

**NAVAJO NATION
UNDERGROUND
STORAGE TANK ACT**

TITLE _____, NAVAJO NATION CODE
CHAPTER _____, THE NAVAJO NATION UNDERGROUND STORAGE TANK ACT

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SUBCHAPTER 1. GENERAL PROVISIONS

101. Title

This chapter may be cited as the Navajo Nation Underground Storage Tank Act.

102. Definitions

For the purposes of this chapter--

- A. “Abandoned Underground Storage Tank” means an underground storage tank (UST) abandoned by the owner and operator for which no liability is imposed against the owner or operator or their guarantor for the removal of said UST or associated release under federal law, this chapter, Navajo common law or contract law, or where it is impossible to require an owner or operator to remove a UST or remediate a release or collect damages from the owner or operator for their failure to remove an UST or remediate a release because the owner and operator have been determined by a court of competent jurisdiction to be bankrupt or otherwise unable to pay.
- B. “Attorney General” means the Attorney General of the Navajo Nation.
- C. “Corrective Action Plan (CAP)” means a document which is submitted to the regulatory agency for approval and which is based on the site characterization of an underground storage tank site. The CAP corrects soil, surface water and groundwater contamination and is implemented in order to protect human health, safety, welfare and the environment.
- D. “Director” means the Director of the Navajo National Environmental Protection Agency or his/her designee.
- E. “Environmental Assessment (EA)” means an assessment done of an individual parcel of land for the purpose of evaluating the environmental impacts of a project and for making management decisions in accordance with the National Environmental Policy Act (NEPA). An EA is not as comprehensive as an Environmental Impact Statement (EIS) which is done for federal projects, nor is it commercially based like an ESA.
- F. “Environmental Audit” means a systematic, documented, periodic and objective

review by regulated entities of facility operations and practices related to meeting environmental requirements.

- G. “Environmental Site Assessment” or “ESA” means the process by which a person or entity seeks to determine if a particular parcel of property (including improvements) is subject to recognized environmental conditions.
- H. “Exposure Assessment” means an assessment to determine the extent of exposure of, or potential for exposure of, individuals to petroleum or a regulated substance from a release from an underground storage tank based on such factors as the nature and extent of contamination and the existence of or potential for pathways of human exposure (including ground or surface water contamination, air emissions, and food chain contamination), the size of the community within the likely pathways of exposure, and the comparison of expected human exposure levels to the short-term and long-term health effects associated with identified contaminants and any available recommended exposure or tolerance limits for such contaminants. Such assessment shall not delay corrective action to abate immediate hazards or reduce exposure.
- I. “Facility” means, with respect to any owner or operator, a single parcel of property or contiguous or adjacent property on which underground storage tanks and their associated piping are used for the storage of regulated substances. A facility may have one or more clusters of storage tanks at separate tank sites.
- J. “Guarantor” means any person, other than the owner or operator, who provides evidence of financial responsibility for an owner or operator as required by this chapter.
- K. “Navajo Nation” means:
 - 1. When referring to the body politic, the same meaning as set forth in 1 N.N.C. § 552;
 - 2. When referring to governmental territory, all land within the territorial boundaries of the Navajo Nation, including:
 - a. all land within the exterior boundaries of the Navajo Indian Reservation, or of the Eastern Navajo Agency, or of Navajo dependent Indian communities, including all lands within the boundaries of Navajo chapter governments;
 - b. all land held in trust by the United States for, or restricted by the United States or otherwise set aside or apart under the

superintendence of the United States for, the use or benefit of the Navajo Nation, the Navajo Tribe, any Band of Navajo Indians, or any individual Navajo Indians as such; and

- c. all other land over which the Navajo Nation may exercise governmental jurisdiction in accordance with federal or international law.

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

- M. “Navajo Nation Environmental Protection Agency” or “Navajo EPA” means the agency established by the Navajo Nation Council pursuant to CAP-47-95, 2 N.N.C. §§ 1921, *et seq.*, to carry out the environmental laws and regulations adopted by the Navajo Nation.

- N. “Navajo Nation Underground Storage Tank Program” or “Navajo UST Program” means the program, including any successor program, regardless of name, within Navajo EPA that is responsible for implementing and enforcing this chapter.

- O. “Non-operational Storage Tank” means any underground storage tank into which regulated substances will not be deposited, or from which regulated substances will not be dispensed, after November 8, 1984.

- P. “Operator” means any person in control of, or having responsibility for the daily operation of underground storage tanks.

- Q. “Owner” means:
 - 1. A person who owns an underground storage tank or a person who owned an underground storage tank immediately before the underground storage tank was taken out of operation. A person who acquires ownership or control of property (by lease, use or other means) where an underground storage tank is located is the owner of the underground storage tank, except that the person is not an owner if the following applies:
 - a. The person, after conducting a due diligence investigation immediately prior to acquiring ownership of the property, did not know and had no reason to know that the underground storage tank was located on the property. Due diligency shall consist of performing a phase I environmental assessment of the property which meets generally accepted commercial practices or standards

for due diligence performed prior to the adoption of this standard.

2. A person who holds indicia of ownership primarily to protect a security interest in either the underground storage tank or in the property on which the underground storage tank is or was located but who does not participate in the management of the underground storage tank and who is not otherwise engaged in petroleum refining or marketing is not an owner for purposes of this chapter.
3. A person who holds indicia of ownership as prescribed by subsection 2. of this section and who acquires ownership or control of an underground storage tank through foreclosure of the property where an underground storage tank is located shall not be deemed an owner and shall not be required to investigate a release or take corrective action in response to a release, if the person does all of the following:
 - a. Complies with the notification requirements prescribed by subchapter 3.
 - b. Complies with the reporting requirements prescribed by section 404 to the extent that the information is known to the person at the time of the report.
 - c. Temporarily or permanently closes the underground storage tank as in accordance with this chapter and regulations promulgated hereunder.
 - d. Divests itself of the property in a reasonably prompt manner using whatever commercially reasonable means are relevant or appropriate with respect to the property, taking into consideration all of the facts and circumstances.
4. The Navajo Nation shall not be deemed an owner and shall not be required to investigate a release or take corrective action in response to a release where it holds indicia of ownership due to bankruptcy, foreclosure, tax delinquency condemnation, abandonment or similar means because of its status as a governmental entity (and is not otherwise operating said tank) and it:
 - a. Complies with the notification requirements prescribed by subchapter 3.
 - b. Complies with the reporting requirements prescribed by section

404 to the extent that the information is known to the person at the time of the report.

- c. Temporarily or permanently closes the underground storage tank as in accordance with this chapter and regulations promulgated hereunder.
- 5. The federal government or any of its agencies shall not be deemed an owner or operator under this chapter if prohibited by federal law.
- R. “Person” means any individual, public or private corporation, company, partnership, firm, association or society of persons, the federal, state or local governments or any of their programs or agencies, any Indian tribe, including the Navajo Nation, or any of its agencies, divisions, departments, programs, enterprises, companies, chapters or other political subdivisions.
- S. “Petroleum” means petroleum, including crude oil or any fraction thereof which is liquid at sixty (60) degrees Fahrenheit and 14.7 pounds per square inch absolute pressure.
- T. “Petroleum product” means petroleum, including crude oil, and/or fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of 42 U.S.C. §9601(14), natural gas, natural gas liquids, liquefied natural gas, and synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas). The word fraction refers to certain distillates of crude oil, including gasoline, kerosene, diesel oil, jet fuels, and fuel oil, pursuant to *Standard definitions of Petroleum statistics*.
- U. “Regulated Substance” means:
 - 1. Petroleum;
 - 2. A substance defined in the Comprehensive Environmental Liability Act of 1980; P.L. 96-510, 94 Stat. 2767; 42 U.S.C. §9601(14), but not including a substance regulated as a hazardous waste under the Solid Waste Disposal Act of 1984, P.L. 98-616, 98 Stat. 3221; 42 U.S.C. §6921.
- V. “Release” means any spilling, leaking, pumping, pouring, emptying, dumping, emitting, discharging, escaping, leaching, or disposing from any underground storage tank into groundwater, surface water or surface or subsurface soil.
- W. “Release” means any spilling, leaking, pumping, pouring, emptying, dumping,

emitting, discharging, escaping, leaching, or disposing from any underground storage tank into groundwater, surface water or surface or subsurface soil.

- X. “Resources Committee” means the standing committee of the Navajo Nation Council as defined in 2 N.N.C. §§691, *et seq.*, with oversight authority over the Navajo Nation Environmental Protection Agency as provided for by Navajo Nation Council Resolution No. CAP-47-95.
- Y. “Site Characterization” at an underground storage tank site is the investigation and reporting of detailed information about soil, ground water, geology, conductivity, contaminants and other data for the purpose of implementing a corrective action plan (CAP).
- Z. “Tank System” means an underground storage tank or tanks and ancillary equipment, including piping, which is used for the storage of regulated substances.
- AA. “Underground Storage Tank” means any one or combination of tanks (including underground pipes connected thereto) which is used to contain an accumulation of regulated substances, and the volume of which (including the volume of the underground pipes connected thereto) is 10 percent (10%) or more beneath the surface of the ground. Such term does not include any--
 - 1. Farm or residential tank of 1,100 gallons or less capacity used for storing motor fuel for noncommercial purposes; provided, however, that the owner or operator of such tanks shall comply with the leak/release reporting requirements of this chapter (section 404) and such tanks installed after the effective date of this chapter shall comply with the best available design technology for preventing leaks or releases. Moreover, in the event of a release the owner or operator of such tanks shall be subject to the corrective action requirements of this chapter and regulations promulgated hereunder.
 - 2. A single tank of 660 gallons or less or tank system of 1,320 gallons or less used for storing heating oil for consumptive use on the premises where stored, provided, however, that the owner or operator of such tanks shall comply with the leak/release reporting requirements of this chapter (section 404) and such tanks installed after the effective date of this chapter shall comply with the best available design technology for preventing leaks or releases. Moreover, in the event of a release the owner or operator shall be subject to the corrective action requirements of this chapter and regulations promulgated hereunder.

3. Septic tank.
4. Pipeline facility (including gathering lines--
 - a. which is regulated under the Natural Gas Pipeline Safety Act of 1968; 49 U.S.C. Appx. §§1671 through 1986;
 - b. the Hazardous Liquid Pipeline Safety Act of 1968; 49 U.S.C. Appx. §2001.
5. An intrastate pipeline facility regulated under Tribal law comparable to the provision under 4.a. and b.
6. Surface impoundment, pit, pond, or lagoon.
7. Storm water or waste water collection system.
8. Flow-through process tank.
9. Liquid trap or associated gathering lines directly related to oil or gas production and gathering operations.
10. Storage tank situated in an underground area (such as a basement, cellar, mineworking, drift, shaft, or tunnel) if the storage tank is situated upon or above the surface of the floor.
11. The term “underground storage tank” shall not include any pipes connected to any tank which is described in subparagraphs 1. through 10.

103. Declaration of Policy

The Navajo Nation Council finds and declares that the release of petroleum products and other hazardous liquids from underground storage tanks presents a significant danger to the public health and the environment, by contaminating surface water, groundwater and subsurface soils. Therefore, it is the intent of the Navajo Nation Council to establish a program for the regulation of underground storage tanks which implements stringent control of the installation, operation, retrofitting, upgrading, removal and abandonment of underground storage tanks, corrective action, closure and post closure care, and financial assurances consistent with the requirements of Title VI of the Hazardous and Solid Waste Amendments of 1984, P.L. 98-618, 98 Stat. 3221; 42 U.S.C. §§ 6991a *et seq.*

104. Applicability; Exemptions

- A. Except as otherwise provided in this section, the provisions of this Act and regulations promulgated hereunder shall apply to all persons and all property within the Navajo Nation.
- B. Except as otherwise provided in subsection C. of this section, the provisions of this Act and/or regulation promulgated thereunder, in whole or in part, shall not apply to any person or property where, but only to the limited extent that, such application would be in violation of any valid covenant not to regulate or otherwise exercise jurisdiction over such person or property.
- C. The provisions of this Act and/or regulations promulgated thereunder, in whole or in part, shall apply to any person and to such property owned or operated by such person where required by federal law or to such extent and under such terms and conditions as may be provided in any voluntary compliance agreement entered into pursuant to section 105 of this Act.
- D. Nothing in this section shall be construed as a determination or admission by the Navajo Nation that any claim of covenant not to regulate or otherwise exercise jurisdiction is valid.

105. Voluntary Compliance Agreement

- A. Any person to whom the provisions of this Act are not otherwise applicable, may apply to the Director to enter into a voluntary compliance agreement with the Navajo Nation with respect to any property to which the provisions of this chapter and/or regulations promulgated thereunder, in whole or in part, are not otherwise applicable.
- B. A proposal to enter into a voluntary compliance agreement shall be in writing, shall indicate the person and property proposed to be subject to the agreement, shall indicate the proposed term of the agreement, and shall indicate which part or parts of this chapter and/or regulations promulgated thereunder, in whole or in part, with which voluntary compliance is proposed.
- C. A voluntary compliance agreement shall be in writing, shall be for a term of not less than one (1) year, and may be subject to renewal for successive terms of not less than one (1) year. A voluntary compliance agreement may not vary the requirements of this chapter, or of any regulations promulgated pursuant to this Act.
- D. A voluntary compliance agreement shall not be effective unless and until final approval of the agreement is given by the Director.

- E. Except as otherwise expressly provided in the agreement, by entering into a voluntary compliance agreement, no person shall be deprived of the benefit of any valid covenant not to regulate or otherwise exercise jurisdiction over such person or property owned or operated by such person.
- F. A person may enter into a voluntary compliance agreement in accordance with this section, notwithstanding that the validity of such person's claim to be exempt from the provisions of this Act has not been judicially determined, whenever the Director determines that entering into such an agreement is in the best interests of the Navajo Nation. Entering into an agreement pursuant to this subsection shall not constitute a determination or admission by the Navajo Nation that such claim of exemption is valid.

106. General Authorities of the Director

A. Powers and Duties

In carrying out the intent of this chapter, the Director is authorized to:

1. Prescribe such regulations as are necessary to carry out his/her functions under this chapter in accordance with the provision of section 601.A. of this chapter;
2. Enforce the provisions of this chapter and the regulations promulgated hereunder, pursuant to the provisions of subchapter 5. of this chapter;
3. Require monitoring, sampling or other studies;
4. Assess fees for the inspection of underground storage tanks;
5. Issue compliance orders, civil penalties and citations to carry out the intent of this chapter and regulations promulgated hereunder;
6. Conduct investigations, inspections and tests at underground storage tank sites to carry out the duties of this chapter pursuant to the provisions of subchapter 5. of the chapter;
7. Hold hearings related to any aspect of or matter within the authority of this section and, in connection therewith, compel the attendance of witnesses and the production of records;
8. Provide to the public pertinent educational materials and information regarding underground storage tank issues;

9. Issue guidelines and encourage voluntary cooperation with the provisions of this chapter and the regulations promulgated hereunder;
10. Consistent with Title II, Navajo Nation Tribal Code, accept, receive and administer grants or other funds or gifts from public and private agencies, including the federal government, to carry out any of the purposes of this chapter, provided that all monies resulting therefrom shall be deposited in the Navajo Nation Treasury to the account of the Underground Storage Tank (UST) Program, as authorized under Navajo law;
11. Require the owner and/or operator of an underground storage tank to perform or cause to be performed a tank and line system test to determine compliance with the standards established by this chapter or regulations promulgated hereunder; and
12. Perform such other activities as the Director may find necessary to carry out his/her functions under this chapter.

In prescribing regulations under this chapter, the Director shall consider but shall not be limited to the requirements of Title VI of the Hazardous and Solid Waste Amendments of 1984, P.L. 98-618, 98 Stat. 3221; 42 U.S.C. §§ 6991a *et seq.* and the regulations thereunder, except that the regulations prescribed by the Director shall be at least as stringent as those promulgated under said Act. All regulations promulgated under this chapter shall be subject to approval by the Resources Committee of the Navajo Nation Council.

B. Delegation of Authority

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

C. Use of Funds

Monies derived from fees and penalties imposed under this chapter shall be available solely for the administration and implementation of this chapter and the regulations promulgated hereunder. Such funds shall be deposited into a duly established Special Fund Account and expended by the Director for the use of the Underground Storage Tank Program in accordance with the Special Fund Account plan of operation pursuant to an approved budget. Any monies contained in said revolving account at the end of the fiscal year (not to exceed \$250,000) shall not revert to the general fund and shall remain available for appropriation as provided in this section. Any amount accumulated in excess of two hundred and fifty thousand dollars (\$250,000) within a single fiscal year shall be deposited into the Navajo Nation general fund

account.

107. Construction

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

108. Compliance with other Laws and Regulations

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

109. Severability

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

SUBCHAPTER 2. PROHIBITED ACTS

201. A. It shall be unlawful for any person:

1. To install an underground storage tank (or tank system) unless:
 - a. It is designed to prevent releases due to corrosion or structural failure for the operational life of the tank;
 - b. It is cathodically protected against corrosion, constructed of noncorrosive material, steel clad with noncorrosive material or designed in a manner to prevent the release of a regulated substance;
 - c. It is equipped with spill and overfill prevention devices;
 - d. It is correctly installed in accordance with manufacture specifications and appropriate technical industry standards;
 - e. The material used in the construction or lining of the tank is compatible with the substance to be stored; and

- f. The tank (or operation thereof) complies with all standards required by this chapter and regulations promulgated hereunder.
2. To fail to remove (or upgrade) an underground storage tank that does not comply with this chapter and in accordance with the removal requirements of this chapter and regulations promulgated hereunder.
 3. To fail to take corrective action for any leaking underground storage tank as required by this chapter and in accordance with the requirements of this chapter and regulations promulgated hereunder.
 4. To fail to maintain adequate financial responsibility assurances as required by this chapter and regulations promulgated hereunder.
 5. To fail to comply with the notification, reporting, and recordkeeping requirements of this chapter or regulations promulgated hereunder.
 6. To violate any duty to allow an inspection, entry or monitoring activities.
 7. To fail to inspect or monitor an underground storage tank or tank system as required by this chapter or regulations promulgated hereunder.
 8. To violate any provision, requirement, prohibition, or duty under this chapter or regulations promulgated hereunder.
- B. It shall be unlawful for any person to:
1. Falsify documents or otherwise provide false information to the Director;
 2. Divulge confidential information as prohibited by section 406 of this chapter.
 3. Fail to notify the Navajo UST Program of the release of a regulated substance as required by this chapter.
- C. It shall be unlawful for any person:
1. To place (effective January 1, 1999) a regulated substance into an underground storage tank where the owner or operator is not in compliance with all the requirements of this chapter or regulations promulgated hereunder.
 2. To place a regulated substance into an underground storage tank where

any tariff or fees imposed under this chapter or regulations promulgated hereunder, including related interest or penalties have not been paid when due.

SUBCHAPTER 3. NOTIFICATION REQUIREMENTS

301. Existing Tanks

Within ninety (90) days from the effective date of this chapter, each owner or operator of an underground storage tank shall notify the Navajo Nation UST Program, on a form to be provided by the Director, of the existence of such tank, specifying the:

1. age,
2. size,
3. type,
4. location,
5. uses of such tank,
6. the type of release detection system and the extent of any known soil or ground water contamination,
7. the material out of which the tank was constructed,
8. factory tank design specifications,
9. tank system schematic,
10. and other pertinent information as may be determined by the Director.

302. Tanks Taken out of Operation

The owner or operator of an underground storage tank taken out of operation after January 1, 1974, but not removed from the ground, shall notify the Navajo Nation UST Program, on a form to be provided by the Director, of the existence of such tank, within ninety (90) days from the effective date of this chapter, specifying the:

1. date the tank was taken out of operation,
2. age of the tank taken out of operation,
3. size,
4. type,
5. location,
6. type and quantity of substance stored in such tank immediately before it was taken out of operation,
7. factory tank design specifications,
8. tank system schematic,
9. and other pertinent information as may be determined by the Director.

303. Tanks Taken out of Operation before January 1, 1974

The notice requirements of paragraphs A. and B. of this subchapter do not apply to an owner of an underground storage tank taken out of operation on or before January 1, 1974; provided, however, that the owner or operator of said tanks (taken out of operation prior to January 1, 1974) shall notify (within six months of the effective date of this chapter) the Navajo UST Program of the existence and location of such tanks and other information (if available) as may be required by the Director.

304. Tanks Removed from a Facility

The notice requirements of sections 301 and 302 of this subchapter do not apply to the owner of an underground storage tank which has been removed from the ground between January 1, 1974, and November 8, 1984, but the Director may require the owner of an underground storage tank removed from the ground after November 8, 1984, to notify the Navajo UST program of the age, location, uses of the tank and the date of its removal.

305. New Tanks

An owner or operator who brings an underground storage tank into operation after the effective date of this chapter shall meet the notice requirements provided for in section 301 of this subchapter within 30 days.

306. Notification by Depositors

After the effective date of this chapter and for twelve (12) months thereafter, any person who deposits regulated substances in an underground storage tank shall notify the owner or operator of the tank of the notification requirements of this subchapter.

307. Notification by Sellers

Any person who sells a tank intended to be used as an underground storage tank shall notify the purchaser of the owner's notification requirements under paragraph E. of this subchapter.

308. Notification Requirements for Tanks Taken out of Operation or Abandoned Prior to January 1, 1974

Any person who discovers the existence of a tank taken out of operation prior to January 1, 1974 shall notify the Navajo Nation UST Program of the existence of such tank. This requirement shall become effective upon the effective date of this chapter.

309. Inventory

The Director shall prepare and maintain an inventory of all underground storage tanks

within the Navajo Nation. The inventory shall be based on the information collected pursuant to the notification requirements under this subchapter.

310. Upgrades, Replacement Tanks and Tanks Which Change Use

An owner or operator shall notify the Navajo UST Program, within 30 days, of any upgrade, underground storage tank replacement (providing the information required in section 301) or any change in the use of an underground storage tank.

SUBCHAPTER 4. RELEASE, DETECTION, PREVENTION, REPORTING AND CORRECTIVE ACTION REGULATIONS AND OTHER REQUIREMENTS

401. Release, Detection, Prevention, Reporting, Closure and Corrective Action Regulations

- A. The Director, after notice and opportunity for public comment as provided for in this chapter shall promulgate release detection, prevention, reporting, closure, and corrective action regulations applicable to all owners and operators of underground storage tanks, as may be necessary to protect human health and the environment. The regulations adopted pursuant to this section shall be no less stringent than that required by federal law.
- B. In promulgating regulations under this section, the Director may distinguish between types, classes, and ages of underground storage tanks. In making such distinctions, the Director may take into consideration factors, including, but not limited to: location of the tanks, soil and climate conditions, uses of the tanks, history of maintenance, age of the tanks, current industry recommended practices, national consensus codes, hydrogeology, water table, proximity to drinking water, size of the tanks, quantity of regulated substances periodically deposited in or dispensed from the tank, the technical capability of the owners and operators, and the compatibility of the regulated substance and the materials of which the tank is fabricated.
- C. The regulations promulgated pursuant to this section shall include, but need not be limited to, the following requirements respecting all underground storage tanks--
 - 1. Requirements for maintaining a leak detection system, an inventory control system together with tank testing, or a comparable system or method designed to identify releases in a manner consistent with the protection of human health and the environment;

2. Requirements for maintaining records of any monitoring or leak detection system or inventory control system or tank testing or comparable system;
3. Requirements for reporting of releases and corrective action taken in response to a release from an underground storage tank;
4. Requirements for performing an environmental assessment (EA);
5. Requirements for taking corrective action in response to a release from an underground storage tank;
6. Requirements for the closure of tanks to prevent future releases of regulated substances into the environment;
7. Requirements for maintaining evidence of financial responsibility for taking corrective action and compensating third parties for bodily injury and property damage caused by sudden or gradual accidental releases arising from operating an underground storage tank; and
8. Requirements for submitting health and safety plans and management plans as may be necessary to protect the public health and safety and the environment.

402. Interim Underground Storage Tank Requirements

Until the Director promulgates regulations authorized under section 401 of this chapter, the owner and operator of any underground storage tank shall comply with all applicable underground storage tank requirements of 42 U.S.C. §§ 6991 *et seq.* and federal regulations promulgated thereunder.

In addition, the owner and operator of any underground storage tank shall comply with the following criteria:

1. Permanent closure of all underground storage tanks and product lines shall be accomplished by the removal and proper disposal of the tanks and product lines except that removal of an underground storage tank may not be required where said removal would result in the unnecessary destruction of a building/structure or harm to potential cultural resources.
2. The owner and/or operator shall hire an independent third party certified consultant to perform removals, installations, upgrades, or remedial activity and shall provide proof of qualifications to NNEPA upon request. Qualifications shall include state certification of installation training (if applicable), field oversight by

a qualified professional (Professional registered engineer or professional geologist or related science), reference list of similar projects completed, proof of liability insurance, proof of adherence to QA/QC protocol, proof of appropriate health and safety training, and proof of training and experience in tank removals (if applicable).

3. Upon hiring a UST consultant, the owner and/or operator shall direct a letter to the NNEPA authorizing under what circumstances the consultant may speak directly to the regulatory agencies on behalf of the owner.
4. Prior to any activity for which the ground surface will be excavated or drilled, the owner or operator or his/her authorized representative shall notify the Navajo Nation Historic Preservation Department to obtain a clearance if required to excavate or drill and provide proof of such clearance to the NNEPA.
5. The owner and/or operator shall make arrangements in advance of the planned activity to obtain clean fill material from a permitted facility if said fill material is taken from Navajo lands.
6. The owner and/or operator shall, in consultation with the consultant, provide a site-specific health and safety plan to the regulatory agencies prior to the planned activity, and shall conduct a health and safety meeting each day prior to commencing activity at the site.
7. The consultant shall contact the NNEPA to arrange for a date to conduct all installation and removal activity, and shall notify the NNEPA in writing of the arranged-for date at least thirty (30) days prior to the commencement of the activity.
8. Until such time as Navajo Nation cleanup standards and written guidelines are promulgated, the consultant shall determine, in advance of the activity, the possible alternatives for disposal and/or treatment of any contaminated soil and/or ground water and shall discuss these alternatives with the NNEPA prior to commencing activity. In the event of the discovery of a release, the consultant shall select the alternative treatment plan and present it in a Corrective Action Plan.
9. Contaminated soil may be temporarily stockpiled on-site only if permission is granted by the leasing agency of the Navajo Nation and the BIA or another agency as appropriate. The Navajo Nation Environmental Protection Agency shall review the plans and monitor the construction of the stockpile. The life span of the temporary stockpile shall be decided on a site-by-site basis by the appropriate oversight agencies.

10. The NNEPA UST Program shall not use risk assessment analysis as the only tool except in limited site specific corrective actions where it is convincingly proven and agreed upon by the Director that there is no other reasonable alternative.
11. The NNEPA can make policy decisions related to protection of the environment, but cannot make land use decisions. For instance, the technical oversight of landfarms shall be done by NNEPA, but the land use decisions must be made by the proper agencies.
12. For purposes of these interim regulations, the NNEPA will act as a second responder only. As stated in subchapter 401.C.3. regulations will be developed which designate the requirements for reporting of releases and corrective action. In the interim, all releases which impact the immediate health and safety of the Navajo people shall be reported to the Department of Emergency Management. Secondly, if any one release from an underground storage tank is greater than 25 gallons, that release shall be reported to the NNEPA and the U.S. EPA within 24 hours as stated in the federal regulations.
13. NNEPA shall operate independently from the Department of Economic Development and other tribal departments and shall enforce against all entities equally. The NNEPA shall not review ESA's, land use documents, contractor bids, purchase requisitions, or other documents which are part of the property transfer process or for which review poses a conflict of interest, unless the review is necessary in order to determine liability for a release or as a follow-up on a reported release. Should the Division of Economic Development or another department, or the Bureau of Indian Affairs need assistance in reviewing an ESA or other document, the NNEPA may do so only as a third party on technical matters.
14. The owner and/or operator shall immediately clean up a release of a regulated substance in accordance with applicable laws and regulations.

403. Financial Responsibility Requirements

- A. Financial responsibility required by this subsection may be established in accordance with regulations promulgated by the Director by any one, or any combination, of the following: insurance, guarantee, surety bond, letter of credit, qualification as a self-insurer or any other method satisfactory to the Director. In promulgating requirements under this subsection, the Director is authorized to specify policy or other contractual terms, conditions, or defenses which are necessary or are unacceptable in establishing such evidence of financial responsibility in order to effectuate the purposes of this subchapter.

- B. In any case where the owner or operator is in bankruptcy, reorganization, or arrangement pursuant to the Federal Bankruptcy Code or where with reasonable diligence jurisdiction in tribal court or the Federal Courts cannot be obtained over an owner or operator likely to be solvent at the time of judgment, any claim arising from conduct for which evidence of financial responsibility must be provided under this subsection may be asserted directly against the guarantor providing such evidence of financial responsibility. In the case of any action pursuant to this paragraph such guarantor shall be entitled to invoke all rights and defenses which would have been available to the owner or operator if any action had been brought against the owner or operator by the claimant and which would have been available to the guarantor if any action had been brought against the guarantor by the owner or operator.
- C. The total liability of any guarantor shall be limited to the aggregate amount which the guarantor has provided as evidence of financial responsibility to the owner or operator under this section. Nothing in this subsection shall be construed to limit any other tribal or federal statutory, contractual or common law liability of a guarantor to its owner or operator including, but not limited to, the liability of such guarantor for bad faith either in negotiating or in failing to negotiate the settlement of any claim. Nothing in this subsection shall be construed to diminish the liability of any person under the Comprehensive Environmental Response Compensation and Liability Act of 1980, P.L. 96-510, 94 Stat. 2769; 42 U.S.C. §9607 or §9611 or other applicable law.
- D. 1. The Director, in promulgating financial responsibility regulations under this section, may establish an amount of coverage for particular classes or categories of underground storage tanks containing petroleum which shall satisfy such regulations and which shall not be less than \$1,000,000 for each occurrence with an annual aggregate of not less than \$1,000,000 for 1 to 100 petroleum USTs or with an annual aggregate of not less than \$2,000,000 for 101 or more petroleum USTs.
2. The Director may set amounts lower than the amounts required by subparagraph 1. of this paragraph for underground storage tanks containing petroleum which are at facilities not engaged in petroleum production, refining, or marketing and which are not used to handle substantial quantities of petroleum.
3. In establishing classes and categories for purposes of this paragraph, the Director may consider the following factors:
- a. The size, type, locations, storage, and handling capacity of underground storage tanks in the class or category and the volume

of petroleum handled by such tanks.

- b. The likelihood of release and the potential extent of damage from any release from underground storage tanks in the class or category.
- c. The economic impact of the limits on the owners and operators of each such class or category, particularly relating to the small business segment of the petroleum marketing industry.
- d. The availability of methods of financial responsibility in amounts greater than the amount established by this paragraph.
- e. Such other factors as the Director deems pertinent.

404. Reporting Releases of a Regulated Substance Requirements

- A. The operator and owner of an underground storage tank shall notify the Navajo Nation UST Program of each release or suspected release (of more than 25 gallons) of petroleum and any release of hazardous substance that equals or exceeds its reportable quantity under CERCLA from the tank as soon as practicable but no later than twenty-four hours after the release or suspected release is detected. For releases of 25 gallons or less of petroleum and any release of a hazardous substance that is less than its reportable quantity, the owner or operator shall immediately clean up the spill or overflow, maintain records of each release for a period of five (5) years and shall report to Navajo EPA any cumulative releases of more than 25 gallons of petroleum or home heating oil during a five-year period.
- B. The operator of an underground storage tank shall notify the owner of each release from the tank as soon as practicable but no later than twenty-four hours after the release is detected.
- C. Notice by the operator and owner required by this section may be made orally or in writing but shall be followed within fourteen days by a written report to the Navajo Nation UST Program that a release or suspected release has been detected. The written report shall specify to the extent known at the time of the report the nature of the release or suspected release, the regulated substance released, the quantity of the release, the period of time over which the release occurred, the initial response and the corrective action taken as of the date of the report and anticipated to be taken subsequent to the date of the report. In addition, the written report shall include additional information as may be required by the Director.

- D. The Director shall prescribe by regulation the reporting, investigation and confirmation actions to be taken in the event of a release or suspected release of a regulated substance from an underground storage tank. Any regulations adopted pursuant to this section shall be no less stringent than that required by federal law. Until regulations adopted pursuant to this subsection are in effect, reporting, investigation and confirmation actions shall be accomplished in a manner consistent with 40 CFR §§ 280.50 through 280.53.

405. Right to Inspect Records, Tanks and Equipment

- A. For the purposes of developing rules, conducting studies or enforcing the provisions of this chapter, an owner or operator of an underground storage tank shall, on request of the Director:
 - 1. Furnish to the Navajo Nation UST Program information relating to the tank and its associated equipment and contents.
 - 2. Permit the Director to have access to the site to conduct monitoring and testing of tanks or surrounding soils, air, surface water or ground water.
 - 3. Permit the Director to inspect and copy all records relating to tanks or which indicates that a release of a regulated substance has occurred.
 - 4. Permit the Director to inspect and obtain samples of regulated substances contained in tanks.
- B. Environmental site assessments (ESA) are generated as part of a property transfer and as such are generally not reviewable by Navajo EPA. Nonetheless, Navajo EPA shall have the right to review such documents upon request to ensure compliance with this chapter and regulations promulgated hereunder.
- C. The Director shall conduct all inspections permitted pursuant to subsection A. at a reasonable time and complete these inspections with reasonable promptness.

406. Confidentiality of Records

- A. Records or other information furnished to or obtained by the Director concerning regulated substances are available to the public, except that any records and information which relate to the trade secrets, processes, operations, style of work or apparatus or to the identity, confidential statistical data, amount or source of any income, profits, losses or expenditures of any person are only for the confidential use of Navajo EPA in the administration of this chapter unless the owner or operator expressly agrees in writing to their publication or availability to

the public. This section does not prohibit the appropriate governmental agency from publishing quantitative and qualitative statistics pertaining to the storage of regulated substances. Notwithstanding provisions to the contrary to this section, information regarding the nature and quality of releases from underground storage tanks otherwise reportable pursuant to this chapter shall be available to the public. Notwithstanding any provision of this section, records, reports, documents or information may be disclosed to other officers, employees, or authorized representatives of the Navajo Nation or the United States government concerned with carrying out this chapter or when relevant in any proceeding taken under Navajo or federal law.

- B. Any person who knowingly and willfully divulges or discloses any information entitled to protection under this section shall, upon conviction, be subject to a fine of not more than \$5,000 or to imprisonment not to exceed one year or both.

407. Authority of the Director to Take Corrective Action

A. Corrective Actions

The Director is authorized to:

1. Require the owner or operator of an underground storage tank to undertake corrective action with respect to any release of a regulated substance when the Director determines that such corrective action will be done properly and promptly by the owner or operator of the underground storage tank from which the release occurs; or
2. Undertake corrective actions, utilizing available funds from the Navajo Leaking Underground Storage Tank Revolving Trust Fund established under section 703 of this chapter, with respect to any release of a regulated substance into the environment from an underground storage tank only if such action is necessary, in the judgment of the Director, to protect human health and the environment and one or more of the following situations exists:
 - a. No person can be found, within 90 days or such shorter period as may be necessary to protect human health and the environment, who is--

- i. An owner or operator of the tank concerned,
 - ii. subject to such corrective action regulations, and
 - iii. capable of carrying out such corrective action properly.
 - b. A situation exists which requires prompt action by the Director to protect human health and the environment.
 - c. Corrective action costs at a facility exceed the amount of coverage required by the Director and, considering the class or category of underground storage tank from which the release occurred, expenditures from Leaking Underground Storage Tank Revolving Trust Fund are necessary to assure an effective corrective action.
 - d. The owner or operator of the tank has failed or refused to comply with an order of the Director under this chapter to comply with the corrective action regulations.
3. Undertake the removal of an abandoned underground storage tank when, in the judgment of the Director, said removal is necessary to protect human health, safety or the environment and sufficient funds exist in the Navajo Leaking Underground Storage Tank Revolving Trust Fund account established under section 703 of this chapter.

B. Priority for Corrective Actions

The Director shall give priority in undertaking corrective actions under this subsection, and in issuing orders requiring owners or operators to undertake such actions, to releases of regulated substances from underground storage tanks which pose the greatest threat to human health and the environment.

C. Corrective Action Orders

The Administrator is authorized to issue orders to the owner or operator of an underground storage tank to carry out paragraph A.1. of this section or to carry out this chapter or regulations promulgated hereunder. Such orders shall be issued and enforced in the same manner and subject to the same requirements as orders under section 502 of this chapter.

D. Allowable Corrective Actions

The corrective actions undertaken by the Director under paragraph A.1. may

include temporary or permanent relocation of residents (or temporary closure of business where necessary to protect the public health) and the establishment of alternative household or public water supplies. In connection with the performance of any corrective action under paragraph A.1., the Director may undertake an exposure assessment. The costs of any such assessment may be treated as corrective action for purposes of paragraph E. related to cost recovery.

E. Recovery of Costs

1. In General

Whenever costs have been incurred by the Director for undertaking corrective action or enforcement action with respect to the release of a regulated substance from an underground storage tank, the owner or operator of such tank shall be liable to the Director. The liability under this paragraph shall be construed to be the standard of strict, joint and several liability and the Director may use funds from the Leaking Underground Storage Tank Revolving Trust Fund to pursue the recovery of cost.

2. Recovery

In determining the equities for seeking the recovery of costs under paragraph A.1., the Director may consider the amount of financial responsibility required to be maintained under this chapter and the regulations promulgated hereunder.

3. Effect on Liability

a. No Transfers of Liability

No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from the owner or operator of any underground storage tank or from any person who may be liable for a release or threat of release under this subsection, to any other person the liability imposed under this subsection. Nothing in this subsection shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this section.

b. No Bar to Cause of Action

Nothing in this subsection, including the provisions of clause a. of

this subparagraph, shall bar a cause of action that an owner or operator or any other person subject to liability under this section, or a guarantor, has or would have, by reason of subrogation or otherwise against any person.

F. Emergency Procurement Powers

Notwithstanding any other provision of law, the Director may authorize the use of such emergency procurement powers as he or she deems necessary.

G. Facilities without Financial Responsibility, Facilities Owned by the Federal Government and Navajo Nation, Facilities not Subject to Tariffs and Facilities not in Compliance with the Tariff Requirements

At any facility where the owner or operator has failed to maintain evidence of financial responsibility in amounts at least equal to the amounts established by this chapter or regulations promulgated hereunder for whatever reason, facilities owned by the federal government, the Navajo Nation or its entities (excluding tribal enterprises), any facility not subject to tariffs under this chapter or any facility that has failed to pay any tariffs owed under this chapter when due, the Director shall expend no monies from the Leaking Underground Storage Tank Revolving Trust Fund to clean up releases at such facility pursuant to the provisions of paragraph A. of this subsection. At such facilities the Director shall use the authorities provided in this chapter to order corrective action to clean up such releases. Notwithstanding the provisions of this paragraph, the Director may use monies from the fund to take the corrective actions authorized by paragraph D. of this subsection to protect human health at such facilities and shall seek full recovery of the costs of all such actions pursuant to the provisions of paragraph E.1. of this subsection and without consideration of the factors in paragraph E.2. of this subsection. Nothing in this paragraph shall prevent the Director from taking corrective action at a facility where there is no solvent owner or operator or where immediate action is necessary to respond to an imminent and substantial endangerment of human health or the environment.

SUBCHAPTER 5. ENFORCEMENT

501. Record-keeping, Inspections, Monitoring and Entry

A. Requirements in Orders

The Director may require, by order any owner or operator of an underground storage tank facility, or any other person who is subject to any requirement of this chapter, to:

1. establish and maintain records;
2. prepare and submit reports;
3. install, use and maintain monitoring equipment, and use such audit procedures or methods;
4. monitor and sample emissions (in accordance with such procedures or methods, at such locations, at such intervals, during such periods and in such manner as the Director shall prescribe);
5. submit compliance certifications in accordance with subsection B. of this section;
6. conduct site characterizations and complete corrective action plans as may be required; and
7. provide such other information as the Director may reasonably require.

B. Production of Records

To ensure compliance with this chapter or of any regulation hereunder, the Director may request in writing that such person produce all existing books, records and other documents evidencing tests, inspections or studies which may reasonably relate to compliance or noncompliance with such requirements.

C. Public Availability of Information

Any records, reports or information obtained under subsections A. or B. of this section shall be available to the public, subject to the confidentiality requirements under subchapter 4.

502. General Enforcement Authority

A. In General

Whenever, on the basis of any information available to the Director, the Director finds that any person has violated, or is in violation of, any requirement or prohibition of this chapter, the regulations promulgated under this chapter, or orders issued pursuant to this chapter, the Director may:

1. issue and serve on such person an order requiring such person to comply with such requirement or prohibition, pursuant to the provisions of this section;
2. issue and serve on such person an administrative penalty order in accordance with section 504 of this chapter;

3. bring a civil action in accordance with section 503.A. of this chapter; and/or
4. bring a criminal action in accordance with section 503.B. of this chapter and/or refer any criminal enforcement action or portion of such action to the U.S. EPA Regional Administrator for the appropriate EPA region.

In addition, when a person has consistently violated any requirements or prohibitions of this chapter, the regulations promulgated under this chapter, or orders issued pursuant to this chapter, or refused to comply with any such requirements or prohibitions, such person shall be prohibited from continuing to operate an underground storage tank facility within the Navajo Nation, and/or from entering into any new contracts (including leases) that would permit such person to operate an underground storage tank facility within the Navajo Nation.

B. Requirements for Orders to Comply

An order to comply issued under this section shall state with reasonable specificity the nature of the violation, shall state that the alleged violator is entitled to a hearing pursuant to regulations promulgated by the Director under section 601 of this chapter, if such hearing is requested in writing within 30 days after the date of issuance of the order, and shall specify a time for compliance that the Director determines is as expeditious as practicable, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements. The order shall become effective immediately upon the expiration of the 30 days if no hearing is requested and, if a timely request for a hearing is made, upon the decision of the Director. The order may be conditional and require a person to refrain from particular acts unless certain conditions are met. A copy of the order shall be sent to the appropriate EPA region and, if the order is issued to a corporation, to the appropriate corporate officers. No order to comply issued under this section shall prevent the Director from assessing any penalties nor otherwise affect or limit the Director's authority to enforce under other provisions of this chapter, nor affect any person's obligations to comply with any section of this chapter or with a term or condition of any permit or implementation plan promulgated or approved under this chapter.

C. Emergency Compliance Orders

Notwithstanding any other provision of this section, the Director (after consultation with the Attorney General where feasible) may issue a compliance order that is effective immediately where there is an imminent and substantial threat to the public health, welfare or environment. Any person issued an order that is effective immediately may file a written request within 30 days with the Director for a stay pending the outcome of any appeal taken under this section in accordance with the procedures

provided for in section 502.B. The Director shall, by written notice, grant or deny the request for a stay within five days receipt of a request for a stay. If the Director denies the request for a stay, the affected party has 30 days to appeal the denial to the Window Rock District Court. Any person subject to an emergency compliance order may seek judicial review of a final agency determination as provided for in section 504.D. of this chapter.

D. Enforcement of Compliance Orders

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

1. entering upon any property or establishment believed to be violating the order and demanding compliance; and
2. terminating part or all operations at the underground storage tank facility.

E. Injunctive Relief

Notwithstanding any other provision of this section, the Director may seek injunctive relief pursuant to section 503.A. to restrain immediately any person from engaging in any unauthorized activity that is endangering or is causing danger to the public health or the environment or enjoin any threatened or continuing violation of any requirements under this chapter or regulations hereunder.

503. Judicial Enforcement

A. Civil Judicial Enforcement

The Director shall request the Attorney General to file an action for a temporary restraining order, a preliminary injunction, a permanent injunction or any other relief provided by law, including the assessment and recovery of civil penalties in an amount of not less than \$500.00 but not to exceed \$25,000 per day per violation, in any of the following instances:

1. whenever a person has violated, or is in violation of, any provision, requirement or prohibition of this chapter, including, but not limited to, a regulation adopted pursuant to this chapter, or order issued pursuant to this chapter;
2. whenever a person has violated, or is in violation of, any duty to allow or

carry out inspection, entry or monitoring activities; and

3. whenever a person is creating an imminent and substantial endangerment to the public health or the environment, in which case the Director shall request the Attorney General to pursue injunctive relief, but not the assessment of penalties, unless the endangerment to the public health is caused by a violation, as specified in paragraphs 1. and 2.

Provided, however, that any person who fails to provide notice as required by subchapter 3. or submits false information required under this chapter or regulations promulgated hereunder shall be subject to a civil penalty of not more than \$10,000 for each tank for which notification is not given or false information is submitted.

B. Criminal Penalties

Any person who intentionally:

1. violates any provision, requirement or prohibition of this chapter, including but not limited to a regulation adopted pursuant to this chapter, a permit or order issued pursuant to this chapter, a filing, reporting or notice requirement under this chapter;
2. makes any false material statement, representation or certification in, or omits material information from, or alters, conceals or fails to file or maintain any notice, application, record, report or other document required pursuant to this chapter; or
3. falsifies, tampers with, renders inaccurate or fails to install any monitoring device or method required to be maintained or followed under this chapter;

shall, upon conviction, be punished by a fine in a maximum amount of not less than \$500 but not to exceed \$5,000 per day per violation or imprisonment for not more than one hundred and eighty (180) days per day per violation or both or be subject to any other penalty imposed by the court available under Navajo law. In any instance where the Nation lacks jurisdiction over the person charged, or where the Director is limited in the amount of the fine that he may impose, the Director may refer the action to the appropriate EPA Regional Administrator pursuant to section 502 of this chapter. For the purpose of this subsection, the term "person" includes, in- addition to the entities referred to in section 102 of this chapter, any responsible corporate officer.

C. Suits for Costs

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

D. Jurisdiction and Venue

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

E. Calculation of Penalties

1. For purposes of determining the number of days of violation for which a civil penalty may be assessed under this section, section 504 or section 505, if the Director has notified the source in writing of the violation and a prima facie showing can be made that the conduct or events giving rise to the violation are likely to have continued or recurred past the date of notice, the days of violation shall be presumed to include the date of such notice, each day of violation prior to such notice and each day thereafter until the violator establishes that continuous compliance has been achieved, except to the extent that the violator can prove by a preponderance of the evidence that there were intervening days during which no violation occurred or that the violation was not continuing in nature. Notice under this section shall be accomplished by the issuance of a written notice of violation or written order to comply or by filing a complaint in the Navajo Nation District Court in Window Rock that alleges any violation described in subsection A. of this section.
2. In determining the amount of a civil penalty assessed under this section, the court shall consider the history, seriousness and duration of the violation; any good faith efforts to comply with the applicable requirements; the violator's full compliance history, including the severity and duration of past violations, if any; the economic impact of the penalty on the violator; as an aggravating factor only, the economic benefit, if any, resulting from the violation; and any other factors that the court deems relevant. The court may assess penalties for noncompliance with administrative subpoenas under section 601 of this chapter or actions

under subchapter 2. of this chapter where the violator does not have sufficient cause to violate or fail or refuse to comply with such subpoena or action.

3. All penalties collected pursuant to this section shall be deposited in the Special Fund Account in the Navajo Treasury for use by the Director to finance the Underground Storage Tank Program compliance and enforcement activities. The Director shall report annually to the Navajo Nation Council about the sums deposited into the fund, including the sources and the actual and proposed uses thereof.
4. In lieu of or in addition to a monetary penalty, the Director may impose or may request the Attorney General to seek from the court a requirement to remediate the damage caused, perform community service, or conduct supplemental environmental projects.

F. Security

The court may, if a temporary restraining order or preliminary injunction is sought under this section or section 505 of this chapter, require the filing of a bond or equivalent security.

504. Administrative Assessment of Penalties

A. Basis for Penalty

The Director may issue against any person an administrative order assessing a civil administrative penalty of up to \$10,000 for each tank for each day of violation whenever the Director finds that a person has violated, or is in violation of, any provision, requirement or prohibition of this chapter, including, but not limited to, a regulation adopted pursuant to this chapter, or order issued pursuant to this chapter. The Director's authority under this subsection shall be limited to matters where the total penalty sought does not exceed \$100,000 and the first alleged date of violation occurred no more than one (1) year prior to the initiation of administrative action, except where the Director and Attorney General jointly determine that a matter involving a larger penalty or longer period of violation is appropriate for administrative penalty action. The communications required to make such a joint determination and the method(s) used for making such a joint determination shall be privileged, and shall not be subject to judicial review. The Director may compromise, modify or remit, with or without any conditions, any administrative penalty imposed under this section.

B. Hearing Requirement

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

C. Field Citations

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

D. Judicial Review

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

E. Failure to Pay Penalty

If any person fails to pay an assessment of a civil penalty or fails to comply with an administrative penalty order after the order or assessment has become final, the Director shall request the Attorney General to bring a civil action in the Navajo Nation District Court in Window Rock to enforce the order or recover the amount ordered or assessed plus interest, from the date of the final order or decision or the date of the final judgment, as the case may be. In such an action the validity, amount and appropriateness

of the order or assessment shall not be subject to review. Any person who fails to pay on a timely basis a civil penalty ordered or assessed under this section shall be required to pay, in addition to such penalty and interest, the Director's enforcement expenses, including but not limited to attorneys' fees and costs of collection proceedings. Such person shall also pay a quarterly nonpayment penalty for each quarter during which such failure to pay persists. The nonpayment penalty shall be 10% of the aggregate amount of the person's outstanding penalties and nonpayment penalties accrued as of the beginning of each quarter of non-payment.

F. Calculation of Penalty

In determining the amount of any penalty to be assessed under this section, the Director or the court, as appropriate, shall take into consideration the factors enumerated in section 503.E. of this chapter.

505. Citizen Suits

A. Authority to Bring Civil Action; Jurisdiction

1. Except as provided in subsection B of this section, a person may commence a civil action in the Navajo Nation District Court in Window Rock on his own behalf (a) against any person (except the Navajo Nation or any instrumentality of the Navajo Nation, but not excepting tribal enterprises or other similar businesses engaged in the wholesale or resale trade whether for profit or nonprofit) who is alleged to be in violation of any provision, requirement or prohibition of this chapter, including but not limited to a regulation adopted pursuant to this chapter, or order issued pursuant to this chapter, or (b) against any person (except the Navajo Nation or any instrumentality of the Navajo Nation, but not excepting tribal enterprises) who has contributed or who is contributing any activity which may present an imminent and substantial endangerment to the public health or the environment.
2. The Navajo Nation courts shall have jurisdiction to enforce such provision, requirement, prohibition, regulation, or order and to take such other action as may be necessary and to apply any appropriate civil penalties.

B. Notice

1. An action may not be commenced under subsection A.1.(a) of this section fewer than 60 days after the plaintiff has given notice of the alleged

violation to the Director, the Navajo Nation and the alleged violator. In addition, an action may not be commenced if the Director has commenced and is diligently prosecuting a civil action in court to require compliance with this chapter, except that any person may intervene as a matter of right in such an action.

2. An action may not be commenced under subsection A.1.(b) of this section fewer than 90 days after the plaintiff has given notice of the endangerment to the Director, the Navajo Nation and the alleged violator. In addition, an action may not be commenced if the Director has commenced and is diligently prosecuting a civil action in court to restrain or abate conditions which may have contributed or are contributing to the activities which may cause or lead to the alleged endangerment, except that any person may intervene as a matter of right in such action if such person claims an interest relating to the subject of the action and is so situated that the disposition of the action may, as a practical matter, impair or impede his ability to protect that interest.

C. Venue; Intervention; Service of Complaint

1. Any action relating to a violation of any requirement of this chapter or the regulations promulgated hereunder may be brought only in the Navajo Nation District Court in Window Rock.
2. The Director, if not already a party, may intervene as of right in any action brought under this section.
3. Whenever any action is brought under this section the plaintiff shall serve a copy of the complaint on the Attorney General and on the Director. No consent judgment may be entered in an action brought under this section in which the Director is not a party prior to 45 days following the receipt of a copy of the proposed consent judgment by the Attorney General and the Director, during which time the Attorney General and the Director may submit, on behalf of the Nation, their comments on the proposed consent judgment to the court and parties or the Director may intervene as a matter of right.

D. Award of Costs

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

bond or equivalent security.

E. Penalty Fund

Penalties received under this section shall be deposited in a Special Fund in the Account established by section 106.c. of this chapter for use by the Director to finance underground storage tank compliance and enforcement activities. The Director shall report annually to the Navajo Nation Council about the sums deposited into the fund, including the sources and the actual and proposed uses thereof.

506. Administrative Hearings

The Director shall, by regulation, establish a formal hearing review process which meets due process standards, to hear appeals taken under section 504.A. and B (administrative penalties), section 504.C. (field citations) and section 502.C. (emergency compliance orders). The Director may establish an informal review process to hear all other administrative appeals provided for under this chapter. Until the Director establishes a formal hearing review process, appoints a qualified presiding officer and certifies this in writing, the Navajo Office of Hearings and Appeals is authorized to hear appeals taken under sections 504.A. and B, section 504.C. and section 502.C.; provided, however, the Director may, at his/her discretion, transfer other appeals allowed under this chapter and regulations promulgated hereunder to the Navajo Office of Hearings and Appeals where the need arises.

SUBCHAPTER 6. RULEMAKING AND JUDICIAL REVIEW

601. Rulemaking and Other Administrative Procedures

A. Rulemaking

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

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

B. Administrative Subpoenas

1. In connection with any investigation, monitoring, reporting, entry, compliance inspection or administrative enforcement proceeding under this chapter, the Director may issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books and documents, and may administer oaths.
2. Upon a showing satisfactory to the Director by the owner or operator of a source that it would divulge trade secrets or secret processes to make public such papers, books, documents or information or any portion thereof, the Director shall consider this information confidential, except that such information may be disclosed to other officers, employees or authorized representatives of the Nation concerned with carrying out this chapter or when relevant in any proceeding under this chapter.
3. Witnesses summoned shall be paid the same fees and mileage that are paid in the Nation's courts. In case of contumacy or refusal to obey a subpoena, the tribal court for the district in which such person is found, resides or transacts business shall have jurisdiction to issue an order requiring such person to appear before the Director and give testimony or produce papers, books or documents, or both, and any failure to obey such an order may be punished by the court as contempt. A person may challenge the lawfulness of an administrative subpoena issued by the Director in the Navajo Nation Window Rock District Court in his or her official capacity and not in any other manner; in any such action, relief shall be limited to declaratory relief.

602. Review in Navajo Nation Supreme Court

A. Petitions for Review

A petition for review of any final action taken by the Director under this chapter, including but not limited to promulgation of regulations and standards or issuance of orders (but not including imposition of administrative penalties under section 504 which are subject to review under section 504.D.), or challenge of an administrative subpoena which are subject to review under section 601.B.3. shall

be brought in the Navajo Nation Supreme Court. The petition shall be filed within 60 days from the date that notice of such final action is first published, or, if notice is not published, first served upon the alleged violator or such other person required to be served under this chapter, except that if the petition is based solely on grounds arising after the sixtieth day, then the petition shall be filed within 60 days after such grounds arise.

B. Limitations on Review

1. If judicial review of a final action of the Director could have been obtained under subsection A of this section, that action shall not be subject to judicial review in judicial proceedings for enforcement.
2. With respect to any regulations promulgated under this chapter, only an objection that was raised with reasonable specificity during the public comment period may be raised during judicial review. If the person raising an objection can demonstrate to the Director that it was impracticable to raise the objection within such time or if the grounds for the objection arose after the public comment period (but within the time specified for judicial review), and if the objection is of central relevance to the outcome of the regulation, the Director shall convene a proceeding for reconsideration of the regulation and provide the same procedural rights as would have been afforded had the information been available at the time the regulation was proposed. If the Director refuses to convene such a proceeding, the person may seek review of such refusal in the Navajo Nation Supreme Court. Such reconsideration shall not postpone the effectiveness of the regulation, although it may be stayed by the Director or the court for up to three (3) months.
3. Except as otherwise expressly allowed by Navajo law, no interlocutory appeals shall be permitted with regard to determinations made by the Director under this chapter. In reviewing alleged procedural errors, the court may invalidate the regulation only if the errors were so serious and related to matters of such central relevance to the regulation that there is a substantial likelihood that the regulation would have been significantly changed if such errors had not been made.

C. Standards for Review

In reviewing any final action of the Director undertaken pursuant to this chapter, the court may reverse any such action that it finds to be:

1. arbitrary, capricious, an abuse of discretion or otherwise not in accordance

with the law;

2. in excess of statutory jurisdiction, authority, or limitations or short of statutory right;
3. without observance of procedure required by law; or
4. unsupported by substantial evidence.

D. Challenge to Provisions

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

SUBCHAPTER 7. FUNDING

701. Annual Tank Fees

Each owner and/or operator of an underground storage tank which is subject to regulations under this chapter shall pay annually to Navajo EPA a fee of one hundred and twenty five (\$125.00) dollars for each tank. The fees collected shall be transmitted to the Controller for deposit into the Underground Storage Tank Revolving Account established by section 106.C. of this chapter.

702. Underground Storage Tank Tariff

- A. Effective January 1, 1998, there is imposed and the Director shall collect a tariff from the owner who is primarily responsible for submitting payment or operator (to be collected on an annual basis except as provided below for suppliers) on the operation of underground storage tanks regulated under this chapter measured by the quantity of regulated substances placed in a tank in any calendar year; provided, however, that the supplier of motor vehicle fuel, diesel fuel and aviation fuel shall be responsible and liable for submitting the tariff (on a monthly basis) to Navajo EPA where the owner or operator is not engaged in the bulk distribution of such fuels. In the event the supplier fails to submit the tariff, the owner and operator shall also remain jointly and severally liable for said tariff.

The tariff shall be levied at the rate of one cent per gallon of regulated substance. In addition to providing monthly tariff payments, the supplier shall provide to Navajo EPA a monthly summary report on forms prescribed by the Director as well as an annual reconciliation report verifying payment of all tariffs owed.

- B. For proper administration of this section, and to prevent the evasion of the tariff imposed by this chapter, it shall be presumed until the contrary is established by competent proof under rules and procedures adopted by the Director, that all regulated substances which are motor vehicle fuel, aviation fuel and diesel and which are refined, manufactured, produced, compounded or blended within the Navajo Nation, or imported into the Navajo Nation will be placed in an underground storage tank from which the fuel is dispensed to users who consume the fuel and do not further distribute it.
- C. The tariff imposed by this chapter does not apply to underground storage tanks operated by the United States or the Navajo Nation, its agencies (including Navajo Nation chapters not engaged in the wholesale or resale trade, whether for profit or not of motor fuel, aviation fuel or diesel fuel) or to underground storage tanks used for the purpose of storing, handling or distributing naphtha-type jet fuel or kerosene-type jet fuel. The tariff does, however, apply to Navajo Nation enterprises and other Navajo Nation business entities who are engaged in the wholesale or resale trade, whether for profit or not, of motor vehicle fuel, aviation fuel or diesel fuel. The Director shall issue, within 30 days of a request, an exemption certificate to those owners or operators of underground storage tanks exempted from the tariff requirements under the provision which shall be used for verifications of the tariff exemption.
- D. The Director shall adopt and specify the forms of the return.
- E. Subchapter 6. shall not apply to the temporary rules adopted pursuant to this section. The temporary rules shall be effective for a period of one hundred eighty (180) days from the date of adoption. The temporary rules may be renewed twice in the same manner as they were adopted, may be amended at the time or times they are renewed, and shall be effective for a period of one hundred eighty days from the date the renewed temporary rules are adopted.
- F. The permanent rules adopted pursuant to this section shall be adopted as provided in subchapter 6.
- G. Return and payment of tariff; due date
 - 1. The tariff levied under this section is due and payable annually on or before March 31 for the preceding calendar year and is delinquent if not

postmarked on or before that date or if not received by Navajo EPA on or before March 31 for tariff payers electing to file in person.

2. At the time the tariff is paid the tariff payer shall prepare and file with the tariff a return, on a form prescribed by the Director, showing the amount of tariff for which he is liable for the period covered by the return. The return shall contain either a sworn statement or a certification, under penalty of perjury, that the information contained in the return is true, complete and correct according to the best belief and knowledge of the owner or operator filing the report.

H. Extensions; abatement

1. The Director, for good cause, may extend the time for filing any return required by this chapter and may grant such reasonable additional time within which to make the return as he deems proper if at least ninety per cent of the tariff liability is paid when the extension is requested.

I. Audits

The Director may require a person who is required to pay the tariff under this section to appear, at reasonable times and on reasonable notice, at the Director's office and produce such records and information as are specified in the notice to determine compliance with this section. The Director shall audit the records of a sufficient number of tariff payers under this section to ensure general compliance with this section.

J. Interest; penalty; lien

1. If the tariff, or any portion of the tariff, is not paid on or before the date prescribed for its payment, interest shall be imposed on any unpaid amount of tariff from the date the payment was due, without regard to any extension of time or stay of payment, to the date payment is received. The rate shall be equal to the IRS rate.
2. If a tariff payer fails to file a return as required under this section on or before the due date as extended by the Director, unless the failure is due to reasonable cause and not due to willful neglect, a penalty of five per cent of the tariff found to be remaining due shall be added to the tariff for each month or fraction of a month elapsing between the due date of the return and the date on which it is filed. The total penalty shall not exceed twenty-five per cent (25%) of the tariff remaining due. The penalty so added to the tariff is due and payable on notice and demand by the

Director.

3. If any tariff, interest or penalty imposed by this section is not paid when due, the unpaid amounts are a lien from the date the amounts became due on all real and personal property and rights to property belonging to the tariff payer. The lien may be perfected by recording a notice of lien in the county in which the property is located, the Navajo Division of Economic Development, the Navajo Land Department or the Bureau of Indian Affairs where appropriate. The notice shall specify the nature of the tariff, the amount of tariff, interest and penalty due, the tariff period for which the amounts are due and the name and last known address of the tariff payer who is liable for the amounts. In addition, it shall be unlawful for the owner, operator or supplier to place a regulated substance into an underground storage tank where said tariff interest or penalty imposed has not been paid when due.

K. Remission and disposition of revenues

The Director shall promptly transmit to the Controller all monies collected under this section. The Controller shall credit these payments to the underground storage tank program revolving fund as follows:

1. Eighty (80) percent of the net revenues shall be credited to the Leaking UST Trust Fund. Any amount accumulated in excess of three million dollars (\$3,000,000) in said account within a single fiscal year shall be deposited in the Navajo Nation General Fund Account. After five (5) years from the effective date of this chapter, any amount accumulated in excess of one million dollars (\$1,000,000) within a single fiscal year shall be deposited into the Navajo Nation General Fund.
2. Twenty (20) percent of the net revenues shall be deposited into the UST Program Special Revenue Fund Account for program implementation. Effective upon the date of this chapter, any amount accumulated in excess of two hundred fifty thousand dollars (\$250,000) within a single fiscal year shall be deposited in the Navajo General Fund.

L. Appeals

Any Appeals taken under this section shall be taken in the same manner as appeals taken under section 504 (administrative penalties) of this chapter.

703. Leaking Underground Storage Tank Revolving Trust Fund

There is hereby established a Leaking Underground Storage Tank Revolving Trust Fund to be utilized by the Director at his/her discretion, but pursuant to an approved budget, to carry out corrective actions required under this chapter, regulations promulgated hereunder and to remove abandoned tanks and clean up such sites. Monies shall be deposited into this trust fund from any tariffs authorized by this chapter, appropriations authorized by the Navajo Nation Council, available state, federal or other grants, corrective action reimbursement cost, or donations. For a period of five years upon the effective date of this chapter, the Navajo Nation Council hereby authorizes a set aside of one-half ($\frac{1}{2}$) of all business site lease revenues (but not to exceed two million dollars (\$2,000,000) within a single fiscal year) to be used for corrective actions, removal of abandoned underground storage tanks and clean ups associated with such removal. The monies collected from this set aside shall be transmitted by the Controller into the Leaking Underground Storage Tank Revolving Trust Fund to be used by the Director to carry out the intent of this section.

704. Tank Removal, Installation and Clean-Up Monitoring Fees

Each owner of an underground storage tank shall pay per tank to Navajo EPA a tank removal and installation field monitoring fee of \$150.00 per day for each removal or installation. In the event that remediation is required, each owner of an underground storage tank shall pay an additional \$150.00 field monitoring fee for each site per day. The fees collected shall be transmitted to the Controller for deposit into the underground storage tank Special Fund Account established by section 106.C. of this chapter.

705. Registration Fee

Notwithstanding the definition of owner under section 102., all owners and/or operators required to provide notice under subchapter 3., shall pay to Navajo EPA a one time registration fee of \$50.00 for each tank. The fees collected shall be transmitted to the Controller for deposit into the Underground Storage Tank Revolving Account established by section 106.C. of this chapter.