

approval on January 12, 2001 of Maine's program outside the disputed areas, DEP has consistently provided to the tribes copies of proposed permits that may be of interest to them; if needed, EPA will exercise appropriate oversight authority to help ensure that DEP continues this practice. Where a tribe raises concerns to EPA regarding the potential effects of a proposed permit on historic properties, EPA will follow the procedures described in the draft MOA, or any subsequently negotiated MOA that is acceptable to both EPA and the tribes, to consider potential effects. A copy of this draft MOA is included in the record. As described in the draft MOA, EPA will exercise its CWA authorities to object to proposed permits, or take other appropriate action, in order to address tribal concerns regarding effects on historic properties where EPA finds (taking into account all available information, including any analysis conducted by the tribe) that a proposed permit is inconsistent with the CWA, including water quality standards designed to protect tribal uses. Where EPA objects to a permit, the Agency will follow the permit objection procedures outlined in 40 CFR 123.44 and will coordinate with the appropriate tribe in seeking to have DEP revise the permit. DEP cannot issue a final MEPDES permit over an outstanding EPA objection. If EPA assumes permit issuing authority for a specific permit, it will further consult with the tribe prior to issuing any permit.

EPA has determined that the approval of Maine's application will have no effect on historic properties in Maine. EPA believes that the agreement between DEP and the SHPO as well as the Agency's commitment to follow the procedures in the draft MOA are consistent with and support EPA's determination. In accordance with the ACHP's regulations at 36 CFR 800.5, EPA proposed a No Adverse Effect finding to the southern tribes on July 25, 2003. In a September 3, 2003 letter to EPA, the Penobscot Nation disagreed with EPA's proposed finding. As a result of this disagreement, EPA met with the ACHP to discuss the No Adverse Effect finding, and, on October 8, 2003, transmitted this finding to the ACHP. EPA's October 8, 2003 submission to the ACHP included documents relied upon by the Agency in making its No Adverse Effect finding and responded to the comments made by the Penobscot Nation in its September 3, 2003 letter to EPA. A copy of the October 8, 2003 submission to the ACHP is included in the record.

Pursuant to the ACHP's regulations, the ACHP had 15 days from receipt of EPA's finding to review and comment upon the Agency's finding. On October 24, 2003, the ACHP provided comments to EPA. The ACHP's comments express certain disagreements with EPA's approach to analyzing the effects of this action and note that, in addition to considering the effects of the administrative act of approval and transfer of the NPDES program to DEP, EPA should also consider the potential effects flowing from implementation of the approved program itself. The ACHP notes its view that EPA should negotiate a programmatic agreement under the ACHP regulations as an appropriate resolution. A copy of the ACHP's October 24, 2003 comment letter is included in the record.

EPA has carefully considered the ACHP's comments in reaching its decision to approve the state's application as described in this notice. Notwithstanding any difference in EPA's and the ACHP's views regarding the effect of this approval on historic properties, EPA notes that the Agency has, in consultation with the tribes, considered any potential that the administration of the program by DEP might have impacts on such properties. As detailed above, EPA has proposed, and is committed to following, the procedures of the draft MOA which include commitments by EPA to utilize the full extent of its CWA oversight authorities to help ensure appropriate consideration of historic properties, including tribal views, during implementation of the program by DEP. EPA does not believe that resolution of this matter calls for execution of a programmatic agreement. Programmatic agreements are not required under the ACHP's regulations but may be used in certain circumstances described therein. In this case, EPA believes that the procedures and commitments of the draft MOA provide the best means of addressing any concerns regarding the consideration of historic properties during implementation of the program by DEP within the confines of EPA's CWA authority and that a programmatic agreement, which would not provide EPA with any additional oversight authority to act with respect to any particular state permit beyond what is already described in the draft MOA, is unnecessary. In addition, EPA notes that pursuant to the decision of the D.C. Circuit in *National Mining Association v. Fowler*, 324 F.3d 752 (D.C. Cir. 2003), individual permitting actions by DEP under the approved program would not trigger NHPA section 106

responsibilities. Having considered the potential impacts of this action on historic properties, consulted with the tribes, provided the ACHP an opportunity to comment and considered those comments, EPA has fulfilled its obligations under the NHPA and the ACHP regulations.

Today's program approval does not include Maine's application as it relates to facilities discharging into the lands of the northern tribes. EPA will address the NHPA in the context of making a final decision on Maine's application as it relates to facilities discharging into the lands of the northern tribes.

Regulatory Flexibility Act

Based on General Counsel Opinion 78-7 (April 18, 1978), EPA has long considered a determination to approve or deny a state NPDES program submission to constitute an adjudication because an "approval," within the meaning of the APA, constitutes a "license," which, in turn, is the product of an "adjudication." For this reason, the statutes and Executive Orders that apply to rulemaking action are not applicable here. Among these are provisions of the Regulatory Flexibility Act (RFA), 5 U.S.C. 601 *et seq.* Under the RFA, whenever a federal agency proposes or promulgates a rule under section 553 of the Administrative Procedure Act (APA), after being required by that section or any other law to publish a general notice of proposed rulemaking, the Agency must prepare a regulatory flexibility analysis for the rule, unless the Agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. If the Agency does not certify the rule, the regulatory flexibility analysis must describe and assess the impact of a rule on small entities affected by the rule.

Even if the NPDES program approval were a rule subject to the RFA, the Agency would certify that approval of the state's proposed MEPDES program would not have a significant economic impact on a substantial number of small entities. EPA's action to approve an NPDES program merely recognizes that the necessary elements of an NPDES program have already been enacted as a matter of state law; it would, therefore, impose no additional obligations upon those subject to the state's program. Accordingly, the Regional Administrator would certify that this program, even if a rule, would not have a significant economic impact on a substantial number of small entities.