

A. All planning and implementation of water resource conservation, utilization, or development programs shall be conducted with the full understanding, consent, and participation of any Navajo Nation entities owning or operating water control structures within the District and of the Navajo Water Commission.

B. Soil and Water Conservation Districts shall have no control or authority whatsoever over the determination or assignment of water rights.

C. Soil and Water Conservation Districts shall be subject to all applicable Navajo Nation and federal laws and regulations.

D. In developing and implementing long range conservation programs and annual work plans, Soil and Water Conservation Districts shall consult and cooperate with other Navajo Nation departments and commissions.

History

CF-11-80, February 7, 1980.

§ 2843. Authority to promulgate regulations

The Resources Committee of the Navajo Nation Council shall have the authority to promulgate regulations necessary for the administration of this Chapter.

History

CF-11-80, February 7, 1980.

Title 4

Environment

History

Previous Title 4, "Ceremonies and Fairs," (ACA-51-58, April 21, 1958 and ACAU-1 53-68, August 16, 1968) has been removed and replaced by a new Title 4, "Environment"; prior §§ 1, 2, 101 and 102 were deleted pursuant Navajo Nation Attorney General's advice on plans of operation for Navajo Nation Divisions dated January 4, 1991.

Chapter 1. Navajo Nation Solid Waste Act

History

CJY-51-97, July 24, 1997, rescinded and repealed the previously codified "Navajo Nation Solid Waste Code" (CJY-51-93, July 22, 1993 and CO-58-90, October 18, 1990) in its entirety and replaced it with the newly codified "Navajo Nation Solid Waste Act".

United States Code

Solid waste disposal, see 42 U.S.C. § 6901 *et seq.*

Subchapter 1. General Provisions

§ 101. Title

This Chapter may be cited as the "Navajo Nation Solid Waste Act."

History

CJY-51-97, July 24, 1997.

§ 102. Definitions

A. For purposes of this Chapter:

1. "Attorney General" means the Attorney General of the Navajo Nation.

2. "Director" means the Director of the Navajo Nation Environmental Protection Agency or his/her designee.

3. "Disposal" means the discharge, deposit, injection, dumping, spilling, leaking or placing of any waste into or on any land or water so that such waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground water.

4. "Health Advisor" means the Director of the Navajo Area Indian Health Service or his or her designee.

5. "Navajo Nation" when used in terms of territorial jurisdiction, means the area defined in 7 N.N.C. § 254.

6. "Navajo Nation Council" means the official legislative body of the Navajo Nation empowered to adopt policies and enact laws governing the Navajo Nation, as set forth in 2 N.N.C. § 102 *et seq.*

7. "Navajo Nation Solid Waste Program" or "Navajo Nation SWP" means the program, including any successor program, regardless of name, within the Navajo Nation Environmental Protection Agency that is responsible for implementing and enforcing this Chapter products.

8. "Open burning" means the combustion of solid waste without: control of combustion air to maintain adequate temperature for efficient combustion; containment of the combustion reaction in an enclosed device to provide sufficient residence time and mixing for complete combustion; and control of the emission of the combustion products.

9. "Open dump" means any facility or site where solid waste is disposed of and which does not comply with the requirements established for solid waste landfill facilities pursuant to this Chapter and the

regulations promulgated hereunder.

10. "Open dumping" means the act of depositing solid waste in a non-complying manner or management practice.

11. "Operator" means any person who operates, controls or otherwise supervises a solid waste management facility.

12. "Owner" means any person who owns all or part of or leases (in the case of trust land) a solid waste management facility.

13. "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.

14. "Resource Conservation and Recovery Act" or "RCRA" means the federal Resource Conservation and Recovery Act, as amended, that is set forth at 42 U.S.C. § 6941 *et seq.*

15. "Resources Committee" means the standing committee of the Navajo Nation Council as defined in 2 N.N.C. § 691 *et seq.* with oversight authority over the Navajo Nation Environmental Protection Agency as provided for in 2 N.N.C. §§ 1921-1927.

16. "Solid waste" means any garbage, refuse or sludge from a wastewater treatment plant, water supply treatment plant or air pollution control facility and other discarded material, including solid, liquid, semi-solid, or contained gaseous material resulting from residential, industrial, commercial, mining, and agricultural operations and from community activities, but does not include:

a. Drilling fluids, produced waters and other non-domestic wastes associated with the exploration, development or production, transportation, storage, treatment or refinement of crude oil, natural gas, carbon dioxide gas or geothermal energy;

b. Fly ash waste, bottom ash waste, slag waste and flue gas emission control waste generated primarily from the combustion of coal or other fossil fuels and wastes produced in conjunction with the combustion of fossil fuels that are necessarily associated with the production of energy and that traditionally have been and actually are mixed, with and are disposed of or treated at the same time with fly ash, bottom ash, boiler slag or flue gas emission control wastes from coal combustion;

c. Waste from extraction, beneficiation and procession of ores and minerals, including phosphate rock and overburden from the mining of uranium ore, coal, copper, molybdenum and other ores and minerals;

d. Agricultural waste, including, but not limited to, manures and crop residues returned to the soil as fertilizer or soil conditioner;

e. Cement kiln dust waste;

f. Sand and gravel;

g. Solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows or industrial discharges that are point sources subject to permits under § 402 of the Federal Water Pollution Control Act, 33 U.S.C. § 1342, or source, special nuclear or by-product material as defined by the Atomic Energy Act of 1954, 42 U.S.C. § 2011 *et seq.*;

h. Densified-remse-derived fuel; or

i. Any material regulated by Subtitle C or Subtitle I, 42 U.S.C. § 6901 *et seq.*, petroleum-contaminated soils, of the Resource Conservation and Recovery Act of 1976, or substances regulated by the Toxic Substances Control Act, 7 U.S.C. § 136 *et seq.* or low-level radioactive waste.

17. "Solid waste landfill" or "SWLF" unit means a discrete area of land or an excavation that receives household waste, and that is not a land application unit, surface impoundment, injection well, or waste pile, as those terms are defined under 40 C.F.R. § 257.2. A SWLF unit also may receive other types of RCRA Subtitle D ¹ wastes, such as commercial solid waste, waste tires, construction/demolition debris, nonhazardous sludge conditionally exempt small quantity generator waste and industrial solid waste. Such a landfill may be publicly or privately owned. A SWLF unit may be a new SWLF unit, an existing SWLF unit or a lateral expansion.

18. "Solid waste management facility" means all contiguous land and structures, other appurtenances, and improvements on the land used for the disposal of solid waste.

19. "Storage" means the accumulation of solid waste after generation and prior to and following collection, processing, composting, recycling, transportation and/or disposal.

20. "Transfer station" means a permanent, fixed, supplemental collection and transportation facility, used by persons and/or route collection vehicles to deposit collected solid waste from offsite into a larger transfer vehicle for transport to a solid waste handling or disposal facility. It does not include solid waste storage containers placed for individual or clusters of residences and institutional, commercial, recreational or industrial establishments that service exclusively those establishments.

21. "Variance" means an acceptable alternative that meets or exceeds the standards required by this Chapter and the regulations hereunder.

History

CJY-51-97, July 24, 1997.

§ 103. Declaration of Policy

Legislative Purposes:

A. The Navajo Nation Council finds and declares that disposal of solid waste in or on the land without careful planning and management can present a danger to public health and the environment; that open dumping is particularly harmful to public health, potentially contaminates drinking water from underground and surface sources, and pollutes the air and the land; and that potentially recoverable material that could be recycled is needlessly buried each year, using scarce land resources, even though methods are available to separate usable materials from solid waste. The Navajo Nation Council is hereby creating a coordinated program for management of solid waste within the Navajo Nation.

B. The Navajo Nation Council, by enacting this Chapter, intends to protect the health, safety, welfare and environment of the Navajo Nation; to manage, protect and preserve the resources of the Navajo Nation; and to maintain and improve the aesthetic appearance of the Navajo Nation, by:

1. Assuring that solid waste management practices are conducted in a manner which protects human health and the environment and minimizes the need for corrective action at a future date;
2. Prohibiting open dumping and requiring the closure of existing open dumps;
3. Prohibiting open burning at SWLFs;
4. Minimizing the generation of solid waste by encouraging recycling and reuse; and
5. Providing for the promulgation of guidelines for solid waste collection, transport, separation, recovery and disposal practices and systems.

C. The Navajo Nation Council places primary responsibility for the enforcement of this Chapter with the Navajo Nation Environmental Protection Agency.

History

CJY-51-97, July 24, 1997.

§ 104. Applicability; Exemptions

A. Except as otherwise provided in this Section, the provisions of this Act and regulations promulgated hereunder shall apply to all persons and all property within the Navajo Nation.

B. Except as otherwise provided in Subsections (C) and (D) of this Section, the provisions of this Act and/or regulation promulgated thereunder,

in whole or in part, shall not apply to any person or property where, but only to the limited extent that, such application would be in violation of any valid covenant not to regulate or otherwise exercise jurisdiction over such person or property.

C. Notwithstanding the provisions of Subsection (B) of this Section, the provisions of this Act and/or regulations promulgated hereunder, in whole or in part, shall apply to any person who has submitted an application for and received a permit pursuant to this Act or is otherwise subject to its provisions and to all property within the Navajo Nation owned or operated by such person.

D. If not otherwise applicable in accordance with Subsection (C) of this Section, the provisions of this Act and/or regulations promulgated thereunder, in whole or in part, shall apply to any person and to such property owned or operated by such person to such extent and under such terms and conditions as may be provided in any voluntary compliance agreement entered into pursuant to Section 105 of this Act.

E. Nothing in this Section shall be construed as a determination or admission by the Navajo Nation that any claim of covenant not to regulate or otherwise exercise jurisdiction is valid.

History

CJY-51-97, July 24, 1997.

§ 105. Voluntary Compliance Agreement

A. Any person to whom the provisions of this Act are not otherwise applicable, may apply to the Director to enter into a voluntary compliance agreement with the Navajo Nation with respect to any property to which the provisions of this Act and/or regulations promulgated hereunder, in whole or in part, are not otherwise applicable.

B. A proposal to enter into a voluntary compliance agreement shall be in writing, shall indicate the person and property proposed to be subject to the agreement, shall indicate the proposed term of the agreement, and shall indicate which part or parts of this Act and/or regulations promulgated hereunder, in whole or in part, with which voluntary compliance is proposed.

C. A voluntary compliance agreement shall be for a term of not less than one year, and may be subject to renewal for successive terms of not less than one year. A voluntary compliance agreement may not vary the requirements of this Act or of any regulations promulgated pursuant to this Act, except that the consent required to be given in accordance with § 143(B) of this Act shall be strictly limited to the application of this Act and regulations promulgated pursuant to this Act in accordance with the terms of said voluntary compliance agreement, including any renewals thereof.

D. A voluntary compliance agreement shall not be effective unless and until final approval of the agreement is given by the Director.

E. Except as otherwise expressly provided in the agreement, by entering

into a voluntary compliance agreement, no person shall be deprived of the benefit of any valid covenant not to regulate or otherwise exercise jurisdiction over such person or property owned or operated by such person.

F. A person may enter into a voluntary compliance agreement in accordance with this Section, notwithstanding that the validity of such person's claim to be exempt from the provisions of this Act has not been judicially determined, whenever the Director determines that entering into such an agreement is in the best interests of the Navajo Nation. Entering into an agreement pursuant to this Subsection shall not constitute a determination or admission by the Navajo Nation that such claim of exemption is valid.

History

CJY-51-97, July 24, 1997.

§ 106. Governmental Cooperation

The provisions of this Chapter may be carried out by agreements between the Navajo Nation and federal, state or county agencies, including but not limited to the Indian Health Service and the Bureau of Indian Affairs

History

CJY-51-97, July 24, 1997.

United States Code

Agreements with Indian tribes, solid waste disposal, see 42 U.S.C. § 6908a.

§ 107. General Authorities of the Director

A. Powers and Duties. In carrying out this Chapter, the Director is authorized to:

1. Prescribe such regulations as are necessary to carry out his/her functions under this Chapter (including but not limited to regulating the open burning of solid waste), pursuant to the provisions of § 161 of this Chapter;

2. Enforce the provisions of this Chapter and the regulations promulgated hereunder, pursuant to the provisions of Subchapter 5 of this Chapter;

3. Require monitoring, sampling or other studies, as provided in § 151 of this Chapter;

4. Issue permits, exemptions and variances pursuant to the provisions of Subchapter 3 and 4 of this Chapter;

5. Assess fees on persons involved with the collection, disposal, transportation, processing or storage of solid waste;

6. Issue compliance orders, civil penalties and citations to carry

out the intent of this Chapter and regulations promulgated hereunder;

7. Conduct investigations, inspections and tests to carry out the duties of this Chapter pursuant to the provisions of Subchapter 5 of this Chapter;

8. Hold hearings related to any aspect of or matter within the authority of this Section and, in connection therewith, compel the attendance of witnesses and the production of records;

9. Provide to the public pertinent educational materials and information regarding solid waste management issues;

10. Issue guidelines and encourage voluntary cooperation with the provisions of this Chapter and the regulations promulgated hereunder;

11. Consistent with Title 2, Navajo Nation Code, accept, receive and administer grants or other funds or gifts from public and private agencies, including the federal government, to carry out any of the purposes of this Chapter, provided that all monies resulting therefrom shall be deposited in the Navajo Nation Treasury to the account of the Solid Waste Program, as authorized under Navajo law; and

12. Perform such other activities as the Director may find necessary to carry out his/her functions under this Chapter.

In prescribing regulations under this Chapter, the Director shall consider but shall not be limited to the relevant factors prescribed by Subtitle D ¹ of the Resource Conservation and Recovery Act and the regulations thereunder,² except that the regulations prescribed by the Director shall be at least as stringent as those promulgated under RCRA. All regulations promulgated under this Chapter shall be subject to approval by the Resources Committee of the Navajo Nation Council.

B. Delegation of Authority. The Director may delegate to any officer or employee of the Navajo Nation Environmental Protection Agency such powers and duties under this Chapter, except the making of regulations, as he/she may deem necessary or expedient.

C. Use of Funds. Monies derived from fees and penalties imposed under this Chapter shall be available solely for the administration and implementation of this Chapter and the regulations promulgated hereunder. Such funds shall be deposited into a duly established Special Revenue Fund and expended by the Director for the use of the Solid Waste Program in accordance with the Special Revenue Fund plan of operation pursuant to an approved budget. Any monies contained in said Fund at the end of the fiscal year shall not revert to the general fund and shall remain available for appropriation as provided in this Section.

History

CJY-51-97, July 24, 1997.

§ 108. Construction

This Chapter shall be liberally construed to carry out its purpose. The effectiveness and enforceability of this Chapter shall not be dependent upon the adoption of any regulations unless otherwise required by law. Nothing contained in this Chapter or regulations promulgated hereunder shall be construed to diminish, limit or otherwise adversely affect any right or remedy held or available to the Navajo Nation.

History

CJY-51-97, July 24, 1997.

§ 109. Compliance with Other Laws and Regulations

Compliance with this Chapter and regulations promulgated hereunder does not relieve a person of the obligation to comply with other applicable laws and regulations.

History

CJY-51-97, July 24, 1997.

§ 110. Contractual Compliance

Contracting for the storage, collection, transportation, processing or disposal of solid waste shall not relieve the contractor or contractee from responsibility for compliance with the provisions of this Chapter and the regulations promulgated hereunder.

History

CJY-51-97, July 24, 1997.

§ 111. Severability

If any provision of this Chapter, or the application of this Chapter to any person or circumstance, is held invalid, the remainder of this Chapter and the application of such provision to other persons or circumstances shall remain unaffected.

History

CJY-51-97, July 24, 1997.

Subchapter 2. Prohibited Acts

§ 121. Disposal, Collection, Transporting, Processing

A. It shall be unlawful for any person to:

1. Dispose of any solid waste in a manner that will harm the environment, endanger the public health, safety and welfare or create a public nuisance;

2. Dispose of any solid waste in a place other than a facility which is in compliance with these regulations and other applicable laws;

3. Dispose of any waste not defined as solid waste in a solid waste disposal facility;

4. Dispose of bulk or non-containerized liquids in a solid waste facility;

5. Collect, dispose of, transport, process or store solid waste in any manner or at any facility that is not in compliance with the provisions of this Chapter or the regulations promulgated hereunder;

6. Interfere/prohibit with inspections, entry or monitoring activities; and

7. Violate any other provision, requirement or prohibition of this Chapter, including but not limited to a regulation or plan adopted pursuant to this Chapter, a permit or order issued pursuant to this Chapter, a filing, reporting or notice requirement under this Chapter or a fee assessed under this Chapter.

B. The on-site disposal of on-site generated solid waste from a family ranch, camp or farm is not prohibited where said disposal does not, according to the Director, create a public health or environmental hazard or public nuisance.

History

CJY-51-97, July 24, 1997.

§ 122. Permits Required

Unless otherwise specified by this Chapter or regulations promulgated hereunder, no person shall construct, operate or modify a solid waste landfill facility unless the facility has obtained a permit or permit modification from the Director for the described action. A permit is not required, however, for facilities that qualify under § 121(B).

History

CJY-51-97, July 24, 1997.

§ 123. Open Burning

No open burning shall be allowed at any solid waste landfill facility.

History

CJY-51-97, July 24, 1997.

§ 124. Open Dumping

All open dumping shall be prohibited.

History

CJY-51-97, July 24, 1997.

Subchapter 3. Solid Waste Management Planning and Criteria

§ 131. Solid Waste Management Criteria

A. Regulations. The Director is authorized to promulgate regulations establishing requirements for solid waste landfills, transfer stations, composting facilities, collection and transportation of solid waste and recycling. Such regulations may include but are not limited to:

1. Siting criteria;
2. Design requirements, including requirements regarding liners, leachate collection, and methane gas monitoring and control; operating requirements; recordkeeping and reporting requirements; and requirements for the preparation of contingency plans in the event of release of contaminants or hazardous waste to the environment;
3. Ground water monitoring, sampling and analysis and corrective action requirements;
4. Closure criteria and post-closure care requirements, including requirements for the installation of final cover; and
5. Financial responsibility requirements, including financial assurance requirements for damage claims, closure, post-closure care and corrective actions relating to SWLFs. The Director shall specify the various financial assurance mechanisms which will be deemed to satisfy these financial responsibility requirements.

B. Transportation Inspection Fees. The Director shall have the authority to inspect solid waste transportation vehicles, by regulation and charge reasonable fees for such service.

History

CJY-51-97, July 24, 1997.

§ 132. Variances

A. Issuance. The Director shall adopt regulations providing for the issuance of variances to owners or operators of solid waste management facilities, which would allow such facilities to vary from provisions of this Chapter and regulations and plans adopted and permits issued pursuant to this Chapter. Such regulations shall allow owners and operators of solid waste management facilities to petition the Director in writing for variances, and shall specify the minimum requirements for such petitions and for public participation. The Director shall also consider issuing variances for

hardships caused by, but not limited to, isolation and extreme weather conditions. In all cases, the Director shall grant a petition for a variance only if the Director finds that issuance of the variance will not endanger public health, safety, welfare or the environment and does not violate 40 C.F.R. Parts 257 or 258.

B. Terms and Conditions of Variances. The requirements imposed as a basis for granting or renewing a variance shall include, but not be limited to:

1. A detailed plan for the completion of corrective steps needed to conform to the provisions of this Chapter and the regulations adopted and permits issued hereunder, wherever practicable;

2. A fixed term for the variance; and

3. The right of the Director to make periodic inspections of the facilities for which the variance is granted.

Subject to the provisions of Subsection (C), variances shall be valid for no longer than the term specified in the variance. The Director may impose fees with the approval of the Resources Committee, on a facility for the issuance of a variance.

C. Renewals. A holder of a variance may petition the Director for a renewal of such variance. A petition for renewal may be filed not more than 60 days nor fewer than 30 days prior to the expiration of the variance. The Director, within 30 days of receipt of the petition, shall issue a decision to grant or deny the request for a renewal of the variance.

D. Suspension and Revocation. If the terms of a variance are being or have been violated, the Director may seek to revoke or suspend the variance. In such event, the Director shall serve notice of such violation on the holder of the variance, specifying the nature of the violation and the date on which a hearing will be held to determine whether the violation occurred and whether the variance should be suspended or revoked.

History

CJY-51-97, July 24, 1997.

Note: Slightly reworded for clarity.

Subchapter 4. Permitting

§ 141. Requirement to Obtain Permit

Any person owning or operating any SWLF or any composting facility, and any person planning to construct a new SWLF or composting facility or to expand or modify such facility, shall not construct, expand, create a lateral expansion of a unit modify or operate such facility without first obtaining a permit or permit modifications from the Director, unless specifically exempt from such requirement by regulation promulgated, by the Director pursuant to this Chapter. In the case of a SWLF, or composting facility that is already in

existence at the time of enactment of this Chapter or of promulgation of permit regulations under this Chapter, the owner or operator shall submit a permit application to the Director within 90 days of the promulgation of permit regulations under this Chapter. Such owner or operator shall be treated as having been issued a permit until a final administrative disposition is made on the permit application, unless the Director finds that a final administrative disposition has not been made because of the failure of the applicant to furnish information reasonably required or requested in order to process the application. A permit shall not be required to undertake a corrective action pursuant to the regulations promulgated under this Chapter. The Director also may by regulation require permits for the collection and transportation of solid waste within the Navajo Nation.

History

CJY-51-97, July 24, 1997.

§ 142. Permit Applications

A. Content of Permit Application. The applicant shall submit to the Director for approval a completed permit application, on a form prescribed by the Director, together with all other information, as required by the regulations promulgated under this Chapter.

B. Application Fees. A filing fee as prescribed by the Director by regulation shall accompany the application for a permit. In addition, the Director may charge a review fee at an hourly rate for the review of a permit application.

History

CJY-51-97, July 24, 1997.

§ 143. Permit Determinations

A. Issuance of Permit. The Director shall issue a permit, for a fixed term not to exceed 30 years, for construction, expansion, modification or operation of a facility that complies with all the requirements of this Chapter and the regulations promulgated hereunder. In the event that the applicant proposes modification of the facility in question, or the Director determines that modifications are necessary to comply with the requirements of this Chapter and the regulations hereunder, the permit shall specify the time allowed to complete the modifications. The Director also may allow the applicant an opportunity to revise a permit application to remedy deficiencies. The approval of a permit application does not relieve the applicant from the responsibility of compliance with all applicable provisions of this Chapter and the regulations promulgated hereunder and applicable federal regulations.

B. Conditions to Permits. As a condition of obtaining a permit and/or constructing, expanding, modifying or operating a SWLF or composting facility,

1. The Director or Health Advisor shall have the right to enter the facility to conduct inspections, take samples and conduct monitoring, as provided under this Chapter or the regulations promulgated hereunder;

2. The Director shall have the right to enter any premises where records relevant to determining compliance with this Chapter, the regulations promulgated hereunder or the requirements of the permit are kept;

3. The permittee, his agents, employees, lessees, sublessees, successors and assigns shall consent to the jurisdiction of the Navajo Nation and shall agree to abide by all laws of the Navajo Nation. Each issued permit shall contain the following statement to which the permittee must agree and subscribe for the permit to be complete and as a condition precedent to the final issuance of any permit:

"Permittee consents to the jurisdiction of the Navajo Nation with respect to those activities conducted pursuant to this permit issued by the Director pursuant to the provisions of the Navajo Nation Solid Waste Act. This consent shall be effective when a permit is issued and may not be withdrawn. This consent shall extend to and be binding upon all successors, heirs, assignees, employees and agents, including contractors and subcontractors of permittee whose activities fall within the scope of the issued permit"; and

4. Permittee shall include the statement in Paragraph 3 of this Subsection as a term and condition of any contract or other agreement it executes for services to be performed or goods to be provided within the Navajo Nation in connection with any permit issued by the Director, and each party to any such contract or other agreement must agree and subscribe to said statement, substituting the name of the party for "permittee" as appropriate.

C. Permit Fees. The initial fee for a permit shall be in accordance with the fee schedule established by the Director in the regulations promulgated pursuant to this Chapter. A permit may be renewed following administrative review and payment of the renewal fee prescribed by regulation of the Director.

D. Permit Transfers. A permit may not be transferred, from one location, facility or person to another, without approval from the Director pursuant to the regulations promulgated under this Chapter.

E. Judicial Review of Final Permit Determinations. An applicant may seek judicial review of any final permit determination (including revocation) in Navajo Nation Court, pursuant to the provisions of § 162 of this Chapter.

History

CJY-51-97, July 24, 1997.

Note: Slightly reworded for clarity.

§ 144. Permit Revocation

The Director may revoke a permit for failure to comply with the terms or conditions of the permit; fraud, deceit or submission of inaccurate information to the Director; or failure to comply with the provisions of this

Chapter or the regulations promulgated hereunder.

History

CJY-51-97, July 24, 1997.

§ 145. Public Participation

A. Availability of Documents. The Director shall maintain a file of all permit applications, documents accompanying such applications and permits issued under this Chapter. This file shall be available for public inspection and comment. If any applicant or permittee is required to submit information entitled to protection from disclosure under § 151(C) of this Chapter, the applicant or permittee may submit such information separately. The requirements of § 151(C) shall apply to such information. The contents of a permit shall not be entitled to protection under § 151(C).

B. Notice of Final Permit Determination. Before making a final determination regarding any permit under this Chapter, including before issuing, transferring, renewing, revising, revoking or denying a permit, the Director shall publish in local newspapers and broadcast over local radio stations the Director's intent regarding such permit. If the Director receives a written request for a public hearing on such permit within 15 days of publication of such notice, the Director shall schedule a public hearing on such permit, and shall give notice of the date time, place and subject matter of such hearing in the aforementioned manner.

History

CJY-51-97, July 24, 1997.

Subchapter 5. Enforcement

§ 151. Recordkeeping, Inspections, Monitoring and Entry

A. Requirements in Orders or Permits. The Director may require, by order or permit, any owner or operator of a solid waste management facility, or any other person who is subject to any requirement of this Chapter, to:

1. Establish and maintain records;
2. Prepare and submit reports;
3. Install, use and maintain monitoring equipment, and use audit procedures or methods;
4. Monitor and sample emissions (in accordance with such procedures or methods, at such locations, at such intervals, during such periods and in such manner as the Director shall prescribe);
5. Submit compliance certifications in accordance with Subsection (B) of this Section; and

6. Provide such other information as the Director may reasonably require.

B. Production of Records. Whenever the Director has reasonable cause to believe that any person has violated or is in violation of any requirement of this Chapter or of any regulation hereunder or any requirement of a permit or order issued pursuant to this Chapter, he/she may request in writing that such person produce all existing books, records and other documents evidencing tests, inspections or studies which may reasonably relate to compliance or noncompliance with such requirements.

C. Public Availability of Information. Any records, reports or information obtained under Subsections (A) or (B) of this Section shall be available to the public, except that upon a showing satisfactory to the Director by any person that records, reports or information, or any portion thereof would, if made public, divulge methods or processes entitled to protection as trade secrets of such person, the Director shall consider such record, report, information or portion thereof confidential, except that such material may be disclosed to other officers, employees or authorized representatives of the Navajo Nation and of the United States concerned with carrying out this Chapter or when relevant to any proceeding under this Chapter.

History

CJY-51-97, July 24, 1997.

§ 152. General Enforcement Authority

A. In General. Whenever, on the basis of any information available to the Director, the Director finds that any person conducting an activity that threatens human health or the environment and/or has violated, or is in violation of, any requirement or prohibition of this Chapter, the regulations promulgated under this Chapter, or permits, orders, plans, variances or fees issued or approved pursuant to this Chapter, the Director may:

1. Issue and serve on such person an order requiring the person to comply with each requirement or prohibition, pursuant to the provisions of this Section;
2. Issue and serve on such person an administrative penalty order in accordance with § 154 of this Chapter;
3. Bring a civil action in accordance with § 153(A) of this Chapter; and/or
4. Bring a criminal action in accordance with § 153(B) of this Chapter.

In addition, when a person has consistently violated any requirements or prohibitions of this Chapter, the regulations promulgated under this Chapter, or permits, orders, variances or fees issued or approved pursuant to this Chapter, or refused to comply with any such requirements or prohibitions, the Director may issue an order prohibiting such person from continuing to operate

a solid waste management facility within the Navajo Nation, and/or prohibiting such person from entering into any new contracts (including leases) that would permit such person to operate a solid waste management facility within the Navajo Nation.

B. Requirements for Orders to Comply. An order to comply issued under this Section shall state with reasonable specificity the nature of the violation, shall state that the alleged violator is entitled to a hearing pursuant to regulations promulgated by the Director under § 161 of this Chapter, if such hearing is requested in writing within 30 days after the date of issuance of the order, and shall specify a time for compliance that the Director determines is as expeditious as practicable, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements. The order shall become effective immediately upon the expiration of the 30 days if no hearing is requested and, if a timely request for a hearing is made, upon the decision of the Director. The order may be conditional and require a person to refrain from particular acts unless certain conditions are met. If the order is issued to a corporation, it shall be issued to the appropriate corporate officers. No order to comply issued under this Section shall prevent the Director from assessing any penalties nor otherwise affect or limit the Director's authority to enforce under other provisions of this Chapter, nor affect any person's obligations to comply with any Section of this Chapter or with a term or condition of any permit or implementation plan promulgated or approved under this Chapter.

C. Emergency Compliance Orders. Notwithstanding any other provision of this Section, the Director (after consultation with the Attorney General where feasible) may issue a compliance order that is effective immediately where there is an imminent and substantial threat to the public health, welfare or environment. Any person issued an order that is effective immediately may file a written request with the Director for a stay pending the outcome of any appeal taken under this Section in accordance with the procedures provided for in § 152(B). The Director shall, by written notice, grant or deny the request for a stay within five days receipt of a request for a stay. If the Director denies the request for a stay, the affected party has 30 days to appeal the denial to the Window Rock District Court. Any person subject to an emergency compliance order may seek judicial review of a final agency determination as provided for in § 154(D) of this Chapter.

D. Enforcement of Compliance Orders. Orders of the Director shall be enforced by the NNSWMP, the Navajo Department of Justice, Resources Enforcement and the Division of Public Safety. Those authorized to enforce the orders may take reasonable steps to assure compliance, including but not limited to:

1. Entering upon any property or establishment believed to be violating the order and demanding compliance; and
2. Terminating part or all operations at the solid waste management facility.

E. Injunctive Relief. Notwithstanding any other provision of this Section, the Director may seek injunctive relief pursuant to § 153(A) to restrain any activity which may endanger or cause damage to human health or the environment.

History

CJY-51-97, July 24, 1997.

§ 153. Judicial Enforcement

A. Civil Judicial Enforcement. The Director shall request the Attorney General to file an action for a temporary restraining order, a preliminary injunction, a permanent injunction or any other relief provided by law, including the assessment and recovery of civil penalties in a maximum amount per day per violation of not less than five hundred dollars (\$500.00) but not to exceed twenty-five thousand dollars (\$25,000), in any of the following instances:

1. Whenever a person has violated, or is in violation of, any provision, requirement or prohibition of this Chapter, including, but not limited to, a regulation adopted pursuant to this Chapter, a permit or order issued pursuant to this Chapter;

2. Whenever a person has violated, or is in violation of, any duty to allow or carry out inspection, entry or monitoring activities; and

3. Whenever an activity exists which may endanger or cause damage to human health or the environment, in which case the Director shall request the Attorney General to pursue injunctive relief, but not the assessment of penalties, unless the endangerment to the public health is caused by a violation, as specified in Paragraphs 1 and 2.

B. Criminal Penalties. Any person who intentionally:

1. Violates any provision, requirement or prohibition of this Chapter, including but not limited to a regulation adopted pursuant to this Chapter, a permit or order issued pursuant to this Chapter, a filing, reporting or notice requirement under this Chapter;

2. Makes any false material statement, representation or certification in, or omits material information from, or alters, conceals or fails to file or maintain any notice, application, record, report, plan or other document required pursuant to this Chapter to be filed or maintained, including required by a permit issued pursuant to this Chapter; or

3. Falsifies, tampers with, renders inaccurate or fails to install any monitoring device or method required to be maintained or followed under this Chapter; shall, upon conviction, be punished by a fine in a maximum amount of not less five hundred dollars (\$500.00) but not to exceed five thousand dollars (\$5,000) per day per violation or imprisonment for not more than 180 days per day per violation or both or be subject to any other penalty imposed by the court available under Navajo law. For the purpose of this Subsection, the term "person" includes, in addition to the entities referred to in § 102(A) (13) of this Chapter, any responsible corporate officer.

C. Suits for Costs. In addition to the above proceedings, the Director is authorized to initiate proceedings, separately or in connection with either a civil, criminal or exclusion proceeding brought under this Chapter, for any damages caused to the lands or other resources of the Navajo Nation as the result of any violation of this Chapter, including for payment of costs of all associated remedial actions taken, for any expenses incurred in investigating and evaluating such damages, for any administrative costs incurred as a result of this matter and for the reasonable value of the attorney time and expenses associated with such proceedings.

D. Jurisdiction and Venue. Any action under this Subsection may be brought in the Navajo Nation District Court in Window Rock, and such Court shall have jurisdiction to restrain such violation, require compliance, assess civil penalties, collect any fees or noncompliance penalties owed the Nation under this Chapter, and award any other appropriate relief.

E. Calculation of Penalties; Notice.

1. For purposes of determining the number of days of violation for which a civil penalty may be assessed under this Section, § 154 or § 155, if the Director has notified the source in writing of the violation and a prima facie showing can be made that the conduct or events giving rise to the violation are likely to have continued or recurred past the date of notice, the days of violation shall be presumed to include the date of such notice, each day of violation prior to such notice and each day thereafter until the violator establishes that continuous compliance has been achieved, except to the extent that the violator can prove by a preponderance of the evidence that there were intervening days during which no violation occurred or that the violation was not continuing in nature. Notice under this Section shall be accomplished by the issuance of a written notice of violation or written order to comply or by filing a complaint in the Navajo Nation District Court in Window Rock that alleges any violation described in Subsection (A) of this Section.

2. In determining the amount of a civil penalty assessed under this Section, the court shall consider the history, seriousness and duration of the violation; any good faith efforts to comply with the applicable requirements; the violator's full compliance history, including the severity and duration of past violations, if any; the economic impact of the penalty on the violator; as an aggravating factor only, the economic benefit, if any, resulting from the violation; and any other factors that the court deems relevant. The court may assess penalties for noncompliance with administrative subpoenas under § 161 of this Chapter or actions under Subchapter 2 of this Chapter where the violator does not have sufficient cause to violate or fail or refuse to comply with such subpoena or action.

3. All penalties collected pursuant to this Section shall be deposited in a special fund in the Navajo Treasury for use by the Director to finance solid waste management compliance and enforcement activities. The Director shall report annually to the Navajo Nation Council about the sums deposited into the fund, including the sources and the actual and proposed uses thereof.

4. In lieu of or in addition to a monetary penalty, the Director may impose or may request the Attorney General to seek from the court a requirement to remediate the damage caused or to perform community service, or both.

F. Security. The court may, if a temporary restraining order or preliminary injunction is sought under this Section or § 155 of this Chapter, require the filing of a bond or equivalent security.

History

CJY-51-97, July 24, 1997.

§ 154. Administrative Assessment of Penalties

A. Basis for Penalty. The Director may issue against any person an administrative order assessing a civil administrative penalty of up to ten thousand dollars (\$10,000) per day per violation whenever the Director finds that a person has violated, or is in violation of, any provision, requirement or prohibition of this Chapter, including, but not limited to, a regulation adopted pursuant to this Chapter, a permit or order issued pursuant to this Chapter. The Director's authority under this Subsection shall be limited to matters where the total penalty sought does not exceed one hundred thousand dollars (\$100,000) and the first alleged date of violation occurred no more than one year prior to the initiation of administrative action, except where the Director and Attorney General jointly determine that a matter involving a larger penalty or longer period of violation is appropriate for administrative penalty action. The communications required to make such a joint determination and the method(s) used for making such a joint determination shall be privileged, and shall not be subject to judicial review. The Director may compromise, modify or remit, with or without any conditions, any administrative penalty imposed under this Section.

B. Hearing Requirement. The Director shall assess an administrative penalty under this Section by an order made after opportunity for a hearing. The Director shall promulgate rules for discovery and other procedures for hearings under this Section. Before issuing such an order, the Director shall give written notice of the proposed order to the person on whom the penalty is to be assessed and provide such person an opportunity to request a hearing within 30 days of receipt of the notice.

C. Field Citations. After consultation with the Attorney General, the Director may implement a field citation program through regulations establishing minor violations for which field citations assessing civil penalties not to exceed five thousand dollars (\$5,000) per day per violation may be issued by officers or employees designated by the Director, to the extent permissible under applicable law. Any person on whom a field citation is assessed may, pursuant to regulations issued under this Section, elect to pay the penalty or request a hearing on the citation. If a timely request for a hearing is not made, the penalty shall be final. Any hearing shall provide a reasonable opportunity to be heard and to present evidence. Payment of a penalty required by a field citation shall not be a defense to further enforcement by the Director to correct a violation or to assess the statutory maximum penalty pursuant to other authorities in this Chapter if the violation

continues.

D. Judicial Review. Any person subject to a civil penalty under Subsections (A) or (C) of this Section may seek review of such penalty assessment in the Navajo Nation District Court in Window Rock by filing a petition for review in such court within 30 days following the date that the penalty becomes final and by simultaneously sending a copy of such filing by certified mail to the Director and the Attorney General. Within 30 days thereafter the Director shall file in such court a certified copy or certified index of the record on which the penalty was based. The court shall not set aside or remand an order or assessment under this Section unless the record, taken as a whole, does not substantially support the finding of a violation or unless the order or penalty assessment constitutes an abuse of discretion. In any such proceedings, the Director may seek to recover civil penalties ordered or assessed under this Section.

E. Failure to Pay Penalty. If any person fails to pay an assessment of a civil penalty or fails to comply with an administrative penalty order after the order or assessment has become final, the Director shall request the Attorney General to bring a civil action in the Navajo Nation District Court in Window Rock to enforce the order or recover the amount ordered or assessed plus interest, from the date of the final order or decision or the date of the final judgment, as the case may be. In such an action the validity, amount and appropriateness of the order or assessment shall not be subject to review. Any person who fails to pay on a timely basis a civil penalty ordered or assessed under this Section shall be required to pay, in addition to such penalty and interest, the Director's enforcement expenses, including but not limited to attorneys' fees and costs of collection proceedings. Such person shall also pay a quarterly nonpayment penalty for each quarter during which such failure to pay persists. The nonpayment penalty shall be ten percent (10%) of the aggregate amount of the person's outstanding penalties and nonpayment penalties accrued as of the beginning of the quarter.

F. Calculation of Penalty. In determining the amount of any penalty to be assessed under this Section, the Director or the court, as appropriate, shall take into consideration the factors enumerated in § 153(E) of this Chapter.

History

CJY-51-97, July 24, 1997.

§ 155. Citizen Suits

A. Authority to Bring Civil Action; Jurisdiction.

1. Except as provided in Subsection (B) of this Section, a person may commence a civil action in the Navajo Nation District Court in Window Rock on his own behalf:

a. Against any person (except the Navajo Nation or any instrumentality of the Navajo Nation, but not excepting tribal enterprises) who is alleged to be in violation of any provision, requirement or prohibition of this Chapter, including but not limited to

a regulation adopted pursuant to this Chapter, an order or permit issued pursuant to this Chapter or a requirement to have a permit issued under this Chapter; or

b. Against any person (except the Navajo Nation or any instrumentality of the Navajo Nation, but not excepting tribal enterprises) who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid waste which may present an imminent and substantial endangerment to health or the environment.

2. The Navajo Nation courts shall have jurisdiction to enforce such provision, requirement, prohibition, regulation, order or permit requirement, to restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid waste, to order such person to take such other action as may be necessary and to apply any appropriate civil penalties.

B. Notice.

1. An action may not be commenced under Subsection (A)(1)(a) of this Section fewer than 60 days after the plaintiff has given notice of the alleged violation to the Director, the Navajo Nation and the alleged violator. In addition, an action may not be commenced if the Director has commenced and is diligently prosecuting an administrative or a civil action in court to require compliance with this Chapter, except that any person may intervene as a matter of right in an action filed with the Window Rock District Court.

2. An action may not be commenced under Subsection (A)(1)(b) of this Section fewer than 90 days after the plaintiff has given notice of the endangerment to the Director, the Navajo Nation and any person alleged to have contributed or to be contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid waste. In addition, an action may not be commenced if the Director has commenced and is diligently prosecuting an administrative or a civil action in court to restrain or abate conditions which may have contributed or are contributing to the activities which may present the alleged endangerment, except that any person may intervene as a matter of right in an action before the Window Rock District Court if such person claims an interest relating to the subject of the action and is so situated that the disposition of the action may, as a practical matter, impair or impede his ability to protect that interest, unless the Director or the Navajo Nation shows that the person's interest is adequately represented by existing parties.

C. Venue; Intervention; Service of Complaint.

1. Any action respecting a violation by a solid waste management facility of any requirement of this Chapter or the regulations promulgated hereunder may be brought only in the Navajo Nation District Court in Window Rock.

2. The Director, if not already a party, may intervene as a matter of right in any action brought under this Section.

3. Whenever any action is brought under this Section the plaintiff shall serve a copy of the complaint on the Attorney General and on the Director. No consent judgment may be entered in an action brought under this Section in which the Director is not a party prior to 45 days following the receipt of a copy of the proposed consent judgment by the Attorney General and the Director, during which time the Attorney General and the Director may submit, on behalf of the Nation, their comments on the proposed consent judgment to the court and parties or the Director may intervene as a matter of right.

D. Award of Costs. The court, in issuing a final order in an action brought under this Section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party whenever the court; determines that such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security.

E. Penalty Fund. Penalties received under this Section shall be deposited in a Special Revenue Fund in the Navajo Nation Treasury for use by the Director to finance solid waste management compliance and enforcement activities. The Director shall report annually to the Navajo Nation Council about the sums deposited into the fund, including the sources and the actual and proposed uses thereof.

History

CJY-51-97, July 24, 1997.

§ 156. Administrative Hearings

The Director shall, by regulation, establish a formal hearing review process which meets due process standards, to hear appeals taken under § 154(A) and (B) (administrative penalties), § 154(C) (field citations) and § 152(C) (emergency compliance orders). The Director may establish an informal review process to hear all other administrative appeals provided for under this Chapter. Until the Director establishes a formal hearing review process, appoints a qualified presiding officer and certifies this in writing, the Navajo Office of Hearings and Appeals is authorized to hear appeals taken under § 154(A) and (B), § 154(C) and § 152(C); provided, however, the Director may, at his/her discretion, transfer other appeals allowed under this Chapter and regulations promulgated hereunder to the Navajo Office of Hearings and Appeals where the need arises.

History

CJY-51-97, July 24, 1997.

Subchapter 6. Rulemaking and Judicial Review

§ 161. Rulemaking and Other Administrative Procedures

A. Rulemaking.

1. Notice of any proposed regulation shall be published in a newspaper of general circulation for the areas of the Nation that are concerned. The notice shall specify the period available for public comment and the date, time and place of any public hearing, and shall make available to the public a copy of the proposed regulation. Not later than the date of proposal of the regulation in question the Director shall establish a rulemaking docket and shall make the docket available to the public for inspection and copying during regular business hours. The Director shall provide a comment period of at least 30 calendar days; allow any person to submit written comments, data or documentary information; shall in addition give interested persons an opportunity to present orally their views, in the Navajo or English languages, data or arguments; and shall keep the docket open for 20 calendar days after such proceeding to provide an opportunity for submission of rebuttal and supplementary information.

2. The final regulation shall be based on the record of the rulemaking proceeding, contained in the docket, and shall be accompanied by an explanation of the reasons for any major changes from the proposed regulation and a response to each of the significant comments submitted in written or oral presentations during the comment period.

B. Administrative Subpoenas.

1. In connection with any investigation, monitoring, reporting, entry, compliance inspection or administrative enforcement proceeding under this Chapter, the Director may issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books and documents, and may administer oaths.

2. Upon a showing satisfactory to the Director by the owner or operator of a source that it would divulge trade secrets or secret processes to make public such papers, books, documents or information or any portion thereof, the Director shall consider this information confidential, except that such information may be disclosed to other officers, employees or authorized representatives of the Nation concerned with carrying out this Chapter or when relevant in any proceeding under this Chapter.

3. Witnesses summoned shall be paid the same fees and mileage that are paid in the Nation's courts. In case of contumacy or refusal to obey a subpoena, the court for the district in which such person is found, resides or transacts business shall have jurisdiction to issue an order requiring such person to appear before the Director and give testimony or produce papers, books or documents, or both, and any failure to obey such an order may be punished by the court as contempt. A person may challenge the lawfulness of an administrative subpoena issued by the Director in the Navajo Nation Window Rock District Court in his or her official capacity and not in any other manner; in any such action, relief shall be limited to declaratory relief.

History

CJY-51-97, July 24, 1997.

§ 162. Review in Navajo Nation Supreme Court

A. Petitions for Review. A petition for review of any final action taken by the Director under this Chapter, including but not limited to promulgation of regulations and standards, issuance of orders and issuance and denial of permits (but not including imposition of administrative penalties under § 154 which are subject to review under § 154(D)), or challenge of an administrative subpoena which are subject to review under § 161(B)(3) shall be brought in the Navajo Nation Supreme Court. The petition shall be filed within 60 days from the date that notice of such final action is first published, or, if notice is not published, first served upon the alleged violator or such other person required to be served under this Chapter, except that if the petition is based solely on grounds arising after the sixtieth day, then the petition shall be filed within 60 days after such grounds arise.

B. Limitations on Review.

1. If judicial review of a final action of the Director could have been obtained under Subsection (A) of this Section, that action shall not be subject to judicial review in judicial proceedings for enforcement.

2. With respect to any regulations promulgated under this Chapter, only an objection that was raised with reasonable specificity during the public comment period may be raised during judicial review. If the person raising an objection can demonstrate to the Director that it was impracticable to raise the objection within such time or if the grounds for the objection arose after the public comment period (but within the time specified for judicial review), and if the objection is of central relevance to the outcome of the regulation, the Director shall convene a proceeding for reconsideration of the regulation and provide the same procedural rights as would have been afforded had the information been available at the time the regulation was proposed. If the Director refuses to convene such a proceeding, the person may seek review of such refusal in the Navajo Nation Supreme Court. Such reconsideration shall not postpone the effectiveness of the regulation, although it may be stayed by the Director or the court for up to three months.

3. Except as otherwise expressly allowed by Navajo law no interlocutory appeals shall be permitted with regard to determinations made by the Director under this Chapter. In reviewing alleged procedural errors, the court may invalidate the regulation only if the errors were so serious and related to matters of such central relevance to the regulation that there is a substantial likelihood that the regulation would have been significantly changed if such errors had not been made.

C. Standards for Review. In reviewing any final action of the Director undertaken pursuant to this Chapter, the court may reverse any such action that it finds to be:

1. Arbitrary, capricious, an abuse of discretion or otherwise not

in accordance with the law;

2. In excess of statutory jurisdiction, authority, or limitations or short of statutory right;

3. Without observance of procedure required by law; or

4. Unsupported by substantial evidence.

D. Challenge to Provisions. Any challenge to the lawfulness of any provision of this Chapter must be filed in accordance with Navajo law within 90 calendar days after the date of enactment of this Chapter in the Window Rock District Court, naming as defendant the Navajo Nation, and not thereafter or in any other manner. Any challenge to regulations promulgated under this Chapter must be filed within 90 calendar days of their adoption. In any such action, relief shall be limited to declaratory relief. The Window Rock District Court shall have exclusive jurisdiction and venue over any action challenging any provision of this Chapter.

History

CJY-51-97, July 24, 1997.

Chapter 3. Navajo Nation Pesticide Act

United States Code

Environmental pesticide control, see 7 U.S.C. § 136 *et seq.*

Code of Federal Regulations

Recordkeeping on restricted use pesticides by certified applicators, surveys and reports, see 7 CFR § 110 *et seq.*

§ 301. Title

This Act may be referred to as the "Navajo Nation Pesticide Act."

History

CJY-62-95, July 21, 1995.

§ 302. Purpose

The purpose of this Act is to promote the protection of the health and welfare of the public and the environment by providing for the safe use and handling of pesticides within the Navajo Nation.

History

CJY-62-95, July 21, 1995.

§ 303. Definitions

A. Except as specifically defined herein, the terms used in this Act (Chapter) shall be given the same meaning as the identical terms are given in the Federal Insecticide, Fungicide and Rodenticide Act, as amended, 7 U.S.C. 136 "FIFRA", and the federal regulations promulgated pursuant to such Act.

B. "Applicator". The term shall be applied as follows:

1. "Certified applicator". The term "certified applicator" means any individual who is certified by the states of Arizona, New Mexico or Utah and who is licensed by the Administrator or his/her designee as authorized to use or supervise the use of any pesticide which is classified for restricted use. All applicators of restricted use pesticides must be certified pursuant to the requirements under §§ 307, 311, 312, 313, 314, 315, 316, and 326 of this Act.

2. "Private applicator". The term "private applicator" means a certified applicator who uses or supervises the use of any pesticide which is classified for restricted use for purposes of producing any agricultural commodity on property owned or rented by him or his employer or (if applied without compensation other than trading of personal services between producers of agricultural commodities) on the property of another person. This term includes persons who use or supervise the use of restricted use pesticides on any lands of the Navajo Nation including lands of the Navajo Nation for purposes of producing any agricultural commodity for themselves, their families or households.

3. "Commercial applicator". The term "commercial applicator" means a certified applicator (whether or not he is a private applicator with respect to some uses) who uses or supervises the use of any pesticide which is classified for restricted use for any purposes or on any property other than as provided by Subsection (C) (2) or (4) herein.

4. "Public applicator". The term "public applicator" means a pesticide applicator who uses or supervises the use of any pesticide which is classified for restricted use on any lands within the Navajo Nation including lands of the Navajo Nation in his capacity as any employee, official, or agent of the Navajo Nation, the United States, or any other government or subdivision thereof. This term does not include those applicators acting on behalf of the business enterprises of the Navajo Nation.

5. "Under the direct supervision of a certified applicator". The term "under the direct supervision of a certified applicator" means a pesticide shall be considered to be applied under the direct supervision of a certified applicator if it is applied by a competent person acting under the instructions and control of a certified applicator who is immediately available if and when needed, as defined in § 315 of this Act, unless otherwise prescribed by its labeling.

C. "Device". The term "device" means any instrument or contrivance other than a firearm which is intended for trapping, destroying, repelling, or mitigating any pest or any other form of plant or animal life, other than man and other than bacteria, viruses or other microorganisms on or in any living

thing other than plants, but does not include equipment used for the application of pesticides when sold separately therefrom, or traps used to control predators or rodents or sterilization using dry heat or steam.

D. "EPA". The term "EPA" means the U.S. Environmental Protection Agency.

E. "Executive Director". The term "Executive Director" means the Executive Director of the Navajo Nation Environmental Protection Agency, or his/her designee.

F. "District Court". The term "District Court" means a District Court of the Navajo Nation.

G. "FIFRA". The term "FIFRA" means the Federal Insecticide, Fungicide and Rodenticide Act, as amended, 7 U.S.C. § 136 *et seq.*

H. "Label and Labeling".

1. The term "label" means the written, printed, or graphic matter on, or attached to, the pesticide or device or any of its containers or wrappers.

2. The term "labeling" means all labels and all other written, printed, or graphic matter:

a. Accompanying the pesticide or devices at any time; or

b. To which reference is made on the label or in literature accompanying the pesticide or device, except to current official publications of the Environmental Protection Agency, the United States Departments of Agriculture and the Interior, the Department of Health and Human Services, state experiment stations, state agricultural colleges, and other similar federal or state institutions or agencies authorized by law to conduct research in the field of pesticides.

I. "NNEPA". The term "NNEPA" means the Navajo Nation Environmental Protection Agency.

J. "Navajo Nation". The term "Navajo Nation" means:

1. All lands within the exterior boundaries of the Navajo Indian Reservation or of the Eastern Navajo Agency or of Navajo dependent Indian communities, including all lands within the boundaries of Navajo chapter governments;

2. All land held in trust by the United States for, or restricted by the United States or otherwise set aside or apart under the superintendence of the United States for, the use or benefit of the Navajo Nation, the Navajo Tribe, any Band of Navajo Indians, or any individual Navajo Indians as such; and

3. All other land over which the Navajo Nation may exercise governmental jurisdiction in accordance with federal or international

law.

K. "Navajo Nation Council". The term "Navajo Nation Council" means the governing body of the Navajo Nation as set forth in 2 N.N.C. § 101.

L. "Pesticide". The term "pesticide" means:

1. Any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest; and

2. Any substance or mixture of substances intended for use as a plant regulator, defoliant, or desiccant; provided that the term pesticide shall not include any article that is;

a. A "new animal drug" within the meaning of § 201 (w) of the Federal Food, Drug and Cosmetic Act (21 U.S.C. § 321 (w)); or

b. An animal drug that has been determined by the Secretary of Health and Human Services not to be a new animal drug by a regulation establishing conditions of use for the article; or

c. An animal feed within the meaning of § 201 (x) of such Act (21 U.S.C. § 321 (x)) bearing or containing an article covered by Paragraph (1) of this Subsection.

N. "Pesticide Dealer". The term "pesticide dealer" means any person who is engaged in the business of distributing, selling, offering for sale, or holding for sale any pesticide classified for restricted or general use pursuant to FIFRA.

O. "Resources Committee". The term "Resources Committee" means the Resources Committee of the Navajo Nation Council.

P. "Restricted Use Pesticide". The term "restricted use pesticide" means a pesticide that is classified for restricted use under the provisions of § 3 (d) (1) (C) of FIFRA or by NNEPA.

Q. "State". The term "State" means the States of Arizona, New Mexico, or Utah. Portions of the Navajo Nation lie within all three states. When the term "State" is used herein it shall be used as a reference for the particular state in which the relevant portion of the Navajo Nation may be located, unless otherwise noted.

R. "An Unreasonable Adverse Effect on the Environment". The term "an unreasonable adverse effect on the environment" means any unreasonable risks to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of any pesticide.

History

CJY-62-95, July 21, 1995.

CMY-28-90, May 3, 1990.

CJY-46-86, July 17, 1986.

Revision note. Slightly reworded for purposes of statutory form.

§ 304. Applicability

A. Except as otherwise provided in this Section, the provisions of this Chapter shall apply to all persons and property within the Navajo Nation.

B. Subject to the provisions of Subsections (C) and (D) of this Section, the provisions of this Chapter shall not apply to any person or property where, but only to the limited extent that, such application would be in violation of any valid waiver of jurisdiction or covenant not to regulate or otherwise exercise jurisdiction over such person or property.

C. Notwithstanding the provisions of Subsection (B) of this Section, the provisions of this Chapter shall apply to any person who has submitted an application for a certification or license pursuant to this Chapter.

D. Nothing in this Chapter shall excuse the required performance of any act as set out in any other applicable law or regulation of the Navajo Nation or limit the jurisdiction of the Navajo Nation.

History

CJY-62-95, July 21, 1995.

§ 305. Authority of Executive Director

A. The Executive Director is responsible for administering this Act and is authorized to exercise all of the legal authority necessary for this purpose including developing plans and strategies related to the use of pesticides on the Navajo Nation. The Executive Director may delegate authority to the Navajo Nation Pesticides Program to insure that the requirements of this Act and the regulations promulgated under this Act are met. In addition, the Executive Director may designate the Pesticides Program as the lead program in developing and implementing a Navajo Nation groundwater management plan, to protect the quality of groundwater throughout the Navajo Nation from contamination by agricultural chemicals. The Pesticides Program would act in cooperation with other NNEPA programs and with EPA. The Executive Director also may delegate authority to the Pesticides Program to develop a plan for implementing the Worker Protection Standard for pesticide workers and handlers and to administer the Navajo Nation Endangered Species Plan in cooperation with EPA and the U.S. Fish and Wildlife Service.

B. The Executive Director is authorized to promulgate such rules and regulations from time to time as may be necessary to carry out the provisions of this Act. Subject to Subsection (D) of this Section, such rules and regulations may include:

1. Regulations governing the determination of penalties, denials, suspension or revocation of certifications or licenses;

2. Rules and procedures governing appeals pursuant to §§ 318, 320,

322 and 323 of this Act; and

3. Regulations governing administration of this Chapter by the Executive Director.

C. Subject to Subsection (D) of this Section, proposed rules and regulations shall be published for public review and comment for at least 30 days prior to their adoption. Rules and regulations shall be effective in accordance with their terms after review and approval by the Resources Committee.

D. Upon adoption of an Administrative Procedure Act by the Navajo Nation Council, the provisions of such Act shall supersede and apply instead of the provisions of Subsection (C) of this Section, and the provisions of Subsection (B) of this Section where they are inconsistent.

E. The effectiveness and enforceability of the provisions of this Chapter shall not be dependent upon the adoption of regulations pursuant to Subsection (B) of this Section.

History

CJY-62-95, July 21, 1995.

CMY-28-90, May 3, 1990.

CJY-46-86, July 17, 1986.

§ 306. Construction

A. The provisions of this Act shall be liberally construed to fulfill the intent and purposes of this Act, and so as not to conflict with applicable law of the United States.

B. Nothing contained in this Act shall be construed to diminish, limit, or otherwise adversely affect any right or remedy otherwise held or available to the Navajo Nation or its members under other applicable law.

History

CJY-62-95, July 21, 1995.

§ 307. Registration and classification of pesticides

The Navajo Nation recognizes the classification of pesticides, whether for general use or restricted use, or both made by the Administrator of the EPA by the EPA pursuant to FIFRA. In addition, the Executive Director may restrict the use of additional pesticide products if the Executive Director finds that their uses must be restricted to prevent damage to property other than the property to which they are directly applied or to persons, animals, crops or vegetation other than the pests which they are intended to destroy.

History

CJY-62-95, July 21, 1995.

CJY-46-86, July 17, 1986.

United States Code

Registration of pesticides, see 7 U.S.C. § 136a.

§ 308. Restricted use pesticide dealer

A. Licensing. Any pesticide dealer in the Navajo Nation shall obtain a license from the Executive Director pursuant to the regulations promulgated under this Act.

B. Responsibility. Every licensed pesticide dealer shall be responsible for the acts of each person employed by him/her in the distribution, sale, solicitation, handling and storage of pesticides. The pesticide dealer's license or the qualification of the sales manager or both may be suspended or revoked, after a hearing, for any violation of this Act, whether committed by the pesticide dealer, the sales manager or by any other officer, agent, or employee of the sales outlet.

History

CJY-62-95, July 21, 1995.

CMY-28-90, May 3, 1990.

CJY-46-86, July 17, 1986.

§ 309. Qualifications of sales manager

Any person seeking to work as a sales manager for a pesticide dealer shall apply for qualification from the Executive Director pursuant to the regulations promulgated under this Act.

History

CJY-62-95, July 21, 1995.

§ 310. Classification of pesticide applicators

Pesticide applicators shall be classified as commercial applicators, public applicators or private applicators according to the definitions shown in § 303(B) of this Act.

History

CJY-46-86, July 17, 1986.

§ 311. Classification and categorization of pesticide applicators

A. The Executive Director will classify pesticide applicators as commercial applicators, public applicators, private applicators, according to

the definitions in § 303 (B). In addition, commercial and public applicators shall be categorized in one or more of the categories defined below, based on the application site and the type of work they perform.

B. Categories:

1. Agriculture Pest Control.

a. Plant. This category includes commercial and public applicators using or supervising the use of restricted use pesticides in the production of agricultural crops, including but not limited to feed grains, soybeans and forage, vegetables, small fruits, tree fruits and nuts, and including use or supervision of use of restricted use pesticides on grasslands and non-crop agricultural lands.

b. Animal.

(1) This category includes commercial and public applicators using or supervising the use of restricted use pesticides on animals, including, but not limited to beef cattle, dairy cattle, swine, sheep, horses, goats, poultry and livestock, and including the use or supervision of the use of restricted use pesticides on places in which animals are confined.

(2) Doctors of Veterinary Medicine engaged in the business of applying pesticides for hire, publicly holding themselves out as pesticide applicators, or engaged in large-scale use of pesticides are included in this category.

2. Forest Pest Control. This category includes commercial and public applicators utilizing or supervising the use of restricted use pesticides in forests, forest nurseries, and forest seed producing areas.

3. Ornamental and Turf Pest Control. This category includes commercial and public applicators using or supervising the use of restricted use pesticides to control pests in the maintenance and production of ornamental trees, shrubs, flowers, and turf.

4. Seed Treatment. This category includes commercial and public applicators using or supervising the use of restricted use pesticides on seeds.

5. Aquatic Pest Control. This category includes commercial and public applicators using or supervising the use of any restricted use pesticide purposefully applied to standing or running water, excluding applicators engaged in public health-related activities included in category (8) below.

6. Right-of-Way Pest Control. This category includes commercial and public applicators using or supervising the use of restricted use pesticides in the maintenance of public roads, electric, powerlines, pipelines, railway rights-of-way or other similar areas.

7. Industrial, Institutional, Structural and Health-Related Pest

Control. This category includes commercial and public applicators using or supervising the use of restricted use pesticides in, on, or around food handling establishments, human dwellings, institutions, such as schools and hospitals, industrial establishments, including warehouses and grain elevators, and any other structures and adjacent areas, public or private; and for the protection of stored, processed, or manufactured products.

8. Public Health Pest Control. This category includes Navajo Nation, state, federal, or other governmental employees using or supervising the use of restricted use pesticides in public health programs for the management and control of pests having medical and public health importance.

9. Regulatory Pest Control. This category includes Navajo Nation, state, federal, or other governmental employees who use or supervise the use of restricted use pesticides in the control of regulated pests.

10. Research and Demonstration Pest Control. This category includes:

a. Persons who demonstrate to the public the proper use and techniques of application of restricted use pesticides or supervise such demonstration; and

b. Persons conducting field research with pesticides, and in doing so, use or supervise the use of restricted use pesticides.

11. Rodent, Predator, and Bird Pest Control. This category includes commercial and public applicators using or supervising the use of any restricted use pesticides in the control of rodents, predators, or birds.

12. Wood Preservative Control. This category includes commercial and public applicators using or supervising the use of restricted use pesticides in wood preservative products containing creosote, pentachlorophenol (including its salts) and inorganic arsenicals.

C. Subcategories. Type of Pesticides. All commercial and public applicators are further placed into subcategories according to the types of pesticides they apply. These subcategories are:

1. Herbicides, desiccants, defoliant, and plant regulators;
2. Insecticides, attractants, and repellents;
3. Pesticides;
4. Rodenticides, predicides and avicides;
5. Fungicides and nematicides; and
6. Disinfectants and germicides.

D. All applicators who apply pesticides via aircraft must comply with all applicable federal and Navajo Nation regulations.

History

CJY-62-95, July 21, 1995.

CJY-46-86, July 17, 1986.

§ 312. Standards of competency for certification of commercial and public applicators

A. Commercial and public applicators must demonstrate competency in the use and handling of pesticides, both with regard to general standards applicable to all users and to additional specific standards applicable to each category or subcategory in which the applicator is to be classified.

B. General Standards for Commercial and Public Applicators. Commercial and public applicators must demonstrate knowledge of the following subjects in order to receive certification:

1. Label and Labeling Comprehension.

a. The general format and terminology of pesticide labels and labeling;

b. The understanding of instructions, signal words, terms, symbols, and other information commonly appearing on pesticide labels;

c. Classification of the product, general or restricted; and

d. Necessity for use consistent with the label.

2. Safety. Factors including:

a. Pesticide toxicity and hazard to man and common exposure routes;

b. Common types and causes of pesticide accidents;

c. Precautions necessary to guard against injury to applicators and other individuals in or near treated areas;

d. Need for and use of protective clothing and equipment;

e. Symptoms of pesticide poisoning;

f. First aid and other procedures to be followed in case of a pesticide accident; and

g. Proper identification, storage, transport, handling, mixing procedures and disposal methods for pesticides and used pesticide containers, including precautions to be taken to prevent children from gaining access to pesticides and pesticide containers.

3. Environment. The potential environmental consequences of the use and misuse of pesticides as may be influenced by such factors as:

- a. Weather and other climatic conditions;
 - b. Types of terrain, soil or other substrate;
 - c. Presence of fish, wildlife and other non-target organisms;
- and
- d. Drainage patterns.

4. Pests. Factors such as:

- a. Common features of pest organisms and characteristics of damage needed for pest recognition;
- b. Recognition of relevant pests; and
- c. Pest development and biology as it may be relevant to problem identification and control.

5. Pesticides. Factors such as:

- a. Types of pesticides;
- b. Types of formulations;
- c. Compatibility, synergism, persistence and animal and plant toxicity of the formulations;
- d. Hazards and residues associated with use;
- e. Factors which influence effectiveness or lead to such problems as resistance to pesticides; and
- f. Dilution procedures.

6. Equipment. Factors including:

- a. Types of equipment and advantages and limitations of each type; and
- b. Uses, maintenance and calibration of equipment.

7. Application Techniques. Factors including:

- a. Techniques used to apply various formulations of pesticides, solutions, and gases, together with a knowledge of which techniques of application to use in a given situation;
- b. Relationship of discharge and placement of pesticides to proper use, unnecessary use, and misuse; and

c. Prevention of drift and pesticide loss into the environment.

8. Laws and Regulations. Applicable federal and Navajo Nation laws and regulations.

C. Category Specific Standards. In addition to the general standards, commercial and public applicators must demonstrate knowledge of the principles of pesticide use as they relate to the particular use category in which the applicator is involved. The following are the category specific standards.

1. Agricultural Pest Control.

a. Plant. Applicators must demonstrate practical knowledge of the crops grown and the specific pests of those crops on which they may be using restricted use pesticides. The importance of such knowledge is amplified by the extensive areas involved, the quantities of pesticides needed, and the ultimate use of many commodities as food and feed. Practical knowledge is required concerning soil and water problems, pre-harvest intervals, re-entry intervals, phytotoxicity, and potential for environmental contamination, non-target injury and community problems resulting from the use of restricted use pesticides in agricultural areas.

b. Animal. Applicators applying pesticides directly to animals must demonstrate practical knowledge of such animals and their associated pests. A practical knowledge is also required concerning specific pesticide toxicity and residue potential, since host animals will frequently be used for food. Further, the applicator must know the relative hazards associated with such factors as formulation, application techniques, age of animals, stress and extent of treatment.

2. Forest Pest Control. Applicators shall demonstrate practical knowledge of the types of forests, forest nurseries, and seed production in the Navajo Nation and the pests involved. They should possess practical knowledge of the cyclic occurrence of certain pests and specific population dynamics as a basis for programming pesticide applications. A practical knowledge is required of the relative biotic agents and their vulnerability to the pesticides to be applied. Because forest stands may be large and frequently include natural aquatic habitats and harbor wildlife, the consequences of pesticide use may be difficult to assess. The applicator must therefore demonstrate practical knowledge of control methods which will minimize the possibility of secondary problems such as unintended effects on wildlife. Proper use of specialized equipment must be demonstrated, especially as it may relate to meteorological factors and adjacent lands use. Due to frequent proximity of human habitation to application activities, applicators in this category must demonstrate practical knowledge of application methods which will minimize or prevent hazards to human, pests and other domestic animals.

3. Ornamental and Turf Pest Control. Applicators shall demonstrate practical knowledge of pesticide problems associated with the production

and maintenance of ornamental trees, shrubs, plantings, and turf, including cognizance of potential phytotoxicity due to a wide variety of plant materials, drift, and persistence beyond the intended period of pest control. Because of the frequent proximity of human habitation to application activities, applicators in this category must demonstrate practical knowledge of application methods which will minimize or prevent hazards to humans, pests, and other domestic animals.

4. Seed Treatment. Applicators shall demonstrate practical knowledge of types of seeds that require chemical protection against pests and factors such as seed coloration, carriers, and surface active agents which influence pesticide binding and may affect germination. They must demonstrate practical knowledge of hazards associated with handling, sorting and mixing, and misuse of treated seed such as introduction of treated seed into food and feed channels, as well as proper disposal of unused treated seeds.

5. Aquatic Pest Control. Applicators shall demonstrate practical knowledge of the secondary effects which can be caused by improper application rates, incorrect formulations, and faulty application of restricted use pesticides used in this category. They shall demonstrate practical knowledge of various water use situations and the potential of downstream effects. Further, they must have practical knowledge concerning potential pesticide effect on plants, fish, birds, beneficial insects and other organisms which may be present in aquatic environments. These applicators shall demonstrate practical knowledge of the principles of limited area application.

6. Right-of-Way Pest Control. Applicators shall demonstrate practical knowledge of a wide variety of environments since rights-of-way can traverse many different terrains, including waterways. They shall demonstrate practical knowledge of problems on runoff, drift, and excessive foliage destruction and ability to recognize target organisms. They shall also demonstrate practical knowledge of the nature of herbicides, the need of containment of these pesticides within the right-of-way area, and the impact of their application activities on the adjacent areas and communities.

7. Industrial, Institutional, Structural and Health-Related Pest Control. Applicators shall demonstrate a practical knowledge of a wide variety of pests including their life cycles, types of formulations appropriate for their control and methods of application that avoid contamination of food, damage and contamination of habitat and exposure of people and pets. Since human exposure, including babies, children, pregnant women and elderly people, is frequently a potential problem, applicators must demonstrate practical knowledge of the specific factors which may lead to a hazardous condition, including continuous exposure in the various situations encountered in this category. Because health-related pest control may involve outdoor application, applicators must also demonstrate practical knowledge of environmental conditions particularly related to this Activity.

8. Public Health Pest Control. Applicator shall demonstrate practical knowledge of vector-disease transmission as it relates to and

influences application programs. A wide variety of pests is involved, and it is essential that they be known and recognized, and appropriate life cycles and habitats be understood as a basis for control strategy. These applicators shall have practical knowledge of a great variety of environments ranging from streams to those conditions found in buildings. They should also have practical knowledge of the importance and employment of such non-chemical control methods as sanitation, waste disposal, and drainage.

9. Regulatory Pest Control. Applicators shall demonstrate practical knowledge of regulated pests, applicable laws relating to quarantine and other regulations of pests, and the potential impact on the environment of restricted use pesticides used in suppressing and eradication programs. They shall demonstrate knowledge of factors influencing introduction, spread, and population dynamics of relevant pests. Their knowledge shall extend beyond that required by their immediate duties since their services are frequently required in other areas of the country where emergency measures are invoked to control regulated pests, and where individual judgments must be made in new situations.

10. Research and Demonstration Pest Control:

a. Persons demonstrating the safe and effective use of pesticides to other applicators and the public will be expected to meet comprehensive standards reflecting a broad spectrum of pesticide uses. Many different pest problem situations will be encountered in the course of activities associated with demonstration, and practical knowledge of problems, pests, and population levels occurring in each demonstration situation is required. Such persons should also demonstrate an understanding of pesticide-organism interaction and the importance of integrating pesticide use with other control methods. In general, it would be expected that applicators doing demonstration pest control work possess a practical knowledge of all of the standards detailed in 40 C.F.R. § 171.4(b). In addition, such persons shall meet the specific standards required for categories (1)-(7) of this Section as may be applicable to their particular activity.

b. Persons conducting field research or method improvement work with restricted use pesticides will be expected to know the general standards detailed in § 312 (B) of this Act. In addition, they shall meet the specific standards required for categories (1)-(7) of § 312(C) of this Act that are applicable to their particular activity, or alternatively, they shall meet the more inclusive requirements listed under "Demonstration".

11. Rodent, Predator, and Bird Pest Control. Applicators shall demonstrate practical knowledge of rodents, predators, and bird pests, as well as predator-prey relationships. They should possess practical knowledge of rodent, predator and bird habits and habitat, and the hazards associated with secondary poisoning of non-target species.

12. Wood Preservative Control. Applicators shall demonstrate practical knowledge of wood preservative products containing creosote,

pentachlorophenol (including its salts) and the inorganic arsenicals. They shall possess knowledge of how wood is preserved when using an EPA-registered pesticide containing creosote, pentachlorophenol (including its salts) and inorganic arsenical to protect it from insect attack and decay. Also knowledge should include applicator safety and environmental protection. Wood treated with creosote, pentachlorophenol (including its salts) and inorganic arsenic should only be used in areas where such protection is important.

D. Exemptions from Standards. The above standards do not apply to the following persons for purposes of this Act:

1. Persons conducting laboratory type research involving restricted use pesticides; and

2. Doctors of Medicine and Doctors of Veterinary Medicine applying pesticides as drugs or medication during the course of their normal practice other than Doctors of Veterinary Medicine included under category (B) (1) of § 311 of this Act.

E. Until such time as the NNEPA has adopted its own plan and procedures for examination and testing of competency, any applicant who possesses a certificate from the State of Arizona, New Mexico, or Utah, granted pursuant to an approved state FIFRA plan, shall be deemed to have demonstrated the level of knowledge and competency necessary to receive a similar certificate from the Navajo Nation.

History

CJY-62-95, July 21, 1995.

CJY-46-86, July 17, 1986.

United States Code

Certification of applicators, see 7 U.S.C. § 136i.

§ 313. Standards of competency for certification of private applicators

A. In order to receive certification, all private applicators must show that they possess a practical knowledge of the pest problems and pest control practices associated with their agricultural operations; proper storage, use, handling and disposal of the pesticides and containers; and their related legal responsibilities. This practical knowledge includes the ability to:

1. Recognize common pests to be controlled and prevent potential damages caused by them.

2. Read and understand the label and labeling information including the common name of the pesticide to be applied; pest(s) to be controlled; timing and methods of application; safety precautions; preharvest or re-entry restrictions; and any specific disposal procedures.

3. Apply pesticides in accordance with label instructions and warnings, including the ability to prepare the proper concentration of pesticide to be used under particular circumstances taking into account such factors as areas to be covered, speed at which application equipment will be driven, and the quantity dispersed in a given period of operation.

4. Recognize local environmental situations that must be considered during application to avoid contamination.

5. Recognize poisoning symptoms and procedures to follow in case of a pesticide accident.

B. Until such time as the NNEPA has adopted its own procedures for examination and testing of competency, any applicant who possesses a certificate from the State of Arizona, New Mexico, or Utah, granted pursuant to an approved state FIFRA plan, shall be deemed to have demonstrated the level of knowledge and competency necessary to receive a similar certificate from the Navajo Nation.

History

CJY-62-95, July 21, 1995.

CJY-46-86, July 17, 1986.

United States Code

Certification of applicators, see 7 U.S.C. § 136i.

§ 314. Certification and license application conditions

A. All certification and license applications shall contain the following statement to which the applicant must agree and subscribe for the application to be complete and as a condition precedent to the issuance of any certification or license:

"Applicant hereby consents to the jurisdiction of the Navajo Nation in connection with all activities conducted pursuant to or in connection with any certification or license issued pursuant to this application or to which the provisions of the Navajo Nation Pesticide Act otherwise apply. This consent shall be effective whether or not a certification or license is issued or is in effect, and may not be withdrawn by Applicant. This consent shall extend to and be binding upon all successors, heirs, assigns, employees and agents, including contractors and subcontractors, of Applicant."

B. Applicant shall include the foregoing statement as a term and condition of any agreement it executes for services to be performed or goods to be provided within the Navajo Nation in connection with any certification or license issued under this Chapter, and each party to any such agreement must agree and subscribe to said statement, substituting the name of the party for "Applicant" as appropriate, and substituting the phrase "this agreement" in place of the phrase "any certification or license issued pursuant to this application." Failure by Applicant to include such statement, or of any party

to agree and subscribe to such statement, shall render the contract or other agreement void and unenforceable, and shall subject Applicant to a civil penalty in accordance with § 322 of this Chapter.

History

CJY-62-95, July 21, 1995.

United States Code

Certification of applicators, see 7 U.S.C. § 136i.

§ 315. Standards for supervision of non-certified applicators by certified applicators

A. Certified applicators (except non-readers) whose activities indicate a supervisory role must demonstrate a practical knowledge of federal and Navajo Nation supervisory requirements, including labeling, regarding the application of restricted use pesticides by non-certified applicators.

B. The availability of the certified applicator must be directly related to the hazard of the situation. In many situations, where the certified applicator is not required to be physically present, "direct supervision" shall include verifiable instruction to the competent person, as follows:

(1) Detailed guidance for applying the pesticide properly, and

(2) Provisions for contacting the certified applicator in the event he/she is needed. In other situations, and as required by the label, the actual physical presence of a certified applicator may be required when application is made by a non-certified applicator.

C. Each commercial applicator shall be responsible for the acts of each person employed, contracted, subcontracted, or supervised by him in the application of pesticides and all claims and recommendations for use of pesticides. The certified applicator shall be subject to criminal or civil penalties for any violation whether committed by him, or by his officers, agents, employees or subcontractors. Reliance on a subcontractor shall not constitute a defense against any action brought by the Executive Director against a certified applicator pursuant to this Act.

History

CJY-62-95, July 21, 1995.

CMY-28-90, May 3, 1990.

CJY-46-86, July 17, 1986.

§ 316. Certification procedures

A. Commercial and Public Applicators.

1. Certification Methods:

a. A Navajo Nation certification may be obtained by presenting to the Executive Director a valid commercial or public applicator certification issued by the State of Arizona, New Mexico, or Utah pursuant to an approved state FIFRA plan. The Navajo Nation certification issued will reflect Navajo Nation certification only in the commercial or public applicator categories appearing on the State certification. Further, the expiration date on the Navajo Nation certification shall not exceed the expiration date given on the State certification.

b. The Executive Director is authorized to develop and implement a Navajo Nation commercial and public applicator examination and certification program, in conjunction with EPA, and in accordance with the standards required by this Act and FIFRA. Such program may be either an exclusive or non-exclusive alternative to the acceptance of state certification. A Navajo Nation certification issued pursuant to such a program shall be valid for a period of three years from the date of issuance. A reasonable fee, at a rate set by regulation, may be charged for the issuance of a Navajo Nation certification, whether the certification is based on a State certification or on exam.

2. Certification Renewal. A Navajo Nation certification may be renewed by presenting a valid Arizona, New Mexico, or Utah certification to the Executive Director, and shall be re-issued for a period not to exceed the expiration of such State certification; provided, if the Executive Director has promulgated a Navajo Nation examination procedure for commercial and public applicators, such certification may be renewed pursuant to the procedure specified therein.

3. Records.

a. Commercial and public applicators shall keep and maintain records of each application of any restricted use pesticide within the Navajo Nation. Such records shall include the following information:

(1) Name and address of the person for whom the pesticide was applied;

(2) Location and size of treatment site, if different from Subsection (A) (3) (a) (1);

(3) Year, month, day and time of application;

(4) Name of pesticide, identified by trade name and EPA registration number, formulation, concentration, rate applied, and total amount used;

(5) Purpose of application, including target pest(s), crop, commodity, or site, as applicable;

(6) Weather conditions; and

(7) Type and amount of pesticide disposed of, method

of disposal, date, and location of disposal site.

b. Such records shall be kept for a period of two years from the date of application of the pesticide and shall be available for inspection by the Executive Director at reasonable times. The Executive Director shall, upon written request, be furnished a copy of such records by the commercial or public applicator. Records of restricted use pesticides application performed by persons under the direct supervision of a certified commercial or public applicator shall be the responsibility of the supervising certified applicator.

4. Exemption. The provision of this Section concerning records shall not apply to persons conducting research involving restricted use pesticides nor to Doctors of Medicine or Doctors of Veterinary Medicine applying restricted use pesticides as drugs or medication during the course of their normal practice other than Doctors of Veterinary Medicine included under category (B) (1) (b) of § 311 of this Act.

B. Private Applicators

1. Certification Methods.

a. A private applicator may obtain a Navajo Nation certification by presenting to the Executive Director a valid Private Applicator's certification issued by the States of Arizona, New Mexico, or Utah pursuant to an approved state FIFRA plan. The Executive Director will issue a Navajo Nation certification to the holder of an Arizona, New Mexico, or Utah certification which shall authorize only those uses authorized by the State certification. The expiration date of the Navajo Nation certification shall not exceed the expiration date given on the State certification.

b. The Executive Director is authorized to conduct or arrange for the conducting of training sessions for private applicators. Applicators who complete a thorough training in the use of one or more pesticides and demonstrate competency to use such pesticide(s), based on the private applicator standards set forth above, may be certified by the Executive Director to use such pesticide(s). The certification program may employ either a written or oral testing procedure or a thorough physical demonstration of proper technical knowledge and competency. This certification program may be either an exclusive or a non-exclusive alternative to the acceptance of State certification. A Navajo Nation certification issued pursuant to such a program shall be valid for three years from the date of issuance.

c. A reasonable fee, at a rate set by regulation, may be charged for the issuance of a Navajo Nation certification.

d. Recertification may be obtained by presenting an updated Arizona, New Mexico, or Utah certification to the Executive Director, but such renewal shall not exceed the period of the state certification, provided, if the Executive Director has promulgated a Navajo Nation Certification Program, such certifications shall be renewed pursuant to the procedures specified therein.

C. Certification of Non-English Reading Applicators/Non-Readers.

1. The Executive Director may certify a person who is unable to read English, if such person can demonstrate competency with regard to all of the standards required by this Act, except the ability to read. An applicator who does not read English or cannot for any other reason read the appropriate labels must:

a. Receive personal instruction from a certified applicator in the use of the pesticide.

b. Physically demonstrate that he understands how to use such pesticide.

c. Learn and memorize all of the significant information on the label.

d. Be able to distinguish by label shape, color, size or configuration the pesticide from others.

e. Be aware of sources of advice and information for safe and proper use of each pesticide related to his authorization.

2. Certification for non-readers is limited to one pesticide per certification. Non-readers may not supervise non-certified applicators.

History

CJY-62-95, July 21, 1995.

CJY-46-86, July 17, 1986.

United States Code

Certification of applicators, see 7 U.S.C. § 136i.

§ 317. Pesticide containers

Storage and disposal methods shall comply with appropriate pesticide label instructions and regulations promulgated pursuant to this Act. All containers shall be flattened or pierced before disposal so that they cannot be used to contain any other materials or used for any other purposes. Storage and disposal of pesticides shall only be at areas designated and approved by the Executive Director. Disposal of pesticide containers shall only be at approved or permitted landfills, in accordance with applicable solid waste laws and regulations.

History

CJY-62-95, July 21, 1995.

CMY-28-90, May 8, 1990.

CJY-46-86, July 17, 1986

§ 318. Entry and inspection

For purposes of carrying out this Act, the Executive Director may enter at reasonable times any establishment or other places where pesticides or devices are held for use, distribution or sale or where pesticides are being, or have been used, for the purposes of inspecting and obtaining samples of any pesticides or devices or samples of any container or copies of labels. The Executive Director also may enter at reasonable times any establishment or site for the purpose of inspecting records required to be maintained pursuant to this Act or the regulations hereunder.

History

CJY-62-95, July 21, 1995.

CJY-46-86, July 17, 1986.

§ 319. Cooperative agreements

The Executive Director is authorized to pursue the development of cooperative agreements including grants-in-aid from any agency of the States of Arizona, New Mexico, or Utah, the Bureau of Indian Affairs, or the United States Environmental Protection Agency for the purpose of carrying out the provisions of this Act. Any such agreements are subject to approval in accordance with the laws and procedures of the Navajo Nation.

History

CJY-62-95, July 21, 1995.

CJY-46-86, July 17, 1986.

Cross References

Navajo Nation standing committee authority, see 2 N.N.C. § 824(B)(6).

United States Code

Cooperation, aid and training, see 7 U.S.C. § 136u.

§ 320. Denial, suspension or revocation of license or certificate

A. The Executive Director may, for good cause shown or upon his/her own information and belief, informally contact any pesticide dealer or applicator about possible violations of the Act or practices which may result in violations. These informal contacts are to assist the dealer or applicator in adhering to practices which promote the proper use of pesticides.

B. Upon recommendation to the Executive Director or based upon his/her own findings and belief, the Executive Director may issue a Warning of Possible Violation in the form of a letter to a dealer or an applicator. The letter shall explain the basis for the Warning, possible measures which the dealer or

applicator may take to mitigate the basis of the Warning, and an explanation of the steps that may be taken if the dealer or applicator does not take positive corrective action. Neither this letter nor an informal contact are a necessary prerequisite to any further administrative or judicial action, except that the issuance of a warning of possible violation is a prerequisite to any criminal action against a private applicator.

C. The Executive Director is authorized to issue to any person who has willfully or negligently failed to comply with the recommendations of a Warning of Possible Violation or otherwise failed to comply with the requirements of this Act or the terms of a license or certification, an Order to Show Cause why a license or certification should not be revoked. Such an Order will require the person to appear before the Executive Director or other body designated by the Executive Director.

D. The Executive Director is authorized to suspend immediately or deny an application for a license or certification of any dealer or applicator whose actions or omissions in violation of this Act pose a significant threat to the health or welfare of the Navajo Nation, its people and its resources. Within 30 days of any such action, the Executive Director must insure that the dealer or applicator is given an opportunity for a hearing before the Executive Director or a body the Executive Director may designate for consideration of the suspension action and consideration as to whether the license or certification must be revoked, denied, or suspended pending further investigation.

History

CJY-62-95, July 21, 1995.

CMY-28-90, May 3, 1990.

CJY-46-86, July 17, 1986.

Revision note. Slightly reworded for purposes of statutory form.

§ 321. Prohibited acts

A. No pesticide applicator (commercial, public, private, or otherwise) using or supervising the use of a restricted use pesticide shall:

1. Use any pesticide in a manner inconsistent with its labeling or with this Act.
2. Use any restricted use pesticide without being certified or under the direct supervision of a certified applicator.
3. Supervise the use of a restricted pesticide without first obtaining a Navajo Nation certification.
4. Falsify any applications or records required by this Act.
5. Fail to keep or refuse to allow inspection of any records required by this Act.

6. Make available any restricted use pesticide to anyone who is not authorized to use it or is not acting directly under the supervision of one who is authorized to use it.

7. Use or dispose of any pesticide or pesticide container in a manner which is inconsistent with the label directions or which unreasonably endangers or harms the quality of the natural environment or the health of any living beings.

8. Violate any of the requirements of this Act or the regulations thereunder.

B. No pesticide dealer shall:

1. Distribute, sell, offer, or hold for sale any pesticide without being licensed by the Executive Director.

2. Sell any restricted use pesticide not registered pursuant to FIFRA.

3. Detach, alter, deface, or destroy, in whole or in part, any label or labeling required by FIFRA.

4. Add or delete any substance to or from a pesticide which may alter its registered composition.

5. Sell or offer for sale any pesticide other than from the original unbroken package.

6. Make false or misleading representation or advertisement for any pesticide or device, including any advertisement or representation which fails to reveal the consequences which may result from the use of the pesticide or device to which the advertisement or representation refers.

7. Use any pesticide in a manner inconsistent with the label or this Act.

8. Dispose of or store any pesticide in areas not approved for disposal and storage.

9. Violate any of the requirements of this Act or the regulations thereunder.

C. No person shall:

1. Distribute, sell, offer for sale, hold for sale, ship, or deliver for shipment to, or receive from, any person any pesticide that is not registered with the EPA under FIFRA or subject to the exceptions listed under FIFRA § 3 (a) and (b).

2. Produce any pesticide subject to FIFRA or any active ingredient used in producing a pesticide subject to FIFRA unless the establishment in which it is produced is registered with the EPA.

3. Use restricted use pesticides unless certified pursuant to this Act. This prohibition however does not apply to persons who apply pesticides under the direct supervision of a certified applicator pursuant to this Act. In addition, any person may use a general use pesticide, provided it is used in accordance with its directions, warnings, and cautions, and only for the uses for which it is registered.

4. Transport, store, or dispose of any pesticide or pesticide container in such a manner as to cause injury to humans, vegetation, crops, livestock, wildlife, or beneficial insects, or to pollute any waterway in a manner harmful to any wildlife therein or the quality of the water in such waterway, or to otherwise adversely impact the quality of any other water resources, including groundwater, within the Navajo Nation.

5. Violate any of the requirements of this Act or the regulations thereunder.

History

CJY-62-95, July 21, 1995.

CJY-46-86, July 17, 1986.

United States Code

Unlawful acts, environmental pesticide control, see 7 U.S.C. § 136j.

§ 322. Penalties

A. Criminal Penalties.

1. Any person who commits one or more violations of the provisions of this Act shall be subject to criminal prosecution in the District Courts of the Navajo Nation. Upon receipt of the Executive Director's sworn statement alleging one or more violations of this Act, the Office of the Prosecutor of the Navajo Nation shall investigate and prosecute as appropriate alleged criminal violations of this Act.

2. Any person who knowingly violates any provision of this Act or the regulations promulgated thereunder, or who knowingly makes any material false statement or omits material information from, or alters, conceals, or fails to file or maintain any record, application, or other document required pursuant to this Chapter to be filed or maintained shall, upon conviction, be subject to a criminal fine of not greater than five thousand dollars (\$5,000), except that in the case of a private applicator the maximum fine shall be one thousand dollars (\$1,000), and/or imprisonment for a period not to exceed 30 days.

3. In any instance where the Navajo Nation lacks jurisdiction over the person charged, the Executive Director may refer the action to the appropriate EPA Regional Administrator. Any person who is not subject to the criminal jurisdiction of the Navajo Nation also may be subject to

exclusion from the territory of the Navajo Nation for consistent violations of the provisions of this Chapter or the regulations promulgated thereunder. Exclusion proceedings may be initiated by the Director in the District Courts of the Navajo Nation upon his/her determination that such violations have occurred.

4. In addition to the above proceedings, the Director in the District Courts of the Navajo Nation is authorized to initiate a proceeding, separately or in connection with either a criminal or exclusion proceeding brought under this Chapter, for any damages caused to the lands or other resources of the Navajo Nation as the result of any violation of this Chapter or the regulations promulgated thereunder, for any expenses incurred in investigating and evaluating such damages or violations, for any administrative costs incurred, and for the reasonable value of any attorney time or expenses associated with such proceeding.

B. Civil Administrative Penalties.

1. Any person who violates any provision of this Act or the regulations promulgated hereunder may be assessed a civil administrative penalty by order of the Executive Director of not more than five thousand dollars (\$5,000) for each violation; provided, however, that no civil penalty shall be assessed unless the person cited shall have been given notice and opportunity for a hearing on such violation. The person cited shall have 30 days from receipt of such notice to pay the penalty or request a hearing. If a timely request for a hearing is not made, the penalty shall be final and the opportunity for judicial review shall be waived.

2. In the event that the Executive Director is unable to collect the civil penalty, the Executive Director shall refer the matter to the Attorney General of the Navajo Nation, for recovery of such amount in the appropriate District Court of the Navajo Nation. In addition, the Attorney General is authorized to recover all of the Director's enforcement expenses, including, but not limited to attorneys' fees and the cost of collection proceedings.

3. In determining the amount of the penalty, the Executive Director shall consider the appropriateness of such penalty to the size of the business of the person charged, the effect on the person's ability to continue in business, and the gravity of the violation. Whenever the Executive Director finds that the violation occurred despite the exercise of due care or did not cause significant harm to health or the environment, the Executive Director may issue a warning in lieu of assessing a penalty.

C. Stop Sale, Use, Removal, and Seizure.

1. Stop Sale, Use, or Removal Orders. In addition to any other penalties or actions available under this Act, the Executive Director may issue and enforce a written or printed "stop sale, use, or removal" order to the pesticide dealer for any lot of pesticides or devices which the Executive Director has reasonable cause to believe are being sold or offered for sale in violation of any of the provisions of this Act or

regulations promulgated pursuant to this Act. Such order shall remain in effect until the Executive Director has determined that the provisions of this Act or regulations in question have been complied with.

2. Seizure. If the Executive Director has reasonable cause to believe that a pesticide dealer is selling or offering for sale any pesticides or devices in violation of a "stop sale, use or removal order," the Executive Director may seize the pesticides or devices subject to such order and hold them at a designated place until the violation of this Act or its regulations has been complied with or until the violation has been otherwise legally disposed of and the dealer has paid all costs incurred in connection with the seizure. Such seizure shall be conducted in accordance with the applicable laws of the Navajo Nation.

D. Injunctive Relief. If the violation of any of the provisions of this Act or of any regulations promulgated thereunder is a nuisance or a hazard to the health and safety of humans or harmful to the environment, such activity may be restrained or enjoined at any time by an order issued by the appropriate District Court of the Navajo Nation, but only if all administrative remedies have been exhausted or if the Executive Director determines that immediate and irreparable injury, loss, or damage will result if such violation or activity is not immediately restrained or enjoined. The Executive Director shall request the Attorney General of the Navajo Nation to bring an action to obtain an order to restrain or enjoin any such violation.

E. Records and reports. Pesticide dealers shall keep a record of each sale of restricted use pesticide at each sales outlet on forms provided by the Executive Director. All records and reports shall be submitted to the Executive Director as specified by the regulations promulgated pursuant to this Act.

History

CJY-62-95, July 21, 1995.

CMY-28-90, May 3, 1990.

CJY-46-86, July 17, 1986.

Revision note. Slightly reworded for purposes of statutory form.

United States Code

Penalties, environmental pesticide control, see 7 U.S.C. § 1361.

§ 323. Judicial Review

A. Review in Navajo Nation District Court. Whenever the Executive Director takes final action without the opportunity for a hearing, such as in the case of a refusal to change a pesticide classification, review of such final action shall be had in the appropriate Navajo Nation District Court in Window Rock. In addition, any person subject to an administrative penalty under § 322(B) may seek review of such penalty assessment in the Navajo Nation

District Court in Window Rock by filing a petition for review in such court within 30 days following the date that the penalty becomes final and by simultaneously sending a copy of such filing by certified mail to the Executive Director and the Attorney General. Within 30 days thereafter the Executive Director shall file in such court a certified copy or certified index of the record on which the penalty was based. The court shall not set aside or remand an order or assessment under this Section unless the record, taken as a whole, does not substantially support the finding of a violation or unless the order or penalty assessment constitutes an abuse of discretion. In any such proceedings, the Executive Director may seek to recover civil penalties ordered or assessed under this Section.

B. Review in Navajo Nation Supreme Court. Review of all other final actions of the Executive Director, including but not limited to promulgation of regulations, issuance of orders, including civil penalty orders, and denial, suspension or revocation of certificates and licenses, shall be had in the Navajo Nation Supreme Court. A petition for review shall be filed within 60 days from the date that notice of such final action is first published, or, if notice is not published, first served upon the alleged violator or person required to be served, except that if the petition is based solely on grounds arising after the sixtieth day, then the petition shall be filed within 60 days after such grounds arise. The Navajo Nation Supreme Court, in reviewing the final action, shall limit its review to the issues and evidence that were before the Executive Director at the time of the final action from which the appeal is taken.

C. Limitations on Review. If judicial review of a final action of the Executive Director could have been obtained under Subsection (A) or (B) of this Section, that action shall not be subject to judicial review in judicial proceedings for enforcement.

D. Standards for Review. In reviewing any final action of the Executive Director undertaken pursuant to this Act, the court may reverse any such action that it finds to be:

1. Arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law;
2. Contrary to constitutional right, power, privilege or immunity;
3. In excess of statutory jurisdiction, authority, or limitations or short of statutory right;
4. Without observance of procedure required by law, such failure to observe such procedure is arbitrary or capricious; or
5. Unsupported by substantial evidence.

E. Any challenge to the lawfulness of any provision of this Act must be filed in accordance with Navajo law within 90 days after the date of the enactment of this Act in the District Court for the District of Window Rock, naming as defendant the Navajo Nation, and not thereafter or in any other manner. In any such action, relief shall be limited to declaratory relief. The District Court for the District of Window Rock shall have exclusive

jurisdiction and venue over any action challenging any provision of this Act.

History

CJY-62-95, July 21, 1995.

§ 324. License conditions

A. As a condition of obtaining a dealer's license, or qualification of a sales manager, said applicants shall consent to the jurisdiction of the Navajo Nation and shall agree to abide by all laws of the Navajo Nation.

B. All dealer license and qualification of sales manager application forms shall contain the consent to jurisdiction statement set forth at § 314 of this Act.

History

CJY-62-95, July 21, 1995.

§ 325. Use of funds

Monies derived from fees and penalties under this Act and regulations promulgated thereunder shall be available to the Executive Director to administer this Act and regulations. Such funds shall be deposited into a duly established revolving account and expended in accordance with the revolving account Plan of Operation approved budget. Any monies contained in said revolving account at the end of any fiscal year shall not revert to the general fund and shall remain available for appropriation as provided in this Section.

History

CJY-62-95, July 21, 1995.

CMY-28-90, May 3, 1990.

§ 326. Certification requirements for agricultural aircraft pilots

All agricultural aircraft pilots must possess a valid agricultural aircraft pilot certification issued by the Executive Director, pursuant to regulations promulgated hereunder, and a valid commercial pilot's certification issued by the Federal Aviation Administrator.

History

CJY-62-95, July 21, 1995.

CMY-28-90, May 3, 1990.

Revision note. Sections 319 and 320 have been rearranged for purposes of statutory form.

§ 327. Severability

If any provision of this Act or the application thereof to any person or circumstance is held invalid, the remainder of this Act and the application of such provision to other persons or circumstances shall remain unaffected and to this end the provisions of this Code are declared to be severable.

History

CJY-62-95, July 21, 1995.

CMY-28-90, May3, 1990.

Chapter 5. [Reserved]

Chapter 5 of Title 4, consisting of §§ 500 to 544, was recodified as Title 18, Chapter 15. See now, 18 NNC §§ 1601 to 1644.

Chapter 7. Navajo Energy Development Administration

History

Note. CMY-39-80, May 1, 1980 established the Navajo Energy Development Authority. NEDA has, since its creation, operated within the Executive Branch of the Navajo Nation government.

United States Code

Indian energy resources, see 25 U.S.C. § 3501 *et seq.*

§ 701. Establishment

The Navajo Energy Development Administration (NEDA) is a department of the Executive Branch of the Navajo Nation government within the Division of Economic Development.

History

ACJA-21-87, January 7, 1987.

CMY-39-80, May 1, 1980.

Note. Slightly reworded for purposes of statutory form.

§ 702. Purposes

A. The basic purpose of NEDA is to plan energy related projects and to spin off actual project development to the Commercial and Industrial Departments of the Economic Development Division, or other entities as determined by the Office of the President/Vice-President including but not limited to private enterprises. In addition, NEDA's purposes include:

1. To plan and develop the following resources:

a. Energy. In the absence of capability from the private sector, the goal is to eventually spin off the management to the private sector. These resources include but are not limited to solar, wind, and geothermal;

b. Industrial and non-industrial minerals. NEDA shall assist from a planning standpoint, in exploration, determination of resources characterization, and conducting feasibility studies of industrial and non-industrial minerals; and

c. Coal, oil, gas, uranium and their processed forms, including but not limited to synthetic fuel and gasoline. NEDA shall assist in the production, mining, processing, and distribution of these resources.

2. To initiate the preliminary negotiation format and provisions on agreements and contracts with private enterprises with the specific goals of maximizing financial returns and Navajo employment of promoting conservation, and of transferring the eventual control over resources from non-Navajo private enterprise to Navajo;

3. To promote efficient utilization of Navajo energy resources in a manner which is consistent with Navajo social and environmental concerns;

4. To represent the Navajo Nation in various state and federal activities, acting as an energy advisor to the Navajo Nation, in conjunction with other Navajo Nation programs; and

5. To promote the utilization of Navajo labor and businesses.

History

ACJA-21-87, January 7, 1987.

CMY-39-8, 3, May 1, 1980.

Revision note. Slightly reworded for purposes of statutory form.

§ 703. Activities

A. NEDA will be responsible for the following activities and services:

1. Prepare an overall energy development plan for the Navajo Nation.

2. Inventory the following resources:

a. Nonferrous minerals;

b. Industrial minerals;

c. Oil, gas, and coal; and

d. Alternative energy and other minerals.

3. Conduct feasibility studies for the areas of concentration of specified resources.

4. Receive and evaluate proposals from non-Navajo Nation government entities interested in developing the specified resources, in conjunction with other Navajo Nation programs.

5. Refer planned projects to the appropriate agencies within the Navajo Nation and federal Governments, and others for further project planning and development.

6. Assist Navajo entities who request technical assistance for project planning/development.

7. Participate in evaluations concerning energy development projects, in conjunction with other agencies within the Navajo Nation and other governments.

8. Assist the Navajo Nation Negotiating Team with the provision of accurate information and technical assistance upon request.

9. Assist the Navajo Nation government in generating development financing for project planning and development, upon request.

10. Apply to the appropriate agencies of the state and the federal government for permits, licenses, or approval as may be necessary or appropriate to carry out the above-specified activities; and construct, maintain and operate energy projects in accordance with such licenses or permits, in conjunction with other Navajo Nation programs.

History

ACJA-21-87, January 7, 1987.

CMY-39-80, May 1, 1980.

§ 704. Organization

NEDA will operate under the Executive Branch of the Navajo Nation government as a department within the Division of Economic Development.

History

ACJA-21-87, January 7, 1987.

CMY-39-80, May 1, 1980.

§ 705. Personnel

All personnel shall be hired pursuant to Personnel Policies and Procedures of the Navajo Nation.

History

ACJA-21-87, January 7, 1987.

CMY-39-80, May 1, 1980.

§ 706. Conflict of interest

All employees of Navajo Energy Development Administration shall comply with the Navajo Nation Ethics in Government Law.

History

ACJA-21-87, January 7, 1987.

CMY-39-80, May 1, 1980.

§ 707. Amendments

This Plan of Operation may be amended from time to time as deemed necessary by the Government Services Committee of the Navajo Nation Council upon the recommendation of the Economic Development Committee and the Resources Committee of the Navajo Nation Council.

History

ACJA-21-87, January 21, 1987.

CMY-39-80, May 1, 1980.

Revision note. Slightly reworded for purposes of statutory form.

Chapter 9. Navajo Nation Environmental Policy Act

Subchapter 1. General Provisions

History

Note. Section headings have been added and are not to be construed as interpretive of or as a part of the Navajo Nation Environmental Policy Act adopted by CAP-47-95, April 21, 1995.

United States Code

National environmental policy, see 42 U.S.C. § 4321 *et seq.*

§ 901. Policy

It is the policy of the Navajo Nation to promote harmony and balance between the natural environment and people of the Navajo Nation, and to restore that harmony and balance as necessary. To this end, the Navajo Nation Council declares that the protection, restoration and preservation of the environment is a central component of the philosophy of the Navajo Nation; that the

quality of life of the Navajo People is intimately related to the quality of the environment within the Navajo Nation; that all persons and entities, including agencies, departments, enterprises and other instrumentalities of the Navajo Nation itself and agencies of other governments, can and do affect the environment; and that it is the policy of the Navajo Nation to use all practicable means to create and maintain conditions under which humankind and nature can exist in productive harmony.

History

CAP-47-95, April 21, 1995.

United States Code

Policies and goals, national environmental policy, see 42 U.S.C. § 4321 et seq.

§ 902. Authority

The Navajo Nation, acting through the Navajo Nation Environmental Protection Agency, shall exert to the fullest extent its authority to regulate, monitor and enforce performance with appropriate environmental standards throughout all of the Navajo Nation, including the exercise of its authority to limit or eliminate environmental contaminants emitted outside the Navajo Nation, but which may migrate into or otherwise adversely affect the lands, waters or air of the Navajo Nation. The Navajo Nation will employ any and all authority it may have pursuant to its inherent sovereign authority, delegations of authority from the United States and any cooperative arrangements entered into between the Navajo Nation and other governmental institutions where such arrangements are approved by the Navajo Nation or its duly authorized committee or committees.

History

CAP-47-95, April 21, 1995.

Cross References

Navajo Nation Environmental Protection Agency, 2 N.N.C. § 1921-1927.

§ 903. Purposes

The Navajo Nation shall employ its governmental authority pursuant to § 902 hereof, using all practicable means consistent with other essential governmental functions, for the following purposes:

A. To fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

B. To assure for all residents of and visitors to the Navajo Nation a safe, healthful, productive, aesthetically pleasing and culturally appropriate environment;

C. To promote to the fullest extent practicable recycling and the use of renewable resources to ensure that the level of use of renewable resources does

not exceed that which is sustainable; to reduce or eliminate the waste of resources; to designate, conserve and protect unique ecosystems; to eliminate unnecessary destruction, depletion, degradation, and disturbance of natural resources in the extraction or use of other resources; and to attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable consequences;

D. To ensure that activities within the Navajo Nation that may substantially disturb the environment are conducted in a manner to minimize such disturbance to the extent feasible and practicable; to ensure that any person or entity doing business on or otherwise carrying on activities within the Navajo Nation is required to remediate any environmental damage caused in the course of business and to provide ample security for the costs of any such remedial actions in the event that such person or entity fails to satisfy such requirements;

E. To ensure that damage to or contamination of the environment which occurred in the past is remedied, and that the appropriate person or entity be held accountable for the costs of such remediation;

F. To preserve important cultural, religious, historic, and natural aspects of the Navajo Nation; and

G. To achieve and maintain, wherever possible, an environment which supports diversity, and to achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities.

History

CAP-47-95, April 21, 1995.

§ 904. Navajo Nation government

A. All agencies, departments, enterprises and other instrumentalities of the Navajo Nation shall review their current Plans of Operation, charters, and policies and procedures to determine if they should be amended in order to better fulfill and promote the purposes set forth in § 903 hereof, and shall pursue such amendments pursuant to Navajo law.

B. All such agencies, departments, enterprises and other instrumentalities shall consider carefully in decision making, and prepare appropriate documentation of, any adverse environmental impacts which may occur as a result of any proposed action, the extent to which environmental impacts may be reduced or mitigated, and other alternatives, including no action, to the proposed action which may reduce or eliminate significant adverse environmental impacts.

History

CAP-47-95, April 21, 1995.

Note. Paragraph divided for statutory clarity.

§ 905. Limitations

Nothing in this Navajo Nation Environmental Policy Act is intended to, nor shall it be construed to:

A. Alter, amend or diminish in any way the sovereign immunity of the Navajo Nation or constitute a waiver of the sovereign immunity of the Navajo Nation, as defined in 1 N.N.C. § 551, *et seq.*;

B. Abrogate any authority conferred by the Navajo Nation Council upon any agency, enterprise or other instrumentality of the Navajo Nation;

C. Repeal in whole or in part any law or regulation duly promulgated by the Navajo Nation or any of its agencies;

D. Authorize or sanction the breach of any contractual duty or diminish any vested property rights; or

E. Provide the basis for a private cause of action by or against any person or entity, or confer jurisdiction upon any court for any cause of action predicated on this Act.

History

CAP-47-95, April 21, 1995.

§ 906. Severability

If any part of this Navajo Nation Environmental Policy Act is declared by a court of competent jurisdiction to be invalid, the other provisions shall not be affected, but shall continue to remain in force to the extent possible.

History

CAP-47-95, April 21, 1995.

Chapter 11. Navajo Nation Air Pollution Prevention and Control Act

United States Code

Air pollution prevention and control, see 42 U.S.C. § 7401 *et seq.*

Subchapter 1. General Provisions

§ 1101. Definitions

A. For purposes of this Chapter:

1. "Administrator" means the Administrator of the United States Environmental Protection Agency (USEPA).

2. "Adverse human health effects" means, for purposes of Part F of Subchapter 2 of this Chapter, those effects that result in or

significantly contribute to an increase in mortality or an increase in serious irreversible or incapacitating reversible illness, including adverse effects that are known to be or may reasonably be anticipated to be caused by substances that are acutely or chronically toxic, carcinogenic, mutagenic, teratogenic, neurotoxic or causative of reproductive dysfunction.

3. "Adverse environmental effect" means, for purposes of Part F of Subchapter 2 of this Chapter, any significant and widespread detrimental effect which may reasonably be anticipated on wildlife, aquatic life, or other natural resources, including adverse impacts on populations of endangered or threatened species or significant degradation of environmental quality over broad areas.

4. "Affected source" means, for purposes of Parts G and H of Subchapter 2 of this Chapter, a source that includes one or more affected units.

5. "Affected unit" means, for purposes of Part G of Subchapter 2 of this Chapter, a unit that is subject to emission reduction requirements or limitations under that Part and under Title IV of the Clean Air Act.¹

6. "Air pollutants" means any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive (including source material, special nuclear material, and by product material) substance or matter which is emitted into or otherwise enters the ambient air. Such term includes any precursors to the formation of any air pollutant to the extent the Administration of USEPA has identified such precursor or precursors for the particular purpose for which the term "air pollutant" is used.

7. "Air pollution" means the presence in the ambient air of one or more air pollutants or combinations thereof in sufficient quantities, which either alone or in connection with other substances, by reason of their concentration and duration, is or tends to be injurious to human, plant or animal life, causes damage to property, unreasonably interferes with the comfortable enjoyment of life or property of a substantial part of a community, obscures visibility, or in any way degrades the quality of the ambient air.

8. "Allowance" means an authorization, allocated to an affected unit by the Administrator of the USEPA under Title IV of the Clean Air Act,¹ to emit, during or after a specified calendar year, one ton of sulfur dioxide.

9. "Alternative method of compliance" means, for purposes of Part G of Subchapter 2 of this Chapter, a method of compliance in accordance with one or more of the following authorities:

a. An alternative NO_x emission limitation, authorized in accordance with § 1132 of this Chapter or § 407 (d) of the Clean Air Act;²

b. NO_x emissions averaging, under § 1132 (D) of this Chapter

or § 407(e) of the Clean Air Act;³ or

c. Repowering with a qualifying clean coal technology under § 1133 of this Chapter or § 409 of the Clean Air Act.⁴

10. "Area source" means, for purposes of Part F of Subchapter 2 of this Chapter, any stationary source of air pollutants that is not a major source. The term "area source" shall not include motor vehicles or nonroad vehicles subject to regulation under Title II of the Clean Air Act.⁵

11. "Attainment area" means any area that has been identified in regulations promulgated by the Administrator of the USEPA as being in compliance with national ambient air quality standards.

12. "Attorney General" means the Navajo Nation Attorney General.

13. "Baseline concentration" means, with respect to a pollutant, the ambient concentration levels which exist at the time of the first application for a permit in an area subject to Part B of Subchapter 2 of this Chapter, based on air quality data available to EPA or NNAQCP and on such monitoring data as the permit applicant is required to submit.

14. "Best available control technology" or "BACT" means, with respect to each pollutant subject to regulation under this Chapter, an emission limitation based on the maximum degree of emission reduction from a major emitting facility which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility through application of production processes and available methods, systems and techniques, including fuel cleaning or treatment or innovative fuel combination techniques for control of such pollutant. In no event shall application of BACT result in emissions of any pollutants which will exceed the emissions allowed by any applicable standard established pursuant to § 111⁶ or § 112⁷ of the Clean Air Act or Parts (D) or (F) of Subchapter 2 of this Chapter.

15. "Building," "structure," "facility" or "installation" means all of the pollutant-emitting activities that belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person or of persons under common control, except that it shall not include the activities of any vessel. Pollutant-emitting activities shall be considered as part of the same industrial grouping if they belong to the same major group (i.e., have the same two digit code) as described in the Standard Industrial Classification Manual, 1972, as amended by the 1977 Supplement (U.S. Government Printing Office stock numbers 4101-0066 and 003-005-00176-0, respectively).

16. "Carcinogenic" shall have the same meaning, for purposes of Part F of Subchapter 2 of this Chapter, as provided by the Administrator of the USEPA under Guidelines for Carcinogenic Risk Assessment as of the date of enactment of the Clean Air Act Amendments of 1990.

17. "Class I," "Class II" and "Class III" shall have the same meaning as provided under Part C of Title 1 of the Clean Air Act.⁸

18. "Clean Air Act" or "Act" means the federal Clean Air Act, as amended, that is set forth at 42 U.S.C. § 7401 *et seq.*

19. "Commence" means, as applied to construction of a source:

a. For purposes other than for Part G of Subchapter 2 of this Chapter, that the owner or operator has obtained all necessary preconstruction approvals or permits required by federal law and this Chapter and has done either of the following:

(1) Begun or caused to begin a continuous program of physical on-site construction of the source to be completed within a reasonable time, or

(2) Entered into binding agreements or contractual obligations, which cannot be cancelled or modified without substantial loss to the owner or operator, to undertake a program of construction of the source to be completed within a reasonable time.

b. For purposes of Part G of Subchapter 2 of this Chapter, that the owner or operator has undertaken a continuous program of construction or that an owner or operator has entered into a contractual obligation to undertake and complete within a reasonable time a continuous program of construction.

20. "Commenced commercial operation" means, for purposes of Part G of Subchapter 2 of this Chapter, to have begun to generate electricity for sale.

21. "Compliance plan" means, for purposes of Part G of Subchapter 2 of this Chapter, either a statement that the source will comply with all applicable requirements of that Part or, where applicable, a schedule and description of the method or methods for compliance and certification by the owner or operator that the source is in compliance with the requirements of that Part.

22. "Construction" means any physical change in a source or change in the method of operation of a source, including fabrication, erection, installation, demolition or modification of a source, that would result in a change in actual emissions.

23. "Continuous Emission Monitoring System" or "CEMS" means the equipment required by § 412 of the Clean Air Act⁹ and the regulations thereunder and used to sample, analyze, measure, and provide on a continuous basis a permanent record of emissions and flow expressed in pounds per million British Thermal units, pounds per hour or such other form as the Administrator of the USEPA prescribes by regulation.

24. "Designated representative" means a responsible person or official authorized by the owner or operator of a unit to represent the owner or operator in matters pertaining to the holding, transfer, or

disposition of allowances allocated to a unit, and the submission of and compliance with permits, permit applications and compliance plans for the unit.

25. "Director" means the Executive Director of the Navajo Nation Environmental Protection Agency.

26. "Excess emissions" means emissions of an air pollutant in excess of any applicable emission standard. The averaging time and test procedures for determining such excess emissions shall be as specified as part of the applicable emission standard.

27. "Existing solid waste incineration unit" means a solid waste incineration unit that is not a new or modified solid waste incineration unit.

28. "Existing source" means any stationary source that is not a new source.

29. "Existing unit" means, for purposes of Part G of Subchapter 2 of this Chapter, a unit (including units subject to § 111 of the Clean Air Act)⁶ that commenced commercial operation before November 15, 1990. Any unit that commenced commercial operation before November 15, 1990 that is modified, reconstructed or repowered after November 15, 1990 shall continue to be an existing unit for the purposes of Part G. Existing units shall not include simple combustion turbines, or units that serve a generator with a nameplate capacity of 25 MWe or less.

30. "Federal land manager" means the Secretary of the United States Department with authority over the federal class I area.

31. "Federally listed hazardous air pollutant" means any air pollutant listed pursuant to § 112 of the Clean Air Act⁷ and not deleted from the list pursuant to that Section.

32. "Hazardous air pollutant" means any federally listed hazardous air pollutant and any air pollutant that the Director has listed as a hazardous air pollutant pursuant to § 1126 of this Chapter.

33. "Lowest achievable emission rate" or "LAER" means, for any source, the rate of emissions that reflects:

a. The most stringent emission limitation that is contained in the implementation plan of any tribe or state for such class or category of source, unless the owner or operator of the proposed source demonstrates that such limitations are not achievable, or

b. The most stringent emission limitation that is achieved in practice by such class or category of source, whichever is more stringent. In no event shall the application of this term permit a proposed new or modified source to emit any pollutant in excess of the amount allowable under applicable new source performance standards.

34. "Major emitting facility" means any of the following stationary

sources of air pollutants that emit, or have the potential to emit, 100 tons per year or more of any air pollutant: fossil-fuel fired steam electric plants of more than 250 mBtu per hour heat input, coal cleaning plants (thermal dryers), kraft pulp mills, Portland Cement plants, primary zinc smelters, iron and steel mill plants, primary aluminum ore reduction plants, primary copper smelters, municipal incinerators capable of charging more than 50 tons of refuse per day, hydrofluoric, sulfuric and nitric acid plants, petroleum refineries, lime plants, phosphate rock processing plants, coke oven batteries, sulfur recovery plants, carbon black plants (furnace process), primary lead smelters, fuel conversion plants, sintering plants, secondary metal production facilities, chemical process plants, fossil-fuel boilers of more than 250 mBtu per hour heat input, petroleum storage and transfer facilities with a capacity exceeding 300,000 barrels, taconite ore processing facilities, glass fiber processing plants, and charcoal production facilities. Such term also includes any other source with the potential to emit 250 tons per year or more of any air pollutant.

35. "Major source" for purposes of Part F of Subchapter 2, means any stationary source or group of stationary sources located within a contiguous area and under common control that emits or has the potential to emit, considering controls, in the aggregate, 10 tons per year or more of any hazardous air pollutant or 25 tons per year or more of any combination of hazardous air pollutants, unless the Administrator of the USEPA establishes a lesser quantity or, in the case of radionuclides, different criteria, as provided in § 112(a)(1) of the Clean Air Act ¹⁰. For purposes of Part B of Subchapter 2, "major source" means "major stationary source," as defined in the USEPA regulations under Clean Air Act Title I, Part C. For purposes of all other parts of Subchapter 2, "major source" means any stationary source that directly emits or has the potential to emit 100 tons per year or more of any air pollutant (including any major emitting facility or source of fugitive emissions of any such pollutant, as determined by rule by the Administrator of the USEPA as provided in § 302(j) of the Clean Air Act),¹¹ or that is defined in Part D of Title I of the Clean Air Act ¹² or the regulations thereunder or in regulations of the NNAQCP as a major source.

36. "Maximum achievable control technology" or "MACT" means an emission standard that requires the maximum degree of reduction in emissions of the hazardous air pollutants subject to this Chapter, including a prohibition on such emission where achievable, that the Director, after considering the cost of achieving such emission reduction and any non-air quality health and environmental impacts and energy requirements, determines to be achievable by new or existing sources in the category or subcategory to which such standard applies, through application of measures, processes, methods, systems or techniques including, but not limited to, measures that:

a. Reduce the volume of, or eliminate emissions of, such pollutants through process changes, substitution of material or other modifications;

b. Enclose systems or processes to eliminate emissions;

c. Collect, capture or treat such pollutants when released from a process, stack, storage or fugitive emissions point;

d. Are design, equipment, work practice, or operational standards, including requirements for operator training or certification, as provided in § 112 (h) of the Clean Air Act;¹³ or

e. Are a combination of the above.

37. "Mobile source" means any combustion engine, device, machine or equipment that operates during transport and that emits or generates air pollutants whether in motion or at rest.

38. "Modification" means, for purposes of Parts B, D, E and F of Subchapter 2 of this Chapter, a physical change in or change in the method of operation of a source that increases the actual emissions of any air pollutant (or, in the case of Part F, hazardous air pollutant) emitted by such source by more than a de minimis amount or that results in the emission of any air pollutant (or hazardous air pollutant) not previously emitted by more than such de minimis amount.

39. "Modified solid waste incineration unit" means a solid waste incineration unit at which modifications have occurred after the effective date of a standard under § 129(a) of the Clean Air Act ¹⁴ if:

a. The cumulative cost of the modifications, over the life of the unit, exceed fifty percent (50%) of the original cost of construction and installation of the unit (not including the cost of any land purchased in connection with such construction or installation) updated to current costs;

b. The modification is a physical change in or change in the method of operation of the unit that increases the amount of any air pollutant emitted by the unit for which standards have been established under § 111 ⁷ or § 129 ¹⁵ of the Clean Air Act.

40. "Municipal solid waste" means refuse and refuse derived fuel collected from the general public and from residential, commercial, institutional and industrial sources consisting of paper, wood, yard wastes, food wastes, plastics, leather, rubber and other combustible materials and noncombustible materials such as metal, glass and rock, provided that:

a. The term does not include industrial process wastes or medical wastes that are segregated from such other wastes; and

b. An incineration unit shall not be considered to be combusting municipal waste for purposes of § 111 ⁷ and § 129 ¹⁵ of the Clean Air Act and § 1121 of this Chapter if it combusts a fuel feed stream thirty percent (30%) or less of the weight of which is comprised, in aggregate, of municipal waste.

41. "Nation" means the Navajo Nation, and shall encompass the area defined in 7 N.N.C. § 254.

42. "National ambient air quality standard" or "NAAQS" means the ambient air pollutant concentration limits established by the Administrator of the USEPA pursuant to § 109¹⁶ of the Clean Air Act.

43. "Navajo Nation Air Quality Control Program" or "NNAQCP" means the program within the Navajo Nation Environmental Protection Agency responsible for implementing and enforcing this Chapter.

44. "New solid waste incineration unit" means a solid waste incineration unit the construction of which is commenced after the Administrator of the USEPA proposes requirements under § 129 of the Clean Air Act¹⁵ establishing emissions standards or other requirements that would be applicable to such unit or to a modified solid waste incineration unit.

45. "New source" means, for purposes of § 1121 of this Chapter, any stationary source, the construction or modification of which is commenced after the publication of regulations (or, if earlier, of proposed regulations) prescribing a standard of performance under § 111 of the Clean Air Act⁶ that will be applicable to such source. For purposes of Part F of Subchapter 2 of this Chapter, "new source" means a stationary source the construction or reconstruction of which is commenced after the Administrator of the USEPA first proposes regulations under § 112 of the Clean Air Act⁷ establishing an emission standard applicable to such source.

46. "New unit" means, for purposes of Part G of Subchapter 2 of this Chapter, a unit that commences commercial operation on or after November 15, 1990.

47. "Nonattainment area" means any area that is designated pursuant to § 107 of the Clean Air Act¹⁷ and where violations of national ambient air quality standards have been measured.

48. "Owner" or "operator" means any person who owns, leases, operates, controls, or supervises a source.

49. "Person" means any public or private corporation, company, partnership, firm, association or society of persons, the federal or state governments and any of their programs or agencies, the Nation and any of its agencies, programs, enterprises, companies or political subdivisions, as well as a natural person.

50. "Phase H" means, for purposes of Part G of Subchapter 2 of this Chapter, the period beginning January 1, 2000 and extending into the future.

51. "Portable source" means any stationary source that is capable of being transported and operated in more than one location.

52. "President" means the President of the Navajo Nation.

53. "Reasonable further progress" means, for purposes of Part E of

Subchapter 2 of this Chapter, such annual incremental reductions in emissions of the relevant air pollutant as are required by Part E or may reasonably be required by the Director or the Administrator of the USEPA in order to ensure attainment of the applicable national ambient air quality standard by the applicable date.

54. "Reasonably available control technology" or "RACT" means devices, systems process modifications, or other apparatus or techniques that are reasonably available taking into account:

a. The necessity of imposing such controls in order to attain and maintain a national ambient air quality standard,

b. The social, environmental and economic impact of such controls, and

c. Alternative means of providing for attainment and maintenance of such standard.

55. A "repowering" means replacement of an existing coal-fired boiler with one of the clean coal technologies specified in §§ 402¹⁸ and 415¹⁹ of the Clean Air Act and in the regulations thereunder.

56. "Resources Committee" means the standing committee of the Navajo Nation Council with oversight authority over the Navajo Nation Environmental Protection Agency.

57. "Schedule of compliance" means, for purposes of Part H of Subchapter 2 of this Chapter, a schedule of remedial measures, including an enforceable sequence of actions or operations, leading to compliance with an applicable implementation plan, emission standard, emission limitation or emission prohibition.

58. "Small business stationary source" means a stationary source that:

a. Is owned or operated by a person that employs 100 or fewer individuals;

b. Is a small business concern as defined in the Small Business Act, 42 U.S.C. § 631 *et seq.*;

c. Is not a major stationary source;

d. Emits fewer than 50 tons per year of any regulated pollutant; and

e. Emits fewer than 75 tons per year of all regulated pollutants combined, except as excluded by the Administrator of the USEPA pursuant to § 507(c)(3)(A) of the Clean Air Act²⁰ or as modified by the Director pursuant to § 1140 (A) of this Chapter.

59. "Solid waste incineration unit" means a distinct operating unit of any facility that combusts any solid waste material from commercial or

industrial establishments or the general public (including single and multiple residences, hotels and motels). Such term does not include incinerators or other units required to have a permit under § 3005 of the Solid Waste Disposal Act, 42 U.S.C. § 6925. The term also does not include:

a. Materials recovery facilities (including primary or secondary smelters) that combust waste for the primary purpose of recovering metals;

b. Qualifying small power production facilities, as defined in 16 U.S.C. § 769(17)(C), or qualifying cogeneration facilities, as defined in 16 U.S.C. § 769 (18) (B), that burn homogeneous waste (such as units that burn tires or used oil, but not including refuse-derived fuel) for the production of electric energy or, in the case of qualifying cogeneration facilities, that burn homogeneous waste for the production of electric energy and steam or other useful forms of energy (such as heat) that are used for industrial, commercial, heating or cooling purposes; or

c. Air curtain incinerators, provided that such incinerators only burn wood wastes, yard wastes and clean lumber and that such air curtain incinerators comply with opacity limitations established by rule by the Administrator of the USEPA.

60. "Source" means any building, structure, facility or installation that may cause or contribute to air pollution.

61. "Standard of performance" means a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any non-air quality health and environmental impact and energy requirements) the Administrator of the USEPA determines has been adequately demonstrated.

62. "Stationary source" means any building, structure, facility, or installation that emits or may emit any air pollutant and that is not a nonroad engine under Title II of the Clean Air Act.²¹

63. "Tribal implementation plan" means the accumulated record of enforceable air pollution control measures, programs and plans adopted by the Director and submitted to the Administrator of the USEPA pursuant to § 110(o)²² and § 301(d)²³ of the Clean Air Act and Part A of Subchapter 2 of this Chapter.

64. "Unclassifiable area" means an area of the Navajo Nation for which inadequate ambient air quality data exist to determine compliance with the national ambient air quality standards.

65. "Unit" means, for purposes of Part G of Subchapter 2 of this Chapter, a fossil fuel-fired combustion device.

66. "Utility unit" means, for purposes of Part G of Subchapter 2 of this Chapter:

a. A unit that serves a generator that produces electricity for sale, or a unit that, during 1985, served a generator that produced electricity for sale.

b. Notwithstanding Subparagraph (a), a unit described in Subparagraph (a) that was in commercial operation during 1985 but did not, during 1985, serve a generator that produced electricity for sale shall not be a utility unit for purposes of Part G.

c. A unit that cogenerates steam and electricity is not a "utility unit" for purposes of Part G unless the unit is constructed for the purpose of supplying, or commences construction after November 15, 1990 and supplies more than one third of its potential electric output capacity and more than 25 megawatts electrical output to any utility power distribution system for sale.

67. "Visibility Transport Region" means, whenever, upon the USEPA Administrator's motion or by petition from the Governors of at least two affected States, the Administrator of the USEPA has reason to believe that the current or projected interstate transport of air pollutants from one or more States contributes significantly to visibility impairment in Class I areas located in the affected States, the Administrator of the USEPA may establish a transport region for such pollutants that includes such States.

History

CAP-12-04, April 22, 2004.

CJY-58-95, July 20, 1995.

§ 1102. Declaration of policy

A. Legislative findings and purposes:

1. The Navajo Nation Council finds that air pollution exists with varying degrees of severity within the Navajo Nation; is an increasing danger to the health and welfare of residents of the Navajo Nation; can cause physical discomfort and injury to property and property values, including injury to agricultural crops and livestock; discourages recreational and other uses of the Navajo Nation's resources; and is aesthetically unappealing.

2. The Navajo Nation Council, by enacting this Chapter, is creating a coordinated program to control present and future sources of air pollution on the Navajo Nation. This Chapter provides for the regulation of air pollution activities in a manner that ensures the health, safety and general welfare of all the residents of the Navajo Nation, protects property values and protects plant and animal life. The Council further is placing primary responsibility for air pollution control and abatement in the Navajo Nation Air Quality Control Program, a program of the Navajo Nation Environmental Protection Agency.

B. Maintenance of air quality. It is the policy of this Nation that no further significant degradation of the air in the Navajo Nation shall be tolerated, and that economic growth will occur in a manner consistent with the preservation of existing clean air resources. Those sources emitting pollutants in excess of the emission standards set by the Director of the Navajo Nation Environmental Protection Agency shall bring their emissions into conformity with the standards with all due speed. A new source shall not commence operation until it has secured a permit according to the provisions of this Chapter, the conditions of which require that operation of the source will not cause pollution in excess of the standards set by the Director.

C. Modular approach to air quality control programs:

1. The Navajo Nation is committed to providing for an air quality control program to ensure clean air for residents of the Navajo Nation. Pursuant to § 301 (d) of the Clean Air Act ¹ and the regulations thereunder, however, it is discretionary with the Navajo Nation as to whether and which Clean Air Act programs to implement, and in what order. The Director shall determine which programs are essential to the protection of the environment and the health and welfare of the Navajo Nation, and of those programs shall determine which should be developed first. The Director may also determine that only parts of such programs are essential, and may develop these severable portions, as provided in the regulations under § 301 (d) of the Clean Air Act. The Director shall not be required to develop any of the programs described in this Chapter by any particular time.

2. However, once the Director determines that a particular program or portion of a program should be developed, the Director and the NNAQCP must comply with all the relevant statutory and regulatory requirements for that program or portion of a program.

History

CAP-12-04, April 22, 2004.

CJY-58-95, July 20, 1995.

§ 1103. Administration

A. Regulations. The Director is authorized to prescribe such regulations as are necessary to carry out his/her functions under this Chapter, pursuant to the provisions of § 1161 of this Chapter. This shall include setting air quality standards, emission limitations and standards of performance for the prevention, control and abatement of air pollution in the Navajo Nation. In prescribing regulations, the Director shall give consideration to but shall not be limited to the relevant factors prescribed by the Clean Air Act ¹ and the regulations hereunder, except that the regulations prescribed by the Director shall be at least as stringent as those promulgated under the Clean Air Act. All regulations promulgated under this Chapter shall be subject to approval by the Resources Committee of the Navajo Nation Council.

B. Authority of Director. In addition, in order to fulfill his/her obligations under this Chapter, the Director may:

1. Conduct investigations, inspections and tests to carry out the duties of this Chapter according to the procedures established by this Chapter;

2. Hold hearings related to any aspect of or matter within the duties of this Section and, in connection therewith, compel the attendance of witnesses and the production of records;

3. Prepare and develop a comprehensive plan or plans for the abatement and control of air pollution in the Navajo Nation;

4. Encourage voluntary cooperation by advising and consulting with persons or affected groups, tribes or states to achieve the purposes of this Chapter, including voluntary testing of actual or suspected sources of air pollution;

5. Subject to 2 N.N.C. § 164(B)(2) and 2 N.N.C. § 1005(C)(2), enter into voluntary compliance agreements with entities that otherwise may not be subject to the provisions of this Chapter, or as to which there is a dispute regarding the applicability of this Chapter, under which the entity would be regulated by the Navajo Nation for air quality in order to achieve the goals and purposes of this Chapter, and provided that the Director finds, after consultation with the Resources Committee, that entering into the agreement is in the best interests of the Navajo Nation. Such agreements may contain provisions that differ from and supersede the requirements of this Chapter and implementing regulations, provided that the minimum federal requirements apply to the entity in question;

6. Make continuing determinations of the quantity and nature of emission of air pollutants, topography, wind and temperature conditions, possible chemical reactions in the atmosphere, the character of development of the various areas of the Navajo Nation, the economic effect of remedial measures on the various areas of the Navajo Nation, the availability, use and economic feasibility of air-cleaning devices, the effect on human health and property of air pollutants, and other matters necessary to arrive at a better understanding of air pollution and its control;

7. Consistent with Title 2, Navajo Nation Code, accept, receive and administer grants or other funds or gifts from public and private agencies, including the federal government, to carry out any of the purposes of this Chapter, provided that all monies resulting therefrom shall be deposited in the Navajo treasury to the account of the Air Quality Control Program, as authorized under Navajo law;

8. Secure necessary scientific, technical, administrative and operational services, including laboratory facilities, by contract or otherwise, to carry out the purposes of this Chapter;

9. Compile and publish from time to time reports, data and statistics with respect to matters studied or investigated by the Director or at his/her direction;

10. Require, as specified in § 1151 of this Chapter, any source of air pollution to monitor, sample or perform other studies to quantify emissions of air pollutants or levels of air pollution that may reasonably be attributable to that source; and

11. Perform such other activities as the Director may find necessary to carry out his/her functions under this Chapter.

C. Delegation of powers and duties. The Director may delegate to any officer or employee of the Navajo Nation Environmental Protection Agency such powers and duties under this Chapter, except the making of regulations, as he/she may deem necessary or expedient.

History

CAP-12-04, April 22, 2004.

CJY-58-95, July 20, 1995.

§ 1104. Air quality impact reports

A. Contents of report. Whenever a Navajo agency proposes to carry out or approve a Navajo-funded project relating to transportation that may have a significant impact on air quality, the agency shall file with the Director a report that contains the following information:

1. A description of the proposed project;
2. Any significant impact on air quality of the proposed project;
3. Significant environmental effects that can not be avoided if the project is implemented, including any significant irreversible air quality changes that would be involved in the proposed project if it is implemented;
4. Mitigation measures proposed to minimize any significant air quality effects;
5. Alternatives to the proposed project;
6. The known views of any local groups concerning the proposed project; and
7. A statement briefly indicating the reasons for determining that various effects of a project are not significant and consequently have not been discussed in detail in the impact report.

B. Exemptions. This Section shall not apply to:

1. Emergency repairs to public service facilities that are necessary to maintain service;
2. Projects that are undertaken, carried out or approved to

maintain, repair, restore, demolish or replace property or facilities damaged or destroyed as a result of a disaster in a disaster-stricken area in which a state of emergency has been declared by the President;

3. Projects related to the interstate highway system; and

4. Projects that were already in existence before the date of enactment of this Chapter.

History

CAP-12-04, April 22, 2004.

CJY-58-95, July 20, 1995.

§ 1105. Emergency powers

A. Injunctive relief. Notwithstanding any permit granted pursuant to this Chapter, the Director, upon receipt of evidence that a pollution source or combination of sources (including mobile or portable sources) is presenting an imminent and substantial endangerment to public health or welfare or the environment, may bring suit on behalf of the Navajo Nation, pursuant to § 1154 of this Chapter, to immediately restrain any person causing or contributing to the alleged pollution to cease such emissions or to take such other action as may be necessary.

B. Orders of the Director:

1. If the Director determines that air pollution is presenting an imminent and substantial endangerment to public health or welfare or the environment and determines, in consultation with the Attorney General, that it is not practicable to assure prompt protection of public health or welfare or the environment by commencement of a civil action pursuant to Subsection (A) of this Section, the Director may issue such orders as may be necessary to protect public health or welfare or the environment. Such orders may prohibit, restrict or condition any and all activities that contribute or may contribute to the emergency, including but not limited to motor vehicles; retail, commercial, manufacturing and industrial activities; incinerators; and the burning or other consumption of fuels or other materials.

2. Any order issued by the Director under this Section shall be effective immediately upon issuance and shall remain in effect for a period of not more than 60 days, unless the Director brings an action pursuant to Subsection (A) of this Section within the 60-day period. If the Director brings such an action, the order shall remain in effect for an additional 14 days or for such longer period as may be authorized by the court in which such action is brought.

3. Orders of the Director shall be enforced by the NNAQCP, the Navajo Department of Justice, Resources Enforcement and the Division of Public Safety. Those authorized to enforce the orders may take reasonable steps to assure compliance, including but not limited to:

a. Entering upon any property or establishment believed to be violating the order and demanding compliance;

b. Stopping, detouring, rerouting and prohibiting vehicle traffic; and

c. Terminating operations at incinerators or other types of combustion facilities.

History

CJY-58-95, July 20, 1995.

§ 1106. Severability and preservation of rights

A. Severability. If any provision of this Chapter, or the application of any provision of this Chapter to any person or circumstance, is held invalid, the remainder of this Chapter and the application of such provision to other persons or circumstances shall remain unaffected.

B. Preservation of rights. It is the purpose of this Chapter to provide additional and cumulative remedies to prevent, abate and control air pollution in the Navajo Nation. Nothing contained in this Chapter shall be construed to abridge or alter rights of action or remedies in equity under the common law or statutory law, nor shall any provisions of this Part or any act done by virtue thereof be construed as preventing the Navajo Nation or individuals from the exercise of their rights under the common law or statutory law to suppress nuisances or to abate pollution.

History

CJY-58-95, July 20, 1995.

Subchapter 2. Air Quality Control Programs

Part A. Tribal Implementation Plans

§ 1111. Designation of air quality control regions

A. Designations. The Director may request the President to submit to the Administrator of the USEPA a list of all areas in the Navajo Nation, designating, with regard to each pollutant for which a national ambient air quality standard exists, each such area as:

1. Nonattainment, if it does not meet (or contributes to ambient air quality in a nearby area that does not meet) the national primary or secondary ambient air quality standard for the pollutant;

2. Attainment, if it meets the national primary or secondary ambient air quality standard for the pollutant; or

3. Unclassifiable, if it can not be classified on the basis of available information as meeting or not meeting the national primary or

secondary ambient air quality standard for the pollutant.

B. Redesignations

1. If the President has submitted designations to the Administrator of the USEPA pursuant to Subsection (A) of this Section, and the Administrator of the USEPA promulgates a new or revised NAAQS pursuant to § 109 of the Clean Air Act,¹ the President may, and in the case of a revised NAAQS for which the President has submitted designations pursuant to Subsection (A) shall, submit to the Administrator of the USEPA a new list of designations not later than one year after promulgation of the new or revised NAAQS.

2. The President also shall submit to the Administrator of the USEPA a redesignation of a particular area no later than 120 days after receiving notification from the Administrator of the USEPA, pursuant to § 107(d) (3) of the Clean Air Act,² of the need to redesignate.

3. The Director may request the President, on his/her own motion, to submit to the Administrator of the USEPA for approval, pursuant to § 107 of the Clean Air Act,³ a redesignation of any area within the Navajo Nation if air quality changes within such area. In the case of an area in the Nation which the Administrator of the USEPA finds may significantly affect air pollution concentrations in a state or another tribe, the Director may redesignate that area only with the consent of the states or tribes which the Administrator of the USEPA determines may be significantly affected.

4. The submission of a redesignation shall not affect the effectiveness or enforceability of the applicable tribal implementation plan.

C. Regulations. If the President decides to submit designations to the Administrator of the USEPA under this Section, the Director shall adopt regulations to implement this Section that both:

1. Describe the geographic extent of attainment, nonattainment or unclassified areas of the Navajo Nation for all pollutants for which a national ambient air quality standard exists; and

2. Establish procedures and criteria for redesignating such areas that include:

a. The technical bases for proposed changes, including ambient air quality data, types and distributions of sources of air pollution, population density and projected population growth, transportation system characteristics, traffic congestion, projected industrial and commercial development, meteorology, pollution transport and political boundaries; and

b. Provisions for review of and public comment on proposed changes to area designations.

History

CJY-58-95, July 20, 1995.

United States Code

Air quality control regions, see 42 U.S.C. § 7407.

§ 1112. Tribal (Navajo Nation) implementation plans for national primary and secondary ambient air quality standards

A. Submission of and contents of plans. The Director may submit to the Administrator of the USEPA a tribal (Navajo Nation) implementation plan for any pollutant for which a national ambient air quality standard exists. The plan shall provide for implementation, maintenance and enforcement of such standard and protection of visibility in each air quality control region within the Navajo Nation. The plan shall be adopted by the Director according to the provisions of § 1161 of this Chapter and shall contain the following provisions:

1. Each Tribal implementation plan shall:

a. Include enforceable emission limitations and other control measures, means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emission rights), as well as schedules and timetables for compliance, as may be necessary or appropriate to meet the applicable requirements of this Chapter or the Clean Air Act;¹

b. Provide for establishment and operation of appropriate devices, methods, systems, and procedures necessary to monitor, compile, and analyze data on ambient air quality, and upon request, make such data available to the Administrator of the USEPA;

c. Include a program to enforce the measures described in Subparagraph (a) and regulate the modification and construction of any stationary source within the areas covered by the plan as necessary to assure that national ambient air quality standards are achieved, including a permit program as required in Parts B and E of this Subchapter;

d. Contain adequate provisions:

(1) Prohibiting, consistent with the provisions of this Chapter, any source within the Navajo Nation from emitting any air pollutant in amounts that will:

(a) Contribute significantly to nonattainment in, or interfere with maintenance by, any neighboring state or tribe with respect to any such national primary or secondary ambient air quality standard; or

(b) Interfere with measures required to be included in an applicable implementation plan for any neighboring state or tribe under Part C of Title I of the Clean Air Act ² to prevent

significant deterioration of air quality or to protect visibility; and

(2) Insuring compliance with the applicable requirements of Subsection (C) of this Section (relating to interstate pollution abatement);

e. Provide:

(1) Necessary assurances that the Navajo Nation will have adequate personnel, funding, and authority under Navajo Nation law to carry out such implementation plan and that the NNAQCP is not prohibited by any provision of federal or tribal law from carrying out such implementation plan or portion thereof; and

(2) Necessary assurances that, where the Navajo Nation has relied on a local or regional government, agency, or instrumentality for the implementation of any plan provision, the Navajo Nation has responsibility for ensuring adequate implementation of such plan provision;

f. Require, as may be prescribed by the Administrator of the USEPA:

(1) The installation, maintenance, and replacement of equipment, and the implementation of other necessary steps, by owners or operators of stationary sources to monitor emissions from such sources;

(2) Periodic reports on the nature and amounts of emissions and emissions related data from such sources; and

(3) Correlation of such reports by the NNAQCP with any emission limitations or standards established pursuant to this Chapter, which reports shall be available at reasonable times for public inspection;

g. Provide for authority comparable to that in § 1105 of this Chapter and adequate contingency plans to implement such authority,

h. Provide for revision of such plan:

(1) From time to time as may be necessary to take account of revisions of national primary or secondary ambient air quality standards or the availability of improved or more expeditious methods of attaining such standards; and

(2) Whenever the Administrator of the USEPA finds, on the basis of information available to the Administrator of the USEPA and pursuant to the requirements of § 110 of the Clean Air Act³ and the regulations hereunder, that the plan is substantially inadequate to attain the national ambient air quality standard which it implements or to otherwise comply with any additional requirements established under the Clean Air Act¹ or this Chapter.

i. In the case of a plan or plan revision for an area

designated as a nonattainment area, meet the applicable requirements of Part E of this Subchapter (relating to nonattainment areas);

j. Meet the applicable requirements of Subsection (D) of this Section (relating to public notification) and Parts B and C of this Subchapter (relating to prevention of significant deterioration of air quality and visibility protection);

k. Provide for:

(1) The performance of such air quality modeling as the Administrator of the USEPA may prescribe for the purpose of predicting the effect on ambient air quality of any emissions of any air pollutant for which the Administrator of the USEPA has established a national ambient air quality standard; and

(2) The submission, upon request, of data related to such air quality modeling to the Administrator of the USEPA;

l. Require the owner or operator of each major stationary source to pay to the permitting authority, as a condition of any permit required under this Chapter, a fee sufficient to cover:

(1) The reasonable costs of reviewing and acting upon any application for such a permit; and

(2) If the owner or operator receives a permit for such source, the reasonable costs of implementing and enforcing the terms and conditions of any such permit (not including any court costs or other costs associated with any enforcement action), until such fee requirement is superseded with respect to such sources by the USEPA Administrator's approval of a fee program under Title V of the Clean Air Act;⁴

m. Provide for consultation and participation by Navajo chapters, as defined in 2 N.N.C. § 4001, and any Navajo-created townships affected by the plan; and

n. Provide that in the case of any source which uses a supplemental or intermittent control system for purposes of meeting the requirements of an order under § 113(d) of the Clean Air Act,⁵ the owner or operator of such source may not temporarily reduce the pay of any employee by reason of the use of such supplemental or intermittent or other dispersion-dependent control system.

B. Revisions to plans

1. The Director shall adopt regulations that describe procedures for revising tribal implementation plans as needed from time to time and as required by the Administrator of the USEPA, pursuant to the Clean Air Act¹ and the regulations thereunder, after promulgation of new or revised national ambient air quality standards.

2. If the Director has adopted and submitted to the Administrator of the USEPA a proposed plan revision which the Director determines:

a. Meets the requirements of this Section; and

b. Is necessary (i) to prevent the closing for one year or more of any source of air pollution and (ii) to prevent substantial increases in unemployment which would result from such closing, and which the Administrator of the USEPA has not approved or disapproved under this Section within 12 months of submission of the proposed plan revision, the Director may issue a temporary emergency suspension of the part of the applicable implementation plan that is proposed to be revised with respect to such source. The determination under Subparagraph (b) may not be made with respect to a source that would close without regard to whether or not the proposed plan revision is approved.

3. A temporary emergency suspension issued by the Director under this Subsection shall remain in effect for a maximum of four months or such lesser period as may be specified in a disapproval order of the Administrator of the USEPA.

4. The Director may include in any temporary emergency suspension issued under this Subsection a provision delaying for a period identical to the period of such suspension any compliance schedule (or increment of progress) to which such source is subject under § 113 (d) of the Clean Air Act⁵ upon a finding that such source is unable to comply with such schedule (or increment) solely because of the conditions on the basis of which a suspensions was issued under this Subsection.

C. Interstate pollution abatement. Each applicable implementation plan shall require each proposed new or modified major source that is subject to Part B of this Chapter or that may significantly contribute to levels of air pollution in excess of the NAAQS in any air quality control region outside the Navajo Nation to provide written notice to all nearby states or tribes in which air pollution levels may be affected by such source at least 60 days prior to the date on which commencement of construction is to be permitted. Each applicable plan shall also identify all major existing stationary sources that may significantly contribute to levels of air pollution in excess of the NAAQS in any area outside the Navajo Nation and shall provide for notice to all nearby states or tribes in which air pollution levels may be affected of the identity of such sources.

D. Public notification. Each plan shall contain measures that will be effective to notify the public on a regular basis of instances or areas in which any national primary ambient air quality standard is or was exceeded, to advise the public of the health hazards associated with such pollution, and to enhance public awareness of the measures that can be taken to prevent such standards from being exceeded and the ways in which the public can participate in regulatory and other efforts to improve air quality. Provisions shall be made to notify the public in both the Navajo and English languages.

E. Prohibition against modification of plan requirements. No order, suspension, plan revision or other action modifying any requirement of any applicable implementation plan may be taken with respect to any stationary source except for those specifically allowed under the provisions of this Chapter and the Clean Air Act.¹

History

CAP-12-04, April 22, 2004.

CJY-58-95, July 20, 1995.

United States Code

National primary and secondary ambient air quality standards, see 42 U.S.C. § 7409.

State implementation of plans for national primary and secondary ambient air quality standards, see 42 U.S.C. § 7410.

§ 1113. Regulation of fuels and motor vehicles

The provisions of §§ 177,¹ 211 (c), (k) and (m),² 246³ and 249⁴ of the Clean Air Act and the regulations hereunder, regarding fuels and motor vehicles, shall apply as required by the Clean Air Act⁵ in certain nonattainment areas or as adopted by the Navajo Nation.

History

CJY-58-95, July 20, 1995.

Part B. Prevention of Significant Deterioration of Air Quality

§ 1114. Plan requirements

Each applicable implementation plan shall contain emission limitations and such other measures as may be necessary, as determined under regulations promulgated under this Part, to prevent significant deterioration of air quality in each area designated pursuant to § 1111 of this Chapter and § 107 of the Clean Air Act¹ as attainment or unclassifiable. The provisions of this Part do not apply to hazardous air pollutants listed under Part F of this Subchapter.

History

CJY-58-95, July 20, 1995.

United States Code

Plan requirements, see 42 U.S.C. § 7471.

§ 1115. Initial classification

All areas in the Navajo Nation that are designated as attainment or unclassifiable pursuant to § 1111 of this Chapter and § 107 of the Clean Air Act¹ shall be class II areas, as defined under Part C of Title I of the Clean Air Act,² unless reclassified under § 1117 of this Chapter.

History

CJY-58-95, July 20, 1995.

United States Code

Initial classifications, see 42 U.S.C. § 7472.

§ 1116. Increments and ceilings

A. Sulfur oxide and particulate matter. Each applicable implementation plan shall contain measures ensuring that maximum allowable increases over baseline concentrations of, and maximum allowable concentration of, sulfur dioxide and particulate matter shall not be exceeded. The maximum allowable increases and concentrations and provisions affecting those increases and concentrations are specified in §§ 163¹ and 165(d)² of the Clean Air Act and the regulations thereunder.

B. Other pollutants. In the case of nitrogen oxides, each applicable implementation plan shall contain measures ensuring compliance with the maximum allowable increases set forth at 40 C.F.R. § 51.166. With respect to any air pollutant for which a NAAQS is established, other than sulfur oxides or particulate matter, an area classification plan shall not be required if the implementation plan adopted by the Navajo Nation and submitted for the USEPA Administrator's approval or promulgated by the Administrator of the USEPA under § 110(c) of the Clean Air Act³ contains other provisions that, when considered as a whole, the Administrator of the USEPA finds will carry out the purposes in § 110 of the Clean Air Act⁴ at least as effectively as an area classification plan for such pollutant. Such other provisions referred to in the preceding sentence need not require the establishment of maximum allowable increases with respect to such pollutant for any area to which this Section applies.

History

CAP-12-04, April 22, 2004.

CJY-58-95, July 20, 1995.

United States Code

Increments and ceilings, see 42 U.S.C. § 7473.

§ 1117. Area reclassification

A. Authority to reclassify areas. The President may reclassify, upon approval of the Navajo Nation Council, such areas as he deems appropriate as class I areas. The land comprising Canyon de Chelly National Monument, as established in 16 U.S.C. § 445, may be reclassified only as class I or II. An area may be reclassified as class III if:

1. Such reclassification will not cause or contribute to concentrations of any air pollutant which exceed any maximum allowable increase or maximum allowable concentration permitted under the classification of any other area; and

2. Such reclassification otherwise meets the requirements of this Part.

B. Notice and hearing; disapproval of Administrator of the USEPA

1. Prior to reclassification of any area under this Part, notice shall be afforded and public hearings shall be conducted in areas proposed to be reclassified and in areas which may be affected by the proposed reclassification. Prior to any such public hearing a satisfactory description and analysis of the health, environmental, economic, social and energy effects of the proposed reclassification shall be prepared and made available for public inspection, and prior to any such reclassification the description and analysis of such effects shall be reviewed and examined by the Navajo Nation Council.

2. Prior to the issuance of notice under Paragraph (1) respecting the reclassification of any area under this Subsection, if such area includes any federal lands, the President shall provide for written notice to be given to the appropriate federal land manager and afford adequate opportunity (but not in excess of 60 days) to confer with the President and to submit written comments and recommendations with respect to the intended notice of reclassification. In reclassifying any area under this Section with respect to which any federal land manager has submitted written comments and recommendations, the President shall publish a list of any inconsistency between such reclassification and such recommendations and an explanation of such inconsistency (together with the reasons for making such reclassification against the recommendation of the federal land manager).

3. Any reclassification is subject to disapproval by the Administrator of the USEPA pursuant to § 164(b) (2) of the Clean Air Act.¹

C. Resolution of disputes between the Navajo Nation and other Indian tribes or states. If any state or tribe is affected by the reclassification of an area by the Navajo Nation and if such party disagrees with such reclassification, or if a permit is proposed to be issued for any new major emitting facility proposed for construction in the Navajo Nation which the governor of an affected state or governing body of an affected tribe, as the case may be, determines will cause or contribute to a cumulative change in air quality in excess of that allowed in the affected state or tribe, the Director shall enter into negotiations with the representative of such governor or other Indian governing body to attempt to resolve such dispute. If the parties are unable to reach an agreement, the Director shall request the USEPA Administrator's involvement pursuant to § 164(e) of the Clean Air Act.²

History

CJY-58-95, July 20, 1995.

United States Code

Area redesignation, see 42 U.S.C. § 7474.

§ 1118. Preconstruction requirements

A. Major emitting facilities on which construction is commenced. No major emitting facility on which construction was commenced after August 7, 1977, may be constructed in any area to which this Part applies unless:

1. A permit has been issued for such proposed facility in accordance with this Part (and Part H of this Subchapter) setting forth emission limitations for such facility which conform to the requirements of this Part;

2. The proposed permit has been subject to a review in accordance with this Section, the required analysis has been conducted in accordance with regulations promulgated by the Administrator of the USEPA, and a public hearing has been held with opportunity for interested persons including representatives of the Administrator of the USEPA to appear and submit written or oral presentations on the air quality impact of such source, alternatives to the proposed construction, control technology requirements, and other appropriate considerations;

3. The owner or operator of such facility demonstrates as required pursuant to § 110(j) of the Clean Air Act,¹ that emissions from construction or operation of such facility will not cause, or contribute to, air pollution in excess of any (a) maximum allowable increase or maximum allowable concentration for any pollutant in any area to which this Part applies more than one time per year, (b) national ambient air quality standard in any air quality control region, or (c) any other applicable emission standard or standard of performance under this Chapter;

4. The proposed facility is subject to the best available control technology for each pollutant subject to regulation under this Chapter that is emitted from or results from such facility;

5. The proposed facility has complied with the provisions of Subsection (D) of this Section with respect to protection of class I areas, where applicable;

6. There has been an analysis of any air quality impacts projected for the area as a result of growth associated with such facility;

7. The person who owns or operates, or proposes to own or operate, a major emitting facility for which a permit is required under this Part agrees to conduct such monitoring as may be necessary to determine the effect that emissions from any such facility may have, or are having, on air quality in any area that may be affected by emissions from such source; and

8. In the case of a source which proposes to construct in a class III area, emissions from which would cause or contribute to exceeding the maximum allowable increments applicable in a class II area and where no standard under § 111 of the Clean Air Act² has been promulgated subsequent to August 7, 1977 for such source category, the Administrator of the USEPA has approved the determination of best available technology

as set forth in the permit.

B. Exception. The demonstration pertaining to maximum allowable increases required under Subsection (A) (3) of this Section shall not apply to maximum allowable increases for class II areas in the case of an expansion or modification of a major emitting facility that was in existence on August 7, 1977, whose allowable emissions of air pollutants, after compliance with Subsection (A) (4) of this Section, will be less than 50 tons per year and for which the owner or operator of such facility demonstrates that emissions of particulate matter and sulfur oxides will not cause or contribute to ambient air quality levels in excess of the national secondary ambient air quality standard for either of such Pollutants.

C. Permit applications. Any completed permit application under this Part and the regulations hereunder for a major emitting facility in any area to which this Part applies shall be granted or denied not later than one year after the date of filing of such completed application.

D. Action taken on permit applications; notice; adverse impact on air quality related values; variance; emission limitations

1. The Director shall transmit to the Administrator of the USEPA a copy of each permit application relating to a major emitting facility that he/she receives and provide notice to the Administrator of the USEPA of every action related to the consideration of such permit. The Administrator of the USEPA will provide notice of the permit application to the federal land manager and the federal official directly responsible for management of any lands within a class I area that may be affected by emissions from the proposed facility, pursuant to the requirements of § 165 (d) (2) of the Clean Air Act.³

a. In any case where the federal official charged with direct responsibility for management of any lands within a class I area, or the federal land manager of such lands, or the Administrator, of the USEPA, or the Governor of an adjacent state or governing body of a nearby tribe containing such a class I area files a notice alleging that emissions for a proposed major emitting facility may cause or contribute to a change in the air quality in such area and identifying the potential adverse impact of such change, a permit shall not be issued unless the owner or operator of such facility demonstrates that emissions of particulate matter and sulfur dioxide will not cause or contribute to concentrations which exceed the maximum allowable increases for a class I area.

b. In any case where the federal land manager demonstrates to the satisfaction of the Director that the emissions for such facility will have an adverse impact on the air quality-related values (including visibility) of such lands, notwithstanding the fact that the change in air quality resulting from emissions from such facility will not cause or contribute to concentrations which exceed the maximum allowable increases for a class I area, a permit shall not be issued.

c. In any case where the owner or operator of such facility demonstrates to the satisfaction of the federal land manager, and the federal land manager so certifies, that the emissions from such facility

will have no adverse impact on the air quality-related values of such lands (including visibility), notwithstanding the fact that the change in air quality resulting from emissions from such facility will cause or contribute to concentrations which exceed the maximum allowable increases for class I areas, the NNAQCP may issue a permit.

d. In the case of a permit issued pursuant to Paragraph (c), the facility shall comply with such emission limitations under the permit as may be necessary to assure that emissions of sulfur oxides and particulates from the facility will not cause or contribute to concentrations of such pollutant which exceed the maximum allowable increases over the baseline concentration regulations thereunder.

e. In any case where the owner or operator of a proposed major emitting facility who has been denied a certification under Paragraph (c) demonstrates to the satisfaction of the President, after notice and public hearing, and the President finds, that the facility cannot be constructed by reason of any maximum allowable increase for sulfur dioxide for periods of 24 hours or less applicable to any class I area, the President, after consideration of the federal land manager's recommendation (if any) and subject to his concurrence, may grant a variance from such maximum allowable increase. If such variance is granted, a permit may be issued to such source pursuant to the requirements of this Subparagraph.

f. In any case in which the President recommends a variance under this Subsection in which the federal land manager does not concur, the recommendations of the President and the federal land manager shall be transmitted to the President of the United States, according to the provisions of § 165(d)(2)(D)(ii) of the Clean Air Act.⁴

g. In the case of a permit issued pursuant to Paragraphs (e) and (f), the facility shall comply with such emission limitations under the permit as may be necessary to assure that emissions of sulfur oxides from such facility will not (during any day on which the otherwise applicable maximum allowable increases are exceeded) cause or contribute to concentrations which exceed the maximum allowable increases for such areas over the baseline concentration of such pollutant, as prescribed in § 165(d)(2)(D)(iii) of the Clean Air Act⁵ and the regulations thereunder, and to assure that such emissions will not cause or contribute to concentrations which exceed the otherwise applicable maximum allowable increases for periods of exposure of 24 hours or less on more than 18 days during any annual period.

E. Analysis; continuous air quality monitoring data; regulations; model adjustments

1. The review provided for in Subsection (A) of this Section shall be preceded by an analysis in accordance with regulations of the Administrator of the USEPA, promulgated under § 165 of the Clean Air Act,⁶ which shall be conducted by the major emitting facility applying for such permit, of the ambient air quality at the proposed site and in areas which may be affected by emissions from the proposed facility for each pollutant subject to regulations under this Chapter which will be

emitted from such facility.

2. The analysis required by this Subsection shall include continuous air quality monitoring data gathered for purposes of determining whether emissions from the proposed facility will exceed the maximum allowable increases or the maximum allowable concentration permitted under this Part. Such data shall be gathered over a period of one calendar year preceding the date of application for a permit under this Part unless the NNAQCP, in accordance with regulations promulgated by the Administrator of the USEPA, determines that a complete and adequate analysis for such purposes may be accomplished in a shorter period. The results of such analysis shall be available at the time of the public hearing on the application for such permit.

History

CAP-12-04, April 22, 2004.

CJY-58-95, July 20, 1995.

United States Code

Preconstruction requirements, see 42 U.S.C. § 7475.

Part C. Protection of Visibility

§ 1119. Visibility protection for federal class I areas

A. Plan requirements. In the case of an area listed by the Administrator of the USEPA under § 169(A)(a)(2) of the Clean Air Act¹ that is located within the Navajo Nation or that could reasonably be anticipated to have impaired visibility due in part or in whole to emissions coming from within the Navajo Nation, each applicable tribal (Navajo Nation) implementation plan under Part A of this Subchapter shall contain such emission limits, schedules of compliance and other measures as may be necessary to make reasonable progress toward meeting the national goal of preventing any future and remedying any existing impairment of visibility due to man-made air pollution in mandatory class I federal areas. Such provisions shall include:

1. Except as otherwise provided pursuant to § 169A(c) of the Clean Air Act,² regarding exemptions, a requirement that each major stationary source that was in existence on August 7, 1977, but was not in operation for more than 15 years prior to such date, and that as determined by the Director (or the Administrator of the USEPA in the case of a federal implementation plan under § 110 (c) of the Clean Air Act),³ emits any air pollutant which may reasonably be anticipated to cause or contribute to any impairment of visibility in any such area, shall procure, install, and operate, as expeditiously as practicable (and maintain thereafter) the best available retrofit technology, as determined by the Director or the Administrator of the USEPA, as the case may be, for controlling emissions from such source for the purpose of eliminating or reducing any such impairment; and

2. A long-term (10 to 15 year) strategy for making reasonable progress toward meeting the national goal specified in the first Paragraph of this Subsection (A) and in § 169(A)(a)(1) of the Clean Air Act.⁴

The Director shall make such determinations in accordance with regulations and guidelines promulgated by the Administrator of the USEPA pursuant to § 169(A) of the Clean Air Act.⁵ In the case of a fossil fuel-fired power plant having a total generating capacity in excess of 750 megawatts, the emission limitations required under this Paragraph shall be determined pursuant to guidelines promulgated by the Administrator of the USEPA under § 169(A)(b)(1) of the Clean Air Act.

B. Consultations with appropriate federal land managers. Before holding the public hearing required on a proposed promulgation of or revision to an applicable implementation plan to meet the requirements of this Section, the Director shall consult in person with the appropriate federal land manager or managers and shall include a summary of the conclusions and recommendations of the federal land managers in the notice to the public.

History

CAP-12-04, April 22, 2004.

CJY-58-95, July 20, 1995.

United States Code

Visibility protection for Federal class I areas, see 42 U.S.C. § 7491.

§ 1120. Visibility transport regions and commissions

A. Visibility transport regions. The President, in conjunction with at least one other tribe or state, may petition the Administrator of the USEPA for a determination that current or projected transport of air pollutants from the Navajo Nation or from one or more other tribes or states contributes significantly to visibility impairment in class I areas located in the Navajo Nation or in the other affected tribes or states and that a transport region for such pollutants that includes the Navajo Nation and such other tribes or states should be established. The President may also petition the Administrator of the USEPA to add or remove any state or tribe or portion thereof to a visibility transport region.

B. Visibility transport commissions. The President or his designee may be a member of a visibility transport commission established by the Administrator of the USEPA pursuant to § 169(B) of the Clean Air Act,¹ and as such shall participate in all activities required under that Section.

History

CJY-58-95, July 20, 1995.

United States Code

Visibility transport regions and commissions, see 42 U.S.C. § 7492.

Part D. New Source Performance Standards

§ 1121. Implementation and enforcement of standards of performance

A. Implementation and enforcement by Director. The Director may develop and submit to the Administrator of the USEPA a procedure for implementing and enforcing standards of performance for new sources located in the Navajo Nation. The Director is authorized under the Clean Air Act ¹ to implement and enforce such standards upon delegation of such authority from the Administrator of the USEPA.

B. Standards of performance for existing sources. The Director may submit to the Administrator of the USEPA a plan that:

1. Establishes standards of performance for any existing source for any air pollutant:

a. For which air quality criteria have not been issued or that is not included on a list published under § 108 of the Clean Air Act ² or emitted from a source category that is regulated under § 112 of the Clean Air Act,³ but

b. To which a standard of performance under § 111 of the Clean Air Act ⁴ would apply if such existing source were a new source; and

2. Provides for the implementation and enforcement of such standards of performance.

3. In applying a standard of performance to any particular source under a plan submitted under this Paragraph, the Director may take into consideration, among other factors, the remaining useful life of the existing source to which such standard applies.

C. Solid waste incineration units.

1. If existing solid waste incineration units of a category for which the Administrator of the USEPA has promulgated guidelines are operating within the Navajo Nation, the Director may submit to the Administrator of the USEPA for approval, pursuant to § 129(b)(2) of the Clean Air Act,⁵ a plan to implement and enforce the guidelines. The plan shall be at least as protective as the guidelines and shall provide that each unit subject to the guidelines shall be in compliance with all requirements of § 129 of the Clean Air Act ⁶ within three years of the date that the plan is approved by the Administrator of the USEPA. The Director may modify and resubmit a plan that has been disapproved.

2. The Director may implement a model program for the training of solid waste incineration unit operators and high-capacity fossil fuel-fired plant operators, if the Director has adopted a program that is at least as effective as the model program developed by the Administrator

of the USEPA under § 129(d) of the Clean Air Act ⁷ and has been authorized to do so by the Administrator of the USEPA.

3. Each solid waste incineration unit in the Navajo Nation in a category for which the Administrator of the USEPA has promulgated performance standards under §§ 111 ⁴ or 129 ⁶ of the Clean Air Act shall operate pursuant to a permit issued under this Subsection and Part H of this Subchapter, if the Navajo Nation has an approved permit program for such source. Such permits may be renewed according to the provisions of Part H of this Subchapter. Notwithstanding any other provision of this Chapter, each permit for a solid waste incineration unit that combusts municipal waste shall be issued for a period of up to 12 years and shall be reviewed every five years from the date of issuance or reissuance. Each permit shall continue in effect after the date of issuance until the date of termination, unless the Director determines that the unit is not in compliance with all standards and conditions contained in the permit. Such determination shall be made at regular intervals during the term of the permit, such intervals not to exceed five years, and only after public comment and public hearing. No permit may be issued by any person who is also responsible, in whole or in part, for the design and construction or operation of the unit. Notwithstanding any other provision of this Paragraph, the Director may require the owner or operator of any unit to comply with emissions limitations or implement any other measures, if the Director determines that emissions in the absence of such limitations or measures may reasonably be anticipated to endanger public health or the environment.

4. The Director may adopt and enforce any regulation, requirement, limitation or standard relating to solid waste incineration units that is more stringent than one in effect under the Clean Air Act,¹ and may establish any other requirements applicable to solid waste incineration units, including the authority to establish for any air pollutant an ambient air quality standard, except that no solid waste incineration unit subject to performance standards under §§ 111 ⁴ and 129 ⁶ of the Clean Air Act shall be subject to standards under § 1128 of this Chapter.

5. A solid waste incineration unit shall not be a utility unit for purposes of Part G of this Subchapter, provided that more than eighty percent (80%) of its annual average fuel consumption measured on a Btu basis, during a period or periods to be determined by the Administrator of the USEPA, is from a fuel (including any waste burned as a fuel) other than a fossil fuel.

6. No requirement of an applicable implementation plan under §§ 1118 or 1122 of this Chapter may be used to weaken the standards in effect under this Subsection.

D. Prohibited acts. It shall be unlawful for any owner or operator of any new source (or any existing source for which standards of performance are established pursuant to Subsection (B) of this Sections) or any new or existing solid waste incineration unit to operate such source in violation of any standard of performance applicable to such source, as prescribed by the Administrator of the USEPA pursuant to §§ 111 ⁴ or 129 ⁶ of the Clean Air Act and the regulations thereunder and by the Director pursuant to this Section and

the regulations hereunder.

E. Revision of regulations. The Director, with the approval of the President, may submit an application to the Administrator of the USEPA for revision of the regulations promulgated under § 111(f)(1) of the Clean Air Act.⁸ The application shall demonstrate that:

1. The Administrator of the USEPA has failed to specify in regulations under § 111 (f)(1) of the Clean Air Act ⁸ any category of major stationary sources required to be specified under such regulations;

2. The Administrator of the USEPA has failed to include in the list under § 111 (b) (1) (A) of the Clean Air Act ⁹ any category of stationary sources that contributes significantly to air pollution which may reasonably be anticipated to endanger public health or welfare (notwithstanding that such category is not a category of major stationary sources);

3. The Administrator of the USEPA has failed to apply properly the criteria required to be considered under § 111(f) (2) of the Clean Air Act;¹⁰ or

4. A new, innovative or improved technology or process that achieves greater continuous emission reduction has been adequately demonstrated for any category of stationary sources and, as a result, the new source standard of performance in effect for such category no longer reflects the greatest degree of emission limitation achievable through application of the best technological system of continuous emission reduction which (taking into consideration the cost of achieving such emission reduction, and any non-air quality health and environmental impact and energy requirements) has been adequately demonstrated.

History

CAP-12-04, April 22, 2004.

CJY-58-95, July 20, 1995.

United States Code

Solid waste combustion, see 42 U.S.C. § 7429.

Part E. Provisions for Nonattainment Areas and New Source Review

§ 1122. Nonattainment plan provisions

A. Plan submissions. With respect to any area within the Navajo Nation that the Administrator of the USEPA designates as nonattainment for any NAAQS, pursuant to § 107 of the Clean Air Act,¹ the Director may submit a plan or plan revision meeting the applicable requirements prescribed in §§ 110(a)(2) ² and 172(c) ³ of the Clean Air Act and in Subsection (B) of this Section and § 1112 (A) of this Chapter and in the regulations promulgated hereunder.

B. Plan provisions. The plan shall provide for attainment of the

national primary ambient air quality standards and shall also contain the following provisions:

1. A requirement for the implementation of all reasonably available control measures as expeditiously as practicable (including such reductions in emissions from existing sources in the area as may be obtained through the adoption, at a minimum, of reasonably available control technology);

2. A requirement for reasonable further progress:

3. A comprehensive, accurate, current inventory of actual emissions from all sources of the relevant pollutant or pollutants in such area, including such periodic revisions as the Administrator of the USEPA may determine necessary to assure that the requirements of this Part are met;

4. An identification and quantification of the emissions, if any, of any such pollutant or pollutants which will be allowed, in accordance with § 1124 (A) (1) (b) of this Chapter, from the construction and operation of major new or modified stationary sources in each such area. The plan shall demonstrate to the satisfaction of the Administrator of the USEPA that the emissions quantified for this purpose will be consistent with the achievement of reasonable further progress and will not interfere with attainment of the applicable national ambient air quality standard by the applicable attainment date;

5. A requirement for permits for the construction and operation of new or modified major stationary sources anywhere in the nonattainment area, in accordance with § 1124 of this Chapter;

6. Enforceable emission limitations and such other control measures, means or techniques (including economic incentives such as fees, marketable permits and auctions of emission rights), as well as schedules and timetables for compliance, as may be necessary or appropriate to provide for attainment of such standard in such area by the applicable attainment date specified by the Administrator of the USEPA pursuant to regulations issued under § 172(a)(2) and (b) of the Clean Air Act,⁴ as modified for Indian tribes by regulations issued under § 301 (d) of the Clean Air Act.⁵ The Director may apply to the Administrator of the USEPA for the use of equivalent modeling, emission inventory and planning procedures, if the proposed techniques are, in the aggregate, at least as effective as the methods specified by the Administrator of the USEPA; and

7. A requirement for the implementation of specific measures to be undertaken if the area fails to make reasonable, further progress or to attain the national primary ambient air quality standard by the applicable attainment date. Such measures shall be included in the plan revision as contingency measures to take effect in any such case without further action by the Director or the Administrator of the USEPA.

C. Plan revision in response to finding of plan inadequacy. Any plan revision for a nonattainment area which is submitted in response to a finding by the Administrator of the USEPA pursuant to § 110(k)(5) of the Clean Air Act

⁶ must correct the plan deficiencies specified by the Administrator of the USEPA and meet all other applicable plan requirements of § 1112 of this Chapter and this Part.

D. Planning procedures. For any ozone, carbon monoxide, or PM-10 nonattainment area for which the Director intends to submit a plan, the Director shall develop planning procedures pursuant to this Subsection. The organization preparing the plan shall be certified by the Director, and shall include elected officials from the affected area, representatives of the NNAQCP and representatives of any transportation planning agency and of any other organization with responsibilities for developing, submitting or implementing the plan under this Part. In the case of a nonattainment area that is also included within another tribe or state, the Navajo Nation may jointly with the other tribes or states, through intergovernmental agreement or otherwise, undertake and implement all or part of the planning procedures described in this Subsection.

E. Planning grants. The Director, in accordance with Navajo Nation law, may apply to the Administrator of the USEPA for grants for the planning activities required by this Section.

F. Maintenance plans. If the Director submits a request under § 1111(B) of this Chapter for redesignation of a nonattainment area as an area that has attained the national primary ambient air quality standard for any air pollutant, the Director shall also submit a revision of the applicable implementation plan to provide for the maintenance of the standard for such air pollutant in the area concerned for at least 10 years after the redesignation. The plan shall contain such additional measures, if any, as may be necessary to ensure such maintenance. Until a plan revision is approved and an area is redesignated as attainment, the requirements of this Part shall continue in force and effect with respect to such area. Moreover, eight years after redesignation of any area as an attainment area under § 107(d) of the Clean Air Act,⁷ the Director shall submit to the Administrator of the USEPA an additional revision of the applicable implementation plan for maintaining the standard for an additional 10 years after the expiration of the 10-year period referred to above.

G. Contingency provisions. Each plan revision submitted under Subsection (F) shall contain such contingency provisions as the Administrator of the USEPA deems necessary to assure that the Director will promptly correct any violation of the standard that occurs after the redesignation of the area as an attainment area. Such provision shall include a requirement that the Director implement all measures with respect to the control of the air pollutant concerned that were contained in the implementation plan for the area before redesignation as an attainment area. The failure of an area to maintain the NAAQS concerned shall not result in a requirement that the Director revise the implementation plan unless the Administrator of the USEPA requires the Director to do so.

H. Interstate transport commissions. The President may petition the Administrator of the USEPA to establish an interstate transport commission under § 176A of the Clean Air Act ⁸ and to add or remove the Navajo Nation or any other tribe or state or portion thereof to or from any such commission established under that Section.

History

CAP-12-04, April 22, 2004.

CJY-58-95, July 20, 1995.

United States Code

Nonattainment plan provisions in general, see 42 U.S.C. § 7502.

§ 1123. Additional provision for nonattainment areas for specific pollutants

In the event any area of the Navajo Nation is designated nonattainment for any pollutant for which a NAAQS has been promulgated by the Administrator of the USEPA, the relevant provisions of §§ 181 through 192 of the Clean Air Act ¹ pertaining to that pollutant and of the regulations hereunder shall apply, to the extent such provisions are applicable to the Navajo Nation and as modified by regulations promulgated by the Administrator of the USEPA under § 301(d) of the Clean Air Act.²

History

CAP-12-04, April 22, 2004.

CJY-58-95, July 20, 1995.

§ 1124. Permit requirements

A. General requirements. The Director may issue permits to construct and operate a proposed new or modified major stationary source if:

1. The Director determines, in accordance with regulations issued under § 173 of the Clean Air Act ¹ and under this Section, that:

a. By the time the source is to commence operation, sufficient offsetting emissions reductions have been obtained such that total allowable emissions from existing sources in the region, from new or modified sources that are not major emitting facilities, and from the proposed source will be sufficiently less than total emissions from existing sources prior to the application for such permit to construct or modify so as to represent, when considered together with the plan provisions required under § 1122 of this Chapter, reasonable further progress; or

b. In the case of a new or modified major stationary source that is located in a zone (within the nonattainment area) identified by the Administrator of the USEPA as a zone to which economic development should be targeted, that emissions of such pollutant resulting from the proposed new or modified major stationary source will not cause or contribute to emission levels that exceed the allowance permitted for such pollutant for such area from new or modified major stationary sources under § 1122 of this Chapter and § 172 (c) of the Clean Air Act;²

2. The proposed source is required to comply with the lowest achievable emission rate;

3. The owner or operator of the proposed new or modified source has demonstrated that all major stationary sources owned or operated by such person (or by any entity controlling, controlled by, or under common control with such person) in the Navajo Nation are subject to emission limitations and are in compliance, or on a schedule for compliance, with all applicable emission limitations and standards under this Chapter;

4. The Administrator of the USEPA has not determined that the applicable implementation plan is not being adequately implemented for the nonattainment area in which the proposed source is to be constructed or modified; and

5. An analysis of alternative sites, sizes, production processes and environmental control techniques for such proposed source demonstrates that benefits of the proposed source significantly outweigh the environmental and social costs imposed as a result of its location, construction or modification.

B. Any emission reduction required as a precondition to the issuance of a permit shall be federally enforceable before such permit may be issued.

C. Offsets

1. The owner or operator of a new or modified major stationary source may comply with any offset requirement in effect under this Part and Part D of Title 1 of the Clean Air Act³ for increased emissions of any air pollutant only by obtaining emission reductions of such air pollutant from the same source or other sources in the same nonattainment area, except that the Director may allow the owner or operator to obtain such emission reductions in another nonattainment area if (a) the other area has an equal or higher nonattainment classification than the area in which the source is located, and (b) emissions from such other area contribute to a violation of the NAAQS in the nonattainment area in which the source is located. Such emission reductions shall be in effect and enforceable by the time a new or modified source commences operation, and shall assure that the total tonnage of increased emissions of the air pollutant from the new or modified source shall be offset by an equal or greater reduction, as applicable, in the actual emissions of such air pollutant from the same or other sources in the area.

2. Emission reductions otherwise required by this Chapter or by the Clean Air Act⁴ shall not be creditable as emissions reductions for purposes of any such offset requirement. Incidental emission reductions which are not otherwise required by this Chapter shall be creditable as emission reductions for such purposes if such emission reductions meet the requirements of Paragraph (1).

D. Control technology information

The Director shall provide that control technology information from permits issued under this Section will be promptly submitted to the

Administrator of the USEPA for purposes of making such information available through the RACT/BACT/LAER clearinghouse to other tribes and states and to the general public.

History

CJY-58-95, July 20, 1995.

United States Code

Permit requirements, see 42 U.S.C. § 7503.

Part F. Control of Hazardous Air Pollutants

United States Code

Hazardous air pollutants, see 42 U.S.C. § 7412.

§ 1125. Control of hazardous air pollutants

A. In general. The Director may develop and submit to the Administrator of the USEPA for approval a program for the implementation and enforcement of emission standards and other requirements for hazardous air pollutants pursuant to § 112 of the Clean Air Act ¹ or requirements for the prevention and mitigation of accidental releases pursuant to § 112(r) of the Clean Air Act,² or both. The program may provide for partial or complete delegation of the USEPA Administrator's authorities and responsibilities to implement and enforce emissions standards and prevention requirements.

B. Navajo standards. As part of the program developed under Subsection (A) of this Section, the Director may adopt and enforce regulations, requirements, limitations, or standards that are more stringent than those in effect under § 112 of the Clean Air Act ¹ or that apply to a substance that is not subject to § 112 of the Clean Air Act, pursuant to §§ 1126, 1127 and 1128 of this Chapter. Any standards set by the Director shall be at least as stringent as those promulgated by the Administrator of the USEPA.

C. Grants. The Director, in accordance with Navajo Nation law, may apply to the Administrator of the USEPA, pursuant to § 112(1)(4) of the Clean Air Act,³ for grants to assist in developing and implementing a program under Subsection (A) of this Section.

History

CJY-58-95, July 20, 1995.

§ 1126. List of hazardous air pollutants

A. Contents of list. The hazardous air pollutants that are subject to regulation under this Part shall consist of:

1. The federally listed hazardous air pollutants, as defined in § 1101 of this Chapter;

2. Hazardous air pollutants that are designated by the Director, pursuant to Subsection (B) of this Section.

B. Designation of hazardous air pollutants. The Director may, by regulation, designate hazardous air pollutants in addition to the federally listed hazardous air pollutants if the Director finds that the pollutants present, or may present, through inhalation or other routes of exposure, a threat of adverse human health effects or adverse environmental effects, whether through ambient concentration, bioaccumulation, deposition, or otherwise, but not including releases subject to regulation under § 112(r) of the Clean Air Act.¹ The Director shall rely on technical protocols appropriate for the development of a list of hazardous air pollutants and shall base any designation on credible medical and toxicological evidence that has been subjected to peer review. The Director shall not include any air pollutant that is listed under § 108 of the Clean Air Act,² except that he/she may include a pollutant that independently meets the listing criteria of this Subsection and is a precursor to a pollutant listed under § 108(a) or to any pollutant in a class of pollutants listed under that Section. An adequate and reliable methodology must exist for quantifying emissions and ambient concentrations of a pollutant before that pollutant may be listed under this Subsection. The Director shall not list elemental lead as a hazardous air pollutant under this Subsection.

C. Review of list. The Director shall periodically review the list of hazardous air pollutants that are designated pursuant to Subsection (B) of this Section and, where appropriate, shall revise such list by rule, adding or deleting substances as warranted. A current list of all hazardous air pollutants designated pursuant to Subsection (B) of this Section shall be kept on file at the NNAQCP office and shall be available for examination by the public during regular business hours.

D. Petitions to modify list. Any person may petition the Director to modify the list of hazardous air pollutants under Subsection (B) of this Section by adding or deleting substances. The petition must include a showing that there is adequate data on the health or environmental effects of the pollutant or other evidence adequate to support the petition. The Director shall commence a rulemaking pursuant to § 1161 of this Chapter within six months of receipt of the petition.

History

CJY-58-95, July 20, 1995.

§ 1127. List of source categories

A. Contents of list. The categories and subcategories of major sources and area sources of hazardous air pollutants listed under § 1126 of this Chapter shall consist of:

1. Source categories listed by the Administrator of the USEPA pursuant to § 112 (c) of the Clean Air Act;¹ and

2. Categories and subcategories of sources that emit the hazardous air pollutants designated by the Director pursuant to § 1126 (B) of this

Chapter.

3. The Director may list a major source or area source category under Paragraph (2) of this Subsection if the Director finds, through rulemaking pursuant to § 1161 of this Chapter, that emissions of hazardous air pollutants from that category present a threat of adverse effects to human health or the environment (by such sources individually or in the aggregate) warranting regulation under this Section. The Director shall periodically review the list of hazardous air pollutants that are designated pursuant to Paragraph (2) of this Subsection and, where appropriate, shall revise such list by rule, adding or deleting substances as warranted.

B. Petitions to modify list. Any person may petition the Director to modify the list of source categories under Subsection (A) (2) of this Section by adding or deleting categories. The petition must include a showing as to the lifetime risk of cancer to the most exposed individual in the affected population caused by the hazardous air pollutants emitted from such source category, the extent to which hazardous air pollutants emitted from such source category exceed or do not exceed a level which is adequate to protect public health with an ample margin of safety, the degree to which adverse environmental effects will or will not result from hazardous air pollutants emitted from such source category, or other evidence adequate to support the petition. The Director shall commence a rulemaking pursuant to § 1161 of this Chapter within six months of receipt of the petition to add or delete the source category from the list under Subsection (A).

History

CAP-12-04, April 22, 2004.

CJY-58-95, July 20, 1995.

§ 1128. Emission standards

A. In general. The Director shall adopt the standards promulgated by the Administrator of the USEPA pursuant to § 112 (d), (e) (5), (f) and (n) of the Clean Air Act ¹ and, in addition, shall promulgate regulations establishing emissions standards for each category or subcategory listed by the Director pursuant to § 1127(A)(2) of this Chapter. The Director may distinguish among classes, types and sizes of sources within a category or subcategory in establishing such standards.

Notwithstanding the first sentence of this Subsection, the Director may adopt more stringent standards than those promulgated by the Administrator of the USEPA, except in the case of emissions of radionuclides from facilities licensed by the U.S. Nuclear Regulatory Commission. The Director shall comply with § 112(n)(4) of the Clean Air Act ² with respect to the non-aggregation of emissions from oil and natural gas facilities and pipelines. Emissions from any oil or gas exploration or production well (with its associated equipment) and emissions from any pipeline compressor or pump station shall not be aggregated with emissions from other similar units, whether or not such units are in a contiguous area or under common control, to determine whether such units or stations are major sources, except as provided by regulation

promulgated by the Director, and in the case of any oil or gas exploration or production well (with its associated equipment), such emissions shall not be aggregated for any purpose under this Part, except as provided by regulation promulgated by the Director.

B. Criteria. Emissions standards promulgated by the Director under this Section shall require the maximum degree of reduction in emissions of the hazardous air pollutants subject to this Part (including a prohibition on such emissions, where achievable) that the Director, taking into consideration the cost of achieving such emission reduction, and any non-air quality health and environmental impacts and energy requirements, determines is achievable for new or existing sources in the category or subcategory to which such emission standard applies, through application of measures, processes, methods, systems or techniques including, but not limited to, measures that:

1. Reduce the volume of, or eliminate emissions of, such pollutants through process changes, substitution of materials or other modifications;
2. Enclose systems or processes to eliminate emissions;
3. Collect, capture, or treat such pollutants when released from a process, stack, storage, or fugitive emissions point;
4. Are design, equipment, work practice or operational standards (including requirements for operator training or certification), as provided in § 112(h) of the Clean Air Act;³ or
5. Are a combination of the above.

C. New and existing sources. The maximum degree of reduction in emissions that is deemed achievable for new sources in a category or subcategory shall not be less stringent than the emission control that is achieved in practice by the best controlled similar source, as determined by the Director. Emission standards promulgated under this Section for existing sources in a category or subcategory may be less stringent than standards for new sources in the same category or subcategory but shall not be less stringent, and may be more stringent, than:

1. The average emission limitation achieved by the best performing twelve percent (12%) of the existing sources (for which the Administrator of the USEPA has emissions information), excluding those sources that have, within 18 months before the emission standard is proposed or within 30 months before such standard is promulgated, whichever is later, first achieved a level of emission rate or emission reduction which complies, or would comply if the source is not subject to such standard, with the lowest achievable emission rate applicable to the source category and prevailing at the time, in the category or subcategory for categories and subcategories with 30 or more sources; or
2. The average emission limitation achieved by the best performing five sources (for which the Administrator of the USEPA has or could reasonably obtain emissions information) in the category or subcategory for categories or subcategories with fewer than 30 sources.

D. Alternative standard for area sources. With respect to categories and subcategories of area sources listed pursuant to § 1127 the Director may, in lieu of the authorities provided in Subsection (B) of this Section, elect to promulgate standards or requirements applicable to sources in such categories or subcategories that provide for the use of generally available control technologies or management practices by such sources to reduce emissions of hazardous air pollutants.

E. Compliance. For those standards promulgated by the Administrator of the USEPA that the Director adopts pursuant to Subsection (A) of this Section, the Director shall also adopt the same compliance dates. The Director shall establish compliance dates for each category or subcategory of existing sources for which the Director promulgates emissions standards under this Section. These dates shall provide for compliance as expeditiously as practicable, but not until 90 days after the effective date of the standard, and no later than two years after the effective date of such standard, except as provided in § 1129(D) of this Chapter.

History

CAP-12-04, April 22, 2004.

CJY-58-95, July 20, 1995.

§ 1129. Hazardous air pollutant permit program

A. In general. Permits issued to sources of hazardous air pollutants covered under § 1127 of this Chapter shall be issued pursuant to the provisions of Part H of this Chapter and subject to the requirements and conditions contained within this Section.

B. Construction, reconstruction and modifications. After the effective date of the permit program under Part H of this Subchapter, no person may obtain a permit or permit revision to modify, construct or reconstruct a major source of hazardous air pollutants or area source in a category listed under § 1127 of this Chapter unless the Director determines that the appropriate maximum achievable control technology emission limitation under this Part will be met. In the case of modifications, the appropriate emission limitation shall be that for existing sources; in the case of construction or reconstruction, for new sources, determined pursuant to § 1128(C) of this Part. In both cases, where the Administrator of the USEPA or the Director, as the case may be, has not established applicable emission limitations, the Director shall make such determination on a case-by-case basis.

C. Exemption from definition of modification. A physical change in a source or change in the method of operation of a source that results in a greater than de minimis increase in actual emissions of a hazardous air pollutant shall not be considered a modification if such increase in the quantity of actual emissions of any hazardous air pollutant from such source will be offset by an equal or greater decrease in the quantity of emissions of another hazardous air pollutant or pollutants from such source that is deemed more hazardous, pursuant to guidance issued by the Administrator of the USEPA under § 112(g)(1)(B) of the Clean Air Act.¹ The owner or operator of such

source shall submit a showing to the Director that such increase has been offset under this Subsection.

D. Schedule for compliance. Once the Navajo Nation has an approved permit program under Part H of this Subchapter:

1. After the effective date of any emission standard, limitation, or regulation under § 112(d), (f), or (h) of the Clean Air Act ² or under § 1128 of this Chapter, no person may construct any new major source or area source or reconstruct any existing major source or area source subject to such emission standard, regulation, or limitation unless the Director determines that such source, if properly constructed or reconstructed and operated, will comply with the standard, regulation, or limitation.

2. Notwithstanding Paragraph (1), a new source that commences construction or reconstruction after an applicable standard, limitation or regulation is proposed and before such standard, limitation, or regulation is promulgated shall not be required to comply with such promulgated standard until the date three years after the date of promulgation if:

a. The promulgated standard, limitation, or regulation is more stringent than the standard, limitation, or regulation proposed; and

b. The source complies with the standard, limitation, or regulation as proposed during the three year period immediately after promulgation.

3. After the effective date of any emissions standard, limitation or regulation promulgated under § 112 (d), (f), or (h) of the Clean Air Act or under § 1128 of this Chapter and applicable to a source, no person may operate such source in violation of such standard, limitation or regulation except, in the case of an existing source, the source shall comply with the emissions standard, limitation or regulation by the date set by the Administrator of the USEPA, pursuant to § 112(i) of the Clean Air Act, or by the Director, pursuant to this Section and § 1128 of this Chapter, as the case may be.

4. The Director may issue a permit that grants an extension permitting an existing source up to one additional year to comply with standards under § 112(d) of the Clean Air Act ³ or § 1128 of this Chapter if such additional period is necessary for the installation of controls. An additional extension of up to three years may be added for mining waste operations if the compliance time required under § 112(i)(3) of the Clean Air Act ⁴ and the regulations hereunder, together with the one year extension provided by the Director under this Paragraph, is insufficient to dry and cover mining waste in order to reduce emissions of any pollutant listed under § 112 (b) of the Clean Air Act.⁵

5. If the owner or operator of an existing source demonstrates that the source has achieved a reduction of at least ninety percent (90%) in emissions of hazardous air pollutants (at least ninety-five percent (95%)

in the case of hazardous air pollutants that are particulates) before the otherwise applicable standard under § 112(d) of the Clean Air Act or § 1128 of this Chapter is first proposed, the Director shall issue a permit allowing the source to meet an alternative emission limitation reflecting such reduction in lieu of an emission limitation promulgated under § 112(d) of the Clean Air Act or § 1128 of this Chapter. The permit shall provide for an extension of six years from the compliance date for the otherwise applicable standard. The Director may, through regulations, require greater reductions than those specified in this Paragraph as a condition of granting this extension. The reduction shall be determined according to the provisions of § 112(i)(5)(C) of the Clean Air Act⁶ and the regulations hereunder.

6. The reduction in Paragraph (5) shall be determined with respect to verifiable and actual emissions in a base year not earlier than calendar year 1987, provided that there is no evidence that emissions in the base year are artificially or substantially greater than emissions in other years prior to implementation of emission reduction measures.

7. For each source granted an alternative emission limitation under Paragraph (5) above, the permit shall establish an enforceable emission limitation for hazardous air pollutants reflecting the reduction which qualifies the source for an alternative emission limitation under Paragraph (5). An alternative emission limitation shall not be available with respect to standards or requirements promulgated pursuant to § 112(f) of the Clean Air Act.⁷

E. Equivalent emission limitation by permit. Once the Navajo Nation has an approved permit program under Part H of this Chapter:

1. If the Administrator of the USEPA fails to promulgate a standard for a category or subcategory of major sources by the date established pursuant to § 112(e)(1) and (3) of the Clean Air Act,⁸ then beginning 18 months after that date (but not prior to the effective date of the Navajo permit program), the owner or operator of any major source in such category or subcategory shall submit a permit application to the Director, pursuant to requirements established by the Administrator of the USEPA under § 112(j) of the Clean Air Act.⁹ If the owner or operator has submitted a timely and complete application for a permit, any failure to have a permit shall not be a violation of this requirement, unless the delay in final action is due to the failure of the applicant to timely submit information required or requested to process the application.

2. Permit applications submitted under this Subsection shall be reviewed and approved or disapproved according to the provisions of Part H of this Chapter. If the Director disapproves a permit application or determines that the application is incomplete, the applicant shall have up to six months to revise the application to meet the objections of the Director.

3. The permit shall contain emission limitations for the hazardous air pollutants subject to regulation under this Section and emitted by the source that the Director determines, on a case-by-case basis, to be equivalent to the limitation that would apply to such source if an

emission standard had been promulgated in a timely manner under § 112 (d) of the Clean Air Act. In the alternative, if the applicable criteria are met, the permit may contain an emissions limitation established according to the provisions of Subsection (D)(5) of this Section. For these purposes, the reduction required by Subsection (D)(5) shall be achieved by the date on which the relevant standard should have been promulgated under § 112 (d) of the Clean Air Act. No such pollutant may be emitted in amounts exceeding an emission limitation contained in a permit immediately for new sources and as expeditiously as practicable but no later than three years after the permit is issued for existing sources, or such other compliance date as would apply under Subsection (D) of this Section.

4. If the Administrator of the USEPA promulgates an emission standard that is applicable to the major source prior to the date on which a permit application is approved, the emission limitation in the permit shall reflect the promulgated standard rather than the emission limitation determined pursuant to Paragraph (3), provided that the source shall have the compliance period provided under Subsection (D) of this Section. If the Administrator of the USEPA promulgates a standard under § 112 (d) of the Clean Air Act that would be applicable to the source in lieu of the emission limitation established by permit under this Subsection after the date on which the permit has been issued, the Director shall revise such permit upon the next renewal to reflect the standard promulgated by the Administrator of the USEPA, providing such source a reasonable time to comply but no longer than eight years after such standard is promulgated or eight years after the date on which the source is first required to comply with the emissions limitation established by Paragraph (3), whichever is earlier.

History

CJY-58-95, July 20, 1995.

§ 1130. Research program on hazardous air pollutants

A. Research program. The NNAQCP may, in cooperation with the U.S. Environmental Protection Agency and the National Academy of Sciences, undertake a research program to evaluate the existing risk to public health from hazardous air pollutants and to provide options and recommendations for programs to control the release of hazardous substances into the ambient air. This research may include any or all of the following:

1. Identification of hazardous air pollutants that are or may be emitted into the ambient air in the Navajo Nation;
2. Identification and evaluation of methods for conducting ambient air monitoring, modeling, measuring emissions, and performing related analyses;
3. Surveying concentrations of hazardous air pollutants within the ambient air of the Navajo Nation and estimating contributions to those concentrations from permitted, nonpermitted and natural sources as well as background concentrations;

4. Identification and evaluation of residual risk after implementation of controls during the term of study, of actual risk from exposure to hazardous air pollutants and of alternative risk assessment methodologies;

5. Evaluation of the feasibility of, need for, and potential methods for establishing ambient air quality standards or health-based guidelines for hazardous air pollutants; and

6. Development of a public education program to provide information and increase public awareness of hazardous air pollutants.

B. Report. If the NNAQCP conducts any such research program, it shall submit a report of its findings and recommendations to the President and shall make such report available to the public.

History

CJY-58-95, July 20, 1995.

Part G. Acid Deposition Control

§ 1131. Acid deposition permits and compliance plans

A. Permit Program.

1. The Director may submit a permit program for approval in accordance with Title V of the Clean Air Act ¹ and Part H of this Subchapter to provide for permits for: new utility units required under § 403 (e) of the Clean Air Act ² to have allowances; affected units or sources under § 405 of the Clean Air Act;³ and units subject to nitrogen oxide emission reductions under § 407 of the Clean Air Act.⁴

2. Any permit issued by the Director shall prohibit:

a. Annual emissions of sulfur dioxide in excess of the number of allowances to emit sulfur dioxide that the owner or operator of the unit or designated representative of the owners or operators hold for the unit;

b. Violations of applicable emissions rates;

c. The use of any allowance prior to the year for which it was allocated; and

d. Contravention of any other provision of the permit.

3. Permits shall be issued for a period of five years. No permit shall be issued that is inconsistent with the requirements of this Section and Title IV of the Clean Air Act ⁵ and the regulations thereunder, and with the applicable provisions of Part H of this Subchapter and Title V of the Clean Air Act and the regulations thereunder.

B. Compliance plans. Each affected source when submitting an initial permit application to the Director shall include a compliance plan for the source to comply with its requirements under Title IV of the Clean Air Act. Where an affected source consists of more than one affected unit, the compliance plan shall cover all such units, and for purposes of § 502 (c) of the Clean Air Act ⁶ the source shall be considered a "facility". Nothing in this Section regarding compliance plans or in Part H of this Subchapter shall be construed as affecting allowances. Except as provided under § 408(c) (1) (B) of the Clean Air Act,⁷ submission of a statement by the owner or operator, or the designated representative thereof, of a unit subject to the emissions limitation requirements of §§ 405 and 407 of the Clean Air Act that the unit will meet the applicable emissions limitation requirements of such sections in a timely manner or that, in the case of the emissions limitation requirements of § 405 of the Clean Air Act, the owners and operators will hold allowances to emit not less than the total annual emissions of the unit, shall be deemed to meet the compliance planning requirements of this Section and Title V of the Clean Air Act, except that, for any unit that will meet the requirements of Title IV of the Clean Air Act by means of an alternative method of compliance authorized under §§ 407(d) or (e),⁸ 409 ⁹ or 410 ¹⁰ of the Clean Air Act or §§ 1132 or 1133 of this Chapter, the proposed and approved compliance plan, permit application and permit shall include, pursuant to regulations promulgated by the Administrator of the USEPA, for each alternative method of compliance a comprehensive description of the schedule and means by which the unit will rely on one or more alternative methods of compliance in the manner and time authorized under Title IV of the Clean Air Act. Recordation by the Administrator of the USEPA of transfers of allowances shall amend automatically all applicable proposed or approved permit applications, compliance plans and permits. The Director may also require:

1. For a source, a demonstration of attainment of national ambient air quality standards; and

2. From the owner or operator of two or more affected sources, an integrated compliance plan providing an overall plan for achieving compliance at the affected sources.

C. Phase II permits.

1. The owner or operator or the designated representative thereof of each affected source under § 405 of the Clean Air Act ³ that is located within the Navajo Nation shall submit a permit application and compliance plan for that source to the Director not later than January 1, 1996.

2. Not later than December 31, 1997, provided that the Navajo Nation has an approved acid deposition control permit program, the Director shall issue permits to the owner, operator, or designated representative thereof of affected sources under § 405 of the Clean Air Act ³ that satisfy the requirements of Part H of this Subchapter and Title V of the Clean Air Act ¹ and that submitted to the Director a permit application and compliance plan pursuant to Paragraph (1). The permit application and the compliance plan, including amendments thereto, shall be binding on the owner, operator, or designated representative and

shall be enforceable as a permit for purposes of this Part and Part H of this Subchapter until a permit is issued by the Director for the affected source.

3. The permit issued in accordance with this Subsection for an affected source shall provide that the affected units at the affected source may not emit an annual tonnage of sulfur dioxide in excess of the number of allowances to emit sulfur dioxide that the owner, operator, or designated representative holds for the unit.

D. New units. The owner or operator of each source that includes a new utility unit that is located within the Navajo Nation shall submit a permit application and compliance plan to the Director not later than two years before January 1, 2000, or the date on which the unit commences operation, whichever is later. The Director shall issue a permit to the owner, operator, or designated representative of the unit that satisfies the requirements of this Part and Part H of this Subchapter and of Titles IV⁵ and V¹ of the Clean Air Act.

E. Units subject to NO_x emission limitations. The owner or operator, or designated representative thereof, of any unit subject to an emission rate requirement under § 407 of the Clean Air Act⁴ and located within the Navajo Nation shall submit a permit application and compliance plan for such unit to the Director not later than January 1, 1998.

The Director shall issue a permit to the owner or operator that satisfies the requirements of Titles IV⁵ and V¹ of the Clean Air Act and this Part and Part H of this Subchapter, including any appropriate monitoring and reporting requirements.

F. Amendment of application and compliance plan. At any time after the submission of an application and compliance plan under this Section, the applicant may submit a revised application and compliance plan in accordance with the requirements of this Section and the regulations hereunder. In considering any permit application and compliance plan under this Section, the Director shall ensure coordination with the applicable electric ratemaking authority, in the case of regulated utilities, and with unregulated public utilities.

G. Prohibition.

1. It shall be unlawful for an owner or operator, or designated representative thereof, required to submit a permit application or compliance plan under this Part to fail to submit such application or plan in accordance with the requirements specified in this Section or to otherwise fail to comply with regulations implementing this Section.

2. It shall be unlawful for any person to operate any source subject to this Section except in compliance with the terms and requirements of a permit application and compliance plan (including amendments thereto) or permit issued by the Director, provided that there is an approved Navajo Nation acid deposition permit program. For purposes of this Subsection, compliance, as provided in § 1136(E) of this Chapter, with a permit issued under Part H of this Subchapter which

complies with this Part for sources subject to this Part shall be deemed compliance with this Part as well as with § 1134(E) of this Chapter.

3. In order to ensure reliability of electric power, nothing in this Part or Part H of this Subchapter shall be construed as requiring termination of operations of an electric utility steam generating unit for failure to have an approved permit or compliance plan, except that any such unit may be subject to the applicable enforcement provisions of Subchapter 3 of this Chapter.

H. Certificate of representation. No permit shall be issued under this Section to an affected unit until the designated representative of the owners or operators has filed, with the Administrator of the USEPA and the Director, a certificate of representation with regard to matters under Title IV of the Clean Air Act ⁵ and this Part, including the holding and distribution of allowances and the proceeds of transactions involving allowances. Such certificate shall comply with the requirements of § 408(i) of the Clean Air Act ¹¹ and the regulations thereunder, including where there are multiple holders of a legal or equitable title to, or a leasehold interest in, such a unit, or where a utility or industrial customer purchases power from an affected unit (or units) under life-of-the-unit, firm power contractual arrangements, as those terms are defined under Title IV of the Clean Air Act ⁵ and the regulations thereunder.

History

CAP-12-04, April 22, 2004.

CJY-58-95, July 20, 1995.

United States Code

Permits and compliance plans, acid deposition control, see 42 U.S.C. § 7651g.

§ 1132. Special provisions related to nitrogen oxides

A. Alternative emission limitations. Upon request by an owner or operator of a unit subject to § 407 of the Clean Air Act,¹ the Director shall authorize an emission limitation less stringent than the applicable limitation established under § 407(b) of the Clean Air Act upon a determination that:

1. A unit subject to § 407(b) (1) of the Clean Air Act ² cannot meet the applicable limitation using low NOx burner technology, as defined in Title IV of the Clean Air Act ³ and the regulations thereunder; or

2. A unit subject to § 407(b) (2) of the Clean Air Act ³ cannot meet the applicable rate using the technology on which the Administrator of the USEPA based the applicable emission limitation.

B. Demonstration required. The Director shall base such determination upon a showing satisfactory to the Director, in accordance with regulations promulgated by the Administrator of the USEPA, that the owner or operator:

1. Has properly installed appropriate control equipment designed to meet the applicable emission rate;

2. Has properly operated such equipment for the period required by the Administrator of the USEPA in regulations and provides operating and monitoring data for such period demonstrating that the unit cannot meet the applicable emission rate; and

3. Has specified emission rate that such unit can meet on an annual average basis.

C. Permit. The Director shall issue an operating permit for the unit in question in accordance with § 1131 of this Chapter that permits the unit during the demonstration period referred to in Paragraph (B)(2) above to emit at a rate in excess of the applicable emission rate. At the conclusion of the demonstration period, the Director shall revise the operating permit to reflect the alternative emission rate demonstrated in Paragraphs (B)(2) and (3) above.

D. Emissions averaging.

1. In lieu of complying with the applicable emission limitations under § 407(b)(1), (2) or (d) of the Clean Air Act,⁵ the owner or operator of two or more units subject to one or more of the applicable emission limitations set pursuant to those Sections may petition the Director for alternative contemporaneous annual emission limitations for such units that ensure that the actual annual emission rate in pounds of nitrogen oxides per million Btu averaged over the units in question is a rate that is less than or equal to the Btu-weighted average annual emission rate for the same units if they had been operated, during the same period of time, in compliance with limitations set in accordance with the applicable emission rates set pursuant to § 407 (b) (1) and (2) of the Clean Air Act.⁶

2. If the Director determines in accordance with regulations promulgated by the Administrator of the USEPA, that the conditions in Paragraph (1) can be met, the Director shall issue operating permits for such units, in accordance with § 1131 of this Chapter, that allow alternative contemporaneous annual emission limitations. Such emission limitations shall only remain in effect while all such units continue operation under the conditions specified in their respective operating permits.

History

CAP-12-04, April 22, 2004.

CJY-58-95, July 20, 1995.

United States Code

Nitrogen oxides emission reduction program, see 42 U.S.C. § 7651f.

§ 1133. Repowered sources

A. Eligibility. Not later than December 31, 1997, the owner or operator of an existing unit subject to the emission limitation requirements of § 405(b) or (c) of the Clean Air Act ¹ may demonstrate to the Director, if the Navajo Nation has an approved acid deposition control permit program by that date, that one or more units will be repowered with a qualifying clean coal technology, as that term is defined in Title IV of the Clean Air Act ² and the regulations hereunder, to comply with the requirements of § 405 of the Clean Air Act.³ The owner or operator shall, as part of any such demonstration, provide, not later than January 1, 2000, satisfactory documentation of a preliminary design and engineering effort for such repowering and an executed and binding contract for the majority of the equipment to repower such unit and such other information as is required by regulation under this Section and § 409 of the Clean Air Act.⁴

B. Extension. The Director shall grant to an owner or operator satisfying the requirements of Subsection (A) of this Section an extension of the emission limitation requirement compliance date for that unit from January 1, 2000 to December 31, 2003. The extension shall be specified in the permit issued to the source, together with any compliance schedule and other requirements necessary to meet Phase II requirements by the extended date. Any unit that is granted an extension under this Section shall not be eligible for a waiver under § 1110 of the Clean Air Act.

C. Control requirements. Any unit qualifying for an extension under this Section that does not increase actual hourly emissions for any pollutant regulated under this Chapter or the Clean Air Act ⁵ shall not be subject to any standard of performance under § 1121 of this Chapter. Notwithstanding the preceding sentence, no new unit that is designated as a replacement for an existing unit, qualifies for an extension under this Section and is located at a different site than the existing unit shall receive an exemption from the requirements imposed under § 1121 of this Chapter.

D. Expedited permitting. The Director shall attempt to give expedited consideration to permit applications under Parts B and E of this Subchapter for any source qualifying for an extension under this Section.

E. Prohibition. It shall be unlawful for the owner or operator of a repowered source to fail to comply with the requirements of this Section, or any regulation or permit requirements to implement this Section, including the prohibition against emitting sulfur dioxide in excess of allowances held.

History

CJY-58-95, July 20, 1995.

United States Code

Repowered sources, see 42 U.S.C. § 7651h.

Part H. Permits

§ 1134. Permit programs.

A. Submission and approval

1. The Director may develop and submit to the Administrator of the USEPA a permit program or portion thereof meeting the requirements of Title V of the Clean Air Act ¹ and the regulations thereunder. The Director may establish additional permitting requirements in regulations under this Section, provided that the additional requirements are not inconsistent with the requirements of Title V of the Clean Air Act. In addition, the Director shall submit to the Administrator of the USEPA a legal opinion from the Attorney General that the laws of the Navajo Nation provide adequate authority to carry out the program.

2. If the Administrator of the USEPA disapproves the permit program, in whole or in part, and notifies the Director of any revisions or modifications necessary to obtain approval, the Director may revise and resubmit the program for review under § 502 of the Clean Air Act.²

3. The Director may, subject to 2 N.N.C. § 824(B)(6), 2 N.N.C. § 164(B)(2) and 2 N.N.C. § 1005(C)(2), enter into a delegation agreement with USEPA providing for the Director to implement a CAA Title V operating permit program pursuant to 40 C.F.R. Part 71, pending USEPA's approval of a permit program submitted by the Director pursuant to 40 C.F.R. Part 70 and the requirements of this part, and pending the transition from Part 71 to Part 70 permits, and in other instances when it may be appropriate to enter into such an agreement.

B. Requirements. The permit program shall contain the elements required by the Administrator of the USEPA by regulation pursuant to Title V of the Clean Air Act,¹ as well as such other elements as the Director may require by regulation, including but not limited to:

1. Requirements for permit applications, including a standard application form and criteria for processing permit applications and for determining in a timely fashion the completeness of applications;

2. Adequate, streamlined, and reasonable procedures for expeditiously determining when applications are complete, for processing such applications, for public notice, including offering an opportunity for public comment and a hearing on permit applications and compliance plans and for expeditious review of permit actions, including applications, renewals, and revisions, and including an opportunity for judicial review in the Navajo Nation Court system of final permit actions (including review of failures to take timely action on permit applications or permit renewal applications, to require that action be taken on such permit applications without additional delay), by the permit applicant, any person who participated in the public comment process provided according to § 1137(D) of this Part, and any other person who could obtain judicial review under Navajo law;

3. Monitoring and reporting requirements;

4. Requirements for adequate personnel and funding to administer the program;

5. Provisions ensuring adequate authority to issue permits; assure

compliance by all sources required to have a permit under this Part with each applicable standard, regulation or requirement under this Chapter; assure that upon issuance or renewal permits incorporate emission limitations and other requirements in an applicable implementation plan; terminate, modify or revoke, and reissue permits for cause; enforce permits and permit requirements imposed pursuant to this Part; assure that no permit will be issued if the Administrator of the USEPA objects to its issuance in a timely manner under this Part; and generally administer the permit program;

6. In the case of permits for major sources with a remaining term of three or more years, a requirement that revisions be made to the permit to incorporate applicable standards and regulations promulgated under this Chapter or under the Clean Air Act ³ after the issuance of such permit, as expeditiously as practicable and consistent with the procedures established under Paragraph (2) but not later than 18 months after the promulgation of such standards and regulations, except that no revision shall be required if the effective date of the standards or regulations is after the expiration of the permit term. Such permit revision shall be treated as a permit renewal if it complies with the requirements of this Part regarding renewals;

7. In the case of affected sources under the acid rain program, a requirement that revisions be made to the permit to incorporate applicable requirements under Part G of this Subchapter and Title IV of the Clean Air Act ⁴ and the regulations hereunder;

8. Provisions to allow changes within a permitted facility or one operating pursuant to § 1135(D) of this Chapter or § 503(d) of the Clean Air Act ⁵ without requiring a permit revision, if the changes are not modifications under any provision of Title 1 of the Clean Air Act ³ and the changes do not exceed the emissions allowable under the permit (whether expressed as a rate of emissions or as total emissions), and if the facility provides the Director and the Administrator of the USEPA with written notification a minimum of seven days in advance of the proposed changes according to the requirements of the regulations promulgated under § 502 (b)(10) of the Clean Air Act ⁶ and under this Section;

a. A requirement that the owner or operator of a source required to obtain a permit under this Part pay a fee to a system of fees established by the Director under this Part and designed solely to cover all reasonable direct and indirect costs required to develop and administer the permit program under this Part and the small business assistance program under § 1140 of this Part (if such program is developed by the Director), including the reasonable costs of reviewing and acting upon permit applications; implementing and enforcing the terms and conditions of permits (not including costs associated with enforcement actions); performing emissions and ambient monitoring; preparing generally applicable regulations and guidance; conducting modeling, analyses and demonstrations; preparing inventories and tracking emissions; the general administrative costs of running the permit program; and the costs of providing direct and indirect support to sources under the small business assistance program in determining and

meeting their obligations under this Part and the regulations hereunder (if such program is developed by the Director);

b. A requirement that the fee program result in the collection, in the aggregate, from all sources subject to fees, of an amount not less than twenty-five dollars (\$25.00) per ton of each regulated pollutant, as such term is defined and as such amount is calculated in accordance with § 502 (b) (3) (B) of the Clean Air Act ⁷ and the regulations hereunder, unless a lesser amount will meet the requirements of the preceding paragraph; and that the NNAQCP regulations prescribe procedure for increasing the fee each year by the percentage, if any, by which the Consumer Price Index for the immediately preceding calendar year exceeds the Consumer Price Index for calendar year 1989, as defined in § 502 (b) (3) (B) of the Clean Air Act, and provide that any fees collected shall be deposited in the fund established by § 1139 of this Chapter and used solely to cover the reasonable costs of the permit program; and

9. Authority, and reasonable procedures consistent with the need for expeditious action by the Director on permit applications and related matters, to make available to the public any permit application, compliance plan, permit and monitoring or compliance report under § 1135(E) of this Chapter, subject to the provisions of § 1151 (D) of this Chapter.

C. Effective date. The effective date of a permit program or partial or interim program approved under § 502 of the Clean Air Act ² shall be the effective date of approval by the Administrator of the USEPA.

D. Interim approval. If a program, including a partial permit program, submitted under Subsection (A) of this Section receives interim approval from the Administrator of the USEPA, for the period of any such interim approval the provisions of Subsection (E) of this Section shall be suspended.

E. Violations. After the effective date of any permit program promulgated under this Part, it shall be unlawful for any person to violate any requirement of a permit issued under this Part or to operate an affected source or a major source, as those terms are defined under § 1101 of this Chapter, or any other source (including an area source) subject to regulation under Parts D and F of this Subchapter, any other source required to have a permit under Parts B or E of this Subchapter, or any other stationary source in a category designated in whole or in part by the Administrator of the USEPA or the Director as requiring a permit, except in compliance with a permit issued by the Director under this Part. If the Director designates a category in whole or in part under this Subsection he/she shall do so by regulation after notice and public comment and shall include a finding setting forth the basis for such designation. If the Administrator of the USEPA exempts a source category from the requirements of § 502(a) of the Clean Air Act,⁸ pursuant to that Subsection, the Director may, but is not required to, exempt that source category from the requirements of this Subsection. Nothing in this Subsection shall be construed to alter the applicable requirements of this Chapter that a permit be obtained before construction or modification.

F. Permits implementing acid deposition provisions. The requirements of

this Part, including regarding schedules for submission and approval or disapproval of permit applications, shall apply to permits implementing the requirements of Part G of this Subchapter except as modified by Part G. Nothing in the permits or compliance plans issued pursuant to this Part shall be construed as affecting allowances under Part G of this Subchapter or Title IV of the Clean Air Act.⁴

G. Minor source permits. Notwithstanding any other provisions under this Part, the Director shall establish by regulation a minor source permitting program, under which sources not classified as major sources or not otherwise subject to the provisions of this Part shall nevertheless be required to obtain operating permits, in order to control emissions, including fugitive emissions, from such sources. The Director shall promulgate regulations pursuant to this Subsection which shall identify the minor sources subject to this Subsection, provide for the filing of permit applications and compliance plans and for the payment of fees pursuant to Subsection (B) (9) of this Section, and require monitoring and reporting. Minor sources identified by the Director may include coal mines and uranium mines, in addition to such other sources as the Director identifies by regulation.

History

CAP-12-04, April 22, 2004.

CJY-58-95, July 20, 1995.

United States Code

Permit programs, see 42 U.S.C. § 7661a.

§ 1135. Permit applications

A. Applicable date. Any source specified in § 1134(E) of this Part shall become subject to a permit program under this Part on the later of the following dates:

1. The effective date of a permit program or partial or interim permit program applicable to the source; or
2. The date such source becomes subject to § 1134 of this Chapter.

B. Deadline. Any person required to have a permit shall, not later than one year after the date on which the source becomes subject to a permit program under this Part (including permit programs that have received interim approvals and partial permit programs), or such earlier date as the Director may establish, submit to the Director a compliance plan and an application for a permit signed by a responsible official, who shall certify the accuracy of the information submitted. Permit applications shall be filed in the manner and according to the requirements prescribed by this Chapter and by the Director through regulation. The Director shall approve or disapprove a completed application and shall issue or deny the permit within 18 months after the date of receipt thereof, except that the Director shall establish, in conjunction with EPA Region 9, a phased schedule for acting on permit applications submitted within the first full year after the effective date of the permit

program or the partial or interim program. This schedule shall ensure that all such applications will be acted on by the Director within five years after such effective date. The Director shall establish reasonable procedures to review permit applications and to prioritize approval or disapproval actions in the case of applications for construction or modification under the applicable requirements of this Chapter.

C. Permit applications.

1. Each issued permit shall contain the following statement to which the permittee must agree and subscribe for the permit to be complete and as a condition precedent to the final issuance of any permit:

"Permittee consents to the jurisdiction of the Navajo Nation with respect to those activities conducted pursuant to this permit issued by the Director pursuant to the provisions of the Navajo Nation Air Pollution Prevention and Control Act. This consent shall be effective when a permit is issued and may not be withdrawn. This consent shall extend to and be binding upon all successors, heirs, assigns, employees and agents, including contractors and subcontractors of permittee whose activities fall within the scope of the issued permit."

2. Permittee shall include the foregoing statement as a term and condition of any contract or other agreement it executes for services to be performed or goods to be provided within the Navajo Nation in connection with any permit issued by the Director, and each party to any such contract or other agreement must agree and subscribe to said statement, substituting the name of the party for "permittee" as appropriate.

D. Compliance plan. The applicant shall submit with the permit application a compliance plan describing how the source will comply with all applicable requirements under this Chapter. The compliance plan shall include a schedule of compliance and a schedule under which the permittee will submit progress reports to the Director no less frequently than every six months. In addition, the permittee shall periodically certify that the facility is in compliance with any applicable requirements of the permit, and promptly report any deviations from permit requirements to the Director, as provided in the regulations promulgated under this Part.

E. Timely and complete applications. Except for sources required to have a permit before construction or modification under this Chapter, if an applicant has submitted a timely and complete application for a permit required by this Part (including for a renewal) but final action has not been taken on such application, the source's failure to have a permit shall not be a violation of this Chapter, unless the delay in final action was due to the failure of the applicant timely to submit information required or requested to process the application. No source required to have a permit under this Part shall be in violation of § 1134 (E) of this Chapter before the date on which the source is required to submit an application under Subsection (B) of this Section.

F. Availability to public. A copy of each permit application, compliance

plan (including the schedule of compliance), emissions or compliance monitoring report, certification, and each permit issued under this Part, shall be available to the public. If an applicant or permittee is required to submit information entitled to protection from disclosure under § 1151 (D) of this Chapter, the applicant or permittee may submit such information separately. The requirements of § 1151 (D) shall apply to such information. The contents of a permit shall not be entitled to protection under § 1151 (D) of this Chapter.

History

CAP-12-04, April 22, 2004.

CJY-58-95, July 20, 1995.

United States Code

Permit applications, see 42 U.S.C. § 7661b.

§ 1136. Permit requirements and conditions

A. In general. Permits shall be issued under this Part for fixed terms, not to exceed five years, except that affected sources under Part G of this Subchapter must have five year fixed terms and solid waste incineration units under Part D of this Subchapter may have up to 12-year fixed terms. Each permit shall include enforceable emission limitations and standards, a schedule of compliance, a requirement that the permittee submit to the Director, no less often than every six months, the results of any required monitoring, provisions under which the permit can be revised, terminated, modified, or reissued for cause, an identification of all alternative operating scenarios, and such other conditions as are necessary to assure compliance with applicable requirements of this Chapter and the regulations hereunder, including the requirements of the applicable implementation plan.

B. Inspection, entry, monitoring, certification and reporting. Each permit issued under this Part shall set forth inspection, entry, monitoring, compliance certification and reporting requirements to assure compliance with the permit terms and conditions. Such monitoring and reporting requirements shall conform to any applicable regulation promulgated under § 504(b) of the Clean Air Act.¹ Any report required to be submitted by a permit issued to a corporation under this Part shall be signed by a responsible corporate official, who shall certify its accuracy.

C. General permits. The Director may, after notice and opportunity for public hearing, issue a general permit covering numerous similar sources. Any general permit shall comply with all requirements applicable to permits under this Subchapter. No source covered by a general permit shall thereby be relieved from the obligation to file an application under § 1135 of this Chapter.

D. Temporary sources. The Director may issue a single permit authorizing emissions from similar operations at multiple temporary locations. No such permit shall be issued unless it includes conditions that will assure compliance with all the requirements of this Chapter at all authorized

locations, including, but not limited to, ambient standards and compliance with any applicable increment or visibility requirements under Parts B and C of this Subchapter. Any such permit shall in addition require the owner or operator to notify the Director in advance of each change in location. The Director may require a separate permit fee for operations at each location.

E. Permit shield. Compliance with a permit issued in accordance with this Part shall be deemed compliance with § 1134 of this Chapter. Except as otherwise provided by the Administrator of the USEPA by regulation, the permit may also provide that compliance with the permit shall be deemed compliance with other applicable provisions of this Chapter that relate to the permittee if:

1. The permit includes the applicable requirements of such provisions; or

2. The Director, in acting on the permit application, makes a determination relating to the permittee that such other provisions are not applicable and the permit includes the determination or a concise summary thereof.

3. Nothing in the preceding sentence shall alter or affect the provisions of § 1105 of this Chapter, including the authority of the Director under that Section.

History

CAP-12-04, April 22, 2004.

CJY-58-95, July 20, 1995.

United States Code

Permit requirements and conditions, see 42 U.S.C. § 7661c.

§ 1137. Notification to Administrator of the USEPA and contiguous tribes and states; notification to public

A. Notice. Unless the following notification requirements are waived by the Administrator of the USEPA for a particular category of sources (other than major sources), pursuant to § 505(d) of the Clean Air Act ¹:

1. The Director shall:

a. Transmit to the Administrator of the USEPA a copy of each permit application (including any application for a permit modification or renewal) or such portion thereof, including any compliance plan, as the Administrator of the USEPA may require to effectively review the application and otherwise carry out the USEPA Administrator's responsibilities under the Clean Air Act;² and

b. Provide to the Administrator of the USEPA a copy of each permit proposed to be issued and issued as a final permit.

2. The Director shall notify all states and tribes:

a. Whose air quality may be affected and that are contiguous to the Navajo Nation; or

b. That are within 50 miles of the source, of each permit application or proposed permit forwarded to the Administrator of the USEPA under this Section, and shall provide an opportunity for such states and tribes to submit written recommendations respecting the issuance of the permit and its terms and conditions. If any part of those recommendations are not accepted by the Director, the Director shall notify the state or tribe submitting the recommendations and the Administrator of the USEPA in writing of his/her refusal to accept those recommendations and the reasons therefor.

B. Objection by USEPA. Unless the following requirements are waived by the Administrator of the USEPA for any particular category of sources (other than major sources), pursuant to § 505(d) of the Clean Air Act ¹:

1. The Director shall respond in writing to any objection by the Administrator of the USEPA to the issuance of a permit, pursuant to the provisions of § 505(b) of the Clean Air Act ³ and the regulations hereunder.

2. Upon receipt of an objection by the Administrator of the USEPA under § 505 of the Clean Air Act,⁴ the Director may not issue the permit unless it is revised and issued in accordance with Subsection (C) of this Section. If the Director has issued a permit prior to receipt of an objection by the Administrator of the USEPA under § 505(b)(2) of the Clean Air Act, the Director may issue a revised permit in accordance with Subsection (C) of this Section after the permit has been modified, terminated, or revoked by the Administrator of the USEPA.

C. Issuance or denial.

1. The Director shall, within 90 days after the date of an objection under § 505(b) of the Clean Air Act,³ submit a permit revised to meet the objection.

2. If the Administrator of the USEPA notifies the Director that cause exists to terminate, modify, or revoke and reissue a permit, the Director shall, within 90 days after receipt of such notification, forward to the Administrator of the USEPA a proposed determination of termination, modification, or revocation and reissuance, as appropriate. The Director may request a 90-day extension for this submittal, in accordance with § 505(e) of the Clean Air Act.⁵

D. Notification to general public. The NNAQCP shall give notice of permit applications and proposed permits to the public, according to regulations promulgated by the Director under this Part, providing an opportunity for public hearing and comment. Any person may petition the Administrator of the USEPA to veto a permit, pursuant to § 505(b) of the Clean Air Act,³ if the Administrator of the USEPA fails to object to the permit within the period prescribed by Title V of the Clean Air Act ⁶ and the

regulations thereunder. The objections in the petition must have been raised in the public comment period provided for in this Subsection, unless the petitioner shows that it was impracticable to have done so.

History

CAP-12-04, April 22, 2004.

CJY-58-95, July 20, 1995.

United States Code

Notification to Administrator and contiguous States, see 42 U.S.C. § 7661d.

§ 1138. Permit transfers

A permit shall not be transferable, by operation of law or otherwise, from one location to another or from one source to another, except that a permit may be transferred from one location to another in the case of a mobile or portable source that has notified the NNAQCP in advance of the transfer, pursuant to regulations promulgated under this Section. A permit for a source may be transferred from one person to another if the person who holds the permit notifies the NNAQCP in advance in writing of the transfer, according to regulations promulgated by the Director, and if the Director finds that the transferee is capable of operating the source in compliance with the permit and the requirements of this Part and the regulations hereunder.

History

CJY-58-95, July 20, 1995.

§ 1139. Permit Fund

There is hereby established a Permit Fund in the Navajo Treasury, consisting of fees, penalties and interest collected pursuant to this Part, § 1153 of this Chapter and Title V of the Clean Air Act. The Fund shall be administered by the Director and shall be used to pay for all direct and indirect costs of developing and administering the permit program under this Part, as described in § 1135 of this Part, including the cost of issuing conditional orders under § 1153 of this Chapter. In addition, penalties collected pursuant to § 1154(D)(3) and § 1156(E) may be utilized for the purposes set out therein. The Permit Fund shall not be utilized for any purpose not authorized by this Chapter or the Clean Air Act.¹ The Director may invest money from the Fund, and the money earned from investment shall be credited to the Fund.

History

CAP-12-04, April 22, 2004.

CJY-58-95, July 20, 1995.

§ 1140. Technical and environmental compliance assistance for small businesses

A. Eligibility. This Section shall apply to small business stationary sources, as such term is defined in § 1101 of this Chapter, except that the Director may, upon petition by a source and after notice and opportunity for public comment, include as a small business stationary source a stationary source that does not meet the criteria of Paragraphs (c) to (e) of § 1101 (A) (58) but that does not emit more than 100 tons per year of all regulated pollutants combined. In addition, the Director may, in consultation with the Administrator of the USEPA and the Administrator of the Small Business Administration and after providing notice and opportunity for public hearing, exclude from the definition any category or subcategory of sources that the Director determines to have sufficient technical and financial capabilities to meet the requirements of this Chapter and the Clean Air Act ¹ without the application of this Section.

B. Content of program. The Director may, after reasonable notice and public hearings, adopt and submit to the Administrator of the USEPA as part of the tribal implementation plan or as a revision to the tribal implementation plan a program to provide technical and environmental compliance assistance to small business stationary sources. The program must include each of the following:

1. Adequate mechanisms for developing, collecting and coordinating information concerning compliance methods and technologies for small business stationary sources, and programs to encourage lawful cooperation among such sources and other persons to further compliance with this Chapter and the Clean Air Act;¹

2. Adequate mechanisms for assisting small business stationary sources with pollution prevention and accidental release detection and prevention, including providing information concerning alternative technologies, process changes, products and methods of operation that help reduce air pollution;

3. A designated office within NNEPA to serve as ombudsman for small business stationary sources in connection with the implementation of this Chapter and the Clean Air Act;¹

4. A compliance assistance program for small business stationary sources that assists such sources in determining applicable requirements and in receiving permits under this Chapter and the Clean Air Act ¹ in a timely and efficient manner;

5. Adequate mechanisms to assure that small business stationary sources receive notice of their rights under this Chapter and the Clean Air Act ¹ in such manner and form as to assure reasonably adequate time for such sources to evaluate compliance methods and any relevant or applicable proposed or final regulation or standard issued under this Chapter or the Clean Air Act;

6. Adequate mechanisms for informing small business stationary sources of their obligations under this Chapter and the Clean Air Act,¹ including mechanisms for referring such sources to qualified auditors or, at the option of the Director, for providing audits of the operations of such sources to determine compliance with this Chapter and the Clean Air

Act; and

7. Procedures for consideration of requests from a small business stationary source, made before any applicable compliance date, for modification of any work practice or technological method of compliance or modification of the schedule for implementing such work practice or method of compliance, based on the technological and financial capability of any such source. No such modification may be granted unless it is in compliance with the applicable requirements of this Chapter and the Clean Air Act,¹ including the requirements of the applicable implementation plan. Where such requirements are set forth in federal regulations, only modifications authorized in such regulations may be allowed.

C. Compliance advisory panel.

1. A compliance advisory panel shall be established which shall:

a. Advise the Director on the effectiveness of the program operated pursuant to this Section, including on the difficulties encountered and the degree and severity of enforcement;

b. Review information developed by the program to ensure that it is understandable by the general public; and

c. Have the program develop and disseminate reports and advisory opinions concerning the findings made pursuant to Paragraphs (a) and (b) above.

2. The panel shall consist of five members, appointed for staggered terms, as follows:

a. Two members, who are not owners or representatives of owners of small business stationary sources, selected by the President to represent the general public;

b. Two members selected by the Speaker of the Navajo Nation Council who are owners or who represent owners of small business stationary sources; and

c. One member selected by the Director to represent NNEPA.

D. Fees. The Director may reduce any fee required under this Chapter to take into account the financial resources of small business stationary sources.

History

CAP-12-04, April 22, 2004.

CJY-58-95, July 20, 1995.

United States Code

Small business stationary source technical and environmental compliance assistance program, see 42 U.S.C. § 7661f.

Subchapter 3. Enforcement

United States Code

Federal enforcement, see 42 U.S.C. § 7413.

§ 1151. Record keeping, inspections, monitoring and entry

A. Requirements in orders or permits. The Director may require, by order or permit and on a one-time, periodic or continuous basis, any person who owns or operates any emission source, who manufactures emission control equipment or process equipment, who the Director believes may have information necessary for the purposes set forth in this Subsection, or who is subject to any requirement of this Chapter, to:

1. Establish and maintain such records;
2. Make such reports;
3. Install, use and maintain such monitoring equipment, and use such audit procedures or methods;
4. Sample such emissions (in accordance with such procedures or methods, at such locations, at such intervals, during such periods and in such manner as the Administrator of the USEPA or the Director shall prescribe);
5. Keep records on control equipment parameters, production variables or other indirect data when direct monitoring of emissions is impractical;
6. Submit compliance certifications in accordance with Subsection (B) of this Section; and
7. Provide such other information as the Director may reasonably require.

B. Monitoring. The Director may require sources to monitor, sample or otherwise quantify their emissions as follows:

1. The Director may adopt regulations requiring sources to monitor, sample or otherwise quantify their emissions of air pollutants for which ambient air quality standards or emission, design, equipment, work practice or operational standards have been adopted. In the development of these regulations, the Director shall consider the cost and effectiveness of the monitoring, sampling or other studies.
2. In prescribing monitoring, sampling or other quantification requirements under Subsection (A), the Director shall consider the relative cost and accuracy of any reasonable alternatives to such requirements. The Director may require monitoring, sampling or other quantifications under Subsection (A) if the Director determines in

writing that the actual or potential emissions in question may adversely affect public health or the environment and the monitoring, sampling, or other quantification method to be required is technically feasible, reasonably accurate and reasonable in cost in light of the use to be made of the data.

3. The Director may require enhanced monitoring and submission of compliance certifications in cases where the Administrator of the USEPA has not already done so pursuant to § 114(a) (3) of the Clean Air Act.¹ Compliance certifications shall be subject to the same requirements as those prescribed under § 114 (a) (3) of the Clean Air Act and the regulations hereunder and, together with monitoring data, shall be subject to Subsection (D) of this Chapter. Submission of a compliance certification shall not limit the Director's authority to investigate or otherwise implement this Chapter.

C. Production of records. Whenever the Director has reasonable cause to believe that any person has violated or is in violation of any requirement of this Chapter or of any regulation hereunder or any requirement of a permit issued pursuant to this Chapter, he/she may require in writing that such person produce all existing books, records and other documents evidencing tests, inspections or studies which may reasonably relate to compliance or noncompliance with such requirements.

D. Public availability of information. Any records, reports or information obtained under Subsections (A), (B) or (C) of this Section shall be available to the public, except that upon a showing satisfactory to the Director by any person that records, reports or information, or any portion thereof (other than emission data), would, if made public, divulge methods or processes entitled to protection as trade secrets of such person, the Director shall consider such record, report, information or portion thereof confidential, except that such material may be disclosed to other officers, employees or authorized representatives of the Navajo Nation and of the United States concerned with carrying out this Chapter or when relevant to any proceeding under this Chapter.

History

CJY-58-95, July 20, 1995.

United States Code

Recordkeeping, inspections, monitoring and entry, see 42 U.S.C. § 7414.

§ 1152. Orders to comply

A. In general. Whenever, on the basis of any information available to the Director, the Director finds that any person has violated, or is in violation of, any requirement or prohibition of this Chapter, the regulations promulgated under this Chapter, or permits, orders, plans (including tribal (Navajo Nation) implementation plans), waivers or fees issued or approved pursuant to this Chapter, the Director may:

1. Issue and serve on such person an order requiring such person to

comply with such requirement or prohibition, pursuant to the provisions of this Section;

2. Issue and serve on such person an administrative penalty in accordance with § 1155 of this Chapter;

3. Bring a civil action in accordance with § 1154 of this Chapter; and/or;

4. Bring a criminal action in accordance with § 1154 of this Chapter and/or refer any criminal enforcement action or portion of such action to the EPA Regional Administrator for the appropriate EPA region.

B. In addition, when a person has consistently violated any requirements or prohibitions of this Chapter, the regulations promulgated under this Chapter, or permits, orders, plans (including tribal (Navajo Nation) implementation plans), waivers or fees issued or approved pursuant to this Chapter, or refused to comply with any such requirements or prohibitions, the Director may issue an order prohibiting such person from continuing to operate a source within the Navajo Nation, and/or prohibiting such person from entering into any new contracts (including leases) that would permit such person to operate a source within the Navajo Nation.

C. Requirements for orders to comply. An order to comply issued under this Section shall state with reasonable specificity the nature of the violation, shall state that the alleged violator is entitled to a hearing pursuant to regulations promulgated by the Director under § 1161 of this Chapter, if such hearing is requested in writing within 30 days after the date of issuance of the order, and shall specify a time for compliance that the Director determines is as expeditious as practicable, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements. The order shall become effective immediately upon the expiration of the 30 days if no hearing is requested and, if a timely request for a hearing is made, upon the decision of the Director. The order may be conditional and require a person to refrain from particular acts unless certain conditions are met. In the case of a source required to obtain a permit pursuant to Part H of Subchapter 2 of this Chapter and Title V of the Clean Air Act,¹ the order shall require compliance no later than one year after the date the order is issued and shall be nonrenewable. A copy of the order shall be sent to the appropriate EPA region and, if the order is issued to a corporation, to the appropriate corporate officers. No order to comply issued under this Section shall prevent the Navajo Nation from assessing any penalties nor otherwise affect or limit the Navajo Nation's authority to enforce under other provisions of this Chapter, nor affect any person's obligations to comply with any Section of this Chapter or with a term or condition of any permit or implementation plan promulgated or approved under this Chapter.

History

CJY-58-95, July 20, 1995.

§ 1153. Conditional orders

A. Issuance. The Director may adopt regulations providing for the

issuance of conditional orders to owners or operators of air pollution sources, which would allow sources to vary from provisions of this Chapter and regulations and plans adopted and permits issued pursuant to this Chapter. Such regulations shall allow owners and operators of sources to petition the Director for conditional orders, and shall specify the minimum requirements for such petitions and procedures for processing petitions and for public participation. For a conditional order that would vary from a requirement of a tribal (Navajo Nation) implementation plan, the regulations shall provide for submittal of the order to the Administrator of the USEPA pursuant to § 110(1) of the Clean Air Act ¹ and shall provide for a public hearing on the petition. For a conditional order that would vary from a requirement of a permit issued pursuant to this Chapter, the regulations shall conform to the procedures established for permit revisions pursuant to Part H of Subchapter 2 of this Chapter. In all cases, the Director shall grant a petition for a conditional order only if he/she finds that:

1. There has been a breakdown of equipment or operations beyond the control of the petitioner, the source was in compliance before the breakdown and the breakdown can be corrected within a reasonable time; and

2. Issuance of the conditional order will not endanger public health or the environment, impede attainment of the national ambient air quality standards or cause significant deterioration of existing air quality.

B. Terms and conditions of orders. The requirements imposed as a basis for granting or renewing a conditional order shall include, but not be limited to:

1. A detailed plan for the completion of corrective steps needed to conform to the provisions of this Chapter, and the regulations adopted and permits issued hereunder;

2. A requirement that necessary construction shall begin as expeditiously as practicable; and

3. The right of the NNAQCP to make periodic inspections of the facilities for which the conditional order is granted.

C. Subject to the provisions of Subsection (D), conditional orders shall, be valid for no longer than one year in the case of a source that is required to obtain a permit pursuant to Part H of Subchapter 2 of this Chapter and Title V of the Clean Air Act ² and no longer than three years in the case of any other source. Any fees imposed by the Director in order to obtain a conditional order shall be deposited in the permit fund established under § 1139 of this Chapter.

D. Renewals. A holder of a conditional order may petition the Director for a renewal of such order. A petition for renewal may be filed not more than 60 days nor fewer than 30 days prior to the expiration of the order. The Director, within 30 days of receipt of the petition, shall renew the conditional order for one year if the petitioner is in compliance with the requirements imposed pursuant to Subsection (B). The total term of renewals

shall not exceed three years from the date of initial issuance of such order, except that if the petitioner is not in compliance with the requirements of the order after this three-year period and the Director finds that such failure is due to conditions beyond the control of the petitioner, the Director may renew the order for a total term of two additional years. The Director may also renew a conditional order for up to an additional two year term if the Director amends or adopts any regulation that requires the installation of additional or different air pollution control equipment on the source in question.

E. Suspension and revocation. If the terms of a conditional order are being or have been violated, the Director may seek to revoke or suspend the conditional order. In such event, the Director shall serve notice of such violation on the holder of the order, specifying the nature of the violation and the date on which a hearing will be held to determine whether the violation occurred and whether the order should be suspended or revoked.

History

CAP-12-04, April 22, 2004.

CJY-58-95, July 20, 1995.

§ 1154. Judicial Enforcement

A. Civil judicial enforcement. The Director shall request the Attorney General to file an action for a temporary restraining order, a preliminary injunction, a permanent injunction or any other relief provided by law, including the assessment and recovery of civil penalties not more than thirty-two thousand five hundred dollars (\$32,500) per day, which amount shall increase automatically whenever the federal maximum civil penalty increases, in any of the following instances:

1. Whenever a person has violated, or is in violation of, any provision, requirement or prohibition of this Chapter, including, but not limited to, a regulation or plan adopted pursuant this Chapter, a permit or order issued pursuant to this Chapter or a fee assessed under this Chapter;

2. Whenever a person has violated, or is in violation of, any duty to allow or carry out inspection, entry or monitoring activities;

3. Whenever a person is creating an imminent and substantial endangerment to the public health or the environment because of a release of air pollution, in which case the Director shall request the Attorney General to pursue injunctive relief but not the assessment of penalties, unless the endangerment to the public health is caused by a violation, as specified in Paragraphs (1) and (2).

B. Criminal penalties. Any person who intentionally:

1. Violates any provision, requirement or prohibition of this Chapter, including but not limited to a regulation or plan adopted pursuant to this Chapter, a permit or order issued pursuant to this Chapter, a filing, reporting or notice requirement under this Chapter or

a fee assessed under this Chapter;

2. Makes any false material statement, representation or certification in, or omits material information from, or alters, conceals or fails to file or maintain any notice, application, record, report, plan or other document required pursuant to this Chapter to be filed or maintained, including required by a permit issued pursuant to this Chapter; or

3. Falsifies, tampers with, renders inaccurate or fails to install any monitoring device or method required to be maintained or followed under this Chapter; shall, upon conviction, be punished by a fine in a maximum amount of not less than ten thousand dollars (\$10,000) per day per violation or, if smaller, the largest amount permissible under applicable law. In any instance where the Navajo Nation lacks jurisdiction over the person charged, or where the Director is limited in the amount of the fine that he/she may impose, the Director may refer the action to the appropriate EPA Regional Administrator pursuant to § 1152 of this Chapter. For the purpose of this Subsection, the term "person" includes, in addition to the entities referred to in § 1101(a)(49) of this Chapter, any responsible corporate officer.

C. Jurisdiction and venue. Any action under this Subsection may be brought in the Navajo Nation District Court in Window Rock, and such court shall have jurisdiction to restrain such violation, require compliance, assess civil penalties, collect any fees or noncompliance penalties owed the Navajo Nation under this Chapter, and awarded any other appropriate relief.

D. Calculation of penalties.

1. For purposes of determining the number of days of violation for which a civil penalty may be assessed under this Section, § 1155 or § 1156, if the Director has notified the source in writing of the violation and the Director or plaintiff makes a prima facie showing that the conduct or events giving rise to the violation are likely to have continued or recurred past the date of notice, the days of violation shall be presumed to include the date of such notice and each day thereafter until the violator establishes that continuous compliance has been achieved, except to the extent that the violator can prove by a preponderance of the evidence that there were intervening days during which no violation occurred or that the violation was not continuing in nature. Notice under this Section shall be accomplished by the issuance of a written notice of violation or written order to comply or by filing a complaint in the Navajo Nation District Court in Window Rock that alleges any violation described in Subsection (A) of this Section.

2. In determining the amount of a civil penalty assessed under this Section, the court shall consider the history, seriousness and duration of the violation; any good faith efforts to comply with the applicable requirements; the violator's full compliance history, including the severity and duration of past violations, if any, the economic impact of the penalty on the violator; as an aggravating factor only, the economic benefit, if any, resulting from the violation; and any other factors that the court deems relevant. The court shall not assess penalties for

noncompliance with administrative subpoenas under § 1161 of this Chapter or actions under § 1151 of this Chapter where the violator had sufficient cause to violate or fail to refuse to comply with such subpoena or action.

3. All penalties collected pursuant to this Section shall be deposited in a special fund in the Navajo Treasury for use by the Director to finance air compliance and enforcement activities. The Director shall report annually to the Navajo Nation Council about the sums deposited into the fund, including the sources and the actual and proposed uses thereof

E. Security. The court may, if a temporary restraining order or preliminary injunction is sought under this Section or § 1156 of this Chapter, require the filing of a bond or equivalent security.

History

CAP-12-04, April 22, 2004.

CJY-58-95, July 20, 1995.

§ 1155. Administrative assessment of penalties

A. Basis for penalty. The Director may issue against any person an administrative order assessing a civil administrative penalty of up to ten thousand dollars (\$10,000) per day per violation whenever the Director finds that a person has violated, or is in violation of, any provision, requirement or prohibition of this Chapter, including, but not limited to, a regulation or plan adopted pursuant to this Chapter, a permit or order issued pursuant to this Chapter or a fee assessed under this Chapter. The Director's authority under this Subsection shall be limited to matters where the total penalty sought does not exceed one hundred thousand dollars (\$100,000) and the first alleged date of violation occurred no more than one year prior to the initiation of administrative action, except where the Director and Attorney General jointly determine that a matter involving a larger penalty or longer period of violation is appropriate for administrative penalty action. The communications required to make such a joint determination and the method(s) utilized for making such a joint determination shall be privileged, and shall not be subject to judicial review. The Director may compromise, modify or remit, with or without any conditions, any administrative penalty imposed under this Section.

B. Hearing requirement. The Director shall assess an administrative penalty under this Section by an order made after opportunity for a hearing. The Director shall promulgate rules for discovery and other procedures for hearings under this Section. Before issuing such an order, the Director shall give written notice of the proposed order to the person on whom the penalty is to be assessed and provide such person an opportunity to request a hearing within 30 days of receipt of the notice.

C. Field citations. After consultation with the Attorney General, the Director may implement a field citation program through regulations establishing minor violations for which field citations (assessing civil

penalties not to exceed five thousand dollars (\$5,000) per day per violation) may be issued by officers or employees designated by the Director, to the extent permissible under applicable law. Any person on whom a field citation is assessed may, pursuant to regulations issued under this Section, elect to pay the penalty or request a hearing on the citation. If a timely request for a hearing is not made, the penalty shall be final and the opportunity for judicial review shall be waived. Any hearing shall provide a reasonable opportunity to be heard and to present evidence. Payment of a penalty required by a field citation shall not be a defense to further enforcement by the Director to correct a violation or to assess the statutory maximum penalty pursuant to other authorities in this Chapter if the violation continues.

D. Judicial review. Any person subject to a civil penalty under Subsections (A) or (C) of this Section may seek review of such penalty assessment in the Navajo Nation District Court in Window Rock by filing a petition for review in such court within 30 days following the date that the penalty becomes final and by simultaneously sending a copy of such filing by certified mail to the Director and the Attorney General. Within 30 days thereafter the Director shall file in such court a certified copy or certified index of the record on which the penalty was based. The court shall not set aside or remand an order or assessment under this Section unless the record, taken as a whole, does not substantially support the finding of a violation or unless the order or penalty assessment constitutes an abuse of discretion. In any such proceedings, the Director may seek to recover civil penalties ordered or assessed under this Section.

E. Failure to pay penalty. If any person fails to pay an assessment of a civil penalty or fails to comply with an administrative penalty order after the order or assessment has become final, the Director shall request the Attorney General to bring a civil action in the Navajo Nation District Court in Window Rock to enforce the order or recover the amount ordered or assessed plus interest, from the date of the final order or decision or the date of the final judgment, as the case may be. In such an action the validity, amount and appropriateness of the order or assessment shall not be subject to review. Any person who fails to pay on a timely basis a civil penalty ordered or assessed under this Section shall be required to pay, in addition to such penalty and interest, the Director's enforcement expenses, including but not limited to attorneys' fees and costs of collection proceedings. Such person shall also pay a quarterly nonpayment penalty for each quarter during which such failure to pay persists. The nonpayment penalty shall be ten percent (10%) of the aggregate amount of the person's outstanding penalties and nonpayment penalties accrued as of the beginning of the quarter.

F. Calculation of penalty. In determining the amount of any penalty to be assessed under this Section, the Director or the court, as appropriate, shall take into consideration the factors enumerated in § 1154(D) of this Chapter.

History

CJY-58-95, July 20, 1995.

§ 1156. Citizen suits

A. Authority to bring civil action; jurisdiction.

1. Except as provided in Subsection (B) of this Section, a person may commence a civil action in the Navajo Nation District Court in Window Rock on his/her own behalf against any person (except the Navajo Nation or any instrumentality of the Navajo Nation, but not excepting Tribal enterprises) who is alleged to be in violation of an emission standard or limitation under this Chapter, an order issued by the Director or the President with respect to such a standard or limitation, or a permit of requirement to have a permit issued under this Chapter.

2. The Navajo Nation Courts shall have jurisdiction to enforce such an emission standard or limitation, order or permit requirement and to apply any appropriate civil penalties.

B. Notice.

1. An action may not be commenced under Subsection (A) (1) of this Section fewer than 60 days after the plaintiff has given notice of the alleged violation to the Director, the Navajo Nation and the alleged violator. In addition, an action may not be commenced if the Director has commenced and is diligently prosecuting a civil action in court to require compliance with this Chapter, except that any person may intervene as a matter of right in such an action.

C. Venue; intervention; service of complaint

1. Any action respecting a violation by a source of an emission standard or limitation or an order respecting such standard or limitation may be brought only in the Navajo Nation District Court in Window Rock.

2. The Director, if not already a party, may intervene as of right in any action brought under this Section.

3. Whenever any action is brought under this Section the plaintiff shall serve a copy of the complaint on the Attorney General and on the Director. No consent judgment may be entered in an action brought under this Section in which the Director is not a party prior to 45 days following the receipt of a copy of the proposed consent judgment by the Attorney General and the Director, during which time the Attorney General and the Director may submit, on behalf of the Navajo Nation, their comments on the proposed consent judgment to the court and parties or the Director may intervene as a matter of right.

D. Award of costs. The Court, in issuing a final order in an action brought under this Section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party whenever the court determines that such award is appropriate.

E. Penalty fund. Penalties received under this Section shall be deposited in a special fund in the Navajo Nation Treasury for use by the Director to finance air compliance and enforcement activities. The Director shall report annually to the Navajo Nation Council about the sums deposited into the fund, including the sources and the actual and proposed uses thereof.

History

CJY-58-95, July 20, 1995.

United States Code

Citizen suits, see 42 U.S.C. § 7604.

Subchapter 4. Rulemaking and Judicial Review

United States Code

Administrative proceedings and judicial review, see 42 U.S.C. § 7607.

§ 1161. Rulemaking and other administrative procedures

A. Rulemaking.

1. Notice of any proposed regulation shall be published in a newspaper of general circulation for the areas of the Navajo Nation that are concerned. The notice shall specify the period available for public comment and the date, time and place of any public hearing, and shall make available to the public a copy of the proposed regulation. Not later than the date of proposal of the regulation in question the Director shall establish a rulemaking docket and shall make the docket available to the public for inspection and copying during regular business hours. The Director shall allow any person to submit written comments, data or documentary information; shall in addition give interested persons an opportunity to present orally their views, in the Navajo or English language, data or arguments; and shall keep the docket open for 20 days after such proceeding to provide an opportunity for submission of rebuttal and supplementary information.

2. The final regulation shall be based on the record of the rulemaking proceeding, contained in the docket, and shall be accompanied by an explanation of the reasons for any major changes from the proposed regulation and a response to each of the significant comments submitted in written or oral presentations during the comment period.

B. Administrative subpoenas.

1. In connection with any investigation, monitoring, reporting, entry, compliance inspection or administrative enforcement proceeding under this Chapter, the Director may issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books and documents, and may administer oaths.

2. Except for emissions data, upon a showing satisfactory to the Director by the owner or operator of a source that it would divulge trade secrets or secret processes to make public such papers, books, documents or information or any portion thereof, the Director shall consider this information confidential, except that such information may be disclosed

to other officers, employees or authorized representatives of the Navajo Nation concerned with carrying out this Chapter or when relevant in any proceeding under this Chapter.

3. Witnesses summoned shall be paid the same fees and mileage that are paid in the Navajo Nation's Courts. In case of contumacy or refusal to obey a subpoena, the tribal court for the district in which such person is found, resides or transacts business shall have jurisdiction to issue an order requiring such person to appear before the Director and give testimony or produce papers, books or documents, or both, and any failure to obey such an order may be punished by the court as contempt.

History

CJY-58-95, July 20, 1995.

§ 1162. Review in Navajo Nation Courts

A. Petitions for review. A petition for review of any final action taken by the Director under this Chapter, including but not limited to promulgation of regulations and standards, issuance of orders, and issuance and denial of permits (but not including imposition of administrative penalties under § 1155), shall be brought in the Navajo Nation Supreme Court. The petition shall be filed within 90 days from the date that notice of such final action is first published, or, if notice is not published, first served upon the alleged violator or such other person required to be served under this Chapter, except that if the petition is based solely on grounds arising after the ninetieth day, then the petition shall be filed within 90 days after such grounds arise. The Navajo Nation Supreme Court, in reviewing the final action, shall limit its review to the issues and evidence that were before the Director at the time of the final action from which the appeal is taken.

B. Limitations on review.

1. If judicial review of a final action of the Director could have been obtained under Subsection (A) of this Section, that action shall not be subject to judicial review in judicial proceedings for enforcement.

2. With respect to any regulations promulgated under this Chapter, only an objection that was raised with reasonable specificity during the public comment period may be raised during judicial review. If the person raising an objection can demonstrate to the Director that it was impracticable to raise the objection within such time or if the grounds for the objection arose after the public comment period (but within the time specified for judicial review), and if the objection is of central relevance to the outcome of the regulation, the Director shall convene a proceeding for reconsideration of the regulation and provide the same procedural rights as would have been afforded had the information been available at the time the regulation was proposed. If the Director refuses to convene such a proceeding, the person may seek review of such refusal in the Navajo Nation Supreme Court. Such reconsideration shall not postpone the effectiveness of the regulation, although it may be stayed by the Director or the court for up to three months.

3. No interlocutory appeals shall be permitted with regard to procedural determinations made by the Director during rulemakings. In reviewing alleged procedural errors, the court may invalidate the regulation only if the errors were so serious and related to matters of such central relevance to the regulation that there is a substantial likelihood that the regulation would have been significantly changed if such errors had not been made.

C. Standards for review. In reviewing any final action of the Director undertaken pursuant to this Chapter, the court may reverse any such action that it finds to be:

1. Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law;
2. In excess of statutory jurisdiction, authority, or limitations short of statutory right;
3. Without observance of procedure required by law; or
4. Unsupported by substantial evidence.

D. Challenge to any provisions. Any challenge to the lawfulness of any provision of this Chapter must be filed in accordance with Navajo law within 90 calendar days after the date of enactment of this Chapter in the District Court for the District of Window Rock, naming as defendant the Navajo Nation, and not thereafter or in any other manner. Any challenge to regulations promulgated under this Chapter must be filed within 90 calendar days of their adoption. In any such action, relief shall be limited to declaratory relief. The District Court for the District of Window Rock shall have exclusive jurisdiction and venue over any action challenging any provision of this Chapter.

History

CJY-58-95, July 20, 1995.

Chapter 13. Navajo Nation Clean Water Act

History

Note. The Navajo Nation Clean Water Act amended the Navajo Nation Pollutant Discharge Elimination System Act previously approved by Navajo Nation Council Resolution CJA-16-96.

United States Code

Indian tribes, water pollution prevention and control, see 33 U.S.C. § 1377.

Subchapter 1. General Provisions

§ 1301. Title

This Act may be cited as the Navajo Nation Clean Water Act ("NNCWA").

History

CJY-81-99, July 26, 1999.

§ 1302. Definitions

A. For the purposes of this Act:

1. "Administrator" means the Administrator of the U.S. Environmental Protection Agency.

2. "Best management practice" or "BMP" means methods, measures or practices selected by an agency to meet its nonpoint source control needs or, in the case of the National Pollutant Discharge Elimination System, schedules of activities, prohibitions of practices, maintenance procedures and other management practices to prevent or reduce the pollution of waters of the Navajo Nation. BMPs include, but are not limited to, structural and nonstructural controls, treatment requirements, operation and maintenance procedures and practices to control plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage, and can be applied before, during, or after pollution-producing activities to reduce or eliminate the introduction of pollutants into waters of the Navajo Nation.

3. "Biological monitoring" means the determination of the effects on aquatic life, including accumulation of pollutants in tissue, in receiving waters due to the discharge of pollutants:

(a) By techniques and procedures, including sampling of organisms representative of appropriate levels of the food chain appropriate to the volume and the physical, chemical, and biological characteristics of the effluent, and

(b) At appropriate frequencies and locations.

4. "Chapter," when used with reference to a governmental unit, means those community organizations duly certified and recognized as such by the Navajo Nation Council in CAP-34-98.

5. "Clean Water Act" means the Federal Water Pollution Control Act of 1972, as amended, 33 U.S.C. § 1251 *et seq.*

6. "Contaminant" means any physical, chemical, biological, or radiological substance or matter introduced by man or man's actions in water.

7. "Director" means the Executive Director of the Navajo Nation Environmental Protection Agency.

8. "Discharge," when used without qualification, means a discharge of pollutant(s).

9. "Discharge of pollutant(s)" means any addition of any pollutant

to navigable waters from any point source.

10. "Disposal system" means a system for disposing of wastes, either by surface or underground methods, and includes sewerage systems, treatment works, disposal wells, septic tanks, and other systems.

11. "Domestic septage" means either liquid or solid material removed from a septic tank, cesspool, portable toilet, Type III marine sanitation device, or similar treatment works that receive only domestic sewage. Domestic septage does not include liquid or solid material removed from a septic tank, cesspool, or similar treatment works that receives either commercial wastewater or industrial wastewater and does not include grease removed from a grease trap at a restaurant.

12. "Domestic sewage" means waste and wastewater from humans or household operations that is discharged to or otherwise enters a treatment works.

13. "Effluent limitation" means any restriction, requirement, or prohibition on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources, including schedules of compliance.

14. "Fundamentally different factors variance" means a variance from otherwise applicable technology-based effluent limitations under Subsections 301(b)(1)(A), 301(b)(2)(A) and (E), and 301(n) of the Clean Water Act.¹

15. "Industrial user" means those industries identified in the Standard Industrial Classification Manual, Bureau of the Budget, 1967, as amended and supplemented, under the category "Division D-Manufacturing," and such other classes of significant waste products as, by regulation, the Administrator deems appropriate.

16. "Load allocation" or "LA" means the portion of a receiving water's loading capability that is attributed either to one of its existing or future nonpoint sources of pollution or to natural background sources.

17. "Medical waste" means isolation wastes, infectious agents, human blood and blood products, pathological wastes, sharps, body parts, contaminated bedding, surgical wastes and potentially contaminated laboratory wastes, dialysis wastes, and such additional medical items as the Administrator shall prescribe by regulation.

18. "National Pollutant Discharge Elimination System" or "NPDES" means the regulatory program operated under Sections 307,² 318,³ 402⁴ and 405⁵ of the Clean Water Act (including pretreatment and sludge management) and under Subchapters 3, 4 and 5 of this Act.

19. "National pretreatment standard" means any regulation promulgated by the Administrator in accordance with Section 307(b) and (c) of the Clean Water Act⁶ which applies to industrial users, including prohibited discharges.

20. "Navajo Nation" or "Nation" means-

a. When referring to the body politic, except as the context may otherwise require, the same meaning as set forth in 1 N.N.C. § 501.

b. When referring to territorial jurisdiction, all lands and waters within the territorial boundaries of the Navajo Nation, including:

i. All lands and waters within the exterior boundaries of the Navajo Indian Reservation or of the Eastern Navajo Agency or within the boundaries of Navajo dependent Indian communities, including all lands within the boundaries of Navajo chapter governments, all without regard to the nature of title thereto;

ii. All lands and waters held in trust by the United States for, or restricted by the United States, or otherwise set apart under the superintendence of the United States for, the use of the Navajo Nation, the Navajo Tribe, any Band of Navajo Indians, or any individual Navajo Indians as such; and

iii. All other lands and waters over which the Navajo Nation may exercise governmental jurisdiction in accordance with federal or international law.

21. "Navigable waters" means waters of the Navajo Nation.

22. "New source" means any source (a building, structure, facility, or installation from which there is or may be a discharge of pollutants), the construction of which is commenced after publication by the Administrator of proposed regulations prescribing a standard of performance under Section 306 of the Clean Water Act ⁷ which will be applicable to such sources, if such a standard is thereafter promulgated in accordance with Section 306 of the Clean Water Act.

23. "New source performance standard" means a standard promulgated by the Administrator applicable to a category of new sources.

24. "Non-point source" means any source of water pollution that is not a point source, as defined herein.

25. "Person" means the Navajo Nation or any agency, entity or institution thereof, any chapter, township, political subdivision, public or private corporation, individual, partnership, association, federal agency, state, Indian Tribe, any interstate or intertribal body, municipality, commission or political subdivision of a state, or other entity, and includes any officer or governing or managing body of any chapter, township, political subdivision, or public or private corporation.

26. "Point source" means any discernible, confined, and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, landfill leachate collection system, container, rolling stock (except to the extent excluded from the

NPDES program by Section 601 of the National and Community Service Act of 1990, P.L. 101-610, 104 Stat. 3185), concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural storm water discharges or return flows from irrigated agriculture.

27. "Pollution" means any man-made or man-induced alteration of the chemical, physical, biological, or radiological integrity of the environment.

28. "Pretreatment program" means the program operated by the Navajo Nation Environmental Protection Agency and any publicly owned treatment works (whose program has been approved either by the Director or the Administrator) to implement national pretreatment standards to control pollutants which pass through or interfere with treatment processes in publicly owned treatment works or which may contaminate sewage sludge.

29. "Publicly owned treatment works" or "POTW" means any device or system used in the treatment (including recycling and reclamation) of municipal sewage or industrial wastes of a liquid nature which is owned by the Navajo Nation, its political subdivisions or entities, or other state, municipality, or tribe; this term does not include such a facility owned or operated by the United States or a federal agency.

30. "Schedule of compliance" or "compliance schedule" means a schedule of remedial measures, including an enforceable sequence of actions or operations leading to compliance with an effluent limitation or other limitation, prohibition or standard.

31. "Section 404 permit" means a permit issued by the U.S. Army Corps of Engineers under Section 404 of the Clean Water Act ⁸ or a permit issued by a tribe or state that is authorized by the U.S. Environmental Protection Agency to issue Section 404 permits.

32. "Sewerage system" means pipelines or conduits, pumping stations, and all other constructions, devices, appurtenances, and facilities used for collecting or conducting wastes to a point of ultimate disposal.

33. "Sewage sludge" means solid, semi-solid, or liquid residues generated during the treatment of domestic sewage in a treatment works. Sewage sludge includes, but is not limited to, domestic septage, scum or solid removed in primary, secondary, or advanced wastewater treatment processes, and a material derived from sewage sludge. Sewage sludge does not include ash generated during firing of sewage sludge in a sewage sludge incinerator or grit and screenings generated during preliminary treatment of domestic sewage in a treatment works.

34. "Storm water" means storm water runoff, snow melt runoff, and surface runoff and drainage.

35. "Total maximum daily load" or "TMDL" means the sum of the individual wasteload allocations for point sources and load allocations for nonpoint sources and natural background.

36. "Toxic pollutant" means those pollutants, or combinations of pollutants, including disease-causing agents, which after discharge and upon exposure, ingestion, inhalation or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, will, on the basis of information available to the Administrator, cause death, disease, behavioral abnormalities, cancer, genetic mutations, physiological malfunctions (including malfunctions in reproduction) or physical deformations in such organisms or their offspring.

37. "Treatment works" means any device, system, plant, disposal field, lagoon, dam, pumping station, incinerator, or other works subject to this Act used for the purpose of recycling, reclaiming, treating, stabilizing, or holding wastes.

38. "Treatment works treating domestic sewage" means a POTW or any other sewage sludge or waste water treatment devices or systems, regardless of ownership (including federal facilities), used in the storage, treatment, recycling, and reclamation of municipal or domestic sewage, including land dedicated for the disposal of sewage sludge. This definition does not include septic tanks or similar devices. For the purposes of this definition, "domestic sewage" includes waste and waste water from humans or household operations that are discharged to or otherwise enter a treatment works. The Director may designate any person subject to the standards for sewage sludge use and disposal established by the Administrator as a "treatment works treating domestic sewage."

39. "Underground injection" means the subsurface emplacement of fluids by well injection.

40. "United State Environmental Protection Agency" or "U.S. EPA" means the United States Environmental Protection Agency, its Administrator, Regional Administrator, or delegate.

41. "Waste" or "pollutant" means dredged spoil, solid waste, incinerator residue, filter backwash, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials (except those regulated under the Atomic Energy Act of 1954,⁹ as amended), heat, wrecked or discarded equipment, rock, sand, cellar dirt, and industrial, municipal, and agricultural waste discharged into water. This term does not mean (A) "sewage from vessels" within the meaning of Section 312 of the Clean Water Act;¹⁰ or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the Navajo Nation, and the Navajo Nation determines that such injection or disposal will not result in the degradation of ground or surface water resources.

42. "Wasteload allocation" or "WLA" means the portion of a receiving water's loading capacity that is allocated to one of its existing or future point sources of pollution.

43. "Waters of the Navajo Nation" means all surface waters, including but not limited to portions of rivers, streams (including perennial, intermittent and ephemeral streams and their tributaries), lakes, ponds, dry washes, marshes, waterways, wetlands, mudflats, sandflats, sloughs, prairie potholes, wet meadows, playa lakes, impoundments, riparian areas, springs, and all other bodies or accumulations of water, surface, natural or artificial, public or private, including those dry during part of the year, that are within or border the Navajo Nation. This definition shall be interpreted as broadly as possible to include all waters that are currently used, were used in the past, or may be susceptible to use in interstate, intertribal or foreign commerce. Consistent with federal requirements, the Director may exclude from waters of the Navajo Nation certain waste treatment systems.

44. "Wetlands" means those areas that are inundated or saturated by surface water or groundwater at a frequency and duration to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

History

CJY-81-99, July 26, 1999.

§ 1303. Policy and Authority

A. Legislative purposes and intent.

1. The Navajo Nation Council finds and declares that discharges of pollutants into the waters of the Navajo Nation from point and non-point sources, introduction of pollutants by industrial users into publicly owned treatment works and improper management of sewage sludge are potential hazards to the health, welfare and environment of the Navajo Nation and its residents and need to be addressed.

2. It is the policy of the Navajo Nation Council to protect the health, safety, welfare and environment of the Navajo Nation and its residents; to prevent, reduce and eliminate pollution of the waters of the Navajo Nation; and to plan the development and use (including restoration, preservation, and enhancement) of land and water resources within the Nation, by:

a. Providing for the establishment of water quality standards to protect fish and wildlife and the domestic, cultural, agricultural and recreational uses of the waters of the Navajo Nation;

b. Preventing the discharge of pollutants into waters of the Navajo Nation in amounts that would cause violations of water quality standards;

c. Providing for the issuance of permits and implementation of certification programs under this Act to control present and future point source discharges, introduction of pollutants by industrial users

to publicly owned treatment works, and sludge management activities, using, to the extent practicable, a watershed basis;

d. Providing for the development of nonpoint source, clean lakes, and watershed protection programs, and for the implementation of these programs using, to the extent practicable, a watershed basis; and

e. Supporting research relating to water quality standards and planning, clean lakes, nonpoint sources, and watershed protection, and providing for tribal technical services and financial aid (to the extent funds are available and appropriated) to the Navajo Nation government and chapters in connection with these programs and their implementation.

3. The Navajo Nation Council also finds and declares that degradation of the waters of the Navajo Nation shall be minimized, and that economic growth should occur in a manner consistent with the preservation of existing clean Navajo Nation water resources.

4. It is further the policy of the Navajo Nation Council that the President, acting through such tribal organizations as he determines appropriate, shall take such action as may be necessary to encourage all surrounding governmental entities to take meaningful action regarding water quality standards and planning, permitting of discharges into surface waters, pretreatment of pollutants introduced into treatment works, clean lakes, non-point sources, and watershed protection for the achievement of goals regarding these programs and the improvement of water quality to at least the same extent as the Navajo Nation does under its laws.

5. The Navajo Nation Council is placing primary responsibility for the implementation and enforcement of this Act with the Navajo Nation EPA.

B. Modular approach to water quality programs. The Navajo Nation is committed to providing for water quality standards and planning and implementing NPDES and other water quality management programs under this Act, to protect the health, safety, welfare and environment of the Navajo Nation. It is, however, discretionary with the Navajo Nation as to whether and which programs to implement, and in what order. The Director shall determine which programs are essential to the protection of the environment, health and welfare of the Navajo Nation, and of those programs shall determine which should be developed first. The Director may also determine that only parts of such programs are essential, and may develop these severable portions. The Director shall not be required to implement any of the programs described in this Act by any particular time. However, once the Director determines that a particular program or portion of a program should be developed, and sufficient funding exists, the Director must comply with all of the relevant statutory and regulatory requirements for that program or portion of a program.

History

CJY-81-99, July 26, 1999.

United States Code

Congressional declaration of goals and policy, water pollution prevention and control, see 33 U.S.C. § 1377.

§ 1304. General Authorities of the Director

A. Powers and Duties.

1. Except as otherwise expressly provided in this Act, the Director shall be responsible for administering this Act.

2. In order to fulfill his or her obligations under this Act, the Director may:

a. Encourage, participate in, or conduct studies, investigations, research, and demonstrations relating to water pollution as necessary for the discharge of duties assigned under this Act;

b. Hold hearings related to any aspect of or matters within the authorities of this Section and, in connection therewith, compel the attendance of witnesses and the production of records;

c. Develop programs for the prevention, control, and abatement of new or existing pollution of waters of the Navajo Nation;

d. Encourage voluntary cooperation by advising and consulting with persons or affected groups, tribes or states to achieve the purposes of this Act, including voluntary testing of actual or suspected sources of surface water pollution;

e. Enforce regulations that have been promulgated by the Director, after review and approval by the Resources Committee of the Navajo Nation Council, consistent with the provisions of this Act, including but not limited to regulations concerning water quality standards and planning; discharges of pollutants into navigable waters; introduction of pollutants by industrial users; disposal of sewage sludge; construction of new control facilities or any parts of them or the modification of existing control facilities or any parts of them or the adoption of other remedial measures to prevent, control or abate water pollution; clean lakes; nonpoint sources; and watershed protection;

f. Consistent with Title 2, Navajo Nation Code, accept, receive and administer grants or other funds or gifts from public and private agencies, including the federal government, to carry out the purposes of this Act;

g. Secure necessary scientific, technical, administrative and operational services, including laboratory facilities, by contract or otherwise, to carry out the purposes of this Act;

h. Compile and publish from time to time reports, data and statistics with respect to matters studied or investigated by the

Director or at his or her direction;

i. Require, as specified in § 1381 of this Act, any point source or non-point source discharger, industrial user or treatment works treating domestic sewage to monitor, sample or perform other studies to quantify effects of pollutants and sewage sludge to the environment;

j. Represent, consistent with the requirements of Title 2 of the Navajo Nation Code and after appropriate consultation with other Divisions, the Navajo Nation in all matters pertaining to water pollution and its control, abatement, and prevention; and

k. Perform such other activities appropriate for the Director to carry out his/her functions under this Act.

B. Regulations. The Director is authorized to promulgate such regulations as are necessary to carry out his or her functions under this Act, pursuant to the provisions of § 1391 of this Act, including, but not limited to, setting water quality standards, effluent limitations, standards of performance for point source discharges, industrial users and sludge management activities, and best management practices for non-point source discharges. In promulgating regulations, the Director shall give consideration to, but shall not be limited to, the relevant factors prescribed by the Clean Water Act¹ and the regulations thereunder, except that the regulations prescribed by the Director shall be at least as stringent as those promulgated under the Clean Water Act, if there is an applicable minimum standard established therein. In promulgating regulations, the Director shall also give consideration to, but shall not be limited to, the relevant factors prescribed by Navajo Nation law. All regulations promulgated under this Act shall be subject to review and approval by the Resources Committee of the Navajo Nation Council.

C. Delegation of Powers and Duties. The Director may delegate to any officer or employee of the Navajo Nation Environmental Protection Agency such of his or her powers and duties under this Act, except the making of regulations, as he or she may deem necessary or expedient.

History

CJY-81-99, July 26, 1999.

§ 1305. Plans, Specifications and Information

The Director, under such conditions as he or she may prescribe, may require the submission of such plans, specifications, and other information as he or she deems necessary to carry out the rules and regulations adopted pursuant to the provisions of this Act.

History

CJY-81-99, July 26, 1999.

§ 1306. Severability and Preservation of Rights

A. Severability. If any provision of this Act, or the application of any

provision of this Act to any person or circumstance, is held invalid, the remainder of this Act and the application of such provision to other persons or circumstances shall remain unaffected.

B. Water Quantity Rights. The right of the Navajo Nation to certain quantities of water and the authority of the Navajo Nation to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this Act. The Navajo Nation Environmental Protection Agency and local chapter governments are encouraged to cooperate with federal and state agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.

C. Preservation of Rights and Construction. It is the purpose of this Act to provide additional and cumulative remedies to prevent, abate, and control pollution of waters of the Navajo Nation. The provisions of this Act shall be liberally construed to fulfill the intent and purpose of this Act and so as not to conflict with the applicable laws of the Navajo Nation and the United States. Nothing contained in this Act shall be construed to abridge or alter rights of action or remedies in equity under treaties, the common law or statutory law, nor shall any provisions of this Part or any act done by virtue thereof be construed as preventing the Navajo Nation or individuals from the exercise of their rights under treaties, the common law or statutory law to suppress nuisances or to abate pollution.

History

CJY-81-99, July 26, 1999.

§ 1307. Applicability

A. Except as otherwise provided in this Section, the provisions of this Act shall apply to all persons and all property within the Navajo Nation.

B. Subject to the provisions of Subsections (C) and (D) of this Section, the provisions of this Act and/or regulations promulgated hereunder, in whole or in part, shall not apply to any person or property where, but only to the limited extent that, such application would be in violation of any valid covenant not to regulate or otherwise exercise jurisdiction over such person or property.

C. Notwithstanding the provisions of Subsection (B) of this Section, the provisions of this Act and/or regulations promulgated hereunder, in whole or in part, shall apply to any person and to all property within the Navajo Nation owned or operated by such person who has submitted an application for and received a permit pursuant to this Act or is otherwise subject to the provisions of this Act.

D. If not otherwise applicable in accordance with Subsection (C) of this Section, the provisions of this Act and/or regulations promulgated hereunder, in whole or in part, shall apply to any person and to such property owned or operated by such person to such extent and under such terms and conditions as may be provided in any voluntary compliance agreement entered into pursuant to § 1308 of this Act.

E. Nothing in this Section shall be construed as a determination or admission by the Navajo Nation that any claim of covenant not to regulate or otherwise exercise jurisdiction is valid.

History

CJY-81-99, July 26, 1999.

§ 1308. Voluntary Compliance Agreement

A. Any person to whom the provisions of this Act are not otherwise applicable, may apply to the Director to enter into a voluntary compliance agreement with the Navajo Nation with respect to any property to which the provisions of this Act and/or regulations promulgated hereunder, in whole or in part, are not otherwise applicable.

B. A proposal to enter into a voluntary compliance agreement shall be in writing, shall indicate the person and property proposed to be subject to the agreement, shall indicate the proposed term of the agreement, and shall indicate which part or parts of this Act and/or regulations promulgated hereunder, in whole or in part, with which voluntary compliance is proposed.

C. A voluntary compliance agreement shall be in writing, shall be for a term of not less than one year, and may be subject to renewal for successive terms of not less than one year. A voluntary compliance agreement may not vary the requirements of this Act or of any regulations promulgated pursuant to this Act, except that the consent required to be given in accordance with § 1341(B) of this Act shall be strictly limited to the application of this Act and regulations promulgated pursuant to this Act and shall be strictly limited to the term of the agreement, including any renewals thereof.

D. A voluntary compliance agreement shall not be effective unless and until approved by the Director.

E. Except as otherwise expressly provided in the agreement, by entering into a voluntary compliance agreement, no person shall be deprived of the benefit of any valid covenant not to regulate or otherwise exercise jurisdiction over such person or property owned or operated by such person.

F. A person may enter into a voluntary compliance agreement in accordance with this Section, notwithstanding that the validity of such person's claim to be exempt from the provisions of this Act has not been judicially determined, whenever the Director determines that entering into such an agreement is in the best interests of the Navajo Nation. Entering into an agreement pursuant to this Subsection shall not constitute a determination or admission by the Navajo Nation that such claim of exemption is valid.

History

CJY-81-99, July 26, 1999.

Subchapter 2. Navajo Water Quality Standards and Planning

Part A. Water Quality Standards

United States Code

Water quality standards and implementation plans, see 33 U.S.C. § 1313.

§ 1311. Water Quality Standards

A. Promulgation of Standards. The Director shall promulgate water quality standards that protect the public health or welfare, enhance the quality of water and generally serve the purposes of this Act. The standards shall provide for the protection and propagation of fish, wildlife and livestock and protect agricultural, domestic and recreational uses of water, as well as protecting the cultural value and use of water. The standards shall consist of the designated uses for the waters of the Navajo Nation and the water quality criteria for such waters based upon such uses, and shall be applicable to all waters of the Navajo Nation. The standards shall also include the methods and analyses to be used to determine compliance with such standards. The Director may also promulgate regulations regarding compliance schedules, mixing zones, low flows, variances and such other matters as may be appropriate, including regulations implementing the anti-degradation policy set forth in § 1303(A) (2) of this Act.

B. Uses. The water quality standards shall establish designated uses for waters of the Navajo Nation, or segments thereof, taking into consideration their use and value for public water supplies, protection and propagation of fish and wildlife, recreational purposes, and agricultural (including livestock watering), industrial, and other purposes, and also taking into consideration their use and value for navigation and the cultural value and use of the water. The Director may remove a designated use that is not an existing use consistent with the requirements of Section 303(c) of the Clean Water Act ¹ and the Administrator's implementing regulations.

C. Criteria. The criteria established by the Director shall protect the designated uses, be based on sound scientific rationale (which may include criteria documents of the Administrator), and include sufficient parameters or constituents to protect the designated use. For waters with multiple uses, the criteria shall protect the most sensitive use. The Director may establish criteria specifically applicable to wildlife or sediment. The criteria shall include:

1. Narrative criteria to protect all waters of the Navajo Nation from: the discharge of toxics in toxic amounts; objectionable odors, tastes, color or turbidity in or on the water; detrimental effects on edible plant or animal life that reside in or on the water; bottom deposits; floating debris; and any other protections determined by the Director to be warranted under the goals of this Act.

2. Numerical criteria for pollutants or pollutant parameters, including toxic pollutants and a thermal component (consistent with the requirements of the Clean Water Act),² the discharge or presence of which in the waters of the Navajo Nation the Director has determined could reasonably be expected to interfere with designated uses adopted by the Director. The numerical criteria shall support such designated uses. In

setting numerical criteria the Director may consider the effect of local conditions on water quality, and may modify stream standards to reflect actual stream conditions when justified by sufficient data and need. Where such numerical criteria are not available, and the Director determines it is appropriate to protect designated uses, the Director shall adopt criteria based on biological monitoring or assessment methods consistent with information published pursuant to Section 304(a)(8) of the Clean Water Act.³ Nothing in this Section shall be construed to limit or delay the use of effluent limitations or other permit conditions based on or involving biological monitoring or assessment methods or previously adopted numerical criteria.

3. Any other criteria the Director determines are necessary to protect the designated uses of the waters of the Navajo Nation.

D. Methods Used. The Director, in specifying the methods and analyses to be used to determine compliance with the water quality standards, may include biological monitoring and toxicity testing.

E. Compliance Schedules. The Director may establish by regulation, or on a case-by-case basis, a reasonable period of time, but no longer than five years, for a person subject to an NPDES permit to comply with a new or more restrictive water quality-based effluent limitation based upon a water quality standard. The Director may establish by regulation, or on a case-by-case basis, a reasonable period of time, but no longer than five years, for any person subject to a mechanism, including a best management practice applicable to a non-point source, to comply with a new or more restrictive requirement which implements a water quality standard.

History

CJY-81-99, July 26, 1999.

§ 1312. Review of Water Quality Standards

The Director shall from time to time (but at least once each three year period beginning with the date of enactment of this Act) hold public hearings for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards. The results of such review shall be provided to the Administrator. Whenever the Director revises or adopts a new standard, such revised or new standard shall be submitted to the Administrator.

History

CJY-81-99, July 26, 1999.

§ 1313. Water Quality Standards Implementation

The Director shall implement the water quality standards provisions of this Act through issuance of permits under Subchapter 5 of this Act, mechanisms provided under Subchapter 6 of this Act for non-point source discharges, mechanisms provided under Subchapter 7 of this Act for the clean lakes program, certification of federal licenses and permits (including permits issued by the

U.S. Army Corps of Engineers pursuant to Section 404 of the Clean Water Act)¹ as provided in § 1319 of this Act, and participation as an adjoining tribe for discharges that may affect the waters of the Navajo Nation (under Section 401(a)(2) of the Clean Water Act).²

History

CJY-81-99, July 26, 1999.

Part B. Water Quality Planning and Management

§ 1314. Coordinated Water Quality Planning and Management

The Director may conduct water quality planning and management activities within the Navajo Nation in a coordinated fashion. Any such coordination shall be conducted consistent with this Act and the regulations promulgated hereunder and with applicable minimum federal requirements and may include, but is not limited to, identification of waters under § 1315 of this Act, development of total maximum daily loads and wasteload allocations/load allocations under § 1316 of this Act, and development of water quality monitoring, management plans and reports under § 1317 of this Act.

History

CJY-81-99, July 26, 1999.

§ 1315. Identification of Waters

A. Effluent limitations. The Director shall identify those waters of the Navajo Nation for which the effluent limitations required by Sections 301(b)(1)(A) and 301(b)(1)(B) of the Clean Water Act¹ are not stringent enough to implement a water quality standard applicable to such waters. The Director shall establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters.

B. Thermal discharges. The Director shall identify those waters of the Navajo Nation for which controls on thermal discharges under Section 301 of the Clean Water Act² are not stringent enough to assure protection and propagation of a balanced indigenous population of fish and wildlife.

C. Approval by Administrator. The Director shall submit to the Administrator from time to time for approval the identifications made under this Section. If the Administrator approves any such identification, the Director shall incorporate it into the current plan under § 1308 of this Act. If the Administrator disapproves such identification and himself identifies certain waters of the Navajo Nation for which the effluent limitations and controls on thermal discharges are not stringent enough to implement the water quality standards applicable to such waters, the Director shall incorporate this identification into the Director's current plan under § 1308 of this Act. These actions shall be taken in parallel with actions under Subsection 1306(C) of this Act.

History

CJY-81-99, July 26, 1999.

§ 1316. Total Maximum Daily Loads and Wasteload Allocations/Load Allocations

A. Total maximum daily load. The Director shall establish for the waters identified under Subsection 1315(A) of this Act, and in accordance with the priority ranking, the total maximum daily load for those pollutants which the Administrator identifies under Section 304(a)(2) of the Clean Water Act ¹ as suitable for such calculation. Such load shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.

B. Total maximum daily thermal load. The Director shall estimate for the waters identified in Subsection 1315(B) of this Act the total maximum daily thermal load required to assure protection and propagation of a balanced, indigenous population of fish and wildlife. Such estimates shall take into account the normal water temperatures, flow rates, seasonal variations, existing sources of heat input, and the dissipative capacity of the identified waters or parts thereof. Such estimates shall include a calculation of the maximum heat input that can be made into each such part and shall include a margin of safety which takes into account any lack of knowledge concerning the development of thermal water quality criteria for such protection and propagation in the identified waters or parts thereof.

C. Approval by Administrator. The Director shall submit to the Administrator from time to time for approval the loads established under this Section. If the Administrator approves such loads, the Director shall incorporate them into the current plan under § 1318 of this Act. If the Administrator disapproves such loads and himself establishes loads to implement the water quality standards applicable to such waters, upon such establishment the Director shall incorporate such loads into the Director's current plan under § 1318 of this Act. These actions shall be taken in parallel with actions under § 1315 of this Act.

D. Additional identification. For the specific purpose of developing information, the Director shall identify all waters of the Navajo Nation which were not identified under Subsections 1315(A) and (B) of this Act and estimate for such waters the total maximum daily load with seasonal variations and margins of safety for those pollutants which the Administrator identifies under Section 304(a)(2) of the Clean Water Act ¹ as suitable for such calculation and for thermal discharges, at a level that would assure protection and propagation of a balanced indigenous population of fish and wildlife.

History

CJY-81-99, July 26, 1999.

§ 1317. Water Quality Monitoring, Management Plans and Reports

A. Monitoring. The Director shall establish and provide for the operation of appropriate devices, methods, systems, and procedures necessary to monitor, and to compile and analyze data on (including classification according

to eutrophic condition), the quality of the waters of the Navajo Nation, including biological monitoring, and provide for periodic updating of such data and the submission of such data to the Administrator. The Director may provide for such monitoring through water quality management plans and through regulations promulgated under § 1391 of this Act.

B. Management Plans. The Director may develop water quality management plans consistent with the requirements of Sections 205(j),¹ 208² and 303³ of the Clean Water Act and submit these plans to the Administrator; the Director may also periodically update these plans.

C. Reports. The Director may prepare water quality reports consistent with the requirements of Section 305(b) of the Clean Water Act⁴ and submit these reports to the Administrator; the Director may also periodically update these reports.

History

CJY-81-99, July 26, 1999.

United States Code

State reports on water quality, see 33 U.S.C. § 1315.

§ 1318. Continuing Planning Process

A. Plan. The Director shall submit to the Administrator for approval (to the extent that it has not otherwise already been completed and approved) a proposed continuing planning process which is consistent with this Act and the Clean Water Act. The Director shall from time to time review the Navajo Nation's approved planning process for the purpose of insuring that such planning process is at all times consistent with this Act and the Clean Water Act.¹

B. Elements of Plan. The continuing planning process shall include, but not be limited to, the following:

1. Effluent limitations and schedules of compliance at least as stringent as those required by §§ 1322 and 1323 of this Act, and at least as stringent as any requirements contained in any applicable water quality standard in effect under authority of this Act and the Clean Water Act;¹

2. All elements of any applicable area wide waste management plans or applicable basin plans, established under Sections 208² and 209³ of the Clean Water Act, for which the submitting governmental entity had jurisdiction;

3. Total maximum daily load for pollutants in accordance with § 1316 of this Act;

4. Procedures for revision;

5. Adequate authority for intergovernmental cooperation;

6. Adequate implementation, including schedules of compliance, for revised or new water quality standards, under Part A of this Subchapter;

7. Controls over the disposition of all residual waste from any water treatment processing;

8. An inventory and ranking, in order of priority, of needs for construction of waste treatment works required to meet the applicable requirements of § 1322 of this Act.

History

CJY-81-99, July 26, 1999.

Part C. Certification of Compliance

§ 1319. Certification of Compliance with Federal Water Pollution Control Requirements

A. Certification of compliance. The Director may grant or deny certification that an applicant for a Navajo Nation or federal license or permit necessary to conduct any activity, including but not limited to the construction or operation of facilities, which may result in a discharge into waters of the Navajo Nation has satisfactorily shown that he or she will comply with Sections 301,¹ 302,² 303,³ 306⁴ and 307⁵ of the Clean Water Act. If there is no applicable effluent limitation or other limitation under Sections 301(b) and 302, and there is no applicable standard under Sections 306 and 307, for the activity in question, the Director shall so certify. The Director shall submit the application and any certification issued under this Section to the Administrator, pursuant to Section 401 of the Clean Water Act.⁶

B. Rules for grant or denial of certification. The Director shall promulgate rules, consistent with the provisions of Section 1391 of this Act, establishing the procedures that the Director will follow in granting or denying certifications under this Section. Such rules shall require public notice of an application for certification within an area no smaller than the chapter where the activity is located, opportunity for public participation in the decision-making process on an application for certification, and opportunity and procedures for contested hearings on applications for certification. Such rules also shall require an applicant to provide the Director with notice of proposed changes in the construction or operation of the facility or other activity in question and with plans for the operation of the facility or conduct of the activity in question. Such rules may also include fees to be charged by the Director for the review of applications and issuance of certifications.

C. Limitations and monitoring requirements. In any certification issued under this Section, the Director shall set forth effluent limitations, other limitations and monitoring requirements necessary to assure that the applicant will comply with applicable effluent and other limitations under Sections 301¹ or 302² of the Clean Water Act, standards of performance under Section 306 of the Clean Water Act,⁴ prohibitions, effluent standards or pretreatment

standards under Section 307 of the Clean Water Act,⁵ and any other appropriate requirement of Navajo Nation law. These limitations and requirements shall become conditions on any permit subject to the provisions of Section 401 of the Clean Water Act.⁶

History

CJY-81-99, July 26, 1999.

United States Code

Certification, permits and licenses, see 33 U.S.C. § 1341.

Subchapter 3. Surface Water Discharges and Pretreatment Requirements

Part A. Surface Water Discharges

§ 1321. Permit Required to Discharge into Surface Waters

A. Prohibitions.

1. Except as provided in this Act or regulations promulgated hereunder, it is unlawful for any person to discharge a pollutant from a point source into waters of the Navajo Nation. Any such action is a public nuisance, as well as being subject to enforcement under Subchapter 9 of this Act.

2. No person may discharge any waste, pollutant or combination of pollutants from a point source into the waters of the Navajo Nation without a permit issued consistent with rules promulgated pursuant to this Subchapter and Subchapter 5 or, if no such permit program has been established, by the Administrator under Section 402 of the Clean Water Act.¹

3. It is unlawful for any person, without first securing a permit from the Director, to:

a. Make any discharge of pollutants from a point source into waters of the Navajo Nation if not authorized under an existing valid permit; or

b. Construct, install, modify, or operate any treatment works or part of any treatment works or any extension or addition to any treatment works, the operation of which is reasonably determined to result in a discharge due to runoff, flow or usage.

B. Exemptions. The following discharges do not require NPDES permits:

1. Discharges into waters of the Navajo Nation of dredged or fill materials that are regulated under Section 404 of the Clean Water Act.²

2. Any discharge in compliance with the instructions of an on-scene coordinator pursuant to 40 C.F.R. Part 300 or 33 C.F.R. § 153.10(e).

C. Grounds for issuance of permit. The Director may, after notice and opportunity for public hearing, issue a permit for the discharge of any waste, pollutant or combination of pollutants into navigable waters, for a period not to exceed five years, upon condition that such discharge meets or will meet, subject to authorized schedules of compliance, all applicable Navajo Nation, adjoining tribe or state, and federal water quality standards and effluent standards and all other requirements of this Act.

D. Grounds for denial of permit. The Director shall deny a permit where:

1. The permit would authorize the discharge of any radiological, chemical, or biological warfare agent, any high-level radioactive waste, or any medical waste into navigable waters;

2. The permit would, in the judgment of the Secretary of the Army acting through the Chief of Engineers, result in the substantial impairment of anchorage and navigation of any navigable waters;

3. The permit is objected to in writing by the Administrator pursuant to any right to object provided to the Administrator by Section 402(d) of the Clean Water Act;³

4. The permit would authorize a discharge from a point source which is in conflict with a plan approved by the Administrator under Subsection 208(b) of the Clean Water Act,⁴ and for which the submitting government entity had jurisdiction;

5. The issuance of the permit would otherwise be inconsistent with the applicable requirements of other Navajo Nation laws or regulations promulgated thereunder; or

6. The issuance of the permit would otherwise be inconsistent with applicable requirements of the Clean Water Act⁵ or regulations promulgated thereunder.

E. General permit. The Director may issue a general permit within a geographical area to cover (1) storm water point sources, (2) a category of point sources, or (3) a category of treatment works treating domestic sewage. A facility covered by a general permit shall be subject to all provisions of this Act and regulations promulgated hereunder, except as otherwise provided by the Director by regulation in the case of certain application requirements.

F. Compliance. Compliance with a permit issued pursuant to this Act shall be deemed compliance, for the purposes of Subchapter 9 of this Act, with Sections 301,⁶ 302,⁷ 306⁸ and 307⁹ of the Clean Water Act, except for any standard imposed under Section 307 for a toxic pollutant injurious to human health.

History

CJY-81-99, July 26, 1999.

Permits and licenses, water pollution prevention and control, see 33 U.S.C. § 1341 *et seq.*

§ 1322. Effluent Limitations Enforced in Issuance of Permits

A. Permit conditions. The Director shall require as permit terms, limitations and conditions the achievement of:

1. Effluent limitations based upon the application of such levels of treatment, technology and processes as are required under the Clean Water Act for which the Administrator has promulgated regulations under Sections 301,¹ 304,² 306³ and/or 318⁴ of the Clean Water Act for industrial or municipal dischargers and aquaculture projects;

2. Effluent limitations, best management practices, requirements for cooling water intake structures, alternative limitations for coal remining under Section 301(p) of the Clean Water Act,⁵ and/or a determination of maximum extent practicable, based upon the application of best professional judgment, in the absence of formally promulgated standards and limitations by the Administrator under the Clean Water Act,⁶ based upon the appropriate criteria contained in Sections 301,¹ 304(e),⁷ 316(b)⁸ and/or 402(a)(1)(B)⁹ of the Clean Water Act;

3. Toxic pollutant effluent standards or prohibitions promulgated by the Administrator under Section 307(a) of the Clean Water Act¹⁰ and contained within 40 C.F.R. Part 129, within the time frame for compliance provided by the Administrator, as well as the authority to modify existing permits to require compliance with such toxic pollutant effluent standards;

4. Effluent limitations, standards, or prohibitions on discharges from publicly owned treatment works and/or requirements of a pretreatment program based upon the requirements of Section 307 of the Clean Water Act¹¹ and the Administrator's implementing regulations;

5. For those treatment works treating domestic sewage and required to obtain a permit under Section 1321, appropriate conditions which are required in order to comply with regulations for sludge use and disposal promulgated by the Administrator under Section 405 of the Clean Water Act;¹²

6. Any more stringent effluent limitations necessary to meet water quality standards established pursuant to any Navajo Nation, adjoining state or tribe, or federal law or regulation, including water quality-related effluent limitations established by the Administrator under Section 302 of the Clean Water Act;¹³ and/or

7. Any more stringent effluent limitations necessary to comply with the continuing planning process approved by the Administrator under Section 303(e) of the Clean Water Act.¹⁴

B. Time for compliance. Effluent limitations prescribed under this Section shall be achieved in the shortest reasonable period consistent with

Navajo Nation law and the Clean Water Act,⁶ and with any regulations or guidelines promulgated or issued thereunder.

C. Variances

1. The Director may grant or deny requests for variances under Section 316(a) of the Clean Water Act¹⁵ for thermal pollution. The Director may implement any alternative limitations, terms or conditions established in a final decision on such a variance request.

2. The Director may deny, forward to the Administrator with a written concurrence, or submit to the Administrator without a recommendation, completed requests for variances under Subsections 301(c),¹⁶ 301(g),¹⁷ 301(n)¹⁸ (including fundamentally different factors variance requests from best practicable control technology currently available effluent limitations guidelines), or 302(b)(2)¹⁹ under the Clean Water Act. To the extent that the Director has forwarded a request to the Administrator with a written concurrence or without a recommendation, the Director may implement any alternative limitations, terms or conditions established by the Administrator in a final decision on such a variance request.

History

CJY-81-99, July 26, 1999.

United States Code

Effluent limitations, see 33 U.S.C. § 1311.

Water quality related effluent limitations, see 33 U.S.C. § 1312.

§ 1323. Schedules of Compliance

The Director may set and revise schedules of compliance and include such schedules within the terms and conditions of permits for discharge of wastes or pollutants or for sludge use and disposal, consistent with Navajo Nation law, the Clean Water Act¹ and implementing regulations. The Director may establish interim compliance schedules in permits which are enforceable without showing a violation of an effluent limitation or harm to water quality.

History

CJY-81-99, July 26, 1999.

§ 1324. Extension of Time to Meet Quality and Effluent Standards

A. Required findings. The Director may issue a reasonable extension to a point source discharger, industrial user, or treatment works treating domestic sewage, which extension shall not conflict with the Clean Water Act,¹ in which to meet water quality standards or other applicable effluent limitations or standards of the Navajo Nation or an adjoining state or tribe (to the extent allowable under the state or tribal law or regulations), if the Director determines that:

1. The violation was the result of actions or conditions outside the control of the discharger;

2. The discharger, industrial user, or treatment works treating domestic sewage has acted in good faith;

3. The extension would not result in the imposition of any additional controls on any point or non-point source; and

4. Facilities necessary for compliance are under construction and will be completed at the earliest date possible.

B. Excuse of noncompliance. Any extension of time granted under this Section will not compromise any right for enforcement available under Subchapter 9 which exists before the extension is granted.

History

CJY-81-99, July 26, 1999.

§ 1325. Recording, Reporting, and Inspection Conditions

The Director may prescribe terms and conditions for permits or other controls on industrial users to assure compliance with applicable Navajo Nation, adjoining state or tribe, and federal effluent standards and water quality standards (as set forth in § 1322 of this Act), including, but not limited to, requirements concerning recording, reporting, monitoring, entry, and inspection (as provided in § 1381 of this Act).

History

CJY-81-99, July 26, 1999.

United States Code

Records and reports, inspections, water pollution prevention and control, see 33 U.S.C. § 1318.

§ 1326. Disposal of Pollutants into Wells

The disposal of pollutants into wells shall be prohibited, unless the disposal is authorized by the federal underground injection control (UIC) program or by the Navajo Nation UIC program approved by the Administrator. The Director shall regulate any such discharges that are subject to the NPDES program through NPDES permits that incorporate appropriate federal or Navajo Nation UIC requirements. This authority shall enable the Navajo Nation to protect the public health and welfare and to prevent the pollution of ground and surface waters by prohibiting well discharges or by issuing permits for such discharges with appropriate permit terms and conditions.

History

CJY-81-99, July 26, 1999.

Part B. Pretreatment Requirements

United States Code

Toxic and pretreatment effluent standards, water pollution prevention and control, see 33 U.S.C. § 1317.

§ 1327. Pretreatment Standards

The Director may promulgate rules specifying pretreatment standards to be applied to all industrial users of publicly owned treatment works for the introduction of pollutants into publicly owned treatment works, including pollutants which interfere with, pass through, or otherwise are incompatible with such treatment works. Such standards shall not conflict with any pretreatment standard established under Subsection 307(b) of the Clean Water Act.¹

History

CJY-81-99, July 26, 1999.

§ 1328. Conditions in Permits Issued for POTWs

A. Compliance with Clean Water Act. The Director or the owner or operator of a publicly owned treatment works, if it has an approved pretreatment program, shall implement all provisions of Section 307 of the Clean Water Act,¹ including issuing pretreatment industrial user permits or controlling discharges from significant industrial users by other appropriate means, such as discharge fees.

B. Other conditions. The Director shall include the following requirements as conditions in permits for the discharge of pollutants from publicly owned treatment works:

1. The identification, in terms of character and volume of pollutants, of any significant source introducing into such POTWs pollutants subject to pretreatment standards under Subsection 307(b) of the Clean Water Act;²

2. A program to assure compliance by each such source with pretreatment standards promulgated under Subsection 307(b) of the Clean Water Act² and § 1327 of this Act;

3. Adequate notice to the Navajo Nation EPA of:

a. New introductions into such works of pollutants from any source which would be a new source as defined in Section 306 of the Clean Water Act³ if such source were discharging pollutants,

b. New introductions of pollutants into such works from a source which would be subject to Section 301 of the Clean Water Act⁴ if it were discharging such pollutants, or

c. A substantial change in volume or character of pollutants being introduced into such works by a source introducing pollutants into such works at the time of issuance of the permit.

Such notice shall include information on the quality and quantity of effluent to be introduced into such treatment works and any anticipated impact of such change in the quantity or quality of effluent to be discharged from such publicly owned treatment works;

4. Compliance with any system of user charges required under Navajo law or the Clean Water Act or regulations promulgated thereunder; and

5. Compliance with record-keeping, reporting, sampling, monitoring and inspection requirements under Section 308 of the Clean Water Act⁵ and § 1381 of this Act.

History

CJY-81-99, July 26, 1999.

§ 1329. Other Authority of Director Regarding POTWs

In addition to other provisions specifically authorized in this Act, the Director shall have, but not be limited to, the following authority regarding publicly owned treatment works:

A. Issue decisions on requests by publicly owned treatment works for pretreatment program approval;

B. Act on requests for removal credits under Subsection 307(b) of the Clean Water Act;¹

C. Act on categorical determination requests;

D. Deny or make recommendations on requests for fundamentally different factors variances under Subsection 301(n) of the Clean Water Act;²

E. Make decisions on compliance deadline extension requests based on innovative technology under Subsection 307(e) of the Clean Water Act;³ and

F. Join the publicly owned treatment works as a defendant in an enforcement action under this Act against an industrial user.

History

CJY-81-99, July 26, 1999.

Subchapter 4. Sewage Sludge

United States Code

Disposal or use of sewage sludge, water pollution prevention and control, see 33 U.S.C. § 1345.

§ 1331. Regulation of the Use and Disposal of Sewage Sludge

A. Establishment of program. The Director shall, by rulemaking consistent with Section 1391 of this Act, establish a program to regulate the use and disposal of sewage sludge.

B. Content of Regulations. In establishing a sewage sludge program, the Director shall:

1. Regulate all sludge use and disposal methods within the Navajo Nation;

2. Regulate the transportation and storage of sewage sludge in the Navajo Nation;

3. Ensure compliance with applicable sludge standards by all users or disposers of sewage sludge; and

4. Regulate the issuance of permits under §§ 1321 and 1332 of this Act for the disposal of sewage sludge, which regulations shall require the application to sewage sludge disposal of each criterion, factor, procedure and requirement applicable to a permit issued under § 1321 of this Act.

History

CJY-81-99, July 26, 1999.

§ 1332. Permits

A. Permit requirement. In any case where the disposal of sewage sludge resulting from the operation of a treatment works (including the removal of in-place sewage sludge from one location and its deposit at another location) would result in any pollutant from such sewage sludge entering navigable waters, such disposal is prohibited except in accordance with a permit issued under Section 1321 of this Act or, if no such permit program has been established, by the Administrator under Section 402 of the Clean Water Act.¹

B. Consistency with sewage sludge regulations. Any permit issued under § 1321 to a publicly owned treatment works or any other treatment works treating domestic sewage shall include requirements for the use and disposal of sludge that implement the regulations promulgated pursuant to § 1331 of this Act.

C. Applicability to all treatment works. In the case of a publicly owned treatment works or other treatment works treating domestic sewage that is not subject to § 1321 of this Act, the Director may issue a permit to such treatment works solely to impose requirements for the use and disposal of sludge that implement the regulations established pursuant to § 1331 of this Act. The Director shall establish procedures for issuing permits pursuant to this Subsection.

History

CJY-81-99, July 26, 1999.

§ 1333. Recordkeeping, Reporting, and Inspections

Any treatment works treating domestic sewage is subject to applicable provisions of regulations issued by the Director regarding recordkeeping, reporting and inspections, including provisions of § 1381 of this Act. The Director may prescribe terms and conditions for permits issued under this Part to assure compliance with applicable Navajo Nation and federal effluent, solid waste, and water quality standards, including requirements concerning recordkeeping, reporting, monitoring, entry and inspection, to the extent provided under this Act. The Director may establish regulations specifically establishing terms, limitations and conditions, including notification requirements, applicable to septage haulers.

History

CJY-81-99, July 26, 1999.

Subchapter 5. Permits and Other Authorizations

Part A. Permits

United States Code

Permits and licenses, water pollution prevention and control, see 33 U.S.C. § 1341 *et seq.*

§ 1341. Conditions of Permits

A. Submission of information. The Director may prescribe conditions for (by issuing regulations and on a case-by-case basis) and require the submission of plans, specifications, and other information from a permittee, person applying for a permit, or person discharging without a permit, in connection with applications for or otherwise related to the issuance of permits, introduction of pollutants by an industrial user into a publicly owned treatment works, or activities of a treatment works treating domestic sewage.

B. Consent to jurisdiction. All permit applications and permits, including general permits, as well as regulations or other mechanisms issued by the Director for direct implementation of requirements for industrial users and treatment works treating domestic sewage that are not otherwise required to apply for permits, shall contain the following statement to which the applicant must agree and subscribe for the application to be complete and as a condition precedent to the issuance of any permit or coverage by direct implementation mechanism:

"Applicant hereby consents to the jurisdiction of the Navajo Nation in connection with all activities conducted pursuant to, in connection with, or directly affecting compliance with, any permit issued pursuant to this application or to which the provisions of the Navajo Nation Clean Water Act otherwise apply. This consent shall be effective when a permit is issued and may not be withdrawn. This consent shall extend to and be binding upon all

successors, heirs, assigns, employees and agents, including contractors and subcontractors, of the applicant."

The applicant shall include the foregoing statement as a term and condition of any contract or other agreement it executes for services to be performed or goods to be provided within the Navajo Nation in connection with any permit issued under this Act, or to which the provisions of the Act otherwise apply. Each party to any such contract or other agreement must agree and subscribe to said statement, substituting the name of the party for "applicant" as appropriate and substituting the phrase "this agreement" in place of the phrase "any permit issued pursuant to this application." Failure by the applicant to include such statement, or of any party to agree and subscribe to such statement, shall subject the applicant to civil penalty in accordance with this Act.

History

CJY-81-99, July 26, 1999.

§ 1342. Term of Permits

A. Fixed term. Each permit shall have a fixed term not exceeding five years. Upon expiration of a permit, a new permit may be issued by the Director after notice and opportunity for public hearing and upon condition that the discharge or disposal (including of sludge) meets or will meet, subject to authorized schedules of compliance, all applicable requirements of this Act, including the conditions of any permit issued by the Director.

B. Renewals. When the permittee has made a timely and sufficient application for a renewal in accordance with Navajo Nation EPA rules, an existing permit for an activity of a continuing nature shall not expire until the application for renewal has been finally determined by the Director.

History

CJY-81-99, July 26, 1999.

§ 1343. Notice of Actions

The Director shall issue and implement rules to ensure:

A. That the public, appropriate government agencies, and any other tribe or state the waters of which may be affected, receive notice of each application for a permit; be provided an opportunity for public hearing before ruling on each such application; and be provided an explanation in writing of the reasons why any recommendations submitted with regard to such application were not adopted;

B. That the public, appropriate government agencies, and any other tribe or state the waters of which may be affected, receive appropriate notice of activities of the pretreatment program and be provided an opportunity for public hearing before the Director rules on such activities, as provided by Section 307 of the Clean Water Act ¹ and the Administrator's implementing regulations; and

C. That the Administrator receives notice and a copy of each application for a permit.

History

CJY-81-99, July 26, 1999.

§ 1344. Issuance, Revocation, or Denial of Permits

The Director shall issue, suspend, revoke, modify, or deny permits consistent with provisions of this Subchapter and with rules issued by the Director consistent with the provisions of § 1391 of this Act.

History

CJY-81-99, July 26, 1999.

§ 1345. Issuance of Permits and Grounds for Revocation, Modification, or Suspension of Permits

A. Grounds for revocation, modification or suspension. Any permit issued under this Part may be revoked, modified, or suspended in whole or in part during its term or upon request of the permit holder or any interested person, for cause including, but not limited to the following:

1. Violation of any condition of the permit;
2. Obtaining a permit by misrepresentation or failure to disclose fully all relevant facts; or
3. Change in condition that requires either a temporary or permanent reduction or elimination of the permitted discharge or disposal operation, where "condition" does not include statutory or regulatory effluent limitations or standards enacted or adopted during the permit term, other than for toxic pollutants.

B. Notice and hearing. If the Director recommends issuance or denial of an application for a permit, or revokes, suspends, or modifies a permit, he or she shall give written notice of his or her action to the applicant or permittee, any interested person who has requested to be notified, as well as other entities as provided by this Act. The applicant, permittee or any interested person may request a hearing before the Director after issuance of the initial decision. Such hearing shall be held within 30 calendar days after receipt of written request, or as soon thereafter as reasonably practical. The Director may affirm, modify or reverse his or her initial decision based upon the evidence presented.

C. Effective date. Issuance, modification, revocation, or suspension of a permit shall be effective 30 calendar days after issuance of the initial decision, unless a later date is specified. If the holder or any interested person requests a hearing before the Director, the order of modification, revocation or suspension shall be effective 30 calendar days after the final determination by the Director.

History

CJY-81-99, July 26, 1999.

§ 1346. Conflict of Interest

A. The Director, or his or her delegate, shall not participate in a permit action which involves himself or herself, any discharger, industrial user or treatment works treating domestic sewage with which he or she is connected as a director, officer or employee, or in which he or she has a direct personal financial interest. Direct financial interest is defined as receiving, or having received during the previous two years, a significant portion of income directly or indirectly from permit holders or applicants for permits.

B. To the extent not prohibited by Subsection (A) of this Section, the Director, or his or her delegate, shall not participate in any proceeding as a consultant or in any other capacity on behalf of any discharger, industrial user or treatment works treating domestic sewage, except to the extent otherwise allowed under Navajo Nation law. In no case, shall the Director, or his or her delegate, participate in any proceeding as a consultant or in any other capacity on behalf of any discharger, industrial user or treatment works treating domestic sewage, that was instituted or ongoing during their tenure.

History

CJY-81-99, July 26, 1999.

Part B. Other Authorizations

§ 1347. Approval of Construction Grant Projects and User Charges

A. Requirements for approval. The Director shall not approve (for those projects the Director has authority to approve or disapprove) any projects for any treatment works from a grant under Section 201(g)(1) of the Clean Water Act,¹ unless he or she shall first have determined that the applicant

1. Has adopted or will adopt a system of charges to assure that each recipient of waste treatment services within the applicant's jurisdiction, as determined by the Director, will pay its proportionate share (except as otherwise provided in this Paragraph) of the costs of operation and maintenance (including replacement) of any waste treatment services provided by the applicant; and

2. Has legal, institutional, managerial, and financial capability to ensure adequate construction, operation, and maintenance of treatment works throughout the applicant's jurisdiction, as determined by the Director. The Director may determine that the applicant has a system of charges which results in the distribution of operation and maintenance costs for treatment works within the applicant's jurisdiction, to each user class, by determining the system of charges is in proportion to the contribution to the total cost of operation and maintenance of such works by each user class (taking into account total waste water loading of such

works, the constituent elements of the waste, and other appropriate factors), including different rates for small non-residential and residential user classes. In defining small non-residential users, the Director shall consider the volume of wastes discharged into the treatment works by such users and the constituent elements of such wastes as well as such other factors as he or she deems appropriate. A system of user charges which imposes a lower charge for low-income residential users (as defined by the Director) shall be deemed to be a user charge system meeting the requirements of clause (1) of this Paragraph if the Director determines that such system was adopted after public notice and hearing.

B. Guidelines on Payment of Waste Treatment Costs. The Director may, after consultation with appropriate Navajo Nation, federal, interstate, municipal, and intermunicipal agencies, issue guidelines applicable to payment of waste treatment costs by industrial and nonindustrial recipients of waste treatment services which shall establish:

1. Classes of users of such services, including categories of industrial users;

2. Criteria against which to determine the adequacy of charges imposed on classes and categories of users reflecting all factors that influence the cost of waste treatment, including strength, volume, and delivery flow rate characteristics of waste; and

3. Model systems and rates of user charges typical of various treatment works serving municipal-industrial communities.

C. Alternative systems of charges. A system of charges that meets the requirements of § 1347(A)(1) may be based on something other than metering the sewage or water supply flow of residential recipients of waste treatment services, consistent with Navajo Nation law. If the system of charges is based on something other than metering the Director shall require:

1. The applicant to establish a system by which the necessary funds will be available for the proper operation and maintenance of the treatment works; and

2. The applicant to establish a procedure under which the residential user will be notified as to that portion of his or her total payment which will be allocated to the costs of the waste treatment services.

History

CJY-81-99, July 26, 1999.

§ 1348. Clean Water Act Fund

Monies derived from fees and penalties imposed under this Act shall be available solely to the Navajo Nation EPA for the administration, implementation and enforcement of this Act and the regulations promulgated hereunder. Such monies shall be deposited into a duly established Special

Revenue Fund, called the Clean Water Act Fund, and shall be expended by the Director for the use of the Clean Water Act ¹ programs in accordance with the Special Revenue Fund plan of operation and pursuant to an approved budget. The Director shall report annually to the Navajo Nation Council on the sums deposited into the fund, including the sources and uses thereof. Any monies contained in said fund at the end of the fiscal year shall not revert to the general fund and shall remain available for appropriation as provided in this Section.

History

CJY-81-99, July 26, 1999.

Subchapter 6. Nonpoint Source Management Program

United States Code

Nonpoint source management programs, water pollution prevention and control, see 33 U.S.C. § 1329.

§ 1351. Nonpoint Source Assessment Report

A. Content of report. The Director shall, after notice and opportunity for public comment, prepare and submit to the Administrator for approval (to the extent that it has not otherwise already been completed and approved), a report which:

1. Identifies those waters of the Navajo Nation which, without additional action to control nonpoint sources of pollution, cannot reasonably be expected to attain or maintain applicable water quality standards or the goals and requirements of this Act or the Clean Water Act;¹

2. Identifies those categories and subcategories of nonpoint sources or, where appropriate, particular nonpoint sources which add significant pollution to each portion of the waters of the Navajo Nation identified under Subsection (A)(1) in amounts which contribute to such portion not meeting such water quality standards or such goals and requirements;

3. Describes the process, including intergovernmental coordination and public participation, for identifying best management practices and measures to control each category and subcategory of nonpoint sources and, where appropriate, particular nonpoint sources identified under Subsection (A)(2) and to reduce, to the maximum extent practicable, the level of pollution resulting from such category, subcategory, or source; and

4. Identifies and describes Navajo Nation and local programs for controlling pollution added from nonpoint sources to, and improving the quality of, each such portion of the waters of the Navajo Nation, including but not limited to those programs which are receiving federal assistance under Subsections 319(h) and (i) of the Clean Water Act.²

B. Basis for report. In preparing the report required by this Section, the Director may use all available information.

History

CJY-81-99, July 26, 1999.

§ 1352. Nonpoint Source Management Program

A. Program submission. The Director shall, after notice and opportunity for public comment, prepare and submit to the Administrator for approval a management program for controlling pollution added from nonpoint sources to the waters of the Navajo Nation and improving the quality of such waters, which program the Navajo Nation proposes to implement in the first four fiscal years beginning after the date of submission of the program. The Director may periodically revise the submission.

B. Program Contents. The management program proposed for implementation under this Section shall include the following:

1. An identification of the best management practices and measures which will be undertaken to reduce pollutant loadings resulting from each category, subcategory, or particular nonpoint source designated under § 1351(A)(2) of this Act, taking into account the impact of the practice on ground water quality.

2. An identification of programs within the Navajo Nation and adjoining tribes and states (including, as appropriate, nonregulatory or regulatory programs for enforcement, technical assistance, financial assistance, education, training, technology transfer, and demonstration projects) designed to achieve implementation of the best management practices by the categories, subcategories, and particular nonpoint sources designated under Subsection (B)(1) of this Section.

3. A schedule containing annual milestones for (i) utilization of the program implementation methods identified in Subsection (B)(2) of this Section, and (ii) implementation of the best management practices identified in Subsection (B)(1) of this Section by the categories, subcategories, or particular nonpoint sources designated under § 1351(A)(2) of this Act. Such schedule shall provide for utilization of the best management practices at the earliest practicable date, but no later than the time period provided in § 1311(E) of this Act.

4. Any other information required by Section 319(b) of the Clean Water Act.¹

C. Utilization of Local and Private Experts. In developing and implementing a management program under this Section, the Director shall, to the maximum extent practicable, involve local public and private agencies and organizations which have expertise in control of nonpoint sources of pollution.

D. Development on Watershed Basis. The Director shall, to the maximum extent practicable, develop and implement a management program under this Part

on a watershed-by-watershed basis within the Navajo Nation.

History

CJY-81-99, July 26, 1999.

United States Code

Nonpoint source management programs, water pollution prevention and control, see 33 U.S.C. § 1329.

Subchapter 7. Clean Lakes Program

United States Code

Clean lakes, water pollution prevention and control, see 33 U.S.C. § 1324.

§ 1361. Biennial Report

The Director may initiate a Clean Lakes program under this Subchapter. If the Director decides to develop such a program, the Director shall prepare and submit to the Administrator for approval a report containing the following information:

A. An identification and classification according to eutrophic condition of all lakes within the Navajo Nation;

B. A description of procedures, processes and methods (including land use requirements) to control sources of pollution of such lakes;

C. A description of methods and procedures, in conjunction with appropriate federal agencies, to restore the water quality of such lakes;

D. Methods and procedures to mitigate the harmful effects of high acidity, including innovative methods of neutralizing and restoring buffering capacity of lakes and methods of removing from lakes toxic metals and other toxic substances mobilized by high acidity;

E. A list and description of those lakes within the Navajo Nation which are known to be impaired, including those lakes which are known not to meet applicable water quality standards or which require implementation of control programs to maintain compliance with applicable standards and those lakes in which water quality has deteriorated as a result of high acidity that may reasonably be due to acid deposition; and

F. An assessment of the status and trends of water quality in lakes in the Navajo Nation, including but not limited to the nature and extent of pollution loading from point and nonpoint sources and the extent to which the use of lakes is impaired as a result of such pollution, particularly with respect to toxic pollution.

This report shall be updated and submitted to the Administrator every two years, for so long as the Director continues to operate a Clean Lakes program.

History

CJY-81-99, July 26, 1999.

§ 1362. Demonstration Program

The Director may establish and conduct a lake water quality demonstration program, in order to promote the following goals and activities:

A. Develop cost effective technologies for the control of pollutants to preserve or enhance lake water quality while optimizing multiple lake uses;

B. Control nonpoint sources of pollution which are contributing to the degradation of water quality in lakes;

C. Evaluate the feasibility of implementing regional consolidated pollution control strategies;

D. Demonstrate environmentally preferred techniques for the removal and disposal of contaminated lake sediments;

E. Develop improved methods for the removal of silt, stumps, aquatic growth, and other obstructions which impair the quality of lakes;

F. Construct and evaluate silt traps and other devices or equipment to prevent or abate the deposit of sediment in lakes; and

G. Demonstrate the costs and benefits of utilizing dredged material from lakes in the reclamation of despoiled land.

History

CJY-81-99, July 26, 1999.

§ 1363. Contracts and Interagency Agreements

The Director is authorized to enter into agreements with other public agencies and to contract with public and private agencies, organizations and individuals to develop and demonstrate new or improved methods for the prevention, removal, reduction and elimination of pollution in lakes, including the undesirable effects of nutrients and vegetation.

History

CJY-81-99, July 26, 1999.

Subchapter 8. Watershed Protection Program

§ 1371. Development of Program

The Director may develop a program to protect surface and ground water from pollution on a watershed basis, taking into account impacts on water

quality from a variety of sources and considering cumulative impacts as well as discrete instances of contamination. In developing this program, the Director shall consult with other Navajo Nation agencies and departments, and with state and federal agencies and other entities having authority over activities which may impact water quality within the Navajo Nation (such as agriculture, livestock grazing, mining and timber operations and business development). The Director may conduct studies regarding watershed protection within the Navajo Nation, may develop guidelines and procedures to protect such watersheds and may promulgate regulations to implement the purposes of this Subchapter, in accordance with the provisions of § 1391.

History

CJY-81-99, July 26, 1999.

Subchapter 9. Enforcement

§ 1381. Records, Inspections, Monitoring and Entry

A. Record-keeping, reporting and monitoring. In order to carry out the purposes of this Act, including but not limited to developing or enforcing any water quality standard, water quality management plan, continuing planning process or best management practice under this Act, issuing certifications, granting approvals, and issuing permits or otherwise regulating point sources, treatment works and industrial users of POTWs under this Act, the Director may promulgate regulations requiring any person subject to the requirements of this Act to:

1. Establish and maintain records;
2. Prepare and submit reports;
3. Install, calibrate, use and maintain monitoring equipment or methods, including, where appropriate, biological monitoring;
4. Sample effluents (in accordance with such procedures or methods, at such locations, at such intervals, during such periods and in such manner as the Director shall prescribe); and
5. Provide such other information as the Director may reasonably require.

B. Entry and inspections. The Director or his/her authorized representative (including an authorized contractor acting as a representative of the Director), upon presentation of his/her credentials,

1. Shall have a right of entry to, upon, or through any premises necessary to implement and enforce the provisions of this Act and the regulations promulgated hereunder, and
2. May at reasonable times have access to and copy any records, inspect any monitoring or sampling equipment or method under Subsection (A) above, inspect any treatment processes or equipment, sample any

effluents which are being discharged into the waters of the Navajo Nation or are required to be or are sampled under Subsection (A), and perform such other inspection as is necessary to ensure compliance with this Act and the regulations promulgated hereunder.

Any records, reports or information obtained under this Section shall, in the case of effluent data, be related to any applicable effluent limitations, toxic, pretreatment or new source performance standards.

C. Availability of information to public. Any records, reports or other information obtained under this Section shall be available to the public, except that upon a showing satisfactory to the Director by any person that records, reports or other information or any particular part thereof (other than effluent data) to which the Director has access under this Section would, if made public, divulge methods or processes entitled to protection as trade secrets of such person, the Director shall consider such record, report or other information or portion thereof confidential, except that such material may be disclosed to other officers, employees or authorized representatives of the Navajo Nation and of the United States concerned with carrying out this Act or when relevant to any proceeding under this Act. The Director shall deny claims of confidentiality for name and address of any permit applicant or permittee; permit applications; permits; and effluent data.

D. Confidential information. Any authorized representative of the Director (including an authorized contractor acting as a representative of the Director) who discloses confidential information contrary to these provisions, except as otherwise provided by law, may be subject to dismissal, suspension, or other adverse personnel action. Any authorized representative of the Director (including an authorized contractor acting as a representative of the Director) who knowingly or willfully publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information that is required to be considered confidential under this Subsection shall be fined not more than one thousand dollars (\$1,000). Nothing in this Subsection shall prohibit the Director or an authorized representative of the Director (including any authorized contractor acting as a representative of the Director) from disclosing records, reports, or information to officers, employees, or authorized representatives of the United States concerned with carrying out this Act or when relevant in any proceeding under this Act. In any instance where the Navajo Nation lacks jurisdiction over the person charged, the Director may refer the action to the appropriate USEPA Regional Administrator and/or U.S. Department of Justice official.

History

CJY-81-99, July 26, 1999.

United States Code

Records and reports, inspections, water pollution prevention and control, see 33 U.S.C. § 1318.

§ 1382. General Enforcement Authority

A. In general. Whenever, on the basis of any information available to

the Director, the Director finds that any person (including the Navajo Nation and any instrumentality of the Navajo Nation, but only with regard to their role as a point or nonpoint source, industrial user of a publicly owned treatment works or a treatment works treating domestic sewage) has violated, or is in violation of, any requirement or prohibition of this Act, the regulations promulgated under this Act, or permits, orders, plans, programs or fees issued or developed pursuant to this Act, the Director may:

1. Issue and serve on such person an order requiring such person to comply with such requirement or prohibition, including an emergency order to comply, pursuant to the provisions of this Section;

2. Issue and serve on such person an administrative penalty order in accordance with § 1384 of this Act;

3. Request that the Attorney General bring a civil action, including an action for injunctive relief, in accordance with § 1383(A) of this Act; and/or

4. Request that the Navajo Nation Prosecutor's Office bring a criminal action in accordance with § 1383(B) of this Act and/or refer any criminal enforcement action or portion of such action to the U.S. Environmental Protection Agency Regional Administrator for the appropriate EPA region.

B. Requirements for orders to comply. An order issued under Subsection (A)(1) or (A)(2) of this Section shall state with reasonable specificity the nature of the violation, shall state that the alleged violator is entitled to a hearing pursuant to regulations promulgated by the Director under § 1391 of this Act, if such hearing is requested in writing within 30 calendar days after the date of issuance of the order, and shall specify a time for compliance that the Director determines is as expeditious as practicable, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements. The order shall become effective immediately upon the expiration of the 30 calendar days if no hearing is requested and, if a timely request for a hearing is made, upon the decision of the Director. The order may be conditional and require a person to refrain from particular acts unless certain conditions are met. A copy of the order shall be sent to the appropriate U.S. EPA region and, if the order is issued to a corporation, to the appropriate corporate officers and registered agent of the corporation. No order to comply issued under this Section shall prevent the Navajo Nation from assessing any penalties or otherwise affect or limit the Navajo Nation's authority to enforce under other provisions of this Act, or affect any person's obligations to comply with any Section of this Act or with a term or condition of any permit or other requirements promulgated or approved under this Act.

C. Emergency compliance orders. Notwithstanding any permit issued under this Act, if the Director determines that discharge of pollutants into the waters of the Navajo Nation, into a POTW or a treatment works treating domestic sewage, pollution from a nonpoint source, or a combination of such sources, is presenting an imminent and substantial endangerment to public health or welfare or the environment and determines, in consultation with the Attorney General, that it is not practicable to assure prompt protection of public health or welfare or the environment by commencement of a civil action pursuant to

Subsection (E) of this Section, the Director may issue such orders as may be necessary to protect public health or welfare or the environment. Such orders may prohibit, restrict or condition any and all activities that contribute or may contribute to the emergency, shall be effective immediately upon issuance and shall remain in effect for a period of not more than 60 days, unless the Director brings an action pursuant to Subsection (E) of this Section within the 60-day period. If the Director brings such an action, the order shall remain in effect for an additional 14 days or for such longer period as may be authorized by the court in which such action is brought.

D. Enforcement of compliance orders. Enforcement actions of the Director shall be enforced by the Navajo Nation EPA, the Navajo Department of Justice, Navajo Prosecutors Office, Resources Enforcement and/or the Division of Public Safety. Those authorized to enforce the Director's actions may take reasonable steps to assure compliance, consistent with the requirements established by this Act (including rights of appeal), including but not limited to:

1. Entering upon any property or establishment believed to be violating the order and demanding compliance; and
2. Terminating operations at facilities not in compliance.

E. Injunctive relief. The Director may seek injunctive relief pursuant to § 1383(A) of this Act to restrain any person who causes or contributes to an imminent and substantial threat to the public health or welfare or environment due to a discharge or other activity affecting the water quality of the Navajo Nation.

History

CJY-81-99, July 26, 1999.

United States Code

Enforcement, water pollution prevention and control, see 33 U.S.C. § 1319.

§ 1383. Judicial Enforcement

A. Civil judicial enforcement. The Director shall request the Attorney General to file an action for a temporary restraining order, a preliminary injunction, a permanent injunction or any other relief provided by law, including the assessment and recovery of civil penalties of not less than five hundred dollars (\$500.00) and not more than twenty-five thousand dollars (\$25,000) per day per violation, in any of the following instances:

1. Whenever a person has violated, or is in violation of, any provision, requirement or prohibition of this Act, including, but not limited to, a regulation or plan adopted pursuant to this Act, a permit or an order issued pursuant to this Act or a fee assessed under this Act;
2. Whenever a person has violated, or is in violation of, any duty to allow or carry out inspection, entry or monitoring activities; or
3. Whenever a person is creating an imminent and substantial

endangerment to the public health or the environment, in which case the Director shall request the Attorney General to pursue injunctive relief but not the assessment of civil penalties, unless the endangerment is caused by a violation, as specified in Paragraphs (1) and (2).

B. Criminal penalties. Any person who intentionally:

1. Violates any provision, requirement or prohibition of this Act, including but not limited to a regulation or plan adopted pursuant to this Act or a permit or an order issued pursuant to this Act;

2. Makes any false material statement, representation or certification in, or omits material from, or alters, conceals or fails to file or maintain any notice, application, record, report, plan or other document required to be filed or maintained pursuant to this Act, regulations or plans adopted pursuant to this Act or a permit or an order issued pursuant to this Act; or

3. Falsifies, tampers with, renders inaccurate or fails to install any monitoring device or method required to be maintained or followed under this Act, regulations or plans adopted pursuant to this Act or a permit or an order issued pursuant to this Act; shall, upon conviction, be punished by a fine of not less than five hundred dollars (\$500.00) and not more than twenty-five thousand dollars (\$25,000) per day of violation or, if smaller, the largest amount permissible under applicable law, or imprisonment for not more than one year, or both, notwithstanding the provisions of 17 N.N.C. §§ 222 and 223, or be subject to any other penalty imposed by the court that is available under Navajo Nation law. In any instance where the Nation lacks jurisdiction over the person charged, or where the Director is limited in the amount of the fine that he may impose, the Director may refer the action to the appropriate EPA Regional Administrator pursuant to § 1352 of this Act. For the purpose of this Subsection, the term "person" includes, in addition to the entities referred to in § 1302(A)(26) of this Act, any responsible corporate officer.

C. Jurisdiction and venue. Any action under this Section shall be brought in the Navajo Nation District Court in Window Rock, and such court shall have jurisdiction to restrain such violation, require compliance, assess civil and criminal penalties up to the amounts provided in this Section, collect any fees or noncompliance penalties owed the Nation under this Act, and award any other appropriate relief.

D. Calculation of penalties.

1. For purposes of determining the number of days of violation for which a civil penalty may be assessed under this Section, § 1384 or § 1385, if the Director has notified the source in writing of the violation and the plaintiff makes a prima facie showing that the conduct or events giving rise to the violation are likely to have continued or recurred past the date of notice, the days of violation shall be presumed to include the date of such notice and each day thereafter until the violator establishes that continuous compliance has been achieved, except to the extent that the violator can prove by a preponderance of the

evidence that there were intervening days during which no violation occurred or that the violation was not continuing in nature. Notice under this Section shall be accomplished by the issuance of a written notice of violation or written order to comply or by filing a complaint in the Navajo Nation District Court in Window Rock that alleges any violation described in Subsection (A) of this Section.

2. In determining the amount of a penalty assessed under this Section, § 1384 or § 1385, the court shall consider the history, seriousness and duration of the violation; any good faith efforts to comply with the applicable requirements; the violator's full compliance history, including the severity and duration of past violations, if any; the economic impact of the penalty on the violator; as an aggravating factor only, the economic benefit, if any, resulting from the violation; and any other factors that the court deems relevant. For purposes of this Section, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

3. All penalties collected pursuant to this Section shall be deposited into the Clean Water Act Fund established pursuant to § 1348.

4. In lieu of or in addition to a monetary penalty, the Director may impose or may request the Attorney General to seek from the court a requirement to remediate the damage caused or to perform community service, or both.

E. Failure to pay penalty. If any person fails to pay an assessment of a civil penalty, the Director shall request the Attorney General to bring a civil action in the Navajo Nation District Court in Window Rock to enforce the order or recover the amount ordered or assessed plus interest, from the date of the final order or decision or the date of the final judgment, as the case may be. In such an action the validity, amount and appropriateness of the order or assessment shall not be subject to review. Any person who fails to pay on a timely basis a civil penalty ordered or assessed under this Section shall be required to pay, in addition to such penalty and interest, the Director's enforcement expenses, including but not limited to attorneys' fees and costs of collection proceedings. Such person shall also pay a quarterly nonpayment penalty for each quarter during which such failure to pay persists. The nonpayment penalty shall be no less than ten percent (10%) of the aggregate amount of the person's outstanding penalties and nonpayment penalties accrued as of the beginning of the quarter; the Director may by regulation establish higher penalties to take into account situations where the prime rate is higher.

History

CJY-81-99, July 26, 1999.

United States Code

Enforcement, water pollution prevention and control, see 33 U.S.C. § 1319.

§ 1384. Administrative Assessment of Penalties

A. Basis for penalty. The Director may issue against any person an administrative order assessing a civil administrative penalty of up to ten thousand dollars (\$10,000) per day per violation whenever the Director finds that a person has violated, or is in violation of, any provision, requirement or prohibition of this Act, including, but not limited to, a regulation or plan adopted pursuant to this Act, a permit or an order issued pursuant to this Act or a fee assessed under this Act. The Director's authority under this Subsection, combined with actions under Subsection (C), shall be limited to matters where the total penalty sought does not exceed one hundred thousand dollars (\$100,000) and the first alleged date of violation occurred no more than one year prior to the initiation of administrative action, except where the Director and Attorney General jointly determine that a matter involving a larger penalty or longer period of violation is appropriate for administrative penalty action. The communications required to make such a joint determination and the method(s) utilized for making such a joint determination shall be privileged, and shall not be subject to judicial review. The Director may compromise, modify or remit, with or without any conditions, any administrative penalty imposed under this Section.

B. Hearing requirement. The Director shall assess an administrative penalty under this Section by an order made after opportunity for a hearing, pursuant to § 1391 of this Act. Before issuing such an order, the Director shall give written notice of the proposed order to the person on whom the penalty is to be assessed and provide such person an opportunity to request a hearing within 30 calendar days of receipt of the notice.

C. Field citations. After consultation with the Attorney General, the Director may implement a field citation program through regulations establishing minor violations for which field citations (assessing civil penalties not to exceed one thousand dollars (\$1,000) per day per violation) may be issued by officers or employees designated by the Director, for any violation for which an administrative order could be issued under Subsection (A) to the extent permissible under applicable law. The Director's authority under this Subsection, combined with action taken under Subsection (A), shall be limited in total amount by the provisions in Subsection (A). Any person on whom a field citation is assessed may, pursuant to regulations issued under this Section, elect to pay the penalty or request a hearing on the citation under the provisions of Subsection (B). If a timely request for a hearing is not made, the penalty shall be final and the opportunity for judicial review shall be waived. Any hearing shall provide a reasonable opportunity to be heard and to present evidence. Payment of a penalty required by a field citation shall not be a defense to further enforcement by the Director to correct a violation or to assess the statutory maximum penalty pursuant to other authorities in this Act, except as to the days of violation for which the penalty required by a field citation is paid.

D. Judicial review. Any person subject to a civil penalty under Subsections (A) or (C) of this Section may seek review of such penalty assessment in the Navajo Nation District Court in Window Rock by filing a petition for review in such court within 30 calendar days following the date that the penalty becomes final and by simultaneously sending a copy of such filing by certified mail to the Director and the Attorney General. A notice of intent to challenge such penalty assessment, otherwise required by the Navajo

Nation Sovereign Immunity Act, 1 N.N.C. § 551 et seq., is not required. Within 30 calendar days thereafter the Director shall file in such court a certified copy or certified index of the record on which the penalty was based. The court shall not set aside or remand an order or assessment under this Section unless the record, taken as a whole, does not substantially support the finding of a violation or unless the order or penalty assessment constitutes an abuse of discretion. In any such proceedings, the Director may seek to recover civil penalties ordered or assessed under this Section.

E. Failure to pay penalty. If any person fails to comply with an administrative penalty order after the order or assessment has become final, the Director shall request the Attorney General to bring a civil action in the Navajo Nation District Court in Window Rock to enforce the order or recover the amount ordered or assessed plus interest, from the date of the final order or decision or the date of the final judgment, as the case may be. In such an action the validity, amount and appropriateness of the order or assessment shall not be subject to review. Any person who fails to pay on a timely basis a civil penalty ordered or assessed under this Section shall be required to pay, in addition to such penalty and interest, the Director's enforcement expenses, including but not limited to attorneys' fees and costs of collection proceedings. Such person shall also pay a quarterly nonpayment penalty for each quarter during which such failure to pay persists. The nonpayment penalty shall be no less than ten percent (10%) of the aggregate amount of the person's outstanding penalties and nonpayment penalties accrued as of the beginning of the quarter; the Director may by regulation establish higher penalties to take into account situations where the prime rate is higher.

F. Calculation of penalty. In determining the amount of any penalty to be assessed under this Section, the Director or the court, as appropriate, shall take into consideration the factors enumerated in § 1383(D) of this Act.

History

CJY-81-99, July 26, 1999.

United States Code

Enforcement, water pollution prevention and control, see 33 U.S.C. § 1319.

§ 1385. Citizen Suits

A. Authority to bring civil action; jurisdiction.

1. Except as provided in Subsection (B) of this Section, a person may commence a civil action in the Navajo Nation District Court in Window Rock on his or her own behalf against any person (except the Navajo Nation or any instrumentality of the Navajo Nation, but not excepting tribal enterprises) who is alleged to be in violation of any provision, requirement or prohibition of this Act, including but not limited to a regulation or plan adopted pursuant to this Act, a permit or an order issued pursuant to this Act or a fee assessed under this Act.

2. The Navajo Nation courts shall have jurisdiction to enforce such provision, prohibition, regulation, plan, permit, order, fee or other

requirement, to restrain such violation, to order such person to take such other action as may be necessary and to apply any appropriate civil penalties.

B. Notice. An action may not be commenced under Subsection (A)(1) of this Section fewer than 60 days after the plaintiff has given notice of the alleged violation to the Director, the Navajo Nation and the alleged violator. In addition, an action may not be commenced if the Director has commenced and is diligently prosecuting a civil action in court to require compliance with this Act, except that any person may intervene as a matter of right in such an action.

C. Venue; intervention; service of complaint.

1. Any action under this Section may be brought only in the Navajo Nation District Court in Window Rock.

2. The Director, if not already a party, may intervene as of right in any action brought under this Section.

3. Whenever any action is brought under this Section the plaintiff shall serve a copy of the complaint on the Attorney General and on the Director. No consent judgment may be entered in an action brought under this Section in which the Director is not a party prior to 45 days following the receipt of a copy of the proposed consent judgment by the Attorney General and the Director, during which time the Attorney General and/or the Director may submit, on behalf of the Navajo Nation, their comments on the proposed consent judgment to the court and parties or the Director may intervene as a matter of right.

D. Award of costs. The court, in issuing a final order in an action brought under this Section, may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party whenever the court determines that such award is appropriate.

E. Use of penalties. All penalties collected pursuant to this Section shall be deposited into the Clean Water Act Fund established pursuant to § 1348.

History

CJY-81-99, July 26, 1999.

United States Code

Citizen suits, water pollution prevention and control, see 33 U.S.C. § 1365.

Subchapter 10. Rulemaking and Judicial Review

United States Code

Administrative procedure and judicial review, water pollution prevention and control, see 33 U.S.C. § 1369.

§ 1391. Rulemaking and Other Administrative Procedures

A. Rulemaking.

1. Notice of any proposed regulation shall be published in a newspaper of general circulation for the areas of the Navajo Nation that are concerned and shall be given orally in English and Navajo over local radio stations. The notice shall specify the period available for public comment and the date, time and place of any public hearing, and shall make available to the public a copy of the proposed regulation. Not later than the date of proposal of the regulation in question the Director shall establish a rulemaking docket and shall make the docket available to the public for inspection and copying during regular business hours. The Director shall provide a comment period of at least 30 calendar days; shall allow any person to submit written comments, data or documentary information; shall in addition give interested persons an opportunity to present orally, in the Navajo or English languages, their views, data or arguments; and shall keep the record open for at least 10 days after such proceeding to provide an opportunity for submission of rebuttal and supplementary information.

2. The final regulation shall be based on the record of the rulemaking proceeding contained in the docket, and shall be accompanied by an explanation of the reasons for any major changes from the proposed regulation and a response to each of the significant comments submitted in written or oral presentations during the comment period.

B. Administrative hearings. The Director shall, by regulation, establish a formal administrative hearing process which meets due process standards to hear appeals taken under §§ 1382(B) (compliance orders) and 1384 (administrative penalties and field citations). Until the Director establishes this administrative hearing process and appoints a qualified presiding officer, the Navajo Office of Hearings and Appeals is authorized to hear appeals taken under the above-cited Sections; provided, however, that the Director may, in his or her discretion, transfer other appeals allowed under this Act and the regulations promulgated hereunder to the Navajo Office of Hearings and Appeals when necessary.

C. Administrative subpoenas.

1. In connection with any investigation, monitoring, reporting, entry, compliance inspection or administrative enforcement proceeding under this Act, the Director may issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books and documents, and may administer oaths.

2. Claims of confidentiality shall be processed using the provisions of § 1381(C) of this Act and regulations promulgated thereunder.

3. Witnesses summoned shall be paid the same fees and mileage that are paid in the Navajo Nation courts. In case of contumacy or refusal to obey a subpoena, the Navajo Nation District Court for the district in

which such person is found, resides or transacts business shall have jurisdiction to issue an order requiring such person to appear before the Director and give testimony or produce papers, books or documents, or both, and any failure to obey such an order may be punished by the court as contempt. A person may challenge the lawfulness of an administrative subpoena issued by the Director in the Navajo Nation District Court for the District of Window Rock, naming as defendant the Director in his or her official capacity and not in any other manner; in any such action, relief will be limited to declaratory relief.

History

CJY-81-99, July 26, 1999.

§ 1392. Review in Navajo Nation Supreme Court

A. Petitions for review. A petition for review of any final action taken by the Director under this Act, including but not limited to promulgation of regulations, plans and standards, issuance of orders and issuance or denial of permits (but not including imposition of administrative penalties under Section 1384), which are subject to review under the provisions of Subsection 1384(D), or for challenge of an administrative subpoena, which is subject to review under the provisions of Subsection 1391(C)(3), shall be brought in the Navajo Nation Supreme Court. The petition shall be filed within 60 calendar days from the date that notice of such final action is first published, or, if notice is not published, first served upon the alleged violator or such other person required to be served under this Act, except that if the petition is based solely on grounds arising after the sixtieth day, then the petition shall be filed within 60 calendar days after such grounds arise. The date of adoption of any regulation promulgated pursuant to this Act shall be the date of its approval by the Resources Committee of the Navajo Nation Council. The Navajo Nation Supreme Court, in reviewing the final action, shall limit its review to the issues and evidence that were before the Director at the time of the final action from which the appeal is taken.

B. Limitations on review.

1. If judicial review of a final action of the Director could have been obtained under Subsection (A) of this Section, that action shall not be subject to judicial review in judicial proceedings for enforcement.

2. With respect to any regulations promulgated under this Act or other notice and comment actions taken pursuant to this Act, only an objection that was raised with reasonable specificity during the public comment period may be raised during judicial review. If the person raising an objection can demonstrate to the Director that it was impracticable to raise the objection within such time or if the grounds for the objection arose after the public comment period (but within the time specified for judicial review), and if the objection is of central relevance to the outcome of the regulation or other action, the Director may convene a proceeding for reconsideration of the regulation or other action and provide the same procedural rights as would have been afforded had the information been available at the time the regulation or other action was proposed. If the Director declines to convene such a

proceeding, the person may seek review of such refusal in the Navajo Nation Supreme Court. Such reconsideration shall not postpone the effectiveness of the regulation or other action, although it may be stayed by the Director or the court for up to three months.

3. Except as otherwise expressly allowed by Navajo law, no interlocutory appeals shall be permitted with regard to determinations made by the Director under this Act. In reviewing alleged procedural errors, the court may invalidate the regulation or other action only if the errors were so serious and related to matters of such central relevance to the regulation or permitting action that there is a substantial likelihood that the regulation or other action would have been significantly changed if such errors had not been made.

C. Standards for review. In reviewing any final action of the Director undertaken pursuant to this Act, the court may reverse any such action that it finds to be:

1. Arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law;

2. In excess of statutory jurisdiction, authority, or limitations or short of statutory right;

3. Without observance of procedure required by law; or

4. Unsupported by substantial evidence.

D. Challenge to any provisions. Any action brought pursuant to the provisions of this Section shall be brought in compliance with the Navajo Nation Sovereign Immunity Act, 1 N.N.C. § 551 *et seq.*, and not in any other manner. In any such action, relief shall be limited to declaratory relief and the Navajo Nation Supreme Court shall have no jurisdiction to grant any other relief. The Navajo Nation Supreme Court shall have exclusive jurisdiction and venue over any action brought pursuant to this Section, except as otherwise provided in this Section.

History

CJY-81-99, July 26, 1999.

§ 1393. Challenge to Facial Validity of Act

A. Any challenge to the lawful authority of the Navajo Nation Council to enact any provision of this Act must be filed in accordance with the laws of the Navajo Nation within 90 calendar days after the date of enactment of such provision of this Act, in the Navajo Nation District Court in Window Rock, naming as defendant the Navajo Nation, and not thereafter or in any other manner.

B. For purposes of this Section, the date of enactment of each provision of this Act shall be the date of signature by the President of the Navajo Nation after its adoption by the Navajo Nation Council, or the date of its adoption by the Navajo Nation Council if the Navajo Nation Council overrides a

veto by the President.

C. The Navajo Nation District Court in Window Rock shall have exclusive jurisdiction and venue over any action under this Section.

D. In any action brought pursuant to the provisions of this Section, relief shall be limited to declaratory relief.

E. Any action brought pursuant to the provisions of this Section shall be brought in compliance with the Navajo Nation Sovereign Immunity Act, 1 N.N.C. § 551 *et seq.*, and not in any other manner.

History

CJY-81-99, July 26, 1999.

§ 1394. Legislative Oversight and Amendments

The Resources Committee of the Navajo Nation Council shall serve as the legislative oversight committee for the Navajo Nation Environmental Protection Agency, 2 N.N.C. § 1926 *et seq.* The Navajo Nation Council may amend 2 N.N.C. §§ 1921-1926 upon recommendation from the Resources Committee pursuant to 2 N.N.C. § 1927 *et seq.*

History

CJY-81-99, July 26, 1999.

Chapter 15. The Navajo Nation Underground Storage Tank Act

Subchapter 1. General Provisions

§ 1501. Title

This Chapter may be cited as the "Navajo Nation Underground Storage Tank Act."

History

CO-82-98, October 20, 1998.

§ 1502. Definitions

For the purposes of this Chapter:

A. "Abandoned Underground Storage Tank" means an underground storage tank (UST) abandoned by the owner and operator for which no liability is imposed against the owner or operator or their guarantor for the removal of said UST or associated release under federal law, this Chapter, Navajo common law or contract law, or where it is impossible to require an owner or operator to remove a UST or remediate a release or collect damages from the owner or operator for their failure to remove a UST or remediate a release because the owner and operator have been determined by a court of competent jurisdiction to

be bankrupt or otherwise unable to pay.

B. "Attorney General" means the Attorney General of the Navajo Nation.

C. "Corrective Action Plan (CAP)" means a document which is submitted to the regulatory agency for approval and which is based on the site characterization of an underground storage tank site. The CAP corrects soil, surface water and ground water contamination and is implemented in order to protect human health, safety, welfare and the environment.

D. "Director" means the Director of the Navajo Nation Environmental Protection Agency or his/her designee.

E. "Environmental Assessment (EA)" means an assessment done of an individual parcel of land for the purpose of evaluating the environmental impacts of a project and for making management decisions in accordance with the National Environmental Policy Act (NEPA). An EA is not as comprehensive as an Environmental Impact Statement (EIS) which is done for federal projects, nor is it commercially based like an ESA.

F. "Environmental Audit" means a systematic, documented, periodic and objective review by regulated entities of facility operations and practices related to meeting environmental requirements.

G. "Environmental Site Assessment" or "ESA" means the process by which a person or entity seeks to determine if a particular parcel of property (including improvements) is subject to recognized environmental conditions.

H. "Exposure Assessment" means an assessment to determine the extent of exposure of, or potential for exposure of, individuals to petroleum or a regulated substance from a release from an underground storage tank based on such factors as the nature and extent of contamination and the existence of or potential for pathways of human exposure (including ground or surface water contamination, air emissions, and food chain contamination), the size of the community within the likely pathways of exposure, and the comparison of expected human exposure levels to the short-term and long-term health effects associated with identified contaminants and any available recommended exposure or tolerance limits for such contaminants. Such assessment shall not delay corrective action to abate immediate hazards or reduce exposure.

I. "Facility" means, with respect to any owner or operator, a single parcel of property or contiguous or adjacent property on which underground storage tanks and their associated piping are used for the storage of regulated substances. A facility may have one or more clusters of storage tanks at separate tank sites.

J. "Guarantor" means any person, other than the owner or operator, who provides evidence of financial responsibility for an owner or operator as required by this Chapter.

K. "Navajo Nation" means:

1. When referring to the body politic, the same meaning as set forth in 1 N.N.C. § 552;

2. When referring to governmental territory, all land within the territorial boundaries of the Navajo Nation, including:

a. All land within the exterior boundaries of the Navajo Indian Reservation, or of the Eastern Navajo Agency, or of Navajo dependent Indian communities, including all lands within the boundaries of Navajo chapter governments;

b. All land held in trust by the United States for, or restricted by the United States or otherwise set aside or apart under the superintendence of the United States for, the use or benefit of the Navajo Nation, the Navajo Tribe, any Band of Navajo Indians, or any individual Navajo Indians as such; and

c. All other land over which the Navajo Nation may exercise governmental jurisdiction in accordance with federal or international law.

L. "Navajo Nation Council" means the official legislative body of the Navajo Nation empowered to adopt policies and enact laws governing the Navajo Nation, as set forth in 2 N.N.C. § 102 *et seq.*

M. "Navajo Nation Environmental Protection Agency or Navajo EPA" means the agency established by the Navajo Nation Council pursuant to CAP-47-95, 2 N.N.C. § 1921 *et seq.*, to carry out the environmental laws and regulations adopted by the Navajo Nation.

N. "Navajo Nation Underground Storage Tank Program or Navajo UST Program" means the program, including any successor program, regardless of name, within Navajo EPA that is responsible for implementing and enforcing this Chapter.

O. "Non-operational Storage Tank" means any underground storage tank into which regulated substances will not be deposited, or from which regulated substances will not be dispensed, after November 8, 1984.

P. "Operator" means any person in control of, or having responsibility for the daily operation of underground storage tanks.

Q. "Owner" means:

1. A person who owns an underground storage tank or a person who owned an underground storage tank immediately before the underground storage tank was taken out of operation. A person who acquires ownership or control of property (by lease, use or other means) where an underground storage tank is located is the owner of the underground storage tank, except that the person is not an owner if the following applies:

a. The person, after conducting a due diligence investigation immediately prior to acquiring ownership of the property, did not know and had no reason to know that the underground storage tank was located on the property. Due diligence shall consist of performing a phase I environmental assessment of the property which meets generally accepted

commercial practices or standards for due diligence performed prior to the adoption of this standard.

2. A person who holds indicia of ownership primarily to protect a security interest in either the underground storage tank or in the property on which the underground storage tank is or was located but who does not participate in the management of the underground storage tank and who is not otherwise engaged in petroleum refining or marketing is not an owner for purposes of this Chapter.

3. A person who holds indicia of ownership as prescribed by Subsection (2) of this Section and who acquires ownership or control of a underground storage tank through foreclosure of the property where a underground storage tank is located shall not be deemed an owner and shall not be required to investigate a release or take corrective action in response to a release, if the person does all of the following:

a. Complies with the notification requirements prescribed by Subchapter 3.

b. Complies with the reporting requirements prescribed by § 1544 to the extent that the information is known to the person at the time of the report.

c. Temporarily or permanently closes the underground storage tank as in accordance with this Chapter and regulations promulgated hereunder.

d. Divests itself of the property in a reasonably prompt manner using whatever commercially reasonable means are relevant or appropriate with respect to the property, taking into consideration all of the facts and circumstances.

4. The Navajo Nation shall not be deemed an owner and shall not be required to investigate a release or take corrective action in response to a release where it holds indicia of ownership due to bankruptcy, foreclosure, tax delinquency condemnation, abandonment or similar means because of its status as a governmental entity (and is not otherwise operating said tank) and it:

a. Complies with the notification requirements prescribed by Subchapter 3.

b. Complies with the reporting requirements prescribed by § 1544 to the extent that the information is known to the person at the time of the report.

c. Temporarily or permanently closes the underground storage tank as in accordance with this Chapter and regulations promulgated hereunder.

5. The federal government or any of its agencies shall not be deemed an owner or operator under this Chapter if prohibited by federal law.

R. "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.

S. "Petroleum" means petroleum, including crude oil or any fraction thereof which is liquid at 60 degrees Fahrenheit and 14.7 pounds per square inch absolute pressure.

T. "Petroleum product" means petroleum, including crude oil, and/or fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under Subparagraphs (A) through (F) of 42 U.S.C. § 9601(14), natural gas, natural gas liquids, liquified natural gas, and synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas). The word fraction refers to certain distillates of crude oil, including gasoline, kerosene, diesel oil, jet fuels, and fuel oil, pursuant to Standard definitions of Petroleum statistics.

U. "Regulated Substance" means

1. Petroleum;

2. A substance defined in the Comprehensive Environmental Liability Act of 1980; P.L. 96-510, 94 Stat. 2767; 42 U.S.C. § 9601(14), but not including a substance regulated as a hazardous waste under the Solid Waste Disposal Act of 1984, P.L. 98-616, 98 Stat. 3221; 42 U.S.C. § 6921.

V. "Release" means any spilling, leaking, pumping, pouring, emptying, dumping, emitting, discharging, escaping, leaching, or disposing from any underground storage tank into groundwater, surface water or surface or subsurface soil.

W. "Resources Committee" means the standing committee of the Navajo Nation Council as defined in 2 N.N.C. § 691 *et seq.* with oversight authority over the Navajo Nation Environmental Protection Agency as provided for by Navajo Nation Council Resolution No. CAP-47-95.

X. "Site Characterization" at an underground storage tank site is the investigation and reporting of detailed information about soil, ground water, geology, conductivity, contaminants and other data for the purpose of implementing a corrective action plan (CAP).

Y. "Tank System" means an underground storage tank or tanks and ancillary equipment, including piping, which is used for the storage of regulated substances.

Z. "Underground Storage Tank" means any one or combination of tanks (including underground pipes connected thereto) which is used to contain an accumulation of regulated substances, and the volume of which (including the volume of the underground pipes connected thereto) is 10 per centum or more beneath the surface of the ground. Such term does not include any

1. Farm or residential tank of 1,100 gallons or less capacity used for storing motor fuel for noncommercial purposes; provided, however, that the owner or operator of such tanks shall comply with the leak/release reporting requirements of this Chapter (§ 1544) and such tanks installed after the effective date of this Chapter shall comply with the best available design technology for preventing leaks or releases. Moreover, in the event of a release the owner or operator of such tanks shall be subject to the corrective action requirements of this Chapter and regulations promulgated hereunder.

2. A single tank of 660 gallons or less or tank system of 1,320 gallons or less used for storing heating oil for consumptive use on the premises where stored; provided, however that the owner or operator of such tanks shall comply with the leak/release reporting requirements of this Chapter (§ 1544) and such tanks installed after the effective date of this Chapter shall comply with the best available design technology for preventing leaks or releases. Moreover, in the event of a release the owner or operator shall be subject to the corrective action requirements of this Chapter and regulations promulgated hereunder.

3. Septic tank.

4. Pipeline facility (including gathering lines)-

a. Which is regulated under the Natural Gas Pipeline Safety Act of 1968; 49 U.S.C. Appx. §§ 1671 through 1686;

b. The Hazardous Liquid Pipeline Safety Act of 1968; 49 U.S.C. Appx. § 2001.

5. An intrastate pipeline facility regulated under Tribal law comparable to the provision under 4(a) and (b).

6. Surface impoundment, pit, pond, or lagoon.

7. Storm water or waste water collection system.

8. Flow-through process tank.

9. Liquid trap or associated gathering lines directly related to oil or gas production and gathering operations.

10. Storage tank situated in an underground area (such as a basement, cellar, mineworking, drift, shaft, or tunnel) if the storage tank is situated upon or above the surface of the floor.

11. The term "underground storage tank" shall not include any pipes connected to any tank which is described in Subparagraphs (1) through (10).

History

§ 1503. Declaration of Policy

The Navajo Nation Council finds and declares that the release of petroleum products and other hazardous liquids from underground storage tanks presents a significant danger to the public health and the environment, by contaminating surface water, ground water and subsurface soils. Therefore, it is the intent of the Navajo Nation Council to establish a program for the regulation of underground storage tanks which implements stringent control of the installation, operation, retrofitting, upgrading, removal and abandonment of underground storage tanks, corrective action, closure and post closure care, and financial assurances consistent with the requirements of Title VI of the Hazardous and Solid Waste Amendments of 1984, P.L. 98-618, 98 Stat. 3221; 42 U.S.C. § 6991(a) *et seq.*

History

CO-82-98, October 20, 1998.

§ 1504. Applicability; Exemptions

A. Except as otherwise provided in this Section, the provisions of this Act and regulations promulgated hereunder shall apply to all persons and all property within the Navajo Nation.

B. Except as otherwise provided in Subsection (C) of this Section, the provisions of this Act and/or regulation promulgated thereunder, in whole or in part, shall not apply to any person or property where, but only to the limited extent that, such application would be in violation of any valid covenant not to regulate or otherwise exercise jurisdiction over such person or property.

C. The provisions of this Act and/or regulations promulgated thereunder, in whole or in part, shall apply to any person and to such property owned or operated by such person where required by federal law or to such extent and under such terms and conditions as may be provided in any voluntary compliance agreement entered into pursuant to § 1505 of this Act.

D. Nothing in this Section shall be construed as a determination or admission by the Navajo Nation that any claim of covenant not to regulate or otherwise exercise jurisdiction is valid.

History

CO-82-98, October 20, 1998.

§ 1505. Voluntary Compliance Agreement

A. Any person to whom the provisions of this Act are not otherwise applicable, may apply to the Director to enter into a voluntary compliance agreement with the Navajo Nation with respect to any property to which the provisions of this Chapter and/or regulations promulgated thereunder, in whole or in part, are not otherwise applicable.

B. A proposal to enter into a voluntary compliance agreement shall be in

writing, shall indicate the person and property proposed to be subject to the agreement, shall indicate the proposed term of the agreement, and shall indicate which part or parts of this Chapter and/or regulations promulgated thereunder, in whole or in part, with which voluntary compliance is proposed.

C. A voluntary compliance agreement shall be in writing, shall be for a term of not less than one year, and may be subject to renewal for successive terms of not less than one year. A voluntary compliance agreement may not vary the requirements of this Chapter, or of any regulations promulgated pursuant to this Act.

D. A voluntary compliance agreement shall not be effective unless and until final approval of the agreement is given by the Director.

E. Except as otherwise expressly provided in the agreement, by entering into a voluntary compliance agreement, no person shall be deprived of the benefit of any valid covenant not to regulate or otherwise exercise jurisdiction over such person or property owned or operated by such person.

F. A person may enter into a voluntary compliance agreement in accordance with this Section, notwithstanding that the validity of such person's claim to be exempt from the provisions of this Act has not been judicially determined, whenever the Director determines that entering into such an agreement is in the best interests of the Navajo Nation. Entering into an agreement pursuant to this Subsection shall not constitute a determination or admission by the Navajo Nation that such claim of exemption is valid.

History

CO-82-98, October 20, 1998.

§ 1506. General Authorities of the Director

A. Powers and Duties. In carrying out the intent of this Chapter, the Director is authorized to:

1. Prescribe such regulations as are necessary to carry out his/her functions under this Chapter in accordance with the provision of § 1561(A) of this Chapter;
2. Enforce the provisions of this Chapter and the regulations promulgated hereunder, pursuant to the provisions of Subchapter 5 of this Chapter;
3. Require monitoring, sampling or other studies;
4. Assess fees for the inspection of underground storage tanks;
5. Issue compliance orders, civil penalties and citations to carry out the intent of this Chapter and regulations promulgated hereunder;
6. Conduct investigations, inspections and tests at underground storage tank sites to carry out the duties of this Chapter pursuant to the provisions of Subchapter 5 of this Chapter;

7. Hold hearings related to any aspect of or matter within the authority of this Section and, in connection therewith, compel the attendance of witnesses and the production of records;

8. Provide to the public pertinent educational materials and information regarding underground storage tank issues;

9. Issue guidelines and encourage voluntary cooperation with the provisions of this Chapter and the regulations promulgated hereunder;

10. Consistent with Title 2, Navajo Nation Code, accept, receive and administer grants or other funds or gifts from public and private agencies, including the federal government, to carry out any of the purposes of this Chapter, provided that all monies resulting therefrom shall be deposited in the Navajo Nation Treasury to the account of the Navajo UST Program, as authorized under Navajo law;

11. Require the owner and/or operator of an underground storage tank to perform or cause to be performed a tank and line system test to determine compliance with the standards established by this Chapter or regulations promulgated hereunder; and

12. Perform such other activities as the Director may find necessary to carry out his/her functions under this Chapter.

In prescribing regulations under this Chapter, the Director shall consider but shall not be limited to the requirements of Title VI of the Hazardous and Solid Waste Amendments of 1984, P.L. 98-618, 98 Stat. 3221; 42 U.S.C. § 6991(a) *et seq.* and the regulations thereunder, except that the regulations prescribed by the Director shall be at least as stringent as those promulgated under said Act. All regulations promulgated under this Chapter shall be subject to approval by the Resources Committee of the Navajo Nation Council.

B. Delegation of Authority. The Director may delegate to any officer or employee of the Navajo Nation Environmental Protection Agency such powers and duties under this Chapter, except the making of regulations, as he or she may deem necessary or expedient.

C. Use of Funds. Monies derived from fees and penalties imposed under this Chapter shall be available solely for the administration and implementation of this Chapter and the regulations promulgated hereunder. Such funds shall be deposited into a duly established UST Program Special Revenue Fund Account and expended by the Director for the use of the Underground Storage Tank Program in accordance with the UST Program Special Revenue Fund Account plan of operation pursuant to an approved budget. Any monies contained in said revolving account at the end of the fiscal year (not to exceed two hundred fifty thousand dollars (\$250,000)) shall not revert to the general fund and shall remain available for appropriation as provided in this Section. Any amount accumulated in excess of two hundred fifty thousand dollars (\$250,000) within a single fiscal year shall be deposited into the Navajo Nation General Fund Account.

History

CO-82-98, October 20, 1998.

§ 1507. Construction

This Chapter shall be liberally construed to carry out its purpose. The effectiveness and enforceability of this Chapter shall not be dependent upon the adoption of any regulations unless otherwise required by law. Nothing contained in this Chapter or regulations promulgated hereunder shall be construed to diminish, limit or otherwise adversely affect any right or remedy held or available to the Navajo Nation.

History

CO-82-98, October 20, 1998.

§ 1508. Compliance with other Laws and Regulations

Compliance with this Chapter and regulations promulgated hereunder does not relieve a person of the obligation to comply with other applicable laws and regulations.

History

CO-82-98, October 20, 1998.

§ 1509. Severability

If any provision of this Chapter, or the application of this Chapter to any person or circumstance, is held invalid, the remainder of this Chapter and the application of such provision to other persons or circumstances shall remain unaffected.

History

CO-82-98, October 20, 1998.

Subchapter 2. Prohibited Acts

§ 1521. Prohibited Acts

A. It shall be unlawful for any person:

1. To install an underground storage tank (or tank system) unless:

a. It is designed to prevent releases due to corrosion or structural failure for the operational life of the tank;

b. It is cathodically protected against corrosion, constructed of noncorrosive material, steel clad with noncorrosive material or designed in a manner to prevent the release of a regulated substance;

- c. It is equipped with spill and overfill prevention devices;
- d. It is correctly installed in accordance with manufacture specifications and appropriate technical industry standards;
- e. The material used in the construction or lining of the tank is compatible with the substance to be stored; and
- f. The tank (or operation thereof) complies with all standards required by this Chapter and regulations promulgated hereunder.

2. To fail to remove (or upgrade) an underground storage tank that does not comply with this Chapter and in accordance with the removal requirements of this Chapter and regulations promulgated hereunder.

3. To fail to take corrective action for any leaking underground storage tank as required by this Chapter and in accordance with the requirements of this Chapter and regulations promulgated hereunder.

4. To fail to maintain adequate financial responsibility assurances as required by this Chapter and regulations promulgated hereunder.

5. To fail to comply with the notification, reporting, and recordkeeping requirements of this Chapter or regulations promulgated hereunder.

6. To violate any duty to allow an inspection, entry or monitoring activities.

7. To fail to inspect or monitor an underground storage tank or tank system as required by this Chapter or regulations promulgated hereunder.

8. To violate any provision, requirement, prohibition, or duty under this Chapter or regulations promulgated hereunder.

B. It shall be unlawful for any person to:

1. Falsify documents or otherwise provide false information to the Director;

2. Divulge confidential information as prohibited by § 1546 of this Chapter.

3. Fail to notify the Navajo UST Program of the release of a regulated substance as required by this Chapter.

C. It shall be unlawful for any person:

1. To place (effective January 1, 1999) a regulated substance into an underground storage tank where the owner or operator is not in compliance with all the requirements of this Chapter or regulations promulgated hereunder.

2. To place a regulated substance into an underground storage tank where any tariff or fees imposed under this Chapter or regulations promulgated hereunder, including related interest or penalties have not been paid when due.

History

CO-82-98, October 20, 1998.

United States Code

Release detection, prevention, and correction regulations, regulation of underground storage tanks, see 42 U.S.C. § 6991b.

Subchapter 3. Notification Requirements

United States Code

Notification, regulation of underground storage tanks, see 42 U.S.C. § 6991a.

§ 1531. Existing Tanks

Within 90 days from the effective date of this Chapter, each owner or operator of an underground storage tank shall notify the Navajo UST Program, on a form to be provided by the Director, of the existence of such tank, specifying the:

1. Age,
2. Size,
3. Type,
4. Location,
5. Uses of such tank, and
6. The type of release detection system and the extent of any known soil or ground water contamination,
7. The material out of which the tank was constructed,
8. Factory tank design specifications,
9. Tank system schematic, and
10. Other pertinent information as may be determined by the Director.

History

CO-82-98, October 20, 1998.

§ 1532. Tanks Taken out of Operation

The owner or operator of an underground storage tank taken out of operation after January 1, 1974, but not removed from the ground, shall notify the Navajo UST Program, on a form to be provided by the Director, of the existence of such tank, within 90 days from the effective date of this Chapter, specifying the:

1. Date the tank was taken out of operation,
2. Age of the tank taken out of operation,
3. Size,
4. Type,
5. Location,
6. Type and quantity of substance stored in the such tank immediately before it was taken out of operation,
7. Factory tank design specifications,
8. Tank system schematic, and
9. Other pertinent information as may be determined by the Director.

History

CO-82-98, October 20, 1998.

§ 1533. Tanks Taken out of Operations before January 1, 1974

The notice requirements of §§ 1531 and 1532 of this Subchapter do not apply to an owner of an underground storage tank taken out of operation on or before January 1, 1974; provided, however, that the owner or operator of said tanks (taken out of operation prior to January 1, 1974) shall notify (within six months of the effective date of this Chapter) the Navajo UST Program of the existence and location of such tanks and other information (if available) as may be required by the Director.

History

CO-82-98, October 20, 1998.

Note. Slightly reworded for clarity.

§ 1534. Tanks Removed from a Facility

The notice requirements of §§ 1531 and 1532 of this Subchapter do not apply to the owner of an underground storage tank which has been removed from the ground between January 1, 1974 and November 8, 1984, but the Director may

require the owner of an underground storage tank removed from the ground after November 8, 1984 to notify the Navajo UST program of the age, location, uses of the tank and the date of its removal.

History

CO-82-98, October 20, 1998.

Note. Slightly reworded for clarity.

§ 1535. New Tanks

An owner or operator who brings an underground storage tank into operation after the effective date of this Chapter shall meet the notice requirements provided for in § 1531 of this Subchapter within 30 days.

History

CO-82-98, October 20, 1998.

§ 1536. Notification By Depositors

After the effective date of this Chapter and for 12 months thereafter, any person who deposits regulated substances in an underground storage tank shall notify the owner or operator of the tank of the notification requirements of this Subchapter.

History

CO-82-98, October 20, 1998.

§ 1537. Notification By Sellers

Any person who sells a tank intended to be used as an underground storage tank shall notify the purchaser of the owner's notification requirements under § 1535 of this Subchapter.

History

CO-82-98, October 20, 1998.

Note. Slightly reworded for clarity.

§ 1538. Notification Requirements for Tanks Taken Out of Operation or Abandoned Prior to January 1, 1974

Any person who discovers the existence of a tank taken out of operation prior to January 1, 1974 shall notify the Navajo UST Program of the existence of such tank. This requirement shall become effective upon the effective date of this Chapter.

History

CO-82-98, October 20, 1998.

§ 1539. Inventory

The Director shall prepare and maintain an inventory of all underground storage tanks within the Navajo Nation. The inventory shall be based on the information collected pursuant to the notification requirements under this Subchapter.

History

CO-82-98, October 20, 1998.

§ 1540. Upgrades, Replacement Tanks and Tanks Which Change Use

An owner or operator shall notify the Navajo UST Program, within 30 days, of any upgrade, underground storage tank replacement (providing the information required in § 1531) or any change in the use of an underground storage tank.

History

CO-82-98, October 20, 1998.

Subchapter 4. Release, Detection, Prevention, Reporting and Corrective Action Regulations and Other Requirements

United States Code

Release detection, prevention, and correction regulations, regulation of underground storage tanks, see 42 U.S.C. § 6991b.

§ 1541. Release, Detection, Prevention, Reporting, Closure and Corrective Action Regulations

A. The Director, after notice and opportunity for public comment as provided for in this Chapter shall promulgate release detection, prevention, reporting, closure, and corrective action regulations applicable to all owners and operators of underground storage tanks, as may be necessary to protect human health and the environment. The regulations adopted pursuant to this Section shall be no less stringent than that required by federal law.

B. In promulgating regulations under this Section, the Director may distinguish between types, classes, and ages of underground storage tanks. In making such distinctions, the Director may take into consideration factors, including, but not limited to: location of the tanks, soil and climate conditions, uses of the tanks, history of maintenance, age of the tanks, current industry recommended practices, national consensus codes, hydrogeology, water table, proximity to drinking water, size of the tanks, quantity of regulated substances periodically deposited in or dispensed from the tank, the technical capability of the owners and operators, and the compatibility of the regulated substance and the materials of which the tank is fabricated.

C. The regulations promulgated pursuant to this Section shall include, but need not be limited to, the following requirements respecting all

underground storage tanks:

1. Requirements for maintaining a leak detection system, an inventory control system together with tank testing, or a comparable system or method designed to identify releases in a manner consistent with the protection of human health and the environment;
2. Requirements for maintaining records of any monitoring or leak detection system or inventory control system or tank testing or comparable system;
3. Requirements for reporting of releases and corrective action taken in response to a release from an underground storage tank;
4. Requirements for performing an environmental assessment (EA) ;
5. Requirements for taking corrective action in response to a release from an underground storage tank;
6. Requirements for the closure of tanks to prevent future releases of regulated substances into the environment; and
7. Requirements for maintaining evidence of financial responsibility for taking corrective action and compensating third parties for bodily injury and property damage caused by sudden or gradual accidental releases arising from operating an underground storage tank;
8. Requirements for submitting health and safety plans and management plans as may be necessary to protect the public health and safety and the environment.

History

CO-82-98, October 20, 1998.

§ 1542. Interim Underground Storage Tank Requirements

Until the Director promulgates regulations authorized under § 1541 of this Chapter, the owner and operator of any underground storage tank shall comply with all applicable underground storage tank requirements of 42 U.S.C. § 6991 et seq. and federal regulations promulgated thereunder. In addition, the owner and operator of any underground storage tank shall comply with the following criteria:

A. Permanent closure of all underground storage tanks and product lines shall be accomplished by the removal and proper disposal of the tanks and product lines except that removal of an underground storage tank may not be required where said removal would result in the unnecessary destruction of a building/ structure or harm to potential cultural resources.

B. The owner and/or operator shall hire an independent third party certified consultant to perform removals, installations, upgrades, or remedial activity and shall provide proof of qualifications to NNEPA upon

request. Qualifications shall include state certification of installation training (if applicable), field oversight by a qualified professional (Professional registered engineer or professional geologist or related science), reference list of similar projects completed, proof of liability insurance, proof of adherence to QA/QC protocol, proof of appropriate health and safety training, and proof of training and experience in tank removals (if applicable).

C. Upon hiring a UST consultant, the owner and/or operator shall direct a letter to the NNEPA authorizing under what circumstances the consultant may speak directly to the regulatory agencies on behalf of the owner.

D. Prior to any activity for which the ground surface will be excavated or drilled, the owner or operator or his/her authorized representative shall notify the Navajo Nation Historic Preservation Department to obtain a clearance if required to excavate or drill and provide proof of such clearance to the NNEPA.

E. The owner and/or operator shall make arrangements in advance of the planned activity to obtain clean fill material from a permitted facility if said fill material is taken from Navajo lands.

F. The owner and/or operator shall, in consultation with the consultant, provide a site-specific health and safety plan to the regulatory agencies prior to the planned activity, and shall conduct a health and safety meeting each day prior to commencing activity at the site.

G. The consultant shall contact the NNEPA to arrange for a date to conduct all installation and removal activity, and shall notify the NNEPA in writing of the arranged-for date at least 30 days prior to the commencement of the activity.

H. Until such time as Navajo Nation clean-up standards and written guidelines are promulgated, the consultant shall determine, in advance of the activity, the possible alternatives for disposal and/or treatment of any contaminated soil and/or ground water and shall discuss these alternatives with the NNEPA prior to commencing activity. In the event of the discovery of a release, the consultant shall select the alternative treatment plan and present it in a Corrective Action Plan.

I. Contaminated soil may be temporarily stockpiled on-site only if permission is granted by the leasing agency of the Navajo Nation and the BIA or another agency as appropriate. The NNEPA shall review the plans and monitor the construction of the stockpile. The life span of the temporary stockpile shall be decided on a site-by-site basis by the appropriate oversight agencies.

J. The NNEPA UST Program shall not use risk assessment analysis as the only tool except in limited site specific corrective actions where it is convincingly proven and agreed upon by the Director that there is no other reasonable alternative.

K. The NNEPA can make policy decisions related to protection of the environment, but cannot make land use decisions. For instance, the technical oversight of land farms shall be done by NNEPA, but the land use decisions must be made by the proper agencies.

L. For purposes of these interim regulations, the NNEPA will act as a second responder only. As stated in § 1541(C)(3), regulations will be developed which designate the requirements for reporting of releases and corrective action. In the interim, all releases which impact the immediate health and safety of the Navajo people shall be reported to the Department of Emergency Management. Secondly, if any one release from an underground storage tank is greater than 25 gallons, that release shall be reported to the NNEPA and the U.S. EPA within 24 hours as stated in the federal regulations.

M. NNEPA shall operate independently from the Division of Economic Development and other tribal departments and shall enforce against all entities equally. The NNEPA shall not review ESA's, land use documents, contractor bids, purchase requisitions, or other documents which are part of the property transfer process or for which review poses a conflict of interest, unless the review is necessary in order to determine liability for a release or as a follow up on a reported release. Should the Division of Economic Development or another department, or the Bureau of Indian Affairs need assistance in reviewing an ESA or other document, the NNEPA may do so only as a third party on technical matters.

N. The owner and/or operator shall immediately clean up a release of a regulated substance in accordance with applicable laws and regulations.

History

CO-82-98, October 20, 1998.

Note. Subsections originally numbered were lettered to conform with codification forms.

§ 1543. Financial Responsibility Requirements

A. Financial responsibility required by this Subsection may be established in accordance with regulations promulgated by the Director by any one, or any combination, of the following: insurance, guarantee, surety bond, letter of credit, qualification as a self-insurer or any other method satisfactory to the Director. In promulgating requirements under this Subsection, the Director is authorized to specify policy or other contractual terms, conditions, or defenses which are necessary or are unacceptable in establishing such evidence of financial responsibility in order to effectuate the purposes of this Subchapter.

B. In any case where the owner or operator is in bankruptcy, reorganization, or arrangement pursuant to the Federal Bankruptcy Code or where with reasonable diligence jurisdiction in tribal court or the Federal Courts cannot be obtained over an owner or operator likely to be solvent at the time of judgment, any claim arising from conduct for which evidence of financial

responsibility must be provided under this Subsection may be asserted directly against the guarantor providing such evidence of financial responsibility. In the case of any action pursuant to this Paragraph such guarantor shall be entitled to invoke all rights and defenses which would have been available to the owner or operator if any action had been brought against the owner or operator by the claimant and which would have been available to the guarantor if any action had been brought against the guarantor by the owner or operator.

C. The total liability of any guarantor shall be limited to the aggregate amount which the guarantor has provided as evidence of financial responsibility to the owner or operator under this Section. Nothing in this Subsection shall be construed to limit any other tribal or Federal statutory, contractual or common law liability of a guarantor to its owner or operator including, but not limited to, the liability of such guarantor for bad faith either in negotiating or in failing to negotiate the settlement of any claim. Nothing in this Subsection shall be construed to diminish the liability of any person under the Comprehensive Environmental Response Compensation and Liability Act of 1980, P.L. 96-510, 94 Stat. 2769; 42 U.S.C. § 9607 or § 9611 or other applicable law.

D. The Director, in promulgating financial responsibility regulations under this Section,

1. May establish an amount of coverage for particular classes or categories of underground storage tanks containing petroleum which shall satisfy such regulations and which shall not be less than one million dollars (\$1,000,000) for each occurrence with an annual aggregate of not less than one million dollars (\$1,000,000) for 1 to 100 petroleum USTs or with an annual aggregate of not less than two million dollars (\$2,000,000) for 101 or more petroleum USTs;

2. May set amounts lower than the amounts required by Subparagraph 1. of this Paragraph for underground storage tanks containing petroleum which are at facilities not engaged in petroleum production, refining, or marketing and which are not used to handle substantial quantities of petroleum.

3. In establishing classes and categories for purposes of this Paragraph, the Director may consider the following factors:

- a. The size, type, location, storage, and handling capacity of underground storage tanks in the class or category and the volume of petroleum handled by such tanks.

- b. The likelihood of release and the potential extent of damage from any release from underground storage tanks in the class or category.

- c. The economic impact of the limits on the owners and operators of each such class or category, particularly relating to the small business segment of the petroleum marketing industry.

- d. The availability of methods of financial responsibility in amounts greater than the amount established by this Paragraph.

e. Such other factors as the Director deems pertinent.

History

CO-82-98, October 20, 1998.

§ 1544. Reporting Releases of a Regulated Substance Requirements

A. The operator and owner of an underground storage tank shall notify the Navajo UST Program of each release or suspected release (of more than 25 gallons) of petroleum and any release of hazardous substance that equals or exceeds its reportable quantity under CERCLA from the tank as soon as practicable but no later than 24 hours after the release or suspected release is detected. For releases of 25 gallons or less of petroleum and any release of a hazardous substance that is less than its reportable quantity, the owner or operator shall immediately clean up the spill or overflow, maintain records of each release for a period of five years and shall report to Navajo EPA any cumulative releases of more than 25 gallons of petroleum or home heating oil during a five year period.

B. The operator of an underground storage tank shall notify the owner of each release from the tank as soon as practicable but no later than 24 hours after the release is detected.

C. Notice by the operator and owner required by this Section may be made orally or in writing but shall be followed within 14 days by a written report to the Navajo UST Program that a release or suspected release has been detected. The written report shall specify to the extent known at the time of the report the nature of the release or suspected release, the regulated substance released, the quantity of the release, the period of time over which the release occurred, the initial response and the corrective action taken as of the date of the report and anticipated to be taken subsequent to the date of the report. In addition, the written report shall include additional information as may be required by the Director.

D. The Director shall prescribe by regulation the reporting, investigation and confirmation actions to be taken, in the event of a release or suspected release of a regulated substance from an underground storage tank. Any regulations adopted pursuant to this Section shall be no less stringent than that required by federal law. Until regulations adopted pursuant to this Subsection are in effect, reporting, investigation and confirmation actions shall be accomplished in a manner consistent with 40 CFR §§ 280.50 through 280.53.

History

CO-82-98, October 20, 1998.

§ 1545. Right to Inspect Records, Tanks and Equipment

A. For the purposes of developing rules, conducting studies or enforcing the provisions of this Chapter, an owner or operator of an underground storage tank shall, on request of the Director:

1. Furnish to the Navajo UST Program information, relating to the tank and its associated equipment and contents.

2. Permit the Director to have access to the site to conduct monitoring and testing of tanks or surrounding soils, air, surface water or ground water.

3. Permit the Director to inspect and copy all records relating to tanks or which indicates that a release of a regulated substance has occurred.

4. Permit the Director to inspect and obtain samples of regulated substances contained in tanks.

B. Environmental site assessments (ESA) are generated as part of a property transfer and as such are generally not reviewable by Navajo EPA. Nonetheless, Navajo EPA shall have the right to review such documents upon request to ensure compliance with this Chapter and regulations promulgated hereunder.

C. The Director shall conduct all inspections permitted pursuant to Subsection (A) at a reasonable time and complete these inspections with reasonable promptness.

History

CO-82-98, October 20, 1998.

United States Code

Inspections, monitoring, testing and corrective action, regulation of underground storage tanks, see 42 U.S.C. § 6991d.

§ 1546. Confidentiality of Records

A. Records or other information furnished to or obtained by the Director concerning regulated substances are available to the public, except that any records and information which relate to the trade secrets, processes, operations, style of work or apparatus or to the identity, confidential statistical data, amount or source of any income, profits, losses or expenditures of any person are only for the confidential use of Navajo EPA in the administration of this Chapter unless the owner or operator expressly agrees in writing to their publication or availability to the public. This Section does not prohibit the appropriate governmental agency from publishing quantitative and qualitative statistics pertaining to the storage of regulated substances. Notwithstanding provisions to the contrary to this Section, information regarding the nature and quality of releases from underground storage tanks otherwise reportable pursuant to this Chapter shall be available to the public. Notwithstanding any provision of this Section, records, reports, documents or information may be disclosed to other officers, employees, or authorized representatives of the Navajo Nation or the United States government concerned with carrying out this Chapter or when relevant in any proceeding taken under Navajo or federal law.

B. Any person who knowingly and willfully divulges or discloses any information entitled to protection under this Section shall, upon conviction, be subject to a fine of not more than five thousand dollars (\$5,000) or to imprisonment not to exceed one year or both.

History

CO-82-98, October 20, 1998.

United States Code

Inspections, monitoring, testing and corrective action, regulation of underground storage tanks, see 42 U.S.C. § 6991d.

§ 1547. Authority of the Director to Take Corrective Action

A. Corrective Actions. The Director is authorized to:

1. Require the owner or operator of an underground storage tank to undertake corrective action with respect to any release of a regulated substance when the Director determines that such corrective action will be done properly and promptly by the owner or operator of the underground storage tank from which the release occurs; or

2. Undertake corrective actions, utilizing available funds from the Navajo Leaking Underground Storage Tank Revolving Trust Fund Account established under § 1573 of this Chapter, with respect to any release of a regulated substance into the environment from an underground storage tank only if such action is necessary, in the judgment of the Director, to protect human health and the environment and one or more of the following situations exists:

a. No person can be found, within 90 days or such shorter period as may be necessary to protect human health and the environment, who is:

i. An owner or operator of the tank concerned,

ii. Subject to such corrective action regulations, and

iii. Capable of carrying out such corrective action properly.

b. A situation exists which requires prompt action by the Director to protect human health and the environment.

c. Corrective action costs at a facility exceed the amount of coverage required by the Director and, considering the class or category of underground storage tank from which the release occurred, expenditures from the Navajo Leaking Underground Storage Tank Revolving Trust Fund Account are necessary to assure an effective corrective action.

d. The owner or operator of the tank has failed or refused to

comply with an order of the Director under this Chapter to comply with the corrective action regulations.

3. Undertake the removal of an abandoned underground storage tank when, in the judgment of the Director, said removal is necessary to protect human health, safety or the environment and sufficient funds exist in the Navajo Leaking Underground Storage Tank Revolving Trust Fund Account established under § 1573 of this Chapter.

B. Priority for Corrective Actions. The Director shall give priority in undertaking corrective actions under this Subsection, and in issuing orders requiring owners or operators to undertake such actions, to releases of regulated substances from underground storage tanks which pose the greatest threat to human health and the environment.

C. Corrective Action Orders. The Administrator is authorized to issue orders to the owner or operator of an underground storage tank to carry out Subsection (A)(1) of this Section or to carry out this Chapter or regulations promulgated hereunder. Such orders shall be issued and enforced in the same manner and subject to the same requirements as orders under § 1552 of this Chapter.

D. Allowable Corrective Actions. The corrective actions undertaken by the Director under Subsection (A)(1) may include temporary or permanent relocation of residents (or temporary closure of business where necessary to protect the public health) and the establishment of alternative household or public water supplies. In connection with the performance of any corrective action under Subsection (A)(1), the Director may undertake an exposure assessment. The costs of any such assessment may be treated as corrective action for purposes of Subsection (E) related to cost recovery.

E. Recovery of Costs.

1. In General. Whenever costs have been incurred by the Director for undertaking corrective action or enforcement action with respect to the release of regulated substance from an underground storage tank, the owner or operator of such tank shall be liable to the Director. The liability under this Subsection shall be construed to be the standard of strict, joint and several liability and the Director may use funds from the Navajo Leaking Underground Storage Tank Revolving Trust Fund Account to pursue the recovery of cost.

2. Recovery. In determining the equities for seeking the recovery of costs under Subsection (A)(1), the Director may consider the amount of financial responsibility required to be maintained under this Chapter and the regulations promulgated hereunder.

3. Effect on Liability.

a. No Transfers of Liability. No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from the owner or operator of any underground storage tank or from any person who may be liable for a release or threat of release under this Subsection, to any other person the liability imposed under

this Subsection. Nothing in this Subsection shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this Section.

b. No Bar to Cause of Action. Nothing in this Subsection, including the provisions of Subsection (A) of this Subsection, shall bar a cause of action that an owner or operator or any other person subject to liability under this Section, or a guarantor, has or would have, by reason of subrogation or otherwise against any person.

F. Emergency Procurement Powers. Notwithstanding any other provision of law, the Director may authorize the use of such emergency procurement powers as he or she deems necessary.

G. Facilities without Financial Responsibility, Facilities Owned by the Federal Government and Navajo Nation, Facilities not Subject to Tariffs and Facilities not in Compliance with the Tariff Requirements. At any facility where the owner or operator has failed to maintain evidence of financial responsibility in amounts at least equal to the amounts established by this Chapter or regulations promulgated hereunder for whatever reason, facilities owned by the federal government, the Navajo Nation or its entities (excluding tribal enterprises), any facility not subject to tariffs under this Chapter or any facility that has failed to pay any tariffs owed under this Chapter when due, the Director shall expend no monies from the Navajo Leaking Underground Storage Tank Revolving Trust Fund Account to clean up releases at such facility pursuant to the provisions of Subsection (A) of this Section. At such facilities the Director shall use the authorities provided in this Chapter to order corrective action to clean up such releases. Notwithstanding the provisions of this Section, the Director may use monies from the fund to take the corrective actions authorized by Subsection (D) of this Section to protect human health at such facilities and shall seek full recovery of the costs of all such actions pursuant to the provisions of Subsection (E)(1) of this Section and without consideration of the factors in Subsection (E)(2) of this Section. Nothing in this Section shall prevent the Director from taking corrective action at a facility where there is no solvent owner or operator or where immediate action is necessary to respond to an imminent and substantial endangerment of human health or the environment.

History

CO-82-98, October 20, 1998.

United States Code

Inspections, monitoring, testing and corrective action, regulation of underground storage tanks, see 42 U.S.C. § 6991d.

Subchapter 5. Enforcement

United States Code

Federal enforcement, regulation of underground storage tanks, see 42 U.S.C. § 6991e.

§ 1551. Record-keeping, Inspections, Monitoring and Entry

A. Requirements in Orders. The Director may require, by order any owner or operator of an underground storage tank facility, or any other person who is subject to any requirement of this Chapter, to:

1. Establish and maintain records;
2. Prepare and submit reports;
3. Install, use and maintain monitoring equipment, and use such audit procedures or methods;
4. Monitor and sample emissions (in accordance with such procedures or methods, at such locations, at such intervals, during such periods and in such manner as the Director shall prescribe)
5. Submit compliance certifications in accordance with Subsection (B) of this Section;
6. Conduct site characterizations and complete corrective action plans as may be required; and
7. Provide such other information as the Director may reasonably require.

B. Production of Records. To ensure compliance with this Chapter or of any regulation hereunder, the Director may request in writing that such person produce all existing books, records and other documents evidencing tests, inspections or studies which may reasonably relate to compliance or noncompliance with such requirements.

C. Public Availability of Information. Any records, reports or information obtained under Subsections (A) or (B) of this Section shall be available to the public, subject to the confidentiality requirements under Subchapter 4.

History

CO-82-98, October 20, 1998.

§ 1552. General Enforcement Authority

A. In General. Whenever, on the basis of any information available to the Director, the Director finds that any person has violated, or is in violation of, any requirement or prohibition of this Chapter, the regulations promulgated under this Chapter, or orders issued pursuant to this Chapter, the Director may:

1. Issue and serve on such person an order requiring such person to comply with such requirement or prohibition, pursuant to the provisions of this Section;

2. Issue and serve on such person an administrative penalty order in accordance with § 1554 of this Chapter;

3. Bring a civil action in accordance with § 1553(A) of this Chapter; and/or

4. Bring a criminal action in accordance with § 1553(B) of this Chapter and/or refer any criminal enforcement action or portion of such action to the U.S. EPA Regional Administrator for the appropriate EPA region.

In addition, when a person has consistently violated any requirements or prohibitions of this Chapter, the regulations promulgated under this Chapter, or orders issued pursuant to this Chapter, or refused to comply with any such requirements or prohibitions, such person shall be prohibited from continuing to operate an underground storage tank facility within the Navajo Nation, and/or from entering into any new contracts (including leases) that would permit such person to operate an underground storage tank facility within the Navajo Nation.

B. Requirements for Orders to Comply. An order to comply issued under this Section shall state with reasonable specificity the nature of the violation, shall state that the alleged violator is entitled to a hearing pursuant to regulations promulgated by the Director under § 1561 of this Chapter, if such hearing is requested in writing within 30 days after the date of issuance of the order, and shall specify a time for compliance that the Director determines is as expeditious as practicable, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements. The order shall become effective immediately upon the expiration of the 30 days if no hearing is requested and, if a timely request for a hearing is made, upon the decision of the Director. The order may be conditional and require a person to refrain from particular acts unless certain conditions are met. A copy of the order shall be sent to the appropriate EPA region and, if the order is issued to a corporation, to the appropriate corporate officers. No order to comply issued under this Section shall prevent the Director from assessing any penalties nor otherwise affect or limit the Director's authority to enforce under other provisions of this Chapter, nor affect any person's obligations to comply with any Section of this Chapter or with a term or condition of any permit or implementation plan promulgated or approved under this Chapter.

C. Emergency Compliance Orders. Notwithstanding any other provision of this Section, the Director (after consultation with the Attorney General where feasible) may issue a compliance order that is effective immediately where there is an imminent and substantial threat to the public health, welfare or environment. Any person issued an order that is effective immediately may file a written request within 30 days with the Director for a stay pending the outcome of any appeal taken under this Section in accordance with the procedures provided for in § 1552(B). The Director shall, by written notice, grant or deny the request for a stay within five days receipt of a request for a stay. If the Director denies the request for a stay, the affected party has 30 days to appeal the denial to the Window Rock District Court. Any person subject to an emergency compliance order may seek judicial review of a final agency determination as provided for in § 1554(D) of this Chapter.

D. Enforcement of Compliance Orders. Orders of the Director shall be enforced by the Navajo Nation Underground Storage Tank Program, the Navajo Department of Justice, Resources Enforcement and the Division of Public Safety. Those authorized to enforce the orders may take reasonable steps to assure compliance, including but not limited to:

1. Entering upon any property or establishment believed to be violating the order and demanding compliance; and
2. Terminating part or all operations at the underground storage tank facility.

E. Injunctive Relief. Notwithstanding any other provision of this Section, the Director may seek injunctive relief pursuant to § 1553(A) to restrain immediately any person from engaging in any unauthorized activity that is endangering or is causing danger to the public health or the environment or enjoin any threatened or continuing violation of any requirements under this Chapter or regulations hereunder.

History

CO-82-98, October 20, 1998.

§ 1553. Judicial Enforcement

A. Civil Judicial Enforcement. The Director shall request the Attorney General to file an action for a temporary restraining order, a preliminary injunction, a permanent injunction or any other relief provided by law, including the assessment and recovery of civil penalties in an amount of not less than five hundred dollars (\$500.00) but not to exceed twenty five thousand dollars (\$25,000) per day per violation, in any of the following instances:

1. Whenever a person has violated, or is in violation of, any provision, requirement or prohibition of this Chapter, including, but not limited to, a regulation adopted pursuant to this Chapter, or order issued pursuant to this Chapter;
2. Whenever a person has violated, or is in violation of, any duty to allow or carry out inspection, entry or monitoring activities; and
3. Whenever a person is creating an imminent and substantial endangerment to the public health or the environment, in which case the Director shall request the Attorney General to pursue injunctive relief, but not the assessment of penalties, unless the endangerment to the public health is caused by a violation, as specified in Subsection (1) and (2). Provided, however, that any person who fails to provide notice as required by Subchapter 3 or submits false information required under this Chapter or regulations promulgated hereunder shall be subject to a civil penalty of not more than ten thousand dollars (\$10,000) for each tank for which notification is not given or false information is submitted.

B. Criminal Penalties. Any person who intentionally:

1. Violates any provision, requirement or prohibition of this Chapter, including but not limited to a regulation adopted pursuant to this Chapter, a permit or order issued pursuant to this Chapter, a filing, reporting or notice requirement under this Chapter;

2. Makes any false material statement, representation or certification in, or omits material information from, or alters, conceals or fails to file or maintain any notice, application, record, report or other document required pursuant to this Chapter; or

3. Falsifies, tampers with, renders inaccurate or fails to install any monitoring device or method required to be maintained or followed under this Chapter; shall, upon conviction, be punished by a fine in a maximum amount of not less than five hundred dollars (\$500.00) but not to exceed five thousand dollars (\$5,000) per day per violation or imprisonment for not more than 180 days per day per violation or both or be subject to any other penalty imposed by the court available under Navajo law. In any instance where the Navajo Nation lacks jurisdiction over the person charged, or where the Director is limited in the amount of the fine that he may impose, the Director may refer the action to the appropriate EPA Regional Administrator pursuant to § 1552 of this Chapter. For the purpose of this Subsection, the term "person" includes, in addition to the entities referred to in § 1502 of this Chapter, any responsible corporate officer.

C. Suits for Costs. In addition to the above proceedings, the Director is authorized to initiate proceedings, separately or in connection with either a civil, criminal or exclusion proceeding brought under this Chapter, for any damages caused to the lands or other resources of the Navajo Nation as the result of any violation of this Chapter, including for payment of costs of all associated remedial actions taken, for any expenses incurred in investigating and evaluating such damages, for any administrative costs incurred as a result of this matter and for the reasonable value of the attorney time and expenses associated with such proceedings.

D. Jurisdiction and Venue. Any action under this Subsection may be brought in the Navajo Nation District Court in Window Rock, and such court shall have jurisdiction to restrain such violation, require compliance, assess civil penalties, collect any fees or noncompliance penalties owed the Navajo Nation under this Chapter, and award any other appropriate relief.

E. Calculation of Penalties.

1. For purposes of determining the number of days of violation for which a civil penalty may be assessed under this Section, § 1554 or § 1555, if the Director has notified the source in writing of the violation and a prima facie showing can be made that the conduct or events giving rise to the violation are likely to have continued or recurred past the date of notice, the days of violation shall be presumed to include the date of such notice, each day of violation prior to such notice and each day thereafter until the violator establishes that continuous compliance has been achieved, except to the extent that the violator can prove by a preponderance of the evidence that there were intervening days during

which no violation occurred or that the violation was not continuing in nature. Notice under this Section shall be accomplished by the issuance of a written notice of violation or written order to comply or by filing a complaint in the Navajo Nation District Court in Window Rock that alleges any violation described in Subsection (A) of this Section.

2. In determining the amount of a civil penalty assessed under this Section, the court shall consider the history, seriousness and duration of the violation; any good faith efforts to comply with the applicable requirements; the violator's full compliance history, including the severity and duration of past violations, if any; the economic impact of the penalty on the violator; as an aggravating factor only, the economic benefit, if any, resulting from the violation; and any other factors that the court deems relevant. The court may assess penalties for noncompliance with administrative subpoenas under § 1561 of this Chapter or actions under Subchapter 2 of this Chapter where the violator does not have sufficient cause to violate or fail or refuse to comply with such subpoena or action.

3. All penalties collected pursuant to this Section shall be deposited in the UST Program Special Revenue Fund Account in the Navajo Treasury for use by the Director to finance the Underground Storage Tank Program compliance and enforcement activities. The Director shall report annually to the Navajo Nation Council about the sums deposited into the fund, including the sources and the actual and proposed uses thereof.

4. In lieu of or in addition to a monetary penalty, the Director may impose or may request the Attorney General to seek from the court a requirement to remediate the damage caused, perform community service, or conduct supplemental environmental projects.

F. Security. The court may, if a temporary restraining order or preliminary injunction is sought under this Section or § 1555 of this Chapter, require the filing of a bond or equivalent security.

History

CO-82-98, October 20, 1998.

§ 1554. Administrative Assessment of Penalties

A. Basis for Penalty. The Director may issue against any person an administrative order assessing a civil administrative penalty of up to ten thousand dollars (\$10,000) for each tank for each day of violation whenever the Director finds that a person has violated, or is in violation of, any provision, requirement or prohibition of this Chapter, including, but not limited to, a regulation adopted pursuant to this Chapter, or order issued pursuant to this Chapter. The Director's authority under this Subsection shall be limited to matters where the total penalty sought does not exceed one hundred thousand dollars (\$100,000) and the first alleged date of violation occurred no more than one year prior to the initiation of administrative action, except where the Director and Attorney General jointly determine that a matter involving a larger penalty or longer period of violation is appropriate for administrative penalty action. The communications required to make such a

joint determination and the method(s) used for making such a joint determination shall be privileged, and shall not be subject to judicial review. The Director may compromise, modify or remit, with or without any conditions, any administrative penalty imposed under this Section.

B. Hearing Requirement. The Director shall assess an administrative penalty under this Section by an order made after opportunity for a hearing. The Director shall promulgate rules for discovery and other procedures for hearings under this Section. Before issuing such an order, the Director shall give written notice of the proposed order to the person on whom the penalty is to be assessed and provide such person an opportunity to request a hearing within 30 days of receipt of the notice.

C. Field Citations. After consultation with the Attorney General, the Director may implement a field citation program through regulations establishing minor violations for which field citations assessing civil penalties not to exceed five thousand dollars (\$5,000) per day per facility may be issued by officers or employees designated by the Director, to the extent permissible under applicable law. Any person on whom a field citation is assessed may, pursuant to regulations issued under this Section, elect to pay the penalty or request a hearing on the citation. If a timely request for a hearing is not made, the penalty shall be final. Any hearing shall provide a reasonable opportunity to be heard and to present evidence. Payment of a penalty required by a field citation shall not be a defense to further enforcement by the Director to correct a violation or to assess the statutory maximum penalty pursuant to other authorities in this Chapter if the violation continues.

D. Judicial Review. Any person subject to a civil penalty under Subsections (A) or (C) of this Section may seek review of such penalty assessment in the Navajo Nation District Court in Window Rock by filing a petition for review in such court within 30 days following the date that the penalty becomes final and by simultaneously sending a copy of such filing by certified mail to the Director and the Attorney General. Within 30 days thereafter the Director shall file in such court a certified copy or certified index of the record on which the penalty was based. The court shall not set aside or remand an order or assessment under this Section unless the record, taken as a whole, does not substantially support the finding of a violation or unless the order or penalty assessment constitutes an abuse of discretion. In any such proceedings, the Director may seek to recover civil penalties ordered or assessed under this Section.

E. Failure to Pay Penalty. If any person fails to pay an assessment of a civil penalty or fails to comply with an administrative penalty order after the order or assessment has become final, the Director shall request the Attorney General to bring a civil action in the Navajo Nation District Court in Window Rock to enforce the order or recover the amount ordered or assessed plus interest, from the date of the final order or decision or the date of the final judgment, as the case may be. In such an action the validity, amount and appropriateness of the order or assessment shall not be subject to review. Any person who fails to pay on a timely basis a civil penalty ordered or assessed under this Section shall be required to pay, in addition to such penalty and interest, the Director's enforcement expenses, including but not limited to attorneys fees and costs of collection proceedings. Such person shall also pay

a quarterly nonpayment penalty for each quarter during which such failure to pay persists. The nonpayment penalty shall be ten percent (10%) of the aggregate amount of the person's outstanding penalties and nonpayment penalties accrued as of the beginning of each quarter of non-payment.

F. Calculation of Penalty. In determining the amount of any penalty to be assessed under this Section, the Director or the court, as appropriate, shall take into consideration the factors enumerated in § 1553(E) of this Chapter.

History

CO-82-98, October 20, 1998.

§ 1555. Citizen Suits

A. Authority to Bring Civil Action; Jurisdiction.

1. Except as provided in Subsection (B) of this Section, a person may commence a civil action in the Navajo Nation District Court in Window Rock on his own behalf:

(a) Against any person (except the Navajo Nation or any instrumentality of the Navajo Nation, but not excepting tribal enterprises or other similar businesses engaged in the wholesale or resale trade whether for profit or nonprofit) who is alleged to be in violation of any provision, requirement or prohibition of this Chapter, including but not limited to a regulation adopted pursuant to this Chapter, or order issued pursuant to this Chapter, or

(b) Against any person (except the Navajo Nation or any instrumentality of the Navajo Nation, but not excepting tribal enterprises) who has contributed or who is contributing any activity which may present an imminent and substantial endangerment to the public health or the environment.

2. The Navajo Nation courts shall have jurisdiction to enforce such provision, requirement, prohibition, regulation, or order and to take such other action as may be necessary and to apply any appropriate civil penalties.

B. Notice.

1. An action may not be commenced under Subsection (A)(1)(a) of this Section fewer than 60 days after the plaintiff has given notice of the alleged violation to the Director, the Navajo Nation and the alleged violator. In addition, an action may not be commenced if the Director has commenced and is diligently prosecuting a civil action in court to require compliance with this Chapter, except that any person may intervene as a matter of right in such an action.

2. An action may not be commenced under Subsection (A)(1)(b) of this Section fewer than 90 days after the plaintiff has given notice of the endangerment to the Director, the Navajo Nation and the alleged

violator. In addition, an action may not be commenced if the Director has commenced and is diligently prosecuting a civil action in court to restrain or abate conditions which may have contributed or are contributing to the activities which may cause or lead to the alleged endangerment, except that any person may intervene as a matter of right in such action if such person claims an interest relating to the subject of the action and is so situated that the disposition of the action may, as a practical matter, impair or impede his ability to protect that interest.

C. Venue; Intervention; Service of Complaint.

1. Any action relating to a violation of any requirement of this Chapter or the regulations promulgated hereunder may be brought only in the Navajo Nation District Court in Window Rock.

2. The Director, if not already a party, may intervene as of right in any action brought under this Section.

3. Whenever any action is brought under this Section the plaintiff shall serve a copy of the complaint on the Attorney General and on the Director. No consent judgment may be entered in an action brought under this Section in which the Director is not a party prior to 45 days following the receipt of a copy of the proposed consent judgment by the Attorney General and the Director, during which time the Attorney General and the Director may submit, on behalf of the Navajo Nation, their comments on the proposed consent judgment to the court and parties or the Director may intervene as a matter of right.

D. Award of Costs. The court, in issuing a final order in an action brought under this Section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party whenever the court determines that such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security.

E. Penalty Fund. Penalties received under this Section shall be deposited in the UST Program Special Revenue Fund Account established by § 1506(C) of this Chapter for use by the Director to finance underground storage tank compliance and enforcement activities. The Director shall report annually to the Navajo Nation Council about the sums deposited into the fund, including the sources and the actual and proposed uses thereof.

History

CO-82-98, October 20, 1998.

§ 1556. Administrative Hearings

The Director shall, by regulation, establish a formal hearing review process which meets due process standards, to conduct hearings under § 1554(A) and (B) (administrative penalties), § 1554(C) (field citations) and § 1552(C) (emergency compliance orders). The Director may establish an informal review process to hear all other matters where a hearing is provided for under this

Chapter. Until the Director establishes a formal hearing review process, appoints a qualified presiding officer and certifies this in writing, the Navajo Office of Hearings and Appeals is authorized to conduct hearings under §§ 1554(A) and (B), § 1554(C) and § 1552(C); provided, however, the Director may, at his/her discretion, transfer other hearings provided for under this Chapter and regulations promulgated hereunder to the Navajo Office of Hearings and Appeals where the need arises.

History

CO-82-98, October 20, 1998.

Subchapter 6. Rulemaking and Judicial Review

§ 1561. Rulemaking and Other Administrative Procedures

A. Rulemaking.

1. Notice of any proposed regulation shall be published in a newspaper of general circulation for the Navajo Nation. The notice shall specify the period available for public comment and the date, time and place of any public hearing, and shall make available to the public a copy of the proposed regulation. Not later than the date of proposal of the regulation in question the Director shall establish a rulemaking docket and shall make the docket available to the public for inspection and copying during regular business hours. The Director shall provide a comment period of at least 30 calendar days; allow any person to submit written comments, data or documentary information; shall in addition give interested persons an opportunity to present orally their views, in the Navajo or English languages, data or arguments; and shall keep the docket open for 20 calendar days after such proceeding to provide an opportunity for submission of rebuttal and supplementary information.

2. The final regulation shall be based on the record of the rulemaking proceeding, contained in the docket, and shall be accompanied by an explanation of the reasons for any major changes from the proposed regulation and a response to each of the significant comments submitted in written or oral presentations during the comment period.

B. Administrative Subpoenas.

1. In connection with any investigation, monitoring, reporting, entry, compliance inspection or administrative enforcement proceeding under this Chapter, the Director may issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books and documents, and may administer oaths.

2. Upon a showing satisfactory to the Director by the owner or operator of a source that it would divulge trade secrets or secret processes to make public such papers, books, documents or information or any portion thereof, the Director shall consider this information confidential, except that such information may be disclosed to other officers, employees or authorized representatives of the Nation concerned

with carrying out this Chapter or when relevant in any proceeding under this Chapter.

3. Witnesses summoned shall be paid the same fees and mileage that are paid in the Navajo Nation's courts. In case of contumacy or refusal to obey a subpoena, the tribal court for the district in which such person is found, resides or transacts, business shall have jurisdiction to issue an order requiring such person to appear before the Director and give testimony or produce papers, books or documents, or both, and any failure to obey such an order may be punished by the court as contempt. A person may challenge the lawfulness of an administrative subpoena issued by the Director in the Navajo Nation Window Rock District Court in his or her official capacity and not in any other manner; in any such action, relief shall be limited to declaratory relief.

History

CO-82-98, October 20, 1998.

§ 1562. Review in Navajo Nation Supreme Court

A. Petitions for Review. A petition for review of any final action taken by the Director under this Chapter, including but not limited to promulgation of regulations and standards or issuance of orders (but not including imposition of administrative penalties under § 1554 which are subject to review under § 1554(D)), or challenge of an administrative subpoena which are subject to review under § 1561(B)(3) shall be brought in the Navajo Nation Supreme Court. The petition shall be filed within 60 days from the date that notice of such final action is first published, or, if notice is not published, first served upon the alleged violator or such other person required to be served under this Chapter, except that if the petition is based solely on grounds arising after the sixtieth day, then the petition shall be filed within 60 days after such grounds arise.

B. Limitations on Review.

1. If judicial review of a final action of the Director could have been obtained under Subsection (A) of this Section, that action shall not be subject to judicial review in judicial proceedings for enforcement.

2. With respect to any regulations promulgated under this Chapter, only an objection that was raised with reasonable specificity during the public comment period may be raised during judicial review. If the person raising an objection can demonstrate to the Director that it was impracticable to raise the objection within such time or if the grounds for the objection arose after the public comment period (but within the time specified for judicial review), and if the objection is of central relevance to the outcome of the regulation, the Director shall convene a proceeding for reconsideration of the regulation and provide the same procedural rights as would have been afforded had the information been available at the time the regulation was proposed. If the Director refuses to convene such a proceeding, the person may seek review of such refusal in the Navajo Nation Supreme Court. Such reconsideration shall not postpone the effectiveness of the regulation, although it may be

stayed by the Director or the court for up to three months.

3. Except as otherwise expressly allowed by Navajo law, no interlocutory appeals shall be permitted with regard to determinations made by the Director under this Chapter. In reviewing alleged procedural errors, the court may invalidate the regulation only if the errors were so serious and related to matters of such central relevance to the regulation that there is a substantial likelihood that the regulation would have been significantly changed if such errors had not been made.

C. Standards for Review. In reviewing any final action of the Director undertaken pursuant to this Chapter, the court may reverse any such action that it finds to be:

1. Arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law;
2. In excess of statutory jurisdiction, authority, or limitations or short of statutory right;
3. Without observance of procedure required by law; or
4. Unsupported by substantial evidence.

D. Challenge to Provisions. Any challenge to the lawfulness of any provision of this Chapter must be filed in accordance with Navajo law within 90 calendar days after the date of enactment of this Chapter in the District Court for the District of Window Rock, naming as defendant the Navajo Nation, and not thereafter or in any other manner. Any challenge to regulations promulgated under this Chapter must be filed within 90 calendar days of their adoption. In any such action, relief shall be limited to declaratory relief. The District Court for the District of Window Rock shall have exclusive Jurisdiction and venue over any action challenging any provision of this Chapter.

History

CO-82-98, October 20, 1998.

Subchapter 7. Funding

§ 1571. Annual Tank Fees

Each owner and/or operator of an underground storage tank which is subject to regulations under this Chapter shall pay annually to Navajo EPA a fee of one hundred twenty five dollars (\$125.00) for each tank. The fees collected shall be transmitted to the Controller for deposit into the UST Program Special Revenue Fund Account established by § 1506(C) of this Chapter.

History

CO-82-98, October 20, 1998.

§ 1572. Underground Storage Tank Tariff

A. Effective January 1, 1998, there is imposed and the Director shall collect a tariff from the owner who is primarily responsible for submitting payment or operator (to be collected on an annual basis except as provided below for distributors) on the operation of underground storage tanks regulated under this Chapter measured by the quantity of regulated substances placed in a tank in any calendar year; provided, however, that the distributor of motor vehicle fuel, diesel fuel and aviation fuel shall be responsible and liable for submitting the tariff (on a monthly basis) to Navajo EPA where the owner or operator is not engaged in the bulk distribution of such fuels. In the event the distributor fails to submit the tariff, the owner and operator shall also remain jointly and severally liable for said tariff. The tariff shall be levied at the rate of one cent per gallon of regulated substance. In addition to providing monthly tariff payments, the distributor shall provide to Navajo EPA a monthly summary report on forms prescribed by the Director as well as an annual reconciliation report verifying payment of all tariffs owned.

B. For proper administration of this Section, and to prevent the evasion of the tariff imposed by this Chapter, it shall be presumed until the contrary is established by competent proof under rules and procedures adopted by the Director, that all regulated substances which are motor vehicle fuel, aviation fuel and diesel and which are refined, manufactured, produced, compounded or blended within the Navajo Nation, or imported into the Navajo Nation will be placed in an underground storage tank from which the fuel is dispensed to users who consume the fuel and do not further distribute it.

C. The tariff imposed by this Chapter does not apply to underground storage tanks operated by the United States or the Navajo Nation, its agencies (including Navajo Nation chapters not engaged in the wholesale or resale trade, whether for profit or not of motor fuel, aviation fuel or diesel fuel) or to underground storage tanks used for the purpose of storing, handling or distributing naphtha-type jet fuel or kerosene-type jet fuel. The tariff does, however, apply to Navajo Nation enterprises and other Navajo Nation business entities who are engaged in the wholesale or resale trade, whether for profit or not, of motor vehicle fuel, aviation fuel or diesel fuel. The Director shall issue, within 30 days of a request, an exemption certificate to those owners or operators of underground storage tanks exempted from the tariff requirements under the provision which shall be used for verifications of the tariff exemption.

D. The Director shall adopt and specify the forms of the return.

E. Subchapter 6 shall not apply to the temporary rules adopted pursuant to this Section. The temporary rules shall be effective for a period of 180 days from the date of adoption. The temporary rules may be renewed twice in the same manner as they were adopted, may be amended at the time or times they are renewed, and shall be effective for a period of 180 days from the date the renewed temporary rules are adopted

F. The permanent rules adopted pursuant to this Section shall be adopted as provided in Subchapter 6.

G. Return and payment of tariff; due date.

1. The tariff levied under this Section is due and payable annually on or before March 31 for the preceding calendar year and is delinquent if not postmarked on or before that date or if not received by Navajo EPA on or before March 31 for tariff payers electing to file in person.

2. At the time the tariff is paid the tariff payer shall prepare and file with the tariff a return, on a form prescribed by the Director, showing the amount of tariff for which he is liable for the period covered by the return. The return shall contain either a sworn statement or a certification, under penalty of perjury, that the information contained in the return is true, complete and correct according to the best belief and knowledge of the owner or operator filing the report.

H. Extensions; abatement. The Director, for good cause, may extend the time for filing any return required by this Chapter and may grant such reasonable additional time within which to make the return as he deems proper if at least ninety percent (90%) of the tariff liability is paid when the extension is requested.

I. Audits. The Director may require a person who is required to pay the tariff under this Section to appear, at reasonable times and on reasonable notice, at the Director's office and produce such records and information as are specified in the notice to determine compliance with this Section. The Director shall audit the records of a sufficient number of tariff payers under this Section to ensure general compliance with this Section.

J. Interest; penalty; lien.

1. If the tariff, or any portion of the tariff, is not paid on or before the date prescribed for its payment, interest shall be imposed on any unpaid amount of tariff from the date the payment was due, without regard to any extension of time or stay of payment, to the date payment is received. The rate shall be equal to the IRS rate.

2. If a tariff payer fails to file a return as required under this Section on or before the due date as extended by the Director, unless the failure is due to reasonable cause and not due to willful neglect, a penalty of five percent (5%) of the tariff found to be remaining due shall be added to the tariff for each month or fraction of a month elapsing between the due date of the return and the date on which it is filed. The total penalty shall not exceed twenty-five percent (25%) of the tariff remaining due. The penalty so added to the tariff is due and payable on notice and demand by the Director.

3. If any tariff, interest or penalty imposed by this Section is not paid when due, the unpaid amounts are a lien from the date the amounts became due on all real and personal property and rights to property belonging to the tariff payer. The lien may be perfected by recording a notice of lien in the county in which the property is located, the Navajo Division of Economic Development, the Navajo Land Department or the Bureau of Indian Affairs where appropriate. The notice shall specify the nature of the tariff, the amount of tariff, interest and penalty due, the tariff period for which the amounts are due and the name and last known address of the tariff payer who is liable for the

amounts. In addition, it shall be unlawful for the owner, operator or distributor to place a regulated substance into an underground storage tank where said tariff, interest or penalty imposed has not been paid when due.

K. Remission and disposition of revenues. The Director shall promptly transmit to the Controller all monies collected under this Section. The Controller shall credit these payments to the UST Program Special Revenue Fund Account and the Navajo Leaking Underground Storage Tank Revolving Trust Fund Account as follows:

1. Eighty percent (80%) of the net revenues shall be credited to the Navajo Leaking Underground Storage Tank Revolving Trust Fund Account. Any amount accumulated in excess of three million dollars (\$3,000,000) in said account within a single fiscal year shall be deposited in the Navajo Nation General Fund Account. After five years from the effective date of this Chapter, any amount accumulated in excess of one million dollars (\$1,000,000) within a single fiscal year shall be deposited into the Navajo Nation General Fund Account.

2. Twenty percent (20%) of the net revenues shall be deposited into the UST Program Special Revenue Fund Account for program implementation. Effective upon the date of this Chapter, any amount accumulated in excess of two hundred fifty thousand dollars (\$250,000) within a single fiscal year shall be deposited in the Navajo Nation General Fund Account.

L. Appeals. Any Appeals taken under this Section shall be taken in the same manner as appeals taken under § 1554 (administrative penalties) of this Chapter.

History

CO-82-98, October 20, 1998.

§ 1573. Navajo Leaking Underground Storage Tank Revolving Trust Fund Account

There is hereby established a Navajo Leaking Underground Storage Tank Revolving Trust Fund Account to be utilized by the Director at his/her discretion, but pursuant to an approved budget, to carry out corrective actions required under this Chapter, regulations promulgated hereunder and to remove abandoned tanks and clean up such sites. Monies shall be deposited into this trust fund from any tariffs authorized by this Chapter, appropriations authorized by the Navajo Nation Council, available state, federal or other grants, corrective action reimbursement cost, or donations. For a period of five years upon the effective date of this Chapter, the Navajo Nation Council hereby authorizes a set aside of one-half of all business site lease revenues (but, not to exceed two million dollars (\$2,000,000) within a single fiscal year) to be used for corrective actions, removal of abandoned underground storage tanks and clean ups associated with such removal. The monies collected from this set aside shall be transmitted by the Controller into the Navajo Leaking Underground Storage Tank Revolving Trust Fund Account to be used by the Director to carry out the intent of this Section.

History

CO-82-98, October 20, 1998.

§ 1574. Tank Removal, Installation and Clean-Up Monitoring Fees

Each owner of an underground storage tank shall pay per tank to Navajo EPA a tank removal and installation field monitoring fee of one hundred fifty dollars (\$150.00) per day for each removal or installation. In the event that remediation is required, each owner of an underground storage tank shall pay an additional one hundred fifty dollars (\$150.00) field monitoring fee for each site per day. The fees collected shall be transmitted to the Controller for deposit into the UST Program Special Revenue Fund Account established by § 1506(C) of this Chapter.

History

CO-82-98, October 20, 1998.

§ 1575. Registration Fee

Notwithstanding the definition of owner under § 1502, all owners and/or operators required to provide notice under Subchapter 3 shall pay to Navajo EPA a one-time registration fee of fifty dollars (\$50.00) for each tank. The fees collected shall be transmitted to the Controller for deposit into the UST Program Special Revenue Fund Account established by Section 1506(C) of this Chapter.

History

CO-82-98, October 20, 1998.

**Chapter 17. Navajo Nation Comprehensive Environmental Response,
Compensation and Liability Act**

Subchapter 1. General Provisions

§ 2101. Title

This Act may be cited as the Navajo Nation CERCLA.

History

CF-07-08, February 26, 2008.

§ 2102. Declaration of policy

A. Legislative Findings and Purposes

1. The Navajo Nation Council finds and declares that contamination from hazardous substances, pollutants and contaminants exists with varying degrees of severity within the Navajo Nation. Releases or

threatened releases of these hazardous substances, pollutants and contaminants can endanger the public health and the safety of its residents, by causing physical discomfort, disability, and injury; can cause injury to property and property values; can discourage recreational uses of the Nation's resources; and can discourage economic development, including by halting and hindering economic use and re-use of contaminated or affected business and industrial areas within the Nation.

2. The Navajo Nation Council, by enacting the Navajo Nation CERCLA, is creating a coordinated program to control present and future contamination by hazardous substances, pollutants and contaminants. This Act provides for the regulation, assessment, containment, removal, and monitoring of hazardous substances, pollutants and contaminants on sites in the Navajo Nation; ensures the health, safety and general welfare of all the residents of the Nation; and protects plants and animal life, property values, and cultural resources of the Navajo Nation. The Council further is placing primary responsibility for the regulation and abatement of hazardous substances, pollutants or contaminants in the Navajo Nation Environmental Protection Agency.

B. Modular Implementation of the Navajo Nation CERCLA

The Navajo Nation is committed to providing a program for response to releases and threatened releases of hazardous substances, pollutants and contaminants. However, it is discretionary with the Nation as to whether and which provisions of this Act to implement and in what order, based on the Nation's needs and available resources. The Director shall determine the order and timing for implementation of the authorities provided for in this Act. The Director shall not be required to implement any of the provisions described in this Act by any particular time.

C. Preservation of Rights

It is the purpose of this Act to provide additional and cumulative remedies to those existing under common or statutory law to prevent, abate, remove, remediate, and monitor releases and threatened releases of hazardous substances, pollutants and contaminants in the Navajo Nation. Nothing contained in this Act shall be construed to abridge or alter rights of action or remedies in equity under common law or statutory law, nor shall any provisions of this part or any act done by virtue thereof be construed as preventing the Nation or individuals from the exercise of their rights under the common law or statutory law to suppress nuisances or to abate pollution or contamination.

History

CF-07-08, February 26, 2008.

§ 2103. Purpose

A. To assure that all persons subject to this Act have a clear, non-technical statement of the requirements of the law, this Section provides a summary of the provisions of the Act and explains the intent of the Navajo Nation in adopting the Act.

B. This Act serves substantially the same purposes as the United States Comprehensive Environmental Response, Compensation, and Liability Act, as amended, commonly known as CERCLA or the Superfund law, but this Act is intended to provide a more flexible program suited to the specific requirements of the Navajo Nation. This Act also authorizes the use of response and enforcement tools for circumstances under which the federal Superfund law would not usually be used, such as for certain petroleum releases. This added flexibility should help avoid disputes over the application of the Act to various environmental and public health threats.

C. This Act authorizes the Director of the Navajo Nation EPA to implement the authorities of this Act in a phased manner, and to coordinate activities, as appropriate, with other state, federal and tribal agencies, to assure the efficient use of available resources and minimize duplication of effort. The Act also provides the Director flexibility in conducting response actions so that the timing and extent of investigation, documentation, and response actions can be appropriate to the environmental threat and the priorities of the Navajo Nation.

D. Like the Superfund law, the Navajo Nation CERCLA places principal responsibility for conducting and paying for response actions on the parties who are legally responsible for contamination, including current and prior owners and operators of sites, and persons who arranged for hazardous substances, pollutants or contaminants to be brought to and used at a site. The Director is authorized to work with responsible parties in a cooperative manner, emphasizing voluntary cleanup where possible, and authorizing agreements and settlements with responsible parties.

E. The Act also provides for necessary enforcement authorities, including information gathering, administrative orders, cost recovery, natural resource and cultural resource damages, penalties, and civil and criminal actions, and provides the Director with discretion to decide which authorities should be applied in any given situation.

F. Persons who are responsible for releases of hazardous substances, pollutants or contaminants will be required to report certain releases to the Navajo Nation EPA and the Navajo Nation Department of Emergency Management, and to cooperate with the Navajo Nation EPA in the circumstances and in the manner prescribed, including but not limited to paying for or conducting a needed investigation or cleanup. In addition to cleanup obligations, responsible persons may be liable to the Nation for damages to Navajo natural and cultural resources.

G. This Act also imposes an obligation on other persons to cooperate with the Navajo Superfund Program's information-gathering and response actions, including providing access to Navajo Nation officials for the purpose of investigation or response actions.

H. The Act provides for public participation in such matters as the selection of response actions and provides a public forum and site information clearinghouse for the community. A Navajo Site List serves an important public information function by listing sites in the Navajo Nation that have been identified by the Director as having possible releases, or have been the

subject of screening or evaluation. The Act also contains a citizens' suit provision to aid in enforcement.

History

CF-07-08, February 26, 2008.

§ 2104. Definitions

For the purposes of this Act:

A. "Act of God" means an unanticipated grave natural disaster or other natural phenomenon of an exceptional, inevitable, and irresistible character, the effects of which could not have been prevented or avoided by the exercise of due care or foresight.

B. "Administrator" means the Administrator of the U.S. Environmental Protection Agency.

C. "Alternative water supplies" includes, but is not limited to, drinking water and household water supplies.

D. "ARAR" means those applicable or relevant and appropriate requirements of federal and tribal environmental law which the Director considers, selects or waives in determining the degree of cleanup and control of further releases which assures protection of human health and the environment.

E. "Attorney General" means the Navajo Nation Attorney General.

F. "Barrel" means forty-two United States gallons at sixty degrees Fahrenheit (60° F).

G. "Claim" means a demand in writing for a sum certain.

H. "Claimant" means any person who presents a claim for compensation under this Act.

I. "Comprehensive Environmental Response, Compensation and Liability Act," or "CERCLA," means the federal law codified at 42 U.S.C. § 9601 *et seq.*

J. "Cultural resource" means any product of human activity or any object or place given significance by human action or belief. Places that may be cultural resources include building and other structures, landforms, archaeological sites, traditional cultural properties, and districts that are eligible or potentially eligible for listing on the Navajo Nation Register of Cultural Properties or the National Register of Historic Places. Objects that may be cultural resources include artifacts and other physical remains of human activity, natural objects given significance by human action or belief, human remains and "cultural items" as defined in the Native American Graves Protection and Repatriation Act, and archaeological resources.

K. "Damages" means damages for injury to or loss of natural resources and cultural resources, as set forth in this Act.

L. "Director" means the Executive Director of the Navajo Nation Environmental Protection Agency (Navajo Nation EPA) or, where appropriate, his or her designee.

M. "Drinking water supply" means any raw or finished water source that is or may be used by a public water system (as defined in the Navajo Nation Safe Drinking Water Act, 22 N.N.C. § 201(Q)), or as drinking water by one or more individuals.

N. "Environment" means the waters, including surface water and ground water, drinking water supply, land surface or subsurface strata, or ambient air within the Navajo Nation or under the jurisdiction of the Navajo Nation.

O. "Groundwater" means water in a saturated zone or stratum beneath the surface of land or water.

P. "Guarantor" means any person, other than the owner or operator, who provides evidence of financial responsibility for an owner or operator under this Act.

Q. "Hazardous substance" means:

1. Any substance designated pursuant to § 311 of the Clean Water Act, 33 U.S.C. § 1321(b) (2) (A);

2. Any element, compound, mixture, solution, or substance designated pursuant to § 2105(B) of this Act or 42 U.S.C. § 9602;

3. Any hazardous waste having the characteristics identified under or listed pursuant to § 3001 of the Solid Waste Disposal Act, 42 U.S.C. § 6921;

4. Any toxic pollutant listed under § 307 of the Clean Water Act, 33 U.S.C. § 1317(a);

5. Any hazardous air pollutant listed under § 112 of the Clean Air Act, 42 U.S.C. § 7412; and

6. Any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to § 7 of the Toxic Substances Control Act, 15 U.S.C. § 2606.

The term includes petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under Subparagraphs (1) through (6) of this Paragraph, and the term includes natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas).

R. "National contingency plan" means the plan established under § 105 of the Superfund law, 42 U.S.C. § 9605, and § 311 of the Clean Water Act, 33 U.S.C. § 1321, and published at 40 C.F.R. Part 300.

S. "Natural resources" means land, fish, wildlife, biota, air, water,

ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust for, appertaining to, or otherwise controlled by the Navajo Nation.

T. "Navajo Nation" or "Nation" means:

1. When referring to the body politic, except as the context may otherwise require, the same meaning as set forth in 1 N.N.C. § 552.

2. When referring to governmental territory, all lands and waters within the territorial boundaries of the Navajo Nation, including:

a. All lands within the exterior boundaries of the Navajo Reservation or of the Eastern Navajo Agency or within the boundaries of Navajo dependent Indian communities, including all lands within the boundaries of Navajo chapter governments, all without regard to the nature of title thereto;

b. All lands held in trust by the United States for, or restricted by the United States, or otherwise set apart under the superintendence of the United States for the use of the Navajo Nation or benefit of the Navajo Nation, Tribe, any band of Navajo Indians or any individual Navajo Indians; and

c. All other lands over which the Navajo Nation may exercise governmental jurisdiction in accordance with federal or international law.

U. "Navajo Nation Environmental Protection Agency" or "Navajo Nation EPA" means the division of Navajo Nation government that is authorized by the Navajo Nation Council to oversee the health and well-being of the public and the Navajo Nation environment and to implement environmental laws and regulations.

V. "Navajo Nation Resource Trustee" means the Resource Trustee for the Navajo Nation, who is authorized to monitor and further any natural resource damage claims that the Navajo Nation has or may have in the future pursuant to the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), the Oil Pollution Act (OPA), and the Clean Water Act (CWA).

W. "Navajo Nation Superfund Program" or "NSP" means the program within the Navajo Nation EPA responsible for implementing and enforcing this Act.

X. "Navajo Department of Emergency Management" or "DEM" means the department within the Division of Public Safety that is authorized by the Navajo Nation Council to respond to emergencies on the Navajo Nation.

Y. "Owner or Operator" means:

1. In the case of a site:

a. Any person owning or operating such site; and

b. In the case of any site, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment,

escheat or similar means to a unit of the Navajo Nation, District, geographic Agency, or Chapter government, any person who owned, operated, or otherwise controlled activities at such site immediately beforehand.

Such term does not include a person who, without participating in the management of a vessel or site, holds indicia of ownership primarily to protect his security interest in the vessel or site.

2. In the case of a hazardous substance, pollutant or contaminant which has been accepted for transportation by a common or contract carrier and except as provided in this Act, the term "owner or operator" shall mean such common carrier or other bona fide for hire carrier acting as an independent contractor during such transportation, and the shipper of such hazardous substance, pollutant or contaminant shall not be considered to have caused or contributed to any release during such transportation which resulted solely from circumstances or conditions beyond his control.

3. In the case of a hazardous substance, pollutant or contaminant which has been delivered by a common or contract carrier to a disposal or treatment site and except as provided in this Act, the term "owner or operator" shall not include such common or contract carrier, and such common or contract carrier shall not be considered to have caused or contributed to any release at such disposal or treatment site resulting from circumstances or conditions beyond its control.

4. The term "owner or operator" does not include a unit of Navajo Nation or Chapter government which acquired ownership or control involuntarily through bankruptcy, tax delinquency, abandonment, escheat, or other circumstances in which the government involuntarily acquires title by virtue of its function as sovereign. However, the exclusion provided under this Paragraph shall not apply to any government which has caused or contributed to the release or threatened release of a hazardous substance, pollutant or contaminant from the site, and such government shall be subject to the provisions of this Act in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under § 2501 of this Act.

Z. "Person" means an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, the United States, state, tribe, municipality, commission, political subdivision of a state or tribe, or any interstate or other intergovernmental body.

AA. "Permitted release" means a discharge in compliance with a permit issued by the Navajo EPA or the U.S. EPA.

BB. "Pollutant or contaminant" means any element, substance, compound, or mixture, including disease-causing agents, which after release into the environment and upon exposure, ingestion, inhalation, or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, will or may reasonably be anticipated to cause death, disease, behavioral abnormalities, cancer, genetic mutation, physiological malfunctions (including malfunctions in reproduction) or physical deformations, in such organisms or their offspring.

CC. "President" means the President of the Navajo Nation.

DD. "Release" means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant), but excludes:

1. Any release which results in exposure to persons solely within a workplace, with respect to a claim which such persons may assert against the employer of such persons;

2. Emissions from the engine exhaust of a motor vehicle, rolling stock, aircraft, vessel, or pipeline pumping station engine;

3. Release of source, byproduct, or special nuclear material from a nuclear incident, as those terms are defined in the Atomic Energy Act of 1954, 42 U.S.C. § 2011 et seq., if such release is subject to requirements with respect to financial protection established by the Nuclear Regulatory Commission under § 170 of such Act, 42 U.S.C. § 2210, or, for the purposes of this Act or any other response action, any release of source byproduct or special nuclear material from any processing site designated under the Uranium Mill Tailings Control Act of 1978, 42 U.S.C. § 7912(a)(1) or § 7942(a); and

4. The normal application of fertilizer.

EE. "Remove" or "removal" means the cleanup or removal of released hazardous substances, pollutants or contaminants from the environment; such actions as may be necessary to take in the event of the threat of release of hazardous substances, pollutants or contaminants into the environment; such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, pollutants or contaminants; the disposal of removed material; or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment which may otherwise result from a release or threat of release. The term includes, but is not limited to, security fencing or other measures to limit access, provision of alternative water supplies, and temporary evacuation of threatened individuals.

FF. "Remedy" or "remedial action" means those actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance, pollutant or contaminant into the environment, to prevent or minimize the release of hazardous substances, pollutants or contaminants so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment. The term includes, but is not limited to, such actions at the location of the release as storage, confinement, perimeter protection using dikes, trenches, or ditches, clay cover, neutralization, cleanup of released hazardous substances, pollutants or contaminants and associated contaminated materials, recycling or reuse, diversion, destruction, segregation of reactive wastes, dredging or excavations, repair or replacement of leaking containers, collection of leachate and runoff, onsite treatment or incineration, provision

of alternative water supplies, and any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment. The term includes offsite transport and offsite storage, treatment, destruction, or secure disposition of hazardous substances, pollutants or contaminants and associated contaminated materials.

GG. "Respond" or "response" means remove, removal, remedy and remedial action; all such terms (including the terms "removal" and "remedial action") include enforcement activities related thereto.

HH. "Response action contract" means any written contract or agreement entered into by a response action contractor with the Director to provide any remedial action or any removal under this Act with respect to any release or threatened release of a hazardous substance or pollutant or contaminant from a site or to provide any evaluation, planning, engineering, surveying and mapping, design, construction, equipment, or any ancillary services thereto for such site.

II. "Response action contractor" means:

1. Any:

a. Person who enters into a response action contract with respect to any release or threatened release of a hazardous substance or pollutant or contaminant from a site or vessel and who is carrying out such contract; and

b. Person, public or nonprofit private entity, conducting a field demonstration pursuant to this Act.

2. Any person who is retained or hired by a person described in Subparagraph (1) to provide any services relating to a response action.

JJ. "Service station dealer" means any person:

1. Who owns or operates a motor vehicle service station, filling station, garage, or similar retail establishment engaged in the business of selling, repairing, or servicing motor vehicles, where a significant percentage of the gross revenue of the establishment is derived from the fueling, repairing, or servicing of motor vehicles, and

2. Who accepts for collection, accumulation, and delivery to an oil recycling facility, recycled oil that has been removed from the engine of a light duty motor vehicle or household appliances by the owner of such vehicle or appliances, and is presented by such owner to such person for collection, accumulation, and delivery to an oil recycling facility.

KK. "Site" means:

1. Any facility, building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or

2. Any area where a hazardous substance, pollutant or contaminant has been deposited, stored, disposed of, placed, or otherwise come to be located, but does not include any consumer product in consumer use.

LL. "Transport" or "transportation" means the movement of a hazardous substance, pollutant or contaminant by any mode, including pipeline (as defined in the Federal Pipeline Safety Act), and in the case of a hazardous substance, pollutant or contaminant which has been accepted for transportation by a common or contract carrier, the term "transport" or "transportation" shall include any stoppage in transit which is temporary, incidental to the transportation movement, and at the ordinary operating convenience of a common or contract carrier, and any such stoppage shall be considered as a continuity of movement and not as the storage of a hazardous substance, pollutant or contaminant.

MM. "Tribe" means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village but not including any Alaska Native regional or village corporation, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

NN. "Uniform Regulations" means the Navajo Nation Environmental Protection Agency Uniform Regulations for Permit Review, Administrative Enforcement Orders, Hearings, and Rulemakings under Navajo Nation Environmental Acts.

OO. "United States Environmental Protection Agency (USEPA)" means the United States Environmental Protection Agency, its Administrator, Regional Administrator, or delegatee.

PP. "Vessel" means every type of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.

QQ. The terms "disposal," "hazardous waste" and "treatment" shall have the meanings provided in § 1004 of the Solid Waste Disposal Act, 42 U.S.C. § 6903.

History

CF-07-08, February 26, 2008.

Note. This definition section was reformatted in an alphabetic-based format rather than numeric format for purposes of codification.

§ 2105. Authority of the director

A. General Authority of the Director. In order to fulfill the obligations under this Act, the Director may:

1. Conduct investigations, inspections and tests to carry out the duties of this Act according to the procedures established by this Act;

2. Hold hearings related to any aspect of or matter within the duties of the Director and, in connection therewith, compel the

attendance of witnesses and the production of records according to the procedures established under this Act;

3. Prepare and develop a comprehensive plan, or plans, for the prevention, assessment, containment, removal and remediation of contamination from hazardous substances, pollutants and contaminants in the Nation;

4. Encourage voluntary cooperation by advising and consulting with owners, operators and potentially responsible parties to achieve the purposes of this Act, including a Voluntary Response Program, as specified in § 2402 of this Act;

5. Consistent with Title 2, Navajo Nation Code, accept, receive, and administer grants, funds, or gifts from public or private agencies, including the federal government, to carry out any of the purposes of this Act, provided that all such monies shall be deposited in the Hazardous Substances Fund established by § 2701 for the use of the Navajo Superfund Program;

6. Secure necessary scientific, technical, administrative, and operational services, including laboratory facilities and technical consultants, by contract or otherwise, to carry out the purposes of this Act;

7. Compile and publish from time to time reports, data, and statistics with respect to matters studied or investigated by the Director;

8. Require assessments, sampling, and monitoring of affected or potentially affected media to discover, verify, and quantify contamination by hazardous substances, pollutants or contaminants;

9. Ensure timely public notice and adequate opportunity for public participation;

10. Ensure the best and most appropriate response for each site;

11. Perform such other activities as the Director may find necessary to implement and carry out this Act, including enforcing the provisions of this Act and taking such other action authorized by this Act as the Director deems appropriate.

B. Standards and Reportable Quantities

The Director may promulgate regulations, pursuant to § 2801, designating as hazardous substances, in addition to those referred to in § 2104(Q), such elements, compounds, mixtures, solutions, and substances which, when released into the environment, may present substantial danger to the public health or welfare or the environment, as well as promulgating regulations establishing that quantity of any hazardous substance the release of which shall be reported pursuant to § 2201. The Director may determine that one single quantity shall be the reportable quantity for any hazardous substance, regardless of the medium into which the hazardous substance is released. The Director may adopt

hazardous substances and their reportable quantities as published in the Federal Register. Hazardous substances and their reportable quantities will be listed in the Navajo Nation Hazardous Substance Regulations, and may be revised as necessary.

C. Emergency procurement powers

Notwithstanding any other provision of law, the Director may authorize the use of such emergency procurement powers as he or she deems necessary to carry out the provisions of this Act. Upon determination that such procedures are necessary, the Director shall promulgate regulations prescribing the circumstances under which such authority shall be used and the procedures governing the use of such authority.

D. Delegation of Powers and Duties

The Director may delegate to any officer or employee of the Navajo Superfund Program or the Navajo Nation EPA such powers and duties under this Act, except the making of regulations, as the Director deems necessary or expedient.

E. Coordination with Other Environmental Programs

Nothing in this Act shall prevent the Director from determining that a cleanup or other action authorized under this Act may be conducted by another branch of the Navajo Nation EPA, where that other branch has concurrent jurisdiction and is prepared to conduct the action.

For the purposes of program authorization, eligibility for grants, or any other purpose identified by the Director, other Navajo Nation environmental programs may elect to use the cleanup authorities provided in this Act to meet the requirements of a cleanup or abatement law, including but not limited to corrective action, closure, and post-closure. The Director shall ensure that there is no duplication of effort or listing with respect to such sites. Any exercise of the response or order authorities of this Act by any other branch of the Navajo Nation EPA should be exercised in consultation with the Navajo Superfund Program under such protocols as the Director may deem appropriate.

History

CF-07-08, February 26, 2008.

Note. Reference to § 2104(A)(17) at Subsection B was changed to § 2014(Q) to reflect format changes.

§ 2106. Applicability; relationship to other law

A. Applicability

Except as otherwise provided in this Act, the provisions of this Act and any regulations promulgated hereunder shall apply to all persons and all property within the Navajo Nation.

B. Exemptions

1. Voluntary Cleanup Agreement

The provisions of this Act and any regulations promulgated hereunder shall not apply to any person (or to any property owned or operated by such person) who is subject to a voluntary cleanup agreement entered into pursuant to § 2402, except under such terms and conditions as may be provided in that voluntary cleanup agreement.

2. Covenant Not to Regulate

The provisions of this Act and any regulations promulgated hereunder shall not apply to any person or property where, but only to the limited extent that, such application would be in breach of any covenant not to regulate or otherwise exercise jurisdiction over such person or property. Such person may, however, enter into a voluntary cleanup agreement pursuant to § 2402, in which case this Act and implementing regulations shall apply as provided in that voluntary cleanup agreement. Nothing in this Paragraph shall be construed as a determination or admission by the Navajo Nation that any covenant not to regulate or otherwise exercise jurisdiction is valid.

C. Relationship to Other Law

Any person who receives compensation for response costs or damages or claims pursuant to this Act shall be precluded from recovering compensation for the same response costs or damages or claims pursuant to any other tribal, state or federal law. Any person who receives compensation for removal costs or damages or claims pursuant to any other federal or state law shall be precluded from receiving compensation for the same response costs or damages or claims from the Navajo Nation as provided in this Act.

History

CF-07-08, February 26, 2008.

§ 2107. Severability

If any provision of this Act, or the application of any provision of this Act to any person or circumstance, is held invalid, the remainder of this Act and the application of such provision to other persons or circumstances shall remain unaffected.

History

CF-07-08, February 26, 2008.

Subchapter 2. Reporting and recordkeeping

§ 2201. Obligation to report releases of hazardous substances

A. Notification Requirements Respecting Released Substances

Any person in charge of a site shall, as soon as he or she has knowledge of any release (other than a permitted release) of a hazardous substance from the site in quantities equal to or greater than those determined as reportable quantities under this Act or 42 U.S.C. § 9602, notify the Navajo Nation Department of Emergency Management, or their designee, within 24 hours of learning of such release. Whether a release meets or exceeds a reportable quantity shall be determined based on the amount of the hazardous substance released within a 24-hour period.

B. Continuous Releases

Notification need not be given more than annually for a release subject to Subsection (A) when that release is a continuous release, stable in quantity and rate, and notification has already been given for that release pursuant to Subsection (A) for a period sufficient to establish the continuity, quantity and regularity of such release. At such time as there is any statistically significant increase in the quantity of any hazardous substance or constituent thereof released above that previously reported, however, notice shall be given immediately pursuant to this Section.

C. Penalties for Failure to Notify; Use of Notice

Any person in charge of a site from which a hazardous substance is released, other than a permitted release, in a quantity equal to or greater than the reportable quantity established by the Director or, in the absence of action by the Director, established pursuant to 42 U.S.C. § 9602, and who fails to notify immediately the Navajo Department of Emergency Management as soon as he or she has knowledge of such release, or who submits in such a notification any information which he or she knows to be false or misleading, shall, upon conviction, be fined in accordance with § 2509(D) of this Act. Notification received pursuant to this Subsection or information obtained by the exploitation of such notification shall not be used against any such person in any criminal case, except a prosecution for perjury or for giving a false statement.

D. Registered Pesticide Products

This Section shall not apply to the application of a pesticide product registered under the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 136 *et seq.*, or to the handling and storage of such a pesticide product by an agricultural producer.

History

CF-07-08, February 26, 2008.

§ 2202. Preservation of records

A. Requirement to Preserve Records

1. Beginning with the date of enactment of this statute, for 50 years thereafter or for 50 years after the date of establishment of a record required under 42 U.S.C. § 9603 (whichever is later), or at any such earlier time as a waiver is obtained under Paragraph (3) of this Subsection, the Navajo Nation EPA shall require any person required to notify the Administrator under 42 U.S.C. § 9603(c) to preserve said records. It shall be unlawful for any such person knowingly to destroy, mutilate, erase, dispose of, conceal, or otherwise render unavailable or unreadable or falsify any records.

2. Notwithstanding the provisions of this Subsection, the Director may in his or her discretion require any such person to retain any record identified pursuant to Paragraph (1) of this Subsection for such a time as the Director determines to be necessary to protect the public health or welfare.

3. At any time prior to the date which occurs 50 years after the date of establishment of a record under Paragraph (1) of this Subsection, any person identified under Paragraph (1) of this Subsection may apply to the Director for a waiver of the provisions of Paragraph (1) of this Subsection. The Director may grant such waiver if, in his or her discretion, such waiver would not unreasonably interfere with the attainment of the purposes and provisions of this Act.

B. Penalty for Violation

Any person who violates this Section shall, upon conviction, be fined in accordance with applicable provisions of Navajo Nation law or imprisoned for not more than one year, or both.

History

CF-07-08, February 26, 2008.

Note. This Section was changed to § 2202 to correct inadvertent enactment of two sections 2201.

Subchapter 3. Information gathering, site evaluation and response action determination

§ 2301. Authorities for information gathering and access to sites

A. Actions to Obtain Information

The Director, or any duly designated officer, employee or representative of the Director, is authorized to take action under Paragraph (B)(2), Subsection (C) or Subsection (D) (or any combination thereof) at a site,

establishment, place, property, or location or, in the case of Subsections (C) and (D), at any site, establishment, place, property, or location which is adjacent to the site, establishment, place, property, or location referred to in such Subsection (C) or (D). Any duly designated officer, employee, or representative of the Nation is also authorized to take such action. The authority of Subsections (C) and (D) may be exercised only if there is a reasonable basis to believe there may be a release or threat of release of a hazardous substance, pollutant or contaminant, or that illness, disease, or complaints thereof may be attributable to exposure to a hazardous substance, pollutant, or contaminant and that a release may have occurred or be occurring. The Director, or any duly designated officer, employee or representative, may undertake such investigations, monitoring, surveys, testing, and other information-gathering activities as he or she may deem necessary or appropriate to identify the existence and extent of the release or threat thereof, the source and nature of the hazardous substances, pollutants or contaminants involved, and the extent of danger to the public health or welfare or to the environment. In addition, the Director may undertake such planning, legal, fiscal, economic, engineering, architectural, and other studies or investigations as he or she may deem necessary or appropriate to plan and direct response actions, to recover the costs thereof, and to enforce the provisions of this Act.

B. Access to Information

1. Information to be provided

Any officer, employee, or representative described in Subsection (A) may require any person who has or may have information relevant to any of the following to furnish, upon reasonable notice, information or documents relating to such matter:

a. The identification, nature, and quantity of materials which have been or are generated, treated, stored, transported or disposed of at a site or transported to a site or a vessel;

b. The nature or extent of a release or threatened release of a hazardous substance or pollutant or contaminant at or from a site or vessel;

c. Information relating to the ability of a person to pay for and/or to perform a cleanup.

2. Access

In addition, upon reasonable notice, such person either:

a. Shall grant any such officer, employee, or representative access at all reasonable times to any site, establishment, place, property, or location to inspect and copy all documents or records relating to such matters; or

b. Shall copy and furnish to the officer, employee, or representative all such documents or records, at the option and expense of such person.

C. Access and Entry to the Site

Any officer, employee, or representative described in Subsection (A) is authorized to enter at reasonable times any of the following:

1. Any site, establishment, or other place or property where any hazardous substance or pollutant or contaminant may be or has been generated, stored, treated, disposed of, or transported to or from;

2. Any site, establishment, or other place or property from which or to which a hazardous substance or pollutant or contaminant has been or may have been released;

3. Any site, establishment, or other place or property where such release is or may be threatened; and

4. Any site, establishment, or other place or property where entry is needed to determine the need for response or the appropriate response or to effectuate a response action under this Subchapter.

D. Inspection and Samples

1. Authority

Any officer, employee or representative designated by the Director is authorized to inspect and obtain samples from any site, establishment, or other place or property of any suspected hazardous substance, pollutant or contaminant. Any such officer, employee, or representative is authorized to inspect and obtain samples of any containers or labeling for suspected hazardous substances, pollutants or contaminants. Each such inspection shall be completed with reasonable promptness.

2. Samples

If the officer, employee, or representative obtains any samples, before leaving the premises he or she shall give to the owner, operator, tenant, or other person in charge of the place from which the samples were obtained a receipt describing the sample obtained and, if requested, a portion of each such sample. A copy of the results of any analysis made of such samples shall be furnished promptly to the owner, operator, tenant, or other person in charge, if such person can be located.

E. Protection of Confidential Information

1. Any records, reports, or information obtained from any person under this Section shall be available to the public, except that upon a showing satisfactory to the Director by any person that records, reports, or information, or any particular part thereof (other than health or safety effects data) to which the Director or any officer, employee, or representative has access under this Section would, if made public, divulge information entitled to protection under the federal Privacy Act, 18 U.S.C. § 1905, such information or particular portion thereof shall be considered confidential in accordance with the purposes of the Privacy

Act, except that such record, report, document or information may be disclosed to other officers, employees, or authorized representatives of the Navajo Nation concerned with carrying out this Act, to officers, employees or authorized representatives of the United States concerned with carrying out CERCLA, or when relevant in any proceeding under this Act or CERCLA.

2. Any person to whom confidential information is disclosed pursuant to Paragraph (1) who knowingly and willfully divulges or discloses any information entitled to protection under this Subsection shall, upon conviction, be subject to a fine of not more than five thousand dollars (\$5,000) or to imprisonment not to exceed one year, or both.

3. In submitting data under this Act, a person required to provide such data may:

a. Designate the data which such person believes is entitled to protection under this Subsection; and

b. Submit such designated data separately from other data submitted under this Act.

A designation under this Paragraph shall be made in writing and in such manner as the Director may prescribe by regulation.

4. Notwithstanding any limitation contained in this Section or any other provision of law, all information reported to or otherwise obtained by the Director (or any representative of the Director) under this Act shall be made available to any duly authorized committee of the Navajo Nation Council, such as the Resources Committee, upon receipt of that Committee's written request.

No person required to provide information under this Act may claim that the information is entitled to protection under this Subsection unless such person shows each of the following:

a. Such person has not disclosed the information to any other person, other than a member of a local emergency planning committee established under SARA Title III (1986), 42 U.S.C. § 11001 *et seq.*, an officer or employee of the Navajo Nation, United States, state, or local government, an employee of such person, or a person who is bound by a confidentiality agreement, and such person has taken reasonable measures to protect the confidentiality of such information and intends to continue to take such measures.

b. The information is not required to be disclosed, or otherwise made available, to the public under any other tribal or federal law.

c. Disclosure of the business/industrial proprietary information is likely to cause substantial harm to the competitive position of such person.

d. The specific chemical identity, if sought to be protected, is not readily discoverable through reverse engineering.

5. The following information with respect to any hazardous substance, pollutant or contaminant at a site or vessel shall not be entitled to protection under this Subsection and shall be available to the public:

a. The trade name, common name, or generic class or category of the hazardous substance, pollutant or contaminant.

b. The physical properties of the substance, including its boiling point, melting point, flash point, specific gravity, vapor density, solubility in water, and vapor pressure at twenty degrees Celsius (20°C).

c. The hazards to health and the environment posed by the substance, including physical hazards (such as explosion) and potential acute and chronic health hazards.

d. The potential routes of human exposure to the substance at the site, establishment, place, or property being investigated, entered, or inspected under this Section.

e. The location of disposal of any waste stream.

f. Any monitoring data or analysis of monitoring data pertaining to disposal activities.

g. Any hydrogeologic or geologic data.

h. Any groundwater monitoring data.

6. To promote consistency in the handling of confidential business information among the various environmental programs administered by the Navajo Nation Environmental Protection Agency, the Director may amend or adopt regulations promulgated under other statutes for the purpose of establishing procedures for the implementation of this Subsection. Implementing regulations may include such matters as the handling by the Navajo Nation EPA of business information which is or may be entitled to confidential treatment, determinations by the Navajo EPA of whether information is entitled to confidential treatment for reasons of business confidentiality, notice to businesses and such other procedures as the Director deems appropriate. Until such time as the Director promulgates regulations to implement this Subsection, the Director is authorized to protect confidential business information using such interim procedures as the Director deems appropriate.

F. Compliance Order for Information and Access

In addition to any other enforcement action available under this Act, if consent is not granted regarding any request made by an officer, employee, or representative pursuant to this Section, the Director may issue an order directing compliance with the request. The order may be issued after such

notice and opportunity for a hearing as is reasonably appropriate under the circumstances. The Director may ask the Navajo Nation Attorney General to commence a civil action to compel compliance with any such request or order, pursuant to § 2509 of this Act.

History

CF-07-08, February 26, 2008.

§ 2302. Coordination of investigations

A. Notification to Natural Resource Trustees

The Director shall promptly notify the appropriate tribal and federal natural resource trustees of potential damages to natural resources resulting from releases under investigation pursuant to this Section and shall coordinate the assessments, investigations, and planning under this Section with such tribal and federal trustees.

B. Cooperative Agreements

The Director may enter into any cooperative agreements needed to conduct adequate risk or health assessments. The Director may also contract with appropriate agencies or technical professionals to gather and/or interpret site information.

History

CF-07-08, February 26, 2008.

§ 2303. The Navajo Nation Contingency Plan

A. The Navajo Nation Contingency Plan

The Director may promulgate a Navajo Nation Contingency Plan which shall contain procedures to be employed in identifying, screening, evaluating, selecting and providing response action for releases of hazardous substances, pollutants and contaminants at sites within the Navajo Nation. The Director may, from time to time, revise and republish the Navajo Nation Contingency Plan. The Navajo Nation Contingency Plan may include, but is not limited to:

1. Methods for discovering and investigating sites at which hazardous substances, pollutants or contaminants have been disposed of or otherwise come to be located;

2. Methods for evaluating, including analyses of relative cost, and responding to any releases or threats of releases from sites which pose substantial danger to the public health, welfare, or the environment;

3. Methods and criteria for determining the appropriate extent of

removal, remedy, and other measures authorized by this Act;

4. Appropriate roles and responsibilities for the federal, state, and local governments and for interstate and nongovernmental entities in effectuating the plan;

5. Provision for identification, procurement, maintenance, and storage of response equipment and supplies;

6. Means of assuring that remedial action measures are cost-effective over the period of potential exposure to the hazardous substances, pollutants or contaminants or contaminated materials;

7. Specified roles for private organizations and entities in preparation for response and in responding to releases of hazardous substances, pollutants or contaminants, including identification of appropriate qualifications and capacity therefore and including consideration of minority firms in accordance with § 2601 of this Act; and

8. Standards and testing procedures by which alternative or innovative treatment technologies can be determined to be appropriate for utilization in response actions authorized by this Act.

The Director shall implement the Navajo Nation Contingency Plan so that screening and evaluation of a site is commensurate with the risks presented by the site. In assessing the need for and scope of response, the Director may consider such factors as the Director determines to be appropriate, including no action criteria, site history, contaminants, pathways of contaminants, sampling history and sampling data assessment, and other available regulatory responses and oversight. To assure a more efficient use of Navajo Nation EPA resources, the Director may use a multi-media approach to screening and evaluation of sites and may refer sites to other environmental programs based upon the screening and evaluation, as appropriate.

B. Assessing Risks from Multiple Sources

1. The Navajo Nation Contingency Plan shall provide that during site screening and evaluation, preliminary assessment and site assessment, and response action evaluation and selection, the Director shall, as appropriate, consider the identification, assessment, management of, and response to multiple sources of risk in and around sites. The Director shall, as appropriate, examine various approaches to protect communities exposed to such sources of multiple risk, such as:

a. Health risks from the existence of and exposure to hazardous substances, pollutants or contaminants in the vicinity of a site; or

b. Health risks from releases or threatened releases of a hazardous substance, pollutant, or contaminant from adjacent sites, permitted or otherwise, in the vicinity of the site.

2. Where two or more non-contiguous sites are reasonably related on

the basis of geology, geography, hydrology, threat, or potential threat to the public health or welfare or the environment, the Director may, in his discretion, aggregate the sites and treat these related sites as one for purposes of this Act.

C. Health Assessment of Water Contamination Risks

The Navajo Nation Contingency Plan shall provide that:

1. The Director shall ensure that the human health risks associated with the potential or actual contamination (either directly or as a result of the runoff of any hazardous substance or pollutant or contaminant from sites) of surface water are appropriately assessed in situations where the water is, or can be, used for recreation or for consumption by humans or livestock. This assessment shall also consider the potential migration of any hazardous substance, pollutant, or contaminant through such surface water to downstream sources of drinking water.

2. For purposes of taking action under this Act, the Director shall give a high priority to sites where the release of hazardous substances or pollutants or contaminants has resulted in the closing of drinking water wells or has contaminated a principal drinking water supply.

History

CF-07-08, February 26, 2008.

§ 2304. Site listing and prioritization

A. The Navajo Nation EPA Site List

The Director shall compile and maintain a Navajo Nation EPA Site List of all the known releases or threatened releases throughout the Navajo Nation and shall revise the list no less often than annually. The Navajo Nation EPA Site List shall include sites that have already undergone screening, evaluation or response as well as sites that have been identified as having possible releases but have not yet been screened or evaluated. The Navajo Nation EPA Site List is intended to serve as an informational tool and is not intended to identify priorities for action.

B. Site Prioritization

The Director may adopt by rulemaking a process or criteria for determining priorities among releases or threatened releases throughout the Navajo Nation for the purpose of taking response action. The priorities shall be based upon, but not limited to:

1. The relative risk or danger to the public health, welfare or the environment;
2. The population at risk;

3. The hazard potential of the hazardous substances, pollutants or contaminants at such sites;
4. The potential for contamination of drinking water supplies;
5. The potential for direct human contact;
6. The potential for destruction of sensitive ecosystems;
7. The damage to natural or cultural resources;
8. The effect on the human food chain;
9. The contamination or potential contamination of the ambient air;
10. Whether the site is already listed on the National Priorities List, in which case the Director shall avoid any duplication of effort with regard to that facility; and
11. Other appropriate factors, as determined by the Director.

C. Hazard Ranking System

The Director may elect to assess a site pursuant to the federal Hazard Ranking System. Ranking under the federal Hazard Ranking System shall not be a prerequisite for the initiation of long-term or other response action at a site.

History

CF-07-08, February 26, 2008.

§ 2305. Response action selection

A. General Use of Removal and Remedial Actions

1. The Director is authorized to select removal or remedial actions as appropriate to the circumstances and to undertake a level of information-gathering, sampling, analysis and alternatives evaluation appropriate to the circumstances. The use of the terms removal and remedial action are not intended to limit the Director's discretion in determining the appropriate response action to be taken.

2. No further action. The Director is also authorized to determine at any time during the site screening, evaluation or response process that a site does not require any further action, if the Director determines that the site does not present risks warranting response. The Director may also suspend action if the Director determines that the site does not require response at that time.

B. Degree of Cleanup

1. As provided in this Section, response actions selected under

this Section or otherwise required or agreed to by the Director shall attain a degree of cleanup of hazardous substances, pollutants or contaminants released into the environment and of control of further release at a minimum which assures protection of human health and the environment. Such response actions shall be relevant and appropriate under the circumstances presented by the release or threatened release of such hazardous substance, pollutant or contaminant.

2. The Director may promulgate regulations providing the manner in which the Director shall consider any promulgated standard, requirement, criteria, or limitation under a federal or tribal environmental or siting law that is legally applicable to the hazardous substance, pollutant or contaminant concerned, or is relevant and appropriate under the circumstances of the release or threatened release of such hazardous substance, pollutant or contaminant, in determining the degree of cleanup or response action to be implemented. In applying such applicable or relevant and appropriate requirements (ARARs) to removal actions, the regulations shall recognize that it may not be practicable to achieve such ARARs, taking into account the exigencies of the situation. The regulations may also specify circumstances under which the Director may waive attainment of ARARs.

3. In selecting response actions, the Director may also consider such other guidance or technical information as the Director determines is relevant to the release or threatened release.

C. Administrative Record

The Director shall establish an administrative record upon which the Director shall base the selection of a response action. The administrative record shall be available to the public at or near the site at issue. The Director also may place duplicates of the administrative record at any adjacent Chapter House or other location. The Director may, in his or her discretion, provide a subset of the administrative record at or near the site, or at other locations, in lieu of the full administrative record, if it would be administratively inconvenient, due to the size of the record or such other appropriate reasons as the Director determines, to place the full record at such location. If the Director provides a subset rather than the full record, the subset shall include information on the location of the full record, and shall contain documents that inform the public on the nature and extent of risk posed by the site and the response actions considered.

D. Public Participation Procedures

1. Removal action

Regulations promulgated under this Section shall establish procedures for the appropriate participation of interested persons in the development of the administrative record on which the Director will base the selection of removal actions and on which judicial review of removal actions will be based. These regulations shall be promulgated pursuant to § 2801 and shall provide for a level of documentation and timing of public review that takes into account such factors as the need to take prompt response action.

2. Remedial action

The Director shall provide by regulation for the participation of interested persons, including potentially responsible parties, in the development of the administrative record on which the Director will base the selection of remedial actions and on which judicial review of remedial actions will be based. These regulations shall be promulgated pursuant to § 2801 and shall include, at a minimum, requirements for each of the following:

a. Notice to potentially affected persons and to the public, by publication in a local newspaper for at least three consecutive publications, of the proposed response action, the site concerned and the parties to the response action, accompanied by a brief analysis of the plan and alternative plans that were considered;

b. A reasonable opportunity to comment and provide information regarding the plan;

c. An opportunity for a public meeting in the affected area;

d. A response to each of the significant comments, criticisms, and new data submitted in written or oral presentations; and

e. A statement of the basis and purpose of the selected action.

The administrative record required under Subsection (C) shall include all items developed and received under this Paragraph.

E. Interim Record

Until regulations under Subsection 505(D) are promulgated, the administrative record shall consist of all items developed and received pursuant to current procedures for selection of the response action, including procedures for the participation of interested parties and the public. The development of an administrative record and the selection of response action under this Act shall not include an adjudicatory hearing.

F. Potentially Responsible Parties

The Director shall make reasonable efforts to identify and notify potentially responsible parties as early as possible before selection of a response action. Nothing in this Subsection shall be construed to be a defense to liability.

G. Permits

No tribal permit shall be required for any portion of any response action conducted entirely onsite, where such response action is selected and carried out in compliance with this Section. For purposes of this Paragraph, onsite means the areal extent of contamination and all suitable areas in very close proximity to the contamination necessary for implementation of the response

action.

H. Requirements for Remedial Actions

1. Removal actions taken at long-term remedial action sites

Any removal action undertaken by the Director under this Act (or by any other person undertaking a response action under this Act) should, to the extent the Director deems practicable, contribute to the efficient performance of any long-term remedial action with respect to the release or threatened release concerned.

2. Cost-effective remedies

The Director shall select appropriate remedial actions determined to be necessary to be carried out under this Act which are in accordance with this Section and, to the extent practicable, the Navajo Nation Contingency Plan, and which provide for cost-effective response. In evaluating the cost effectiveness of proposed alternative remedial actions, the Director shall take into account the total short-and long-term costs of such actions, including the costs of operation and maintenance for the entire period during which such activities will be required.

3. Preference for treatment

Remedial actions in which treatment which permanently and significantly reduces the volume, toxicity or mobility of the hazardous substances, pollutants, and contaminants is a principal element are to be preferred over remedial actions not involving such treatment. The offsite transport and disposal of hazardous substances, pollutants or contaminants or contaminated materials without such treatment should be the least favored alternative remedial action where practicable treatment technologies are available. The Director shall conduct an assessment of permanent solutions and alternative treatment technologies or resource recovery technologies that, in whole or in part, will result in a permanent and significant decrease in the toxicity, mobility, or volume of the hazardous substance, pollutant, or contaminant. In making such assessment, the Director shall specifically address the long-term effectiveness of various alternatives. In assessing alternative remedial actions, the Director shall, at a minimum, take into account:

- a. The long-term uncertainties associated with land disposal;
- b. The goals, objectives, and requirements of the Navajo Nation Solid Waste Code, 4 N.N.C. § 101 *et seq.*;
- c. The persistence, toxicity, mobility, and propensity to bioaccumulate of such hazardous substances, pollutants or contaminants and their constituents;
- d. Short-and long-term potential for adverse health effects from human exposure;

e. Long-term maintenance costs;

f. The potential for future remedial action costs if the alternative remedial action in question were to fail; and

g. The potential threat to human health and the environment associated with excavation, transportation, and redisposal, or containment.

The Director shall select a remedial action that is protective of human health and the environment, that is cost effective, and that utilizes permanent solutions and alternative treatment technologies or resource recovery technologies to the maximum extent practicable. If the Director selects a remedial action not appropriate for a preference under this Subsection, the Director shall publish an explanation as to why such remedial action nevertheless was selected.

4. Alternative remedial actions

The Director may select an alternative remedial action meeting the objectives of this Subsection whether or not such action has been achieved in practice at any other site that has similar characteristics. In making such a selection, the Director may take into account the degree of support for such remedial action by parties interested in such site.

5. Periodic Review of Remedial Actions

If the Director selects a remedial action that results in any hazardous substances, pollutants, or contaminants remaining at the site, the Director shall review such remedial action no less often than each five years after the initiation of such remedial action to assure that human health and the environment are being protected by the remedial action being implemented. In addition, if upon such review it is the judgment of the Director that further action is appropriate at such site in accordance with this Act, the Director shall take or require such action. The Director shall report to the Navajo Nation Resources Committee a list of sites for which such review is required, the results of all such reviews, and any further actions taken as a result of such reviews.

6. Notice to interested tribes, states and the USEPA

The Director shall provide notice to interested tribes, states and the US EPA and an opportunity to comment on the Director's proposed plan for remedial action as well as on alternative plans under consideration. The Director's proposed decision regarding the selection of remedial action shall be accompanied by a response to the significant comments submitted by the US EPA or interested tribes or states, including an explanation regarding any decision under this Subsection on compliance with promulgated federal, tribal, or state standards. A copy of such response shall also be provided to the Navajo Nation Resources Committee, the US EPA, and the interested tribes and states.

History

Subchapter 4. Response implementation and enforcement

§ 2401. General response authority

A. General Response Authority of the Director

When any hazardous substance is released or there is a substantial threat of such a release into the environment, or there is a release or substantial threat of release into the environment of any pollutant or contaminant that may present an imminent and substantial danger to the public health or welfare, the Director is authorized to act, consistent with the Navajo Nation Contingency Plan, to investigate, remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance, pollutant, or contaminant at any time (including its removal from any contaminated natural resource), or take any other response measures, consistent with the Navajo Nation Contingency Plan, that the Director deems necessary to protect the public health, welfare or the environment. The Director shall take such action when one or more of the following situations exist:

1. No person can be found, within 90 days or such shorter period as may be necessary to protect human health and the environment, who is:
 - a. An owner or operator of the site of concern, and
 - b. Capable of carrying out such corrective action properly, either financially or otherwise;
2. A situation exists which requires prompt action by the Director to protect human health and the environment; and
3. The owner or operator has failed or refused to comply with an order of the Director to comply with corrective action requirements.

The Director is authorized to take removal actions under this Section when such removal is necessary to protect human health, safety, or the environment and sufficient funds exist in the Hazardous Substances Fund.

B. Limitations on Response

The Director shall not provide for a response action under this Section in response to a release or threat of release:

1. Of a naturally occurring substance in its unaltered form, or altered solely through naturally occurring processes or phenomena, from a location where it is naturally found;
2. Into public or private drinking water supplies due to deterioration of the system through ordinary use.

Notwithstanding the limitations identified in this Subsection, and to the extent authorized by this Section, the Director may respond to any release or threat of release if, in the Director's discretion, it constitutes a public health or environmental emergency and no other person with the authority and capability to respond to the emergency will do so in a timely manner.

C. Site Coordinator

The Director may appoint a Site Coordinator, who shall perform duties as delegated by the Director, including, but not limited to:

1. Screening sites for entry into a database or inventory;
2. Making preliminary visits to sites for assessment by inspection, investigation, sampling and/or any other relevant means;
3. Communicating with and coordinating actions among Navajo and federal Divisions, Departments, Agencies, and other entities; and
4. Giving notice to the Navajo Department of Emergency Management, the National Response Center, the Arizona Department of Environmental Quality, the New Mexico Environment Department, the Utah Department of Environmental Quality and any other relevant entity upon release or suspected release of hazardous substances.

History

CF-07-08, February 26, 2008.

§ 2402. Voluntary response

A. Purposes and Objectives

The purposes and objectives of this Section are to increase significantly the pace of response activities at contaminated sites by promoting and encouraging the development and expansion of a voluntary response program, and to benefit the public welfare by returning contaminated sites to economically productive uses.

B. In General

The Director may establish by rulemaking and administer a voluntary cleanup program that—

1. Identifies the circumstances and conditions under which a site may be eligible for the voluntary cleanup program;
2. Provides adequate opportunities for public participation, including prior notice and opportunity for comment, in selecting response actions;
3. Has the capacity, through enforcement or other mechanisms, of assuming the responsibility for completing a response action if the

current owner or prospective purchaser fails or refuses to complete the necessary response, including operation and maintenance; and

4. Provides adequate oversight and enforcement authorities to ensure that voluntary response actions are completed in accordance with applicable tribal and federal laws, including applicable permit requirements and any on-going operation and maintenance requirements or long-term remedial activities.

C. Application

A person desiring to participate in the Voluntary Cleanup Program must submit to the Director an application containing information regarding the site in question, its proposed future development, an environmental assessment of the site, a description of the proposed cleanup plan, and an application fee, as specified in the regulations promulgated under this Section. If the Director approves the application, a corrective action plan must be prepared and approved by the Director before any work may begin.

D. Requirement for Authorized Actions

No person may undertake any investigation or response action under this Section unless the Director has determined that the person meets the criteria and conditions established for participation in the voluntary cleanup program and has approved the application to participate and the proposed corrective action plan.

E. Oversight Fees

The Director may require a person participating in the Voluntary Cleanup Program to pay an oversight fee to the NSP to reimburse the NSP for the costs of monitoring the cleanup. The Director shall set the amount of the oversight fee by regulation.

F. Certification of Completion

After remediating the site in question, the person undertaking the voluntary cleanup must prepare a completion report for review by the Director and, if the approved corrective action plan has been completed, the Director will issue a certificate of completion certifying that the requirements of the plan have been implemented, the applicable cleanup standards have been met, and the person is released from any further liability under Navajo law for cleanup of the site and for any contamination identified in the environmental assessment submitted with the application. In addition, persons who conduct voluntary cleanups pursuant to an agreement entered into under this Section are eligible for covenants under § 2504(C) of this Act under the same terms and conditions as any party to an agreement under § 2504 of this Act.

History

CF-07-08, February 26, 2008.

§ 2403. Administrative and civil actions for imminent and substantial

endangerment

A. Injunctive Relief

Notwithstanding any permit granted pursuant to the Navajo Nation Code, upon receipt of evidence that a release of a hazardous substance, pollutant or contaminant or a threat of release is presenting an imminent and substantial endangerment to the public health or welfare or the environment, the Director may request that the Attorney General bring suit on behalf of the Nation to immediately restrain, pursuant to this Act, any person causing or contributing to such endangerment to cease such releases, or the Director may take such other action as may be necessary, including but not limited to issuing administrative orders as provided in this Section.

B. Administrative Orders

In addition to any other action taken by any other person or agency, when the Director determines that there may be an imminent and substantial endangerment to the public health, welfare or the environment because of an actual or threatened release of a hazardous substance, pollutant or contaminant from a site, the Director may issue such orders as may be necessary to protect public health, welfare and the environment, pursuant to the procedures set forth in the Uniform Regulations.

C. Continuing Jurisdiction

Notwithstanding any interim or stabilization measures undertaken by a responsible party or any other person, the Director's authority to require response action under this Section shall continue until the necessary response actions are completed.

D. Coordination with Other Agencies

Consistent with the Director's general ability to coordinate activities conducted under this Act with other federal, state and tribal agencies, the Director shall provide appropriate coordination of any emergency response actions conducted under this Section with the Navajo Department of Emergency Management.

E. Reimbursement

Persons who satisfy the requirements of this Section are eligible for reimbursement of response costs:

1. Any person who receives and fully complies with all of the terms of any order issued under Subsection (B) of this Section may, within 60 days after completion of all required action, petition the Director for reimbursement from the Hazardous Substances Fund for the reasonable costs of such action, plus interest. Any interest payable under this Paragraph shall accrue on the amounts expended from the date of expenditure at the same rate as specified for response costs under 42 U.S.C. § 9607.

2. If the Director refuses to grant all or part of a petition made under this Subsection, the petitioner may within 30 days of receipt of

such refusal file an action against the Director in Navajo Nation Court seeking reimbursement from the Hazardous Substances Fund.

3. Except as provided in Paragraph (4), to obtain reimbursement the petitioner shall establish by a preponderance of the evidence that petitioner is not liable for response costs under § 2501(A) of this Act, and that costs for which petitioner seeks reimbursement are reasonable in light of the action required by the relevant order.

4. A petitioner who is unable to establish a lack of liability pursuant to Paragraph (3) may recover reasonable costs of response to the extent that petitioner can demonstrate, on the administrative record, that the Director's decision in selecting the response action ordered was arbitrary and capricious or was otherwise not in accordance with law. Reimbursement awarded under this Subsection shall include all reasonable response costs incurred by the petitioner pursuant to the portions of the order found to be arbitrary and capricious or otherwise not in accordance with law.

Reimbursement is limited by the amounts available in the Hazardous Substances Fund.

History

CF-07-08, February 26, 2008.

Subchapter 5. Liability, Enforcement and Settlement

§ 2501. Liable persons and standard of liability

A. Liable Persons

Notwithstanding any other provisions or rule of law, and subject only to the defenses and limitations set forth in § 2502 of this Act, the following persons shall be liable for the costs and damages described in § 2503 and for compliance with administrative and judicial orders issued pursuant to § 2403:

1. The owner or operator of a site or vessel that is involved in a release or threatened release of any hazardous substance, pollutant, or contaminant;

2. Any person who at the time of disposal of any hazardous substance, pollutant or contaminant owned or operated any site at which such hazardous substance, pollutant or contaminant was disposed of;

3. Any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances, pollutants or contaminants owned or possessed by such person or by any other party or entity, at any site or incineration vessel owned or operated by another party or entity and containing such hazardous substances, pollutants or contaminants; and

4. Any person who accepts or accepted any hazardous substance, pollutant or contaminant for transport to disposal or treatment facilities, or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, pollutant or contaminant.

B. Standard of Liability

Persons liable under this act shall be strictly liable. Liability shall be joint and several.

C. Indemnification

1. No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from the owner or operator of any site or vessel or from any person who may be liable for a release or threat of release under this Section to any other person the liability imposed pursuant to this Section. Nothing in this Subsection shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this Section.

2. Nothing in this Act, including the provisions of Paragraph (1) of this Subsection, shall bar a cause of action that an owner or operator or any other person subject to liability under this Section, or a guarantor, has or would have, by reason of subrogation or otherwise against any person.

D. Impacts from Federal Sites

The Director may request the USEPA Regional Administrator to enforce provisions of federal law against federal sites releasing or threatening to release any hazardous substance, pollutant or contaminant within the Navajo Nation. In addition, the Director may apply requirements concerning removal and remedial actions under this Act to federal sites that are not included on the National Priorities List, provided that such requirements are not more stringent than requirements applicable to non-federal sites.

History

CF-07-08, February 26, 2008.

§ 2502. Defenses to liability and limitations on liability

A. Defenses to Liability

There shall be no liability under § 2501(A) of this Act for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance, pollutant or contaminant and the damages resulting therefrom were caused solely by:

1. An act of God;

2. An act of war;

3. An act or omission of a third party other than an employee or agent of the defendant or one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published fee and acceptance for transport by a common carrier by rail);

4. An act or omission of a third party other than the defendant where:

a. The defendant would otherwise be liable as a current or former owner, and the real property at which the site concerned is located was acquired by the defendant after the disposal or placement of the hazardous substance, pollutant or contaminant on, in or at the site, and one or more of the circumstances described in Clauses (1), (2), or (3) is also established by the defendant by a preponderance of the evidence:

(1) At the time the defendant acquired the site the defendant did not know and had no reason to know that any hazardous substance, pollutant or contaminant which is the subject of the release or threatened release was disposed of on, in, or at the site.

(2) The defendant is a government entity which acquired the site by escheat, or through any other involuntary transfer or acquisition, or through the exercise of eminent domain authority by purchase or condemnation.

(3) The defendant acquired the site by inheritance or bequest.

b. To establish that the defendant had no reason to know, as provided in clause (1) of Subparagraph (a) of this Paragraph, the defendant must have undertaken, at time of acquisition, all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability. For purposes of the preceding sentence the court shall take into account any specialized knowledge or experience on the part of the defendant, the relationship of the purchase price to the value of property if uncontaminated, commonly known or reasonably ascertainable information about the property, the obviousness of the presence or likely presence of contamination at the property, and the ability to detect such contamination by appropriate inspection.

c. Nothing in this Paragraph shall diminish the liability of any previous owner or operator of such site who would otherwise be liable under this Act. Notwithstanding this Paragraph, if the defendant obtained actual knowledge of the release or threatened release of a hazardous substance, pollutant or contaminant at such site when the defendant owned the real property and then subsequently transferred ownership of the property to another person without disclosing such knowledge, such defendant shall be treated as liable under § 2501(A)(1) and no defense

under § 2502(A) shall be available to such defendant.

d. Nothing in this Paragraph (4) shall affect the liability under this Act of a defendant who, by any act or omission, caused or contributed to the release or threatened release of a hazardous substance, pollutant or contaminant which is the subject of the action relating to the site;

5. In order for a defendant to establish a defense under Paragraphs (3) or (4), the defendant must also establish by a preponderance of the evidence that:

a. He or she exercised due care with respect to the hazardous substances, pollutants or contaminants concerned, taking into consideration the characteristics of such hazardous substances, pollutants or contaminants, in light of all relevant facts and circumstances; and

b. He or she took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions;

6. Any combination of Paragraphs (1)-(4) above.

B. Limitations on Liability

1. Limitation on liability of the Navajo Nation

a. In no event shall the Navajo Nation be liable based solely on its ownership of a site or its status as a lessor or the grantor of any land use interest, including but not limited to rights-of-way, easements, and land use permits.

b. The Navajo Nation shall not be liable for the costs and damages provided in § 2503 or for any expenditure for compliance with administrative or judicial orders issued pursuant to § 2403 unless the Navajo Nation Council has specifically appropriated funds for such costs, damages, or compliance. The failure of the Navajo Nation Council to appropriate such funds may not be relied upon as a defense by any other responsible party.

c. The limitations on liability of the Navajo Nation provided in this Subsection shall not apply to enterprises or companies owned, operated, or otherwise affiliated with the Navajo Nation.

2. Rendering care or advice

a. Except as provided in Subparagraph (B), no person shall be liable under this Subchapter for costs or damages as a result of actions taken or omitted in the course of rendering care, assistance, or advice in accordance with the Navajo Nation Contingency Plan or at the direction of a federal on-scene coordinator or a site coordinator appointed under the Navajo Nation Contingency Plan with respect to any releases or threatened releases of a hazardous substance, pollutant or contaminant

creating a danger to public health, welfare or the environment. This Paragraph shall not preclude liability for costs or damages as the result of negligence on the part of such person.

b. Neither the Navajo Nation nor the Chapter governments shall be liable under this Act for costs or damages as a result of actions taken in response to an emergency created by the release or threatened release of a hazardous substance, pollutant or contaminant generated by or from a site owned by another person. This Paragraph shall not preclude liability for costs or damages as a result of gross negligence or intentional misconduct by the tribal or local government. For the purpose of the preceding sentence, reckless, willful, or wanton misconduct shall constitute gross negligence.

c. Savings provision

This Subsection shall not alter the liability of any person covered by the provisions of § 2501(A) of this Act with respect to the release or threatened release concerned.

3. Application of a registered pesticide product

No person may recover under the authority of this Section for any response costs or damages resulting from the application of a pesticide product by a licensed applicator under the Navajo Nation Pesticide Act, 4 N.N.C. § 301 *et seq.*, or registered under the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136 *et seq.* Nothing in this Paragraph shall affect or modify in any way the obligations or liability of any person under any other provision of tribal or federal law, including common law, for damages, injury, or loss resulting from a release of any hazardous substances, pollutants or contaminants or for removal or remedial action or the costs of removal or remedial action of such hazardous substances, pollutants or contaminants.

4. Obligation or liability pursuant to permitted release

Recovery by any person (including the Navajo Nation) for response costs or damages resulting from a federally or tribally permitted release shall be pursuant to existing law in lieu of this Section. Nothing in this Paragraph shall affect or modify in any way the obligations or liability of any person under any other provision of tribal or federal law, including common law, for damages, injury, or loss resulting from a release of any hazardous substance, pollutant or contaminant for removal or remedial action or the costs of removal or remedial action of such hazardous substance, pollutant or contaminant.

History

CF-07-08, February 26, 2008.

§ 2503. Costs and damages

A. Costs and damages

The persons identified in § 2501(A) shall be liable to the Navajo Nation for:

1. All response costs incurred by the Navajo Nation that are not inconsistent with the Navajo Nation Contingency Plan;

2. Damages for injury to, destruction of, or loss of natural and/or cultural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release;

3. The costs of any health assessment or health effects study carried out under this Act or regulations promulgated hereunder;

4. The costs of constructing and maintaining physical controls to site access, for purposes of public safety and the safety of livestock; and

5. Interest on the amounts recoverable under Paragraphs (1) through (4). Such interest shall accrue from the later of:

a. The date that payment of a specified amount is demanded in writing; or

b. The date of the expenditure concerned.

The rate of interest on the outstanding unpaid balance of the amounts recoverable under this Section shall be the same rate as is specified for interest on recoverable amounts under 42 U.S.C. § 9607. For purposes of applying § 9607 to interest under this Paragraph, the term "comparable maturity" shall be determined with reference to the date on which interest accruing under this Paragraph commences.

B. Lien

1. In general

All costs and damages for which a person is liable to the Navajo Nation under § 2501(A) of this Act shall constitute a lien in favor of the Navajo Nation upon all real property and rights to such property which:

a. Belong to such person; and

b. Are subject to or affected by a removal or remedial action.

2. Duration

The lien imposed by this Subsection shall arise at the later of the following:

a. The time that costs are first incurred by the Navajo Nation with respect to a response action under this Act.

b. The time that the person referred to in Paragraph (1) is provided (by certified or registered mail) with written notice of potential liability.

Such lien shall continue until the liability for the costs (or a judgment against the person arising out of such liability) is satisfied or becomes unenforceable through the operation of any Navajo Nation statute of limitations.

3. Notice and validity

The lien imposed by this Subsection shall be subject to the rights of any purchaser, holder of a security interest, or judgment lien creditor whose interest is perfected under applicable law before notice of the lien has been filed in the appropriate office within the state (or county or other governmental subdivision), as designated by applicable law, in which the real property subject to the lien is located. Any such purchaser, holder of a security interest, or judgment lien creditor shall be afforded the same protections against the lien imposed by this Subsection as are afforded under applicable law against a judgment lien which arises out of an unsecured obligation and which arises as of the time of the filing of the notice of the lien imposed by this Subsection. The notice shall be filed in the tribal court with jurisdiction for where the real property is located. For purposes of this Subsection, the terms "purchaser" and "security interest" shall have the definitions provided under 26 U.S.C. § 6323(h).

4. Action in rem

The costs constituting the lien may be recovered in an action in rem in the tribal court with jurisdiction over property in which the removal or remedial action is occurring or has occurred. Nothing in this Subsection shall affect the right of the Navajo Nation to bring an action against any person to recover all costs and damages for which such person is liable under § 2501(A) of this Act.

C. Natural and Cultural Resources Liability

1. Natural and cultural resources liability

In the case of an injury to, destruction of, or loss of natural or cultural resources under Subsection (A)(2) of this Section, liability shall be to the Navajo Nation for natural and cultural resources within the jurisdiction of the Navajo Nation or belonging to, managed by, controlled by, or appertaining to the Navajo Nation or held in trust for the benefit of the Nation, or belonging to a member of the Nation if such resources are subject to a trust restriction on alienation: Provided, however, that no liability to the Navajo Nation shall be imposed under Subsection (A)(2) where the party sought to be charged has demonstrated that the damages to natural or cultural resources complained of were specifically identified as an irreversible and irretrievable commitment of resources in an environmental impact statement, or other comparable environment analyses, and the decision to grant a permit or license

authorizes such commitment of natural or cultural resources, and the site or project was otherwise operating within the terms of its permit or license, so long as, in the case of damages occurring pursuant to a federal permit or license, the issuance of that permit or license was not inconsistent with the fiduciary duty of the United States with respect to the Navajo Nation. The President, or his designee, shall act on behalf of the public as trustee of such natural or cultural resources to recover for such damages. Sums recovered shall be retained by the trustee, without further appropriation, for use only to restore, replace, or acquire the equivalent of such natural or cultural resources. The measure of damages in any action under § 2501 shall not be limited by the sums which can be used to restore or replace such resources. There shall be no double recovery under this Act for natural or cultural resource damages, including the costs of damage assessment or restoration, rehabilitation, or acquisition for the same release and natural or cultural resource.

2. Designation of Navajo Nation officials

a. The President may designate the Navajo Nation official(s) who shall act on behalf of the public as trustees for natural resources and trustees for cultural resources under this Act. Such officials shall assess damages for injury to, destruction of, or loss of natural resources for purposes of this Act for those resources under their trusteeship.

b. Any determination or assessment of damages to natural and cultural resources for the purposes of this Act made by the appropriate Tribal trustees in accordance with promulgated regulations or made by a federal trustee pursuant to CERCLA shall have the force and effect of a rebuttable presumption on behalf of the trustee in any administrative or judicial proceeding under this Act.

D. Contribution

Any person may seek contribution in tribal court from any other person who is liable or potentially liable under § 2501(A), during or following any action brought under this Act. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this Subsection shall diminish the right of any person to bring an action for contribution in the absence of an action being brought under this Act.

E. Limitation Period

The limitation period for bringing actions under this Section shall be the same as that specified in 42 U.S.C. § 9613(g), subject to the same conditions as specified therein (as modified to pertain to this Act).

History

CF-07-08, February 26, 2008.

§ 2504. Settlements

A. Authority to Enter into Agreements

1. The Director, in his or her discretion, may enter into an agreement with any person (including the owner or operator of the site from which a release or substantial threat of release emanates, or any other potentially responsible person), to perform any investigation or response action if the Director determines that such investigation or response action will be done properly by such person. Whenever practicable and in the public interest, as determined by the Director, the Director may act to facilitate agreements under this Section that are in the public interest and consistent with the Navajo Nation Contingency Plan in order to expedite effective response actions and minimize litigation. If the Director decides not to use the procedures in this Section, the Director shall notify in writing potentially responsible parties at the site of such decision and the reasons why use of the procedures is inappropriate. A decision of the Director to use or not to use the procedures in this Section is not subject to judicial review.

2. Whenever the Director enters into an agreement under this Act with any potentially responsible party with respect to an action under this Act, the Director shall issue an order or enter into a decree setting forth the obligations of such party. The Navajo Nation Courts may enforce such order or decree. In addition, the President of the Navajo Nation, in his discretion, may request that the Navajo Nation Attorney General petition any federal or state court of competent jurisdiction to enforce such order or decree.

3. Any agreement for the conduct of an investigation or response action under this Section shall provide that the party reimburse the Hazardous Substances Fund for any cost incurred by the Director under, or in connection with, the oversight contract, arrangement or agreement. Reimbursement of oversight costs shall be under such terms and conditions as the Director may prescribe. The Director may contract with or arrange for a qualified person to assist the Director in overseeing and reviewing the data, documents, responsible party conduct, progress of the response action, and other related matters of such investigation or response action.

4. In no event shall a potentially responsible party be subject to a lesser standard of liability, receive preferential treatment, or in any other way, whether direct or indirect, benefit from any such arrangement as a response action contractor, or as a person hired or retained by such a response action contractor, with respect to the release or site in question. The Director shall give primary attention to those releases which the Director deems may present a public health threat.

5. If, as part of any agreement, the Director will be carrying out any action and the parties will be paying amounts to the Director, the Director may, notwithstanding any other provision of law, retain and use such amounts for purposes of carrying out the agreement.

6. The Director need not make any finding regarding an imminent and substantial endangerment to the public health or the environment in

connection with any such agreement.

B. Special Notice Procedures

1. Notice

Whenever the Director determines that a period of negotiation under this Subsection would facilitate an agreement with potentially responsible parties for taking response action and would expedite remedial action, the Director shall so notify all such known parties and shall provide them with information concerning each of the following:

a. The names and addresses of potentially responsible parties, to the extent such information is available.

b. The volume and nature of substances contributed by each potentially responsible party identified at the site, to the extent that such information is available.

c. A ranking by volume of the substances at the site, to the extent such information is available.

The Director may make the information referred to in this Paragraph available in advance of notice under this Paragraph upon the request of a potentially responsible party in accordance with procedures and guidance to be developed by the Director. The provisions regarding protection of confidential information apply to information provided under this Paragraph. Disclosure of information generated by the Director under this Section is subject to other privileges or protections provided by law, including (but not limited to) those applicable to attorney work product. Nothing contained in this Paragraph or in other provisions of this Subchapter shall be construed, interpreted, or applied to diminish the required disclosure of information under other provisions of this Act.

2. Negotiation

a. Proposals

Persons receiving notice and information under Paragraph (1) of this Subsection with respect to action for imminent and substantial endangerment under this Act shall have 60 days from the date of receipt of such notice to make a proposal to the Director for undertaking or financing the action under § 2403 of this Act. Persons receiving notice and information under Paragraph (1) of this Subsection with respect to action under response authorities of this Act shall have 60 days from the postmark of such notice to make a proposal to the Director for undertaking or financing the response action under § 2401 of this Act.

b. Additional parties

If another potentially responsible party is identified during the negotiation period or after an agreement has been entered into under this Subsection concerning a release or threatened release, the Director may bring the additional party into the negotiation or enter into a

separate agreement with such party.

3. Preliminary allocation of responsibility

a. In general

The Director may develop guidelines for preparing non-binding preliminary allocations of responsibility. In developing these guidelines the Director may include such relevant factors as: volume, toxicity, mobility, strength of evidence, ability to pay, litigative risks, public interest considerations, precedential value, and inequities and aggravating factors. When it would expedite settlements under this Section and remedial action, the Director may, after completion of the remedial investigation and feasibility study, provide a non-binding preliminary allocation of responsibility which allocates percentages of the total cost of response among potentially responsible parties at the site.

b. Collection of information

To collect information necessary or appropriate for performing the allocation under Subparagraph (A) or for otherwise implementing this Section, the Director may by subpoena require the attendance and testimony of witnesses and the production of reports, papers, documents, answers to questions, and other information that the Director deems necessary. Witnesses shall be paid the same fees and mileage as are paid other witnesses in the courts of the Navajo Nation. In the event of contumacy or failure or refusal of any person to obey any such subpoena, any Navajo Nation court in which venue is proper shall have jurisdiction to order such person to comply with such subpoena. Any failure to obey such an order of the court is punishable by the court as contempt.

c. Effect

The non-binding preliminary allocation of responsibility shall not be admissible as evidence in any proceeding, and no court shall have jurisdiction to review the non-binding preliminary allocation of responsibility. The non-binding preliminary allocation of responsibility shall not constitute an apportionment or other statement on the divisibility of harm or causation.

d. Costs

The costs incurred by the Director in producing the non-binding preliminary allocation of responsibility shall be reimbursed by the potentially responsible parties whose offer is accepted by the Director. Where an offer under this Section is not accepted, such costs shall be considered costs of response.

e. Decision to reject offer

Where the Director, in his discretion, has provided a non-binding preliminary allocation of responsibility and the potentially

responsible parties have made a substantial offer providing for response to the Director which he or she rejects, the reasons for the rejection shall be provided in a written explanation. The Director's decision to reject such an offer shall not be subject to judicial review.

4. Failure to propose

If the Director determines that a good faith proposal for undertaking or financing action under § 2403 has not been submitted within 60 days of the provision of notice pursuant to this Subsection, the Director may take an action against any person under this Act.

5. Significant threats

Nothing in this Subsection shall limit the Director's authority to undertake response or enforcement action regarding a significant threat to public health or the environment within the negotiation period established by this Subsection.

C. Liability and Covenants

1. Liability

Whenever the Director has entered into an agreement under this Section or the voluntary cleanup program under § 2402, the liability to the Navajo Nation under this Act of each party to the agreement, including any future liability to the Navajo Nation, arising from the release or threatened release that is the subject of the agreement shall be limited as provided in the agreement pursuant to a covenant not to sue in accordance with Paragraph (2) of this Subsection. A covenant not to sue may provide that future liability to the Navajo Nation of a settling potentially responsible party under the agreement may be limited to the same proportion as that established in the original settlement agreement. Nothing in this Section shall limit or otherwise affect the authority of any court to review in the consent decree process under Subsection (E) of this Section any covenant not to sue contained in an agreement under this Section. In determining the extent to which the liability of parties to an agreement shall be limited pursuant to a covenant not to sue, the Director may be guided by the principle that a more complete covenant not to sue could be provided for a more permanent remedy undertaken by such parties.

2. Discretionary covenants

The Director may, in his or her discretion, provide any person with a covenant not to sue concerning any liability to the Navajo Nation under this Act, including future liability, resulting from a release or threatened release of a hazardous substance, pollutant or contaminant addressed by a response action, whether that action is onsite or offsite, if each of the following conditions is met:

- a. The covenant not to sue is in the public interest;
- b. The covenant not to sue would expedite response action

consistent with the purposes of this Act;

c. The person is in full compliance with a consent decree entered into under this Act for response to the release or threatened release concerned; and

d. The response action has been approved by the Director.

3. Special covenants not to sue

In the case of any person to whom the Director is authorized under Paragraph (2) of this Subsection to provide a covenant not to sue, for the portion of investigation or response action:

a. Which involves the transport and secure disposition offsite of hazardous substances, pollutants or contaminants at a site meeting the Navajo Nation disposal requirements, where the Director has rejected a proposed response action that does not include such offsite disposition and has thereafter required offsite disposition; or

b. Which involves the treatment of hazardous substances, pollutants or contaminants so as to destroy, eliminate, or permanently immobilize the hazardous constituents of such substances, such that, in the judgment of the Director, the substances no longer present any current or future significant risk to public health,

c. Welfare or the environment, no byproduct of the treatment or destruction process presents any significant hazard to public health, welfare or the environment, and all byproducts are themselves treated, destroyed, or contained in a manner which assures that such byproducts do not present any current or foreseeable future significant risk to public health, welfare or the environment,

The Director shall provide such person with a covenant not to sue with respect to future liability to the Navajo Nation under this Act for a future release or threatened release of hazardous substances, pollutants or contaminants from such site, and a person provided such covenant not to sue shall not be liable to the Navajo Nation under this Act with respect to such release or threatened release at a future time.

4. Requirement that action be completed

A covenant not to sue concerning future liability to the Navajo Nation shall not take effect until the Director certifies that the action which is the subject of the agreement has been completed in accordance with the requirements of this Act at the site that is the subject of such covenant.

5. Factors

In assessing the appropriateness of a covenant not to sue under Paragraph (2) and any condition to be included in a covenant not to sue under Paragraph (2) or (3), the Director may consider whether the covenant or condition is in the public interest on the basis of such

factors as the following:

a. The effectiveness and reliability of the remedy, in light of the other alternative remedies considered for the site concerned.

b. The nature of the risks remaining at the site.

c. The extent to which performance standards are included in the order or decree.

d. The extent to which the response action provides a complete remedy for the site, including a reduction in the hazardous nature of the substances, as well as the remediation byproducts at the site.

e. The extent to which the technology used in the response action is demonstrated to be effective.

f. Whether the Hazardous Substances Fund or other sources of funding would be available for any additional remedial actions that might eventually be necessary at the site.

g. Whether the remedial action will be carried out, in whole or in significant part, by the responsible parties themselves.

6. Satisfactory performance

Any covenant not to sue under this Subsection shall be subject to the satisfactory performance by the party concerned of its obligations under the agreement concerned.

7. Additional condition for future liability

a. Except for the portion of the remedial action which is subject to a covenant not to sue under Paragraph (3) or under § 2505 (relating to de minimis settlements), a covenant not to sue a person concerning future liability to the Navajo Nation shall include an exception to the covenant that allows the Director to sue such person concerning future liability resulting from the release or threatened release that is the subject of the covenant where such liability arises out of conditions which are unknown at the time the Director certified under Paragraph (4) that the investigation or response action has been completed at the site concerned.

b. In extraordinary circumstances, the Director may determine, after assessment of relevant factors such as those referred to in Paragraph (5) and volume, toxicity, mobility, strength of evidence, ability to pay, litigative risks, public interest considerations, precedential value, and inequities and aggravating factors, not to include the exception referred to in Subparagraph (A) if other terms, conditions, or requirements of the agreement containing the covenant not to sue are sufficient to provide all reasonable assurances that public health and the environment will be protected from any future releases at or from the site.

c. The Director is authorized to include any provisions allowing future enforcement action under this Act that in the discretion of the Director are necessary and appropriate to assure protection of public health, welfare and the environment.

D. Actions Against Other Persons

If an agreement has been entered into under this Section, the Director may take any action under this Act against any person who is not a party to the agreement, once the period for submitting a proposal under Subsection (B) of this Section has expired. Nothing in this Section shall be construed to affect either of the following:

1. The liability of any person under this Act with respect to any costs or damages which are not included in the agreement.

2. The authority of the Director to maintain an action under this Act against any person who is not a party to the agreement.

E. Consent Decrees

1. Remedial action

Whenever the Director enters into an agreement under this Section with any potentially responsible party with respect to remedial action under this Act, following approval of the agreement by the Attorney General, except as otherwise provided in the case of certain administrative settlements referred to in §§ 2505 and 2506 of this Act, the agreement shall be entered in Navajo Nation court as a consent decree.

2. Effect

The entry of any consent decree under this Subsection shall not be construed to be an acknowledgment by the parties that the release or threatened release concerned constitutes an imminent and substantial endangerment to the public health, welfare or the environment.

3. Structure

The Director may fashion a consent decree so that the entering of such decree and compliance with such decree or with any determination or agreement made pursuant to this Section shall not be considered an admission of liability for any purpose.

4. Public participation

a. Filing of proposed judgment

At least 30 days before a final judgment is entered under Paragraph (1), the proposed judgment shall be filed with the Navajo Nation court.

b. Opportunity for comment

The Attorney General of the Navajo Nation shall provide an opportunity to persons who are not named as parties to the action to comment on the proposed judgment before its entry by the court as a final judgment. The Attorney General shall consider, and file with the court, any written comments, views, or allegations relating to the proposed judgment. The Attorney General may withdraw or withhold its consent to the proposed judgment if the comments, views, and allegations concerning the judgment disclose facts or considerations which indicate that the proposed judgment is inappropriate, improper, or inadequate.

History

CF-07-08, February 26, 2008.

§ 2505. De minimis settlements

A. De Minimis Settlements

1. Expedited final settlement

Whenever practicable and in the public interest, as determined by the Director, the Director shall as promptly as possible reach a final settlement with a potentially responsible party in an administrative or civil action under this Act if such settlement involves only a minor portion of the response costs at the site concerned and, in the judgment of the Director, the conditions in any one of the following Subparagraphs (a), (b) or (c) are met:

a. Both of the following are minimal in comparison to other hazardous substances, pollutants or contaminants at the site:

(1) The amount of the hazardous substances, pollutants or contaminants contributed by that party to the site.

(2) The toxic or other hazardous effects of the substances contributed by that party to the site.

b. The potentially responsible party:

(1) Is the owner of the real property at which the site is located;

(2) Did not conduct or permit the generation, transportation, storage, treatment, or disposal of any hazardous substance, pollutant or contaminant at the site; and

(3) Did not contribute to the release or threat of release of a hazardous substance, pollutant or contaminant at the site through any action or omission.

This Subparagraph (b) does not apply if the potentially

responsible party purchased the real property with actual or constructive knowledge that the property was used for the generation, transportation, storage, treatment, or disposal of any hazardous substance, pollutant or contaminant.

c. The potentially responsible party is a Navajo Chapter or other division of government undertaking household refuse collection or the benefit of its constituency.

B. Covenant Not to Sue

The Director may provide a covenant not to sue with respect to the site concerned to any party who has entered into a settlement under this Section unless such a covenant would be inconsistent with the public interest as determined under § 2504(C)(5).

C. Expedited Agreement

The Director shall reach any such settlement or grant any such covenant not to sue as soon as possible after the Director has available the information necessary to reach such a settlement or grant such a covenant.

D. Consent Decree or Administrative Order

A settlement under this Section shall be entered as a consent decree or embodied in an administrative order setting forth the terms of the settlement. In the case of any site where the total response costs exceed five hundred thousand dollars (\$500,000) (excluding interest), if the settlement is embodied as an administrative order, the order may be issued only with the prior written approval of the Attorney General. If the Attorney General or his designee has not approved or disapproved the order within 30 days of this referral, the order shall be deemed to be approved unless the Attorney General and the Director have agreed to extend the time. Such administrative order may be enforced in Navajo Nation court.

E. Effect of Agreement

A party who has resolved its liability to the Navajo Nation under this Section shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially responsible parties unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

F. Settlements with Other Potentially Responsible Parties

Nothing in this Section shall be construed to affect the authority of the Director to reach settlements with other potentially responsible parties under this Act.

History

CF-07-08, February 26, 2008.

§ 2506. Cost recovery settlement authority

A. Use of Arbitration

The Director may elect to use arbitration in accordance with the Navajo Nation Arbitration Act as a method of settling claims of the Navajo Nation where the total response costs for the site concerned do not exceed five hundred thousand dollars (\$500,000) (excluding interest).

B. Recovery of Claims

If any person fails to pay a claim that has been settled under this Section, the Director shall request the Attorney General to bring a civil action in the appropriate Navajo Nation court to recover the amount of such claim, plus costs, attorney's fees, and interest from the date of the settlement. In such an action, the terms of the settlement shall not be subject to review.

C. Claims for Contribution

A person who has resolved his liability to the Navajo Nation under this Section shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement shall not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

History

CF-07-08, February 26, 2008.

Cross Reference

Navajo Nation Arbitration Act, 7 N.N.C. § 1101 *et seq.*

§ 2507. Settlement procedures

A. Publication

At least 30 days before any settlement (including any settlement arrived at through arbitration) may become final under § 2504 or § 2505, the Director shall publish in a local newspaper notice of the proposed settlement for a minimum of three consecutive publications. The notice shall identify the site concerned and the parties to the proposed settlement.

B. Comment Period

For a 30-day period beginning on the first date of publication of notice under Subsection (A) of this Section of a proposed settlement, the Director shall provide an opportunity for persons who are not parties to the proposed settlement to file written comments relating to the proposed settlement.

C. Consideration of Comments

The Director shall consider any comments filed under Subsection (B) in determining whether or not to consent to the proposed settlement and may withdraw or withhold consent to the proposed settlement if such comments disclose facts or considerations which indicate the proposed settlement is inappropriate, improper, or inadequate.

History

CF-07-08, February 26, 2008.

§ 2508. Settlement of natural and cultural resources claims

A. Notification of Trustee

Where a release or threatened release of any hazardous substance, pollutant or contaminant that is the subject of negotiations under this Subchapter may have resulted in damages to natural resources or cultural resources under the trusteeship of the Navajo Nation, the Director shall notify the Resources Committee of the Navajo Nation Council, the Navajo Nation Resource Trustee and the Federal Trustee for the resource of the negotiations and shall encourage the participation of such trustee(s) in the negotiations.

B. Covenant Not to Sue

An agreement under this Section may contain a covenant not to sue for damages to natural and cultural resources under the trusteeship of the Navajo Nation resulting from the release or threatened release of hazardous substances, pollutants or contaminants that is the subject of the agreement, but only if the Resources Committee of the Navajo Nation Council and the Navajo Nation Resource Trustee have agreed by resolution to such covenant. The Resources Committee of the Navajo Nation Council and the Navajo Nation Resource Trustee may agree to such covenant if the potentially responsible party agrees to undertake appropriate actions necessary to protect and restore the natural and cultural resources damaged by such release or threatened release of hazardous substances, pollutants or contaminants.

History

CF-07-08, February 26, 2008.

§ 2509. Judicial enforcement

A. Civil Judicial Enforcement

The Director shall request the Attorney General to file an action for a temporary restraining order, a preliminary injunction, a permanent injunction or any other relief provided by law, including the assessment and recovery of civil penalties in a maximum amount per day per violation of not less than ten thousand dollars (\$10,000) but not to exceed twenty-five thousand dollars (\$25,000), in any of the following instances:

1. Whenever a person has violated, or is in violation of, any

provision, requirement or prohibition of this Act, including, but not limited to, a regulation or order issued pursuant to this Act;

2. Whenever a person has violated, or is in violation of, any duty to allow or carry out entry, assessment, inspection, sampling, monitoring, or other duty required by the Director;

3. Whenever a person is creating an imminent and substantial endangerment to the public health or the environment because of a release or a threatened release, in which case the Director shall request the Attorney General to pursue injunctive relief, but not the assessment of penalties, unless the endangerment to the public health is caused by a violation, as specified in Paragraphs (1) and (2).

B. Calculation of Penalties

1. For purposes of determining the number of days of violation for which a civil penalty may be assessed under this Section, if the Director has notified, in writing, the source of the violation and the Director, or plaintiff, makes a prima facie showing that the conduct or events giving rise to the violation are likely to have continued or recurred past the date of notice, the days of violation shall be presumed to include the date of such notice and each day thereafter, until the violator can prove by a preponderance of the evidence that there were intervening days during which no violation occurred or that the violation was not continuing in nature. Notice under this Section shall be accomplished by an issuance of a written notice of violation or written order to comply or by filing a complaint in the Navajo Nation District Court in Window Rock, Arizona, that alleges any violation described in Subsection (A) of this Section.

2. In determining the amount of a civil penalty assessed under this Section, the court shall consider the history, seriousness and duration of the violation; any good faith efforts to comply with the applicable requirement; the violator's full compliance history, including the severity and duration of past violations; if any, the economic impact of the penalty on the violator; as an aggravating factor only, the economic benefit; if any, resulting from the violation; and any other factors that the court deems relevant.

3. All penalties collected pursuant to this Section shall be deposited in the Hazardous Substances Fund.

C. Damages for Non-Compliance with Orders

1. If any person identified in § 2501(A) fails without sufficient cause to properly provide response action upon order of the President pursuant to this Act, such person may be liable to the Navajo Nation for punitive damages in an amount at least equal to, and not more than three times, the amount of any costs incurred by the Hazardous Substances Fund as a result of such failure to take proper action. The President is authorized to commence a civil action against any such person pursuant to § 2501.

2. Any person who, without sufficient cause, violates, or fails or refuses to comply with, any order of the Director under Subsection (A) of this Section or Subsections (A) or (B) of § 2403, may in an action brought in Navajo Nation court to enforce such order, be fined not more than twenty-five thousand dollars (\$25,000) for each day in which such violation occurs or such failure to comply continues. This fine may be in addition to any punitive damages assessed in a cost recovery action under § 2501.

D. Criminal Penalties

Any person who intentionally or knowingly:

1. Violates any provision, requirement or prohibition of this Act, including but not limited to a regulation pursuant to this Act or order issued under this Act;

2. Makes any false material statement, representation or certification in, or omits material information from, or alters, conceals or fails to file or maintain any notice, record, report, or other requirement under this Act; or

3. Falsifies, tampers with, renders inaccurate or fails to install any monitoring device or method required to be maintained or followed under this Act;

Shall upon conviction, be punished by a fine in a maximum amount of not more than five thousand dollars (\$5,000) per day per violation. In any instance where the Navajo Nation lacks jurisdiction over the person charged, or where the Director is limited in the amount of the fine that he/she may impose, the Director may refer the action to the appropriate EPA Regional Administrator pursuant to this Act. For the purposes of this Subsection, the term person includes, in addition to the entities referred to in § 2104(Z) of this Act, any responsible corporate officer.

E. Jurisdiction and Venue

Any action under this Section shall be brought in the Navajo Nation District Court in Window Rock, and such court shall have jurisdiction to restrain such violation, require compliance, assess civil and criminal penalties up to the amounts provided in this Section, collect any fees or noncompliance penalties owed the Nation under this Act, and award any other appropriate relief.

F. Security

The court may, if a temporary restraining order or preliminary injunction is sought under this Act, require filing of a bond or equivalent security.

History

CF-07-08, February 26, 2008.

Note. Reference to § 2104(A) (25) for the definition of "person" at Subsection D

was changed to § 2104(Z) to reflect format changes.

§ 2510. Administrative assessment of penalties

A. Basis for Penalty

The Director may issue against any person an administrative order assessing a civil administrative penalty of up to ten thousand dollars (\$10,000) per day per violation whenever the Director finds that a person has violated, or is in violation of, any provision, requirement or prohibition of this Act, including, but not limited to, a regulation or order issued pursuant to this Act. The Director's authority under this Subsection shall be limited to matters where the total penalty sought does not exceed one hundred thousand dollars (\$100,000) and the first alleged date of violation occurred no more than one year prior to the initiation of administrative action, except where the Director and Attorney General jointly determine that a matter involving a larger penalty or longer period of violation is appropriate for administrative penalty action. The communications required to make such a joint determination and the method(s) utilized for making such a joint determination shall be privileged, and shall not be subject to judicial review. The Director may compromise, modify, or remit, with or without any conditions, any administrative penalty imposed under this Section.

B. Hearing Requirement

The Director shall assess an administrative penalty under this Section by an order made after an opportunity for a hearing, as provided in the Uniform Regulations. Before issuing such an order, the Director shall issue a proposed order to the person on whom the penalty is to be assessed and provide that person with an opportunity to request a hearing in writing within 30 days of the issuance of the proposed order. The hearing shall be conducted pursuant to the Uniform Regulations. The order shall become final immediately upon the expiration of the 30 days if no hearing is requested and, if a timely request for a hearing is made, upon the decision of the Director.

C. Calculation of Penalty

In determining the amount of any penalty to be assessed under this Section, the Director or the court, as appropriate, shall take into account the factors enumerated in § 2509(B)(2) of this Act.

D. Judicial Review

Any person subject to a penalty under this Subsection may seek review of such penalty assessment in the Navajo Nation District Court in Window Rock, AZ, by filing a petition for review in such court within 30 days following the date that the penalty becomes final and by simultaneously sending a copy of such filing by certified mail to the Director and the Attorney General. A notice of intent to challenge such penalty assessment, otherwise required by the Navajo Sovereign Immunity Act, 1 N.N.C. § 351 et seq., is not required. Within 30 days thereafter, the Director shall file in such court a certified copy or certified index of the record on which the penalty was based. The court shall not set aside or remand an order or assessment under this Section unless the record,

taken as a whole, does not substantially support the finding of a violation or unless the order or penalty assessment constitutes an abuse of discretion. In any such proceedings, the Director may seek to recover civil penalties ordered or assessed under this Section.

History

CF-07-08, February 26, 2008.

Note. Corrected the word "be" to "by" to read, "...filing by certified mail..." in Subsection D.

§ 2511. Other enforcement actions

A. Debarment and Exclusion

Notwithstanding any other provision of this Act, any person who has failed to comply with the requirements of an order under this Act, or who has failed to pay costs or damages under this Act, may be the subject of debarment or exclusion under applicable law.

B. Inconsistent Response Action

When either the Director or a potentially responsible party pursuant to an administrative order or consent decree under this Act has initiated a remedial investigation and feasibility study or other investigation or evaluation for a particular site under this Act, no potentially responsible party may undertake any response action at the site unless such response action has been authorized by the Director. The Director may take any appropriate action, including issuing an administrative order, to enjoin such inconsistent response action.

History

CF-07-08, February 26, 2008.

Subchapter 6. Contracts, Hiring and Employee Protection

§ 2601. Minority contractors

In awarding contracts under this Act, the Director shall consider the availability of qualified Navajo firms. As part of the annual report submitted to the Navajo Nation Resources Committee under this Act, the Director shall detail the participation of Navajo firms in contracts awarded under this Act.

History

CF-07-08, February 26, 2008.

§ 2602. Contracts for response actions

In awarding contracts to any person engaged in response actions, the Director shall require contractors and subcontractors to comply with federal health and safety standards, known as OSHA standards, as a condition of such contracts.

History

CF-07-08, February 26, 2008.

Cross Reference

Navajo Nation Occupational Safety and Health Act, 15 N.N.C. § 1401 *et seq.*

§ 2603. Activities of employees subject to protection

No person shall fire or in any other way discriminate against, or cause to be fired or discriminated against, any employee or any authorized representative of employees by reason of the fact that such employee or representative has provided information to the Navajo Nation, filed, instituted, or caused to be filed or instituted any proceeding under this Act, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this Act.

History

CF-07-08, February 26, 2008.

§ 2604. Competition

The Director may adopt title IX of the Federal Property and Administrative Services Act of 1949, 40 U.S.C. § 541 *et seq.* to govern the relationship between the Navajo Nation and response action contractors and subcontractors in the areas of program management, construction management, architecture and engineering, surveying and mapping, and related services while conducting activities under this Act.

History

CF-07-08, February 26, 2008.

Subchapter 7. Funding

§ 2701. Hazardous substances fund

A. Establishment

The Director shall establish a Special Revenue Fund, called the Hazardous Substances Fund, to fund the activities of the Navajo Superfund Program in the administration, implementation and enforcement of this Act and the regulations promulgated hereunder, including to fund response actions taken under the Act when other sources of funds are not available at the time the action is taken.

B. Sources of Funding

The Hazardous Substances Fund shall contain the following:

1. All tariffs collected from transporters of hazardous substances, pursuant to § 2704;
2. Except as specified otherwise in any appropriations of the Navajo Nation Council, those amounts appropriated for the conduct of the Navajo Superfund Program;
3. All application and registration fees assessed pursuant to § 2703;
4. All fees and penalties recovered pursuant to administrative actions, citizen suits and other enforcement actions brought under this Act;
5. All response costs recovered pursuant to any cost recovery actions brought under this Act;
6. Unless funds are to be used for the purposes of carrying out a settlement agreement as provided in § 2504(A)(5) or a voluntary cleanup agreement under § 2402 of this Act, any payments made by a responsible party pursuant to a settlement agreement or voluntary cleanup agreement under this Act; and
7. Any funds received from any other sources for implementation of the Navajo Superfund Program, but not including grant funds from the United States, or other grant funds which by their terms must be maintained in a separate account;
8. Provided, that the Hazardous Substances Fund shall not contain any funds resulting from natural or cultural resource damage claims brought under this Act.

C. Uses of the Fund

1. General uses.

The monies deposited into the Hazardous Substances Fund shall be expended by the Director for the use of the Navajo Superfund Program, as provided in this Section, in accordance with the Special Revenue Fund Management Plan and pursuant to an approved budget. The Director shall report annually to the Navajo Nation Council on the sums deposited into the Fund, including the sources and uses thereof. Any monies contained in

said Fund at the end of the fiscal year shall not be transferred to the General Fund and shall remain available for appropriation as provided in this Section.

2. Limitations on use.

The Director shall expend no monies from the Hazardous Substances Fund to clean up releases at any facility owned by the federal government or the Navajo Nation or its entities (excluding tribal enterprises), any facility not subject to tariffs under this Act, or any facility that has failed to pay any tariffs owed under this Act when due. At such facilities the Director shall use the authorities provided in this Act to order corrective action to clean up such releases. Notwithstanding this Paragraph, the Director may use monies from the Fund to take the corrective actions authorized by §§ 2305 and 2401 to protect human health at such facilities and shall seek full recovery of the costs of all such action pursuant to the provisions of §§ 2501 and 2503 and without consideration of the defenses to liability in § 2502(A). Nothing in this Paragraph shall prevent the Director from taking corrective action at a facility where there is no solvent owner or operator or where immediate action is necessary to respond to an imminent and substantial endangerment of human health or the environment.

History

CF-07-08, February 26, 2008.

§ 2702. Natural and cultural resources fund

A. Establishment

The Director shall establish a fiduciary account, called the Natural and Cultural Resources Fund, which shall be used solely to restore, replace or acquire natural or cultural resources equivalent to those damaged, destroyed or otherwise lost.

B. Sources of Funding

The Natural and Cultural Resources Fund shall be comprised of all funds received from natural and cultural resource damage claims brought pursuant to this Act.

C. Uses of the Fund

The monies deposited into the Fund shall be expended by the Trustee(s) for Natural and Cultural Resources, designated pursuant to § 2503(C), for use only to restore, replace or acquire the equivalent of any natural or cultural resources that have been damaged, destroyed or otherwise lost, pursuant to the provisions of § 2503(C)(1). The Trustee(s) shall report annually, through the Director, on the sums deposited into the Fund, including the sources and uses thereof. Any monies contained in said Fund at the end of the fiscal year shall not revert to the General Fund and shall remain available for appropriation as provided in this Section.

History

CF-07-08, February 26, 2008.

§ 2703. Registration and fees

A. Applicability

All transporters of hazardous substances within the Navajo Nation shall register annually with the Navajo Nation Superfund Program on forms provided for that purpose and shall submit registration fees together with the registration forms. For purposes of this Section, § 2701, and § 2704, the term "transporter of a hazardous substance" means any person who transports a hazardous substance (as those terms are defined in § 2104) to a location within the Navajo Nation, including but not limited to transport for the purpose of importing or delivering a hazardous substance, or who transports a hazardous substance across any portion of the Navajo Nation, except the term does not include any person who delivers motor vehicle fuel, diesel fuel, or aviation fuel to an aboveground or underground storage tank within the Navajo Nation. The term also does not include the United States or the Navajo Nation.

B. Due Dates and Fees

The registration form shall be submitted by January 31 of the calendar year following enactment of this Act to cover the preceding calendar year (or portion thereof after this Act became effective), and shall be filed by January 31 of each succeeding calendar year for the previous calendar year. The registration fee shall initially be set at one hundred dollars (\$100), subject to increase by the Director by regulation.

History

CF-07-08, February 26, 2008.

§ 2704. Tariff on transporters of hazardous substances

A. Establishment of Tariff

Within one year after enactment of this Act, the Director shall impose a tariff on the transportation of hazardous substances within or across the Navajo Nation. The amount of the tariff shall be established by the Director by rulemaking, pursuant to the provisions of § 2801, and shall be levied on transporters of hazardous substances based on the quantities of hazardous substances that they are transporting, in an amount determined by the Director to be sufficient to cover program costs.

B. Rulemaking

In addition to prescribing the amount of the tariff, the rulemaking shall provide for administration of the tariff, including but not limited to establishing the periods when the tariff is due and record-keeping, reporting,

and auditing procedures to verify the accuracy of payments. The Director also may include provisions for late payment interest and penalties.

C. Additional Tariffs

The Director may, by rulemaking, establish tariffs on entities in addition to transporters that are involved with the supply, treatment, storage, or disposal of hazardous substances within the Navajo Nation, provided that the Director determines such a tariff is feasible to impose and administer and will contribute to covering program costs.

History

CF-07-08, February 26, 2008.

Subchapter 8. Rulemaking, Judicial Review and Public Participation

§ 2801. Rulemaking

A. Authority to Promulgate Regulations

The Director is authorized to prescribe such regulations as are necessary to implement and enforce this Act. This shall include, but not be limited to, regulations designating hazardous substances, determining reportable quantities, adopting maximum contamination levels and soil action-trigger levels, adopting operating guidances and procedures for the prevention, control, abatement and remediation of hazardous substances in the Nation's environment, and providing procedures for public participation and the development of administrative records. In prescribing regulations, the Director may give consideration to, but is not limited by, the provisions of the Comprehensive Environmental Response, Compensation and Liability Act and the applicable regulations thereunder.

B. Use of Federal Regulations

Until such time as the Director promulgates regulations under this Act, the Director is authorized to implement federal regulations adopted pursuant to, or referenced in CERCLA, as provided in this Section.

1. Prior to the adoption of regulations pursuant to this Section, a reportable quantity shall be the amount prescribed in 40 C.F.R. § 302.4 or one pound, if not listed in that Section, except in the case of petroleum, where the reportable quantity shall be 25 gallons for releases on land and, for releases into surface water, such quantity as violates applicable water quality standards or causes a film or sheen upon or discoloration of the surface of the water or causes a sludge or emulsion to be deposited beneath the surface of the water.

2. Prior to the promulgation of the Navajo Nation Contingency Plan pursuant to § 2503, the Director may elect to use the federal National Contingency Plan for actions which would be conducted pursuant to the Navajo Nation Contingency Plan when promulgated. In the interests of

expediting cleanup and to the extent otherwise consistent with this Act, the Director is authorized to waive specific requirements of the National Contingency Plan on a site-specific basis.

C. Rulemaking

1. Rulemakings shall be conducted pursuant to Subpart 4 of the Uniform Regulations. Notice of any proposed regulation shall be published in a newspaper of general circulation for the areas of the Navajo Nation that are concerned and shall be given orally in English and Navajo languages over local radio stations. The notice shall specify the period available for public comment and the date, time and place of any public hearing, and shall make available to the public a copy of the proposed regulation. Not later than the date of proposal of the regulation in question, the Director shall establish a rulemaking docket and shall make the docket available to the public for inspection and copying during regular business hours. The Director shall provide a comment period of at least 30 days following notice of the proposed regulation; shall allow any person to submit written comments, data or documentary information; shall in addition give interested persons an opportunity to present orally, in Navajo or English, their views, data or arguments; and shall keep the record open for at least 10 days after such proceeding to provide an opportunity for submission of rebuttal and supplementary information.

2. The final regulation shall be based on the record of the rulemaking proceeding contained in the docket, and shall be accompanied by an explanation of the reasons for any major changes from the proposed regulation and a response to each of the significant comments submitted in written or oral presentations during the comment period.

History

CF-07-08, February 26, 2008.

§ 2802. Judicial review

A. Petitions for Review

A petition for review of any final action taken by the Director under this Act, including but not limited to promulgation of regulations or standards and issuance of orders, but not including imposition of administrative penalties under § 2510, shall be brought in the Navajo Nation Supreme Court. The petition shall be filed within 60 days from the date the final action is first published, or if the notice is not published, first served on the potentially responsible party or such other person required to be served under this Act, except if the petition is based solely on grounds arising after the sixtieth day, then the petition shall be filed within 60 days after such grounds arise. The date of adoption of any regulation promulgated pursuant to this Act shall be the date of its approval by the Resources Committee of the Navajo Nation Council. The Navajo Nation Supreme Court, in reviewing the final action, shall limit its review to the issues and evidence that were before the Director at the time of the final action from which the appeal is taken.

B. Limitations on Review

1. If judicial review of a final action of the Director could have been obtained under Subsection (A) of this Section, that action shall not be subject to judicial review in judicial proceedings for enforcement.

2. With respect to any regulations promulgated under this Act, only an objection that was raised with reasonable specificity during the public comment period may be raised during judicial review. If the person raising an objection can demonstrate to the Director that it was impracticable to raise the objection within such time, or if the grounds for the objection arose after the public comment period (but within the time specified for judicial review), and if the objection is of central relevance to the outcome of the regulation, the Director may convene a proceeding for the reconsideration of the regulation and provide the same procedural rights as would have been afforded had the information been available at the time the regulation was proposed. If the Director refuses to convene such a proceeding, the person may seek review of such refusal in the Navajo Nation Supreme Court. Such reconsideration shall not postpone the effectiveness of the regulation, although it may be stayed by the Director or the Court for up to three months.

3. Except as otherwise expressly allowed by Navajo law, no interlocutory appeals shall be permitted with regard to determinations made by the Director under this Act. In reviewing alleged procedural errors, the Court may invalidate the regulation or other action only if the errors were so serious and related to matters of such central relevance to the regulation or other action that there is a substantial likelihood that the regulation or other action would have been significantly changed if such errors had not been made.

C. Standards for Review

In reviewing any final action of the Director pursuant to this Act, the court may reverse any such action that it finds to be:

1. Arbitrary and capricious, an abuse of discretion or otherwise not in accordance with the law;
2. In excess of statutory authority, jurisdiction, or limitations or short of statutory right;
3. Without observance of procedure required by law; or
4. Unsupported by substantial evidence.

D. Judicial Review of the Response Action Selection

1. Limitation

In any judicial action under this Act, judicial review of any issues concerning the adequacy of any response action taken or ordered by the Director shall be limited to the administrative record prepared

pursuant to § 2505(C). Otherwise applicable principles of administrative law shall govern whether any supplemental materials may be considered by the court.

2. Standard

In considering objections raised in any judicial action under this Act, the court shall uphold the Director's decision in selecting the response action unless the objecting party can demonstrate, on the administrative record, that the decision was arbitrary and capricious or otherwise not in accordance with law.

3. Remedy

If the court finds that the selection of the response action was arbitrary and capricious or otherwise not in accordance with law, the court shall award:

a. Only the response costs or damages that are not inconsistent with the national contingency plan; and

b. Such other relief as is consistent with the National Contingency Plan.

4. Procedural errors

In reviewing alleged procedural errors, the court may disallow costs or damages only if the errors were so serious and related to matters of such central relevance to the action that the action would have been significantly changed had such errors not been made and only to the extent such procedural errors resulted in increased costs.

E. Challenge to Any Provisions

Any action brought pursuant to the provisions of this Section shall be brought in compliance with the Navajo Sovereign Immunity Act, 1 N.N.C. § 351 *et seq.*, and not in any other manner. In any such action, relief shall be limited to declaratory relief and the Navajo Nation Supreme Court shall have no jurisdiction to grant any other relief. The Navajo Nation Supreme Court shall have exclusive jurisdiction and venue over any action brought pursuant to this Section, except as otherwise provided in this Section.

F. Challenge to Facial Validity of Act

Any challenge to the lawful authority of the Navajo Nation Council to enact any provision of this Act must be filed in accordance with Navajo law within 90 calendar days after the date of enactment of such provision. Suit shall be filed in the Navajo Nation District Court in Window Rock, naming as defendant the Navajo Nation, and not thereafter or in any other manner. For purposes of this Subsection, the date of enactment of each provision of this Act shall be the date of signature by the President of the Navajo Nation after its adoption by the Navajo Nation Council, or the date of its adoption by the Navajo Nation Council if the council overrides a veto by the President. The Navajo Nation District Court in Window Rock shall have exclusive jurisdiction

and venue over any action challenging any provision of this Act. Relief shall be limited to declaratory relief.

History

CF-07-08, February 26, 2008.

Note. CERCLA was signed into law by the President of the Navajo Nation on March 10, 2008.

§ 2803. Public participation

A. Dissemination of Information to Public

The Director shall, by promulgating regulations and establishing agency procedures, provide for information to be disseminated to the public in order to:

1. Inform citizens and officials at all levels of government of the existence and status of sites on the Navajo Nation EPA Site List;

2. Provide citizens with information regarding the hazardous substance, pollutant, and contaminant identification and cleanup process and maintain lists of technical, health, and other relevant experts licensed or located in the Nation, who are available to assist the public;

3. Provide the public with information necessary to develop meaningful comments on critical decisions regarding site characterization, risks posed by the site, and selection of removal and remedial actions; and

4. Provide for early, direct, and meaningful public participation in each significant phase of response activities taken under this Act.

B. Accessibility of Information

In providing information to the public as required under Subsection (A), the Director shall ensure wide distribution of and access to information in a manner that is easily understood by the public, considering any unique cultural needs of the Navajo people, including presentation of the information orally and distribution of this information in Navajo. In addition, in taking actions under this Act, the Director shall ensure that he or she is aware of and considers the views of the local people and their District, Agency, and Chapter representatives.

C. Regulations for Public Participation

The Director shall promulgate regulations to implement the requirements of this Section, which shall provide for but not be limited to the following:

1. Any notice and analysis of a proposed response action published under this Act shall include sufficient information as may be necessary

to provide a reasonable explanation of the proposed action and any alternative proposals considered.

2. Any document used to select a response action shall be accompanied by a discussion of the views and preferences of the affected community, any significant changes (and the reasons for such changes) in the proposed plan and a response to each of the significant comments, criticisms, and new data submitted in written or oral presentations.

3. The timing of public participation prior to the taking of a response action shall take into account the need to take prompt response action. During a time-critical response the Director may forgo or shorten the time for public comment.

D. Other information provided to the Community

In addition to other information the Director considers appropriate, the Director shall ensure that the community is provided information on the following:

1. The possibility (where relevant) that members of a community may qualify to receive an alternative water supply;

2. The details of the Superfund process, and rights of private citizens and public interest groups;

3. An objective description of the site's location and characteristics, the known exposure pathways, and the steps being taken to assess the risk presented by the site;

4. The potential for a copy of the administrative record to be located at the affected Chapter House(s), or at a convenient location within an affected District or Agency;

5. The availability or existence of federal Technical Assistance Grants (TAG) with respect to a federal National Priorities List site.

E. Public Participation in Settlements

In addition to the public participation rights in this Section, the public also has the right to comment on settlements as provided in § 2504(E) (4) of this Act.

History

CF-07-08, February 26, 2008.

§ 2804. Citizen Suits

A. Authority to Bring Civil Actions

1. Except in reference to the timing of judicial review, any person may commence a civil action in the Navajo Nation District Court on his

own behalf against any person (except the Navajo Nation or any instrumentality of the Navajo Nation, but not excepting tribal enterprises) who is alleged to be in violation with regard to a requirement or standard of this Act, a regulation promulgated pursuant this Act, or an agreement or order agreed to or issued pursuant to this Act.

2. The Navajo Nation courts shall have jurisdiction to enforce such requirements, standards, regulations, agreements or orders and to apply any appropriate civil penalties.

B. Notice

An action may not be commenced under Subsection (A)(1) of this Section fewer than 60 days after the plaintiff has given notice of the alleged violation to the Director, the Attorney General, and the person who is alleged to be in violation. In addition, an action may not be commenced if the Director has commenced and is diligently prosecuting a civil action in court to require compliance with this Act, except that any person may intervene as a matter of right in such an action.

C. Venue; Intervention; Service of Complaint

1. Any action in regard to a release, a threatened release, ARAR, order or other requirement may be brought only in the Navajo Nation District Court for the District of Window Rock, Navajo Nation (Arizona).

2. The Director, if not already a party, may intervene as of right in any action brought under this Section.

3. Whenever any action is brought under this Section the plaintiff shall serve a copy of the complaint on the Attorney General and on the Director. No consent judgment may be entered in an action brought under this Section in which the Director is not a party prior to 45 days following the receipt of a copy of the proposed consent judgment by the Attorney General and the Director, during which time the Attorney General and the Director may submit, on behalf of the Nation, their comments on the proposed consent judgment to the court and parties or the Director may intervene as a matter of right.

D. Award of Costs

The court, in issuing a final order in an action brought under this Section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party whenever the court determines that such an award is appropriate.

E. Penalty fund

Penalties collected pursuant to this Section shall be deposited in the Hazardous Substances Fund.

History

CF-07-08, February 26, 2008.

§ 2805. Petition for assessment of release

Any person who is, or may be, affected by a release or threatened release of a hazardous substance or pollutant or contaminant, may petition the Director to conduct a site screening and evaluation, as appropriate, to assess the hazards to public health and the environment which are associated with such release or threatened release.

History

CF-07-08, February 26, 2008.

Title 5

Commerce and Trade

History

Common or Contract Carriers previously codified at Chapter 19, §§ 3201-3203 has been redesignated to Title 5, Chapter 3, Subchapter 2, §§ 411-413. (1995)

Signs, Billboards, and Advertising Devices previously codified as Chapter 21, §§ 3401-3412 has been redesignated to Title 5, Chapter 3, Subchapter 3, §§ 421-432. (1995)

Chapter 1. Industrial Development Program

§ 1. Participation in peripheral community programs

A. The President of the Navajo Nation is directed to advise peripheral communities of the willingness of the Navajo Nation to participate in peripheral community programs for development of industries where such industries will create payrolls for Navajos.

B. Participation in peripheral community programs may include negotiation of arrangements for Navajo Nation participation in provision for plant facilities for prospective industrial operators and training for Navajo workers.

C. Negotiations shall provide adequate assurance covering employment for Navajos and shall be subject to approval of the Navajo Nation Council where the expenditure of Navajo Nation funds is contemplated.

History

CO-40-55, 1955 Ex. Vol. p. 332, October 15, 1955.

Development of industrial and business enterprises.