regulating the reservation environment and commits the Agency to working with tribes on a "government-togovernment" basis to effectuate that recognition. A major goal of EPA's Indian Policy is to eliminate all statutory and regulatory barriers to tribal assumption of federal environmental programs. Providing tribes with the opportunity to implement permit programs represents another facet of the Agency's continuing commitment to the implementation of this long-standing policy.

In the case of other environmental statutes which initially did not have explicit provisions concerning treatment of Indian tribes in the same manner as states, such as the Clean Water Act, EPA, in accord with its Indian Policy, has worked to ensure that Congress revises them at the earliest opportunity to define explicitly the role for tribes under these programs. Congress added the provisions of the Clean Water Act that specifically allow tribes to be treated in the same manner as states in 1987. Clean Water Act section 518, 33 U.S.C. 1377.

However, EPA also has stepped in on at least two occasions to allow tribes to seek program approval despite the lack of an explicit Congressional mandate. EPA has recognized Indian tribes as the appropriate authority under the **Emergency Planning and Community** Right-to-Know Act (EPCRA), despite silence on the tribal role under EPCRA. 55 FR 30632 (July 26, 1990). EPA also filled a statutory gap in the Clean Air Act even before development of its Indian Policy. In 1974, EPA authorized Indian tribes to redesignate the level of air quality applicable to Indian country under the Prevention of Significant Deterioration (PSD) program in the same manner that states could redesignate for other lands. This decision was upheld in Nance v. EPA, 645 F.2d 701 (9th Cir. 1981). EPA believes the current situation to be analogous to these situations.

One commenter asserted that Nance was the only authority cited by EPA in support of the Agency's position that it has authority to approve tribal programs. This commenter listed several facts distinguishing the circumstances in the Nance case from the present determination. However, as explained more fully throughout these responses to comments, Nance is not EPA's sole support for today's action. EPA's interpretation is based on a number of authorities, including several cases-Chevron, supra, Cabazon, supra, State of Washington, Department of Ecology v. U.S. EPA, 752 F.2d 1465 (9th Cir. 1985) (discussed below), and others-as well as EPA's Indian Policy. Furthermore, EPA reiterates the fact that the Nance court held that under a federal statute silent as to jurisdiction in Indian country, EPA correctly allowed the Tribe, rather than the State, to "exercise control...over the entrance of pollutants onto the reservation". That is precisely what EPA's action today will do.

2. Applicability of Chevron

EPA received several general comments which suggest that the Chevron test does not apply to the interpretation of RCRA at issue here. The Agency disagrees with these comments.

Several facts create a gap in the implementation of RCRA. First, Congress did not directly speak to the issue of how a MSWLF regulatory program should be implemented in Indian country. In Washington, the Ninth Circuit upheld EPA's decision to exclude Indian country from the approved State hazardous waste program, stating that "RCRA does not directly address the problem of how to implement a hazardous waste management program on Indian reservations." 752 F.2d at 1469. Second, under the current statutory scheme as implemented, EPA is generally precluded from enforcing federal requirements on MSWLFs. Section 4005(c) of RCRA only allows EPA to enforce the 40 CFR part 258 Criteria after a finding of inadequacy of the state permit program, indicating Congress' preference for non-federal oversight of MSWLFs. Third, it is a well-settled principle of federal Indian law that states are precluded from exercising civil regulatory authority in Indian country unless Congress has expressly authorized them to do so. Cabazon, supra; Santa Rosa Band of Indians v. Kings County, 532 F.2d 655 (9th Cir. 1975), cert. denied 97 S.Ct. 731 (1977); Washington, 752 F.2d at 1469-1470. These facts leave open the question of how MSWLFs will be regulated in Indian country.

A gap in the administrative scheme of a statute indicates that Congress has delegated implicitly to the administrative Agency the authority to interpret the statute in a way that fills the gap. *Washington*, 752 F.2d at 1465. This interpretation is to be upheld if it is based on a permissible construction of the statute and reasonably promotes the goals and purposes of the statute. *Chevron*, 467 U.S. at 843. The Agency's determination that RCRA Subtitle D allows Indian tribes to develop permitting programs to ensure that MSWLFs comply with the Federal Criteria under 40 CFR part 258 is not only a permissible interpretation of RCRA, but is the most reasonable interpretation of RCRA given the strong legal and policy considerations in favor of promoting tribal sovereignty, and Congress' preference for non-federal oversight of MSWLFs.

3. Existence of a "Gap" in MSWLF Regulation

EPA also received comments that *Chevron* should not apply because there is no gap in the regulatory program for EPA to fill. According to these comments, the case of Coalition for Clean Air v. EPA, 971 F.2d 219 (9th Cir. 1992) should govern this issue. *Coalition* involved interpreting a provision of the Clean Air Act. Under the Clean Air Act, states are to submit proposals for State Implementation Plans (SIPs) allowing for attainment of National Ambient Air Quality Standards (NAAQS) by the statutory deadline. If EPA disapproves the state's proposed SIP, EPA must establish a Federal Implementation Plan (FIP) to take the place of the SIP. As noted in Coalition, EPA had disapproved California's proposed SIP for the South Coast and was in the process of finalizing a FIP for the South Coast when Congress passed the Clean Air Act Amendments of 1990. 971 F.2d at 222-223. The Amendments changed the criteria and timetables for NAAQS attainment. EPA argued that the changes relieved EPA of the obligation to promulgate a FIP and made it incumbent upon California to try again and submit a new SIP proposal. Id.

In Coalition, the Ninth Circuit declined to defer to EPA's interpretation for three reasons. First, the court found that the plain language of the Clean Air Act expressed Congress' intent to require EPA to promulgate a FIP. The court also found that legislative history did not support EPA's interpretation. Finally, the court held that EPA's interpretation was not entitled to deference because EPA had previously argued the opposite to Congress-that unless the statute were amended, EPA would be obligated to promulgate FIPs. The court pointed out that the change in EPA's interpretation did not reflect accumulated experience or respond to changing circumstances, nor was the change justified with reasoned analysis. Rather, the court found that EPA was merely asking the court to do what Congress would not.

The factors that lead the Ninth Circuit to reject EPA's interpretation of the Clean Air Act in *Coalition* are not present here. As discussed in more detail below, the plain language of RCRA does not express Congress' intent