The SHOSHONE-BANNOCK TRIBES

FORT HALL INDIAN RESERVATION
PHONE (208) 478-3903
(208) 478-3905
FAX (208) 478-3909

ENVIRONMENTAL WASTE
MANAGEMENT PROGRAM
PIMA DRIVE
P.O. BOX 306
FORT HALL, IDAHO 83203

Shoshone-Bannock Tribes Waste Management Act
Proposed Closure and Post-Closure Regulations for Waste Treatment, Storage, and Disposal Facilities

Response to Comments

March 7, 2023

I. Introduction and Description of Public Comment Period

On November 18, 2021, the Shoshone-Bannock Tribes Environmental Waste Management Program ("EWMP") published notice in the Sho-Ban News to announce the availability for comment of Proposed Closure and Post-Closure Regulations for Waste Treatment, Storage, and Disposal Facilities ("Proposed Regulations"). The Proposed Regulations, which implement provisions of the Shoshone-Bannock Tribes Waste Management Act ("WMA"), also were posted on EWMP's website.

This Response to Comments responds to all significant comments that were received on the Proposed Regulations either orally at the public hearing, which took place on January 4, 2022, or in writing, as required by WMA § 22-6-50. The EWMP appreciates the public's engagement in the process. The EWMP has fully considered all comments provided during the public comment period in the course of developing the Final Closure and Post-Closure Regulations ("Final Regulations") and all comments are included in the administrative record for this rulemaking. The Final Regulations also include minor, non-substantive revisions for clarity.

II. Response to Comments

1. One commenter suggested that EWMP add a preamble that addresses or interprets the proposed regulations. [EPA]

EWMP has added a preamble ("Introduction") to the Final Regulations. The Introduction addresses some of the comments on the Proposed Regulations, as identified and discussed below.

2. One commenter requested that the Tribes withdraw the Proposed Regulations, claiming that the Tribes lack a legal basis to go "beyond" the federal Resource Conservation and Recovery Act ("RCRA") regulations and that regulations consistent with RCRA would be duplicative. The commenter also claimed that the Tribes have not asserted any specific justification for the regulations. [FMC]

Tribes have inherent authority to enact laws that protect tribal members' health and welfare, which the Proposed Regulations are designed to do. *See, e.g., Montana v. U.S.*, 450 U.S. 544, 566 (1981); *FMC Corp. v. Shoshone-Bannock Tribes*, 942 F.3d 916, 934-35 (2019). The Tribes have chosen to enact such laws in several instances, including the one at issue here, and for several reasons. Federal law does not always address tribal concerns, or may not address those concerns as fully as or in the way that the Tribes prefer.

The WMA, under which the Proposed Regulations are set to be promulgated, expresses the Tribes' concerns with hazardous waste treatment, storage, and disposal facilities on the Reservation. In particular, WMA § 22-6-1 includes the Fort Hall Business Council's ("FHBC") findings and purposes for enacting legislation calling for the regulation of waste sites and facilities on the Reservation, including the handling, generation, storage, treatment, and disposal of waste.[1] The WMA was duly enacted by the FHBC on February 8, 2006, and amended on November 24, 2009. To the extent the commenter has requests regarding or objections to the WMA, this rulemaking is not the appropriate venue.

As specified in the "Authority" provision (§ 102) of the Proposed Regulations, moreover, the regulations are authorized by WMA § 22-6-1(a) and (d)(3), discussed above, and §§ 22-6-9(b), 22-6-34(a), and 22-6-35(a). They are being promulgated pursuant to EWMP's exclusive duty and authority to promulgate, administer, and enforce regulations under WMA § 22-6-9(b) and EWMP's duty to promulgate regulations regarding the partial and final closure of a waste management facility and its post-closure care and use pursuant to WMA §§ 22-6-34(a) and 22-6-35(a).

The commenter asserts that only states can regulate hazardous waste in lieu of EPA, alluding by implication to the absence of a "treatment of a state" ("TAS") provision in RCRA, but the Tribes are not asserting that their regulations take the place of RCRA, rather that they function alongside of RCRA. *See, e.g., Res. Tel. Co-op v. Three Affiliated Tribes of Fort Berthold Res.*, 76 F.3d 181, 186 (8th Cir. 1996) (finding that a federal statute granting rights-of-way across reservation lands "contains no provisions which prohibit designated tribal remedies or reflect a preference for initial adjudication of . . . disputes in a federal forum"). The commenter in fact acknowledges that the Proposed Regulations would apply in addition to applicable RCRA regulations.

The commenter then argues that the Tribes should not promulgate Closure and Post-Closure Regulations consistent with RCRA because that would be duplicative. The Proposed

[1] All citations to the WMA are to the Municode, available at https://library.municode.com/tribes_and_tribal_nations/shoshone-bannock_tribes/codes/the_law_and_order_code?nodeId=CD_TIT22ENNAREHESA_CH6WAMAAC_PTIGE_S22-6-1LEPOFILEAUPU

Regulations are intentionally designed to be consistent with RCRA in many ways, and therefore to limit the burden on owners and operators of complying with both tribal and federal regulations. The Proposed Regulations are not, however, identical to the corresponding RCRA regulations, nor are they required to be.

The commenter argues that aspects of the Proposed Regulations that are more stringent than RCRA cannot be supported, implying that RCRA would preempt such regulations, but nothing in RCRA implies preemption of inherent tribal authority. In fact, many provisions in RCRA, such as those acknowledging the application of local laws, indicate the opposite. Nor does the absence of a TAS provision, discussed above, imply preemption. Although a TAS provision would authorize a tribe to implement and enforce a federal program, its absence does not prevent a tribe from implementing and enforcing its own program, which it may do under its inherent authority as a sovereign and hence without EPA approval. *See, e.g.*, *Albuquerque v. Browner*, 97 F.3d 415, 423 (10th Cir. 1996), *cert. denied*, 522 U.S. 965 (1997) (recognizing tribes' " inherent sovereign power to impose standards or limits that are more stringent than those imposed by the federal government"). Indeed, that Congress overlooked tribes in enacting RCRA is all the more reason for tribes to enact their own hazardous waste laws. Many tribes have enacted their own version of Subtitle I of RCRA (relating to underground storage tanks), even though there is no TAS provision for such programs under RCRA, and EPA supports such tribal programs through funding, training, and in various other ways.

See also the Introduction added to the Regulations in response to Comment 1.

3. *One commenter recommended that clarifications be made to address when waste management units first become subject to the proposed regulations.* [EPA]

EWMP has added Subsection 103(c) to the Final Regulations to address this concern regarding their applicability date. Requirements in the Regulations that pertain to activities that have already begun at a waste management unit as of the effective date of the Regulations will not apply to that unit, but requirements as to future activities will apply. For example, a closure plan will not be required for a unit that has already begun closure as of the effective date of the Regulations and is proceeding under an approved permit and/or closure plan, but the requirement in Section 305(d) of the Regulations to submit a certificate of closure and survey plat to EWMP still applies. Relevant post-closure plan and care requirements in the Regulations apply to units that have not completed at least 30 years of post-closure care as of the effective date of the Regulations.

4. *One commenter requested that the Tribes acknowledge that the proposed waste management unit siting, permitting, closure and post-closure plan development, and closure and post-closure requirements do not apply to units where such actions have already been completed in accordance with RCRA. The commenter claimed that due process and other principles in themselves establish this result and that if the Tribes intended to apply the regulations retroactively they would have failed to provide sufficient public notice and opportunity to comment on the Proposed Regulations.* [FMC]

See Response to Comment #3 and the addition of subsection 103(c) to the Final Regulations, which should address any concerns with retroactivity.

The commenter does not explain its belief regarding the lack of sufficient public notice and opportunity to comment. However, EWMP followed the public notice and comment provisions required by WMA § 22-6-50 by publishing notice of the Proposed Regulations in the Sho-Ban News and on the EWMP website, providing 45 days for public comment, and holding a public hearing. The comments themselves are evidence of notice and opportunity to comment.

5. *One commenter requested that the Tribes withdraw the baseline requirement for clean closure. The commenter argues that the definition of clean closure is ambiguous because it does not provide fair notice of what is required by the word "decontamination." The commenter also claims that the decontamination requirement lacks connection to protecting human health and the environment because it protects environmental media rather than being linked to risk, and also claims that clean closure should not be required even if practicable if it is not necessary to protect health, safety and the environment (meaning risk). The commenter further asserts that the Proposed Regulations do not explain what factors will be considered to determine whether waste removal is practicable, and suggests these should include net benefits, costs, worker risks, and the availability of waste disposal locations. Finally, the commenter asserts that the clean closure baseline requirement exceeds the authority provided in the WMA because it is not connected to protecting human health and the environment and is in conflict with and thus preempted by RCRA, as well as violating due process.* [FMC]

First, the requirement for decontamination as part of clean closure is consistent with federal requirements. Second, RCRA requires protection of the environment, not just of public health, and Section 201(b) states that clean closure (including decontaminating waste and materials) means no longer posing a threat to the environment (which, in addition, is similar to the concept of posing risk to the environment). Moreover, closure takes place according to a closure plan, see Final Regulations § 302(b)(1), which must be consistent with federal regulations, see § 304(a), and which will be the result of discussions between the owner/operator of the facility at issue and EWMP. If this commenter or any other owners or operators have questions about whether actions they might take would violate clean closure or any other requirements in these regulations, they can reach out to EWMP for guidance.

As for laying out in advance the factors that EWMP should consider before determining whether clean closure is practicable, it is very difficult to lay out all the factors in the abstract. Rather, the factors will be determined on a case-by-case basis in conjunction with finalizing the closure plan. However, the term "practicable" is a term of art that conveys the need to consider technical feasibility, which in part includes cost, as well as available technologies, risks to human health and the environment, and any other information the owner or operator presents to EWMP. This clarification has been added as Section 201(b)(3).

Finally, the commenter does not explain its assertion that this provision goes beyond the authority of the WMA. In fact, Section 201(b)(1) states specifically that the purpose of the clean-closure requirement is to ensure that "waste no longer poses a threat to soils, surface or ground

water, or air quality." This reasoning is plainly connected to protecting human health and the environment, as the WMA authorizes and prescribes. See also Response to Comment #2 regarding lack of preemption by RCRA. The commenter does not explain how due process is violated by the clean-closure requirement, hindering EWMP's ability to respond. However, EWMP believes that its Response to Comment #3 and revisions to Section 103 may address the commenter's assertions.

6. *One commenter requested that the regulations acknowledge that no soil gas monitoring would be required at units that are clean-closed. The commenter also requested that a determination that soil gas monitoring is required when wastes are left in place be based on quantifiable risks from soil gases to human health and the environment. The commenter stated that the soil gas monitoring requirement would otherwise be arbitrary and invalid.* [FMC]

Section 202(c)(5) requires that after final closure, the owner or operator must: "Conduct soil gas monitoring at locations and frequency provided in a post-closure plan for all gasses that EWMP determines in its discretion may be a threat to public health and safety or the environment, and maintain such monitoring system consistent with that plan." EWMP agrees that in general this requirement would not occur at units that are clean-closed; however, it may be necessary as part of a contingent post-closure plan if not all contaminated subsoils can be practicably removed at closure. *See* Section 308. Soil gas monitoring would only be required for gasses that EWMP, in its discretion, determines may be a threat to public health and safety of the environment. EWMP intends to use all available information to make such a determination.

7. *One commenter stated that Sections 302 and 303, which reference permit fees and requirements for financial assurance, do not indicate how those fees and financial assurance amounts would be set. The commenter requested that the Tribes identify the factors that would determine those dollar amounts*. [FMC]

The EWMP will determine permit fees according to the fee schedules provided in the Shoshone-Bannock Tribes Waste Management Act Permit Regulations, which contain fee provisions in Chapter 6 of that document (and which provide other applicable permit procedures as well, for example as referenced in Sections 302(a) and (b)(3)). A specific reference to that document has been added to Section 302 of the Regulations for clarity.

The factors for determining financial assurance amounts are already enumerated in Section 303 of the Regulations. Specifically, the facility owner or operator must provide a cost estimate for properly closing the facility at issue and for post-closure care (as is also required under 40 C.F.R. §§ 264.142 and 264.144) and must comply with the financial assurance requirements in Section 203 of the WMA Permit Regulations. The financial assurance requirements also must be equivalent to the federal requirements in 40 C.F.R. Part 264, Subpart H. Any further details would be spelled out in the permits or the closure and post-closure plans.

8. *One commenter suggested revising Section 104 of the Regulations to clarify whether all future changes to federal requirements would be incorporated by reference or only those changes resulting from litigation. The commenter also suggested clarifying which entity would be substituted for EPA when a federal requirement is incorporated by reference.* [EPA]

Section 104 already specifies that both types of changes would be incorporated by reference. It states in the second sentence that all future changes to incorporated federal laws and regulations would be automatically incorporated by reference, and in the third sentence that changes brought about by judicial action will "also" be incorporated by reference. The third sentence, however, unnecessarily mentions changes not just from judicial action but also from "administrative action," which is already covered to the extent relevant by the preceding sentence referencing federal regulations, so EWMP has deleted that reference in the Final Regulations. EWMP also has added a sentence to Section 104 clarifying that EWMP will be substituted for EPA when EPA is referenced as the regulatory agency in the incorporated federal requirements.

9. *One commenter suggested clarifying whether the Tribes intend to enforce federal RCRA requirements as Tribal requirements. The Commenter specifically asked about the term "all applicable closure requirements" in the definition of "final closure."* [EPA]

In general, EWMP intends to enforce federal RCRA requirements that are incorporated by reference in the Regulations as Tribal requirements. For example, Section 201(a)(3) requires a waste management facility or unit to be closed in a manner that complies with, among other things, the applicable closure requirements of 40 C.F.R. Part 264. *See also, e.g.,* Sections 202(a), (c)(3)-(4); 304(a)(2); 307(a). The federal requirements that are incorporated by reference into the Regulations would be the "applicable" requirements under the Regulations, including for purposes of the definition of final closure. EWMP intends to coordinate with EPA on enforcement of such requirements.

10. *One commenter asked how the Tribes envision their closure and post-closure permit programs being implemented, particularly with regard to parallel but differing obligations for owners and operators under RCRA and the WMA. The commenter referenced the requirement in the Regulations to obtain permits at least 180 days prior to initiating partial or final closure, which differs from the requirements of RCRA operating permits.* [EPA]

As mentioned in Response to Comment #2, EWMP designed the Regulations to be consistent in many ways with RCRA, in part to avoid subjecting owners and operators to conflicting regulatory obligations. The Regulations are intended to supplement RCRA to further prevent threats to human health and the environment and to natural and cultural resources within the Reservation. With respect to the requirement to obtain the necessary permit at least 180 days prior to initiating partial or final closure, although it is different from the requirements for RCRA operating permits, it is largely consistent with the permit requirements for RCRA treatment, storage and disposal facilities, which would be required to operate such facilities.

11. *One commenter asserted that the Regulations would directly affect non-members and therefore, under Art. VI § (l)* and *(h) of the Shoshone-Bannock Tribes Constitution, require review by the Secretary of the Interior.* [FMC]

Article VI § 1(l) of the Shoshone-Bannock Tribes Constitution describes the Fort Hall Business Council's powers and duties "to safeguard and promote the peace, safety, morals, and general welfare of the Fort Hall Reservation by regulating the conduct of trade and the use and

disposition of property upon the reservation, provided that any ordinances directly affecting non-members of the reservation shall be subject to review by the Secretary of the Interior." Article VI § 1(h) similarly describes the Fort Hall Business Council's powers and duties "to levy taxes or license fees, subject to review by the Secretary of the Interior, upon nonmembers doing business within the reservation."

The Tribes are not obliged to submit the Final Regulations to the Secretary of the Interior for approval because they are implementing regulations and not ordinances. The regulations also are not taxes or license fees. They are instead regulations authorized and required by the WMA (Shoshone-Bannock Tribal Ordinance No. ENVR-09-S8) and implementing that Act, which was approved by the Acting Superintendent of the Fort Hall Agency on December 4, 2009, and by the Northwest Regional Director on February 24, 2010. *See* WMA §§ 22-6-9(b), 22-6-34(a), and 22-6-35(a). Nevertheless, EWMP intends to provide the Secretary of the Interior with notice of and an opportunity to review and approve the Regulations as a courtesy once they are finalized.