

SUBCHAPTER 11. ENFORCEMENT AND OTHER PROVISIONS

§ 1101 Applicability

The provisions of this subchapter shall implement the applicable provisions of Subchapter ~~3~~ 9 of the ~~NNPDES Act~~ NNCWA. As provided in section ~~105(C)~~ 106(c) of the ~~NNPDES Act~~ NNCWA, nothing contained in the ~~NNPDES Act~~ NNCWA, or regulations promulgated under the Act, shall be construed to abridge or alter rights of action or remedies in equity under treaties, the common law or statutory law, nor shall any provisions of the Act or any act done by virtue thereof be construed as preventing the Navajo Nation or individuals from the exercise of their rights under treaties, the common law or statutory law to suppress nuisances or to abate pollution.

§ 1102 Requirements for Compliance Evaluation Program

(a) The NNPDES program shall have procedures for receipt, evaluation, retention and investigation for possible enforcement of all notices and reports required of permittees and other regulated persons (and for investigation for possible enforcement of failure to submit these notices and reports).

(b) The NNPDES program shall have inspection and surveillance procedures to determine, independent of information supplied by regulated persons, compliance or noncompliance with applicable program requirements. The program shall maintain:

(1) A program which is capable of making comprehensive surveys of all facilities and activities subject to the Director's authority to identify persons subject to regulation who have failed to comply with permit application or other program requirements. Any compilation, index or inventory of such facilities and activities shall be made available to the Regional Administrator upon request;

(2) A program for periodic inspections of the facilities and activities subject to regulation. These inspections shall be conducted in a manner designed to:

A. Determine compliance or noncompliance with issued permit conditions and other program requirements;

B. Verify the accuracy of information submitted by permittees and other regulated persons in reporting forms and other forms supplying monitoring data; and

C. Verify the adequacy of sampling, monitoring, and other methods used by permittees and other regulated persons to develop that information;

(3) A program for investigating information obtained regarding violations of applicable program and permit requirements; and

(4) Procedures for receiving and ensuring proper consideration of information submitted by the public about violations. Public effort in reporting violations shall be encouraged, including anonymous reports, and the Director shall make available information on reporting procedures.

(c) The Director and Navajo Nation officers engaged in compliance evaluation have authority, provided by sections ~~301(C) and 301(D)~~ 901(b) of the ~~NNPDES Act~~ NNCWA, including but not limited to entry to any site or premises subject to regulation or in which records relevant to program operation are kept in order to copy any records, inspect, monitor or otherwise investigate compliance with

the NNPDES program including compliance with permit conditions and other program requirements.

(d) Investigatory inspections shall be conducted, samples shall be taken and other information shall be gathered in a manner (e.g., using proper "chain of custody" procedures) that will produce evidence admissible in an enforcement proceeding or in Navajo Nation courts.

(e) The NNPDES compliance evaluation programs shall have procedures and ability for:

(1) Maintaining a comprehensive inventory of all sources covered by NNPDES permits and a schedule of reports required to be submitted by permittees to Navajo EPA;

(2) Initial screening (i.e., pre-enforcement evaluation) of all permit or grant-related compliance information to identify violations and to establish priorities for further substantive technical evaluation;

(3) When warranted, conducting a substantive technical evaluation following the initial screening of all permit or grant-related compliance information to determine the appropriate Navajo EPA response;

(4) Maintaining a management information system which supports the compliance evaluation activities of this subchapter; and

(5) Inspecting the facilities of all major dischargers and all Class I sludge management facilities (as defined in 40 CFR § 501.2/§ 105(a)(9)) where applicable at least annually.

§ 1103 Enforcement Provisions

(a) Sections 302 902, 303 903, 304 and 305 904 of the ~~NNPDES Act~~ NNCWA contain applicable enforcement provisions for violations of the ~~NNPDES Act~~ NNCWA and shall be implemented by the Director and other applicable Navajo Nation officials. These provisions include, in appropriate circumstances articulated in the ~~NNPDES Act~~ NNCWA:

(1) issuing and serving on such person an order requiring such person to comply with a requirement or prohibition, including an emergency order;

(2) issuing and serving on such person an administrative penalty order;

(3) bringing a civil action, including filing for injunctive relief;

(4) bringing a criminal action and/or referring any criminal enforcement action or portion of such action to the USEPA Regional Administrator for the appropriate USEPA region and/or a U.S. Department of Justice official;

~~(5) bringing an action in Navajo Nation Peacemaker Court;~~

~~(6) bringing an action for injunctive relief.~~

(b) **Administrative Penalty Orders.** Regulatory requirements for administrative penalties, including hearing requirements, are contained in ~~Subchapter 12~~ Subpart 3 of the Uniform Regulations.

(c) **Administrative Orders to Comply.** An order to comply issued under section ~~301(A)(1)~~ 901(a) of the ~~NNPDES Act~~ NNCWA shall state with reasonable specificity the nature of the violation, shall state that the alleged violator is entitled to a hearing pursuant to these regulations, and shall specify a time for compliance that the Director determines is as expeditious as

practicable, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements. The order may be conditional and require a person to refrain from particular acts unless certain conditions are met.

(1) The order shall become effective immediately upon the expiration of the thirty (30) calendar days if no hearing is requested and, if a timely request for a hearing is made, upon the decision of the Director.

(2) A copy of the order shall be sent to the appropriate USEPA region and, if the order is issued to a corporation, to the appropriate corporate officers and registered agent of the corporation.

(3) The issuance of an administrative order to comply shall not prevent the Navajo Nation from assessing any penalties nor otherwise affect or limit the Navajo Nation's authority to enforce under other provisions of the ~~NNPDES Act~~ NNCWA, nor affect any person's obligations to comply with any section of the ~~NNPDES Act~~ NNCWA or with a term or condition of any permit or other requirements promulgated or approved under the ~~NNPDES Act~~ NNCWA.

(4) **Hearing on Administrative Order to Comply.** Any person issued an administrative order to comply may request a hearing on the order.

A. The hearing shall be requested in writing within thirty (30) calendar days after the date of issuance of the order. The hearing request shall include a statement of the reasons supporting that review.

B. Within thirty (30) days following the filing of the request for hearing, the Director shall issue an order setting the hearing date.

C. The Director shall hold the hearing in an informal manner and provide all parties an opportunity to be heard and present their case. Upon conclusion of the hearing, the Director shall issue a decision in which the Director may affirm, modify or reverse the administrative order to comply based upon the evidence presented at the hearing.

(5) A request for a hearing before the Director under paragraph (c)(4) of this section is, under section 402(A) of the ~~NNPDES Act~~ NNCWA, a prerequisite to the seeking of judicial review of the action.

(6) For purposes of judicial review under section ~~402(A)~~ 1002(a) of the ~~NNPDES Act~~ NNCWA, final agency action occurs when the decision of the Director is issued after the hearing and notice of the decision is provided by the Director.

§ 1104 Requirements for Citizen Intervention in Enforcement

~~(a)~~ Sections ~~302(D)~~ 905(a) and (b) of the ~~NNPDES Act~~ NNCWA provides

~~Any resident of the Navajo Nation which has an interest that is or may be adversely affected may intervene as of right in any civil action brought by the Director under subsection (a)(3) of this section [302] or administrative action brought by the Director under subsection (a)(2) of this section [302]. [p]rovides that a person may commence a civil action against any person who is alleged to be in violation of any provision, requirement or prohibition of this Act, but may not commence such action if the Director has commenced and is diligently prosecuting a civil action in court to require compliance with this Act.~~

~~(b)~~ The term "any resident of the Navajo Nation" shall be interpreted broadly to be consistent with the requirements of the U.S. Constitution.

§ 1105 Citizens Suits

Section ~~306~~ 905 of the ~~NNPDES Act~~ NNCWA contains applicable provisions for citizens suit under Navajo Nation law.

§ 1106 Conflict of Interest

(a) Section ~~235~~ 506 of the ~~NNPDES Act~~ NNCWA provides

§ 235. Conflict of Interest

A. The Director, or his or her delegate, shall not participate in a permit action which involves himself or herself, any discharger, industrial user or treatment works treating domestic sewage with which he or she is connected as a director, officer or employee, or in which he or she has a direct personal financial interest. Direct financial interest is defined as receiving, or having received during the previous two (2) years, a significant portion of income directly or indirectly from permit holders or applicants for permits.

B. To the extent not prohibited by paragraph (a) of this section, the Director, or his or her delegate, shall not participate in any proceeding as a consultant or in any other capacity on behalf of any discharger, industrial user or treatment works treating domestic sewage, except to the extent otherwise allowed under Navajo Nation law. In no case, shall the Director, or his or her delegate, participate in any proceeding as a consultant or in any other capacity on behalf of any discharger, industrial user or treatment works treating domestic sewage, that was instituted or ongoing during their tenure.

(b) For the purposes of this section:

(1) "Director, or his or her delegate" includes any individual, including the Director, who has or shares authority to approve all or portions of NNPDES permits either in the first instance, as modified or reissued, or on appeal.

(2) "Significant portion of income" means 10 percent or more of gross personal income for a calendar year, except that it means 50 percent or more of gross personal income for a calendar year if the recipient is over 60 years of age and is receiving that portion under retirement, pension, or similar arrangement.

(3) "Permit holders or applicants for permits" does not include any department or agency of the Navajo Nation, such as a Department of Parks and Recreation or Department of Fish and Wildlife.

(4) "Income" includes retirement benefits, consultant fees, and stock dividends.

(c) For the purposes of this section, income is not received "directly or indirectly from permit holders or applicants for a permit" when it is derived from mutual fund payments, or from other diversified investments for which the recipient does not know the identity of the primary sources of income.