

**RESOLUTION OF THE
NAVAJO NATION COUNCIL
21st NAVAJO NATION COUNCIL – Second Year, 2008
AN ACT**

**RELATING TO RESOURCES; APPROVING THE NAVAJO NATION
COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND
LIABILITY ACT, AMENDING 4 N.N.C. §§2101 TO 2805**

BE IT ENACTED:

Section 1. Findings.

The Navajo Nation Council hereby approves the Comprehensive Environmental Response, Compensation and Liability Act.

Section 2. Amendments to Title 4 of the Navajo Nation Code.

The Navajo Nation Council hereby approves the following amendments to Title 4 of the Navajo Nation Code, Sections 2101 to 2805:

**Title 4, Navajo Nation Code
Chapter 17. Navajo Nation CERLA
Subchapter 1. General Provisions**

§2101 Title

This Act may be cited as the Navajo Nation CERCLA.

§2102 Declaration of Policy

A. Legislative Findings and Purposes

- 1. The Navajo Nation Council finds and declares that contamination from hazardous substances, pollutants and contaminants exists with varying degrees of severity within the Navajo Nation. Releases or threatened**

releases of these hazardous substances, pollutants and contaminants can endanger the public health and the safety of its residents, by causing physical discomfort, disability, and injury; can cause injury to property and property values; can discourage recreational uses of the Nation's resources; and can discourage economic development, including by halting and hindering economic use and re-use of contaminated or affected business and industrial areas within the Nation.

2. The Navajo Nation Council, by enacting the Navajo Nation CERCLA, is creating a coordinated program to control present and future contamination by hazardous substances, pollutants and contaminants. This Act provides for the regulation, assessment, containment, removal, and monitoring of hazardous substances, pollutants and contaminants on sites in the Navajo Nation; ensures the health, safety and general welfare of all the residents of the Nation; and protects plants and animal life, property values, and cultural resources of the Navajo Nation. The Council further is placing primary responsibility for the regulation and abatement of hazardous substances, pollutants or contaminants in the Navajo Nation Environmental Protection Agency.

B. Modular Implementation of the Navajo Nation CERCLA

The Navajo Nation is committed to providing a program for response to releases and threatened releases of hazardous substances, pollutants and contaminants. However, it is discretionary with the Nation as to whether and which provisions of this Act to implement and in what order, based on the Nation's needs and available resources. The Director shall determine the order and timing for implementation of the authorities provided for in this Act. The Director shall not be required to implement any of the provisions described in this Act by any particular time.

C. Preservation of Rights

It is the purpose of this Act to provide additional and cumulative remedies to those existing under common or statutory law to prevent, abate, remove,

remediate, and monitor releases and threatened releases of hazardous substances, pollutants and contaminants in the Navajo Nation. Nothing contained in this Act shall be construed to abridge or alter rights of action or remedies in equity under common law or statutory law, nor shall any provisions of this part or any act done by virtue thereof be construed as preventing the Nation or individuals from the exercise of their rights under the common law or statutory law to suppress nuisances or to abate pollution or contamination.

§2103 Purpose

- A. To assure that all persons subject to this Act have a clear, non-technical statement of the requirements of the law, this Section provides a summary of the provisions of the Act and explains the intent of the Navajo Nation in adopting the Act.
- B. This Act serves substantially the same purposes as the United States Comprehensive Environmental Response, Compensation, and Liability Act, as amended, commonly known as CERCLA or the Superfund law, but this Act is intended to provide a more flexible program suited to the specific requirements of the Navajo Nation. This Act also authorizes the use of response and enforcement tools for circumstances under which the federal Superfund law would not usually be used, such as for certain petroleum releases. This added flexibility should help avoid disputes over the application of the Act to various environmental and public health threats.
- C. This Act authorizes the Director of the Navajo Nation EPA to implement the authorities of this Act in a phased manner, and to coordinate activities, as appropriate, with other state, federal and tribal agencies, to assure the efficient use of available resources and minimize duplication of effort. The Act also provides the Director flexibility in conducting response actions so that the timing and extent of investigation, documentation, and response actions can be appropriate to the environmental threat and the priorities of the Navajo Nation.

- D. Like the Superfund law, the Navajo Nation CERCLA places principal responsibility for conducting and paying for response actions on the parties who are legally responsible for contamination, including current and prior owners and operators of sites, and persons who arranged for hazardous substances, pollutants or contaminants to be brought to and used at a site. The Director is authorized to work with responsible parties in a cooperative manner, emphasizing voluntary cleanup where possible, and authorizing agreements and settlements with responsible parties.
- E. The Act also provides for necessary enforcement authorities, including information gathering, administrative orders, cost recovery, natural resource and cultural resource damages, penalties, and civil and criminal actions, and provides the Director with discretion to decide which authorities should be applied in any given situation.
- F. Persons who are responsible for releases of hazardous substances, pollutants or contaminants will be required to report certain releases to the Navajo Nation EPA and the Navajo Nation Department of Emergency Management, and to cooperate with the Navajo Nation EPA in the circumstances and in the manner prescribed, including but not limited to paying for or conducting a needed investigation or cleanup. In addition to cleanup obligations, responsible persons may be liable to the Nation for damages to Navajo natural and cultural resources.
- G. This Act also imposes an obligation on other persons to cooperate with the Navajo Superfund Program's information-gathering and response actions, including providing access to Navajo Nation officials for the purpose of investigation or response actions.
- H. The Act provides for public participation in such matters as the selection of response actions and provides a public forum and site information clearinghouse for the community. A Navajo Site List serves an important public information function by listing sites in the Navajo Nation that have been identified by the Director as having possible releases, or have been the subject of screening or

evaluation. The Act also contains a citizens' suit provision to aid in enforcement.

§2104 Definitions

- A. For the purposes of this Act --
1. “Act of God” means an unanticipated grave natural disaster or other natural phenomenon of an exceptional, inevitable, and irresistible character, the effects of which could not have been prevented or avoided by the exercise of due care or foresight.
 2. “Administrator” means the Administrator of the U.S. Environmental Protection Agency.
 3. “Alternative water supplies” includes, but is not limited to, drinking water and household water supplies.
 4. “ARAR” means those applicable or relevant and appropriate requirements of federal and tribal environmental law which the Director considers, selects or waives in determining the degree of cleanup and control of further releases which assures protection of human health and the environment.
 5. “Attorney General” means the Navajo Nation Attorney General.
 6. “Barrel” means forty-two United States gallons at sixty degrees Fahrenheit (60° F).
 7. “Claim” means a demand in writing for a sum certain.
 8. “Claimant” means any person who presents a claim for compensation under this Act.
 9. “Comprehensive Environmental Response, Compensation and Liability Act,” or “CERCLA,” means the federal law codified at 42 U.S.C. § 9601 et seq.
 10. “Cultural resource” means any product of human activity or any object or place given significance by human action or belief. Places that may be cultural resources include building and other structures, landforms,

archaeological sites, traditional cultural properties, and districts that are eligible or potentially eligible for listing on the Navajo Nation Register of Cultural Properties or the National Register of Historic Places. Objects that may be cultural resources include artifacts and other physical remains of human activity, natural objects given significance by human action or belief, human remains and “cultural items” as defined in the Native American Graves Protection and Repatriation Act, and archaeological resources.

11. “Damages” means damages for injury to or loss of natural resources and cultural resources, as set forth in this Act.
12. “Director” means the Executive Director of the Navajo Nation Environmental Protection Agency (Navajo Nation EPA) or, where appropriate, his or her designee.
13. “Drinking water supply” means any raw or finished water source that is or may be used by a public water system (as defined in the Navajo Nation Safe Drinking Water Act, 22 N.N.C. § 201(Q), or as drinking water by one or more individuals.
14. “Environment” means the waters, including surface water and ground water, drinking water supply, land surface or subsurface strata, or ambient air within the Navajo Nation or under the jurisdiction of the Navajo Nation.
15. “Groundwater” means water in a saturated zone or stratum beneath the surface of land or water.
16. “Guarantor” means any person, other than the owner or operator, who provides evidence of financial responsibility for an owner or operator under this Act.
17. “Hazardous substance” means --
 - a. any substance designated pursuant to §311 of the Clean Water Act, 33 U.S.C. § 1321(b)(2)(A);

- b. any element, compound, mixture, solution, or substance designated pursuant to §2105(B) of this Act or 42 U.S.C. § 9602;
- c. any hazardous waste having the characteristics identified under or listed pursuant to §3001 of the Solid Waste Disposal Act, 42 U.S.C. § 6921;
- d. any toxic pollutant listed under §307 of the Clean Water Act, 33 U.S.C. § 1317(a);
- e. any hazardous air pollutant listed under §112 of the Clean Air Act, 42 U.S.C. § 7412; and
- f. any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to §7 of the Toxic Substances Control Act, 15 U.S.C. § 2606.

The term includes petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under Subparagraphs (A) through (F) of this Paragraph, and the term includes natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas).

- 18. “National contingency plan” means the plan established under §105 of the Superfund law, 42 U.S.C. § 9605, and §311 of the Clean Water Act, 33 U.S.C. § 1321, and published at 40 C.F.R. Part 300.
- 19. “Natural resources” means land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust for, appertaining to, or otherwise controlled by the Navajo Nation.
- 20. “Navajo Nation” or “Nation” means --
 - a. when referring to the body politic, except as the context may otherwise require, the same meaning as set forth in 1 N.N.C. § 552.

- b. when referring to governmental territory, all lands and waters within the territorial boundaries of the Navajo Nation, including:
- (1) all lands within the exterior boundaries of the Navajo Reservation or of the Eastern Navajo Agency or within the boundaries of Navajo dependent Indian communities, including all lands within the boundaries of Navajo chapter governments, all without regard to the nature of title thereto;
 - (2) all lands held in trust by the United States for, or restricted by the United States, or otherwise set apart under the superintendence of the United States for the use of the Navajo Nation or benefit of the Navajo Nation, Tribe, any band of Navajo Indians or any individual Navajo Indians; and
 - (3) all other lands over which the Navajo Nation may exercise governmental jurisdiction in accordance with federal or international law.

21. “Navajo Nation Environmental Protection Agency” or “Navajo Nation EPA” means the division of Navajo Nation government that is authorized by the Navajo Nation Council to oversee the health and well-being of the public and the Navajo Nation environment and to implement environmental laws and regulations.

22. “Navajo Nation Resource Trustee” means the Resource Trustee for the Navajo Nation, who is authorized to monitor and further any natural resource damage claims that the Navajo Nation has or may have in the future pursuant to the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), the Oil Pollution Act (OPA), and the Clean Water Act (CWA).

23. “Navajo Nation Superfund Program” or “NSP” means the program within the Navajo Nation EPA responsible for implementing and enforcing this Act.

24. “Navajo Department of Emergency Management” or “DEM” means the department within the Division of Public Safety that is authorized by the Navajo Nation Council to respond to emergencies on the Navajo Nation.

25. “Owner or Operator” means --

a. In the case of a site:

- (1) any person owning or operating such site; and
- (2) in the case of any site, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, escheat or similar means to a unit of the Navajo Nation, District, geographic Agency, or Chapter government, any person who owned, operated, or otherwise controlled activities at such site immediately beforehand.

Such term does not include a person who, without participating in the management of a vessel or site, holds indicia of ownership primarily to protect his security interest in the vessel or site.

b. In the case of a hazardous substance, pollutant or contaminant which has been accepted for transportation by a common or contract carrier and except as provided in this Act, the term “owner or operator” shall mean such common carrier or other bona fide for hire carrier acting as an independent contractor during such transportation, and the shipper of such hazardous substance, pollutant or contaminant shall not be considered to have caused or contributed to any release during such transportation which resulted solely from circumstances or conditions beyond his control.

- c. In the case of a hazardous substance, pollutant or contaminant which has been delivered by a common or contract carrier to a disposal or treatment site and except as provided in this Act, the term “owner or operator” shall not include such common or contract carrier, and such common or contract carrier shall not be considered to have caused or contributed to any release at such disposal or treatment site resulting from circumstances or conditions beyond its control.
- d. The term “owner or operator” does not include a unit of Navajo Nation or Chapter government which acquired ownership or control involuntarily through bankruptcy, tax delinquency, abandonment, escheat, or other circumstances in which the government involuntarily acquires title by virtue of its function as sovereign. However, the exclusion provided under this Paragraph shall not apply to any government which has caused or contributed to the release or threatened release of a hazardous substance, pollutant or contaminant from the site, and such government shall be subject to the provisions of this Act in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under §2501 of this Act.
26. “Person” means an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, the United States, state, tribe, municipality, commission, political subdivision of a state or tribe, or any interstate or other intergovernmental body.
27. “Permitted release” means a discharge in compliance with a permit issued by the Navajo EPA or the U.S. EPA.
28. “Pollutant or contaminant” means any element, substance, compound, or mixture, including disease-causing agents, which after release into the environment and upon exposure, ingestion, inhalation, or assimilation

into any organism, either directly from the environment or indirectly by ingestion through food chains, will or may reasonably be anticipated to cause death, disease, behavioral abnormalities, cancer, genetic mutation, physiological malfunctions (including malfunctions in reproduction) or physical deformations, in such organisms or their offspring.

29. “President” means the President of the Navajo Nation.
30. “Release” means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant), but excludes --
- a. any release which results in exposure to persons solely within a workplace, with respect to a claim which such persons may assert against the employer of such persons;
 - b. emissions from the engine exhaust of a motor vehicle, rolling stock, aircraft, vessel, or pipeline pumping station engine;
 - c. release of source, byproduct, or special nuclear material from a nuclear incident, as those terms are defined in the Atomic Energy Act of 1954, 42 U.S.C. § 2011 *et seq.*, if such release is subject to requirements with respect to financial protection established by the Nuclear Regulatory Commission under §170 of such Act, 42 U.S.C. § 2210, or, for the purposes of this Act or any other response action, any release of source byproduct or special nuclear material from any processing site designated under the Uranium Mill Tailings Control Act of 1978, 42 U.S.C. § 7912(a)(1) or § 7942(a); and
 - d. the normal application of fertilizer.
31. “Remove” or “removal” means the cleanup or removal of released hazardous substances, pollutants or contaminants from the environment; such actions as may be necessary to take in the event of the threat of

release of hazardous substances, pollutants or contaminants into the environment; such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, pollutants or contaminants; the disposal of removed material; or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment which may otherwise result from a release or threat of release. The term includes, but is not limited to, security fencing or other measures to limit access, provision of alternative water supplies, and temporary evacuation of threatened individuals.

32. “Remedy” or “remedial action” means those actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance, pollutant or contaminant into the environment, to prevent or minimize the release of hazardous substances, pollutants or contaminants so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment. The term includes, but is not limited to, such actions at the location of the release as storage, confinement, perimeter protection using dikes, trenches, or ditches, clay cover, neutralization, cleanup of released hazardous substances, pollutants or contaminants and associated contaminated materials, recycling or reuse, diversion, destruction, segregation of reactive wastes, dredging or excavations, repair or replacement of leaking containers, collection of leachate and runoff, onsite treatment or incineration, provision of alternative water supplies, and any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment. The term includes offsite transport and offsite storage, treatment, destruction, or secure disposition of hazardous substances, pollutants or contaminants and associated contaminated materials.

33. “Respond” or “response” means remove, removal, remedy and remedial action; all such terms (including the terms “removal” and “remedial action”) include enforcement activities related thereto.
34. “Response action contract” means any written contract or agreement entered into by a response action contractor with the Director to provide any remedial action or any removal under this Act with respect to any release or threatened release of a hazardous substance or pollutant or contaminant from a site or to provide any evaluation, planning, engineering, surveying and mapping, design, construction, equipment, or any ancillary services thereto for such site.
35. “Response action contractor” means --
- a. any --
 - (1) person who enters into a response action contract with respect to any release or threatened release of a hazardous substance or pollutant or contaminant from a site or vessel and who is carrying out such contract; and
 - (2) person, public or nonprofit private entity, conducting a field demonstration pursuant to this Act.
 - b. any person who is retained or hired by a person described in Subparagraph (A) to provide any services relating to a response action.
36. “Service station dealer” means any person --
- a. who owns or operates a motor vehicle service station, filling station, garage, or similar retail establishment engaged in the business of selling, repairing, or servicing motor vehicles, where a significant percentage of the gross revenue of the establishment is derived from the fueling, repairing, or servicing of motor vehicles, and
 - b. who accepts for collection, accumulation, and delivery to an oil recycling facility, recycled oil that has been removed from the

engine of a light duty motor vehicle or household appliances by the owner of such vehicle or appliances, and is presented by such owner to such person for collection, accumulation, and delivery to an oil recycling facility.

37. “Site” means --
- a. any facility, building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or
 - b. any area where a hazardous substance, pollutant or contaminant has been deposited, stored, disposed of, placed, or otherwise come to be located, but does not include any consumer product in consumer use.
38. “Transport” or “transportation” means the movement of a hazardous substance, pollutant or contaminant by any mode, including pipeline (as defined in the Federal Pipeline Safety Act), and in the case of a hazardous substance, pollutant or contaminant which has been accepted for transportation by a common or contract carrier, the term “transport” or “transportation” shall include any stoppage in transit which is temporary, incidental to the transportation movement, and at the ordinary operating convenience of a common or contract carrier, and any such stoppage shall be considered as a continuity of movement and not as the storage of a hazardous substance, pollutant or contaminant.
39. “Tribe” means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village but not including any Alaska Native regional or village corporation, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

40. “Uniform Regulations” means the Navajo Nation Environmental Protection Agency Uniform Regulations for Permit Review, Administrative Enforcement Orders, Hearings, and Rulemakings under Navajo Nation Environmental Acts.
41. “United States Environmental Protection Agency (USEPA)” means the United States Environmental Protection Agency, its Administrator, Regional Administrator, or delegatee.
42. “Vessel” means every type of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.
43. The terms “disposal,” “hazardous waste” and “treatment” shall have the meanings provided in §1004 of the Solid Waste Disposal Act, 42 U.S.C. § 6903.

§2105 Authority of the director

A. General Authority of the Director

In order to fulfill the obligations under this Act, the Director may --

1. conduct investigations, inspections and tests to carry out the duties of this Act according to the procedures established by this Act;
2. hold hearings related to any aspect of or matter within the duties of the Director and, in connection therewith, compel the attendance of witnesses and the production of records according to the procedures established under this Act;
3. prepare and develop a comprehensive plan, or plans, for the prevention, assessment, containment, removal and remediation of contamination from hazardous substances, pollutants and contaminants in the Nation;
4. encourage voluntary cooperation by advising and consulting with owners, operators and potentially responsible parties to achieve the purposes of this Act, including a Voluntary Response Program, as specified in §2402 of this Act;

5. consistent with Title 2, Navajo Nation Code, accept, receive, and administer grants, funds, or gifts from public or private agencies, including the federal government, to carry out any of the purposes of this Act, provided that all such monies shall be deposited in the Hazardous Substances Fund established by §2701 for the use of the Navajo Superfund Program;
6. secure necessary scientific, technical, administrative, and operational services, including laboratory facilities and technical consultants, by contract or otherwise, to carry out the purposes of this Act;
7. compile and publish from time to time reports, data, and statistics with respect to matters studied or investigated by the Director;
8. require assessments, sampling, and monitoring of affected or potentially affected media to discover, verify, and quantify contamination by hazardous substances, pollutants or contaminants;
9. ensure timely public notice and adequate opportunity for public participation;
10. ensure the best and most appropriate response for each site;
11. perform such other activities as the Director may find necessary to implement and carry out this Act, including enforcing the provisions of this Act and taking such other action authorized by this Act as the Director deems appropriate.

B. Standards and Reportable Quantities

The Director may promulgate regulations, pursuant to § 2801, designating as hazardous substances, in addition to those referred to in §2104(A)(17), such elements, compounds, mixtures, solutions, and substances which, when released into the environment, may present substantial danger to the public health or welfare or the environment, as well as promulgating regulations establishing that quantity of any hazardous substance the release of which shall be reported pursuant to §2201. The Director may determine that one single quantity shall be the reportable quantity for any hazardous substance, regardless of the

medium into which the hazardous substance is released. The Director may adopt hazardous substances and their reportable quantities as published in the Federal Register. Hazardous substances and their reportable quantities will be listed in the Navajo Nation Hazardous Substance Regulations, and may be revised as necessary.

C. Emergency procurement powers

Notwithstanding any other provision of law, the Director may authorize the use of such emergency procurement powers as he or she deems necessary to carry out the provisions of this Act. Upon determination that such procedures are necessary, the Director shall promulgate regulations prescribing the circumstances under which such authority shall be used and the procedures governing the use of such authority.

D. Delegation of Powers and Duties

The Director may delegate to any officer or employee of the Navajo Superfund Program or the Navajo Nation EPA such powers and duties under this Act, except the making of regulations, as the Director deems necessary or expedient.

E. Coordination with Other Environmental Programs

Nothing in this Act shall prevent the Director from determining that a cleanup or other action authorized under this Act may be conducted by another branch of the Navajo Nation EPA, where that other branch has concurrent jurisdiction and is prepared to conduct the action.

For the purposes of program authorization, eligibility for grants, or any other purpose identified by the Director, other Navajo Nation environmental programs may elect to use the cleanup authorities provided in this Act to meet the requirements of a cleanup or abatement law, including but not limited to corrective action, closure, and post-closure. The Director shall ensure that there is no duplication of effort or listing with respect to such sites. Any exercise of the response or order authorities of this Act by any other branch of the Navajo

Nation EPA should be exercised in consultation with the Navajo Superfund Program under such protocols as the Director may deem appropriate.

§2106 Applicability; relationship to other law

A. Applicability

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

B. Exemptions

1. Voluntary Cleanup Agreement

The provisions of this Act and any regulations promulgated hereunder shall not apply to any person (or to any property owned or operated by such person) who is subject to a voluntary cleanup agreement entered into pursuant to § 2402, except under such terms and conditions as may be provided in that voluntary cleanup agreement.

2. Covenant Not to Regulate

The provisions of this Act and any regulations promulgated hereunder shall not apply to any person or property where, but only to the limited extent that, such application would be in breach of any covenant not to regulate or otherwise exercise jurisdiction over such person or property. Such person may, however, enter into a voluntary cleanup agreement pursuant to § 2402, in which case this Act and implementing regulations shall apply as provided in that voluntary cleanup agreement. Nothing in this Paragraph shall be construed as a determination or admission by the Navajo Nation that any covenant not to regulate or otherwise exercise jurisdiction is valid.

C. Relationship to Other Law

Any person who receives compensation for response costs or damages or claims pursuant to this Act shall be precluded from recovering compensation for the same response costs or damages or claims pursuant to any other tribal, state or

federal law. Any person who receives compensation for removal costs or damages or claims pursuant to any other federal or state law shall be precluded from receiving compensation for the same response costs or damages or claims from the Navajo Nation as provided in this Act.

§2107 Severability

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

Subchapter 2. Reporting and recordkeeping

§2201 Obligation to report releases of hazardous substances

A. Notification Requirements Respecting Released Substances

Any person in charge of a site shall, as soon as he or she has knowledge of any release (other than a permitted release) of a hazardous substance from the site in quantities equal to or greater than those determined as reportable quantities under this Act or 42 U.S.C. § 9602, notify the Navajo Nation Department of Emergency Management, or their designee, within 24 hours of learning of such release. Whether a release meets or exceeds a reportable quantity shall be determined based on the amount of the hazardous substance released within a 24-hour period.

B. Continuous Releases

Notification need not be given more than annually for a release subject to Subsection (A) when that release is a continuous release, stable in quantity and rate, and notification has already been given for that release pursuant to Subsection (A) for a period sufficient to establish the continuity, quantity and regularity of such release. At such time as there is any statistically significant increase in the quantity of any hazardous substance or constituent thereof

released above that previously reported, however, notice shall be given immediately pursuant to this Section.

C. Penalties for Failure to Notify; Use of Notice

Any person in charge of a site from which a hazardous substance is released, other than a permitted release, in a quantity equal to or greater than the reportable quantity established by the Director or, in the absence of action by the Director, established pursuant to 42 U.S.C. § 9602, and who fails to notify immediately the Navajo Department of Emergency Management as soon as he or she has knowledge of such release, or who submits in such a notification any information which he or she knows to be false or misleading, shall, upon conviction, be fined in accordance with §2509(d) of this Act. Notification received pursuant to this Subsection or information obtained by the exploitation of such notification shall not be used against any such person in any criminal case, except a prosecution for perjury or for giving a false statement.

D. Registered Pesticide Products

This Section shall not apply to the application of a pesticide product registered under the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 136 *et seq.*, or to the handling and storage of such a pesticide product by an agricultural producer.

§2201 Preservation of records

A. Requirement to Preserve Records

1. Beginning with the date of enactment of this statute, for 50 years thereafter or for 50 years after the date of establishment of a record required under 42 U.S.C. § 9603 (whichever is later), or at any such earlier time as a waiver is obtained under Paragraph (3) of this Subsection, the Navajo Nation EPA shall require any person required to notify the Administrator under 42 U.S.C. § 9603(c) to preserve said records. It shall be unlawful for any such person knowingly to destroy.

mutilate, erase, dispose of, conceal, or otherwise render unavailable or unreadable or falsify any records.

2. Notwithstanding the provisions of this Subsection, the Director may in his or her discretion require any such person to retain any record identified pursuant to Paragraph (1) of this Subsection for such a time as the Director determines to be necessary to protect the public health or welfare.
3. At any time prior to the date which occurs 50 years after the date of establishment of a record under Paragraph (1) of this Subsection, any person identified under Paragraph (1) of this Subsection may apply to the Director for a waiver of the provisions of Paragraph (1) of this Subsection. The Director may grant such waiver if, in his or her discretion, such waiver would not unreasonably interfere with the attainment of the purposes and provisions of this Act.

B. Penalty for Violation

Any person who violates this Section shall, upon conviction, be fined in accordance with applicable provisions of Navajo Nation law or imprisoned for not more than one year, or both.

Subchapter 3. Information gathering, site evaluation and response action determination

§2301 Authorities for information gathering and access to sites

A. Actions to Obtain Information

The Director, or any duly designated officer, employee or representative of the Director, is authorized to take action under Paragraph (B)(2), Subsection (C) or Subsection (D) (or any combination thereof) at a site, establishment, place, property, or location or, in the case of Subsections (C) and (D), at any site, establishment, place, property, or location which is adjacent to the site, establishment, place, property, or location referred to in such Subsection (C) or (D). Any duly designated officer, employee, or representative of the Nation is

also authorized to take such action. The authority of Subsections (C) and (D) may be exercised only if there is a reasonable basis to believe there may be a release or threat of release of a hazardous substance, pollutant or contaminant, or that illness, disease, or complaints thereof may be attributable to exposure to a hazardous substance, pollutant, or contaminant and that a release may have occurred or be occurring. The Director, or any duly designated officer, employee or representative, may undertake such investigations, monitoring, surveys, testing, and other information-gathering activities as he or she may deem necessary or appropriate to identify the existence and extent of the release or threat thereof, the source and nature of the hazardous substances, pollutants or contaminants involved, and the extent of danger to the public health or welfare or to the environment. In addition, the Director may undertake such planning, legal, fiscal, economic, engineering, architectural, and other studies or investigations as he or she may deem necessary or appropriate to plan and direct response actions, to recover the costs thereof, and to enforce the provisions of this Act.

B. Access to Information

1. Information to be provided

Any officer, employee, or representative described in Subsection (A) may require any person who has or may have information relevant to any of the following to furnish, upon reasonable notice, information or documents relating to such matter:

- a. the identification, nature, and quantity of materials which have been or are generated, treated, stored, transported or disposed of at a site or transported to a site or a vessel;
- b. the nature or extent of a release or threatened release of a hazardous substance or pollutant or contaminant at or from a site or vessel;
- c. information relating to the ability of a person to pay for and/or to perform a cleanup.

2. Access

In addition, upon reasonable notice, such person either --

- a. shall grant any such officer, employee, or representative access at all reasonable times to any site, establishment, place, property, or location to inspect and copy all documents or records relating to such matters; or
- b. shall copy and furnish to the officer, employee, or representative all such documents or records, at the option and expense of such person.

c. Access and Entry to the Site

Any officer, employee, or representative described in Subsection (A) is authorized to enter at reasonable times any of the following:

1. any site, establishment, or other place or property where any hazardous substance or pollutant or contaminant may be or has been generated, stored, treated, disposed of, or transported to or from;
2. any site, establishment, or other place or property from which or to which a hazardous substance or pollutant or contaminant has been or may have been released;
3. any site, establishment, or other place or property where such release is or may be threatened; and
4. any site, establishment, or other place or property where entry is needed to determine the need for response or the appropriate response or to effectuate a response action under this Subchapter.

D. Inspection and Samples

1. Authority

Any officer, employee or representative designated by the Director is authorized to inspect and obtain samples from any site, establishment, or other place or property of any suspected hazardous substance, pollutant or contaminant. Any such officer, employee, or representative is authorized to inspect and obtain samples of any containers or labeling

for suspected hazardous substances, pollutants or contaminants. Each such inspection shall be completed with reasonable promptness.

2. Samples

If the officer, employee, or representative obtains any samples, before leaving the premises he or she shall give to the owner, operator, tenant, or other person in charge of the place from which the samples were obtained a receipt describing the sample obtained and, if requested, a portion of each such sample. A copy of the results of any analysis made of such samples shall be furnished promptly to the owner, operator, tenant, or other person in charge, if such person can be located.

E. Protection of Confidential Information

1. Any records, reports, or information obtained from any person under this Section shall be available to the public, except that upon a showing satisfactory to the Director by any person that records, reports, or information, or any particular part thereof (other than health or safety effects data) to which the Director or any officer, employee, or representative has access under this Section would, if made public, divulge information entitled to protection under the federal Privacy Act, 18 U.S.C. § 1905, such information or particular portion thereof shall be considered confidential in accordance with the purposes of the Privacy Act, except that such record, report, document or information may be disclosed to other officers, employees, or authorized representatives of the Navajo Nation concerned with carrying out this Act, to officers, employees or authorized representatives of the United States concerned with carrying out CERCLA, or when relevant in any proceeding under this Act or CERCLA.

2. Any person to whom confidential information is disclosed pursuant to Paragraph (1) who knowingly and willfully divulges or discloses any information entitled to protection under this Subsection shall, upon

conviction, be subject to a fine of not more than five thousand dollars (\$5,000) or to imprisonment not to exceed one year, or both.

3. In submitting data under this Act, a person required to provide such data may --
 - a. designate the data which such person believes is entitled to protection under this Subsection; and
 - b. submit such designated data separately from other data submitted under this Act.

A designation under this Paragraph shall be made in writing and in such manner as the Director may prescribe by regulation.

4. Notwithstanding any limitation contained in this Section or any other provision of law, all information reported to or otherwise obtained by the Director (or any representative of the Director) under this Act shall be made available to any duly authorized committee of the Navajo Nation Council, such as the Resources Committee, upon receipt of that Committee's written request.

No person required to provide information under this Act may claim that the information is entitled to protection under this Subsection unless such person shows each of the following:

- a. Such person has not disclosed the information to any other person, other than a member of a local emergency planning committee established under SARA Title III (1986), 42 U.S.C. § 11001 *et seq.*, an officer or employee of the Navajo Nation, United States, state, or local government, an employee of such person, or a person who is bound by a confidentiality agreement, and such person has taken reasonable measures to protect the confidentiality of such information and intends to continue to take such measures.

- b. The information is not required to be disclosed, or otherwise made available, to the public under any other tribal or federal law.
 - c. Disclosure of the business/industrial proprietary information is likely to cause substantial harm to the competitive position of such person.
 - d. The specific chemical identity, if sought to be protected, is not readily discoverable through reverse engineering.
5. The following information with respect to any hazardous substance, pollutant or contaminant at a site or vessel shall not be entitled to protection under this Subsection and shall be available to the public:
- a. The trade name, common name, or generic class or category of the hazardous substance, pollutant or contaminant.
 - b. The physical properties of the substance, including its boiling point, melting point, flash point, specific gravity, vapor density, solubility in water, and vapor pressure at twenty degrees Celsius (20°C).
 - c. The hazards to health and the environment posed by the substance, including physical hazards (such as explosion) and potential acute and chronic health hazards.
 - d. The potential routes of human exposure to the substance at the site, establishment, place, or property being investigated, entered, or inspected under this Section.
 - e. The location of disposal of any waste stream.
 - f. Any monitoring data or analysis of monitoring data pertaining to disposal activities.
 - g. Any hydrogeologic or geologic data.
 - h. Any groundwater monitoring data.
6. To promote consistency in the handling of confidential business information among the various environmental programs administered by

the Navajo Nation Environmental Protection Agency, the Director may amend or adopt regulations promulgated under other statutes for the purpose of establishing procedures for the implementation of this Subsection. Implementing regulations may include such matters as the handling by the Navajo Nation EPA of business information which is or may be entitled to confidential treatment, determinations by the Navajo EPA of whether information is entitled to confidential treatment for reasons of business confidentiality, notice to businesses and such other procedures as the Director deems appropriate. Until such time as the Director promulgates regulations to implement this Subsection, the Director is authorized to protect confidential business information using such interim procedures as the Director deems appropriate.

F. Compliance Order for Information and Access

In addition to any other enforcement action available under this Act, if consent is not granted regarding any request made by an officer, employee, or representative pursuant to this Section, the Director may issue an order directing compliance with the request. The order may be issued after such notice and opportunity for a hearing as is reasonably appropriate under the circumstances. The Director may ask the Navajo Nation Attorney General to commence a civil action to compel compliance with any such request or order, pursuant to §2509 of this Act.

§2302 Coordination of investigations

A. Notification to Natural Resource Trustees

The Director shall promptly notify the appropriate tribal and federal natural resource trustees of potential damages to natural resources resulting from releases under investigation pursuant to this Section and shall coordinate the assessments, investigations, and planning under this Section with such tribal and federal trustees.

B. Cooperative Agreements

The Director may enter into any cooperative agreements needed to conduct adequate risk or health assessments. The Director may also contract with appropriate agencies or technical professionals to gather and/or interpret site information.

§2303 The Navajo Nation Contingency Plan

A. The Navajo Nation Contingency Plan

The Director may promulgate a Navajo Nation Contingency Plan which shall contain procedures to be employed in identifying, screening, evaluating, selecting and providing response action for releases of hazardous substances, pollutants and contaminants at sites within the Navajo Nation. The Director may, from time to time, revise and republish the Navajo Nation Contingency Plan. The Navajo Nation Contingency Plan may include, but is not limited to:

1. methods for discovering and investigating sites at which hazardous substances, pollutants or contaminants have been disposed of or otherwise come to be located;
2. methods for evaluating, including analyses of relative cost, and responding to any releases or threats of releases from sites which pose substantial danger to the public health, welfare, or the environment;
3. methods and criteria for determining the appropriate extent of removal, remedy, and other measures authorized by this Act;
4. appropriate roles and responsibilities for the federal, state, and local governments and for interstate and nongovernmental entities in effectuating the plan;
5. provision for identification, procurement, maintenance, and storage of response equipment and supplies;

6. means of assuring that remedial action measures are cost-effective over the period of potential exposure to the hazardous substances, pollutants or contaminants or contaminated materials;
7. specified roles for private organizations and entities in preparation for response and in responding to releases of hazardous substances, pollutants or contaminants, including identification of appropriate qualifications and capacity therefore and including consideration of minority firms in accordance with §2601 of this Act; and
8. standards and testing procedures by which alternative or innovative treatment technologies can be determined to be appropriate for utilization in response actions authorized by this Act.

The Director shall implement the Navajo Nation Contingency Plan so that screening and evaluation of a site is commensurate with the risks presented by the site. In assessing the need for and scope of response, the Director may consider such factors as the Director determines to be appropriate, including no action criteria, site history, contaminants, pathways of contaminants, sampling history and sampling data assessment, and other available regulatory responses and oversight. To assure a more efficient use of Navajo Nation EPA resources, the Director may use a multi-media approach to screening and evaluation of sites and may refer sites to other environmental programs based upon the screening and evaluation, as appropriate.

b. Assessing Risks from Multiple Sources

1. The Navajo Nation Contingency Plan shall provide that during site screening and evaluation, preliminary assessment and site assessment, and response action evaluation and selection, the Director shall, as appropriate, consider the identification, assessment, management of, and response to multiple sources of risk in and around sites. The Director shall, as appropriate, examine various approaches to protect communities exposed to such sources of multiple risk, such as:

- a. health risks from the existence of and exposure to hazardous substances, pollutants or contaminants in the vicinity of a site; or
 - b. health risks from releases or threatened releases of a hazardous substance, pollutant, or contaminant from adjacent sites, permitted or otherwise, in the vicinity of the site.
 - 2. Where two or more non-contiguous sites are reasonably related on the basis of geology, geography, hydrology, threat, or potential threat to the public health or welfare or the environment, the Director may, in his discretion, aggregate the sites and treat these related sites as one for purposes of this Act.
- C. Health Assessment of Water Contamination Risks
- The Navajo Nation Contingency Plan shall provide that:
- 1. The Director shall ensure that the human health risks associated with the potential or actual contamination (either directly or as a result of the runoff of any hazardous substance or pollutant or contaminant from sites) of surface water are appropriately assessed in situations where the water is, or can be, used for recreation or for consumption by humans or livestock. This assessment shall also consider the potential migration of any hazardous substance, pollutant, or contaminant through such surface water to downstream sources of drinking water.
 - 2. For purposes of taking action under this Act, the Director shall give a high priority to sites where the release of hazardous substances or pollutants or contaminants has resulted in the closing of drinking water wells or has contaminated a principal drinking water supply.

§2304 Site listing and prioritization

- A. The Navajo Nation EPA Site List
The Director shall compile and maintain a Navajo Nation EPA Site List of all the known releases or threatened releases throughout the Navajo Nation and shall revise the list no less often than annually. The Navajo Nation EPA Site

List shall include sites that have already undergone screening, evaluation or response as well as sites that have been identified as having possible releases but have not yet been screened or evaluated. The Navajo Nation EPA Site List is intended to serve as an informational tool and is not intended to identify priorities for action.

B. Site Prioritization

The Director may adopt by rulemaking a process or criteria for determining priorities among releases or threatened releases throughout the Navajo Nation for the purpose of taking response action. The priorities shall be based upon, but not limited to:

1. the relative risk or danger to the public health, welfare or the environment;
2. the population at risk;
3. the hazard potential of the hazardous substances, pollutants or contaminants at such sites;
4. the potential for contamination of drinking water supplies;
5. the potential for direct human contact;
6. the potential for destruction of sensitive ecosystems;
7. the damage to natural or cultural resources;
8. the effect on the human food chain;
9. the contamination or potential contamination of the ambient air;
10. whether the site is already listed on the National Priorities List, in which case the Director shall avoid any duplication of effort with regard to that facility; and
11. other appropriate factors, as determined by the Director.

C. Hazard Ranking System

The Director may elect to assess a site pursuant to the federal Hazard Ranking System. Ranking under the federal Hazard Ranking System shall not be a prerequisite for the initiation of long-term or other response action at a site.

§2305 Response action selection

- A. General Use of Removal and Remedial Actions
1. The Director is authorized to select removal or remedial actions as appropriate to the circumstances and to undertake a level of information-gathering, sampling, analysis and alternatives evaluation appropriate to the circumstances. The use of the terms removal and remedial action are not intended to limit the Director's discretion in determining the appropriate response action to be taken.
 2. No further action. The Director is also authorized to determine at any time during the site screening, evaluation or response process that a site does not require any further action, if the Director determines that the site does not present risks warranting response. The Director may also suspend action if the Director determines that the site does not require response at that time.
- B. Degree of Cleanup
1. As provided in this Section, response actions selected under this Section or otherwise required or agreed to by the Director shall attain a degree of cleanup of hazardous substances, pollutants or contaminants released into the environment and of control of further release at a minimum which assures protection of human health and the environment. Such response actions shall be relevant and appropriate under the circumstances presented by the release or threatened release of such hazardous substance, pollutant or contaminant.
 2. The Director may promulgate regulations providing the manner in which the Director shall consider any promulgated standard, requirement, criteria, or limitation under a federal or tribal environmental or siting law that is legally applicable to the hazardous substance, pollutant or contaminant concerned, or is relevant and appropriate under the circumstances of the release or threatened release of such hazardous substance, pollutant or contaminant, in determining the degree of

cleanup or response action to be implemented. In applying such applicable or relevant and appropriate requirements (ARARs) to removal actions, the regulations shall recognize that it may not be practicable to achieve such ARARs, taking into account the exigencies of the situation. The regulations may also specify circumstances under which the Director may waive attainment of ARARs.

3. In selecting response actions, the Director may also consider such other guidance or technical information as the Director determines is relevant to the release or threatened release.

C. Administrative Record

The Director shall establish an administrative record upon which the Director shall base the selection of a response action. The administrative record shall be available to the public at or near the site at issue. The Director also may place duplicates of the administrative record at any adjacent Chapter House or other location. The Director may, in his or her discretion, provide a subset of the administrative record at or near the site, or at other locations, in lieu of the full administrative record, if it would be administratively inconvenient, due to the size of the record or such other appropriate reasons as the Director determines, to place the full record at such location. If the Director provides a subset rather than the full record, the subset shall include information on the location of the full record, and shall contain documents that inform the public on the nature and extent of risk posed by the site and the response actions considered.

D. Public Participation Procedures

1. Removal action

Regulations promulgated under this Section shall establish procedures for the appropriate participation of interested persons in the development of the administrative record on which the Director will base the selection of removal actions and on which judicial review of removal actions will be based. These regulations shall be promulgated pursuant to §2801 and shall provide for a level of documentation and timing of public

review that takes into account such factors as the need to take prompt response action.

2. Remedial action

The Director shall provide by regulation for the participation of interested persons, including potentially responsible parties, in the development of the administrative record on which the Director will base the selection of remedial actions and on which judicial review of remedial actions will be based. These regulations shall be promulgated pursuant to §2801 and shall include, at a minimum, requirements for each of the following:

- a. notice to potentially affected persons and to the public, by publication in a local newspaper for at least three consecutive publications, of the proposed response action, the site concerned and the parties to the response action, accompanied by a brief analysis of the plan and alternative plans that were considered;
- b. a reasonable opportunity to comment and provide information regarding the plan;
- c. an opportunity for a public meeting in the affected area;
- d. a response to each of the significant comments, criticisms, and new data submitted in written or oral presentations; and
- e. a statement of the basis and purpose of the selected action.

The administrative record required under Subsection (C) shall include all items developed and received under this Paragraph.

E. Interim Record

Until regulations under Subsection 505(D) are promulgated, the administrative record shall consist of all items developed and received pursuant to current procedures for selection of the response action, including procedures for the participation of interested parties and the public. The development of an administrative record and the selection of response action under this Act shall not include an adjudicatory hearing.

F. Potentially Responsible Parties

The Director shall make reasonable efforts to identify and notify potentially responsible parties as early as possible before selection of a response action. Nothing in this Subsection shall be construed to be a defense to liability.

G. Permits

No tribal permit shall be required for any portion of any response action conducted entirely onsite, where such response action is selected and carried out in compliance with this Section. For purposes of this Paragraph, onsite means the areal extent of contamination and all suitable areas in very close proximity to the contamination necessary for implementation of the response action.

H. Requirements for Remedial Actions

1. Removal actions taken at long-term remedial action sites

Any removal action undertaken by the Director under this Act (or by any other person undertaking a response action under this Act) should, to the extent the Director deems practicable, contribute to the efficient performance of any long-term remedial action with respect to the release or threatened release concerned.

2. Cost-effective remedies

The Director shall select appropriate remedial actions determined to be necessary to be carried out under this Act which are in accordance with this Section and, to the extent practicable, the Navajo Nation Contingency Plan, and which provide for cost-effective response. In evaluating the cost effectiveness of proposed alternative remedial actions, the Director shall take into account the total short- and long-term costs of such actions, including the costs of operation and maintenance for the entire period during which such activities will be required.

3. Preference for treatment

Remedial actions in which treatment which permanently and significantly reduces the volume, toxicity or mobility of the hazardous

substances, pollutants, and contaminants is a principal element are to be preferred over remedial actions not involving such treatment. The offsite transport and disposal of hazardous substances, pollutants or contaminants or contaminated materials without such treatment should be the least favored alternative remedial action where practicable treatment technologies are available. The Director shall conduct an assessment of permanent solutions and alternative treatment technologies or resource recovery technologies that, in whole or in part, will result in a permanent and significant decrease in the toxicity, mobility, or volume of the hazardous substance, pollutant, or contaminant. In making such assessment, the Director shall specifically address the long-term effectiveness of various alternatives. In assessing alternative remedial actions, the Director shall, at a minimum, take into account:

- a. the long-term uncertainties associated with land disposal;
- b. the goals, objectives, and requirements of the Navajo Nation Solid Waste Code, 4 N.N.C. §101 et seq.;
- c. the persistence, toxicity, mobility, and propensity to bioaccumulate of such hazardous substances, pollutants or contaminants and their constituents;
- d. short- and long-term potential for adverse health effects from human exposure;
- e. long-term maintenance costs;
- f. the potential for future remedial action costs if the alternative remedial action in question were to fail; and
- g. the potential threat to human health and the environment associated with excavation, transportation, and redisposal, or containment.

The Director shall select a remedial action that is protective of human health and the environment, that is cost effective, and that utilizes

permanent solutions and alternative treatment technologies or resource recovery technologies to the maximum extent practicable. If the Director selects a remedial action not appropriate for a preference under this Subsection, the Director shall publish an explanation as to why such remedial action nevertheless was selected.

4. Alternative remedial actions

The Director may select an alternative remedial action meeting the objectives of this Subsection whether or not such action has been achieved in practice at any other site that has similar characteristics. In making such a selection, the Director may take into account the degree of support for such remedial action by parties interested in such site.

5. Periodic Review of Remedial Actions

If the Director selects a remedial action that results in any hazardous substances, pollutants, or contaminants remaining at the site, the Director shall review such remedial action no less often than each five years after the initiation of such remedial action to assure that human health and the environment are being protected by the remedial action being implemented. In addition, if upon such review it is the judgment of the Director that further action is appropriate at such site in accordance with this Act, the Director shall take or require such action. The Director shall report to the Navajo Nation Resources Committee a list of sites for which such review is required, the results of all such reviews, and any further actions taken as a result of such reviews.

6. Notice to interested tribes, states and the USEPA

The Director shall provide notice to interested tribes, states and the US EPA and an opportunity to comment on the Director's proposed plan for remedial action as well as on alternative plans under consideration. The Director's proposed decision regarding the selection of remedial action shall be accompanied by a response to the significant comments submitted by the US EPA or interested tribes or states, including an

explanation regarding any decision under this Subsection on compliance with promulgated federal, tribal, or state standards. A copy of such response shall also be provided to the Navajo Nation Resource Committee, the US EPA, and the interested tribes and states.

Subchapter 4. Response implementation and enforcement

§2401 General response authority

A. General Response Authority of the Director

When any hazardous substance is released or there is a substantial threat of such a release into the environment, or there is a release or substantial threat of release into the environment of any pollutant or contaminant that may present an imminent and substantial danger to the public health or welfare, the Director is authorized to act, consistent with the Navajo Nation Contingency Plan, to investigate, remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance, pollutant, or contaminant at any time (including its removal from any contaminated natural resource), or take any other response measures, consistent with the Navajo Nation Contingency Plan, that the Director deems necessary to protect the public health, welfare or the environment. The Director shall take such action when one or more of the following situations exist:

1. No person can be found, within 90 days or such shorter period as may be necessary to protect human health and the environment, who is
 - a. an owner or operator of the site of concern, and
 - b. capable of carrying out such corrective action properly, either financially or otherwise;
2. A situation exists which requires prompt action by the Director to protect human health and the environment; and
3. The owner or operator has failed or refused to comply with an order of the Director to comply with corrective action requirements.

The Director is authorized to take removal actions under this Section when such removal is necessary to protect human health, safety, or the environment and sufficient funds exist in the Hazardous Substances Fund.

B. Limitations on Response

The Director shall not provide for a response action under this Section in response to a release or threat of release --

1. of a naturally occurring substance in its unaltered form, or altered solely through naturally occurring processes or phenomena, from a location where it is naturally found;
2. into public or private drinking water supplies due to deterioration of the system through ordinary use.

Notwithstanding the limitations identified in this Subsection, and to the extent authorized by this Section, the Director may respond to any release or threat of release if, in the Director's discretion, it constitutes a public health or environmental emergency and no other person with the authority and capability to respond to the emergency will do so in a timely manner.

C. Site Coordinator

The Director may appoint a Site Coordinator, who shall perform duties as delegated by the Director, including, but not limited to:

1. screening sites for entry into a database or inventory;
2. making preliminary visits to sites for assessment by inspection, investigation, sampling and/or any other relevant means;
3. communicating with and coordinating actions among Navajo and federal Divisions, Departments, Agencies, and other entities; and
4. giving notice to the Navajo Department of Emergency Management, the National Response Center, the Arizona Department of Environmental Quality, the New Mexico Environment Department, the Utah Department of Environmental Quality and any other relevant entity upon release or suspected release of hazardous substances.

§2402 Voluntary response**A. Purposes and Objectives**

The purposes and objectives of this Section are to increase significantly the pace of response activities at contaminated sites by promoting and encouraging the development and expansion of a voluntary response program, and to benefit the public welfare by returning contaminated sites to economically productive uses.

B. In General

The Director may establish by rulemaking and administer a voluntary cleanup program that --

1. identifies the circumstances and conditions under which a site may be eligible for the voluntary cleanup program;
2. provides adequate opportunities for public participation, including prior notice and opportunity for comment, in selecting response actions;
3. has the capacity, through enforcement or other mechanisms, of assuming the responsibility for completing a response action if the current owner or prospective purchaser fails or refuses to complete the necessary response, including operation and maintenance; and
4. provides adequate oversight and enforcement authorities to ensure that voluntary response actions are completed in accordance with applicable tribal and federal laws, including applicable permit requirements and any on-going operation and maintenance requirements or long-term remedial activities.

C. Application

A person desiring to participate in the Voluntary Cleanup Program must submit to the Director an application containing information regarding the site in question, its proposed future development, an environmental assessment of the site, a description of the proposed cleanup plan, and an application fee, as specified in the regulations promulgated under this Section. If the Director

approves the application, a corrective action plan must be prepared and approved by the Director before any work may begin.

D. Requirement for Authorized Actions

No person may undertake any investigation or response action under this Section unless the Director has determined that the person meets the criteria and conditions established for participation in the voluntary cleanup program and has approved the application to participate and the proposed corrective action plan.

E. Oversight Fees

The Director may require a person participating in the Voluntary Cleanup Program to pay an oversight fee to the NSP to reimburse the NSP for the costs of monitoring the cleanup. The Director shall set the amount of the oversight fee by regulation.

F. Certification of Completion

After remediating the site in question, the person undertaking the voluntary cleanup must prepare a completion report for review by the Director and, if the approved corrective action plan has been completed, the Director will issue a certificate of completion certifying that the requirements of the plan have been implemented, the applicable cleanup standards have been met, and the person is released from any further liability under Navajo law for cleanup of the site and for any contamination identified in the environmental assessment submitted with the application. In addition, persons who conduct voluntary cleanups pursuant to an agreement entered into under this Section are eligible for covenants under §2504(c) of this Act under the same terms and conditions as any party to an agreement under §2504 of this Act.

§2403 Administrative and civil actions for imminent and substantial endangerment

A. Injunctive Relief

Notwithstanding any permit granted pursuant to the Navajo Nation Code, upon receipt of evidence that a release of a hazardous substance, pollutant or

contaminant or a threat of release is presenting an imminent and substantial endangerment to the public health or welfare or the environment, the Director may request that the Attorney General bring suit on behalf of the Nation to immediately restrain, pursuant to this Act, any person causing or contributing to such endangerment to cease such releases, or the Director may take such other action as may be necessary, including but not limited to issuing administrative orders as provided in this Section.

B. Administrative Orders

In addition to any other action taken by any other person or agency, when the Director determines that there may be an imminent and substantial endangerment to the public health, welfare or the environment because of an actual or threatened release of a hazardous substance, pollutant or contaminant from a site, the Director may issue such orders as may be necessary to protect public health, welfare and the environment, pursuant to the procedures set forth in the Uniform Regulations.

C. Continuing Jurisdiction

Notwithstanding any interim or stabilization measures undertaken by a responsible party or any other person, the Director's authority to require response action under this Section shall continue until the necessary response actions are completed.

D. Coordination with Other Agencies

Consistent with the Director's general ability to coordinate activities conducted under this Act with other federal, state and tribal agencies, the Director shall provide appropriate coordination of any emergency response actions conducted under this Section with the Navajo Department of Emergency Management.

E. Reimbursement

Persons who satisfy the requirements of this Section are eligible for reimbursement of response costs:

1. Any person who receives and fully complies with all of the terms of any order issued under Subsection (B) of this Section may, within 60 days after completion of all required action, petition the Director for reimbursement from the Hazardous Substances Fund for the reasonable costs of such action, plus interest. Any interest payable under this Paragraph shall accrue on the amounts expended from the date of expenditure at the same rate as specified for response costs under 42 U.S.C. § 9607.
2. If the Director refuses to grant all or part of a petition made under this Subsection, the petitioner may within 30 days of receipt of such refusal file an action against the Director in Navajo Nation Court seeking reimbursement from the Hazardous Substances Fund.
3. Except as provided in Paragraph (4), to obtain reimbursement the petitioner shall establish by a preponderance of the evidence that petitioner is not liable for response costs under §2501(A) of this Act, and that costs for which petitioner seeks reimbursement are reasonable in light of the action required by the relevant order.
4. A petitioner who is unable to establish a lack of liability pursuant to Paragraph (3) may recover reasonable costs of response to the extent that petitioner can demonstrate, on the administrative record, that the Director's decision in selecting the response action ordered was arbitrary and capricious or was otherwise not in accordance with law. Reimbursement awarded under this Subsection shall include all reasonable response costs incurred by the petitioner pursuant to the portions of the order found to be arbitrary and capricious or otherwise not in accordance with law.

Reimbursement is limited by the amounts available in the Hazardous Substances Fund.

Subchapter 5. Liability, enforcement and settlement**§2501 Liable persons and standard of liability****A. Liable Persons**

Notwithstanding any other provisions or rule of law, and subject only to the defenses and limitations set forth in §2502 of this Act, the following persons shall be liable for the costs and damages described in §2503 and for compliance with administrative and judicial orders issued pursuant to §2403:

1. the owner or operator of a site or vessel that is involved in a release or threatened release of any hazardous substance, pollutant, or contaminant;
2. any person who at the time of disposal of any hazardous substance, pollutant or contaminant owned or operated any site at which such hazardous substance, pollutant or contaminant was disposed of;
3. any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances, pollutants or contaminants owned or possessed by such person or by any other party or entity, at any site or incineration vessel owned or operated by another party or entity and containing such hazardous substances, pollutants or contaminants; and
4. any person who accepts or accepted any hazardous substance, pollutant or contaminant for transport to disposal or treatment facilities, or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, pollutant or contaminant.

B. Standard of Liability

Persons liable under this act shall be strictly liable. Liability shall be joint and several.

C. Indemnification

1. No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from the owner or operator of any site or vessel or from any person who may be liable for a release or threat of release under this Section to any other person the liability imposed pursuant to this Section. Nothing in this Subsection shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this Section.
2. Nothing in this Act, including the provisions of Paragraph (1) of this Subsection, shall bar a cause of action that an owner or operator or any other person subject to liability under this Section, or a guarantor, has or would have, by reason of subrogation or otherwise against any person.

D. Impacts from Federal Sites

The Director may request the USEPA Regional Administrator to enforce provisions of federal law against federal sites releasing or threatening to release any hazardous substance, pollutant or contaminant within the Navajo Nation. In addition, the Director may apply requirements concerning removal and remedial actions under this Act to federal sites that are not included on the National Priorities List, provided that such requirements are not more stringent than requirements applicable to non-federal sites.

§2502 Defenses to liability and limitations on liability

A. Defenses to Liability

There shall be no liability under §2501(A) of this Act for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance, pollutant or contaminant and the damages resulting therefrom were caused solely by:

1. an act of God;
2. an act of war;

3. an act or omission of a third party other than an employee or agent of the defendant or one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published fee and acceptance for transport by a common carrier by rail);
4. an act or omission of a third party other than the defendant where:
 - a. the defendant would otherwise be liable as a current or former owner, and the real property at which the site concerned is located was acquired by the defendant after the disposal or placement of the hazardous substance, pollutant or contaminant on, in or at the site, and one or more of the circumstances described in Clauses (1), (2), or (3) is also established by the defendant by a preponderance of the evidence:
 - (1) At the time the defendant acquired the site the defendant did not know and had no reason to know that any hazardous substance, pollutant or contaminant which is the subject of the release or threatened release was disposed of on, in, or at the site.
 - (2) The defendant is a government entity which acquired the site by escheat, or through any other involuntary transfer or acquisition, or through the exercise of eminent domain authority by purchase or condemnation.
 - (3) The defendant acquired the site by inheritance or bequest.
 - b. To establish that the defendant had no reason to know, as provided in clause (1) of Subparagraph (a) of this Paragraph, the defendant must have undertaken, at time of acquisition, all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability. For purposes of the preceding sentence the court shall take into account any specialized

- knowledge or experience on the part of the defendant, the relationship of the purchase price to the value of property if uncontaminated, commonly known or reasonably ascertainable information about the property, the obviousness of the presence or likely presence of contamination at the property, and the ability to detect such contamination by appropriate inspection.
- c. Nothing in this Paragraph shall diminish the liability of any previous owner or operator of such site who would otherwise be liable under this Act. Notwithstanding this Paragraph, if the defendant obtained actual knowledge of the release or threatened release of a hazardous substance, pollutant or contaminant at such site when the defendant owned the real property and then subsequently transferred ownership of the property to another person without disclosing such knowledge, such defendant shall be treated as liable under §2501(A)(1) and no defense under §2502(A) shall be available to such defendant.
- d. Nothing in this Paragraph (4) shall affect the liability under this Act of a defendant who, by any act or omission, caused or contributed to the release or threatened release of a hazardous substance, pollutant or contaminant which is the subject of the action relating to the site;
5. In order for a defendant to establish a defense under Paragraphs (3) or (4), the defendant must also establish by a preponderance of the evidence that-
- a. he or she exercised due care with respect to the hazardous substances, pollutants or contaminants concerned, taking into consideration the characteristics of such hazardous substances, pollutants or contaminants, in light of all relevant facts and circumstances; and

b. he or she took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions;

6. any combination of Paragraphs (1) - (4) above.

B. Limitations on Liability

1. Limitation on liability of the Navajo Nation

a. In no event shall the Navajo Nation be liable based solely on its ownership of a site or its status as a lessor or the grantor of any land use interest, including but not limited to rights-of-way, easements, and land use permits.

b. The Navajo Nation shall not be liable for the costs and damages provided in §2503 or for any expenditure for compliance with administrative or judicial orders issued pursuant to §2403 unless the Navajo Nation Council has specifically appropriated funds for such costs, damages, or compliance. The failure of the Navajo Nation Council to appropriate such funds may not be relied upon as a defense by any other responsible party.

c. The limitations on liability of the Navajo Nation provided in this Subsection shall not apply to enterprises or companies owned, operated, or otherwise affiliated with the Navajo Nation.

2. Rendering care or advice

a. Except as provided in Subparagraph (B), no person shall be liable under this Subchapter for costs or damages as a result of actions taken or omitted in the course of rendering care, assistance, or advice in accordance with the Navajo Nation Contingency Plan or at the direction of a federal on-scene coordinator or a site coordinator appointed under the Navajo Nation Contingency Plan with respect to any releases or threatened releases of a hazardous substance, pollutant or contaminant creating a danger to public health, welfare or the

environment. This Paragraph shall not preclude liability for costs or damages as the result of negligence on the part of such person.

b. Neither the Navajo Nation nor the Chapter governments shall be liable under this Act for costs or damages as a result of actions taken in response to an emergency created by the release or threatened release of a hazardous substance, pollutant or contaminant generated by or from a site owned by another person. This Paragraph shall not preclude liability for costs or damages as a result of gross negligence or intentional misconduct by the tribal or local government. For the purpose of the preceding sentence, reckless, willful, or wanton misconduct shall constitute gross negligence.

c. Savings provision

This Subsection shall not alter the liability of any person covered by the provisions of §2501(A) of this Act with respect to the release or threatened release concerned.

3. Application of a registered pesticide product

No person may recover under the authority of this Section for any response costs or damages resulting from the application of a pesticide product by a licensed applicator under the Navajo Nation Pesticide Act, 4 N.N.C. § 301 *et seq.*, or registered under the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136 *et seq.* Nothing in this Paragraph shall affect or modify in any way the obligations or liability of any person under any other provision of tribal or federal law, including common law, for damages, injury, or loss resulting from a release of any hazardous substances, pollutants or contaminants or for removal or remedial action or the costs of removal or remedial action of such hazardous substances, pollutants or contaminants.

4. Obligation or liability pursuant to permitted release
Recovery by any person (including the Navajo Nation) for response costs or damages resulting from a federally or tribally permitted release shall be pursuant to existing law in lieu of this Section. Nothing in this Paragraph shall affect or modify in any way the obligations or liability of any person under any other provision of tribal or federal law, including common law, for damages, injury, or loss resulting from a release of any hazardous substance, pollutant or contaminant for removal or remedial action or the costs or removal or remedial action of such hazardous substance, pollutant or contaminant.

§2503 Costs and damages

A. Costs and damages

The persons identified in §2501(A) shall be liable to the Navajo Nation for-

1. all response costs incurred by the Navajo Nation that are not inconsistent with the Navajo Nation Contingency Plan;
2. damages for injury to, destruction of, or loss of natural and/or cultural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release;
3. the costs of any health assessment or health effects study carried out under this Act or regulations promulgated hereunder;
4. the costs of constructing and maintaining physical controls to site access, for purposes of public safety and the safety of livestock; and
5. interest on the amounts recoverable under Paragraphs (1) through (4).
Such interest shall accrue from the later of:
 - a. the date that payment of a specified amount is demanded in writing; or
 - b. the date of the expenditure concerned.

The rate of interest on the outstanding unpaid balance of the amounts recoverable under this Section shall be the same rate as

is specified for interest on recoverable amounts under 42 U.S.C. §9607. For purposes of applying §9607 to interest under this Paragraph, the term “comparable maturity” shall be determined with reference to the date on which interest accruing under this Paragraph commences.

B. Lien

1. In general

All costs and damages for which a person is liable to the Navajo Nation under §2501(A) of this Act shall constitute a lien in favor of the Navajo Nation upon all real property and rights to such property which --

- a. belong to such person; and
- b. are subject to or affected by a removal or remedial action.

2. Duration

The lien imposed by this Subsection shall arise at the later of the following:

- a. the time that costs are first incurred by the Navajo Nation with respect to a response action under this Act.
- b. the time that the person referred to in Paragraph (1) is provided (by certified or registered mail) with written notice of potential liability.

Such lien shall continue until the liability for the costs (or a judgment against the person arising out of such liability) is satisfied or becomes unenforceable through the operation of any Navajo Nation statute of limitations.

3. Notice and validity

The lien imposed by this Subsection shall be subject to the rights of any purchaser, holder of a security interest, or judgment lien creditor whose interest is perfected under applicable law before notice of the lien has been filed in the appropriate office within the state (or county or other governmental subdivision), as designated by applicable law, in which

the real property subject to the lien is located. Any such purchaser, holder of a security interest, or judgment lien creditor shall be afforded the same protections against the lien imposed by this Subsection as are afforded under applicable law against a judgment lien which arises out of an unsecured obligation and which arises as of the time of the filing of the notice of the lien imposed by this Subsection. The notice shall be filed in the tribal court with jurisdiction for where the real property is located. For purposes of this Subsection, the terms “purchaser” and “security interest” shall have the definitions provided under 26 U.S.C. §6323(h).

4. Action in rem

The costs constituting the lien may be recovered in an action in rem in the tribal court with jurisdiction over property in which the removal or remedial action is occurring or has occurred. Nothing in this Subsection shall affect the right of the Navajo Nation to bring an action against any person to recover all costs and damages for which such person is liable under §2501(A) of this Act.

C. Natural and Cultural Resources Liability

1. Natural and cultural resources liability

In the case of an injury to, destruction of, or loss of natural or cultural resources under Subsection (A)(2) of this Section, liability shall be to the Navajo Nation for natural and cultural resources within the jurisdiction of the Navajo Nation or belonging to, managed by, controlled by, or appertaining to the Navajo Nation or held in trust for the benefit of the Nation, or belonging to a member of the Nation if such resources are subject to a trust restriction on alienation: Provided, however, that no liability to the Navajo Nation shall be imposed under Subsection (A)(2) where the party sought to be charged has demonstrated that the damages to natural or cultural resources complained of were specifically identified as an irreversible and irretrievable commitment of resources in

an environmental impact statement, or other comparable environment analyses, and the decision to grant a permit or license authorizes such commitment of natural or cultural resources, and the site or project was otherwise operating within the terms of its permit or license, so long as, in the case of damages occurring pursuant to a federal permit or license, the issuance of that permit or license was not inconsistent with the fiduciary duty of the United States with respect to the Navajo Nation. The President, or his designee, shall act on behalf of the public as trustee of such natural or cultural resources to recover for such damages. Sums recovered shall be retained by the trustee, without further appropriation, for use only to restore, replace, or acquire the equivalent of such natural or cultural resources. The measure of damages in any action under §2501 shall not be limited by the sums which can be used to restore or replace such resources. There shall be no double recovery under this Act for natural or cultural resource damages, including the costs of damage assessment or restoration, rehabilitation, or acquisition for the same release and natural or cultural resource.

2. Designation of Navajo Nation officials

- a. The President may designate the Navajo Nation official(s) who shall act on behalf of the public as trustees for natural resources and trustees for cultural resources under this Act. Such officials shall assess damages for injury to, destruction of, or loss of natural resources for purposes of this Act for those resources under their trusteeship.
- b. Any determination or assessment of damages to natural and cultural resources for the purposes of this Act made by the appropriate Tribal trustees in accordance with promulgated regulations or made by a federal trustee pursuant to CERCLA shall have the force and effect of a rebuttable presumption on

behalf of the trustee in any administrative or judicial proceeding under this Act.

D. Contribution

Any person may seek contribution in tribal court from any other person who is liable or potentially liable under §2501(A), during or following any action brought under this Act. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this Subsection shall diminish the right of any person to bring an action for contribution in the absence of an action being brought under this Act.

E. Limitation Period

The limitation period for bringing actions under this Section shall be the same as that specified in 42 U.S.C. § 9613(g), subject to the same conditions as specified therein (as modified to pertain to this Act).

§2504 Settlements

A. Authority to Enter into Agreements

1. The Director, in his or her discretion, may enter into an agreement with any person (including the owner or operator of the site from which a release or substantial threat of release emanates, or any other potentially responsible person), to perform any investigation or response action if the Director determines that such investigation or response action will be done properly by such person. Whenever practicable and in the public interest, as determined by the Director, the Director may act to facilitate agreements under this Section that are in the public interest and consistent with the Navajo Nation Contingency Plan in order to expedite effective response actions and minimize litigation. If the Director decides not to use the procedures in this Section, the Director shall notify in writing potentially responsible parties at the site of such decision and the reasons why use of the procedures is inappropriate. A

decision of the Director to use or not to use the procedures in this Section is not subject to judicial review.

2. Whenever the Director enters into an agreement under this Act with any potentially responsible party with respect to an action under this Act, the Director shall issue an order or enter into a decree setting forth the obligations of such party. The Navajo Nation Courts may enforce such order or decree. In addition, the President of the Navajo Nation, in his discretion, may request that the Navajo Nation Attorney General petition any federal or state court of competent jurisdiction to enforce such order or decree.
3. Any agreement for the conduct of an investigation or response action under this Section shall provide that the party reimburse the Hazardous Substances Fund for any cost incurred by the Director under, or in connection with, the oversight contract, arrangement or agreement. Reimbursement of oversight costs shall be under such terms and conditions as the Director may prescribe. The Director may contract with or arrange for a qualified person to assist the Director in overseeing and reviewing the data, documents, responsible party conduct, progress of the response action, and other related matters of such investigation or response action.
4. In no event shall a potentially responsible party be subject to a lesser standard of liability, receive preferential treatment, or in any other way, whether direct or indirect, benefit from any such arrangement as a response action contractor, or as a person hired or retained by such a response action contractor, with respect to the release or site in question. The Director shall give primary attention to those releases which the Director deems may present a public health threat.
5. If, as part of any agreement, the Director will be carrying out any action and the parties will be paying amounts to the Director, the Director may,

notwithstanding any other provision of law, retain and use such amounts for purposes of carrying out the agreement.

6. The Director need not make any finding regarding an imminent and substantial endangerment to the public health or the environment in connection with any such agreement.

B. Special Notice Procedures

1. Notice

Whenever the Director determines that a period of negotiation under this Subsection would facilitate an agreement with potentially responsible parties for taking response action and would expedite remedial action, the Director shall so notify all such known parties and shall provide them with information concerning each of the following:

- a. The names and addresses of potentially responsible parties, to the extent such information is available.
- b. The volume and nature of substances contributed by each potentially responsible party identified at the site, to the extent that such information is available.
- c. A ranking by volume of the substances at the site, to the extent such information is available.

The Director may make the information referred to in this Paragraph available in advance of notice under this Paragraph upon the request of a potentially responsible party in accordance with procedures and guidance to be developed by the Director. The provisions regarding protection of confidential information apply to information provided under this Paragraph. Disclosure of information generated by the Director under this Section is subject to other privileges or protections provided by law, including (but not limited to) those applicable to attorney work product. Nothing contained in this Paragraph or in other provisions of this Subchapter shall be construed, interpreted, or applied

to diminish the required disclosure of information under other provisions of this Act.

2. Negotiation

a. Proposals

Persons receiving notice and information under Paragraph (1) of this Subsection with respect to action for imminent and substantial endangerment under this Act shall have 60 days from the date of receipt of such notice to make a proposal to the Director for undertaking or financing the action under §2403 of this Act. Persons receiving notice and information under Paragraph (1) of this Subsection with respect to action under response authorities of this Act shall have 60 days from the postmark of such notice to make a proposal to the Director for undertaking or financing the response action under §2401 of this Act.

b. Additional parties

If another potentially responsible party is identified during the negotiation period or after an agreement has been entered into under this Subsection concerning a release or threatened release, the Director may bring the additional party into the negotiation or enter into a separate agreement with such party.

3. Preliminary allocation of responsibility

a. In general

The Director may develop guidelines for preparing non-binding preliminary allocations of responsibility. In developing these guidelines the Director may include such relevant factors as: volume, toxicity, mobility, strength of evidence, ability to pay, litigative risks, public interest considerations, precedential value, and inequities and aggravating factors. When it would expedite settlements under this Section and remedial action, the Director

may, after completion of the remedial investigation and feasibility study, provide a non-binding preliminary allocation of responsibility which allocates percentages of the total cost of response among potentially responsible parties at the site.

b. Collection of information

To collect information necessary or appropriate for performing the allocation under Subparagraph (A) or for otherwise implementing this Section, the Director may by subpoena require the attendance and testimony of witnesses and the production of reports, papers, documents, answers to questions, and other information that the Director deems necessary. Witnesses shall be paid the same fees and mileage as are paid other witnesses in the courts of the Navajo Nation. In the event of contumacy or failure or refusal of any person to obey any such subpoena, any Navajo Nation court in which venue is proper shall have jurisdiction to order such person to comply with such subpoena. Any failure to obey such an order of the court is punishable by the court as contempt.

c. Effect

The non-binding preliminary allocation of responsibility shall not be admissible as evidence in any proceeding, and no court shall have jurisdiction to review the non-binding preliminary allocation of responsibility. The non-binding preliminary allocation of responsibility shall not constitute an apportionment or other statement on the divisibility of harm or causation.

d. Costs

The costs incurred by the Director in producing the non-binding preliminary allocation of responsibility shall be reimbursed by the potentially responsible parties whose offer is accepted by the

Director. Where an offer under this Section is not accepted, such costs shall be considered costs of response.

e. Decision to reject offer

Where the Director, in his discretion, has provided a non-binding preliminary allocation of responsibility and the potentially responsible parties have made a substantial offer providing for response to the Director which he or she rejects, the reasons for the rejection shall be provided in a written explanation. The Director's decision to reject such an offer shall not be subject to judicial review.

4. Failure to propose

If the Director determines that a good faith proposal for undertaking or financing action under §2403 has not been submitted within 60 days of the provision of notice pursuant to this Subsection, the Director may take an action against any person under this Act.

5. Significant threats

Nothing in this Subsection shall limit the Director's authority to undertake response or enforcement action regarding a significant threat to public health or the environment within the negotiation period established by this Subsection.

C. Liability and Covenants

1. Liability

Whenever the Director has entered into an agreement under this Section or the voluntary cleanup program under §2402, the liability to the Navajo Nation under this Act of each party to the agreement, including any future liability to the Navajo Nation, arising from the release or threatened release that is the subject of the agreement shall be limited as provided in the agreement pursuant to a covenant not to sue in accordance with Paragraph (2) of this Subsection. A covenant not to sue may provide that future liability to the Navajo Nation of a settling

potentially responsible party under the agreement may be limited to the same proportion as that established in the original settlement agreement. Nothing in this Section shall limit or otherwise affect the authority of any court to review in the consent decree process under Subsection (E) of this Section any covenant not to sue contained in an agreement under this Section. In determining the extent to which the liability of parties to an agreement shall be limited pursuant to a covenant not to sue, the Director may be guided by the principle that a more complete covenant not to sue could be provided for a more permanent remedy undertaken by such parties.

2. Discretionary covenants

The Director may, in his or her discretion, provide any person with a covenant not to sue concerning any liability to the Navajo Nation under this Act, including future liability, resulting from a release or threatened release of a hazardous substance, pollutant or contaminant addressed by a response action, whether that action is onsite or offsite, if each of the following conditions is met:

- a. the covenant not to sue is in the public interest;
- b. the covenant not to sue would expedite response action consistent with the purposes of this Act;
- c. the person is in full compliance with a consent decree entered into under this Act for response to the release or threatened release concerned; and
- d. the response action has been approved by the Director.

3. Special covenants not to sue

In the case of any person to whom the Director is authorized under Paragraph (2) of this Subsection to provide a covenant not to sue, for the portion of investigation or response action --

- a. which involves the transport and secure disposition offsite of hazardous substances, pollutants or contaminants at a site

meeting the Navajo Nation disposal requirements, where the Director has rejected a proposed response action that does not include such offsite disposition and has thereafter required offsite disposition; or

- b. which involves the treatment of hazardous substances, pollutants or contaminants so as to destroy, eliminate, or permanently immobilize the hazardous constituents of such substances, such that, in the judgment of the Director, the substances no longer present any current or future significant risk to public health,
- c. welfare or the environment, no byproduct of the treatment or destruction process presents any significant hazard to public health, welfare or the environment, and all byproducts are themselves treated, destroyed, or contained in a manner which assures that such byproducts do not present any current or foreseeable future significant risk to public health, welfare or the environment,

the Director shall provide such person with a covenant not to sue with respect to future liability to the Navajo Nation under this Act for a future release or threatened release of hazardous substances, pollutants or contaminants from such site, and a person provided such covenant not to sue shall not be liable to the Navajo Nation under this Act with respect to such release or threatened release at a future time.

(4) Requirement that action be completed

A covenant not to sue concerning future liability to the Navajo Nation shall not take effect until the Director certifies that the action which is the subject of the agreement has been completed in accordance with the requirements of this Act at the site that is the subject of such covenant.

(5) Factors

In assessing the appropriateness of a covenant not to sue under Paragraph (2) and any condition to be included in a covenant not to sue

under Paragraph (2) or (3), the Director may consider whether the covenant or condition is in the public interest on the basis of such factors as the following:

- a. The effectiveness and reliability of the remedy, in light of the other alternative remedies considered for the site concerned.
- b. The nature of the risks remaining at the site.
- c. The extent to which performance standards are included in the order or decree.
- d. The extent to which the response action provides a complete remedy for the site, including a reduction in the hazardous nature of the substances, as well as the remediation byproducts at the site.
- e. The extent to which the technology used in the response action is demonstrated to be effective.
- f. Whether the Hazardous Substances Fund or other sources of funding would be available for any additional remedial actions that might eventually be necessary at the site.
- g. Whether the remedial action will be carried out, in whole or in significant part, by the responsible parties themselves.

6. Satisfactory performance

Any covenant not to sue under this Subsection shall be subject to the satisfactory performance by the party concerned of its obligations under the agreement concerned.

7. Additional condition for future liability

- a. Except for the portion of the remedial action which is subject to a covenant not to sue under Paragraph (3) or under §2505 (relating to de minimis settlements), a covenant not to sue a person concerning future liability to the Navajo Nation shall include an exception to the covenant that allows the Director to sue such person concerning future liability resulting from the release or

threatened release that is the subject of the covenant where such liability arises out of conditions which are unknown at the time the Director certified under Paragraph (4) that the investigation or response action has been completed at the site concerned.

- b. In extraordinary circumstances, the Director may determine, after assessment of relevant factors such as those referred to in Paragraph (5) and volume, toxicity, mobility, strength of evidence, ability to pay, litigative risks, public interest considerations, precedential value, and inequities and aggravating factors, not to include the exception referred to in Subparagraph (A) if other terms, conditions, or requirements of the agreement containing the covenant not to sue are sufficient to provide all reasonable assurances that public health and the environment will be protected from any future releases at or from the site.
- c. The Director is authorized to include any provisions allowing future enforcement action under this Act that in the discretion of the Director are necessary and appropriate to assure protection of public health, welfare and the environment.

D. Actions Against Other Persons

If an agreement has been entered into under this Section, the Director may take any action under this Act against any person who is not a party to the agreement, once the period for submitting a proposal under Subsection (B) of this Section has expired. Nothing in this Section shall be construed to affect either of the following:

- 1. The liability of any person under this Act with respect to any costs or damages which are not included in the agreement.
- 2. The authority of the Director to maintain an action under this Act against any person who is not a party to the agreement.

E. Consent Decrees

1. Remedial action

Whenever the Director enters into an agreement under this Section with any potentially responsible party with respect to remedial action under this Act, following approval of the agreement by the Attorney General, except as otherwise provided in the case of certain administrative settlements referred to in §§2505 and 2506 of this Act, the agreement shall be entered in Navajo Nation court as a consent decree.

2. Effect

The entry of any consent decree under this Subsection shall not be construed to be an acknowledgment by the parties that the release or threatened release concerned constitutes an imminent and substantial endangerment to the public health, welfare or the environment.

3. Structure

The Director may fashion a consent decree so that the entering of such decree and compliance with such decree or with any determination or agreement made pursuant to this Section shall not be considered an admission of liability for any purpose.

4. Public participation

a. Filing of proposed judgment

At least 30 days before a final judgment is entered under Paragraph (1), the proposed judgment shall be filed with the Navajo Nation court.

b. Opportunity for comment

The Attorney General of the Navajo Nation shall provide an opportunity to persons who are not named as parties to the action to comment on the proposed judgment before its entry by the court as a final judgment. The Attorney General shall consider, and file with the court, any written comments, views, or allegations relating to the proposed judgment. The Attorney

General may withdraw or withhold its consent to the proposed judgment if the comments, views, and allegations concerning the judgment disclose facts or considerations which indicate that the proposed judgment is inappropriate, improper, or inadequate.

§2505 De minimis settlements

A. De Minimis Settlements

1. Expedited final settlement

Whenever practicable and in the public interest, as determined by the Director, the Director shall as promptly as possible reach a final settlement with a potentially responsible party in an administrative or civil action under this Act if such settlement involves only a minor portion of the response costs at the site concerned and, in the judgment of the Director, the conditions in any one of the following Subparagraphs (a), (b) or (c) are met:

a. Both of the following are minimal in comparison to other hazardous substances, pollutants or contaminants at the site:

(1) The amount of the hazardous substances, pollutants or contaminants contributed by that party to the site.

(2) The toxic or other hazardous effects of the substances contributed by that party to the site.

b. The potentially responsible party --

(1) is the owner of the real property at which the site is located;

(2) did not conduct or permit the generation, transportation, storage, treatment, or disposal of any hazardous substance, pollutant or contaminant at the site; and

(3) did not contribute to the release or threat of release of a hazardous substance, pollutant or contaminant at the site through any action or omission.

This Subparagraph (b) does not apply if the potentially responsible party purchased the real property with actual or constructive knowledge that the property was used for the generation, transportation, storage, treatment, or disposal of any hazardous substance, pollutant or contaminant.

- c. The potentially responsible party is a Navajo Chapter or other division of government undertaking household refuse collection or the benefit of its constituency.

B. Covenant Not to Sue

The Director may provide a covenant not to sue with respect to the site concerned to any party who has entered into a settlement under this Section unless such a covenant would be inconsistent with the public interest as determined under §2504(C)(5).

C. Expedited Agreement

The Director shall reach any such settlement or grant any such covenant not to sue as soon as possible after the Director has available the information necessary to reach such a settlement or grant such a covenant.

D. Consent Decree or Administrative Order

A settlement under this Section shall be entered as a consent decree or embodied in an administrative order setting forth the terms of the settlement. In the case of any site where the total response costs exceed five hundred thousand dollars (\$500,000) (excluding interest), if the settlement is embodied as an administrative order, the order may be issued only with the prior written approval of the Attorney General. If the Attorney General or his designee has not approved or disapproved the order within 30 days of this referral, the order shall be deemed to be approved unless the Attorney General and the Director have agreed to extend the time. Such administrative order may be enforced in Navajo Nation court.

E. Effect of Agreement

A party who has resolved its liability to the Navajo Nation under this Section shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially responsible parties unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

F. Settlements with Other Potentially Responsible Parties

Nothing in this Section shall be construed to affect the authority of the Director to reach settlements with other potentially responsible parties under this Act.

§2506 Cost recovery settlement authority

A. Use of Arbitration

The Director may elect to use arbitration in accordance with the Navajo Nation Arbitration Act as a method of settling claims of the Navajo Nation where the total response costs for the site concerned do not exceed five hundred thousand dollars (\$500,000) (excluding interest).

B. Recovery of Claims

If any person fails to pay a claim that has been settled under this Section, the Director shall request the Attorney General to bring a civil action in the appropriate Navajo Nation court to recover the amount of such claim, plus costs, attorney's fees, and interest from the date of the settlement. In such an action, the terms of the settlement shall not be subject to review.

C. Claims for Contribution

A person who has resolved his liability to the Navajo Nation under this Section shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement shall not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

§2507 Settlement procedures**A. Publication**

At least 30 days before any settlement (including any settlement arrived at through arbitration) may become final under §2504 or §2505, the Director shall publish in a local newspaper notice of the proposed settlement for a minimum of three consecutive publications. The notice shall identify the site concerned and the parties to the proposed settlement.

B. Comment Period

For a 30-day period beginning on the first date of publication of notice under Subsection (A) of this Section of a proposed settlement, the Director shall provide an opportunity for persons who are not parties to the proposed settlement to file written comments relating to the proposed settlement.

C. Consideration of Comments

The Director shall consider any comments filed under Subsection (B) in determining whether or not to consent to the proposed settlement and may withdraw or withhold consent to the proposed settlement if such comments disclose facts or considerations which indicate the proposed settlement is inappropriate, improper, or inadequate.

§2508 Settlement of natural and cultural resources claims**A. Notification of Trustee**

Where a release or threatened release of any hazardous substance, pollutant or contaminant that is the subject of negotiations under this Subchapter may have resulted in damages to natural resources or cultural resources under the trusteeship of the Navajo Nation, the Director shall notify the Resource Committee of the Navajo Nation Council, the Navajo Nation Resource Trustee and the Federal Trustee for the resource of the negotiations and shall encourage the participation of such trustee(s) in the negotiations.

B. Covenant Not to Sue

An agreement under this Section may contain a covenant not to sue for damages to natural and cultural resources under the trusteeship of the Navajo Nation resulting from the release or threatened release of hazardous substances, pollutants or contaminants that is the subject of the agreement, but only if the Resource Committee of the Navajo Nation Council and the Navajo Nation Resource Trustee have agreed by resolution to such covenant. The Resource Committee of the Navajo Nation Council and the Navajo Nation Resource Trustee may agree to such covenant if the potentially responsible party agrees to undertake appropriate actions necessary to protect and restore the natural and cultural resources damaged by such release or threatened release of hazardous substances, pollutants or contaminants.

§2509 Judicial enforcement

A. Civil Judicial Enforcement

The Director shall request the Attorney General to file an action for a temporary restraining order, a preliminary injunction, a permanent injunction or any other relief provided by law, including the assessment and recovery of civil penalties in a maximum amount per day per violation of not less than ten thousand dollars (\$10,000) but not to exceed twenty-five thousand dollars (\$25,000), in any of the following instances:

1. whenever a person has violated, or is in violation of, any provision, requirement or prohibition of this Act, including, but not limited to, a regulation or order issued pursuant to this Act;
2. whenever a person has violated, or is in violation of, any duty to allow or carry out entry, assessment, inspection, sampling, monitoring, or other duty required by the Director;
3. whenever a person is creating an imminent and substantial endangerment to the public health or the environment because of a release or a threatened release, in which case the Director shall request the Attorney General to pursue injunctive relief, but not the assessment

of penalties, unless the endangerment to the public health is caused by a violation, as specified in Paragraphs (1) and (2).

B. Calculation of Penalties

1. For purposes of determining the number of days of violation for which a civil penalty may be assessed under this Section, if the Director has notified, in writing, the source of the violation and the Director, or plaintiff, makes a prima facie showing that the conduct or events giving rise to the violation are likely to have continued or recurred past the date of notice, the days of violation shall be presumed to include the date of such notice and each day thereafter, until the violator can prove by a preponderance of the evidence that there were intervening days during which no violation occurred or that the violation was not continuing in nature. Notice under this Section shall be accomplished by an issuance of a written notice of violation or written order to comply or by filing a complaint in the Navajo Nation District Court in Window Rock, Arizona, that alleges any violation described in Subsection (A) of this Section.
2. In determining the amount of a civil penalty assessed under this Section, the court shall consider the history, seriousness and duration of the violation; any good faith efforts to comply with the applicable requirement; the violator's full compliance history, including the severity and duration of past violations; if any, the economic impact of the penalty on the violator; as an aggravating factor only, the economic benefit; if any, resulting from the violation; and any other factors that the court deems relevant.
3. All penalties collected pursuant to this Section shall be deposited in the Hazardous Substances Fund.

C. Damages for Non-Compliance with Orders

1. If any person identified in §2501(A) fails without sufficient cause to properly provide response action upon order of the President pursuant to

this Act, such person may be liable to the Navajo Nation for punitive damages in an amount at least equal to, and not more than three times, the amount of any costs incurred by the Hazardous Substances Fund as a result of such failure to take proper action. The President is authorized to commence a civil action against any such person pursuant to §2501.

2. Any person who, without sufficient cause, violates, or fails or refuses to comply with, any order of the Director under Subsection (A) of this Section or Subsections (A) or (B) of §2403, may in an action brought in Navajo Nation court to enforce such order, be fined not more than twenty-five thousand dollars (\$25,000) for each day in which such violation occurs or such failure to comply continues. This fine may be in addition to any punitive damages assessed in a cost recovery action under §2501.

D. Criminal Penalties

Any person who intentionally or knowingly:

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

shall upon conviction, be punished by a fine in a maximum amount of not more than five thousand dollars (\$5,000) per day per violation. In any instance where the Navajo Nation lacks jurisdiction over the person charged, or where the Director is limited in the amount of the fine that he/she may impose, the

Director may refer the action to the appropriate EPA Regional Administrator pursuant to this Act. For the purposes of this Subsection, the term Aperson@ includes, in addition to the entities referred to in §2104(A)(25) of this Act, any responsible corporate officer.

E. Jurisdiction and Venue

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

F. Security

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

§2510 Administrative assessment of penalties

A. Basis for Penalty

The Director may issue against any person an administrative order assessing a civil administrative penalty of up to ten thousand dollars (\$10,000) per day per violation whenever the Director finds that a person has violated, or is in violation of, any provision, requirement or prohibition of this Act, including, but not limited to, a regulation or order issued pursuant to this Act. The Director's authority under this Subsection shall be limited to matters where the total penalty sought does not exceed one hundred thousand dollars (\$100,000) and the first alleged date of violation occurred no more than one year prior to the initiation of administrative action, except where the Director and Attorney General jointly determine that a matter involving a larger penalty or longer period of violation is appropriate for administrative penalty action. The communications required to make such a joint determination and the method(s) utilized for making such a joint determination shall be privileged, and shall not be subject to judicial review. The Director may compromise, modify, or remit,

with or without any conditions, any administrative penalty imposed under this Section.

B. Hearing Requirement

The Director shall assess an administrative penalty under this Section by an order made after an opportunity for a hearing, as provided in the Uniform Regulations. Before issuing such an order, the Director shall issue a proposed order to the person on whom the penalty is to be assessed and provide that person with an opportunity to request a hearing in writing within 30 days of the issuance of the proposed order. The hearing shall be conducted pursuant to the Uniform Regulations. The order shall become final immediately upon the expiration of the 30 days if no hearing is requested and, if a timely request for a hearing is made, upon the decision of the Director.

C. Calculation of Penalty

In determining the amount of any penalty to be assessed under this Section, the Director or the court, as appropriate, shall take into account the factors enumerated in §2509(B)(2) of this Act.

D. Judicial Review

Any person subject to a penalty under this Subsection may seek review of such penalty assessment in the Navajo Nation District Court in Window Rock, AZ, by filing a petition for review in such court within 30 days following the date that the penalty becomes final and by simultaneously sending a copy of such filing by certified mail to the Director and the Attorney General. A notice of intent to challenge such penalty assessment, otherwise required by the Navajo Sovereign Immunity Act, 1 N.N.C. § 351 *et seq.*, is not required. Within 30 days thereafter, the Director shall file in such court a certified copy or certified index of the record on which the penalty was based. The court shall not set aside or remand an order or assessment under this Section unless the record, taken as a whole, does not substantially support the finding of a violation or unless the order or penalty assessment constitutes an abuse of discretion. In any

such proceedings, the Director may seek to recover civil penalties ordered or assessed under this Section.

§2511 Other enforcement actions

A. Debarment and Exclusion

Notwithstanding any other provision of this Act, any person who has failed to comply with the requirements of an order under this Act, or who has failed to pay costs or damages under this Act, may be the subject of debarment or exclusion under applicable law.

B. Inconsistent Response Action

When either the Director or a potentially responsible party pursuant to an administrative order or consent decree under this Act has initiated a remedial investigation and feasibility study or other investigation or evaluation for a particular site under this Act, no potentially responsible party may undertake any response action at the site unless such response action has been authorized by the Director. The Director may take any appropriate action, including issuing an administrative order, to enjoin such inconsistent response action.

Subchapter 6. Contracts, hiring and employee protection

§2601 Minority contractors

In awarding contracts under this Act, the Director shall consider the availability of qualified Navajo firms. As part of the annual report submitted to the Navajo Nation Resources Committee under this Act, the Director shall detail the participation of Navajo firms in contracts awarded under this Act.

§2602 Contracts for response actions

In awarding contracts to any person engaged in response actions, the Director shall require contractors and subcontractors to comply with federal health and safety standards, known as OSHA standards, as a condition of such contracts.

§2603 Activities of employees subject to protection

No person shall fire or in any other way discriminate against, or cause to be fired or discriminated against, any employee or any authorized representative of employees by reason of the fact that such employee or representative has provided information to the Navajo Nation, filed, instituted, or caused to be filed or instituted any proceeding under this Act, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this Act.

§2604 Competition

The Director may adopt title IX of the Federal Property and Administrative Services Act of 1949, 40 U.S.C. § 541 *et seq.* to govern the relationship between the Navajo Nation and response action contractors and subcontractors in the areas of program management, construction management, architecture and engineering, surveying and mapping, and related services while conducting activities under this Act.

Subchapter 7. Funding**§2701 Hazardous substances fund****A. Establishment**

The Director shall establish a Special Revenue Fund, called the Hazardous Substances Fund, to fund the activities of the Navajo Superfund Program in the administration, implementation and enforcement of this Act and the regulations promulgated hereunder, including to fund response actions taken under the Act when other sources of funds are not available at the time the action is taken.

B. Sources of Funding

The Hazardous Substances Fund shall contain the following:

1. all tariffs collected from transporters of hazardous substances, pursuant to §2704;

2. except as specified otherwise in any appropriations of the Navajo Nation Council, those amounts appropriated for the conduct of the Navajo Superfund Program;
3. all application and registration fees assessed pursuant to §2703;
4. all fees and penalties recovered pursuant to administrative actions, citizen suits and other enforcement actions brought under this Act;
5. all response costs recovered pursuant to any cost recovery actions brought under this Act;
6. unless funds are to be used for the purposes of carrying out a settlement agreement as provided in §2504(A)(5) or a voluntary cleanup agreement under §2402 of this Act, any payments made by a responsible party pursuant to a settlement agreement or voluntary cleanup agreement under this Act; and
7. any funds received from any other sources for implementation of the Navajo Superfund Program, but not including grant funds from the United States, or other grant funds which by their terms must be maintained in a separate account;
8. provided, that the Hazardous Substances Fund shall not contain any funds resulting from natural or cultural resource damage claims brought under this Act.

C. Uses of the Fund

1. General uses.

The monies deposited into the Hazardous Substances Fund shall be expended by the Director for the use of the Navajo Superfund Program, as provided in this Section, in accordance with the Special Revenue Fund Management Plan and pursuant to an approved budget. The Director shall report annually to the Navajo Nation Council on the sums deposited into the Fund, including the sources and uses thereof. Any monies contained in said Fund at the end of the fiscal year shall not be transferred to the General Fund and shall remain available for appropriation as provided in this Section.

2. Limitations on use.

The Director shall expend no monies from the Hazardous Substances Fund to clean up releases at any facility owned by the federal government or the Navajo Nation or its entities (excluding tribal enterprises), any facility not subject to tariffs under this Act, or any facility that has failed to pay any tariffs owed under this Act when due. At such facilities the Director shall use the authorities provided in this Act to order corrective action to clean up such releases. Notwithstanding this Paragraph, the Director may use monies from the Fund to take the corrective actions authorized by §§2305 and 2401 to protect human health at such facilities and shall seek full recovery of the costs of all such action pursuant to the provisions of §§2501 and 2503 and without consideration of the defenses to liability in §2502(A). Nothing in this Paragraph shall prevent the Director from taking corrective action at a facility where there is no solvent owner or operator or where immediate action is necessary to respond to an imminent and substantial endangerment of human health or the environment.

§2702 Natural and cultural resources fund

A. Establishment

The Director shall establish a fiduciary account, called the Natural and Cultural Resources Fund, which shall be used solely to restore, replace or acquire natural or cultural resources equivalent to those damaged, destroyed or otherwise lost.

B. Sources of Funding

The Natural and Cultural Resources Fund shall be comprised of all funds received from natural and cultural resource damage claims brought pursuant to this Act.

C. Uses of the Fund

The monies deposited into the Fund shall be expended by the Trustee(s) for Natural and Cultural Resources, designated pursuant to §2503(C), for use only to restore, replace or acquire the equivalent of any natural or cultural resources

that have been damaged, destroyed or otherwise lost, pursuant to the provisions of §2503(C)(1). The Trustee(s) shall report annually, through the Director, on the sums deposited into the Fund, including the sources and uses thereof. Any monies contained in said Fund at the end of the fiscal year shall not revert to the General Fund and shall remain available for appropriation as provided in this Section.

§2703 Registration and fees

A. Applicability

All transporters of hazardous substances within the Navajo Nation shall register annually with the Navajo Nation Superfund Program on forms provided for that purpose and shall submit registration fees together with the registration forms. For purposes of this Section, §2701, and §2704, the term “transporter of a hazardous substance” means any person who transports a hazardous substance (as those terms are defined in §2104) to a location within the Navajo Nation, including but not limited to transport for the purpose of importing or delivering a hazardous substance, or who transports a hazardous substance across any portion of the Navajo Nation, except the term does not include any person who delivers motor vehicle fuel, diesel fuel, or aviation fuel to an aboveground or underground storage tank within the Navajo Nation. The term also does not include the United States or the Navajo Nation.

B. Due Dates and Fees

The registration form shall be submitted by January 31 of the calendar year following enactment of this Act to cover the preceding calendar year (or portion thereof after this Act became effective), and shall be filed by January 31 of each succeeding calendar year for the previous calendar year. The registration fee shall initially be set at one hundred dollars (\$100), subject to increase by the Director by regulation.

§2704 Tariff on transporters of hazardous substances

A. Establishment of Tariff

Within one year after enactment of this Act, the Director shall impose a tariff on the transportation of hazardous substances within or across the Navajo Nation. The amount of the tariff shall be established by the Director by rulemaking, pursuant to the provisions of §2801, and shall be levied on transporters of hazardous substances based on the quantities of hazardous substances that they are transporting, in an amount determined by the Director to be sufficient to cover program costs.

B. Rulemaking

In addition to prescribing the amount of the tariff, the rulemaking shall provide for administration of the tariff, including but not limited to establishing the periods when the tariff is due and record-keeping, reporting, and auditing procedures to verify the accuracy of payments. The Director also may include provisions for late payment interest and penalties.

C. Additional Tariffs

The Director may, by rulemaking, establish tariffs on entities in addition to transporters that are involved with the supply, treatment, storage, or disposal of hazardous substances within the Navajo Nation, provided that the Director determines such a tariff is feasible to impose and administer and will contribute to covering program costs.

Subchapter 8. Rulemaking, judicial review and public participation

§2801 Rulemaking

A. Authority to Promulgate Regulations

The Director is authorized to prescribe such regulations as are necessary to implement and enforce this Act. This shall include, but not be limited to, regulations designating hazardous substances, determining reportable quantities, adopting maximum contamination levels and soil action-trigger levels, adopting operating guidances and procedures for the prevention, control, abatement and

remediation of hazardous substances in the Nation's environment, and providing procedures for public participation and the development of administrative records. In prescribing regulations, the Director may give consideration to, but is not limited by, the provisions of the Comprehensive Environmental Response, Compensation and Liability Act and the applicable regulations thereunder.

B. Use of Federal Regulations

Until such time as the Director promulgates regulations under this Act, the Director is authorized to implement federal regulations adopted pursuant to, or referenced in CERCLA, as provided in this Section.

1. Prior to the adoption of regulations pursuant to this Section, a reportable quantity shall be the amount prescribed in 40 C.F.R. § 302.4 or one pound, if not listed in that Section, except in the case of petroleum, where the reportable quantity shall be 25 gallons for releases on land and, for releases into surface water, such quantity as violates applicable water quality standards or causes a film or sheen upon or discoloration of the surface of the water or causes a sludge or emulsion to be deposited beneath the surface of the water.
2. Prior to the promulgation of the Navajo Nation Contingency Plan pursuant to §2503, the Director may elect to use the federal National Contingency Plan for actions which would be conducted pursuant to the Navajo Nation Contingency Plan when promulgated. In the interests of expediting cleanup and to the extent otherwise consistent with this Act, the Director is authorized to waive specific requirements of the National Contingency Plan on a site-specific basis.

C. Rulemaking

1. Rulemakings shall be conducted pursuant to Subpart 4 of the Uniform Regulations. Notice of any proposed regulation shall be published in a newspaper of general circulation for the areas of the Navajo Nation that

are concerned and shall be given orally in English and Navajo languages over local radio stations. The notice shall specify the period available for public comment and the date, time and place of any public hearing, and shall make available to the public a copy of the proposed regulation. Not later than the date of proposal of the regulation in question, the Director shall establish a rulemaking docket and shall make the docket available to the public for inspection and copying during regular business hours. The Director shall provide a comment period of at least 30 days following notice of the proposed regulation; shall allow any person to submit written comments, data or documentary information; shall in addition give interested persons an opportunity to present orally, in Navajo or English, their views, data or arguments; and shall keep the record open for at least 10 days after such proceeding to provide an opportunity for submission of rebuttal and supplementary information.

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

§2802 Judicial review

A. Petitions for Review

A petition for review of any final action taken by the Director under this Act, including but not limited to promulgation of regulations or standards and issuance of orders, but not including imposition of administrative penalties under §2510, shall be brought in the Navajo Nation Supreme Court. The petition shall be filed within 60 days from the date the final action is first published, or if the notice is not published, first served on the potentially responsible party or such other person required to be served under this Act, except if the petition is based solely on grounds arising after the sixtieth day,

then the petition shall be filed within 60 days after such grounds arise. The date of adoption of any regulation promulgated pursuant to this Act shall be the date of its approval by the Resources Committee of the Navajo Nation Council. The Navajo Nation Supreme Court, in reviewing the final action, shall limit its review to the issues and evidence that were before the Director at the time of the final action from which the appeal is taken.

B. Limitations on Review

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

regulation or other action that there is a substantial likelihood that the regulation or other action would have been significantly changed if such errors had not been made.

C. Standards for Review

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

1. arbitrary and capricious, an abuse of discretion or otherwise not in accordance with the law;
2. in excess of statutory authority, jurisdiction, or limitations or short of statutory right;
3. without observance of procedure required by law; or
4. unsupported by substantial evidence.

D. Judicial Review of the Response Action Selection

1. Limitation

In any judicial action under this Act, judicial review of any issues concerning the adequacy of any response action taken or ordered by the Director shall be limited to the administrative record prepared pursuant to §2505(C). Otherwise applicable principles of administrative law shall govern whether any supplemental materials may be considered by the court.

2. Standard

In considering objections raised in any judicial action under this Act, the court shall uphold the Director's decision in selecting the response action unless the objecting party can demonstrate, on the administrative record, that the decision was arbitrary and capricious or otherwise not in accordance with law.

3. Remedy

If the court finds that the selection of the response action was arbitrary and capricious or otherwise not in accordance with law, the court shall award -

- a. only the response costs or damages that are not inconsistent with the national contingency plan; and
- b. such other relief as is consistent with the National Contingency Plan.

4. Procedural errors

In reviewing alleged procedural errors, the court may disallow costs or damages only if the errors were so serious and related to matters of such central relevance to the action that the action would have been significantly changed had such errors not been made and only to the extent such procedural errors resulted in increased costs.

E. Challenge to Any Provisions

Any action brought pursuant to the provisions of this Section shall be brought in compliance with the Navajo Sovereign Immunity Act, 1 N.N.C. § 351 *et seq.*, and not in any other manner. In any such action, relief shall be limited to declaratory relief and the Navajo Nation Supreme Court shall have no jurisdiction to grant any other relief. The Navajo Nation Supreme Court shall have exclusive jurisdiction and venue over any action brought pursuant to this Section, except as otherwise provided in this Section.

F.) Challenge to Facial Validity of Act

Any challenge to the lawful authority of the Navajo Nation Council to enact any provision of this Act must be filed in accordance with Navajo law within 90 calendar days after the date of enactment of such provision. Suit shall be filed in the Navajo Nation District Court in Window Rock, naming as defendant the Navajo Nation, and not thereafter or in any other manner. For purposes of this Subsection, the date of enactment of each provision of this Act shall be the date of signature by the President of the Navajo Nation after its adoption by the Navajo Nation Council, or the date of its adoption by the Navajo Nation Council if the council overrides a veto by the President. The Navajo Nation District Court in Window Rock shall have exclusive jurisdiction and venue over

any action challenging any provision of this Act. Relief shall be limited to declaratory relief.

§2803 Public participation

A. Dissemination of Information to Public

The Director shall, by promulgating regulations and establishing agency procedures, provide for information to be disseminated to the public in order to:

1. inform citizens and officials at all levels of government of the existence and status of sites on the Navajo Nation EPA Site List;
2. provide citizens with information regarding the hazardous substance, pollutant, and contaminant identification and cleanup process and maintain lists of technical, health, and other relevant experts licensed or located in the Nation, who are available to assist the public;
3. provide the public with information necessary to develop meaningful comments on critical decisions regarding site characterization, risks posed by the site, and selection of removal and remedial actions; and
4. provide for early, direct, and meaningful public participation in each significant phase of response activities taken under this Act.

B. Accessibility of Information

In providing information to the public as required under Subsection (A), the Director shall ensure wide distribution of and access to information in a manner that is easily understood by the public, considering any unique cultural needs of the Navajo people, including presentation of the information orally and distribution of this information in Navajo. In addition, in taking actions under this Act, the Director shall ensure that he or she is aware of and considers the views of the local people and their District, Agency, and Chapter representatives.

C. Regulations for Public Participation

The Director shall promulgate regulations to implement the requirements of this Section, which shall provide for but not be limited to the following:

1. Any notice and analysis of a proposed response action published under this Act shall include sufficient information as may be necessary to provide a reasonable explanation of the proposed action and any alternative proposals considered.
2. Any document used to select a response action shall be accompanied by a discussion of the views and preferences of the affected community, any significant changes (and the reasons for such changes) in the proposed plan and a response to each of the significant comments, criticisms, and new data submitted in written or oral presentations.
3. The timing of public participation prior to the taking of a response action shall take into account the need to take prompt response action. During a time-critical response the Director may forgo or shorten the time for public comment.

D. Other information provided to the Community

In addition to other information the Director considers appropriate, the Director shall ensure that the community is provided information on the following:

1. the possibility (where relevant) that members of a community may qualify to receive an alternative water supply;
2. the details of the Superfund process, and rights of private citizens and public interest groups;
3. an objective description of the site's location and characteristics, the known exposure pathways, and the steps being taken to assess the risk presented by the site;
4. the potential for a copy of the administrative record to be located at the affected Chapter House(s), or at a convenient location within an affected District or Agency;
5. the availability or existence of federal Technical Assistance Grants (TAG) with respect to a federal National Priorities List site.

E. Public Participation in Settlements

In addition to the public participation rights in this Section, the public also has the right to comment on settlements as provided in §2504(E)(4) of this Act.

§2804 Citizen Suits

A. Authority to Bring Civil Actions

1. Except in reference to the timing of judicial review, any person may commence a civil action in the Navajo Nation District Court on his own behalf against any person (except the Navajo Nation or any instrumentality of the Navajo Nation, but not excepting tribal enterprises) who is alleged to be in violation with regard to a requirement or standard of this Act, a regulation promulgated pursuant this Act, or an agreement or order agreed to or issued pursuant to this Act.

2. The Navajo Nation courts shall have jurisdiction to enforce such requirements, standards, regulations, agreements or orders and to apply any appropriate civil penalties.

B. Notice

An action may not be commenced under Subsection (A)(1) of this Section fewer than 60 days after the plaintiff has given notice of the alleged violation to the Director, the Attorney General, and the person who is alleged to be in violation. In addition, an action may not be commenced if the Director has commenced and is diligently prosecuting a civil action in court to require compliance with this Act, except that any person may intervene as a matter of right in such an action.

C. Venue; Intervention; Service of Complaint

1. Any action in regard to a release, a threatened release, ARAR, order or other requirement may be brought only in the Navajo Nation District Court for the District of Window Rock, Navajo Nation (Arizona).

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

D. Award of Costs

The court, in issuing a final order in an action brought under this Section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party whenever the court determines that such an award is appropriate.

E. Penalty fund

Penalties collected pursuant to this Section shall be deposited in the Hazardous Substances Fund.

§2805 Petition for assessment of release

Any person who is, or may be, affected by a release or threatened release of a hazardous substance or pollutant or contaminant, may petition the Director to conduct a site screening and evaluation, as appropriate, to assess the hazards to public health and the environment which are associated with such release or threatened release.

* * * *

Section 3. Effective Date

The amendment enacted herein shall be effective upon its approval pursuant to 2 N.N.C. §2221.

Section 4. Codification

The provisions of this Act which amend or adopt new sections of the Navajo Nation Code shall be codified by the Office of Legislative Counsel. The Office of Legislative Counsel shall incorporate such amended provisions in the next codification of the Navajo Nation Code.

Section 5. Saving Clause

Should any provisions of this Act be determined invalid by the Navajo Nation Supreme Court, or the District Courts of the Navajo Nation, without appeal to the Navajo Nation Supreme Court, those portions of this Act which are not determined invalid shall remain the law of the Navajo Nation.

CERTIFICATION

I hereby certify that the foregoing resolution was duly considered by the Navajo Nation Council at a duly called meeting in Window Rock, Navajo Nation (Arizona) at which a quorum was present and that the same was passed by a vote of 50 in favor and 15 opposed, this 26th day of February 2008.

Lawrence T. Morgan, Speaker
Navajo Nation Council

Motion: Jonathan Nez
Second: Raymond Berchman

ACTION BY THE NAVAJO NATION PRESIDENT:

1. I hereby sign into law the foregoing legislation, pursuant to 2 N.N.C. § 1005 (C) (10), on this _____ day of _____ 2008.

Dr. Joe Shirley, Jr., President
Navajo Nation

2. I hereby veto the foregoing legislation, pursuant to 2 N.N.C. § 1005 (C) (11), this _____ day of _____ 2008 for the reason(s) expressed in the attached letter to the Speaker.

Dr. Joe Shirley, Jr., President
Navajo Nation