction." In addition, 40 CFR § 145.56(c) outlines the necessary documentation a tribe must provide pertaining to this requirement, including a statement from the Tribal Attorney General (or equivalent official) which describes the basis for the Tribe's jurisdictional assertion (including the nature or subject matter of the

asserted jurisdiction); a map or legal description of the area over which the Indian Tribe asserts jurisdiction; a copy of those documents such as Tribal constitutions, by-laws, charters, executive orders, codes, ordinance, and/or resolutions which the Tribe believes are relevant to its assertions regarding jurisdiction; and a description of the locations of the underground injection wells the Tribe proposes to regulate.

The Navajo Nation's assertion of authority is found in three statements. Pursuant to § 145.56, the Navajo Nation has provided a *Statement of the Attorney General of the Navajo Nation Regarding the Regulatory Authority and Jurisdiction of the Navajo Nation with Respect To Its Underground Injection Control Program* ("Jurisdictional Statement"). This Statement was prepared by Levon B. Henry, Attorney General, and is dated August 27, 2001 and July 3, 2002, as revised. The Navajo Nation also submitted a *Supplemental Statement of the Navajo Nation Attorney General Regarding the Regulatory Authority and Jurisdiction of the Navajo Nation to Operate an Underground Injection Control Program under the Safe Drinking Water Act* ("Supplemental Jurisdictional Statement"). The Supplemental Jurisdictional Statement was prepared by Anthony Aguirre, Senior Attorney, Natural Resources Unit, Navajo Department of Justice, and signed by Attorney General Denetsosie on October 14, 2006. In addition, pursuant to § 145.24, the Tribe submitted a statement from Mr. Henry on August 27, 2001, certifying that the laws of the Navajo Nation provide adequate authority to administer a UIC program pursuant to 40 CFR § 145.24 ("AG 145.24 Certification").

In the context of promulgating EPA's regulations regarding "Indian Tribes; Eligibility for Program Authorization," *see* 59 FR 64339, December 14, 1994, EPA recognized that it would not approve a tribal application to administer a regulatory program under the SDWA, including a UIC regulatory program, without undertaking a separate analysis of the legal basis of the tribe's jurisdiction to carry out those activities required to run the program. Consistent with this approach, EPA has conducted a detailed analysis and made findings regarding the Tribe's demonstration of authority pursuant to the program requirements of SDWA Section 1425(a) per Guidance 19, which are also applicable to the Tribe's eligibility for TAS for purposes of the Class II UIC program under SDWA Section 1451 and 40 CFR part 145, Subpart E. That analysis of the Tribe's programmatic authority and corresponding findings are found in Section IV below.

As discussed above, 40 CFR § 145.56(c) further requires that the Tribe provide the following information as part of its TAS application: a map or legal description of the area over which the Indian Tribe asserts jurisdiction; a copy of those documents such as Tribal constitutions, by-laws, charters, executive orders, codes, ordinance, and/or resolutions which the Tribe believes are relevant to its assertions regarding jurisdiction; and a description of the locations of the underground injection wells the Tribe proposes to regulate.

The Class II UIC program to be administered by the Navajo Nation pertains to the management

and protection of underground sources of drinking water[3] and the regulation of Class II underground injection activities. As described above, the Tribe's Primacy Application covers Class II wells located (1) within the exterior boundaries of the formal Navajo Reservation, including the three satellite reservations (Alamo, Canoncito and Ramah), but excluding the former Bennett Freeze Area, the Four Corners Power Plant, and the Navajo Generating Station, and (2) on Navajo Nation tribal trust and allotted lands outside those exterior boundaries. Except as expressly noted, these areas are collectively referred to hereinafter as "areas covered by the Tribe's Primacy Application". These areas include split estate lands. The Tribe has provided maps of the areas covered by the Tribe's Primacy Application. These maps indicate the patterns of land ownership throughout the areas covered by the Tribe's Primacy Application and describe the locations of the existing underground injection wells that the Navajo Nation is proposing to regulate.

EPA is proposing to find that, consistent with the governing documents underlying the Tribal government and under well-established principles of Federal Indian law, the Navajo Nation has inherent authority over its own members and territories to implement and enforce a Class II UIC program with respect to Tribal member activities in the areas covered by the Tribe's Primacy Application. *See, e.g.*, California v. Cabazon Band of Mission Indians, 480 U.S. 202, 207 (1987), United States v. Mazurie, 419 U.S. 544, 557 (1975). This leaves one issue for additional discussion: Tribal authority to regulate nonmember activities in the areas covered by the Tribe's Primacy Application.

The Navajo Nation submitted information in its Primacy Application showing that the Tribe meets EPA's formulation of the test for determining a tribe's jurisdiction to regulate the activities of persons other than tribal members. In the preamble to the amendments to the EPA's water quality standards regulation under the CWA, the EPA set forth its analysis of the scope of inherent tribal authority over nonmember activities on reservation lands owned in fee by nonmembers. *See* 56 FR 64876, 64878, December 12, 1991. In that discussion, the EPA considered relevant case law, including Montana v. United States, 450 U.S. 544 (1981), and adopted an "operating rule," described below, for determining, on a case-by-case basis, whether an Indian tribe has civil regulatory authority over the activities of nonmembers on reservation lands owned in fee by nonmembers.

The Supreme Court in Montana held that, in the absence of a federal grant of authority, tribes generally lack inherent jurisdiction over the activities of nonmembers on nonmember fee lands, with two exceptions. Under the first Montana exception, tribes retain authority over "the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements." Montana, 450 U.S. at

[3]The term underground sources of drinking water, or USDWs, is defined in 40 CFR § 144.3 as an "aquifer or its portion (a)(1) [w]hich supplies any public water system; or (2) [w]hich contains a sufficient quantity of ground water to supply a public water system; and (i) [c]urrently supplies drinking water for human consumption; or (ii) [c]ontains fewer than 10,000 mg/l [milligrams per liter] total dissolved solids; and (b) [w]hich is not an exempted aquifer."

565; *see also* Atkinson Trading Co., Inc. v. Shirley, 532 U.S. 645 (2001). Under the second Montana exception, a tribe retains inherent sovereign power to exercise civil authority when "[nonmember] conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." Montana, 450 U.S. at 565-66. In analyzing tribal assertions of inherent authority over nonmember activities [on fee lands on Indian reservations], the Supreme Court has reiterated that the Montana test remains the relevant standard. *See, e.g.,* Strate v. A-1 Contractors, 520 U.S. 438, 445 (1997) (describing Montana as "the pathmarking case concerning tribal civil authority over nonmembers"); *see also* Nevada v. Hicks, 533 U.S. 353, 358(2001)("Indian tribes' regulatory authority over nonmembers is governed by the principles set forth in [Montana]").

In the preamble to EPA's 1991 water quality standards regulation, the Agency noted that, in applying the Montana test and assessing the impacts of nonmember activities on fee lands on an Indian tribe, EPA relies upon an operating rule that evaluates whether the potential impacts of regulated activities on the tribe are serious and substantial. *See* 56 FR 64878-79.

EPA's approach to applying the Montana test and analyzing tribal civil regulatory authority over nonmember activities on reservation fee lands was upheld in Montana v. EPA, 137 F.3d 1135 (9th Cir. 1998), *cert. denied*, 525 U.S. 921 (1998) (upholding EPA's analytical framework and finding that the Salish and Kootenai Tribes demonstrated adequate civil regulatory jurisdiction to establish tribal water quality standards under the CWA on nonmember fee lands within their Reservation). The Ninth Circuit Court of Appeals found that EPA's approach was consistent with relevant Supreme Court precedent, including the Supreme Court's discussion, in Strate, of the nexus between the regulated activity and tribal self-governance. Montana v. EPA, 137 F.3d at 1140-41. Similarly, in Montana v. EPA, 141 F.Supp.2d 1259 (D. Mont. 1998), the district court upheld EPA's finding that the Assiniboine and Sioux Tribes of the Fort Peck Reservation have adequate civil regulatory jurisdiction to regulate nonmember activity within the Fort Peck Reservation for the purposes of the CWA water quality standards program. Likewise, the Seventh Circuit Court of Appeals upheld EPA's TAS approval of the CWA section 303 program for the Sokaogon Chippewa Community on the Mole Lake Reservation in northeastern Wisconsin. Wisconsin v. EPA, 266 F.3d 741 (7th Cir. 2001) *cert. denied* 535 U.S. 1121 (2002).

In the present case, EPA has applied the operating rule announced in the preamble to the 1991 regulations under the CWA and analyzed whether serious and substantial impacts or potential impacts exist from nonmember activities that would justify the Tribe's exercise of authority over nonmembers, pursuant to Montana v. U.S.[4] As described below, EPA is proposing to find that the Navajo Nation has demonstrated that the existing and potential impacts of nonmember underground injection activities on the Navajo Nation on the Tribe's political integrity, economic security, health and welfare are serious and substantial, thus satisfying

[4] EPA engages in this analysis as a matter of prudence, and does not opine here on whether such a showing that the effects of nonmember activities on a tribe are serious and substantial is required under the Montana decision or subsequent case law.

EPA's operating rule with respect to the second exception of the Montana test.[5]

1. Tribal Authority to Regulate Nonmember Activities on Nonmember Fee Lands Within the Formal Navajo Reservation

EPA proposes to find that existing and potential future Class II underground injection activities of nonmembers within the exterior borders of the formal Navajo Reservation have potential direct impacts on the political integrity, economic security, and health and welfare of the Tribe and Tribal members that are serious and substantial. The specific facts upon which the EPA bases this proposed finding are presented in the Tribe's Primacy Application, Appendix A to this Decision Document (EPA's Proposed Findings of Fact), and supplemental materials.

In brief, the Tribe's Primacy Application, Appendix A and supplemental materials describe the following facts upon which EPA is basing its finding: various activities associated with oil production, including Class II underground injection, that have occurred and are continuing to occur on the formal Navajo Reservation; how these activities, if not properly managed, can affect the underground drinking water supplies on the formal Navajo Reservation; and how degradation of those supplies can have serious and substantial adverse effects on Tribal health and welfare, economic security, and political integrity. More specifically, the Primacy Application, Appendix A, and supplemental materials describe in detail how improperly managed Class II injection wells on the Navajo Nation can introduce pollutants into drinking water aquifers, and how the drinking water aquifers on the formal Navajo Reservation characteristically underlie both fee and trust lands so that impacts on the waters underlying one category of surface ownership typically affect the waters underlying all other categories. These documents also explain the nature of these pollutants and the pathways they can follow absent proper regulatory control of Class II underground injection activities; how Tribal members are potentially exposed to these pollutants; and how such exposures can cause adverse effects on Tribal health and welfare, economic security, and political integrity. The Primacy Application, Appendix A and supplemental materials also describe how ground water is the primary source of water supply, and is also the primary source of drinking water, across the Navajo Nation. (*See* Montana v. EPA, 137 F.3d at 1141, discussing the threat to the health and welfare of a tribe inherent in the impairment of the quality of a reservation's principal water source.)

In making its proposed finding, EPA has relied on its special expertise and practical experience regarding drinking water resource management and its importance, recognizing that safe drinking water supplies are crucial to the continued survival of tribes. Based upon its special expertise and practical experience, the EPA also believes that underground injection activities regulated under the SDWA generally have impacts on tribal political integrity,

[5] EPA has not resolved whether it is necessary to analyze under the Montana test the impacts of nonmember activities occurring on tribal/trust lands to find that a tribe has inherent authority to regulate such activities. EPA believes, however, that, as explained below in Section III.C.2 and 3 of this document, the Tribe could show authority over nonmember activities on tribal/trust lands covered by its Primacy Application under the Montana test.

economic security, and health and welfare that are serious and substantial. As discussed below in Section III.C.4 of this document, this finding is consistent with EPA's belief that the SDWA itself constitutes, in effect, a legislative determination that underground injection activities that affect drinking water quality can have impacts on political integrity, economic security, and human health and welfare that are serious and substantial.

Additionally, EPA is mindful of the mobility of pollutants entering aquifers that are USDWs within the Navajo Nation. Once introduced into an USDW, pollution from improperly managed Class II underground injection activities can migrate under trust and fee lands alike. EPA has reviewed the hydrogeology of the Navajo Nation, including the size and hydrogeologic characteristics of the drinking water aquifers found in the geological formations underlying it. Having then compared the formal Navajo Reservation's hydrogeology to the limited parcels of private fee lands found throughout the Navajo Nation, EPA believes that any aquifer underlying Navajo Nation fee lands within the Reservation has a strong probability of being hydrologically connected to aquifers that Tribal members may use as drinking water supplies. Hence, pollution in aquifers underlying fee lands within the Reservation can reasonably be expected to be carried to aquifers upon which Tribal members may rely for drinking water, thereby adversely impacting the health and welfare of Tribal members, as well as the political integrity and economic security of the Tribe.

As discussed above, EPA finds that it is highly probable that any impairment occurring on, or resulting from nonmember activities on, fee lands will impair the drinking water quality of USDWs on trust lands. Similarly, the serious and substantial effects of drinking water quality impairment within the nonmember portions of the Navajo Nation are very likely to affect the quality of drinking water available to Tribal members anywhere on the Reservation.

2. Tribal Authority to Regulate Nonmember Activities on Lands Other Than Nonmember Fee Lands

With regard to areas covered by the Tribe's Primacy Application other than fee lands owned by nonmembers, EPA finds that under well-established principles of Federal Indian law, the Tribe has inherent authority to regulate Class II underground injection activities. EPA recognizes that under well-established principles of Federal Indian Law, a tribe retains attributes of sovereignty over both its lands and its members. *See, e.g.*, California v. Cabazon 480 U.S. at 207; U.S. v. Mazurie, 419 U.S. at 557. Further, tribes retain the "inherent authority necessary to self-government and territorial management" and there is a significant territorial component to tribal power. Merrion v. Jicarilla Apache Tribe, 450 U.S. 130, 141-142. *See also* White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 151 (1980) (significant geographic component to tribal sovereignty). Additionally, a tribe retains its well-established power to exclude nonmembers from tribal land, including "the lesser power to place conditions on entry, on continued presence, or on reservation conduct." Merrion, 455 U.S. at 144. Thus, a tribe can regulate the conduct of persons over whom it could "'assert a landowner's right to occupy and exclude.'" Atkinson Trading Co. 532 U.S. at 651-652, quoting Strate, 520 U.S. at 456.

With limited exceptions, the Tribe may exclude nonmembers from lands to which the Tribe or its members hold the fee or beneficial title and, therefore, may condition entry on compliance with Tribal law. The presence of nonmembers on such lands is, almost always, only by permission from the Tribe or a Tribal member through some mechanism, such as a commercial lease or contract.

Federal statute requires that the Secretary of the Interior approve leases for the use of restricted lands, including trust lands, whether tribally or individually owned, for, among other things, business or other purposes. 25 U.S.C. § 415. Under U.S. Department of the Interior (DOI) regulations, any person other than an Indian landowner, or the parent or guardian of a minor Indian landowner, must obtain a lease before taking possession of trust lands. 25 CFR § 162.104(d). If possession of trust lands is taken without a lease by someone other than the Indian owner of the tract, the Bureau of Indian Affairs considers the unauthorized use a trespass. 25 CFR § 162.106(a). The DOI regulations further state that tribal laws generally apply to land under the jurisdiction of the tribe enacting the laws. 25 CFR § 162.109. These regulatory provisions, which are applicable to all leases, particularly but not solely when expressly incorporated into the terms of a lease, provide evidence of the lessor's consent to tribal authority in exchange for tribal consent for the nonmember to engage in activity on tribal land.

Additionally, other federal requirements applying to activities such as mineral development (which may, in certain circumstances, be associated with waste disposal activities regulated under the underground injection program) also call for lease arrangements with nonmembers conducting such activities on trust land. For instance, Indian mineral owners may lease their lands for mining purposes but must get approval from the Secretary of the Interior in order to do so. 25 U.S.C. § 2101 *et seq*. (Indian Minerals Development Act of 1982, allowing tribes, with approval of the Secretary of the Interior, to enter into agreements for the extraction, processing, or development of energy or non-energy mineral resources); 25 U.S.C. § 396a (Indian Mineral Leasing Act of 1938, allowing leasing of Indian lands for mining purposes, with the approval of the Secretary of the Interior). Currently, all existing nonmember Class II injection well facilities on Navajo Nation trust lands operate pursuant to a consensual lease relationship with the Tribe. In such cases, under Montana's first exception, the Tribe would have inherent authority over those activities even if they were on nonmember fee lands. Montana, 450 U.S. at 565.

In addition, the Tribe has provided information showing that Class II underground injection activities taking place (or that may take place) on nonmember fee lands within the Navajo Nation can adversely affect Tribal drinking water supplies, cultural uses, political integrity, economic security, health or welfare of the Tribe and its members, as discussed in detail in Section III.C.1 of this document. When those underground injection activities take place on lands held by the Tribe or its members, they are, in general, even more likely to directly impact the political integrity, economic security, health or welfare of the Tribe and its members, as all of the impacts from nonmember activities on fee lands are also likely to occur in other areas covered by the Tribe's Primacy Application.

There are currently 383 Class II injection wells in the areas covered by the Tribe's Primacy Application, 359 operating within the Shiprock Agency and 24 within the Eastern Agency. All of these wells intersect geologic formations considered USDWs and, if improperly managed, could result in the introduction of pollutants into such USDWs resulting in potential serious and substantial adverse effects on the political integrity, economic security, health or welfare of the Tribe and its members.

Furthermore, EPA has made generalized findings described below in Section III.C.4 and 5 of this document about the effects of underground injection activities that logically apply with equal or greater force when those activities are carried out on lands owned by a tribe or its members. EPA has found that underground injection activities generally have impacts on politics, economics and human health and welfare that are serious and substantial. In addition, the mobile nature of pollutants in subsurface waters means that impairment of USDWs within Indian lands, whether on nonmember fee land or lands held by a tribe or its members, will likely impair drinking water sources elsewhere on the Indian lands. In the case of trust lands and other lands under a tribe's jurisdiction, any nonmember activities on those lands that can impair drinking water sources will likely have an even more direct impact on the resources and the health and welfare of the tribe. EPA thus believes the Tribe has demonstrated authority over such nonmember injection activities under the second exception of the Montana test.

3. Tribal Authority to Regulate Nonmember Activities on Split Estate Lands

The Supplemental Jurisdictional Statement indicates that there are some UIC wells located on split estates, with the surface estates held in trust for the Tribe by the United States, with the mineral estates held by the United States and leased to nonmembers. The split estate wells are located within the Utah portion of the formal Navajo Reservation, and on Tribal trust and allotted Indian lands in the Eastern Agency area of New Mexico.

The United States originally owned full title to these split estate properties. When it conveyed the lands to the Tribe, it conveyed only the surface estate, reserving the mineral estates to remain in federal ownership and to be managed separately. This created split estates for these properties: the Tribe is the beneficial owner of the surface estate, while the United States owns the mineral estate. The United States proceeded to lease the mineral rights in the split estates to nonmembers. EPA believes that these split estate properties should be treated like other Tribal trust and allotted lands for the purposes of this analysis, for the reasons explained below.

Because the mineral estates were created by the federal government when it reserved them from the conveyance of the surface estates, they are governed by federal law. *See* Watt v. Western Nuclear, 462 U.S. 36 (1983). Watt sets forth the principles that govern the legal rights conveyed by the federal government when it created split estates. The federal purpose in severing "the surface estate from the mineral estate was to encourage the concurrent development of both the surface and subsurface." *Id.* at 50. "Since Congress intended to facilitate development of both surface and subsurface resources, the determination of whether a

particular substance is included in the surface estate or the mineral estate should be made in light of the use of the surface estate that Congress contemplated." *Id.* at 52.

Where an overriding purpose of the grant of a surface estate is to permit homesteading, the surface estate owner also has a right to use minerals or timber to the extent necessary to successful homesteading. *Id.* at 54 n. 14. And where a "treaty gave Indians only the right to use and occupy certain land" but not beneficial ownership, the "right of use and occupancy encompassed [a] right to cut timber 'for use upon the premises' or 'for the improvement of the land,'" *Id.*, quoting U.S. v. Cook, 86 U.S. (19 Wall) 591, 593 (1874). The Court reached that holding despite the general rule that timber while standing is part of the realty, and can only be sold as the land could be. *Id.* Conversely, a mineral lease implicitly gives the lessee sufficient rights of entry to the surface to enable mining activities, but no right to damage improvements to the surface property, or to avoid being liable for damage to crops or lands from the prospecting activities. *Id.* at 51 n. 11. That reasoning indicates that a mineral lessee's estate would include a right to enter the surface property as needed to allow mining, but subject to liability for activities that could damage use of the surface estate, as would be the case with harm to water resources or public water systems. EPA therefore believes that the title to the surface estate carries with it an ability to act to protect a source of drinking water, to the extent that drinking water is necessary to the use and occupation of the surface.

In another context, without discussing Watt or principles of federal property law, EPA has recognized that both the surface and mineral rights in split estates are within Indian country for SDWA UIC regulatory purposes where either the surface or the mineral estate is in Indian country. EPA followed this approach when issuing 40 CFR part 146, Subpart E to implement SDWA Section 1421(d) establishing a federal UIC program where "an applicable underground injection control program does not exist for an Indian Tribe," and EPA's state program approval had expressly excluded Indian lands. The 10th Circuit upheld EPA's SDWA UIC jurisdiction over a 200-acre split estate parcel located outside the formal Navajo Reservation and within the exterior boundaries of New Mexico. HRI, Inc. v. EPA, 198 F.3d 1224, 1232 (10th Cir. 2000). The surface estate was owned by the United States in trust for the Navajo Nation, and the federal government had retained the mineral rights and leased them to nonmembers, with the lessee's having surface access rights. 198 F.3d at 1231. The Court found that the presence of split estates did not affect the "clear Indian country status," of both the surface and mineral estates. *Id.* at 1254:

> The split nature of the surface and mineral estates does not alter the jurisdictional status of these lands for SDWA purposes. In promulgating its regulations for the Indian lands UIC program, EPA specified that "[i]f ownership of mineral rights and the surface estate is split, and either is considered Indian lands, the Federal EPA will regulate the well under the Indian land program." 53 FR 43098, October 25, 1998. This is not an unreasonable implementation of the SDWA, considering the federal government's role in protecting Indian interests and the relationship of mining and underground injection to Indian communities and their public water supplies.

The Court further stated that the EPA decision necessarily constituted "a determination as to whether certain lands are within the scope of tribal territorial sovereignty." HRI, 198 F.3d at 1246.

In sum, EPA finds that the split estate lands described in the Tribe's Primacy Application are within Indian country. The potential and actual impacts from UIC nonmember activities on the mineral estates of these split estate lands are the same as the potential and actual impacts created by these activities on other lands within Reservation boundaries and Tribal trust and allotted lands in the Eastern Agency area. Consistent with findings EPA has made with respect to the impacts in such areas as described in Section III.C.1 and 2 of this document, EPA finds that the Navajo Nation has demonstrated that it has the authority to regulate nonmember activities on these split estate lands.

4. General Finding on Political, Economic and Human Health and Welfare Impacts

In enacting part C of the SDWA, Congress generally recognized that if left unregulated or improperly managed, underground injection wells have the potential to cause serious and substantial, harmful impacts on political and economic interests and human health and welfare. Specifically, as stated in legislative history of the SDWA:

> [U]nderground injection of contaminants is clearly an increasing problem. Municipalities are increasingly engaging in underground injection of sewage, sludge, and other wastes. Industries are injecting chemicals, byproducts, and wastes. Energy production companies are using injection techniques to increase production and to dispose of unwanted brines brought to the surface during production. Even government agencies, including the military, are getting rid of difficult to manage waste problems by underground disposal methods. Part C is intended to deal with all of the foregoing situations insofar as they may endanger underground sources of drinking water (USDWs).[6]

In response to the problem of the substantial risks inherent in underground injection activities, Congress enacted Section 1421 of the SDWA "to assure that drinking water sources, actual and potential, are not rendered unfit for such use by underground injection of contaminants."[7]

In enacting part C of the SDWA, Congress more specifically found that mismanaged underground injection activities could have serious and substantial, harmful impacts on the public's economic and political interests, as well as its health and welfare. For example, Congress found that:

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[6] *See* H.R. Report No. 93-1185, 93rd Congress, 2nd Session (1974), *reprinted in* "A Legislative History of the Safe Drinking Water Act," February, 1982, by the Government Printing Office, Serial No. 97-9, page 561.
[7] *Id.*, page 560.

> Federal air and water pollution control legislation have increased the pressure to dispose of waste materials on or below land, frequently in ways, such as subsurface injection, which endanger drinking water quality. Moreover, the national economy may be expected to be harmed by unhealthy drinking water and the illnesses which may result therefrom.[8]

Congress specifically noted several economic and political consequences that can result from the degradation of good quality drinking water supplies, including: (1) inhibition of interstate tourism and travel; (2) loss of economic productivity because of absence from employment due to illness; (3) limited ability of a town or region to attract workers; and (4) impaired economic growth of a town or region, and, ultimately, the nation.[9]

As the Agency charged by Congress with implementing part C of the SDWA and assuring implementation of effective UIC programs throughout the United States, EPA agrees with these Congressional findings. EPA finds that underground injection activities, if not effectively regulated, can have serious and substantial, harmful impacts on human health, welfare, economic, and political interests. In making this finding, EPA recognizes that: (1) the underground injection activities, currently regulated as five distinct classes of injection wells as defined in the UIC regulations, typically emplace a variety of potentially harmful organic and inorganic contaminants (*e.g.*, brines and hazardous wastes) into the ground; (2) these injected contaminants have the potential to enter USDWs through a variety of migratory pathways if injection wells are not properly managed; and (3) once present in USDWs, these injected contaminants can have harmful impacts on human health and welfare, and political and economic interests, that are both serious and substantial.

In 1980, EPA issued a document entitled, "Underground Injection Control Regulations: Statement of Basis and Purpose," which provides the rationale for the Agency in proposing specific regulatory controls for a variety of underground injection activities. These controls, or technical requirements (*e.g.*, testing to ensure the mechanical integrity of an injection well), were promulgated to prevent release of pollutants through the six primary "pathways of contamination," or well-established and recognized "ways in which fluids can escape the well or injection horizon and enter USDWs."[10] EPA has found that USDW contamination from one or more of these pathways can occur from underground injection activity of all classes (I - V) of injection wells.

The six pathways are:

1. migration of fluids through a leak in the casing of an injection well and directly into a USDW;
2. vertical migration of fluids through improperly abandoned and improperly

[8] *Id.*, page 540.
[9] *Id.*, page 540.
[10] "Underground Injection Control Regulations: Statement of Basis and Purpose," EPA, (May, 1980), page 7.

completed wells in the vicinity of injection well operations;
3. direct injection of fluids into or above a USDW;
4. upward migration of fluids through the annulus, which is the space located between the injection well's casing and the well bore. This can occur if there is sufficient injection pressure to push such fluid into an overlying USDW;
5. migration of fluids from an injection zone through the confining strata over or underlying a USDW. This can occur if there is sufficient injection pressure to push fluid through a stratum, which is either fractured or permeable, and into the adjacent USDW; and
6. lateral migration of fluids from within an injection zone into a portion of that stratum considered to be a USDW. In this scenario, there may be no impermeable layer or other barrier to prevent migration of such fluids.[11]

Moreover, consistent with EPA's findings, the U.S. Department of the Interior has recognized the ability of injection wells to contaminate surface waters that are hydrogeologically connected to contaminated ground water.[12] Such contamination of surface waters could further cause negative impacts on human health and welfare, and economic and political interests.

In sum, EPA finds that, given the common presence of contaminants in injected fluids, serious and substantial contamination of ground water and surface water resources can result from improperly regulated underground injection activities. Moreover, such contamination has the potential to cause correspondingly serious and substantial harm to human health and welfare, and political and economic interests. EPA also has determined that Congress reached a similar finding when it enacted part C of the SDWA, directing EPA to establish minimum requirements for effective UIC programs to mitigate and prevent such harm through the proper regulation of underground injection activities.

5. General Finding on the Necessity of Protecting Safe Drinking Water Supplies as a Necessary Incident of Self-Government.

Consistent with the finding that improperly managed underground injection activities can have direct harmful effects on human health and welfare, and economic and political interests that are serious and substantial, EPA has determined that proper management of such activities serves the purpose of protecting these public health and welfare, and political and economic interests, which is a core governmental function whose exercise is integral to, and a necessary aspect of, self-government. *See* 56 FR 64876, 64879 (December 12, 1991); Montana v. EPA, 137 F.3d 1135, 1140-41 (9th Cir. 1998). EPA has determined that Congress reached this conclusion in enacting the SDWA and that Congress considered the water quality protection functions authorized by SDWA to be important governmental functions serving to protect

[11]"Underground Injection Control Regulations: Statement of Basis and Purpose," EPA, (May, 1980), pp. 7-17.
[12]*See* Federal Water Quality Administration's Order COM 5040.10 (1970), *as referred to in* H.R. Report No. 93-1185, 561.

essential and vital public interests by ensuring that the public's essential drinking water supplies are safe from contamination, including contamination caused by underground injection activities.

The above findings regarding the effects on public health and welfare, and economic and political interests are generally true for human beings and their communities, wherever they may be located. EPA has determined that the above findings that underground injection regulation is an integral and necessary incident of self-government is generally true for any Federal, State and/or Tribal government having responsibility for protecting public health and welfare. With specific relevance to Tribes, EPA has long noted the relationship between proper environmental management within Indian country and Tribal self-government and self-sufficiency. Moreover, in the 1984 *EPA Policy for the Administration of Environmental Programs on Indian Reservations*, EPA determined that as part of the "principle of Indian self-government," Tribal governments are the "appropriate non-federal parties for making decisions and carrying out program responsibilities affecting Indian reservations, their environments, and the health and welfare of the reservation populace," consistent with Agency standards and regulations. (*EPA Policy for the Administration of Environmental Programs on Indian Reservations*, Paragraph 2, November 8, 1984).

EPA interprets Section 1451 of the SDWA, in providing for the approval of Tribal programs under the Act, as authorizing eligible Tribes to assume a primary role in protecting drinking water sources. These general findings provide a backdrop for EPA's legal analysis of the Navajo Nation's Primacy Application and, in effect, supplement EPA's factual findings specific to the Navajo Nation and the areas covered by the Tribe's Application contained in Appendix A, and the Tribe's similar conclusions, contained in its Application, pertaining specifically to the Navajo Nation and areas covered by its Primacy Application.

6. Conclusion on Adequacy of Authority

The Tribe has thus made a showing of facts that there are USDWs within the areas covered by the Tribe's Primacy Application used by the Tribe or its members that are subject to protection under the SDWA. The Tribe has also shown that the Tribe or its members could be subject to exposure to pollutants present in, or introduced into, those waters. In making these factual showings, the Tribe has demonstrated that impairment of such waters by improperly managed Class II underground injection activities of nonmembers could have serious and substantial effects on the health and welfare, political integrity, and economic security of the Tribe.

Based upon the facts available to EPA from the Tribe and other sources, as presented in Appendix A, and in light of the general findings discussed above, EPA believes that the Tribe has demonstrated that the protection of USDWs sought to be achieved by regulating Class II underground injection activities of nonmembers in the areas covered by the Tribe's Primacy Application is necessary to protect against existing and future potential direct impacts on Tribal health and welfare, political integrity and economic security that are serious and substantial.

Thus, EPA believes that the Tribe has successfully demonstrated adequate authority to administer a Class II underground injection control program in the areas covered by the Tribe's Primacy Application, and has therefore met the requirements of 40 CFR §§ 145.52(c) and 145.56(c).

D. Capability

40 CFR § 145.52(d) requires EPA to make a determination that a tribe is reasonably expected to be capable of administering an effective UIC Program. 40 CFR § 145.56(d) requires the tribe to submit a narrative statement describing its capability to administer an effective program that should include: 1) a description of the tribe's previous management experience; 2) a list of existing environmental or public health programs administered by the tribal governing body and a copy of related tribal laws, regulations and policies; 3) a description of the tribe's accounting and procurement systems; 4) a description of the entity (or entities) which exercises the executive, legislative, and judicial functions of the tribal government; and 5) a description of the existing, or proposed, tribal agency that will assume primacy enforcement responsibility. EPA finds that the Navajo Nation provided the information in § 145.56(d)(1) – (5) in several previous TAS applications as noted in Section III.A above.

Section 145.56(d)(6) provides that the tribe's narrative statement also should include a description of its technical and administrative capabilities to administer and manage an effective UIC program in a manner consistent with the terms and purposes of the SDWA. Section IV below contains EPA's detailed analysis of the Navajo Nation's Class II UIC Program, including the Tribe's technical and administrative capabilities.

As noted in Section IV below, the Tribe currently has a trained staff of technical and administrative personnel to implement its Class II UIC Program. Navajo Nation UIC staff reviews UIC permit applications, write permits, and oversee operator compliance with permit terms and conditions. As part of its analysis, EPA has evaluated the Navajo Nation's permitting process and determined that the Tribe meets the minimum permitting requirements of 40 CFR § 145.11 (the federal requirements for UIC permitting), and that the Tribe has an effective permitting process that results in enforceable permits as required under the SDWA. The Navajo Nation, pursuant to its authority under Tribal laws and regulations, has issued 18 Class II UIC permits. EPA evaluated each of the Navajo Nation-issued permits and determined that the permits' requirements are at least as stringent as the federal permitting requirements, and that each permit was issued in accordance with regulations that are at least as stringent as federal UIC permitting regulations at 40 CFR part 124, Subpart A.

Navajo Nation UIC staff conducts a variety of field work that includes witnessing mechanical integrity tests of UIC wells, overseeing well plugging and abandonment, and conducting inspections and corrective action operations. These technical activities are often coordinated with EPA Region 9 personnel, and the Region relies on the activities of qualified Tribal staff as a supplement to the Region's own oversight of Class II UIC operations on Navajo Indian lands. As noted in the analysis below, EPA determined that the Tribe's field program

represents an effective surveillance program. EPA evaluated the Navajo Nation's UIC enforcement program, including both the enforcement authorities available to the Tribe and past enforcement actions. Based on a comparison of the Tribe's civil enforcement program against the minimum federal enforcement requirements in 40 CFR § 145.13, the review of past enforcement practices, and an evaluation of the Tribe's criminal enforcement authority, including the Criminal Memorandum of Agreement, EPA concluded that the Navajo Nation has an effective civil and criminal enforcement program.

EPA's analysis also finds that the Tribe has the administrative capability necessary to oversee the Class II UIC program. The Navajo Nation already has primacy for the PWSS program under the SDWA, and has applied for and received TAS approval from EPA for several Clean Water Act programs, including the water quality standards program. The Tribe also currently administers grants from EPA for the UIC and PWSS programs under the SDWA, as well as several CWA programs (*e.g.*, Section 106, 104(b)(3), and 319 programs). These approvals and the ongoing administration of these environmental programs clearly demonstrate the Tribe's capability to oversee the Class II UIC program.

Based on the foregoing, EPA finds that the Navajo Nation has demonstrated that it is reasonably expected to be capable of administering an effective Class II UIC program in a manner consistent with the requirements and purposes of the SDWA. Thus, EPA concludes that the Tribe has satisfied the requirements of 40 CFR §§ 145.52(d) and 145.56(d).

Summary

EPA proposes to find that the Tribe meets all requirements of 40 CFR §§ 145.52 and 145.56 and therefore satisfies the criteria for tribal eligibility for purposes of the SDWA UIC Class II program pursuant to Section 1451 of the SDWA.

IV. Navajo Nation Class II UIC Programmatic Review

A. Overview of the Navajo Nation's Class II UIC Program

In 1988, EPA began to administer the UIC Program on Navajo Indian lands (53 FR 43104, October 25, 1988). In 1992, the Navajo Nation started developing the capability to administer a Class II UIC program by assisting EPA in the implementation and enforcement of the federal Class II UIC regulations on Navajo lands. As noted above, the Navajo Nation requested Treatment as a State (TAS) for EPA grants under the UIC program, and subsequently received approval in September 1994. This approval allowed the Tribe to receive grant funds to help further develop and implement a Navajo Nation Class II UIC program. The Navajo Nation received its first UIC developmental grant in federal fiscal year 1995, and the Tribe continues to receive these funds to help build its Class II UIC program administrative and enforcement capacity.

The Navajo Nation has been working diligently over the past several years to develop an

effective Class II UIC program by enacting the Navajo Nation Safe Drinking Water Act (NNSDWA) (2001), promulgating the Navajo Nation UIC Regulations (NNUIC Regulations) (2001, 2006) and the Uniform Regulations for Permit Review, Administrative Enforcement Orders, Hearings and Rulemaking (Uniform Regulations) (2001).

The Tribe's Class II UIC Program is modeled after, and substantially similar to, the program that EPA administers.[13]

Navajo Nation UIC program personnel currently issue UIC permits that are reviewed by EPA staff, support EPA annual reporting, participate in enforcement actions, and conduct inspections for verification of compliance with UIC requirements.

B. SDWA Section 1425 Primacy Application: Guidance 19 Review

The Tribe has requested primacy for the Class II UIC program under Section 1425 of the SDWA, 42 U.S.C. § 300h-4. As discussed above, Guidance 19 sets forth the criteria EPA generally considers in evaluating applications under SDWA Section 1425. EPA has considered the criteria described in Guidance 19, the alternative approach to evaluating Class II UIC primacy applications, to ensure that the Navajo Nation's Class II UIC program, as described in its Primacy Application, prevents underground injection activities that endanger USDWs. The references in Guidance 19 to State programs also apply to tribes. Throughout the remainder of the document, EPA will use the term "tribe" in place of "State" when describing applicable criteria for Class II UIC program applications.

Guidance 19 is divided into six sections. While some sections provide descriptive information about the guidance (e.g., purpose and scope, definitions, instructions), other sections provide criteria that a Class II UIC primacy application should meet to demonstrate the protection of USDWs from injection activities. EPA's review of the programmatic aspects of the Navajo Nation's Primacy Application focused on the following Guidance 19 sections: Section 3 (Elements of an Application), Section 4 (Public Participation), Section 5 (Criteria for Approving or Disapproving Tribal Programs), and Section 6 (Oversight).

The discussion below of EPA's programmatic review is organized according to the four sections identified above. Each section addresses the criteria and conditions in Guidance 19, and provides EPA's evaluation of how the Navajo Nation's Primacy Application meets these criteria and conditions.

C. Guidance 19 Section 3: Elements of an Application for Primacy Under SDWA Section 1425

[13] EPA's current UIC program for Class II underground injection wells on Navajo Indian lands consists of the UIC program requirements of 40 CFR parts 124, 144, 146, 148 and the additional requirements set forth in 40 CFR 147, Subpart HHH . (*See* 40 CFR § 147.3000(a)).

Guidance 19 Section 3.1 states that a complete primacy application should contain the following elements:

1. letter from the tribal President;
2. description of the program;
3. statement of legal authority;
4. copies of the pertinent statutes and regulations;
5. copies of the pertinent tribal forms; and
6. signed copy of a Memorandum of Agreement.

EPA has reviewed the Tribe's Primacy Application with respect to the elements described above and has determined that the Tribe has submitted a complete application. A detailed evaluation of the Tribe's Primacy Application discussing the Guidance 19 Section 3 criteria is presented below.

1. Letter from the Tribal President

Guidance 19 Section 3.2 recommends that the tribe request approval from EPA to administer a UIC program. The request should specify under what section of the SDWA the tribe is seeking primary enforcement responsibility for the UIC Program, and affirm that the tribe is willing and able to carry out the described program. EPA finds that the letters from Kelsey A. Begaye, President, Navajo Nation, October 18, 2001, and Joe Shirley, Jr., President, Navajo Nation, February 18, 2004 to Wayne Nastri, Regional Administrator, EPA Region 9, meet these criteria. These letters request EPA to approve the Tribe's UIC program for primacy pursuant to Section 1425 of the SDWA, and affirm that the Tribe is willing and able to carry out the program as described in the Primacy Application and demonstrated through the NNUIC Regulations, NNSDWA and the Uniform Regulations.

Below is a chart that lists the specific Guidance 19 Section 3.2 criteria that a tribe should meet when requesting approval from EPA to administer a Class II UIC program and summarizes how the Tribe satisfies these criteria.

Guidance 19		**Tribe's UIC Primacy Application - Request for Primacy**
Section	**Criterion**	
3.2.a	Request approval of the tribe's program for primacy under the UIC program	Letter from Navajo Nation President Kelsey A. Begaye dated October 18, 2001 to Wayne Nastri, Regional Administrator, EPA Region 9, requesting primary enforcement responsibility for the UIC Program (Primacy Application attached).

3.2.b	Specify whether approval is sought under Section 1425 of the SDWA or under 40 CFR parts 124, 144, 145 and 146	Letter from Navajo Nation President Joe Shirley, Jr. dated February 18, 2004 to Wayne Nastri, Regional Administrator, EPA Region 9, specifying that the Tribe is requesting primary enforcement authority approval for the Class II UIC Program under Section 1425 of the SDWA.
3.2.c	Affirm that the tribe is willing and able to carry out the program described	The letters noted above, TAS grant approval for the UIC Program by EPA Region 9 on September 20, 1994, and the Primacy Application indicate that the Tribe is willing and able to carry out the program.

2. Program Description

Guidance 19 Section 3.3 lists components that a program description should contain. EPA finds that the Program Description (PD) contains an adequate detailed description of the Tribe's Class II UIC program pursuant to the criteria in Guidance 19 Section 3.3. Specifically, the PD contains a detailed discussion of the Tribe's UIC permitting process, including applicable permit conditions, permit transfers, termination, emergency permits, and modification procedures; technical requirements for operators; monitoring, inspections and reporting requirements; enforcement, including past practices, current compliance and non-compliance, repeat violators procedures, and well failure rates; staffing and resources; procedures for exempting aquifers; and public participation procedures.

The PD is organized into the following sections:

I. Introduction
II. Organization of the Navajo Nation EPA
III. Estimated Cost of Administering the NNUIC Program and Sources and Amounts of Funding for the First Two Years after Primacy
IV. Components of Primacy Application
V. Underground Sources of Drinking Water in the San Juan Basin-NM, Paradox Basin-UT, and Black Mesa Basin-AZ
VI. Exempted Aquifers
VII. Prohibition of Class I and IV wells within the Navajo Nation
VIII. Permit Procedures
IX. Priority and Schedule for Issuing Permits to Inject
X. Judicial Review of Permit Determination
XI. Compliance Tracking
XII. Mechanical Integrity Testing
XIII. Inventory
XIV. Enforcement
XV. Authorization by Rule Injections
XVI. Public Notification
XVII. Technical Requirements

Attachments A - M

The chart below describes in detail each Guidance 19 Section 3.3 criterion and lists the specific section(s) in the PD that meets the criterion.

Guidance 19		**Tribe's UIC Primacy Application - Program Description**
Section	**Criterion**	
3.3.a	Specification of the structure, coverage, and scope of the tribal program	Program Description Sections I & II; Attachment A - Organizational Charts of the Navajo Nation Government and of NNEPA; UIC Staff Resumes
3.3.b	Specification of the tribal permitting process, including elements 3.3.b.1-3.3.b.10	Program Description Sections VIII, IX & X; Attachment E - Chart of Permitting Procedures; Attachment F - NNEPA Forms for Permit Applications, Monitoring and Reporting; Attachment K - Sample Permit
3.3.b.1	Who applies for the permit or the authorization by rule	Program Description Sections VIII.A & XV
3.3.b.2	Signatories required for permit applications & reports	Program Description Section VIII.A.1; Attachment F - NNEPA Forms for Permit Applications, Monitoring and Reporting
3.3.b.3	Conditions applicable to permits including: - duty to comply with permit conditions - duty to reapply - duty to halt or reduce activity - duty to mitigate - proper operation and maintenance - permit actions - property rights - inspection and entry - monitoring - record keeping - reporting requirements	Program Description Section VIII.E
3.3.b.4	Compliance schedules	Program Description Section VIII.F
3.3.b.5	Transfers of permits	Program Description Section VIII.G
3.3.b.6	Termination of permits	Program Description Section VIII.D
3.3.b.7	Whether area permits or project permits are granted	Program Description Section IX.B
3.3.b.8	Emergency permits	Program Description Section VIII.J
3.3.b.9	Availability and use of variances and other discretionary exemptions to programmatic requirements	Program Description Sections VI & XVII

3.3.b.10	Administrative and judicial procedures for modification of permits	Program Description Sections VIII.D & X
3.3.c	Description of the operation of any rules used by the tribe to regulate Class II wells	Program Description Section XV
3.3.d	Description of the technical requirements that the tribal program applies to operators	Program Description Section XVII
3.3.e	Description of tribal procedures for monitoring, inspection, and requiring reports from operators	Program Description Sections XI.B & C
3.3.f	Discussion of tribe's enforcement program, for example 3.3.f.1- 3.3.f.2	Program Description Section XIV
3.3.f.1	Administrative procedures for dealing with violations	Program Description Section XIV
3.3.f.2	Nature and amounts of penalties, fines, and other enforcement tools	Program Description Section XIV
3.3.f.3	Criteria for taking enforcement actions	Program Description Section XIV
3.3.f.4	If seeking approval for an existing program, a summary of 3.3.f.4.A- E	Program Description Section XIV
3.3.f.4.A	Past practice in the use of enforcement tools	Program Description Section XIV
3.3.f.4.B	Current compliance / non-compliance with tribal requirements	Program Description Section XIV
3.3.f.4.C	Repeat violations at the same well or by the same operator at different wells	Program Description Section XIV
3.3.f.4.D	Well failure rates	Program Description Section XIV
3.3.f.4.E	USDW contamination cases based on actual field work and citizen complaints	Program Description Section XIV
3.3.g	Details of the tribe's staffing and resources, and demonstration that these are sufficient to carry out the proposed program	Program Description Sections II.A & III; UIC Staff Resumes
3.3.h	If more than one tribal agency administers program, description of their relationships with regard to carrying out the Class II program	Not applicable
3.3.i	Schedule for completion of an inventory of Class II wells on tribal land	Not applicable. The Tribe has a complete inventory of Class II wells. See Attachment M - Well Inventory.

3.3.j	- Procedures for exempting aquifers - List of the aquifers or portions of aquifers proposed for exemption at the time of application - Reasons for proposed exemptions	Program Description Section VI No new exemptions are being proposed. All but one exempted aquifers are identified under 40 CFR part 147, Subpart HHH, Appendix A. See also Program Description Attachment H - Exempted Class II Wells within Navajo Indian Country for the complete list.
3.3.k	Plan (and basis for assigning priorities) for reviewing all existing Class II wells within 5 years of program approval to assure that they meet current non-endangerment requirements of the tribe	Program Description Sections IX.A & B
3.3.l	Description of the tribe's requirements for ensuring public participation in the process of issuing permits and modifying permits in the case of substantial changes in the project area, injection pressure, or the injection horizon	Program Description Sections XVI.A & B
3.3.m	Description of tribal procedures for responding to complaints by the public	Program Description Sections XIV & XVI.C

3. Statement of Legal Authority

Guidance 19 Section 3.4 recommends that the tribe provide a statement of legal authority, signed by a competent legal officer of the tribe, to assure EPA that the tribe has legal authority to carry out the program described. The statement may consist of either a full analysis of the legal basis for the tribal program, or a certification by the legal representative that the tribe has adequate authority to carry out the described program. If a certification is provided, the program description should detail the legal authority on which the various elements of the tribe's program rest.

The Tribe has satisfied this criterion by submitting the AG 145.24 Certification, signed by Levon B. Henry, Navajo Nation Attorney General, on August 27, 2001, which certifies that the Tribe has adequate authority to carry out the described program. The Primacy Application's PD identifies the legal authority on which the various elements of the program rest. Additionally, the Tribe has submitted two documents asserting jurisdictional authority pursuant to 40 CFR § 145.56(c), which are discussed in more detail above in Section III (Tribal Eligibility Determination).

4. Copies of Tribal Statutes and Regulations

Guidance 19 Section 3.5 states that "the application should contain copies of all applicable tribal statutes, rules and regulations, including those governing the tribal

administrative procedures." The Primacy Application includes the following documents:

- Uniform Regulations;
- NNUIC Regulations; and
- NNSDWA.

These documents contain all applicable Navajo Nation statutes, rules and regulations necessary to administer the Class II UIC Program; therefore the Primacy Application meets this criterion.

5. Copies of Tribal Forms

Guidance 19 Section 3.6 states that "the application should contain examples of all forms used by the tribe in administering the program, including application forms, permit forms, and reporting forms." All forms are contained in the attachments to the PD as cited below:

Attachment F:	NNEPA Form 2001-06: Permit Application
	NNEPA Form 2001-07: Application to Transfer Permit
	NNEPA Form 2001-09: Completion Form for Injection Wells
	NNEPA Form 2001-10: Completion Report for Brine Disposal, Hydrocarbon Storage or Enhanced Recovery Wells
	NNEPA Form 2001-11: Annual Disposal/Injection Well Monitoring Report
	NNEPA Form 2001-12: Well Re-work Record
	NNEPA Form 2001-13: Plugging and Abandonment Plan
Attachment G:	NNEPA Form 2001-08: Notice of Inspection
	NNEPA Form 2001-14: Annular Pressure Test
Attachment K:	NNEPA Sample Permit
Attachment L:	Financial Responsibility Sample Forms

The Tribe has submitted all required forms; accordingly, the criterion of Section 3.6 is satisfied.

6. Memorandum of Agreement

Guidance 19 Section 3.7 recommends that the head of the appropriate tribal agency and the EPA Regional Administrator sign a memorandum of agreement (MOA) that sets forth the terms under which the tribe will carry out the described program and EPA will exercise its oversight responsibility. A MOA entitled "Memorandum of Agreement between the Navajo Nation Acting Through the Navajo Nation Environmental Protection Agency and Region IX, U.S. Environmental Protection Agency for Underground Injection Control Regulation" was signed by Kelsey Begaye, President of the Navajo Nation, on July 16, 2001; Derith Watchman Moore, Director Navajo Nation Environmental Protection Agency, on July 17, 2001; and Laura Yoshii, Acting Regional Administrator, U.S. EPA Region 9, on August 21, 2001.

Guidance 19 recommends that an MOA in support of a SDWA Section 1425 program application address eight specified topics. Here, the Tribe's MOA specifically addresses six of the eight topics identified in Guidance 19. The Tribe addresses the remaining two Guidance 19 topics (3.7.f and 3.7.h) in its NNUIC Regulations. Moreover, in addition to addressing Guidance 19's eight recommended MOA topics, the Tribe's MOA addresses all of the topics a MOA is required to address pursuant to 40 C.F.R § 145.25, if submitted in connection with a section 1422 program approval. Accordingly, EPA has determined that the Tribe's MOA is adequate to support its Primacy Application pursuant to SDWA Section 1425.

The chart below describes each Guidance 19 Section 3.7 criterion and lists the specific section(s) in the MOA or the NNUIC regulatory provision that meets the criterion.

Guidance 19		**Tribe's UIC Primacy Application - Memorandum of Agreement**
Section	**Criterion**	
3.7.a	Includes a commitment by the tribe that the program will be carried out as described and will be supported by an appropriate level of staff and resources	MOA Section I
3.7.b	Recognizes EPA's right of access to any pertinent tribal files	MOA Section IV.7
3.7.c	Specifies the procedures governing EPA inspections of wells or operator records	MOA Sections IV, VI and IX
3.7.d	Recognizes EPA's authority to take federal enforcement action under Section 1423 of the SDWA in cases where the tribe fails to take adequate enforcement actions	MOA Section II and IV.9
3.7.e	Agrees to provide EPA with an annual report on the operation of the tribal program	MOA Section IV.5; NNUIC Regulations § 101.9
3.7.f	Provides that aquifer exemptions for Class II wells be consistent with aquifer exemptions for the rest of the UIC program	NNUIC Regulations § 101.8(b)(2)
3.7.g	When appropriate, includes provisions for joint processing of permits by the tribe and EPA for facilities or activities which require permits from both EPA and the Tribe under different programs	MOA Section VIII

3.7.h	Specifies that if the tribe proposes to allow any mechanical integrity tests other than those specified or justified in the program application, the Director [of the primacy agency] will notify the Regional Administrator and provide enough information about the proposed test that a judgment about its usefulness and reliability may be made	NNUIC Regulations § 103.4(d)

D. Guidance 19 Section 4: Public Participation

Guidance 19 Section 4.1 states that when a tribe applies for primacy under Section 1425 of the SDWA, "it may, but need not, provide an opportunity for public hearings or comments."

The Tribe demonstrated its commitment to administer a Class II UIC program and exceeded the recommendations of Guidance 19 by publishing a public notice of its intent to apply for primacy for its Class II UIC program in both the Farmington Daily Times and the Navajo Times on August 16, 2001, and subsequently holding a public hearing on September 17, 2001 in Shiprock, New Mexico. NNEPA received two requests for copies of the Primacy Application and received one comment. No one attended the public hearing.

The one comment received was from the Arizona Public Service (APS) Company which stated that the Navajo Nation's assertion of jurisdiction in the Primacy Application's jurisdictional statement did not contain any exclusion for the Four Corners Power Plant. APS requested that the jurisdictional statement be revised to clarify that the Navajo Nation is not intending to address or resolve in its UIC Primacy Application the question of whether the Tribe may regulate any aspect of operations at the Four Corners Power Plant. The Navajo Nation agreed with the comment and added the following phrase in the jurisdictional statement: "The Navajo Nation also requests EPA to refrain from making a jurisdictional finding regarding the Four Corners Power Plant and the Navajo Generating Station, since the Navajo Nation and the owners and operators of the power plants are in the middle of negotiations to address jurisdictional issues regarding the plants."

In addition, NNEPA ran another public notice in the Farmington Daily Times and on the Navajo/English radio station, AM 660 KTNN, in July 2006 announcing its proposed revisions to the NNUIC Regulations. No comments were received. NNEPA promulgated these revised NNUIC Regulations on September 12, 2006.

E. Guidance 19 Section 5: Criteria for Approving Tribal Programs

Guidance 19 Section 5 discusses the five conditions a tribe must meet in order to receive primacy approval under the alternative demonstration described in SDWA Section 1425: the proposed Class II UIC program must meet the requirements described in Section 1421(b)(1)(A)

– (D), and the requirement that it represents an "effective program" (including adequate recordkeeping and reporting) to prevent underground injection that endangers drinking water sources.

This section discusses each requirement in more detail and provides an evaluation of whether the Navajo Nation Class II UIC program meets each requirement.

1. SDWA Section 1421(b)(1)(A): This provision requires that a tribe's regulatory (or statutory) authorities prohibit any underground injection that is not authorized by a permit or rule.

Guidance 19 Section 5.2 provides four elements for EPA to review and evaluate to help determine whether a Class II UIC program prohibits unauthorized injections:

a. Coverage and Scope of Program: The coverage and scope of the proposed Navajo Nation Class II UIC program was evaluated under Guidance 19 Section 3.3.a in Section IV.C.2 above. EPA determined that the scope and coverage of the Navajo Nation Class II UIC program prohibits unauthorized injections.

b. Statement of Legal Authority: The Tribe submitted the AG 145.24 Certification, which states that "the laws of the Navajo Nation provide adequate authority for the Navajo Nation Environmental Protection Agency to administer an Underground Injection Control ("UIC") program for Class II wells that meets the applicable requirements of the Safe Drinking Water Act, 42 U.S.C. § 300f et seq. and of 40 C.F.R. Part 145." See Section IV.C.3 above for additional discussion of this document.

c. Statutes: The Navajo Nation has enacted the NNSDWA, which prohibits underground injection without a permit and provides inspection, enforcement and judicial review to ensure compliance with this Act. *See* NNSDWA Sections 107(D)(6)(a), 205, 701(A). In limited instances, where there are wells that are federally authorized by rule on the effective date of EPA's grant of primacy for the Navajo Nation Class II UIC program that do not yet have NNEPA-issued UIC permits, the Navajo Nation incorporates by reference at NNUIC Regulations §102.13(d) the federal authorization by rule (ABR) regulations contained in 40 CFR §§ 144.21 – 144.28 and 147.3006, solely for the purposes of regulating these wells that are temporarily without UIC permits until such time that Navajo Nation can issue a UIC permit.

d. Regulations: The Navajo Nation promulgated the NNUIC Regulations in 2001, to implement the Navajo Nation Class II UIC Program, and revised the regulations in 2006. All persons and underground injection activities must comply with these regulations within the lands under Navajo jurisdiction. The following NNUIC Regulations prohibit any underground injection that is not

authorized by permit or rule.

> NNUIC Regulations § 101.21: *Prohibition of unauthorized injection*. Any underground injection is prohibited except as authorized by a permit issued by NNEPA. Notwithstanding the foregoing sentence, if the owner or operator of an existing injection well has made a timely and complete permit application to NNEPA, pursuant to § 102.1(a) of these regulations and § 205 of the NNSDWA, but a permit has not yet been issued, the underground injection may continue as authorized by rule or by permit under the SDWA, pursuant to the requirements for authorization by rule under the SDWA or the EPA permit, respectively, and enforceable by EPA, until the Navajo permit is issued. Upon the effective date of EPA's grant of primacy to the Navajo Nation for the Navajo Nation UIC Program, the underground injection may continue as provided in § 102.13 of these regulations.
>
> NNUIC Regulations § 102.1(a): *Permit application*. Pursuant to § 205 of the NNSDWA, within 90 days of the effective date of the 2001 amendments to the NNSDWA, no person shall operate or construct an underground injection facility unless such person holds or, in the case of an existing facility, has applied for a permit from the Director.
>
> NNUIC Regulations § 102.1(f): *Application by Facility Authorized by Rule.* A UIC facility authorized by rule pursuant to 40 C.F.R. part 144 that is a Class II enhanced recovery or hydrocarbon storage facility is required to obtain a permit from the Director.
>
> NNUIC Regulations § 102.13(d): *Wells without permits*. In the event that there are wells authorized by rule under the federal UIC regulations that, on the effective date of EPA's grant of primacy for the Navajo Nation UIC Program, do not yet have Navajo permits, NNEPA hereby incorporates by reference the federal authorized by rule (ABR) regulations, contained in 40 C.F.R. §§ 144.21-144.28 and 147.3006, solely for the purpose of regulating these wells that are temporarily without permits.

e. Formal Mechanism for Modifying Permits: The Navajo Nation has adopted the same federal language as 40 CFR § 124.5: Modification, revocation and reissuance, or termination of permits at Uniform Regulations Part 204--Permit Modification, Revocation and Reissuance, or Termination.

Summary

On the basis of the above review and evaluation, EPA has determined that the Tribe prohibits unauthorized Class II underground injection, and thus meets the requirements of

SDWA Section 1421(b)(1)(A).

2. SDWA Section 1421(b)(1)(B): This provision provides that the tribal program must require that UIC permit applicants satisfy the tribe that their proposed injection activities will not endanger drinking water sources, and, for programs that allow ABR, that no rule authorizes any underground injection which endangers drinking water sources.

Applicant Demonstration

For the first condition in SDWA Section 1421(b)(1)(B), Guidance 19 Section 5.3 states that the determination of whether a tribal program is adequate is made by evaluating the following two elements:

a) whether the tribal program places on the applicant the burden of making the requisite showing; and
b) the extent of information the applicant is required to provide as a basis for the tribal agency's decision to grant or deny a permit.

For the first element, a tribe's description of its permitting process is the lead factor in determining whether the burden of making the requisite showing is on the applicant. PD Section VIII and Attachment E (Chart of Permitting Process) discuss the Tribe's UIC permitting process in detail and refer to NNUIC Regulations § 101.22(a),which requires the permit applicant to show that the proposed injection will not endanger drinking water sources. Moreover, NNUIC Regulations § 101.31 and NNSDWA Section 107(D)(6)(b)(i) give the Director the option to require more information from the permit applicant to determine whether an injection activity may be endangering an underground source of drinking water. Additionally, Guidance 19 Section 5.3 states that the applicant should not escape ultimate responsibility for assuring that the information about his operation is accurate and available. The Guidance further suggests that one consideration is whether the well operator has a responsibility to inform the permitting authority about any material change in the operation, or of any pertinent information acquired since the permit application was made. NNUIC Regulations § 102.21(l)(8) states that where the permittee becomes aware that he/she failed to submit any relevant facts in the permit application, or submitted incorrect information in a permit application or in any report to the Director, he/she shall promptly submit such facts or information. The regulation is identical to the federal provision at 40 CFR § 144.51(l)(8).

The second element described in Guidance 19 Section 5.3 discusses the information an applicant is required to submit in order for a tribe to make a decision to grant or deny a UIC permit. The Tribe utilizes the same UIC application form as EPA (see Attachment F - NNEPA Forms for Permit Applications, Monitoring and Reporting); moreover, NNUIC Regulations Part 2 (Underground Injection Control Permits) and Part 3 (Criteria and Standards) are equivalent to the federal counterparts at 40 CFR part 144, Subpart D (Authorization by Permit) and 40 CFR 146 (UIC Program: Criteria and Standards) Subparts A (General Provisions) and C (Criteria and Standards Applicable for Class II Wells). Therefore, the Tribe meets the federal standard of

what information an applicant is required to submit in an application package by utilizing the same required UIC forms and adopting equivalent provisions.

The chart below describes in detail the criteria in Guidance 19 Section 5.3 regarding the information that each application should contain so the Tribe can make a knowledgeable decision about whether to grant or deny a permit, and lists how the Tribe meets each criterion.

Guidance 19		**Tribe's UIC Primacy Application - Section 1421(b)(1)(B)**
Section	**Criterion**	
5.3.a	Map showing the area of review and identification of all wells of public record penetrating the injection interval	Program Description Attachment F; Permit Application Form 2001-06 NNUIC Regulations §§ 102.1(6) and 103.24(a)(2)
5.3.b	Tabulation of data on all wells identified in 5.3.a. Data should include a description of each well's type, construction, date of drilling location, depth, record of plugging and/or completion, and any additional information the Director may require	Program Description Attachment F; Permit Application Form 2001-06 NNUIC Regulations § 103.24(a)(3)
5.3.c	Data on proposed operation including: 1. Average and maximum daily rate and volume of fluids to be injected 2. Average and maximum injection pressure 3. Source, and appropriate analysis of injection fluid if other than produced water, and compatibility with the receiving formation	Program Description Attachment F; Permit Application Form 2001-06 NNUIC Regulations § 103.24(a)(4)
5.3.d	Appropriate geological data on the injection zone and confining zones including lithologic description, geological name, thickness and depth	Program Description Attachment F; Permit Application Form 2001-06 NNUIC Regulations § 103.24(a)(5)
5.3.e	Geologic name, and depth to bottom of all underground sources of drinking water which may be affected by the injection	Program Description Attachment F; Permit Application Form 2001-06 NNUIC Regulations § 103.24(a)(6)

5.3.f	Schematic drawings of the surface and subsurface construction details of the system	Program Description Attachment F; Permit Application Form 2001-06 NNUIC Regulations § 103.24(a)(7)
5.3.g	Proposed stimulation program	Program Description Attachment F; Permit Application Form 2001-06 NNUIC Regulations § 103.24(b)(2)
5.3.h	All available logging and testing data on the well	Program Description Attachment F; Permit Application Form 2001-06 NNUIC Regulations § 103.24(c)(1)
5.3.i	Need for corrective action on wells penetrating the injection zone in the area of review	NNUIC Regulations §§ 103.24(a)(8) & (c)(6); 102.25(a)

Applicant Information

Guidance 19 Section 5.3 lists two circumstances under which the Director may require less information from the applicant than would otherwise be required as described immediately above. First, "the Director need not require an applicant to resubmit information which is up-to-date and readily available in tribal files." Second, "a tribe's application may outline circumstances or conditions where certain items of information may not be required in a specific case." The NNUIC Regulations allow applicants to submit less information than would otherwise be required, under the following circumstances:

- NNUIC Regulations § 101.24(a): When an injection does not occur into, through or above a USDW, the Director may authorize a well or project with less stringent requirements for area of review, construction, mechanical integrity, operation, monitoring and reporting, provided that the reduction in requirements will not result in an increased risk of movement of fluids into a USDW. [This tribal provision is identical to 40 CFR § 144.16(a).]

- NNUIC Regulations § 101.24(b): When injection occurs through or above a USDW but the radius of endangering influence when computed is smaller than or equal to the radius of the well, the Director may authorize a well or project with less stringent requirements for operation, monitoring and reporting, again provided that the reduction in requirements will not result in an increased risk of movement of fluids into a USDW. [This tribal provision is identical to 40 CFR § 144.16(b).]

- NNUIC Regulations § 102.1(e)(8): The applicant shall identify and submit in a list with

the permit application the names and addresses of all owners of record of land within ½ mile of the facility boundary. This requirement may be waived by the Director where the site is located in a populous area and the Director determines that the requirement would be impracticable. [This tribal provision is identical to 40 CFR § 144.31(e)(9).]

- NNUIC Regulations § 102.1(h)(3): Upon written request and supporting documentation, the Director may waive the requirement in paragraph (1) to give individual notice of intent to apply for permits in an area where it would be impractical. However, notice to the NNUIC Program shall not be waived. [This tribal provision is identical to 40 CFR § 147.3002(c).]

- NNUIC Regulations § 103.24 states that "[c]ertain maps, cross-sections, tabulations of wells within the area of review, and other data may be included in the application by reference provided they are current, readily available to the Director ... and sufficiently identified to be retrieved." [This tribal provision is identical to 40 CFR § 146.24.]

As demonstrated above, the two circumstances listed in Guidance 19 Section 5.3 under which the Tribe may require less information from the applicant are circumstances that are similarly provided for in the federal UIC regulations; thus, the Navajo Nation UIC Program is no less stringent than the federal UIC requirements, and is consistent with Guidance 19 criteria.

Authorization by Rule

Section 1421(b)(1)(B) of the SDWA also requires, in the case of a UIC program that provides for ABR, that no rule may authorize "any underground injection which endangers drinking water sources." NNUIC Regulations at § 101.21 requires all injection activity to have a NNEPA-issued permit. However, NNUIC Regulations § 101.21 also authorizes the owner or operator of an existing injection well that has made a timely and complete permit application to NNEPA, but where a permit has not yet been issued, to continue the underground injection pursuant to federal ABR regulations. NNUIC Regulations § 102.13 incorporates by reference federal ABR regulations at 40 CFR §§ 144.21-144.28 and 147.3006, solely for the purpose of regulating those wells that are federally authorized by rule at the time of UIC Program Approval to the Navajo Nation and have yet to receive a NNEPA-issued UIC permit. Because the Tribe's program incorporates federal ABR regulations, which were promulgated to ensure that underground injection would not endanger drinking water sources, EPA finds that the Tribe's program satisfies the requirement that no rule may authorize any underground injection that endangers drinking water sources.

Summary

On the basis of the above evaluation conducted under Guidance 19 Section 5.3, EPA has determined that the Tribe's Class II UIC program adequately requires a permit applicant to demonstrate that the proposed injection will not endanger drinking water sources and for any ABR, that no rule may allow any underground injection which endangers drinking water sources.

The Tribe's program therefore meets the requirements of SDWA Section 1421(b)(1)(B).

3. SDWA Section 1421(b)(1)(C): This provision requires that an approvable tribal program "include inspection, monitoring, recordkeeping, and reporting requirements."

Guidance 19 Section 5.4 divides this provision into two categories for evaluation purposes: (a) inspection, and (b) monitoring, reporting and recordkeeping.

a. Inspection

Guidance 19 Section 5.4.a. states that an approvable UIC program is expected to have an effective system of field inspection which will provide for 1) inspections of injection facilities, wells and nearby producing wells and 2) the presence of qualified inspectors to witness mechanical integrity tests (MITs), corrective action operations, and plugging procedures. Additionally, an adequate program should insure that at least 25% of all MITs performed each year will be witnessed by a qualified inspector.

PD Section XI.C and NNUIC Regulations § 102.21(i), which is identical to 40 CFR § 144.51(i), both discuss "Inspection" procedures and describe the Tribe's authority to enter upon the permittee's premises where a regulated facility or activity is located or conducted, and the Tribe's authority to inspect at reasonable times any facilities, equipment (including monitoring and control equipment), practices, or operations regulated or required under a NNEPA-issued UIC permit. Additionally, NNSDWA Section 801(A) contains language that allows the Director to make investigations and inspections, as necessary, to ensure the compliance of underground injection facilities with all Tribal regulations.

PD Section II provides a description of the NNUIC Program staffing structure which includes a Program Manager/Senior Hydrologist, Senior Environmental Specialist, Senior Environmental Technician, and Senior Office Specialist, with oversight by the Director of the Surface and Ground Water Protection Department. The Program Manager, Senior Environmental Specialist and Senior Environmental Technician all conduct field work that includes witnessing MITs, well plugging and abandonment, inspections and corrective action operations. Staff resumes are included in the Primacy Application and further demonstrate the technical capabilities of these staff members. Additionally, PD Section XII.B ensures that at least 25% of all MITs performed each year will be witnessed by qualified UIC Program staff.

As demonstrated above, the Navajo Nation Class II UIC Program has an effective system of field inspections including inspections of injection facilities, wells and nearby producing wells and the presence of qualified inspectors to witness MIT tests and corrective actions, and thereby meets the criteria in Guidance 19 Section 5.4.a.

b. Monitoring, Reporting, and Recordkeeping

Guidance 19 Section 5.4.b contains four criteria that an approvable program should meet

for monitoring, reporting, and recordkeeping compliance.

i. The Director should have the authority to sample injected fluids at any time during injection operation.

NNUIC Regulations § 102.21(i)(4) states that the UIC permittee shall allow the Director or an authorized representative to sample or monitor at reasonable times, for the purposes of assuring permit compliance or as otherwise authorized by the NNSDWA, any substances or parameters at any location. This tribal provision is identical to and at least as stringent as 40 CFR § 144.51(i)(4).

ii. The operator should be required to monitor the injection pressure and injection rate of each injection well at least on a monthly basis with the results reported annually.

NNUIC Regulations § 103.23(b)(2) states that monitoring requirements shall, at a minimum, include observation of injection pressure, flow rate, and cumulative volume at least weekly for produced fluid disposal operations and monthly for enhanced recovery operations. NNUIC Regulations § 103.23(c)(1) states that reporting requirements shall at a minimum include an annual report to the Director summarizing the results of monitoring required under subsection (b) of this section. These tribal provisions are identical to and at least as stringent as 40 CFR § 146.23(b)(2) and (c)(1), respectively.

iii. The Director should require prompt notice of mechanical failure or downhole problems in injection wells.

NNUIC Regulations § 102.21(l)(6) states that notice of any noncompliance with a permit condition or malfunction of the injection system shall be provided orally to the Director within 24 hours from the time the permittee becomes aware of the problem, and in writing within 5 days. This tribal provision is identical to and at least as stringent as 40 CFR § 144.51(l)(6).

iv. The Tribe should assure retention and availability of all monitoring records from one mechanical integrity test to the next (i.e., 5 years).

Neither the federal nor Tribal UIC regulations contain a specific reference or requirement to retain or make available all monitoring records from one MIT to the next MIT (i.e., 5 years). Rather, federal UIC regulation at 40 CFR § 146.23(b)(4) requires maintenance of the results of all monitoring until the next permit review, and 40 CFR § 144.36 requires permit reviews at least once every 5 years. NNUIC Regulations § 103.23(b)(4) and § 102.6, respectively, contain language equivalent to the federal provisions. Moreover, NNUIC Regulations § 102.21(j)(2)(A) is equivalent to 40 CFR § 144.51(j), which states that the permittee shall retain records of all monitoring information for at least 3 years. Additionally, NNUIC Regulations § 101.25 is equivalent to 40 CFR § 144.17 which gives the Director the ability to require the well owner or operator to maintain records as is deemed necessary to determine whether the owner or operator

has acted or is acting in compliance with the appropriate statute and regulations. EPA finds that the Tribe's records retention requirements are at least as stringent as federal requirements.

Summary

The above review demonstrates that the Tribe's Class II UIC program adequately meets the field inspection system and monitoring, reporting, and recordkeeping compliance criteria as discussed in Guidance 19 Section 5.4.b and thus, meets the requirements of SDWA Section 1421(b)(1)(C).

4. SDWA Section 1421(b)(1)(D): This provision requires a tribe to demonstrate its authority to regulate injection activities by federal agencies and by any other person on property owned or leased by the United States.[14]

The Navajo Nation has met this statutory requirement by submitting a certification of legal authority and two jurisdictional statements. The certification of legal authority (AG 145.24 Certification), signed by Levon B. Henry, the Attorney General of the Navajo Nation, on August 27, 2001, attests to the fact that the Tribe has adequate authority to implement a UIC program that meets all federal requirements. This authority is codified in the NNSDWA § 105(A) which applies to all persons[15] and all property within the Navajo Nation. Additionally, Section I of the PD contains language detailing the legal authority, with citations to the specific statutes and administrative regulations, on which the various elements of the Tribe's Class II UIC Program rest. A more thorough discussion of Navajo Nation jurisdictional authority is discussed above in Section III (Tribal Eligibility Determination).

5. SDWA Section 1425(a): This provision requires a tribe to demonstrate that its Class II UIC program "represents an effective program (including adequate recordkeeping and reporting) to prevent underground injection which endangers drinking water sources."

As discussed in Guidance 19 Section 5.6, EPA has considered the following five (5) factors in its assessment of the effectiveness of the Tribe's UIC program:

Whether the Tribe:

a. has an effective permitting process that results in enforceable permits;
b. applies minimum technical requirements to operators by permit or rule;
c. has an effective surveillance program to determine compliance with its requirements;

[14] EPA notes that while SDWA Section 1421(b)(1)(D) cites to 300j-6(b), EPA assumes that Congress intended this provision to cite to 300j-6(a). Nonetheless, there is no substantive impact on our determination that the Navajo Nation Class II UIC program is consistent with Guidance 19 Section 5.5.

[15] NNSDWA § 104.19 Definitions: PERSON means any individual, public or private corporation, company, partnership, firm, association or society of persons, the federal, state, or local governments or any of their programs or agencies, any Indian tribe including the Navajo Nation, or any of its agencies, divisions, departments, programs, enterprises, companies, chapters or other political subdivisions.

d. has an effective means to enforce against violators; and
e. assures adequate participation by the public in the permit issuance process.

Taking into account these five factors, EPA has determined that the Navajo Nation Class II UIC program represents an effective program. An analysis and evaluation of the five factors are below.

a. Permitting Process

Guidance 19 Section 5.6.a states that "EPA's review will turn on whether the permitting process, taken as a whole, represents an effective mechanism for applying appropriate and enforceable requirements to operators." Given this flexibility, EPA decided to consider the federal UIC permitting requirements listed under 40 CFR § 145.11, and the description of the Tribe's permitting process taking into account Guidance 19 Section 3.3.b in Section IV.C.2 above, to evaluate the Tribe's UIC permitting process as a whole.

40 CFR § 145.11 (Requirements for permitting) requires UIC programs to have legal authority to implement each of the federal regulatory provisions listed below. EPA finds that the Tribe has adopted provisions in its NNUIC Regulations or Uniform Regulations that are equivalent to, or more stringent than, each of the federal UIC permitting requirements listed under 40 CFR § 145.11(a) and (b).[16] Since the Tribe meets the minimum permitting requirements of 40 CFR § 145.11, EPA believes the Tribe has an effective permitting process that results in enforceable permits as required under SDWA Section 1425(a). The text below discusses each federal UIC provision listed under § 145.11 and evaluates how the Tribe addresses each in its regulations.

Requirements for Permitting – 40 CFR § 145.11(a)

i. Confidential information

40 CFR § 144.5(b) states that claims of confidentiality will be denied for 1) the name and address of any permit applicant or permittee and 2) information which deals with the existence, absence, or level of contaminants in drinking water. The Tribe has adopted the same language at NNUIC Regulations § 101.6(b). Moreover, the Tribe meets all of § 144.5, which states that any information submitted to EPA pursuant to the federal UIC regulations may be claimed as confidential by the submitter, by adopting equivalent language at NNUIC Regulations § 101.6(a). Therefore, the NNUIC Regulations §§ 101.6(a) and (b) are at least as stringent as the federal provision.

ii. Classification of wells

40 CFR § 144.6 provides the classification of underground injection wells (Classes I - V).

[16] 40 CFR § 145.11(b) contains optional requirements a tribe may implement if it has adequate legal authority.

The Class II UIC well classification at NNUIC Regulations § 101.7(a)(2) is as stringent as the federal provision.

iii. Identify USDWs and exempted aquifers

40 CFR § 144.7 describes how the Director "may identify and shall protect" all USDWs that meet the definition of a USDW in 40 CFR § 144.3. This section also describes how the Director may identify all aquifers he/she proposes to designate as exempted aquifers. NNUIC Regulations § 101.8 is at least as stringent as the federal provision. NNUIC Regulations do not include a counterpart to 40 CFR § 144.7(b)(3)(ii), which refers to § 146.4(c), because 40 CFR § 147.3008 (Criteria for Aquifer Exemptions) states that these exemptions "shall not be available for this [the Navajo Nation Class II UIC] program."

Additionally, 40 CFR § 147.3000 Appendix A to Subpart HHH (Exempted Aquifers in New Mexico) identifies the areas described by a one-quarter mile radius around the Class II UIC wells in the listed formations that are exempted for the purposes of Class II injection. NNUIC Regulations § 101.8(e) includes a provision that is at least as stringent as the federal provision.

iv. Noncompliance and program reporting by the Director

40 CFR § 144.8[17] describes the reporting requirements of the permit issuing authority to EPA. NNUIC Regulations § 101.9 is at least as stringent as the federal provision.

v. Prohibition of unauthorized injection

40 CFR § 144.11 prohibits underground injection, except into a well authorized by rule or permit. NNUIC Regulations § 101.21 includes similar language plus a discussion of a category of Class II UIC wells that are currently authorized by rule by federal regulation and which will remain under this authority after EPA has approved the Tribe's application for SDWA Class II UIC primacy, until such time as the Tribe issues its own Class II UIC permit to such wells. With the exception of this temporary allowance for continued ABR pending NNUIC permit issuance, the Tribal UIC regulations require every well to have a UIC permit to operate, which is more stringent than the federal regulations, which have a provision for ABR wells.

vi. Prohibition of movement of fluid into underground sources of drinking water

40 CFR § 144.12 prohibits the movement of any injected fluid that may contaminate a USDW. NNUIC Regulations § 101.22 is at least as stringent as the federal provision. § 101.22 omits a direct discussion of wells authorized by rule (40 CFR § 144.12(b)) but covers this requirement at NNUIC Regulations § 102.13, which allows for temporary continued rule authorization pending NNUIC permit issuance by incorporating by reference the federal ABR

[17] 40 CFR § 144.8(b)(2)(ii) references §§ 146.15, 146.25, and 146.35, which do not currently exist.

provisions of 40 CFR §§ 144.21 - 144.28 and 147.3006.

vii. Prohibition of Class IV wells

40 CFR § 144.13 discusses the prohibition of Class IV wells. This provision is not applicable to this review as the Tribe is seeking primacy only for Class II wells.

viii. Requirements for wells injecting hazardous waste

40 CFR § 144.14 discusses regulations that apply to all generators of hazardous waste, and to owners or operators of all hazardous waste management facilities, using any class of well to inject hazardous wastes. NNUIC Regulations § 101.23 prohibits the subsurface injection of hazardous waste so the NNUIC regulations are more stringent than federal regulations.

ix. Subpart C - Authorization of underground injection by rule (§§ 144.21 – 144.28 and 147.3006)

NNUIC Regulations § 102.13(d) incorporates by reference federal ABR provisions contained in 40 CFR §§ 144.21 – 144.28 and 147.3006. NNUIC Regulations include this temporary ABR allowance for those Class II UIC wells that are currently ABR rule by federal regulation and which will remain under this authority after EPA has approved the Tribe's application for SDWA Class II UIC primacy, until such time as the Tribe issues its own Class II UIC permit to such wells.

x. Requiring a Permit

40 CFR § 144.25 discusses the option that the Director may require any ABR well to have a permit. NNUIC Regulations § 101.21 requires that all Class II injection activity have a permit with the exception for temporary continued rule authorization pending NNUIC permit issuance pursuant to NNUIC Regulations § 101.23(d). Therefore, the Navajo Nation UIC program is at least as stringent as the federal provision.

xi. Application for a permit; authorization by permit

40 CFR § 144.31 requires that an applicant apply for and secure a permit before constructing and operating an underground injection well. This provision provides information on how to apply for a permit and what is required in the application. NNUIC Regulation § 102.1 is at least as stringent as the federal provision.

xii. Signatories to permit applications and reports

40 CFR § 144.32 describes who can sign permit application and reports. NNUIC Regulation § 102.2 is at least as stringent as the federal provision.

xiii. Area permits

40 CFR § 144.33 provides that the Director "may" issue a permit on an area basis in certain circumstances, and discusses the conditions for issuing an area permit rather than individual well permits. NNUIC Regulations § 102.3(a) is at least as stringent as the federal provision. NNUIC Regulation § 102.3(a)(1)(B) omits the words "in the same State"; however, this does not make the regulation less stringent since the Tribe is seeking primacy for all underground injection activities within the areas covered by the Tribe's Primacy Application and therefore any facility or activity to be permitted by the Tribe would, by definition, be "in the same State".

Additionally, NNUIC Regulations § 102.3(b) contains information on the conditions for allowing multi-well permits, which is not discussed in the federal UIC regulations. The language is consistent with EPA published guidance entitled "Consolidation of Permitting Procedures for Multiple Wells" (Guidance 29), except that it gives the Director discretion to consolidate permitting procedures, without explicit agreement by the applicant, which is not the case in Guidance 29. Guidance 29 states that "[t]he permitting authority has the discretion, <u>if the applicant so wishes</u>, [emphasis added] to take all review and approval action concurrently for several applications …" Despite the addition of this condition, including the Director discretion provision, the Tribal program is at least as stringent as the federal UIC requirements.

xiv. Emergency permits

40 CFR § 144.34 describes the conditions for authorizing an emergency permit. NNUIC Regulation § 102.4 is identical to (except for substitution of appropriate Navajo Nation references) and at least as stringent as the federal provision.

xv. Effect of a permit

40 CFR § 144.35 describes permit compliance. NNUIC Regulations § 102.5 is identical to (except for substitution of appropriate Navajo Nation references) and at least as stringent as the federal provision.

xvi. Duration of permits

40 CFR § 144.36 explains the allowable duration of permits. NNUIC Regulations § 102.6 adopts all the language in the federal provision except a reference to Class I wells (and a substitution of the appropriate Navajo Nation references). The omission of the reference to Class I wells is not relevant because the Tribe is seeking primacy only for Class II wells. This regulation is at least as stringent as the federal provision.

xvii. Transfer of permits

40 CFR § 144.38 provides a description of the conditions for transferring permits.

NNUIC Regulations § 102.8 is identical to (except for substitution of appropriate Navajo Nation references) and at least as stringent as the federal provision.

xviii. Modification or revocation and reissuance of permits

40 CFR § 144.39 provides conditions to modify, revoke and/or reissue a permit. NNUIC Regulations § 102.9 is equivalent to the federal provision with the exception of omitting a discussion of Class I hazardous waste injection wells in § 102.9(b). The omission of a Class I well discussion is not relevant as the Tribe is seeking primacy only for Class II wells. This regulation is at least as stringent as the federal provision.

xix. Termination of permits

40 CFR § 144.40 describes the causes for terminating permits. NNUIC Regulation § 120.10 is identical to (except for substitution of appropriate Navajo Nation references) and at least as stringent as the federal provision.

xx. Conditions applicable to all permits

40 CFR § 144.51 provides information on the applicable conditions for all UIC permits. NNUIC Regulations § 102.21 is identical to (except for substitution of appropriate Navajo Nation references) the federal provision but excludes a discussion on Class I wells, which is not relevant because the Tribe is seeking primacy only for Class II wells. This regulation is at least as stringent as the federal provision. Additionally, NNUIC Regulations § 102.21(p) requires a plugging and abandonment report within 30 days of plugging a well or at the time of the next quarterly report, and if the report is due in less than 15 days before completion of plugging, then the report shall be submitted within 30 days. This requirement is more stringent than the federal regulation at 40 CFR § 144.51(p), which requires the report in 60 days under both circumstances.

xxi. Establishing permit conditions

40 CFR § 144.52 discusses additional permit conditions that are required on a case-by-case basis under certain provisions. NNUIC Regulations § 102.22 is at least as stringent as the federal provision. The regulation omits discussion on Class I and hazardous waste injection wells. These omissions are not relevant as the Tribe is seeking primacy only for Class II wells.

xxii. Schedule of compliance

40 CFR § 144.53(a) provides general conditions governing the inclusion of schedules of compliance in permits. NNUIC Regulations § 102.23(a) is identical to (except for substitution of appropriate Navajo Nation references) and at least as stringent as the federal provision.

xxiii. Requirements for recording and reporting of monitoring results

40 CFR § 144.54 describes the requirements for recording and reporting of monitoring results. NNUIC Regulations § 102.24 is identical to (except for substitution of appropriate Navajo Nation references) and at least as stringent as the federal provision.

xxiv. Corrective action

40 CFR § 144.55 discusses the conditions and requirements for developing a "corrective action" plan that will be included in a permit. NNUIC Regulation § 102.25 is at least as stringent as the federal provision. The regulation omits a reference to Class I wells which is not relevant as the Tribe is seeking primacy only for Class II wells.

xxv. What are the additional [Class V] requirements?

40 CFR § 144.88 discusses additional Class V requirements. This provision is not applicable to this review as the Tribe is seeking primacy only for Class II wells.

xxvi. Application for a permit

40 CFR § 124.3(a) provides information on the requirements for submitting an application and notes that the Director will not begin to process the permit until the permittee has met all application requirements. This provision references 40 CFR §§ 145.11[18], 144.31 and 144.32. An evaluation of 40 CFR § 144.31 (Application for a permit) and 40 CFR § 144.32 (Signatories to permit applications and reports) have already been discussed above in sections xi and xii, and EPA has determined that NNUIC Regulations §§ 102.1 and 102.2, respectively, are at least as stringent as the federal provisions, and therefore are consistent with 40 CFR § 124.3(a).

xxvii. Modification, revocation, and reissuance, or termination of permits

40 CFR § 124.5 describes the conditions for modifying, revoking, and reissuing or terminating permits. Uniform Regulations § 204 is as stringent as (except for substitution of appropriate Navajo Nation references) the federal provision with the exception of omitting a discussion on EPA-administered programs or Clean Water Act permits. These omissions are not relevant since the Tribe is seeking primacy only for Class II wells. The equivalent NNUIC Regulations §§ 102.9, 102.10 and 102.11, respectively, are discussed in this section and EPA has determined that they are as stringent as the federal provision.

xxviii. Draft permits

40 CFR § 124.6 describes the conditions under which the Director prepares a draft permit

[18] 40 CFR § 124.3(a) is one of the provisions listed under § 145.11 (Requirements for permitting) which EPA is using to determine if the Navajo Nation UIC Program meets, and in certain instances exceeds, the requirements for permitting.

or tentatively decides to deny a permit application. Uniform Regulations § 205 contains an equivalent discussion. Section 205 does not contain a discussion of the appeal process (*see* 40 CFR § 124.6(e)), but references NNSDWA Section 806 which contains a full discussion of the NNUIC appeal process, which is at least as stringent as the federal process.

xxix. Fact sheet

40 CFR § 124.8 describes the information that is required in a permit fact sheet. Uniform Regulations § 206 contains equivalent requirements, except that Section 206 does not have a counterpart to 40 CFR §§ 124.8(b)(3), (8), and (9). These omissions are not relevant because they do not apply to the UIC program. These regulations are at least as stringent as the federal provision.

xxx. Public notice of permit actions and public comment period

40 CFR § 124.10 describes the requirements governing the Director's public notice for a permit action. Uniform Regulations § 207 contains equivalent language but omits information throughout this section that is related to RCRA, NPDES, UIC Class I well, and EPA-administered programs, which is not relevant to the Navajo Nation's Class II UIC program or this approval action.

Additionally, 40 CFR § 147.3002 describes the public notice requirements an applicant must follow to show his intention to apply for a permit, including: notice to each landowner, tenant, and operator of a producing lease within ½ mile of the well and to the affected Tribal Government; a description of the way the notice was given and to whom; and an option for the Director to waive the requirement to give notice to individuals when deemed impractical. The Tribe has an equivalent provision at NNUIC Regulations § 102.1(h). These regulations are at least as stringent as the federal provision.

xxxi. Public comments and requests for public hearings

40 CFR § 124.11 discusses the procedures for submitting comments and requesting a public hearing on a draft permit. Uniform Regulations § 208(b)(1) contains an equivalent discussion, plus it includes an additional requirement that a request for public hearing shall include the name, address and telephone number of the individual, organization or other entity requesting a hearing. This additional requirement makes the tribal regulation more stringent than the federal provision.

xxxii. Public hearings

40 CFR § 124.12 describes the procedures for public hearings. Uniform Regulations § 209 contains equivalent language to the federal provision, though it omits discussion of programs other than UIC, which is not relevant. Uniform Regulations § 209(b)(c)(d) and (f) contain some minor requirements for public hearings in addition to those required in the federal regulations.

These additional requirements do not make the regulation any less stringent than the federal provision.

xxxiii. Response to comments

40 CFR § 124.17 includes requirements concerning response to comments when a final permit is issued. Uniform Regulations § 213(a) contains language equivalent to the federal provision though it omits discussion of non-UIC programs. This omission is not relevant and does not make the Tribal regulations any less stringent than the federal requirements.

Requirements for Permitting (40 CFR § 145.11(b)) - Optional Provisions

40 CFR § 145.11(b) states that a tribal UIC program may, if it has adequate legal authority, implement any of the provisions in parts 124 and 144 that are not included in § 145.11(a). The Tribe has equivalent regulations for all but two of the optional provisions.[19] The discussion below describes each optional provision under § 145.11(b) and the equivalent tribal regulatory provision. Based on EPA's evaluation below, the Tribe has adequate legal authority to implement these optional provisions.

i. Waiver of requirements by Director

40 CFR § 144.16 describes the instances where a Director can authorize a waiver for certain permit requirements. NNUIC Regulations § 101.24 is identical to (except for the substitution of appropriate Navajo Nation references) and is at least as stringent as the federal provision.

ii. Records

40 CFR § 144.17 provides that the Director or the Administrator may, on a well-by-well basis, require an owner or operator of an underground injection well to ensure compliance with the SDWA. NNUIC Regulations § 101.25 is identical to (except for the substitution of appropriate Navajo Nation references) and is at least as stringent as the federal provision.

iii. Requiring other information

40 CFR § 144.27 allows the Regional Administrator, for EPA-administered programs only, to require additional information from owners and operators of any UIC well authorized by rule to determine whether a well may endanger an USDW. The Tribe has been given authority to require such information for all wells, not just those authorized by rule, at NNUIC Regulations § 101.31. Therefore, the Tribal regulation is as stringent as the federal provision.

[19] The two "optional tier" provisions of § 145.11(b) that the Tribe does not include in its regulations are § 124.16 – Stays of contested permit conditions, and § 124.19 – Appeal of UIC Permits.

iv. Requirements of Class II authorization by rule

40 CFR § 144.28 describes the requirements for owners or operators of Class II wells authorized by rule. NNUIC Regulations § 102.1 and NNSDWA § 205 require all underground injection wells to have permits. NNEPA is currently issuing permits for all existing Class II wells (see PD Section IX. Priority and Schedule for Issuing Permits to Inject). However, in the event that there are wells authorized by rule under the federal UIC regulations that do not yet have Navajo-issued UIC permits as of the effective date of EPA's approval of Navajo Nation's application for Class II primacy, NNUIC Regulations § 102.13(d) incorporates by reference federal ABR regulations contained in 40 CFR §§ 144.21- 144.28 and 147.3006. This incorporation is solely for the purpose of regulating wells that are temporarily without permits until a NNEPA UIC permit is issued.

v. Continuation of expiring permits

40 CFR § 144.37 describes the requirements for the continuation of expiring EPA-issued UIC permits. NNUIC Regulations § 102.7 is at least as stringent as the federal provision. NNUIC Regulations § 102.7 does not include a counterpart to the federal language in § 144.37(a) since this paragraph deals with EPA-issued permits only. NNUIC Regulations § 102.7 adequately describes the procedures for the continuation of expiring permits. NNEPA does not allow a permit to continue beyond its expiration date unless the Director allows it to continue, provided the permittee meets the specified *requirements for continuation* at NNUIC Regulations § 102.7(b).

vi. Minor modifications of permits

40 CFR § 144.41 describes the conditions for making minor permit modifications. NNUIC Regulations § 102.11 is identical to and at least as stringent as the federal provision.

vii. Consolidation of permit process

40 CFR § 124.4 describes the option to consolidate the permitting process. Uniform Regulations § 203 is at least as stringent as the federal provision.

viii. Obligation to raise issues and provide information during the public comment period

40 CFR § 124.13 describes the obligation for all persons to raise issues regarding a permit and to submit supporting arguments by the close of the public comment period. Additionally, it states that the 30-day comment period may be extended under § 124.10 to give the commenter(s) a reasonable opportunity to comply with the requirements of this section. The requirements in Uniform Regulations § 210 are at least as stringent as those in the federal provision.

ix. Reopening of the public comment period

40 CFR § 124.14 states that whenever any data, information or arguments submitted during the public comment period appear to raise substantial new questions concerning the draft permit, the Regional Administrator may prepare a new draft permit, revise the statement of basis, and/or reopen or extend the public comment period. Uniform Regulations § 211 is at least as stringent as the federal provision.

x. Issuance and effective date of permit

40 CFR § 124.15 states that the Regional Administrator will issue a final permit decision and notify the appropriate persons. Uniform Regulations § 212 is at least as stringent as the federal provision.

xi. Computation of time

40 CFR § 124.20 describes how to compute or schedule due dates for required actions and beginning/end dates for different time period events. Uniform Regulations § 104 contains an equivalent discussion with the exception of omitting a discussion of allowing an additional three days to the prescribed time if an interested or required person needs to act by mail. This exception does not make Uniform Regulations § 104 any less stringent than the federal provision.

Summary

Given the above evaluation of the Tribe's permitting process, using federal UIC permitting provisions at § 145.11 as the evaluation tool, EPA believes the Tribe has demonstrated that it has an effective permitting process that results in enforceable permits and thus meets the first consideration in Guidance 19 Section 5.6 pursuant to SDWA Section 1425(a) requirements.

Transition Issues Relating to Navajo Nation-Issued UIC Permits

The Navajo Nation UIC Program currently issues Tribal UIC permits pursuant to its authority under tribal laws and regulations. The Navajo Nation has issued 18 Tribal UIC permits to date, covering some, but not all of, the Class II injection operations on lands under Navajo jurisdiction. This section clarifies the status of these Navajo Nation-issued UIC permits after the effective date of EPA's approval of the Navajo Nation Class II UIC Primacy Application. This section also discusses the status of EPA-issued UIC permits and the proposed permit transition process for injection operations that are presently rule-authorized.

Wells regulated under SDWA Class II UIC requirements on the Navajo Nation can be separated into four categories: 1) wells with both Navajo Nation-issued and EPA-issued permits; 2) wells with EPA-issued permits only; 3) wells with Navajo Nation-issued permits only

(federally authorized by rule); and 4) wells without permits (authorized by rule). Each category is discussed below.

For the first category, wells with both Navajo Nation- and EPA-issued Class II UIC permits, as part of the primacy application approval determination, EPA conducted a thorough review of each of the existing Navajo Nation-issued UIC permits and verified that each meets the substantive permitting requirements of the Tribe's proposed program and that those requirements are at least as stringent as federal permitting requirements. EPA also confirmed that each of the Tribe's permits was issued pursuant to the Tribe's procedural regulations for permit issuance and that those procedural regulations are at least as stringent as the provisions of 40 CFR part 124. EPA considers these Navajo Nation-issued permits to be part of the existing Navajo Nation Class II UIC program for which the Navajo Nation is seeking primacy. Appendix B provides a summary of EPA's review of the Navajo Nation-issued permits and a certification for each permit stating that the permit meets the substantive requirements of the Tribe's program, which EPA is proposing to approve. Thus, EPA is proposing that, after delegation of primacy, the pre-existing Navajo Nation Class II UIC permits will become the federally-enforceable UIC permits under the SDWA. In contrast, the EPA-issued permits have provisions stating that they "will expire upon delegation of primary enforcement responsibility" to the Navajo Nation, unless the Navajo Nation "has the appropriate authority and chooses to adopt and enforce this permit as a Tribal permit." Although the Navajo Nation has this authority, it has chosen not to adopt and enforce EPA permits for wells which the Navajo Nation has also permitted. Thus, the EPA permits for wells in this category will expire upon delegation.

The second category includes UIC wells with EPA-issued permits only. As noted above, EPA-issued permits have provisions stating that they "will expire upon delegation of primary enforcement responsibility" to the Navajo Nation, unless the Navajo Nation "has the appropriate authority and chooses to adopt and enforce this permit as a Tribal permit." As the Navajo Nation has authority to adopt and enforce these permits, and the Tribe has not yet issued its own UIC permits for those operations, the Tribe has chosen to administer EPA's permits for UIC wells in this category until a Navajo Nation UIC permit is issued.

For UIC wells with Navajo Nation-issued permits only, as with wells subject to both EPA- and Navajo Nation-issued permits, as part of the primacy application approval determination, EPA conducted a thorough review of each of the existing Navajo Nation-issued UIC permits and verified that each meets the substantive permitting requirements of the Tribe's proposed program and that those requirements are at least as stringent as federal permitting requirements. EPA also confirmed that each of the Tribe's permits was issued pursuant to the Tribe's procedural regulations for permit issuance that are comparable to the provisions of 40 CFR part 124. Thus, EPA is proposing that, after delegation of primacy, the pre-existing tribal UIC permits remain in effect as the federally-enforceable UIC permits under the SDWA.

The final category of wells is made up of those wells that are not currently permitted by EPA or the Tribe. These wells are currently authorized by rule pursuant to 40 CFR §§ 144.21 – 144.28, and 147.3006. After the delegation of primacy to the Tribe, these wells will continue to

operate by rule authorization. The Navajo Nation, in its UIC regulations at NNUIC Regulations § 102.13, has adopted by reference the federal ABR regulations, which will apply until the NNUIC Program issues UIC permits for these wells.

b. Technical Criteria

The second consideration in Guidance 19 Section 5.6 which EPA uses to evaluate whether a tribe has an effective Class II UIC program pursuant to SDWA Section 1425(a) is whether the tribal program has "authority to apply, by permit or rule, certain technical requirements designed to prevent the migration of injected or formation fluids in USDWs". Additionally, this section states that "[a]ny tribe adopting the language of 40 CFR part 146 should be considered approvable on its face value for that portion of the program to which it applies."

EPA evaluated the Tribe's technical requirements by comparing 40 CFR part 146 and the NNUIC Regulations part 3 (Criteria and Standards). EPA concluded that the Tribe has adopted provisions in its NNUIC Regulations that are equivalent to each of the enumerated sections in 40 CFR part 146. These provisions give the Tribe the authority to apply, by permit or rule, certain technical requirements designed to prevent the migration of injected or formation fluids into USDWs.

The federal technical requirements and the comparable NNUIC Regulations are described below.

i. Applicability and scope

40 CFR § 146.1 sets forth the technical criteria and standards that an EPA-approved UIC program must meet, and states that upon approval, any underground injection that is not authorized by the Director either by rule or by permit is unlawful. NNUIC Regulations § 101.1 (Applicability), § 101.3 (Purpose and scope of regulations), § 101.4 (Applicability of Uniform Regulations), and § 101.21 (Prohibition of unauthorized injection) contain language that is at least as stringent as the federal provision.

ii. Law authorizing these regulations

40 CFR § 146.2 states that the federal UIC regulations are authorized by the SDWA 42 U.S.C. 300f *et seq.* A comparable description of the Navajo Nation authority is at NNUIC Regulations § 101.2, which states that the NNSDWA authorizes the NNEPA to promulgate regulations to implement a Navajo Nation UIC program. NNUIC Regulations § 101.2 is at least as stringent as the federal provision.

iii. Definitions

40 CFR § 146.3 provides definitions that apply to the UIC Program. NNUIC Regulations

§ 101.5 includes all the required definitions related to the Class II UIC program. NNUIC Regulations § 101.5 omits some definitions that are not related to the Class II program (e.g., *Point of Injection for Class V wells*) and has added definitions such as *Attorney General*. These omissions and additions do not make the Navajo Nation Class II UIC program any less stringent than the federal program.

iv. Criteria for exempted aquifers

40 CFR § 146.4 discusses the criteria for exempting an aquifer. NNUIC Regulations § 103.1 is equivalent to the federal provision, with the exception of omitting a counterpart to 40 CFR § 146.4(c)[20] which is not available to the Navajo Nation UIC Program pursuant to 40 CFR § 147.3008 (Criteria for Aquifer Exemptions). 40 CFR § 147.3008 restricts the availability of the aquifer exemption criterion to the Navajo Nation by eliminating the option to exempt an aquifer that meets the criteria in 40 CFR § 146.4(c). NNUIC Regulations § 103.1 is at least as stringent as the federal provision.

v. Classification of injection wells

40 CFR § 146.5 contains the classification of the five (5) classes of underground injection wells. NNUIC Regulations § 101.7 contains an equivalent discussion and is at least as stringent as the federal program.

vi. Area of review

40 CFR §§ 146.6 and 147.3009(a) describe the area of review for each injection well or each field, project or area for the zone of endangering influence, and fixed radius. NNUIC Regulations § 103.2 is equivalent to the federal provision for zone of endangering influence and requires ½ mile fixed radius around the well which is more stringent than the federal provision of ¼ mile.

vii. Corrective Action

40 CFR § 146.7 provides criteria for determining the adequacy of corrective action proposed by the applicant and the additional steps needed to prevent fluid movement into USDWs. NNUIC Regulations § 103.3 is at least as stringent as the federal provision.

viii. Mechanical integrity

40 CFR § 146.8 describes the conditions required for a well to maintain mechanical integrity, and the methods to be used to determine if a well meets these conditions. NNUIC

[20] 40 CFR § 146.4(c) – This regulation provides that an aquifer or portion thereof that meets the criteria for a USDW may be determined to be an exempted aquifer if "the total dissolved solids content of the ground water is more than 3,000 and less than 10,000 mg/l and it is not reasonably expected to supply a public water system."

Regulations § 103.4 contains an equivalent discussion with the addition of a description of an initial pressure test at NNUIC Regulations § 103.4(b)(1), as defined at 40 CFR § 147.3010. NNUIC Regulations § 103.4 is at least as stringent as the federal program.

ix. Criteria for establishing permitting priorities

40 CFR § 146.9 describes the criteria to determine priorities for setting times for owners or operators to submit applications for authorization to inject. NNUIC Regulations § 103.5 is at least as stringent as the federal provision.[21]

x. Plugging and abandoning Class I, II, III, IV, and V wells

40 CFR § 146.10 contains requirements for plugging and abandoning all classes of UIC wells. NNUIC Regulations § 103.6 contains all the applicable requirements and is at least as stringent as the federal requirements for Class II wells. NNUIC Regulations omit discussion of Class I, IV and V wells, and include additional discussion of Class III wells. These omissions and additions are not relevant to this analysis since the Tribe is seeking primacy only for Class II wells.

xi. Subpart B – Criteria and Standards Applicable to Class I Wells

40 CFR §§ 146.11 – 146.14 provide criteria and standards applicable to Class I wells. NNUIC Regulations do not include an applicable discussion because the Tribe is seeking primacy only for Class II wells.

xii. Subpart C – Criteria and Standards Applicable to Class II Wells - Applicability

40 CFR § 146.21 establishes criteria and standards for regulating Class II UIC wells. NNUIC Regulations § 103.21 is at least as stringent as the federal provision.

xiii. Construction requirements

40 CFR § 146.22 describes construction requirements for all Class II wells. NNUIC Regulations § 103.22 is at least as stringent as the federal provision.

xiv. Operating, monitoring, and reporting requirements

40 CFR § 146.23 contains requirements for operating, monitoring and reporting for Class II wells. NNUIC Regulations § 103.23 is at least as stringent as the federal provision by requiring mechanical integrity to be demonstrated at least once every five years. NNUIC Regulations also include requirements to determine injection pressure at a wellhead at §

[21] 40 CFR § 146.9 references § 144.22(f), which does not currently exist.

103.23(a)(2)(A), (B), and 3 which are identical to those found in 40 CFR § 147.3006(b).

xv. Information to be considered by the Director

40 CFR § 146.24 sets forth the information that must be considered by the Director in permitting Class II wells. NNUIC Regulation § 103.24 is at least as stringent as the federal provision.

xvi. Subpart D – Criteria and Standards Applicable to Class III Wells

40 CFR §§ 146.31 – 146.34 provide criteria and standards applicable to Class III wells. Equivalent NNUIC Regulations at Subpart C, §§ 103.31 to 103.34, are not relevant to this approval action because the Tribe is seeking primacy only for Class II wells.

xviii. Subpart F – Criteria and Standards Applicable to Class V Wells

40 CFR § 145.51 provides criteria and standards applicable to Class V wells. Equivalent NNUIC Regulations at Subpart D, §§ 103.41 and 103.42, are not relevant to this approval action because the Tribe is seeking primacy only for Class II wells.

xii. Subpart G – Criteria and Standards Applicable to Class I Hazardous Waste Injection Wells

40 CFR §§ 146.61 – 146.73 provide criteria and standards applicable to Class I Hazardous Waste Injection wells. NNUIC Regulations do not include an applicable discussion because the Tribe is seeking primacy only for Class II wells.

Summary

Based on the evaluation discussed above of the Tribe's technical requirements using 40 CFR part 146, EPA believes the Tribe has demonstrated that it has the authority to apply, by permit or rule, the necessary technical requirements designed to prevent the migration of injected or formation fluids into USDWs, and thus meets the second consideration in Guidance 19 Section 5.6 pursuant to the requirements in SDWA Section 1425(a).

c. Surveillance

An effective surveillance program is the third consideration in Guidance 19 Section 5.6 that EPA uses to evaluate whether a tribe has an effective Class II UIC program pursuant to SDWA Section 1425(a). EPA evaluated the Tribe's Class II UIC field inspection program (i.e., surveillance program) pursuant to the criteria in Guidance 19 Section 5.4.a and determined that the Tribe has an effective system of field inspections. For a full discussion of this review, see Section IV.E.3.a above. EPA's evaluation found the following:

- PD Section XI.C and NNUIC Regulations § 102.21(i) both adequately discuss inspection procedures, and include a discussion on authority to enter upon the permittee's premises where a regulated facility or activity is located or conducted and to inspect at reasonable times any facilities, equipment (including monitoring and control equipment), practices, or operations regulated or required under a NNEPA-issued UIC permit.

- PD Section II provides a description of the NNUIC Program staffing structure and demonstrates that the Tribe has technical staff to implement a UIC program, including field inspections.

- The NNUIC Program Manager, Senior Environmental Specialist and Senior Environmental Technician all conduct field work that includes witnessing MITs, well plugging and abandonment procedures, inspections and corrective action operations. PD Section XII.B ensures that at least 25% of all MITs performed each year will be witnessed by qualified UIC Program staff.

d. Enforcement

Effective enforcement against violators is the fourth consideration in Guidance 19 Section 5.6 that EPA uses to evaluate whether a tribe has an effective Class II UIC program pursuant to SDWA Section 1425(a). Guidance 19 Section 5.6.d provides that "EPA will consider not whether a [tribe] has all or any particular enforcement tools but whether the [tribe's] program, taken as a whole, represents an effective enforcement effort."

In evaluating the Navajo Nation's enforcement program, EPA reviewed the Tribe's criminal and civil authorities separately.

Criminal Enforcement Authority

The Tribe's criminal enforcement program is based on a Criminal Memorandum of Agreement (Criminal Enforcement MOA) between the Tribe and EPA, and the Tribe's own criminal penalty authority provisions. The MOA reflects that EPA retains criminal enforcement authority, and sets up a process for the Tribe to refer criminal matters to EPA.

The Tribe has its own criminal enforcement authorities. The Tribe describes its criminal penalty authority at PD Section XIV and NNSDWA § 803(C). According to the NNSDWA, and as described in the PD, the UIC Program Director may request that the Navajo Nation Prosecutor's Office initiate criminal proceedings against a person where, upon conviction, he may be punished by a fine not to exceed $5,000 per day of violation.

Indian tribes are precluded under Federal Indian law from pursuing criminal enforcement as follows: 1) against non-Indians; and 2) against Indians where the potential fine required is greater than $5,000 or where the penalty would require imprisonment for more than one year (in accordance with 25 U.S.C. § 1302). 40 CFR § 145.13(e) notes that to the extent that an Indian

tribe does not assert, or is precluded from asserting, criminal enforcement authority for violations of its SDWA UIC program, EPA will assume primary enforcement responsibility for criminal violations. 40 CFR § 145.13(e) directs EPA to include in its MOA with tribes a process for referring such violations of the UIC provisions to EPA in an appropriate and timely manner.

Accordingly, EPA and the Tribe signed the Criminal Enforcement MOA, entitled "Memorandum of Agreement between Navajo Nation Environmental Protection Agency and U.S. Environmental Protection Agency Regarding Criminal Enforcement of the Underground Injection Control Program Pursuant to 40 C.F.R. 145," on October 30, 2006. Under the terms of this MOA, the Tribe will provide enforcement information to EPA concerning potential criminal violations of the SDWA Class II UIC program.

The Navajo Nation extends into three states: Arizona, New Mexico and Utah. Depending upon the location of the alleged violation, one of three U.S. Attorney's Offices will have jurisdiction over a given case. The nature of criminal investigations requires a close working relationship between the U.S. Attorney's Office and EPA's Criminal Investigation Division (CID) Area Office. Therefore, the CID Special Agents in Charge (SACs) for EPA Regions 6, 8 and 9 and NNEPA agreed that NNEPA would continue to refer cases directly to the CID Area Office that has responsibility for the area where the alleged crime occurs. The Criminal Enforcement MOA reflects the continuation of this arrangement. Consequently, the SACs for Regions 6, 8 and 9 are all signatories to the MOA.

The Tribe's criminal enforcement program, including the Tribe's own criminal penalty authority as well as the protocols set forth in the Criminal Enforcement MOA, represents an important and effective component of the Tribe's SDWA UIC Class II enforcement program.

Civil Enforcement Authority

To determine if a tribe has effective civil enforcement authority, EPA believes that the tribe shall meet all of the civil elements of § 145.13 (requirements for enforcement authority).

The civil enforcement authorities pursuant to 40 CFR § 145.13 and the comparable Tribal provisions, which demonstrate that they are at least as stringent as the federal requirements, are as follows:

i. Immediate Restraining Authority

40 CFR § 145.13(a)(1) requires that tribes seeking primacy have the authority to "restrain immediately and effectively any person by order or by suit in tribal court from engaging in any unauthorized activity which is endangering or causing damage to public health or the environment." A note included in 40 CFR § 145.13(a) states, "This paragraph requires that States have a mechanism (e.g., an administrative cease and desist order or the ability to seek a temporary restraining order) to stop any unauthorized activity endangering public health or the environment."

The Tribe meets this requirement by addressing emergency actions at NNUIC Regulations § 101.26, and NNSDWA §§ 802 and 803. Under these provisions, the Director may issue an order, or take other actions to protect the public health, welfare or environment, including requiring the immediate closure of underground injection facilities. The orders are effective immediately upon issuance. PD Section XIV and Uniform Regulations § 304(a) address emergency orders to comply, and orders to cease and desist.

ii. Injunctive Relief Authority

40 CFR § 145.13(a)(2) requires that tribes with primacy must have the authority to "sue in courts of competent jurisdiction to enjoin any threatened or continuing violation of any program requirement, including permit conditions, without the necessity of a prior revocation of a permit." The Tribe's authorities at NNUIC Regulations § 101.26, NNSDWA § 803(D) and PD Section XIV are at least as stringent as the federal provision.

iii. Penalty Authority

40 CFR § 145.13(a)(3)(i) requires that for Class II wells, "civil penalties shall be recoverable for any program violation in at least the amount of $1,000 per day." The Tribe meets this requirement in NNSDWA Sections 803(A) and 804(A), Uniform Regulations § 304(a)(3), and as described in the PD Sections XIV.2 and 3. In accordance with these provisions, the Director may issue an order that assesses a civil penalty of up to $10,000 per day per violation. The Director may request that the Attorney General recover civil penalties in an amount not to exceed $25,000 per day per violation. The Director's authority is limited to seeking penalties of $100,000 or less, unless the Attorney General and Director jointly determine that a larger penalty is appropriate.

40 CFR § 145.13(b)(1) requires that the maximum civil penalty shall be assessable for each instance of violation and, if the violation is continuous, shall be assessable up to the maximum amount for each day of violation. The Tribe's authorities at NNSDWA § 803(B) and Uniform Regulations § 304 are at least as stringent as the federal provision.

40 CFR § 145.13(c) requires that a civil penalty assessed, sought, or agreed upon by the Tribal Director shall be appropriate to the violation. Uniform Regulations § 304(b) and NNSDWA §§ 802(B) and 803(B) are at least as stringent as the federal requirement.

iv. Burden of Proof

40 CFR § 145.13(b)(2) describes the prohibition against imposing a burden of proof greater than under federal law. Uniform Regulations § 321(A) and NNSDWA § 803(C) are at least as stringent as the federal provision.

v. Public Participation

40 CFR § 145.13(d) describes the public participation requirements for an enforcement process. NNUIC Regulations §§ 101.10(a), (b) and (c), NNSDWA § 801, and the description in the PD Sections XIV and XVI.C are at least as stringent as the federal provision.

Past Enforcement Actions

In addition to meeting the minimum enforcement requirements at 40 CFR § 145.13, Guidance 19 Section 5.6.d provides EPA the opportunity to look at whether a tribe has exercised its enforcement authorities adequately in the past. In the evaluation above, EPA determined that the Tribe has all the enforcement tools needed to administer and implement an effective Class II UIC program. EPA reviewed the Tribe's past enforcement actions and performance and determined that the Tribe's Class II UIC program, taken as a whole, represents an effective enforcement program.

PD Section XIV describes the Tribe's UIC enforcement program and past actions, including those under the Navajo Nation Clean Water Act, to further help demonstrate the Tribe's overall enforcement capacity. EPA determined that the Tribe utilized appropriate enforcement tools in past actions and has been adequately exercising its UIC authorities since 2001 under Navajo law. Highlights of the Tribe's past enforcement actions and performance are below:

- NNUIC Program staff informed all operators of the requirement to apply for Navajo Nation permits and submit the appropriate application fees. The NNUIC Program has collected overdue permit fees from various operators and ensured that the required permit application forms were submitted.

- NNUIC staff assisted EPA on an enforcement action by witnessing the successful plugging and abandonment (P&A) of a water source well at the NE Hogback Unit that was illegally being used for underground injection into a USDW.

- NNUIC staff assisted EPA with enforcement under the Clean Water Act and monitored remedial action pertaining to a well at the McElmo Creek Unit that was leaking oil into a shallow aquifer and an associated spring.

- NNEPA assisted EPA in an enforcement action brought under SDWA Section 1431 to close unlined pits in the Aneth field based on the likelihood of their contaminating an USDW and their posing an imminent and substantial endangerment to public health.

- NNEPA issued orders under the Navajo Nation Clean Water Act for an intentional release of produced water in the Horseshoe Canyon area.

- NNUIC staff has reported quarterly to EPA on various aspects of the UIC Program. In Fiscal Year 2006, the NNUIC program noted the following well failures and compliance actions taken to remediate the problems:
  - 10 wells had MIT failure (7% of the 143 with MITs)
  - 25 wells developed leaks during operations (6.5% of well inventory)
  - 12 remedial actions were taken to bring wells into compliance (34% of wells that failed MIT or developed leaks during operations); 11 of these were repaired and one was plugged and abandoned.
  - In the event of noncompliance, the NNUIC Program contacts the relevant operators, notifying them of areas of noncompliance and ensuring that the necessary steps are taken to correct any noncompliance.

- The NNUIC Program Manager submits information on a weekly basis about permit noncompliance and proposed and pending enforcement actions to the Navajo Surface and Groundwater Director.

- The Navajo Nation Department of Justice hired an attorney in the fall of 2005 in part to assist the NNUIC Program with enforcement issues. He has recently worked with the NNUIC Program on obtaining compliance with permit application requirements.

Summary

Based on the above comparison of the Navajo Nation's civil enforcement program against 40 CFR § 145.13, evaluation of the Tribe's past enforcement practices, and evaluation of the Tribe's criminal enforcement program, EPA finds that the Tribe has an effective civil and criminal enforcement program, thereby meeting the fourth consideration in Guidance 19 Section 5.6 pursuant to the requirements in SDWA Section 1425(a).

e. Public Participation

Adequate public participation in the permit issuance process is the fifth, and final, consideration in Guidance 19 Section 5.6 that EPA uses to evaluate whether a tribe has an effective Class II UIC program pursuant to SDWA Section 1425(a).

Guidance 19 Section 5.6.e provides a "minimal list of elements that EPA will consider" when evaluating the "degree to which the tribe assures the public an opportunity to participate in major regulatory decisions." In Section IV.D of this Decision Document, EPA reviewed the Tribe's public participation regulations and determined that the Tribe's regulatory provisions for public participation exceeded the criteria in Guidance 19 and were at least as stringent as the federal public participation requirements of 40 CFR §§ 124.10 (Public notice of permit actions and public comment period); 124.11 (Public comments and requests for public hearings); 124.12 (Public hearings); 124.13 (Obligations to raise issues and provide information during the public comment period); 124.14 (Reopening of the public comment period); 124.15 (Issuance and effective date of permit); and 124.17 (Response to Comments).

Based on the evaluation discussed above, EPA concludes that the Tribe has demonstrated that it assures adequate public participation in the permit issuance process, thereby satisfying the fifth consideration in Guidance 19 Section 5.6 pursuant to the requirements in SDWA Section 1425(a).

Summary

As demonstrated by the above evaluation, analysis and discussion of the 5 considerations in Guidance 19 Section 5.6, EPA has determined that the Tribe has demonstrated that its Class II UIC program represents an effective program to prevent underground injection which endangers drinking water sources as required in SDWA Section 1425(a).

F. Guidance 19 Section 6: Reporting

Guidance 19 Section 6.3 discusses annual reporting measures that the Tribe should meet. As demonstrated above in Section IV.C.6 -- Memorandum of Agreement (MOA), the Tribe has committed to providing EPA with quarterly and annual reporting. Specific quarterly and annual reporting requirements are provided at NNUIC Regulations § 101.9, which contains language similar to 40 CFR § 144.8 (noncompliance and program reporting to the Director). Therefore, the Tribe's reporting requirements for the Class II UIC program are at least as stringent as the federal reporting provisions and satisfy the criteria in Guidance 19 Section 6.3.

V. Conclusion

Section 1425(a) of the SDWA requires a tribe to demonstrate that its Primacy Application 1) meets the requirements of Section 1421(b)(1)(A) - (D); and 2) represents an effective program to prevent injection which endangers underground drinking water sources. In addition, SDWA Section 1451(a) and its implementing regulations at 40 CFR part 145, Subpart E specify the criteria for tribal eligibility for primacy for the SDWA UIC program. Pursuant to the analysis provided in this document, EPA has concluded that the Navajo Nation's Class II UIC program satisfies the criteria in Guidance 19 and meets the requirements of SDWA Section 1425(a), SDWA Section 1451(a), and 40 CFR part 145, Subpart E. EPA therefore proposes to approve the Tribe's Application for Primacy for the SDWA Class II UIC program for the areas covered in the Tribe's Primacy Application.