FEDERAL ENVIRONMENTAL LAW FOR TRIBES

Fort Belknap Indian Community

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INDIAN LAW
RESOURCE CENTER

Environmental Law for Tribes: Fort Belknap Indian Community

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The following material was prepared as a supplement to a training session on the utility of federal environmental statutes for tribes. In the effort to simplify the prominent federal environmental statutes, concepts are often oversimplified. We hope that this information will foster additional questions that can be addressed with more specificity and therefore accuracy. For example, many federal environmental programs although enabled by federal statute are actually carried out by state or tribal governments and specifics about those regulatory programs are not made available here.

We hope that this training will bring to light the way in which environmental laws overlap as well as the utility of seemingly unconventional laws to obtain beneficial environmental outcomes. For example, the National Historic Preservation Act is mentioned in this material because it has been successfully implemented to ensure sound environmental practices in areas under environmental threat. We hope that these materials will facilitate discussion and further inquiry into federal, state, and tribal regulatory tools for environmental conservation and cultural preservation.

CONTENTS:

Treated as a State (TAS) and Citizen Suit Approaches to Federal Environmental Statute Violations

Overview

Tribal government roles in federal environmental regulation are characterized by "cooperative federalism." The hope from the perspective of the federal government is that tribes will participate in the enforcement of federal environmental regulations in Indian country. While some federal statutes allow for treated as state (TAS) status, tribal members can also file citizen suits for violations of federal environmental statutes via citizen suit provisions.

TAS status grants federal regulatory authority to tribes set up their own natural resource management programs. Citizen suits are individual law suits regarding a violation or violations of federal environmental regulations.

Both TAS status and citizen suits are tools for tribal government, native organizations, individual tribal members, and affected citizens. As tools, either TAS status or an individual suit can be brought based on the specific environmental concern. For instance, either TAS status or a citizen suit may be preferable based on whether the tribe seeks preventative measures through more effective environmental regulation or a remedy for a violation of a federal statute. It is important to note that the use of TAS status does not necessarily preclude a citizen suit and a citizen suit may in fact initiate the application for TAS rather than preclude TAS status.

Montana v United States[1] established that Indians possess inherent authority on all issues affecting tribal operations. However, this doctrine has been consistently undermined.

[1] 450 U.S. 544 (1981) (reasoning that tribes generally lack regulatory jurisdiction over nonmembers on fee land unless a non member enters into a consensual relationship with the tribe or a nonmember's activities threaten or directly affect the political integrity, economic security, or the health or welfare of the interested tribe).

Mexico v. Mescalero Apache Tribe[2]- The court decided that tribes are without authority to regulate hunting and fishing by Non Indians on Non Indian land within reservation boundaries.

Atkinson Trading Post v Shirley[3]- The court decided that the tribes lack authority to impose tax on nonmember guests of a hotel.

Brendale v Confederate Tribes and Bands of the Yakima Nation[4]- The court decided that tribes do not possess the authority to zone reservation property open to the general public.

What is TAS?

TAS provisions are offered under the Clean Water Act (CWA)[5], Clean Air Act (CAA)[67], and the Safe Drinking Water Act (SDWA)[8], Surface Mining Control and Reclamation Act[9], Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)[10], and Oil and Pollution Act (OPA)[11].

Through the application of TAS status, tribes can participate in environmental regulation on reservation and off reservation natural resource management as well as development projects likely to affect reservation resources. For example, through TAS status, tribes may set higher clean water regulations than federal water quality standards and therefore require higher standards from upstream water users. However, there are many obstacles to TAS acquisition. Primarily, the management systems required for TAS are costly and difficult to administer.

The difficulty in acquiring TAS is evident under the Clean Water Act, where tribes are eligible for TAS to regulate clean water issues within their reservations.[12] It is alarming given that over 145 tribes are approved for TAS status under the Clean Water Act[13], and only 23 tribes have set their own water-quality standards and no tribes administer

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[2] 462 U.S. 324

[3] 532 U.S. 645 (2001)

[4] 492 U.S. 408 (1989)

[5] 33 U.S.C. § 1377

[6] 42 U.S.C. § 7410(a)(1)

[7] Unlike other statutory TAS provisions, the CAA left to the EPA the responsibility for determining which CAA programs were appropriate for tribal treatment as a state. 42 U.SC. Section 7601(d)(2). EPA identified nearly all CAA programs as appropriate. Tribal Air Rule , 63 Fed. Reg. 7254 (Feb. 12, 1998) (amending 40 C.F.R. pts. 9, 35, 49, 50 and 81). EPA specifically exempted the provision authorizing citizens suits against states following comments objecting that including the provision might constitute an administrative waiver of tribal sovereign immunity.

[8] 42 U.S.C. § 300j-11(a) David F. Coursen. EPA's New Tribal Strategy. Environmental Law Reporter News and Analysis, September 2008. 38 ENVLRNA 10643.

[9] 30 U.S.C. § 1235(k) (providing for tribes to be treated as states under the abandoned mine reclamation program)

[10] 42 U.S.C. § 9626 (1994) (providing that tribal government "shall be afforded substantially the same roles and responsibilities under the national contingency plan, and submittal or priorities for remedial action)

[11] 33 U.S.C. § 2706(b)(4) (authorizing tribes to designate a trustee for natural resource damage assessments from oil pollution and to implement a plan for restoration, rehabilitation, and replacement of the resources)

[12] 33 U.S.C. § 1251(d).

[13] Paul M. Drucker, Wisconsin v. EPA: Tribal Empowerment and State Powerlessness Under §518(e) of the Clean Water Act, 5 U. Denv. Water L. Rev. 323, 343-44. (2002).

permitting programs.[14] There are multiple points in the process where tribes meet roadblocks.

What are the TAS requirements?

The TAS requirements are similar under all the major federal statutes allowing TAS. As a result, the acquisition of TAS under one statute facilitates the same recognition under others. As an example, under the Clean Water Act, the TAS requirements are as follows:

1. The Indian tribe has a governing body carrying out substantial governmental duties and powers;
2. The functions to be exercised by the Indian tribe pertain to the management and protection of water resources which are held by an Indian tribe, held by the United States in trust for Indians, held by a member of an Indian tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of an Indian reservation; and
3. The Indian tribe is reasonably expected to be capable, in the administrator's judgment, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of this chapter and of all applicable regulations.[15]

What are the TAS application requirements?

Clean Water Act TAS requirements are also similar to other statutes and require the following:

All applications for TAS must include the following:

1. Statement that the applying tribe is federally recognized.
2. Statement that the tribal governing body is currently governing over a defined area.[16]
3. Statements of their authority to regulate water quality,[17] including:
    a. Evidence of the physical area over which it asserts the authority to regulate surface water.
        i. A statement by the tribe's legal counsel as to the legal basis for the tribe's authority.
        ii. Evidence of the basis for that authority, such as a tribal constitution.
        iii. A list of all surface waters that the tribe proposes to regulate.
4. A narrative describing the tribe's ability to administer the water regulation program.[18]
5. Additionally, a regional administrator may request supplementary documentation to support the tribe's application.

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[14] EPA website, Repository of Documents, at http:// www.epa.gov/ost/standards/wqslibrary/ (last updated Nov. 2, 2004).

[15] Id.

[16] Tribes need to elaborate on the form of tribal government, types of government functions currently being carried out, and the source of the tribe's authority for the governmental functions.

[17] *Montana v. United States*, 450 U.S. 544 (1981) (reasoning that tribes generally lack regulatory jurisdiction over nonmembers on fee land unless a nonmember enters into a consensual relationship with the tribe or a nonmember's activities threaten or directly affect the political integrity, economic security, or the health or welfare of the interested tribe).

[18] The tribe needs to convince the EPA that it has experience in governing itself and has been successful in various areas of self-governance.

6. If the tribe has already qualified as a state for one environmental regulation program, the Tribe must only submit documentation that was not included in the previous application. [19]

How does a tribe obtain TAS status?

Within thirty days of receiving an application from a tribe, the regional administrator will notify all "appropriate government entities" [20] which may include regional EPA or state agencies, organizations, or other tribes that are part of the regulatory scheme in the area. The regional administrator will accept comments for thirty days pertaining to the tribe's assertion of authority.[21] In the event that there is a competing or conflicting claim (for example, a state may challenge the TAS designation asserting that the tribe does not meet statutory requirements for TAS or possess the property right in question[22]), then the regional administrator will decide whether the tribe has met all of the requirements promulgated by the EPA.[23] If the tribe is successful in its application, tribal agencies may begin administering water standards immediately.[24]

What is the effect of TAS status?

TAS status primarily allows tribes to influence on and off reservation natural resource management. An effective TAS that establishes more stringent regulation standards than the state or EPA may regulate upstream permits and through monitoring, regulate water quality standards outside reservation boundaries.

In *City of Albuquerque v. Browner*, the Tenth Circuit decided that tribes may adopt water quality standards more stringent than federal standards and enforce those standards against upstream point sources located beyond reservation boundaries.[25]

Can the TAS regulatory scheme be enforced in federal court?

Once a tribe acquires TAS status, the authority and responsibility to enforce regulations is often burdensome both on tribal courts and tribal resources. Therefore, when a violation of the tribe's regulations occurs, tribes may bring enforcement actions in federal court. Based on choice of law rules, the court should be required to apply tribal law. When the EPA approves water quality standards set by tribes, those standards become enforceable federal law.[26]

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[19] 40 C.F.R. § 131.8(b). (2006)
[20] Id. § 131.8(c).
[21] See id. § 131.8(c)(3).
[22] Mark E. Chandler. A Link between Water Quality and Water Rights?: Native American Control over Water Quality. Tulsa Law Journal. 30 TLSJ 105. Fall, 1994. (explaining the State of New Mexico challenge to Pueblos of New Mexico's application to regulate under § 106 of CWA based on reservation property boundaries. New Mexico Pueblos survived the challenge. Also discussing the challenge brought in Albuquerque from the City Water district against Isleta Pueblo's application for TAS under CWA.)
[23] See id. § 131.8(c)(4).
[24] See id. § 131.8(c)(5).
[25] 97 F.3d 415 (10th Cir. 1996).
[26] Arkansas v. Oklahoma, 503 U.S. 91, 104-10 (1992); Dean B. Suagee & John P. Lowndes, Due Process and Public Participation in Tribal Environmental Programs, 13 Tul. Envtl. L.J. 1 (1999).

What are the concerns of TAS Status?

The general fear about tribal regulatory programs is that they may result in the diminishing of tribal authority, such as in the case of *South Dakota v Yankton Sioux Tribe, 522 U.S. 329.* In South Dakota, the U.S. Supreme Court upheld state regulation of an on reservation landfill owned and operated by a four-county municipal waste district. Although the land in question had been previously considered reservation land, the opposition to the TAS argued that the land had been previously ceded in order to conduct the previous management agreement. The result of the court's decision was that the landfill's location was no longer Indian country subject to federal or tribal control.

What is a citizen suit?

In nearly every environmental statute passed since 1970, citizen suit provisions authorize private individuals and entities to enforce the law themselves. Statutes with citizen suit provisions include:

- Toxic Substances Control Act (TSCA) [27]
- Endangered Species Act (ESA) [28]
- Marine Protection, Research, and Sanctuaries Act [29]
- Deepwater Ports Act [30]
- Clean Water Act (CWA) [31]
- Clean Air Act (CAA) [32]
- Resource Conservation and Recovery Act (RCRA)[33] *
- Conservational Environmental Response, Compensation, and Liability Act (CERCLA)[34] *
- Emergency Planning and Community Right to Know Act (EPCRA) [35]
- Safe Drinking Water Act (SDWA)[36]
- Outer Continental Shelf Lands Act [37]

*these statutes do not in all cases offer full TAS status and therefore citizen suit provisions may be more helpful.[38]

What are the filing options for tribes in citizen suits?

1. Tribes as "persons." Major environmental statutes uniformly authorize "any person" to act as a private attorney general by bringing a civil suit seeking enforcement of statutory and administrative requirements. "Persons" include natural persons, legal persons such as corporations, and state and federal

[27] TSCA § 20, 15 USC § 2619 (2000)
[28] ESA § 11 (g)
[29] MPRSA § 105(g), 33 U.S.C. § 1415(g) (2000)
[30] DPA § 16, 33 USC § 1515 (2000)
[31] CWA § 505, 33 USC § 1365 (2000)
[32] CAA § 304, 42 U.S.C. § 7604 (2000)
[33] RCRA § 7002, 42 USC § 6972 (2000)
[34] CERCLA § 310, 42 U.S.C. § 9659 (2000)
[35] EPCRA § 326, 42 U.S.C. § 11046 (2000)
[36] SDWA § 1449, 42 U.S.C. § 300j-8(2000)
[37] OCSLA § 23, 43 U.S.C. § 1349(a) (2000)
[38] RCRA allows on limited tribal involvement. CERCLA requires similar consultation requirements as states, but no regulatory authority is available.

governmental entities. Statutory definitions of "person" do not similarly include tribal governments. However, TAS status may have opened the door to the possibility of tribes as plaintiffs under citizen suit provisions.[39]

2. Tribes as "municipalities" or "organizations." Municipalities and organizations are recognized under some citizen suit provisions, but tribes have separate legal status, making this option problematic.
3. Tribal representative. A tribal official can bring suit as an individual representing tribal citizens' interests.[40]

What are the obstacles for a tribe in filing a citizen suit?

1. Standing. Standing is the ability of a party to demonstrate to the court a sufficient connection to and harm from the law or action challenged to support that party's participation in the case. Essentially, the plaintiff must have "something to lose" in the issue at hand. If filing a suit independent from Congress' authorized citizen suit claims, the tribe will need to consider constitutional standing requirements as well: injury, causation, and redress ability. [41]
2. Notice. Generally, in congressionally authorized citizen suits, the plaintiff is required to notify the defendant and relevant agencies of an impending suit. Under those provisions the plaintiff may not file for a specified time (often 60 to 90 days) after giving notice.[42]
3. Simultaneous lawsuit. Otherwise legitimate suits are barred if EPA or a state "has commenced and is diligently prosecuting a civil action" seeking compliance for the same violation asserted in the citizen suit.[43,44]
   If precluded by this provision, tribes can participate in the compliance process or "intervene as a matter of right" in enforcement actions.[45]

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[39] Infra note 7 at 7260-61. Arguably, a tribe's CAA TAS status does not render it vulnerable as a citizen suit defendant, but does qualify it as a citizen suit plaintiff.

[40] 741 F.2d 992

[41] Injury Defenders of Wildlife, 504 U.S. at 560-61, Sierra Club v Morton, Oregon Natural Desert Association v. Thomas 940 F. Supp. 1534, 1538 (D. Oregon 1996)

[42] See 33 U.S.C. § 1365 (b)(1)(A) (CWA); 42 U.S.C. § 7604 (b)(1)(A) (CAA); 42 U.S.C. § 6972(b)(1)(A) (RCRA); 42 U.S.C. § 9650(d)(1) (CERCLA); 42 U.S.C. § 11046(d)(1) (ECPCRA); 42 U.S.C. § 300(j)-8(b)(1)(A) (SDWA). See, e.g. Hallstrom v Tillamook County, 493 U.S. 20, 32 (1989) (failure to comply with 60 day notice requirement of RCRA citizen suit provision required dismissal of suit); South Carolina Wildlife Fed'n v. Alexander, 457 F. Supp. 118 (D.S.C. 1978) (failure to comply with 60 day notice requirement of CWA citizen suit provision for two of three facilities required dismissal of suit as to those facilities).

[43] See, e.g., 33 U.S.C. § 1365(b)(1)(B) (CWA); 42 U.S.C. § 7604(b)(1)(B) (CAA); 42 U.S.C. § 6972(b)(1)(B) (RCRA); 42 U.S.C. § 9659(d)(2) (CERCLA); 42 U.S.C. § 11046(d)(2) (EPCRA); 42 U.S.C. § 300j-8(b)(1)(B) SDWA).

[44] See, e.g., City of Heath v. Ashland Oil, Inc., 834 F. Supp. 971 (S.D. Ohio 1993) (barring RCRA citizen suits for alleged violation of federal provision superseded by state law pursuant to RCRA delegation to the state), 949 F. 2d 552 (1st Coir. 1991) (barring CWA citizens suit because of state's diligent enforcement action); Atlantic States Legal Found. V. Tyson Foods, Inc. 682 F. Supp. 1186 (N.D. Ala. 1988) (barring CWA citizen suit because of state's diligent enforcement action).

[45] See, e.g. 33 U.S.C. § 13 65 (b)(1)(B) (CWA); 42 U.S.C. § 7604(b)(1)(B) (CAA); 42 U.S.C. § 6972(b)(1)(B) (RCRA); 42 U.S.C. § 9613(i)(CERCLA); 42 U.S.C. § 11046(h)(2)(EPCRA); 42 U.S.C. § 300j-8(b)(1)(B)(SDWA).

How do I know when there is a possible suit? A.k.a. when do I have a "cause for action"?

1. Under the Administrative Procedure Act (APA), suits can be filed for "agency delay,"[46] "agency inaction,"[47] or "abuse of discretion."[48] For example, if the EPA fails to allow a notice and comment period or fails to offer an *effective* notice and comment procedure (i.e. in local language or dialect), stakeholders that are affected by the resulting decision may have a claim against the agency.
2. Under the federal environmental statutes, such as the Clean Water Act (CWA) or Resource and Conservation Recovery Act (RCRA), any requirement not being met under the Act may provide a cause for action. For example, law suits for violations of federal environmental statutes such as the CWA directly prosecute persons or facilities for violating specific effluent limitations, standards, or permit requirements.[49] These cases are brought in federal court. [50]

What is the result of a citizen suit? A.k.a. "What can we get?"

1. Injunction. Injunctions serve to stop action or perceived inaction that is harming or threatening the plaintiff's interests. For example, if the construction of a dam or mine would violate a federal regulation, an appropriate remedy would be to stop development permanently or until the violator complies with relevant regulations. Courts have directed EPA to issue regulations[51], set standards[52], make compliance determinations on state programs[53], replace defective state programs[54], or clean up.[55, 56]

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[46] Sierra Club v Thomas, 828 F.2d 783, 796-97 (D.C. Cir. 1987) (holding plaintiffs could make an APA claim for EPA's unreasonable delay in deciding whether to place strip mines ion its list of pollutant sources subject to fugitive emissions regulations, which would fall within the jurisdiction of the Court of Appeals).
[47] See, e.g. Idaho Sportsmen's Coal v EPA, 951 F. Supp. 962, 966-67 (W.D. Wash. 1996) (rejecting EPA's proposed twenty-five year schedule for promulgation of total maximum daily loads for water quality limited waters), Scott v City of Hammond, 741 F.2d 992 (7th Cir. 1984)(CWA citizen suit where the court held that the State's several year delay in addressing CWA provisions governing waters of limited quality amounted to a constructive non-submission triggering EPA's mandatory duty to promulgate federal total maximum daily loads);
[48] Oljato Chapter of the Navajo Tribe v. Train, 515 F.2d 654, 663-66 (D.C. Cir. 1975). See also Montana Power Co. v EPA and Northern Cheyenne Tribe, 429 F.Supp. 683, 694 (D. Mont. 1977) (addressing an APA claim challenging EPA's implementation of tribal standards brought by an affected air pollution source).
[49] See, e.g. 33 U.S.C. § 1365(a)(1) (CWA); 42 U.S.C. § 7604(a)(1) (CAA); 42 U.S.C. § 69972(a)(1) (RCRA); 42 U.S.C. § 9659(a)(1) (CERCLA); 42 U.S.C. § 11046(a)(1) (EPCRA) (fore specific violations); 42 U.S.C. § 300j-8(a)(1) SDWA).
[50] See, e.g. 33 U.S.C. § 1365(c)(1) (CWA); 42 U.S.C. § 7604(c)(1) (CAA); 42 U.S.C. § 69972(a) (RCRA); 42 U.S.C. § 9659(b)(1) (CERCLA); 42 U.S.C. § 11046(b)(1) (EPCRA) (fore specific violations).
[51] See, e.g. Town of Huntington v. Marsh, 884 F.2d 648, 651 (2nd Cir. 1989), cert. denied, 494 U.S. 1004 (1990).
[52] Sierra Club v Thomas, 658 F. Supp 165 (N.D. Cal 1987) (air quality).
[53] E.g. Scott, 741 F.2d at 998.
[54] *Id.*(finding state inaction triggered deferral duty to develop maximum water pollution loads); Alaska Cntr. For the Env't v. Browner, 20 F.3d 981, 987 (9th Cir. 1994) (same).
[55] See, e.g. Mehrig v KFC Western, Inc. 526 U.S. 479, 486 (1996) (noting RCRA's citizen suit authorizes injunctions for remediation of hazardous wastes presenting an imminent and substantial endangerment to health or the environment); Gache v Town of Harrison, 813 F. Supp. 1037, 1044 9S.D.N.Y. 1993)

2. Judicial order. Judicial orders are authorized in some statutes to enforce agency compliance.[57] For example, in an APA claim, if the EPA has failed to offer the required notice and comment period or delay the issuance of an EIS, then the agency will be ordered to do so immediately. The effect of a judicial order is that the agency must consider the action ordered as a top priority.
3. Penalties. The main regulatory statutes set a maximum civil penalty of 25,000 per violation per day.[58] Courts have a lot of discretion in awarding penalties and often do not award them or enforce less than the maximum.[59] Penalties are paid to the national treasury[60] and do not apply to federal agency violations.[61]
4. Litigation costs. Costs can be recovered as specified in the main environmental statutes and may include: reasonable attorney's fees, expert witness fees, and costs incurred in the course of administrative proceedings pertinent to the case.[62,63] Costs may be awarded to the prevailing party, the substantially prevailing party, or to whomever the court deems appropriate.[64]
5. Supplemental Environmental Projects (SEPs). SEPs offer a remedy that actually improves, protects, or reduces the risk to public health of the environment affected by the legal action.[65]

Citizen suit versus TAS

Keeping in mind that both TAS and citizen suit procedures can be utilized even simultaneously and that the process and result of either approach often promotes the other, a tribe must consider its environmental goals in deciding how to fight a particular environmental threat.

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[56] However, a violation does not guarantee an injunction. Compare Supra notes 30-34 with Marsh, 884 F.2d at 651.

[57] See, e.g. 33 U.S.C. § 1365(a) (CWA); 42 U.S.C. § 7604(a)(CAA); 42 U.S.C. § 6872(a) (RCRA); 42 U.S.C. § 9659(a)(CERCLA); 42 U.S.C. § 11046(a) (EPCRA) (for specified violations); 42 U.S.C. § 300j-8(a) (SDWA).

[58] See, e.g. 33 U.S.C. § 1319(d) (CWA); 42 U.S.C. § 7413(b)(CAA); 42 U.S.C. § 6928(g) (RCRA); 42 U.S.C. § 11045(a) (EPCRA) (for specified violations); 42 U.S.C. § 300h-2(b)(1) (SDWA)(specified civil penalties).

[59] See e.g. United States v. Roll Coater, 21 Envtl. L. Rep. (BNA) 21,073, 21, 074 (C. S.D. Ind. 1991) (approximately 37% of maximum penalty); United States v. Smithfield Foods, Inc. 972 F. Supp. 338 (E.D. Va. 1997) (approximately 7% of maximum penalty); Sierra Club, Inc. v. Electronic Controls Design, inc., 909 F.2d 1350, 1354 (9th Cir. 1990)(approving consent decree settling a CWA citizen suit although it did not provide for a civil penalty to be paid to the Treasury).

[60] E.g., Powell Duffryn Terminals, 913 F.2d 64 (holding defendants'' monetary payments, which a court-approved settlement agreement labeled as penalties, could only be paid to the U.S. Treasury).

[61] Cf. U.S. Dep't of Energy v. Ohio, 503 U.S. 607 (1992) (holding the CWA's and RCRA's provisions for federal compliance were not unequivocal waivers for civil penalties designed to punish the government for past violations), with Fed. Facility Compliance Act of 1992, Pub. L. No. 102-386, § 102(a), 106 Stat. 1505, 1506 (1992) (amending 42 U.S.C. § 6961(a) to waive federal immunity from civil penalties under RCRA).

[62] See, e.g. 33 U.S.C. § 1365(d) (CWA); 42 U.S.C. § 7604(d)(CAA); 42 U.S.C. § 6972(e) (RCRA); 42 U.S.C. § 11046(f) (EPCRA) (for specified violations); 42 U.S.C. § 300j-8(d) (SDWA)(specified civil penalties); 42 U.S.C. § 9659(f) (CERCLA).

[63] E.g. Pennsylvania v. Delaware Valley Citizens

[64] See, e.g. 33 U.S.C. § 1365(d) (CWA); 42 U.S.C. § 6972(e) (RCRA) (where money is awarded to the prevailing or substantially prevailing party); 42 U.S.C. § 7604(d) (CAA); 42 U.S.C. 300j-8(d) (where the court determines awards where it deems appropriate).

[65] Interim Revised EPA Supplemental Envtl. Projects Policy, 60 Fed. Reg. 24,856, 24,857 (May 10, 1995)

Advantages for citizen suit actions include:

- Citizen suits help build institutional capacity for when the tribe decides to assume program implementation in the future.
- SEPs may help community infrastructure.
- Remedies may serve as incremental steps towards a fuller environmental regulatory program.
- Citizen suits do not require the inclusion of inherent sovereignty or jurisdictional issues.
- Citizen suits foster the ability to reach out, past reservation boundaries. For example, the Fort Belknap CWA cases were primarily dealing with water pollution that occurred off of the reservation.
- Citizen suits are likely less expensive than forgoing the TAS process, especially with possible NGO partnerships that are likely to seek litigation fees.

Advantages for TAS:

- Sovereignty implications imperative in citizen suit filing options do not occur with TAS (i.e. deciding on filing as municipality, organization, or through a representative).
- While citizen suits are retroactive and violation-specific, TAS offers a programmatic approach to new regulatory schemes.
- Through TAS implementation, tribes are eligible for funding opportunities as well as tasked with hiring and training environmental experts.

National Environmental Policy Act (NEPA)

Overview

NEPA is a procedural rather than substantive federal statute, which means that it requires a checklist of obligations, but does not make any environmental quality requirements. NEPA serves as a checklist for agencies initiating projects that affect the environment.

- Title I requires the federal government to use all practicable means to incorporate environmental considerations into their decisions. Specifically, all federal agencies are to prepare detailed statements assessing the environmental impact of and alternatives to major federal actions significantly affecting the environment.
- Title II establishes the Council on Environmental Quality (CEQ).

The only aspect of NEPA that is somewhat substantive is the enforcement of general policies which require that agency decisions be consistent with national policy. However, the national policy consideration does not require the agency to select environmentally preferable alternatives, nor does it require the agency to prohibit actions that have adverse environmental effects.

What are NEPA general policies?

1. Fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
2. Assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;
3. Attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;
4. Preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity, and variety of individual choice;
5. Achieve a balance between population and resource use which will permit high standards of living and a wide sharing of one's life amenities; and
6. Enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources. [66]

[66] 42 USC § 4331Section 101 (b) (1-6)

When does NEPA apply?

NEPA applies to:

1. Federal actions. NEPA procedural requirements apply to a federal agency's decision for action, including:
   - Financing, assisting, conducting, or approving projects or programs;
   - Agency rules, regulations, plans, policies, or procedures; and
   - Legislative proposals.[67]

   With:
2. Significant environmental effects. The range of actions that cause significant environmental effects are broad and include:
   - Issuing regulations,
   - Providing permits for private actions,
   - Funding private actions,
   - Making federal land management decisions,
   - Constructing publicly-owned facilities, and
   - Many other types of actions.

Who implements NEPA?

- The Council on Environmental Quality (CEQ) is the primary NEPA authority and carries out tasks relating to the content and promotion of NEPA. The CEQ:
  - Ensures federal agencies meet obligations under the Act,
  - Evaluates federal programs in light of the goals established in Title I,
  - Interprets NEPA,
  - Reviews and approves NEPA procedures, including: alternative arrangements in cases of emergency and dispute resolution between agencies and members of the public,
  - Gathers information on the conditions and trends in environmental quality,
  - Develops and promotes national policies to improve environmental quality, and
  - Conducts studies, surveys, research, and analyses relating to ecosystems and environmental quality.
- The Environmental Protection Agency (EPA) inherits most NEPA obligations and meets these through consultation with other agencies. The EPA:
  - Reviews environmental impact statements (EISs) and some environmental assessments (EAs) issued by federal agencies,[68] and
  - Reviews and provides comments on the adequacy of the analysis and the impact to the environment.[69]
- "Joint leading" agencies are federal, state, local, or tribal entities that have a major role in the proposed action and have NEPA responsibilities under a similar NEPA-like law. These entities may share in the responsibility for management of NEPA process, including public involvement and the preparation of documents.

[67] 40 C.F.R. § 1508.18
[68] CAA, 42 U.S.C. § 7609
[69] CAA, 42 U.S.C. § 7609

- "Cooperating" agencies are entities that may have jurisdiction by law or special expertise with respect to any environmental impact involved in a proposal and will typically have some responsibility in fulfilling NEPA.

What is the NEPA Process?

1. Identification of a need for action. NEPA may be initiated by an actual federal project or any level of federal involvement (i.e. permit issuance, funding, etc.). *If a need for federal action is identified, then the agency begins…*
2. Analysis of "significant environmental effect." This stage determines whether the agency will pursue the path of a:
    - Categorical Exclusion (CE),
    - Environmental Assessment (EA), or
    - Environmental Impact Statement (EIS).

Categorical Exclusions (CEs) are actions that the agency has determined do not individually or cumulatively have a significant effect on the quality of the human environment.[70] These activities are therefore excluded from NEPA procedures. Examples include: personnel procedures, making minor facility renovations such as installing energy efficient lighting, or reconstructing hiking trails on public lands. Drafts of CEs are published in the *Federal Register* and a public comment period is required.

Environmental Assessments (EAs) are completed to determine the significance of environmental effects[71] as well as look at alternative means to achieve the agency's objectives. An EA determines whether it is necessary to prepare an EIS, aids an agency in complying with NEPA when no EIS is necessary, and facilitates the preparation of an EIS when one is necessary.[72] An EA should include:

- The need for a proposal,
- Alternative courses of action for any proposal,
- Environmental impacts of the proposed action and alternative actions, and
- A list of agencies and persons consulted.[73]

An EA may result in a finding of:

- Preparation of an EIS, or
- Finding of No Significant Impact (FONSI).[74]

Environmental Impact Statements (EISs) must be prepared by the federal agency if a federal action is significantly affecting the quality of the human environment.[75] An EIS implicates the need for an environmental impact assessment, which contains significantly more requirements than an EA or CE.

[70] 40 C.F.R. § 1508.4
[71] 40 C.F.R. § 1508.27
[72] 40 C.F.R. § 1508.9
[73] 40 C.F.R. § 1508.9 (b)
[74] 42 U.S.C. § 4332(C) A notice in *Federal Register*, and comment period of 30 days may be required if the type of action hasn't been done before by the particular agency, or if the action is something that typically would require an EIS under the agency NEPA procedures.
[75] 40 C.F.R. § 1501.7

What are the environmental impact assessment procedures?

1. Notice of intent (NOI). The environmental assessment process begins with the NOI published in the *Federal Register*. The NOI provides:
   - Basic information on the proposed action in preparation for the scoping process,
   - A brief description of the proposed action,
   - Alternatives,
   - The actual proposed scoping process (including strategies for public involvement), and
   - Agency point of contact.[76]

2. Scoping. The scoping process is the appropriate time to:
   - Determine points of contact in other relevant agencies,
   - Establish project schedules, and
   - Provide recommendations to the agency.

   The scoping process seeks to:
   - Identify people or organizations who are interested in the proposed action,
   - Identify the significant issues to be analyzed in the EIS,
   - Identify and eliminate from review those issues that will be insignificant or have been adequately covered in prior environmental review,
   - Determine the roles and responsibilities of lead and cooperating agencies,
   - Identify any related EAs or EISs,
   - Identify gaps in data and informational needs,
   - Set time limits for the process,
   - Identify other environmental review and consultation requirements so they can be integrated with the EIS, and
   - Choose the most effective method of communication with potentially interested parties.

3. Draft EIS. During this stage,
   - The EPA publishes a Notice of Availability (NOA) in the *Federal Register* informing interested members of the public that the draft EIA is open for comment.
   - Then, the agency may conduct public meetings or hearings as a way to solicit comments.
   - The agency will also request comments from other federal, state, tribal, and local agencies that may have jurisdiction or interest in the matter.

   Key aspects of the EIS are:
   - The *purpose* and *need* for the project, which become the basis for identifying reasonable alternatives.[77]
   - A list of reasonable alternatives which must:
     1. Meet the purpose and need of the proposed project,
     2. Be practicable and feasible,

[76] Public hearings are run in a formal manner, with a recording or minutes taken of speakers' comments. Public meetings may be held in a variety of formats, and may be much more informal than hearings.
[77] 40 C.F.R. § 1502.13

3. Always analyze the "no action" alternative, and
4. Be objectively evaluated by the agency and the reasons for eliminating alternatives must be discussed at least briefly.[78]

- The "preferred alternative" if one exists.[79]
- The full range of direct, indirect, and cumulative impacts of the preferred or reasonable alternatives proposed whether adverse or beneficial. [80]
- A description of the environment that would be affected by the various alternatives.
- A list of who prepared the document and their qualifications.[81]
- A table of contents and index.[82]

4. Final EIS. The final EIS includes the agency response to the substantive comments received from other government agencies and members of the public.[83] The response can be in the form of
   - Changes to the EIS,
   - Factual corrections,
   - Modifications to the analyses or the alternatives, or
   - An explanation of why a comment does not require the agency's response.[84]

   The agency will publish a NOA when the EIS is ready. Then, the agency will have 30 days to consider the alternatives and make a decision.[85, 86]

5. Record of Decision (ROD). The ROD is a document that:
   - States what the decision is,
   - Identifies the alternatives considered, including the environmentally preferred alternative,
   - Discusses mitigation plans, including any enforcement and monitoring requirements,[87] and
   - Discusses whether all practical means have been adopted, and if not, provides an explanation.[88]

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[78] 40 C.F.R. § 1502.14
[79] 40 C.F.R. § 1502.14(e)
[80] Impacts may be ecological, aesthetic, historic, cultural, economic, social, or Human health related.
[81] 40 C.F.R. § 1502.17
[82] 40 C.F.R. § 1502.10
[83] 40 C.F.R. § 1503.4
[84] 40 C.F.R. § 1503.4 (a)
[85] Proper communication methods should include modes (phone, internet, tv channels, etc.) as well as language (local dialect or native language). This is a helpful requirement for challenging EPA decisions because it implicates important access to environmental information and affects access to justice. Community and local knowledge is crucial to challenging agency procedure that does not comply with this requirement.
[86] The preferred alternatives included in public comments are often utilized to challenge agency decisions through administrative or civil law suits. This aspect of public comment and agency response is an often utilized strategy for environmental litigators.
[87] 40 C.F.R. § 1505.2
[88] 40 C.F.R. § 1505.2(c)

6. Supplement EIS. A supplement EIS may be required if substantial changes in the proposed action are enacted and are relevant to environmental concerns, or new circumstances or information are present. An agency must also prepare a supplement EIS if doing so will further the purpose of NEPA.[89] Requirements for supplemental EISs mirror those of the EIS, but do not require additional scoping.

How can tribes contribute to the NEPA process?

1. Public comment. Tribal members and tribes as members of the general public have an important role in the NEPA process. Particularly during scoping, public involvement is essential to providing input on issues that should be addressed in an EIS and in commenting on the agency's findings. The public can participate in the NEPA process by attending NEPA-related hearings or public meetings and by submitting comments directly to the lead agency. The lead agency must take into consideration all comments received from the public and other parties during the comment period. Comments and agency responses to comments are critical tools for further environmental litigation.

2. Environmental Management Systems (EMSs). Tribes may consider collaborating with companies or agencies EMSs. EMSs are considered pro active approaches to NEPA compliance and may provide a tribe with substantial influence over how a project is carried out.

3. Administrative appeal. Whenever the NEPA process is not completed or inefficiently executed an administrative appeal can be brought with the individual agency that is not complying with the regulation.

4. Civil suit.

Claims under the NEPA

Who?

Any person has a private right of action to seek judicial review of final agency actions.[90]

What for?

If the federal agency does not properly follow the process of analysis, documentation, disclosure, and consideration in decision making the agency is vulnerable to a civil lawsuit.

Where?

Suits under the federal APA can be filed in federal court.

What remedy?

A reviewing court has the authority to:

[89] 40 C.F.R. § 1503.9 (c)
[90] 5 U.S.C. §702; §704(2004).

1. Compel an agency to complete the NEPA process or remedy the NEPA violation.
2. Grant a preliminary injunction.
3. Award Litigation Fees.

How does NEPA apply to Oil and Gas development?

NEPA is one of the only statutes (likely due to its procedural nature) that is rarely if ever waived for development projects. However, agencies interested in stream lining development will try to avoid the entire NEPA procedure. Therefore, development projects are often characterized as CEs when they should undergo full NEPA procedures. Through NEPA, advocates may track development projects to assure that environmental assessments are being made.

In the development of Oil and Gas specifically, there are many zoning and permitting procedures that must be followed and enforcing NEPA will guarantee public comment procedures that will require agencies to consider environmentally preferable development practices. Involvement in the scoping stages of these projects is also crucial for future environmental litigation.

Administrative Procedure Act (APA)

Overview

The Administrative Procedure Act (APA) was enacted in 1946 and seeks to define the procedural requirements for administrative agencies in making rules and providing effective due process procedures for rule violations. The APA serves as a guideline for agencies to ensure minimal levels of public participation and consistency of agency regulations with statutory goals. The APA is a helpful tool for environmental advocates to become involved with and track agency decisions. Because APA procedures require that agencies approach decision making in a consistent, fair, and timely manner, advocates can oppose agency determinations based on the APA rulemaking or adjudicatory process in addition to requesting judicial review of actual agency decisions.

Basic distinctions

- Rulemaking versus adjudicatory functions. Federal agencies are confusing in that they are required to perform many different functions in order to fulfill statutory obligations. Because federal agencies must create regulations as well as assure due process in bringing the public into compliance with new and existing regulations, the distinction between agency rulemaking and agency adjudication provides some guidance on the necessary agency procedures. In differentiating between adjudicatory or rulemaking functions, the court considers how prospective and general the agency action is.

  The more forward looking and general the action, the more likely that the agency is exercising their rulemaking function. For example, adding a requirement to the application for TAS status under the CWA will affect all future TAS applicants and would be considered agency rulemaking. Contrarily, if the action is retrospective and specific, it is more likely adjudicatory. For example, issuing a compliance order for the violation of a

company's NPDES permit will affect only the violator's past operations and will implicate agency adjudication to insure due process.

- Formal versus informal procedure. Under both rulemaking and adjudication procedures, the agency may have to undergo either formal or informal procedural requirements. Whether a particular regulation undergoes either an informal or formal process is usually set forth in the statute. The inclusion of the phrase "on the record after opportunity for an agency hearing" triggers formal procedural requirements.

  A hybrid form of rulemaking often occurs when only informal requirements are set and yet agencies impose additional standards to demonstrate legitimacy of procedure.

What is agency rulemaking?

Agency rulemaking is when the agency issues regulations in order to fulfill statutory obligations. While the APA defines "rule" as "[t]he whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency . . .", this definition is broad and therefore not very helpful. In executing proper procedural requirements, the agency will rely on the generality and forward looking nature of the action to determine whether the action is within an agency's rulemaking function. For example, EPA created a rule that requires water polluters to apply and obtain NPDES permits for pollution emitted from their facilities in order to fulfill the congressional mandate of the Clean Water Act.

Informal rulemaking procedures

Most legislative rules are subject to basic notice and comment procedures under 5 USC § 553 which requires:

- Publication of a Notice of Proposed Rulemaking (NPRM) in the *Federal Register*;
- Opportunity for public participation by submission of written comments;
- Consideration by the agency of the public comments and other relevant material;
- Publication of a final rule not less than 30 days before its effective date, with a statement explaining the purpose of the rule.

Formal rulemaking procedures

When rules are required by statute to be made "on the record after opportunity for an agency hearing," sections 556 and 557 of the APA apply instead of § 553.

APA sections 556 and 557 require:

- Trial type hearing,
- Exclusive record,
- Formal findings, and
- Ban on ex parte contacts. [91,92]

[91] 5 USC § 556
[92] 5 USC § 557

Rulemaking flexibility

The APA merely sets out minimal requirements for the agency rather than one single model. This is to ensure that the public has the opportunity to participate in the formulation and revision of government regulations and that there be minimum standards for judicial review. The requirements are quite minimal. However, as basic rules, they provide the foundation for the development of further procedures. For example, although the APA does not require a public file or record of the rulemaking process, agencies usually compile one to prove that their process is fair and reasonable.

Also, an agency is free to publish an Advance Notice of Proposed Rulemaking (ANPRM) when the agency wants to test out a proposal or solicit ideas before it drafts its Notice of Proposed Rulemaking. On the other hand, if an agency needs to respond quickly to an emergency it can implement a final regulation while still accepting and considering public comments.

Exemptions from rulemaking procedures

Rules that are exempt from the notice and comment requirements of the APA are those dealing with military or foreign affairs functions and those "relating to agency management or personnel or to public property, loans, grants, benefits or contracts."

Agencies often voluntarily waive an exemption, although when they do so, they still retain the power to omit notice-and-comment when for "good cause" the procedures would be "impracticable, unnecessary, or contrary to the public interest." Congress may, of course, add requirements including requiring an agency to follow a specific public participation procedure.

There are other exemptions from notice and comment procedures including:

- "Agency organization, procedure or practice" rules,
- "Interpretative rules" that add little substantive interpretation of the law, or
- "General statements of policy."

However, agencies may run into difficulties in the courts trying to invoke these exemptions if the proposed action has a major impact on the public.

What is agency adjudication?

Agency adjudication is the process by which an agency can assure due process by making a quasi-judicial "determination of past and present rights and liabilities." For example, if agency issues a compliance order for a person in violation of a zoning restriction, the agency assures due process through a trial-like proceeding where their rights are considered. Agency adjudication procedures usually include:

- Neutral Presiding Officer (ALJ)
- Oral Hearing
- Some Cross Examination
- Testimony under oath
- Exclusive record (No FRCP, FRE, or jury)

Formal adjudication

The APA defines and governs only formal adjudications that are required by statute to be conducted "on the record after opportunity for an agency hearing." If an agency is required to conduct such a formal adjudication under the APA, it must engage in a proceeding resembling a trial.

Formal adjudicatory procedures under 5 USC § 554 (a) triggers §556 and §557 requirements, including:

- Trial type hearing,
- Exclusive record,
- Formal findings, and
- Ban on ex parte contacts. [93,94]

Informal adjudication

If the agency is not required to conduct a formal hearing, the APA remains silent on procedure implying only minimal due process requirements. Accordingly, an agency may adopt its own procedure for an informal adjudication so long as the agency does not otherwise violate the U.S. Constitution or other law.

What is Judicial Review?

Other provisions of the APA govern judicial review of agency actions and public access to agency-created law and information.

There are three main issues regarding judicial review:

1. Whether judicial review is available. Judicial review is available where the court has the jurisdiction to hear a case and the plaintiff has standing to sue.
    - Jurisdiction is the range of legal authority including the area or subject over which a court's legal authority extends.
    - Standing is the legal right to initiate a lawsuit. To do so, a person must be sufficiently affected by the matter at hand, and there must be a case or controversy that can be resolved by legal action.
2. When judicial review is appropriate. Judicial review is appropriate after the plaintiff has exhausted other recourse and proves ripeness.
    - Exhaustion is established when other (usually more localized) mechanisms for justice under the law have been used and ineffective.
    - Ripeness considers whether the issue is of prominent concern and whether the law or effects of the violation are not outdated.
3. What the standard of review should be. Different standards of review are appropriate depending on the agency decision.
    - Where agency action violates the Constitution, the court evaluates whether there is substantial bias in the regulation susceptible to a constitutional challenge of animus.

[93] 5 USC § 556
[94] 5 USC § 557

- Where agency action is unsupported by substantial evidence, the court compares evidence in the record with the agency decision.
- Where agency action is arbitrary and capricious, the court determines whether the agency's decision is grounded and supported by the stated purpose of the enacting legislation.

Courts have grappled with judicial review of agency actions. In *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*[95], the U.S. Supreme Court gave administrative agencies flexibility in passing regulations. Agencies are often able to initiate regulations as long as they are reasonable and agency decisions are not heavily scrutinized by the court.[96]

Claims under the APA

Who?

Any person has a private right of action to seek judicial review of final agency actions.[97]

For what?

Any failure on the part of an agency to meet the minimal requirements of federal or state administrative procedure acts is a cause for action under the APA.

The APA is an important tool because it provides for accountability in purported agency procedures. So, when an agency fails to meet even its own procedural requirements, there may be remedy under the APA.

What remedy?

A reviewing court has the authority to:

1. Compel an agency to act where the agency action unlawfully withheld or unreasonably delayed action.
2. Hold unlawful or set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not within the law…[or] without observance of procedure required by law.

How can the APA apply to Oil and Gas development?

The APA allows for advocates to hold agencies responsible to environmental regulations. Tribes may consider APA suits to challenge agency determinations or projects that undermine the purpose of federal environmental regulations.

[95] 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984).
[96] *See generally* http://law.jrank.org/pages/4084/Administrative-Procedure-Act-1946.html
[97] 5 U.S.C. § 702; § 704(2004).

Clean Water Act (CWA)

Overview

The goal of the Clean Water Act (CWA) is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" through the elimination of pollutant discharge, setting of water quality goals, and prohibiting toxic discharge of effluent by point sources. There are three primary actions under the CWA:

1. National Pollution Discharge Elimination System (NPDES) permitting,
2. Total Maximum Daily Load (TMDL) ambient water quality standards, and
3. Section 404 dredge and fill permitting.

What does the CWA apply to?

The CWA applies to "navigable waterways."[98] Although EPA offers a sufficiently convoluted definition,[99] the statute has been interpreted broadly to include "all waters of the United States."[100]

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[98] 33 U.S.C.A. § 1362(7)

[99] http://www.epa.gov/npdes/pubs/101pape.pdf. EPA defines the term to include: navigable waters, tributaries of navigable waters, interstate waters, and intrastate lakes, rivers, and streams which are (1) used by interstate travelers for recreation and other purposes, (2) sources of fish or shellfish sold in interstate commerce, or (3) utilized for industrial purposes by industries engaged in interstate commerce.

[100] *U.S. v. TGR Corp.*, 171 F.3d 762, (2d Cir. 1999). (found that a brook into which the defendant's employees discharged waste slurry from an asbestos removal project was a "navigable water" under the Act. The court noted that the Act defines "navigable waters" to mean "waters of the United States," which includes tributaries of navigable waterways. The court determined that the brook was a natural tributary of a creek that was an undisputed navigable waterway, even though, in some places, it had been channeled

Who implements the CWA?

Although the intent of the CWA was for Congress to administer the programs, they were eventually delegated to the states and tribes (TAS) to administer their own regulatory programs. TAS status allows tribes to regulate water quality on reservation lands as well as make demands on state regulatory schemes upstream from Indian Country. Section 404 is an exception to state and tribal control and is carried out by the Army Corps of Engineers.

What is a pollutant under the CWA?

"Pollutant" is "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment rock, sand, cellar dirt, and industrial, municipal, and agricultural waste discharged into the water."[101]

1. National Pollution Discharge Elimination System (NPDES)

How does an applicant acquire a NPDES permit?

The process for acquiring a permit is relatively simple. CWA requirements for NPDES permit issuance are:

1. Notice. The permit application and the permits themselves must be made available to the public.
2. Public hearing. In addition to NEPA public notice and comment procedures, the permit writer is required to hold a hearing if there is a significant degree of public interest.
3. Judicial review. Review occurs in federal court of appeals.[102] Judicial review of a NPDES permit must be sought within 120 days of permit issuance and complainants must prove exhaustion of administrative procedures. State-issued NPDES permits are subject to judicial review in state courts subject to the provisions of state law. Appeal of an individual NPDES permit decision, may, in certain circumstances, be taken to EPA's Environmental Appeals Board by parties who participated in the permit process. [103]

What are specific or general NPDES permits?

General permits allow "classes of discharge" (e.g. vessels or pesticides) to be permitted together rather than site specific allowances. These permits are designed for situations where specific permits are not efficient at regulating discharge. The decision to require a general permit rather than a specific permit is largely made by an agency director. However, interested parties can petition for a general permit. General permits are subject to the conditions of specific uses and water quality based limits where imposed.

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into underground pipes to make room for development. This annotation collects and summarizes those federal cases in which the courts have determined what are "navigable waters" subject to the Federal Water Pollution Control Act (33 U.S.C.A. §§ 1251 et seq.)).

[101] 33 U.S.C. § 1362(6)

[102] CWA § 509 (b) (1) (F).

[103] Judicial review of federally issued permits is governed by § 509 (b) of the Clean Water Act.

What types of pollutants are regulated under NPDES?

The term pollutant is defined very broadly by the NPDES regulations and litigation and includes any type of industrial, municipal, and agricultural waste discharged into water. For regulatory purposes, pollutants have been grouped into three general categories under the NPDES Program:

- Conventional of which there are five.[104]
- Toxic pollutants, or priority pollutants, which include metals and manmade organic compounds. [105]
- Non-conventional pollutants, which do not fall under either of the above categories and include such parameters as ammonia, nitrogen, phosphorus, chemical oxygen demand (COD), and whole effluent toxicity (WET).[106]

What facilities are regulated under the CWA?

Under the CWA existing facilities are less restricted than new facilities. Sources in existence before the enactment of the CWA are subject to the following standards:

- Technology-based effluent limitations reflecting "best conventional technology" (BCT) for a limited class of "conventional pollutants" and
- "Best available technology" (BAT) for all other pollutants. The Supreme Court has interpreted this standard to require BAT on a cost-benefit analysis.[107]

New sources experience the highest level of regulation. Sources commenced after the promulgation of national effluent limitation for their category are subject to:

- Technology-based limitations reflecting "best available demonstrated control technology," generally known as "new source performance standard" (NSPS). These sources must conform and adopt leading industry technologies to minimize pollution discharge.

What does the NPDES regulate?

NPDES requires a permit for all point sources to discharge into waters of the United States.

What is a point source?

Point sources are discrete conveyances and may include:

- Industrial facilities (e.g. manufacturing, mining, oil and gas extraction, and service industries),
- Municipal governments and other government facilities (e.g. military bases), and
- Some agricultural facilities (e.g. animal feedlots).

What are non point sources (NPSs) and how are they regulated?

Non point source pollution is pollution occurs when rainfall, snowmelt, or irrigation runs over land or through the ground, picks up pollutants, and deposits them into rivers, lakes, and coastal waters, or introduces them into ground water. Examples of NPS are:

- Combined sewer overflows (CSOs),

[104] § 304(a)(4) of the CWA
[105] § 307(a)(1) of the CWA
[106] http://www.epa.gov/npdes/pubs/101pape.pdf
[107] Entergy Corp. v. Riverkeeper Inc, 745 F. 3d 83.

- Pretreatment, sanitary sewer overflows (SSOs), and
- Storm water.

The Section 319 Non point Source Management Program was enacted to aid states, territories, and tribes in reducing NPS. This is accomplished through technical and financial assistance, training, education, and the monitoring of projects aimed at curbing NPS.

NPS regulation relies on NPDES permit coverage to address storm water runoff from:

- Medium and large municipal separate storm water systems (MS4s) generally serving populations of 100,000 or greater,
- Construction activity disturbing 5 acres of land or greater, and
- Ten categories of industrial activity.[108]

2. Total Maximum Daily Load (TMDL) Ambient Water Quality Standards

What are Total Maximum Daily Loads (TMDLs)?

§ 303(d)(1)(C) of the CWA and EPA's implementing regulations require

1. States or tribes to identify the water bodies that do not meet water quality standards after application of the technology-based effluent limitations required by the Act.[109] Technology-based limitations are set according to the effectiveness of available technology rather than water quality-based limitations that aim for a certain water quality standard.
2. States or tribes are then required to develop a TMDL analysis for the pollutants that are not meeting water quality standards in those water bodies. By definition, a TMDL specifies how much pollution is allowed from all contributing sources (e.g., point sources, non point sources, and natural background) at a level necessary to attain the applicable water quality standards with seasonal variations and a margin of safety that takes into account any lack of knowledge concerning the relationship between the sources of the pollutant and water quality.

3. Section 404 Dredge and Fill Permitting Wetland Regulation

What does § 404 regulate?

Section 404 is very distinct from other areas of the CWA and is implemented and carried out by the Army Corps of Engineers. Section 404 may apply to:

- Dams,
- Highways, and
- Any conversion of wetlands to uplands for farming and forestry.

Section 404 establishes a program to regulate the discharge of dredge and fill material into waters of the United States, including the protection of valuable wetlands and other aquatic habitats through a permitting process that ensures development and other

[108] 40 CFR § 122.26; See also for summary http://www.cayugawatershed.org/Cayuga%20Lake/RPP/cayfedregs.htm
[109] 40 CFR Part 130

activities are conducted in an environmentally sound manner.[110] The premise is that no dredging should occur if an environmentally preferable and practicable alternative exists. If a § 404 permit is required in a specific operation, it constitutes a federal action that will implicate NEPA and ESA considerations.

In order to obtain a § 404 permit, a developer must:

1. Take steps to avoid wetland impacts where practicable;
2. Minimize potential impacts to wetlands; and
3. Provide compensation for any remaining, unavoidable impacts through activities to restore or create wetlands.

Section 404 permits may be issued on a nationwide, regional, state, or tribal basis for particular categories of activities (e.g. minor road crossings, utility line backfill, and bedding) as a means to expedite the permitting process.

CWA Claims

Who?

Any person or persons having an interest which is or may be adversely affected.[111]

What for?

Violation of an effluent standard or limitation, including:

- Discharge without a permit,[112] or
- Violation of a permit condition.[113]

What remedy?

- Injunction to enforce standard or limitation
- Civil penalties payable to federal government
- Criminal penalties issued by federal, state, or tribal programs
- Attorneys fees
- Possible jail time

How can the CWA address pollution from Oil and Gas development?

1. Storm water discharge. NPDES permits are required for storm water discharges from field activities or operations associated with Oil and Gas including:
    - exploration,
    - production,
    - processing,
    - treatment operations, or
    - transmission facilities. [114]

[110] EPA Website, Clean Water Act enforcement. http://www.epa.gov/compliance/civil/cwa/index.html
[111] 33 USCA 1365 (g)
[112] § 301 (a)
[113] § 402
[114] 40 CFR 122.26(b)(14)(iii)

This definition also includes activities necessary to prepare a site for drilling and for the movement and placement of drilling equipment, whether or not such field activities or operations may be considered "construction activity."[115,116]

2. Construction NPDES. Oil and gas industry construction activities that disturb more than five acres of land were required to apply for permit coverage by 2003, and all other small construction operations were required to obtain a permit by 2006.[117] State or tribal permitting authorities may require stricter permit attainment.[118] The operator is responsible for applying for the permit.[119]

Operators can avoid permit requirements for Oil and Gas discharge and related construction by establishing "no contamination" to any stream or municipal operation.[120]

Because Oil and Gas development is now subject to NPDES permit requirements, they are subject to the administrative process surrounding the procedure as well including public comments. Through public comment, the agency can learn and respond to suggestions of "best management practices" which may be implemented or raise current development standards in particular areas.

[115] See 33 U.S.C. § 1362(24).

[116] The Energy Policy Act of 2005 effectively exempted from NPDES permit requirements storm water discharges of sediment from construction activities associated with oil and gas exploration, production, processing, or treatment operations or transmission facilities unless the relevant facility had a discharge of storm water resulting in a discharge of a reportable quantity of oil or hazardous substances.[116] Shortly thereafter, the Natural Resources Defense Council (NRDC) petitioned the Ninth Circuit Court of Appeals (Ninth Circuit) for direct review of EPA's action. In 2008, the Ninth Circuit Court of Appeals issued an order denying EPA's request for rehearing of the Court's decision vacating EPA's 2006 oil and gas construction storm water regulation.

[117] For any storm water discharge associated with small construction activity identified in paragraph (b)(15)(i) of this §, see 122.21(c)(1). Discharges from these sources, other than discharges associated with small construction activity at oil and gas exploration, production, processing, and treatment operations or transmission facilities, require permit authorization by March 10, 2003, unless designated for coverage before then. Discharges associated with small construction activity at such oil and gas sites require permit authorization by June 12, 2006. 40 CFR 122.26(e)(8)

[118] Environmental Protection Agency website, NPDES Facts http://cfpub.epa.gov/npdes/faqs.cfm?program_id=6#303

[119] 40 CFR 122.21(b). The operator is the person who has operational control over construction plans and specifications, and/or the person who has day-to-day supervision and control of activities occurring at a construction site. In some cases, the operator may be the owner or the developer, in other cases the operator may be the general contractor, in some cases both entities will be considered operators. *Id.*

[120] The Director may not require a permit for discharges of storm water runoff from mining operations or oil and gas exploration, which are not contaminated by contact with on site pollutants. 40 CWA 122.26(a)(2)

Safe Drinking Water Act (SDWA)

Overview

The Safe Drinking Water Act (SDWA) was passed in 1974 to protect drinking water supplies from harmful contaminants. With the involvement of EPA, states, tribes, drinking water utilities, and citizens, multiple barriers ensure that tap water in the United States and territories is safe to drink.

The SDWA is important in that it not only protects the water humans consume directly, but also water used for agriculture and the production of livestock. The identification and control of non point source (NPS) pollution is a major consideration in attaining the standards set by the EPA to ensure the quality of water used for drinking and agricultural purposes.[121]

Overview of SDWA

I. Prevention Approaches
- Source Water Protection
- State Ground Water Protection
- Capacity Development
- Operator Certification

II. Consumer Information
- Consumer Awareness
- Public Notification

III. Contamination Selection
- Standards and Regulation Development
- Arsenic, Sulfate, Radon, Disinfection Byproducts
- Drinking Water Studies and Research
- Small Systems Technology, Variances, and Exemptions
- Monitoring

[121] http://www.cayugawatershed.org/Cayuga%20Lake/RPP/cayfedregs.htm

- Enforcement

IV. Funding for States and Water Systems
- Drinking Water State Revolving Fund

V. Other Provisions
- Public Water Supply Supervision
- Federal Agencies
- Miscellaneous

Who implements the SDWA?

In most cases, EPA delegates responsibility for implementing drinking water standards to states and tribes.[122]

Who must comply with drinking water standards?

Drinking water standards apply to public water systems (PWSs), which provide water for human consumption through at least 15 service connections, or regularly serve at least 25 individuals. Public water systems include municipal water companies, homeowner associations, schools, businesses, campgrounds and shopping malls.

Primary standards go into effect three years after they are finalized. If capital improvements are required, EPA's Administrator or a state may allow this period to be extended up to two additional years.

What about small systems?

Small systems receive special consideration from primary regulators. More than 90 percent of all public water systems are small and these systems face the greatest challenge in providing safe water at affordable rates. When setting new primary standards, EPA must identify technologies that achieve compliance and are affordable for systems serving fewer than 10,000 people. These may include packaged or modular systems and point-of-entry/point-of-use treatment devices under the control of the water system. When such technologies cannot be identified, EPA must identify affordable technologies that maximize contaminant reduction and protect public health. Small systems are considered in three categories: serving 10,000-3301 people; 3,300-501 people; and 500-25 people.

Are there any additional exemptions?

States or tribes (TAS) are authorized to grant variances from standards for systems serving up to 3,300 people if the system cannot afford to comply with a rule (through treatment, an alternative source of water, or other restructuring) and the system installs EPA-approved variance technology. [123] Under certain circumstances, exemptions from standards may be granted to allow extra time to seek other compliance options or financial assistance. After the exemption period expires, the public water systems must be in compliance. The terms of variances and exemptions must ensure no unreasonable risk to public health.

[122] http://www.epa.gov/safewater/standard/setting.html

[123] States can grant variances to systems serving 3,301-10,000 people with EPA approval. SDWA does not allow small systems to have variances for microbial contaminants.

What are drinking water standards?

Drinking water standards are regulations that EPA sets to control the level of contaminants in the nation's drinking water. The EPA's multiple barrier approach to drinking water protection includes:

- Assessing and protecting drinking water sources;
- Protecting wells and collection systems;
- Making sure water is treated by qualified operators;
- Ensuring the integrity of distribution systems; and
- Making information available to the public on the quality of their drinking water.

There are two categories of drinking water standards:

1. National Primary Drinking Water Regulation (NPDWR). This primary standard is a legally enforceable standard that applies to public water systems. Primary standards protect drinking water quality by limiting the levels of specific contaminants that can adversely affect public health and are known or anticipated to occur in water. They take the form of maximum contaminant levels or treatment techniques.
2. National Secondary Drinking Water Regulation (NSDWR). This secondary standard is a non enforceable guideline regarding contaminants that may cause cosmetic effects (such as skin or tooth discoloration) or aesthetic effects (such as taste, odor, or color) in drinking water. EPA recommends secondary standards to water systems but does not require systems to comply. [124]

What is the process of developing drinking water quality standards?

EPA considers input from many individuals and groups throughout the rulemaking process.[125] While considering public input throughout the process, EPA must (1) identify drinking water problems, (2) establish priorities, and (3) set standards.

1. Identify drinking water problems. EPA must first make determinations about which contaminants to regulate. These determinations are based on health risks and the likelihood that the contaminant occurs in public water systems at levels of concern.
2. Prioritize contaminant regulation. The agency must determine that regulating the contaminants would present a meaningful opportunity to reduce health risk. Contaminants on the Contaminated Candidates List (CCL) are divided into priorities for regulation, health research, and occurrence data collection. The agency will also select up to 30 unregulated contaminants from the CCL for monitoring by public water systems serving at least 100,000 people.
3. Propose and finalize a National Primary Drinking Water Regulation. After reviewing health effects studies, EPA sets a Maximum Contaminant Level Goal (MCLG). The maximum level of a contaminant in drinking water is usually set where no known or anticipated adverse effect on the health of persons would occur.

[124] However, states or tribes may choose to adopt them as enforceable standards. This information focuses on national primary standards.
[125] Implicates APA procedures.

What are MCLGs and how are they enforced?

Maximum Contaminant Level Goals (MCLGs) are non-enforceable public health goals. Since MCLGs consider only public health and not the limits of detection and treatment technology, sometimes they are set at a level which water systems cannot meet. When determining an MCLG, EPA considers the risk to sensitive subpopulations (infants, children, the elderly, and those with compromised immune systems) of experiencing a variety of adverse health effects.

After determining a MCLG, EPA must complete an economic analysis to determine whether the benefits of that standard justify the costs. If not, EPA may adjust the MCLG for a particular class or group of systems to a level that "maximizes health risk reduction benefits at a cost that is justified by the benefits." EPA may not adjust the MCLG if the benefits justify the costs to large systems and small systems are unlikely to receive variances.

Claims under SDWA

Who?

Subchapter 1449 regulates citizen's civil actions. Citizens may bring civil judicial actions against public water systems for violations of the regulations.

What for?

Proof of water contamination or other violation of SDWA.

What remedy?

Remedies may vary based on state or tribal regulatory systems, but may include:

- Injunction or the halt of facility procedures,
- Remediation, or
- Fines of up to $10,000 per day for certain violations of the law.[126]

How does SDWA apply to Oil and Gas development?

SDWA's Underground Injection Control (UIC) program protects current and future underground sources of drinking water by regulating the injection of industrial, municipal, and other fluids into groundwater, including the siting, construction, operation, maintenance, monitoring, testing, and closing of underground injection sites. According to the EPA, there are more than 400,000 underground injection wells across the country used by agribusiness and the chemical and petroleum industries.[127]

Hydraulic fracturing involves injecting fluids into an oil or gas well at extremely high pressure to crack open an underground formation and then prop open the new fractures in order to facilitate the flow of oil and gas out of the well. The fluids often contain highly toxic chemicals, and hydraulic fracturing is suspected of endangering drinking water in many places across the country.

[126] 42 USC 300h-2(c). The total maximum fine is 125,000.
[127] EPA "What Is the UIC Program?" (Feb 2006), http://www.epa.gov/safewater/uic/whatis.html.

Although state UIC programs have been required to include hydraulic fracturing in their UIC Programs,[128] the 2005 Energy Policy Act excluded hydraulic fracturing related to Oil and Gas development from SDWA.

Specific exemptions include:

1. Fines for violations involving the underground injection of fluids related to Oil and Gas production are reduced to only $5,000 per day.[129]
2. While the under the UIC program Class I wells are for injection of waste, including hazardous waste as defined in RCRA. Because many toxic materials associated with Oil and Gas operations are exempt from the hazardous materials section of RCRA, they do not have to be injected only into Class I wells. Instead, they can be injected into Class II wells, which have less stringent standards.[130]
3. The EPA may not prescribe requirements which interfere with or impede underground injection related to certain Oil or Gas operations "unless such requirements are essential to assure that underground sources of drinking water will not be endangered by such injection." This establishes a higher hurdle for regulating the Oil and Gas industry that does not apply to other industries.[131]

The description of this SDWA exemption is important because recent litigation surrounding the Oil and Gas exemptions under the CWA has enhanced the regulation of Oil and Gas development under that statute. So, while Oil and Gas exemptions pursuant to the Energy Policy Act of 2005 are the status quo, litigation may change the effect of SDWA on Oil and Gas development in the near future.

[128] In 1997, the Courts ruled that hydraulic fracturing of coal beds in Alabama should be regulated under the SDWA as underground injection (LEAF v. EPA, 118 F. 3d 1467). Alabama was required under the ruling to modify its UIC program. It did so, and EPA approved the revision.
[129] 42 USC 300h-2(c). In both cases the total maximum fine is 125,000
[130] 42 USC 300h(b) and 42 USC 300h-1(c).
[131] 42 USC 300h-4. *See also* EPA's "What is the UIC Program?" (Feb 2006). http://www.epa.gov/safewater/uic/whatis.html.

Clean Air Act (CAA)

Overview

Under the 1970 Clean Air Act (CAA), the EPA sets limits on certain air pollutants, including setting limits on how much pollution can be in the air anywhere in the United States. The CAA also gives EPA the authority to limit emissions of air pollutants coming from sources like chemical plants, utilities, and steel mills. The CAA regulates emissions for several air pollutants through (1) national ambient air quality standards (NAAQS), (2) regulation of hazardous air pollutants, (3) new source performance standards (NSPSs), and (4) prevention of air quality deterioration (PSD).

What is the CAA regulatory process?

1. EPA sets NAAQS and identifies "non attainment areas."
2. SIPs and TIPs are developed for those areas. Tribes can apply for TAS status to enact TIPs.
3. Permit systems work to make sure power plants, factories, and other pollution sources meet their goals to clean up the air.

1. National Ambient Air Quality Standards (NAAQS)

What air pollutants are regulated?

In setting the NAAQS, the EPA has regulated six common air pollutants (criteria pollutants) that are harmful to health and the environment, and cause property damage.

- Particle pollution* (often referred to as particulate matter)

- Ground-level ozone*
- Carbon monoxide
- Sulfur oxides
- Nitrogen oxides
- Lead

* particle pollution and ground-level ozone are the most widespread health threats.

EPA regulates criteria pollutants by developing human health-based and/or environment-based criteria (science-based guidelines) for setting permissible levels.
The standards for regulating pollutants are:

1. Human health, and
2. Environment and property damage

A geographic area with air quality that is cleaner than the primary NAAQS standard is called an "attainment area." Areas that do not meet the primary standard are called "non attainment areas."

How is the NAAQS enforced?

Both TIPs and SIPs are designed to promote local and regional air quality by allowing tribal and state governments to flexibly tailor air plans to their circumstances. TIPs fill the regulatory gap in air quality regulations in Indian Country where state regulations do not apply and federal regulations might not exist. EPA had previously indicated that tribes, like states, may adopt ambient air quality standards that are more stringent than federal standards.[132] However, few tribes have sought or obtained regulatory authority under the CAA, so the scope of tribal authority under the CAA remains an open question.

How do TIPs differ from SIPs?

Under the CAA, permissible TIPs differ from SIPs in significant ways.

1. Unlike states, which are required to develop and submit SIPs, tribes have the option to either develop a TIP or instead request EPA to develop and implement a federal implementation plan (FIP).[133]
2. Unlike SIPs, which must address each criteria pollutant, TIPs may address only some criteria pollutants and isolated aspects of an air quality plan so long as they are "reasonably severable" from what could be in the TIP as a whole.[134] Under this modular approach, tribes have the flexibility to develop TIPs that address only the air quality concerns that immediately and specifically impact the tribe, rather than all six criteria pollutants for which EPA sets NAAQS. [135]

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[132] Rebecca Battye, Darcie Smith, and Stephanie J. Walsh, United States Environmental Protection Agency, Developing a Tribal Implementation Plan 12 (2002), available at http://www.epa.gov/oar/tribal/tip2002/.
[133] *Id.* 17 (The Shoshone-Bannock Tribe of southeast Idaho, for example, requested EPA to develop a FIP that would respond to elevated levels of particulate matters on the Fort Hall reservation caused in part by a nearby industrial facility).
[134] 40 C.F.R. § 49.7(c)(2007).
[135] 72 Fed. Reg 63988 (2007) (Nov. 14, 12007); United States Environmental Protection Agency, Tribal Air News 3 (November 13, 2007), http://www.epa.gov/air/tribal/pdfs/Nov%202007%20Publication.pdf. (EPA's recent approval of a TIP for the Mohegan Tribe of Connecticut on November 14, 2007, illustrates this modular aspect of TIPs. The Mohegan Tribe of Connecticut instituted a cap on nitrogen oxide

3. Tribes also have the option, unlike states, to jointly manage TIPs with EPA, thereby allowing tribes to focus on particular air quality issues with the assurance that EPA will regulate other air quality issues if necessary.

Perhaps the most significant aspect of TIPs is that they carry the force of federal law on land owned by Non Indians. Congress specifically authorized TIPs to be "applicable to all areas . . . located within exterior boundaries of the reservation, notwithstanding the issuance of any patent and including rights-of-way running through the reservation."[136] Because they carry the force of federal law, TIPs allow tribes to address territorial air quality by regulating an entire region, including Non Indian fee land in Indian Country.

How are pollution emitters regulated?

Larger industrial and commercial sources that release pollutants into the air must aquire operating permits. Permits are issued by states or tribes[137] and include information on:

- Which pollutants are being released,
- How much may be released,
- What steps the source's owner or operator is required to take to reduce the pollution, and
- Plans to measure and report the air pollution emitted.

As part of the permit process, a source must prepare a compliance plan and certify compliance. State or tribe permit authorities must notify contiguous states of permit applications that may affect them and the application and comments from any contiguous states must be forwarded to the EPA for review.

2. Hazardous Pollutant Regulation

How are hazardous pollutants regulated?

The EPA must establish technology-based emission standards, called Maximum Achievable Control Technology (MACT) standards for the sources of 188 hazardous pollutants listed in the legislation and specify categories of sources subject to the emission standards. [138]

The EPA is required to revise standards as well as add or delete substances or sources from lists on its own initiative or in response to a petition.

What are the obligations of hazardous pollutant emitters?

To meet national standards for hazardous air pollutants (NESHAPs), a company must install the MACT that is technically achievable by the cleanest facilities in an industry sector. [139]

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emissions from stationary sources owned by the Mohegan Tribal Gaming Authority within the reservation. Without addressing any of the other five criteria pollutants, the Tribe's TIP attempts to help attain national ambient air quality standards for ground-level ozone.)

[136] 42 U.S.C. §7410(o).

[137] If those governments do not do a satisfactory job of carrying out the Clean Air Act permitting requirements, EPA can take over issuing permits.

[138] 42 U.S.C. §112 (g)

[139] 40 C.F.R Part 63, Subpart B (section 112(g))

What about small pollutant emitters?

Small sources of toxic air pollution that are under common control and in close proximity to perform similar functions must be added together and considered as one source. For example, the emissions from many small wells owned and operated together, that are part of a larger system are considered in the aggregate and must comply with NESHAPs. This "aggregation requirement" is intended to protect the public from smaller sources that might seem individually harmless but cumulatively account for the release of large volumes of toxic substances into the air.

3. New Source Performance Standards (NSPS)

The CAA is structured with a similar purpose as the CWA, where there is a an effort to regulate existing air pollution as well as provide a stringent regulatory scheme for future development. EPA is required under the CAA to establish nationally uniform and technology based performance standards for new pollution sources according to the categories of industrial facilities.[140] Any newly constructed source or increase in emission or pollutant from a particular source is subject to NSPS standards.[141]

4. Prevention of significant deterioration (PSD)

In the effort to prevent further deterioration of air quality throughout the nation, the CAA divides clean air into three classes, and specifies the increments of SO_2 and particulate pollution allowed in each.

- Class I includes international and national parks, wilderness, and other pristine areas and allowable increments of new pollution are very small.
- Class II includes all attainment areas and not classifiable areas not designated as Class I.
- Class III includes selected areas that states may designate for development. Allowable increments of new pollution in this class are large but not exceeding NAAQS.

How is the CAA enforced?

In general, when EPA finds that a violation has occurred, the agency may:

- Issue an order requiring the violator to comply,
- Issue an administrative penalty order (use EPA administrative authority to force payment of a penalty),
- Bring a civil judicial action (sue the violator in court), or
- Use discretion or a request from two or more states to form a commission to address visibility issues surrounding particular areas (e.g. National Parks, Wilderness areas, etc.).

[140] *See* 40 C.F.R 60

[141] *See* 40 C.F.R 60.14(a). However, 40 C.F.R 60.14(e) provides certain exceptions to that general rule.

How does the CAA apply to Oil and Gas development?

The CAA completely exempts Oil and Gas exploration and production activities from the aggregation requirement. Even if wells, compressor stations, condensate tanks, and disposal pits are adjacent to each other and owned by the same company, they do not have to comply with NESHAPs.

New advancements

On April 17, 2009 the U.S. Environmental Protection Agency (EPA) issued a proposed "endangerment finding" for emissions of greenhouse gases (GHGs), including CO_2, from new motor vehicles and new motor vehicle engines. The two proposed findings are:

- "atmospheric concentrations of greenhouse gasses endanger public health and welfare within the meaning of § 202(a) of the Clean Air Act."; and
- "emissions of these substances [six specified GHGs] from new motor vehicles and new motor engines are contributing to air pollution which is endangering public health and welfare under § 202(a) of the Clean Air Act."

The six GHGs whose combined emissions comprise the "air pollution" for the proposed endangerment finding are

- Carbon dioxide (CO_2),
- Methane (CH_4),
- Nitrous oxide (N_2O),
- Hydrofluorocarbons (HFCs),
- Perfluorocarbons (PFCs) and
- Sulphur hexafluoride (SF_6).

EPA concedes that while it plans to include PFCs and SF_6 in the scope of the endangerment finding, those gases are not emitted by new motor vehicles or engines.

This finding is only proposed, so the impact is yet to be seen. If passed, the CAA will be required to set standards for GHG production. Because oil and natural gas industries are producers of significant Carbon Dioxide (CO_2), Methane (CH_4) and Nitrous Oxide (N_2O),[142] the endangerment finding could extend significant protections to Oil and Gas development currently not required to apply for accumulation permits under the CAA.

What can we do?

- Tribe could petition for the addition or deletion of a substance or source. For example, Volatile Organic Compounds or VOCs are also produced by Oil and Gas development and if added to the list of hazardous pollutants, may demand protection.
- Tribe could petition for the regulation of "upwind" air pollution sources.
- Tribe may develop a TIP addressing the primary pollutants generated by Oil and Gas production.

[142] Angela Zahniser. "Characterization of Greenhouse Gas Emmission Involved in Oil and Gas Exploration and Production: A Review for the California Air Resources Board.

- Tribe could utilize TIPs to heighten the air quality designation and regulate the impact of on and off reservation development. For example, both the Fort Peck and Northern Cheyenne Reservations are designated Class I airsheds.
- Citizen suit.[143]

Claims under the CAA

Who?

Any person can bring a suit against any person or entity.

What for?

Violation of any emission standards or administrative order.

What remedy?

1. Injunction to stop the construction or modification of any source in violation of the CAA.
2. Force EPA to carry out any non-discretionary duty.
3. Penalties.
4. Attorneys fees.

[143] CWA Section 304; 42 U.S.C. Section 7604.

Resource Conservation and Recovery Act (RCRA)

Overview

The Resource Conservation and Recovery Act (RCRA) was enacted in 1976 to address the huge volumes of municipal and industrial solid waste generated nationwide.[144] Under RCRA, the EPA is obligated to provide explicit and legally enforceable requirements for waste management.[145] In addition to regulation, the EPA offers general guidance and direction for compliance with the regulations.[146]

Who is obligated under RCRA?

Generators are responsible for characterizing their waste as hazardous and must determine whether a waste exhibits a characteristic by either testing or applying knowledge of the hazardous waste characteristic to the waste.[147] Regulations also extend to transporters, treatments, storage, and disposal facilities (TSDFs).

How are solid wastes managed under RCRA?

EPA develops criteria for the design and operation of municipal solid waste landfills.[148] Subtitle D of RCRA addresses non hazardous solid wastes, including certain hazardous wastes which are exempt from the hazardous waste regulations. For example, hazardous wastes from households are exempt from most regulation. Subtitle D also includes:

- Garbage (milk containers, coffee grounds),
- Non recycled household appliances,
- Residue from incinerated automobile tires,
- Refuse such as metal scrap, wall board, and empty containers, and

[144] RCRA was an amendment to the Solid Waste Disposal Act.
[145] 40 CFR §239-282.
[146] 40 CFR 270.
[147] 40 CFR §262.11.
[148] RCRA Subtitle D.

- Sludge from industrial and municipal waste water treatment plants and from pollution control facilities.

How are hazardous wastes managed under RCRA?

Under the RCRA hazardous waste regulations, Subtitle C, EPA has primary responsibility for the permitting of hazardous waste treatment, storage, and disposal facilities. This is until EPA authorizes a state to operate portions or the entire hazardous waste program in lieu of EPA operating the program.

What is hazardous waste?

There is not a single comprehensive list of hazardous waste that is continuously updated, as hazardous waste identification is a process that involves many steps.

To be considered a hazardous waste,

1. The material must be classified as a solid waste.[149]
   EPA defines solid waste as garbage, refuse, sludge, or other discarded material (including solids, semisolids, liquids, and contained gaseous materials). However, some solid materials are excluded by RCRA and not considered solid wastes. [150]
2. The material must be specifically named on one of four lists of hazardous wastes or exhibit one of four characteristics. [151,152] Certain hazardous wastes are also excluded. [153]

What is the difference between solid and hazardous waste management?

Aside from the different material managed, RCRA intended solid (subtitle D) and hazardous (subtitle C) wastes to be managed by different entities. Congress intended via RCRA subtitle D that permitting and monitoring of municipal and non hazardous waste landfills to be a state responsibility while RCRA establishes a federal program to manage hazardous wastes from "Cradle to Grave."[154] The "Cradle to Grave" approach involves tracking and regulating hazardous wastes at every stage of their life cycle, from production to disposal and beyond.

However, hazardous and solid waste programs have mechanisms through which states can exercise key programs responsibilities. Both subtitle D and C programs can be administered by states that achieve authority to regulate. States may have more stringent rules than those of the federal hazardous waste management program. For instance, a state may impose more stringent regulations for hazardous waste identification or identify state-specific hazardous wastes.

There is not a TAS mechanism under RCRA for tribes to manage waste programs.

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[149] 40 CFR §261.2
[150] Excluded solid wastes are listed in 40 CFR 261.4(a)
[151] 40 CFR 261 (d) (F, K, P, U)
[152] 40 CFR 261 (c) Waste characteristics include: Ignitability, Corrosivity, Reactivity, and Toxicity.
[153] Excluded hazardous wastes are listed in 40 CFR261.4 (b)
[154] RCRA Subtitle C

What regulatory authority is available for tribes under RCRA?

There are no TAS provisions within RCRA and therefore tribes have not been able to implement permitting programs. However, as municipalities, tribes are still able to engage in site-specific waste regulation.[155, 156] tribes are also insulated from presumptive authority of State approved programs.[157]

As municipalities, tribes are eligible for funding options like the Tribal Open Dump Cleanup Project.[158,159]

Tribes may receive assistance by submitting proposals to the interagency work group regarding specific waste management needs. Proposal actions where assistance is available include:

- Proposals to characterize/assess open dumps,
- Proposals to develop Integrated Solid Waste Management (ISWM) Plans and Tribal Codes and regulations,
- Proposals to develop and implement alternative solid waste management activities/facilities, and
- Proposals to develop and implement closure and post-closure programs.

What are TSDF obligations?

TSDFs must obtain a permit to manage waste facilities. In order to obtain a permit, a TSDF owner and operator must comply with specific application procedures. The permitting process consists of

- An informal meeting prior to application,
- Permit submission,
- Permit review,
- Preparation of the draft permit,
- Taking public comment, and
- Finalizing the permit.[160]

Special permit provision procedures may be required by some waste management facilities.

How is RCRA enforced?

When noncompliance with RCRA is detected, compliance may be enforced through:

1. Administrative order. Administrative actions tend to be resolved quickly and can often be quite effective in bringing the facility into compliance with the regulations or in remedying a potential threat to human health or the environment.

[155] *Back country Against Dumps v EPA*, 100 F. 3d 147, 151 (1996) (holding that the EPA cannot approve a Tribal permitting program under § 6945(C), because Tribes are "municipalities" under the statute.)
[156] 42 U.S.C. § 6903(13)
[157] *State of Washington v EPA*, 752 F.2d 1465 (held that EPA administrator properly refused to approve proposed state program because RCRA does not authorize the states to regulate on Indian lands.)
[158] For more information see US-EPA, "Open Dump Cleanup Project helps Tribes Fight Waste." http://www.epa.gov/osw/wycd/tribal/pdftxt/opendump.pdf
[159] 42 U.S.C. § 6948
[160] 40 CFR 270

- Informal action requires notification to the facility that they are not in compliance and guidance on what the facility needs to do to come into compliance.
- Formal action often takes the form of an administrative order which is issued by EPA and imposes enforceable legal duties.

EPA may file an administrative complaint with the Administrative Law Judge (ALJ). Administrative orders issued under RCRA are:

- Compliance orders,[161]
- Corrective action orders,[162]
- Orders to conduct monitoring, analysis, or testing,[163] and
- Imminent and substantial endangerment orders.[164]

2. Criminal actions. Criminal actions are usually reserved for the most serious violations. [165]
3. Civil judicial actions. Civil suits are often employed in situations that present repeated or significant violations or where there are serious environmental concerns. Through the citizen suit provision any affected person may file a law suit.

Claims under RCRA

Who?

Any person once they provide 60 days notice to the EPA, state in which violation occurred, and the violator. This requirement is waived for hazardous waste violations.

What for?

1. Any facility that is in violation of RCRA
2. Against any past or present solid of hazardous waste generator, transporter, or TSDF owner or operator that has contributed or is contributing to management of

[161] § 3008(a) explains that compliance orders require any person who is not in compliance with the requirements of RCRA to comply immediately or set out a schedule for compliance. Penalties and suspension or revocation of interim status may also accompany a compliance order.

[162] § 3008(h) requires corrective action activities including: investigations, repairing liners, or pumping to treat ground water contamination, and any other action deemed necessary. These orders can also suspend interim status and impose larger penalties than other orders.

[163] *See* § 3013. These orders are used to evaluate the nature and extent of the problem through monitoring, analysis, and testing. Orders can be issued to either the current owner or operator of the facility or a previous owner/operator.

[164] EPA orders any person contributing to the problem to abate endangerment, which may include clean up or other actions. Can be used against any party, past or present generators, or owners or operators of the site. *See* § 7003.

[165] Criminal actions listed in RCRA § 3008, include knowingly (1) Transporting waste to a non permitted facility, (2)Treating, storing or disposing of waste without a permit or in violation of materials condition of a permit or interim status standard, (3)omitting important information from, or making a false statement in a label, manifest, report, permit, or interim status standard, (4) Generating, storing, treating or disposing of waste without complying with RCRA's record keeping and reporting requirements, (5) Transporting waste without a manifest, (6) Exporting a waste without the consent of the receiving country, or (7)transportation, treatment, storage, disposal, or export of any hazardous waste in such a way that another person is placed in imminent danger of death or serious bodily injury.

solid or hazardous waste in a manner that may present an imminent and substantial endangerment to human health or the environment.

3. Any failure on the part of the EPA to meet deadlines or promulgate rules mandated by the statute.[166]

What remedy?

1. Injunction to stop TSDFs in violation of RCRA.
2. EPA required carrying out any non-discretionary duty.
3. Penalties.
4. Attorneys fees.

What about cleaning up the mess?

RCRA does not contain comprehensive clean up regulations. However, RCRA allows agencies to address any releases of hazardous waste or hazardous constituents at both RCRA permitted and non permitted facilities. Under RCRA, the EPA:

- Requires corrective action for releases of hazardous waste or hazardous constituents from Solid Waste Management Units (SWNUs) in a facility's permit.[167]
- May impose corrective action requirements for releases that have migrated beyond the facility boundary.[168]
- May include any requirements deemed necessary in a permit, including the requirement to perform corrective action.[169,170]
- May, upon evidence of past or present handling of solid or hazardous waste, require any action necessary when a situation may present an imminent and substantial endangerment to health or the environment.[171]

How does RCRA apply to Oil and Gas development?

Oil and Gas development is not considered hazardous waste under RCRA because of the many exemptions for Oil and Gas production within the statute.[172,173] Diesel fuel for instance is considered a harmful practice in Coal Bed Methane (CBM) production, but there is nothing in place for the EPA to directly monitor this material when it is the result of Oil or Gas drilling. However, the state government may remedy this situation by providing more stringent classification for the different materials used in Oil and Gas development.

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[166] RCRA Section 7002 (a-g)
[167] Releases from Solid Waste Management Units (SWMUs) RCRA §3004(u).
[168] Releases beyond the facility boundary, RCRA § 3004(v).
[169] Omnibus permitting authority found in RCRA § 3005(c)(3)
[170] States may also impose additional permit requirements.
[171] RCRA § 7003.
[172] Exclusions exist because certain waste may be impractical or otherwise undesirable.
[173] Exclusions that account for Oil and Gas development are both solid waste and hazardous waste exclusions. § 261.4 (a)(2) excluded Hazardous Oil-Bearing secondary Materials and Recovered Oil from Petroleum Refining Operations, 261.4 (a)(18) (Petrochemical Recovered Oil), 261.4 (a) (19) (Spent Caustic Solutions from Petroleum Refining), 40 CFR 261.4 (b) (mining Overburden and Bevill and Bentsen wastes excluded). Also Dredge materials are excluded as they are considered covered by 404 permits under the CWA.

One of the primary shortcomings in the EPA regarding Oil and Gas development, particularly CBM development, is the lack of study into the health effects from the production process, including the materials used.

Comprehensive Environmental Response Compensation and Liability (CERCLA)

Overview

CERCLA was enacted in 1980. The law created a tax on the chemical and petroleum industries and provided broad federal authority to respond directly to releases or threatened releases of hazardous substances that may endanger public health or the environment. [174] Whereas RCRA was designed for waste management and does not contain comprehensive clean up provisions, CERCLA enabled the revision of the National Contingency Plan (NCP). The NCP provided the guidelines and procedures needed to respond to releases and threatened releases of hazardous substances, pollutants, or contaminants. CERCLA:

- Established prohibitions and requirements concerning closed and abandoned hazardous waste sites,
- Provided for liability of persons responsible for releases of hazardous waste at these sites, and
- Established a trust fund to provide for cleanup when no responsible party could be identified.

The law authorizes two kinds of response actions:

1. Short-term removals. Where short term removal actions may be taken to address releases or threatened releases requiring prompt response, or
2. Long-term remedial response actions. Long term remedial actions permanently and significantly reduce the dangers associated with releases or threats of releases of hazardous substances that are serious, but not immediately life threatening. These actions can be conducted only at sites listed on EPA's National Priorities List (NPL). [175]

CERCLA was amended by the Superfund Amendments and Reauthorization Act (SARA) in 1986. Among other things, SARA provided additional federal funding for the CERCLA trust.

[174] CERCLA § 9604
[175] EPA. CERCLA Overview. http://www.epa.gov/superfund/policy/cercla.htm.

When is CERCLA invoked?

CERCLA is invoked when:

1. Release of a hazardous substance. Any hazardous substance is released or there is a substantial threat of such a release into the environment, or
2. Release of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare.[176] Any release or substantial threat of release of these pollutants.

The President may also require removal, limited by some considerations[177], if there is a considerable threat to health and welfare and an imminent need for action.[178]

How is CERCLA carried out?

1. Identification of potential release (by emitter, petitioner, or agency).
2. Information is entered into the CERCLA information system (CERCLIS).
3. Each site undergoes a preliminary assessment (PA).
    a. If the threat is determined immediate, removal action may be deemed necessary.[179]
    b. If it is determined that long term clean up is necessary, remedial action will be the action taken. Remedial actions are the final response and remedy necessary and are usually very expensive procedures.
4. If remedial action is necessary, the agency will carry out a site inspection (SI).
5. Based on the information gathered in the PA and SI, the EPA will evaluate the site using the Hazard Ranking System (HRS), a scoring system that determines the relative risk to public health and the environment posed by hazardous substances in ground water, surface water, air, and soil.
6. From this ranking system, some sites are placed on the National Priorities List (NPL).
7. Once placed on the NPL, the remedial process begins.
    a. Remedial investigation/feasibility study (RI/FS) involves evaluating site conditions at the site, defining any problems, and comparing alternative site clean up methods.
    b. Remedial design/remedial action involves designing the chosen clean up and beginning construction.
8. Following the implementation of the remedy, the operation and maintenance of the remedy may include ground water pumping and treatment.
9. Once the EPA determines that all appropriate actions have been achieved the site is deleted from the NPL.

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[176] The Administrator shall promulgate and revise as may be appropriate, regulations designating as hazardous substances 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,* and shall promulgate regulations establishing that quantity of any hazardous substance the release of which shall be reported pursuant to § 9603 of this title. RCRA § 9604(4)

[177] § 9604 (a) (3)

[178] § 9604 (4)

[179] "removal actions" are short term clean up actions that address immediate threats at a site. Removal actions are limited to a 2 million dollar and 12 month perios that can be extended by the agency if deemed necessary. 9604 (c) (1)

10. Five year reviews are conducted to ensure that the remedy continues to be protective of human health and welfare.

What is Superfund liability?

Liability under CERCLA is:

1. Joint and Several. Joint and several liability means that any one potentially responsible party (PRP) may be held liable for the entire cleanup of the site. In other words, when the harm was caused by multiple parties, the parties cannot be separated or "separately liable."[180] For example, this is the opposite of the liability scheme in a car accident where based on fault drivers may be assessed different percentages of liability. Under CERCLA, every person is 100% liable.
2. Strict. Strict liability means that a PRP cannot simply claim negligence or that their actions were consistent with industry standard as a defense to liability. If a PRP was involved in the possession at any stage of some amount of the hazardous waste found at the site, that party is liable. [181]

What are the defenses to CERCLA liability?

Defenses to CERCLA liability are limited to cases in which the release was caused by:

- An act of God,
- Acts of war, or
- Acts/omissions of a third party with whom a PRP has no contractual relationship. [182]

[180] Section 9607 (a)

[181] (1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were 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 owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels 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, shall be liable. 96097 (a)

[182] Section 9607 (b)

How can a tribe take action under CERCLA?

1. Petition for cleanup of a particular site.
2. Monitor clean up activities. Although tribes are not eligible for TAS under CERCLA, federal and state agencies are required to consult with affected and surrounding tribes in implementing CERCLA clean up and NPL listing procedures.
3. Citizen suit for failure to follow CERCLA procedures.

Claims under CERCLA

Who?

Section 7002(a) entitles "any person" to commences a citizen suit under that section"[e]xcept as provided in subsection (b). Subsection 7002(b) call on the previously mentioned limitations to citizen suits including: notice and absence of simultaneous lawsuits. Plaintiffs must also provide notice of endangerment to the EPA and Attorney general.

What for?

The plaintiff has the burden to proves that the (defendant has contributed, or is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment. The endangerment must be from hazardous waste in connection to the CERCLA site.

What remedy?

Remedies for CERCLA violations may include an:

1. Injunction,
2. Alteration in clean up or extension of clean up operations, or
3. Attorney fees.

How does CERCLA apply to Oil and Gas development?

Oil and Gas byproducts are exempt from hazardous waste under CERLCA.[183]

National Historic Preservation Act (NHPA)

Overview

Section 106 of the NHPA requires each federal agency to identify and assess the effects of its actions on registered historic resources. The responsible federal agency must consult with appropriate state and local officials, Indian tribes, applicants for federal assistance, and members of the public and consider their views and concerns about historic preservation issues when making final project decisions.

[183] Section 9602 (b)

When does NHPA apply?

Section 106 of the NHPA applies when two thresholds are met:

1. Federal action. There is a federal or federally licensed action, including grants, licenses, and permits,[184]
2. Affecting a NHPA property. The action only needs the *potential* to affect properties listed in or *eligible* for listing in the National Register of Historic Places.[185]

How does the NHPA affect development projects?

Tribes have been using the registering of historic places as a way to stop development on or near sacred places. In January of 2005, the Forest Service banned rock climbers from Cave Rock, a Washoe sacred site near Lake Tahoe. And in October of the same year, the agency and the federal Bureau of Land Management put on hold plans for two geothermal plants that Calpine had been slated for Northern California's Medicine Lake area, sacred to several area tribes. Some complications exist in protecting sacred sites through federal regulation because it is impossible to maintain confidentiality of sacred sites through the listing process. Each tribe decides how to handle this and ultimately whether the use of federal regulation is worthwhile in protecting sacred places.

Because NEPA and other NEPA-like agency procedures require the consideration of NHPA listed places as part of the environmental analysis, development projects may be completely stopped or altered significantly due to the anticipated effect on a sacred place.

What protections are available for National Historic Places?

1. The NHPA itself requires:
   - Identification and evaluation of historic properties,
   - Assessment of a proposed project's effects on such properties, and
   - Resolution of adverse effects, including consideration of measures to avoid, minimize, or mitigate adverse effects.

   At each step of the process, the federal agency must consult with others. Where historic properties are of religious and cultural significance to Indian tribes, the agency must consult with tribes and organizations accordingly.

2. Executive order 13007 requires federal land managing agencies to:
   - Accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners,
   - Avoid adversely affecting the physical integrity of such sacred sites, and

[184] An "undertaking" means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a federal agency, including those carried out by or on behalf of a federal agency; those carried out with federal financial assistance; or those requiring a federal permit, license or approval. This requirement applies to all undertakings regardless of whether they are located on or off tribal lands.

[185] A historic property is defined in the Act as "any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion on the National Register, including artifacts, records, and material remains related to such a property" (16 U.S.C 470w).

- Develop procedures for reasonable notification of proposed actions or land management policies that may restrict access to or ceremonial use of, or adversely affect, sacred sites.

3. Executive order 13175 addresses consultation and coordination with tribal governments. 13175 applies to all federal agencies other than those considered independent federal agencies, and
   - Directs those agencies to respect tribal self-government and sovereignty, tribal rights, and tribal responsibilities whenever they formulate policies "significantly or uniquely affecting Indian tribal governments,"
   - Requires "meaningful and timely" consultation with tribes, and
   - Requires consideration of compliance costs imposed on tribal governments when developing policies or regulations that may affect Indian tribes.

Effects on historic sites are resolved by mutual agreement, usually among the affected state's historic preservation officer or the tribal historic preservation officer, the federal agency, and any other involved parties.

Toxic Substances and Control Act (TSCA)

Overview

The Toxic Substances Control Act (TSCA) was enacted in 1976 and empowers the EPA to gather information regarding the toxicity of chemical substances to determine whether they are a risk to human health and the environment. The TSCA works in order to notify federal agencies about the potential danger of new chemicals. The chemicals identified through this process contributes to the listing of hazardous substances that might contain such chemicals. Under TSCA:

- The EPA may require testing of substances by manufacturers and notification of the use of new chemical substances, and
- Extensive reporting and record-keeping is required by industry users of toxic substances.

In addition to generally regulating toxic substances, the TSCA contains specific provisions concerning asbestos, PCBs (polychlorinated biphenyls), and radon gas.

- The provisions concerning asbestos require inspection of school buildings, development of asbestos management plans by schools, and training and accreditation of contractors who deal with asbestos.
- The provisions concerning PCBs phase out the use of these substances.
- The provisions concerning radon require providing the public with information concerning the hazards of radon gas accumulation in buildings.

What actions are available?

The failure of EPA to meet the demands of the TSCA will warrant enforcement through administrative action or TSCA citizen suit provisions. [186]

[186] 15 USC Section 2619

Federal Insecticide, Fungicide and Rodenticide Act

Overview

The Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) was enacted to control the use of toxic substances used for pest control. FIFRA and the ESA often work together to protect critical species habitat. FIFRA requires that:

- All pesticides be registered with EPA. The registration process examines whether the pesticide, when used properly, presents unreasonable adverse risks to human health and the environment, and
- Information is disseminated to the public regarding the testing of pesticides.

FIFRA allows experimental use permits to be issued to test new substances and new uses of already tested substances. While posing a similar or overlapping mission as the TSCA, FIFRA is specific in analyzing the impact of chemicals when used particularly as pest control where the environmental health analysis of the TSCA is more broad.

Endangered Species Act (ESA)

Overview

The Endangered Species Act (ESA) was enacted in 1973 to provide a means for protecting animal and plant species that are threatened with extinction.

Under the ESA, the Secretary of the Interior has the authority to determine whether any species is either endangered or threatened. The Act sets out criteria for making this determination. If a species is included on the list of endangered or threatened species, the ESA prohibits any federal agency from jeopardizing the continued existence of that species. A threat may by direct or indirect.

The "taking" provision of the Act significantly impacts land development. This provision makes it unlawful to "take" an endangered or threatened species. A "taking" may consist of any harassment or harm, including significant modification to the habitat of the species. Violations of the Act may result in civil penalties, criminal penalties for knowing violations, injunctions, and suits by private citizens.

The ESA has been considered the most effective environmental law tool based on its ability to halt development projects or stop industry practices due to its implementation.

What can tribes do under the ESA?

1. Participate through notice and comment in the issuing of Habitat Conservation Plans (HCPs) of surrounding land owners.
2. Petition for the listing of endangered species.
3. Influence the effectiveness of approaches to listed species protection through monitoring and enforcement.
4. Citizen suit under ESA citizen suit provisions.[187]

[187] ESA Section 11(g)

Emergency Planning and Community Right to Know Act (EPCRA)

Overview

The Emergency Planning and Community Right-to-Know Act (EPCRA) was enacted in 1986, in the wake of a tragedy which took place in Bhopal, India in 1984 when more than 2,000 people were killed by an accidental release of a toxic substance from a chemical plant. The purpose of EPCRA and what distinguishes EPCRA from RCRA and other statutes is its focus on planning for unexpected spills or exposure to harmful materials.

EPCRA requires state and local government officials, as well as industrial facilities, to:

- Prepare emergency response plans in the event of chemical emergencies, and
- Provide information to the public about activities involving hazardous chemicals.

Under EPCRA, the EPA is required to:

- Publish lists of hazardous substances that, when accidentally released, might cause serious death or injury, or have an adverse effect on human health.
- Prepare and make available to the public a Toxics Release Inventory (TRI), detailing environmental releases and transfers of certain hazardous substances by industrial and other facilities covered by the Act.

Oil and Pollution Act (OPA)

Overview

The OPA was enacted in 1990 as a result of the Exxon Valdese Oil Spill. The OPA expanded the federal government's ability and provided resources necessary, to respond to oil spills through (1) creating the national Oil Spill Liability Trust Fund, which is available to provide up to one billion dollars per spill incident, and (2) providing the new National Oil and Hazardous Substances Pollution Contingency Plan. The OPA also increased penalties for regulatory noncompliance. While the act seems clearly designed to address situations of crashed oil tankers, “vessels” and “facilities” are defined broadly in the statute, therefore the application of the OPA will likely include many spill scenarios.

Additional Resources

Kathleen Zimmerman. National Wildlife Federation. “Fuel For Thought: A citizen's guide to participating in Oil and Gas Decisions on your public lands.” http://ourpubliclands.org/files/upload/OilandGasGuide.pdf

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