explicitly contemplates that Indian Tribes may develop and administer their own Clean Air Act programs in the same manner as States. Section 164(c) delegates to Indian governing bodies the authority to redesignate lands within the exterior boundaries of reservations of federally recognized Indian tribes for purposes of the Act's Prevention of Significant Deterioration of Air Quality (PSD) program. Section 301(d) of the Act delegates to EPA the authority to specify the provisions of the Act for which it is appropriate to treat Indian Tribes in the same manner as States. The EPA has issued proposed rules that would authorize Tribes to administer approved Act programs in the same manner as States for virtually all provisions of the Act, including title V operating permit programs. *See* 59 FR 43956 (Aug. 25, 1994).

The EPA has spelled out some of the steps it currently takes and plans to take to protect tribal air quality prior to issuance of final rules authorizing tribal Act programs and ensuing tribal program approvals. *See, e.g.*, 59 FR at 43960–43961. The EPA is also developing rules to be issued within the next few months that would provide for EPA implementation of title V permit programs on tribal lands in the interim period before tribal programs are approved.

Comment: ''[T]he State of Wisconsin believes that it has authority to permit sources within Indian reservations if the source may have a substantial off-reservation impact * * *. The State has jurisdiction to enforce its air permitting laws on the basis of common law principles laid down by the United States Supreme Court. Recent decisions of that Court have departed from the concept of inherent Indian sovereignty as a bar to State jurisdiction over Indians and leaned towards reliance on the principle of federal preemption. *Rice* v. *Rehner*, 463 U.S. 713 (1983); see also *McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164 (1973) * * *. Although the concept of tribal sovereignty is given less emphasis today, it continues to be relevant to a form of preemption analysis applicable to Indian law, which can be summarized as follows: State jurisdiction is preempted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the State interests at stake are sufficient to justify the assertion of State authority. *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324, [ ] 334 (1983). Thus, the inquiry must be whether federal or Indian interests are interfered with by enforcement of the state's air permitting laws, and, if so, whether the State interests at stake are sufficient to justify the assertion of State authority. In *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), the Court discusses the issue of whether State laws apply to on-reservation conduct of Indians. The Court describes the appropriate analysis, that being the balancing of state, federal, and tribal interests and the related notion of tribal sovereignty * * *. Where a State's interest in applying its law outweighs any competing federal or Indian interests at stake, and where the State's exercise of its jurisdiction is not incompatible with congressional goals of promoting Indian self-government, self-sufficiency and economic development, states may apply their laws unless such application is preempted by the law. *Cabazon*, 480 U.S. at 214–216. In the case of the title V permitting program, no express federal law preempts State jurisdiction on Indian reservations. While this could occur with delegation of state status to the tribes, it has not happened yet. Furthermore, no Tribe in Wisconsin has a comprehensive air management program similar to that of the State. Given this backdrop, the State's interests in protecting the health and welfare of its citizens must prevail.''

''* * * [T]he State of Wisconsin believes that EPA's assertion that the State has no permitting jurisdiction over non-Indians on Indian reservations is overly broad, especially where the lands are owned by non-Indians. It is the State of Wisconsin's position that activities by non-Indians on Indian reservations are subject to a case-by-case review to determine whether the tribe (the federal government) or the state has regulatory jurisdiction. In order to regulate non-Indians, the tribe must demonstrate its inherent authority on a case-by-case basis. *Montana* v. *US*, 450 US 544 [ ] (1981), *Brendale* v. *Confederated Tribes of Yakima Indian Nation*, 492 US 408 [ ] (1989) * * *. In addition, as noted above, there is no inherent bar to state jurisdiction over the on-reservation activities of non-Indians.''

Response: To obtain title V program approval a State must demonstrate that it has adequate authority to issue permits and assure compliance by all sources required to have permits under title V with each applicable requirement under the Act. See Act § 502(b)(5); 40 CFR 70.4(b)(3)(i). The authority must include:

> A legal opinion from the Attorney General from the State or the attorney for those State, local, or interstate air pollution control agencies that have independent counsel, stating that the laws of the State, locality, or interstate compact provide adequate authority to carry out all aspects of the program. This statement shall include citations to the specific stat[ut]es, administrative regulations, and, where appropriate, judicial decisions that demonstrate adequate authority.

40 CFR 70.4(b)(3). Thus, the Act requires affected States to support their title V program submittals with a specific showing of adequate legal authority over all regulated sources, including sources located on lands within Indian reservations. For the reasons outlined below, EPA concludes that the information presented by WDNR has not adequately demonstrated authority to regulate title V sources located within the exterior boundaries of reservations of Federally recognized Tribes, including any non-Indian owned fee lands within reservation boundaries.

In *Washington Department of Ecology* v. *EPA*, 752 F.2d 1465, 1469 (9th Cir. 1985), the court upheld EPA's decision declining to approve the application of a state program submitted under the Resource Conservation and Recovery Act (RCRA) to Indian activities within Indian country, notwithstanding that ''RCRA does not directly address the problem of how to implement a hazardous waste management program on Indian reservations.'' The court reasoned that EPA's decision was within its reasonable discretion and was buttressed by ''well-settled principles of federal Indian law'':

> States are generally precluded from exercising jurisdiction over Indians in Indian country unless Congress has clearly expressed an intention to permit it. [citations omitted]. This rule derives in part from respect for the plenary authority of Congress in the area of Indian affairs. [citations omitted]. Accompanying the broad congressional power is the concomitant federal trust responsibility toward Indian tribes. [citations omitted]. That responsibility arose largely from the federal role as a guarantor of Indian rights against state encroachment. [citation omitted]. We must presume that Congress intended to exercise its power in a manner consistent with the federal trust obligation. [citation omitted].

Washington Department of Ecology, 752 F.2d at 1469–1470; *see also United States* v. *Mazurie*, 419 U.S. 544, 556 (1975) (the inherent sovereign authority of Indian Tribes extends ''over both their members and their territory''); *Montana* v. *United States*, 450 U.S. 544, 556–557 (1981) (Tribes generally have extensive authority to regulate activities on lands that are held by the United States in trust for the Tribe).

The cases cited by WDNR do not demonstrate that Wisconsin has authority to administer its title V operating permits program within the