

NAVAJO NATION ENVIRONMENTAL PROTECTION AGENCY
UNIFORM REGULATIONS FOR PERMIT REVIEW,
ADMINISTRATIVE ENFORCEMENT ORDERS,
HEARINGS, AND RULEMAKINGS UNDER
NAVAJO NATION ENVIRONMENTAL ACTS

(FINAL VERSION AFTER COMMENT PERIOD)

Uniform Regulations for Permit Review, Administrative
Enforcement Orders, Hearings and Rulemakings
Under Navajo Nation Environmental Acts

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Subpart 1. General Provisions and Definitions.

101. Purpose, Applicability and Scope.

- (a) These regulations provide uniform procedures under the Navajo Nation environmental statutes for review and hearings on permit applications; issuance of and hearings on administrative orders; and rulemakings. By providing uniform procedures, the Navajo Nation Environmental Protection Agency (“Navajo Nation EPA” or “NNEPA”) intends to ease the burden on the public of compliance and provide consistency in the implementation of the environmental statutes. Except where otherwise indicated, this Part applies to all applications for permits issued under the Navajo Nation Air Pollution Prevention and Control Act (otherwise known as the “Navajo Nation Clean Air Act,” or “NNCAA”), 4 N.N.C. §§ 1101-1162; the Navajo Nation Clean Water Act (“NNCWA”), 4 N.N.C. §§ 1301-1394; the Navajo Nation Safe Drinking Water Act (“NNSDWA”), 22 N.N.C. §§ 2501-2586; the Navajo Nation Solid Waste Act (“NNSWA”), 4 N.N.C. §§ 101-162; all administrative enforcement orders issued under any of the above Acts, the Navajo Nation Comprehensive Environmental Response, Compensation and Liability Act (“NNCERCLA”), 4 N.N.C. §§ 2101-2805; the Navajo Nation Pesticide Act (“NNPA”), 4 N.N.C. §§ 301-327, and the Navajo Nation Storage Tank Act (“NNSTA”), 4 N.N.C. §§ 1501-1577; and all rulemakings conducted under any of the above Acts. In the event that additional environmental Acts are enacted by the Navajo Nation Council after promulgation of these regulations, these regulations shall apply to permits, administrative orders, hearings and rulemakings issued or conducted under those Acts unless specifically provided otherwise in those statutes or in regulations promulgated under those Acts. In the case of any conflict between a provision of this Part and a provision of the applicable Act or regulations governing a permit application, administrative enforcement order, hearing, or rulemaking, the provision of the applicable Act or regulations shall govern.
- (b) Questions arising at any stage of a permit, enforcement, or rulemaking proceeding which are not addressed in these rules or the applicable Act and regulations shall be resolved at the discretion of the Director or Hearing Official as appropriate.

102. Authority.

The authority to promulgate regulations pertaining to permitting, administrative enforcement actions and rulemaking comes from the Navajo Nation environmental Acts and the corresponding federal environmental Acts. *See, e.g.*, NNCAA, §§ 1103, 1134, 1152, 4 N.N.C. §§ 1103, 1134, 1152; NNCWA §§ 104, 504, 902, 904, 1001, 4 N.N.C. §§ 1304, 1345, 1382, 1384, 1391; NNSDWA §§ 107, 701, 803, 22 N.N.C. §§ 2507, 2571, 2583; NNSWA §§ 107, 161, 4 N.N.C. §§ 107, 161; NNCERCLA §§ 510, 801, 4 N.N.C. §§ 2510, 2801; NNPA, §§ 105, 602,

605, 4 N.N.C. §§ 305, 320, 322; NNSTA §§ 106, 502, 504, 506, 4 N.N.C. §§ 1506, 1552, 1554, 1556; CAA § 301(d), 42 U.S.C. § 7601(d); CWA § 518(e), 33 U.S.C. § 1377(e); SDWA § 1451, 42 U.S.C § 300j-11; CERCLA § 126, 42 U.S.C. § 9626.

103. Definitions.

The definitions below apply to this Part. Additional definitions applicable to Subpart 3 are set forth in § 303.

- (a) *Administrator* means the Administrator of the United States Environmental Protection Agency.
- (b) *Applicable Act* and (or) *regulations* means the NNAPPCA, NNCWA, NNCERCLA, NNSDWA, NNSWA, or NNUSTA, as the case may be, or any Navajo Nation environmental Act enacted by the Navajo Nation Council after promulgation of these regulations, as specified in § 101(a), and (or) applicable regulations promulgated under those Acts.
- (c) *Application* means the EPA standard national forms for applying for a permit, including any additions, revisions or modifications to the forms, and forms developed by NNEPA and approved by EPA, including any approved modifications or revisions. “Application” also includes any information required by the Director under the applicable Act or regulations.
- (d) *Director* means the Executive Director of NNEPA or his or her authorized delegate.
- (e) *Draft permit* means a document prepared under § 205 indicating the Director's tentative decision to issue or deny, modify, revoke and reissue, terminate, or reissue a permit. A notice of intent to terminate a permit and a notice of intent to deny a permit are types of draft permits. A denial of a request for modification, revocation and reissuance or termination is not a draft permit. When no draft permit is required under the applicable Act and regulations, draft permit means the permit application.
- (f) *EPA* means the United States Environmental Protection Agency.
- (g) *Facility* or *activity* means any hazardous waste management facility, underground injection control injection well, national pollutant discharge elimination system point source, treatment works treating domestic sewage or 404 dredge or fill activity (including land or appurtenances thereto) that is subject to regulation by NNEPA, or other facility or activity that is subject to regulation by NNEPA under the applicable Act or regulations.

- (h) *Hearing Moderator* means the person designated by the Director to moderate a public hearing under Subpart 2 or Subpart 4 of these regulations.
- (i) *Hearing Official* means the person designated by the Director to be in charge of and issue decisions at adjudicatory hearings on administrative actions.
- (j) *Navajo Nation EPA or NNEPA* means the Navajo Nation Environmental Protection Agency.
- (k) *Permit* means an authorization, license, or equivalent control document issued by NNEPA to implement the applicable Act and regulations. Any control document specifically exempted from these regulations by the applicable Act or regulations is not a permit.
- (l) *Person* means an individual, public or private corporation, company, partnership, firm, association, the federal or state governments and any of their political subdivisions, agencies or programs, and the Navajo Nation or any other tribe and any of its political subdivisions, agencies, programs, enterprises or companies.
- (m) *Regional Administrator* means the Regional Administrator of U.S. EPA Region 9 or the authorized representative of the Regional Administrator.
- (n) *Schedule of compliance* means a schedule of remedial measures included in a permit, including an enforceable sequence of interim requirements (for example, actions, operations, or milestone events) leading to compliance with the applicable Act and regulations.
- (o) *Site* means the land or water area where any facility or activity is physically located or conducted, including adjacent land used in connection with the facility or activity.
- (p) *State* means one of the states of the United States.

104. Computation of Time.

In computing any period of time prescribed or allowed under these regulations, except as otherwise provided, the day of the event from which the designated period begins to run shall not be included. Saturdays, Sundays, and federal and Navajo Nation legal holidays shall be included. When a stated time expires on a Saturday, Sunday or federal or Navajo Nation legal holiday, the stated time period shall be extended to include the next business day.

105. Conflict of Interest.

- (a) The Director, Hearing Moderator, or Hearing Official may not perform functions provided for in these regulations regarding any matter in which he or she:
 - (1) Has a financial interest; or
 - (2) Has any relationship with a party to or with the subject matter of the proceeding in question which would make it inappropriate for him or her to act.
- (b) If the Director is disqualified pursuant to subsection (a) from performing a function under these regulations, the Director shall assign a Department Director or a program manager who has none of the infirmities listed in subsection (a) to replace him or her with regard to such functions.

Subpart 2. Uniform Permit Review Procedures.

201. Scope.

This Subpart establishes uniform procedures for processing permit applications and requests for permit modification, revocation and reissuance, and termination, including issuing draft permits, providing for public comment and hearings, and issuing final permit determinations under the Navajo Nation Air Pollution Prevention and Control Act, the Navajo Nation Clean Water Act, the Navajo Nation Safe Drinking Water Act, the Navajo Nation Solid Waste Act, and other applicable Acts.

202. Application for a Permit.

- (a) Any person who requires a permit under the applicable Act and regulations shall complete, sign, and submit to the Director an application for the permit as required under this section, together with any fees required by specific program regulations.
- (b) The Director shall not begin the processing of a permit until the applicant has fully complied with the application requirements for that permit.
- (c) Permit applications (except for PSD permits) must comply with any signature and certification requirements of the applicable Act and regulations.
- (d) Each application submitted should be reviewed for completeness by the Director within thirty (30) days of its receipt, or such longer time as the Director may deem necessary. Upon completing the review, the Director shall notify the

applicant in writing whether the application is complete or incomplete. The Director may also request additional information from an applicant when necessary to clarify, modify, or supplement previously submitted material. Requests for such additional information will not render an application incomplete.

- (e) If an applicant fails or refuses to correct deficiencies in the application, the permit may be denied and appropriate enforcement actions may be taken under the applicable Act and regulations.
- (f) If the Director decides that a site visit is necessary for any reason in conjunction with the processing of an application, the applicant shall be notified and a date shall be scheduled.
- (g) The effective date of an application is the date on which the Director notifies the applicant that the application is complete as provided in subsection (d).

203. Consolidation of Permit Processing.

- (a) Whenever a facility or activity requires a permit under more than one Act covered by these regulations, processing of two or more applications for those permits may be consolidated. The first step in consolidation is to prepare each draft permit at the same time.
 - (1) Whenever draft permits are prepared at the same time, fact sheets, administrative records, public comment periods, and any public hearings on those permits should also be consolidated. The final permits may be issued together. They need not be issued together if, in the judgment of the Director, joint processing would result in unreasonable delay in the issuance of one or more permits.
- (b) Whenever an existing facility or activity requires additional permits under one or more of the Acts covered by these regulations, the Director may coordinate the expiration dates of the existing permits so that all permits expire simultaneously. Processing of the subsequent applications for renewal permits may then be consolidated. In making the decision whether to coordinate the expiration dates of the existing permits, the Director may consider whether the burden on the permittee's environmental quality staff and the staff of the NNEPA may be more strained if all of the permits for a facility expire at the same time rather than having them considered on a staggered schedule.
- (c) The Director may agree with the Regional Administrator to consolidate draft permits whenever a facility or activity requires permits from both EPA and NNEPA.

204. Permit Modification, Revocation and Reissuance, or Termination.

- (a) Permits (other than PSD permits) may be modified, revoked and reissued, or terminated either at the request of any interested person (including the permittee) or upon the Director's initiative. However, permits may only be modified, revoked and reissued, or terminated for the reasons specified in the applicable Act and regulations. All requests shall be in writing and shall contain facts or reasons supporting the request.
- (b) If the Director decides that the request is not justified, he or she shall send the requester a brief written response giving a reason for the decision. Denials of requests for modification, revocation and reissuance, or termination are not subject to public notice, comment, or hearings.
- (c) (1) If the Director tentatively decides to modify or revoke and reissue a permit, he or she shall prepare a draft permit under § 205 incorporating the proposed changes. The Director may request additional information and, in the case of a modified permit, may require the submission of an updated application. In the case of revoked and reissued permits, the Director shall require the submission of a new application.

(2) In a permit modification under this section, only those conditions to be modified shall be reopened when a new draft permit is prepared. All other aspects of the existing permit shall remain in effect for the duration of the unmodified permit. When a permit is revoked and reissued under this section, the entire permit is reopened just as if the permit had expired and was being reissued. During any revocation and reissuance proceeding, the permittee shall comply with all conditions of the existing permit until a new final permit is reissued.
- (d) If the Director tentatively decides to terminate a permit, he or she shall issue a notice of intent to terminate. A notice of intent to terminate is a type of draft permit which follows the same procedures as any draft permit prepared under § 205.

205. Draft Permits.

- (a) Once an application is complete, the Director shall tentatively decide whether to prepare a draft permit (except in the case that the applicable Act and regulations do not require a draft permit) or to deny the application.
- (b) If the Director tentatively decides to deny the permit application, then he or she shall issue a notice of intent to deny. A notice of intent to deny the permit application is a type of draft permit which follows the same procedure as any

draft permit prepared under this section. If the Director's final decision is that the tentative decision to deny the permit application was incorrect, he or she shall withdraw the notice of intent to deny and proceed to prepare a draft permit.

- (c) If the Director decides to prepare a draft permit he or she shall prepare a draft permit that contains the following information:
 - (1) All permit conditions under the applicable Act and regulations;
 - (2) All compliance schedules under the applicable Act and regulations;
 - (3) All monitoring requirements under the applicable Act and regulations; and
 - (4) All other information required to be in the permit under the applicable Act and regulations.
- (d) All draft permits prepared under this section shall be accompanied by a fact sheet and shall be based on the administrative record and, pursuant to § 207, notice of the draft permit shall be given to the public and the draft permit shall be made available for public comment. The Director shall give notice of opportunity for a public hearing, issue a final decision and respond to comments, pursuant to § 208.

206. Fact Sheet.

- (a) A fact sheet shall be prepared for every draft permit unless a fact sheet is not required under the applicable Act and regulations, in which case the Director shall prepare a fact sheet if the Director finds that the permit application is the subject of widespread public interest or raises major issues. The fact sheet shall briefly set forth the principal facts and the significant factual, legal, methodological and policy questions considered in preparing the draft permit. The Director shall send this fact sheet to the applicant and, on request, to any other person.
- (b) The fact sheet shall include, when applicable:
 - (1) A brief description of the type of facility or activity which is the subject of the draft permit;
 - (2) The type and quantity of wastes, fluids or pollutants which are proposed to be or are being treated, stored, disposed of, injected, emitted, or discharged;
 - (3) A brief summary of the basis for the draft permit conditions, including references to applicable statutory or regulatory provisions and appropriate supporting references to the administrative record;

- (4) Reasons why any requested variances, exemptions or alternatives to required standards do or do not appear justified;
- (5) A description of the procedures for reaching a final decision on the draft permit including:
 - A. The beginning and ending dates of the comment period and the address where comments will be received;
 - B. Procedures for requesting a hearing and the nature of that hearing; and
 - C. Any other procedures by which the public may participate in the final decision;
- (6) Name and telephone number of a person to contact for additional information;
- (7) When appropriate, a sketch or detailed description of the location of the discharge or regulated activity described in the application; and
- (8) Any other information required to be in the fact sheet under the applicable Act and regulations.

207. Public Notice of Permit Actions and Public Comment Period.

(a) Public Notice Required.

- (1) The Director shall give public notice that the following actions have occurred:
 - A. A draft permit has been prepared;
 - B. When no draft permit is required by the applicable Act and regulations, a permit application has been received; or
 - C. A hearing has been scheduled.
- (2) No public notice is required when a request for permit modification, revocation and reissuance, or termination is denied under § 204(b). Written notice of the denial shall be given to the requester and to the permittee.

(3) Public notices may describe more than one permit or permit action.

(b) Timing.

(1) Public notice of the preparation of a draft permit, including a notice of intent to deny a permit application, shall allow at least thirty (30) days for public comment. This comment period may be reopened pursuant to § 211(b) if the Director determines that issuance of the permit is reasonably likely to be contested and that applying the requirements of § 211(b) will substantially expedite the decision making process. The notice of the draft permit shall state whenever this has been done.

(2) Public notice of a public hearing shall be given at least thirty (30) days before the hearing. Public notice of the hearing may be given at the same time as public notice of the draft permit and the two notices may be combined.

(c) Methods. The public notice required under subsection (a) shall be given by each of the following methods:

(1) A notice by mail to each of the persons listed below. Persons otherwise entitled to receive notice under this paragraph may waive their rights to receive notice for any classes and categories of permits by expressly advising the Director in writing.

A. The applicant;

B. Federal and Navajo Nation agencies with jurisdiction over fish and wildlife resources, the Advisory Council on Historic Preservation, the Navajo Nation Historic Preservation Department, and other appropriate agencies of affected states or Tribes, including the State or Tribal Historic Preservation Officer;

C. Any Chapter or other unit of local government having jurisdiction over the area where the facility is proposed to be located and each Navajo Nation agency having any authority under Navajo Nation law with respect to construction or operation of such facility;

D. Any other agency which the Director knows has issued or is required to issue a permit for the same facility or activity;

E. Any user identified in the permit application; and

F. Persons on a mailing list developed by:

- (i) Including those who request to be on the list;
 - (ii) Soliciting persons for area lists from participants in past permit proceedings in that area; and
 - (iii) Notifying the public of the opportunity to be put on the mailing list through periodic publication in the public press and in such publications as newsletters, environmental bulletins, and Tribal law journals. The Director may update the mailing list from time to time by requesting written indication of continued interest from those listed. The name of any person who fails to respond to such a request may be deleted from the list.
- (2) A notice in a daily or weekly newspaper within the area affected by the facility or activity;
 - (3) A notice broadcast over local radio stations in English and Navajo; and
 - (4) Any other method reasonably determined to give actual notice of the action in question to the persons potentially affected by it, including press releases or any other forum or medium to elicit public participation.
- (d) Contents.**
- (1) All public notices issued under this part shall contain the following minimum information:
 - A. Name and address of the office processing the permit action for which notice is being given;
 - B. Name and address of the permittee or permit applicant and, if different, of the facility or activity regulated by the permit;
 - C. A brief description of the business conducted at the facility or activity described in the permit application or the draft permit;
 - D. Name, address and telephone number of a person from whom interested persons may obtain further information, including copies of the draft permit or draft general permit, as the case may be, the fact sheet, and the application;
 - E. A brief description of the comment procedures and the time and

place of any hearing that will be held (including a statement of procedures to request a hearing, unless a hearing has already been scheduled), and other procedures by which the public may participate in the final permit decision;

- F.** The location of the administrative record, the times at which the record will be open for public inspection, and a statement that all data submitted by the applicant are available as part of the administrative record, except data found to be confidential business information pursuant to the applicable Act or regulations or other applicable law;
- G.** A map or description of the permit area;
- H.** Any additional information required by the applicable Act and regulations; and
- I.** Any additional information that the Director considers necessary or appropriate.

(2) Public notices for hearings. In addition to the contents of a general public notice described in subsection (d)(1), the public notice for a permit hearing shall contain the following information:

- A.** Reference to the date of previous public notices relating to the permit; and
- B.** A brief description of the nature and purpose of the hearing, including the applicable rules and procedures.

(3) In addition to the general public notice described in subsection (d)(1), all persons identified in subsection (c)(1) shall be mailed a copy of the fact sheet and the draft permit. When no draft permit is required under the applicable Act and regulations, a copy of the permit application shall be made available for copying. Upon request, any person shall be provided a copy of the fact sheet and the draft permit, if any, and a copy of the permit application, if any, shall be available for copying.

(4) The Administrator shall be mailed a copy of the notice and the permit application.

208. Public Comments and Requests for Public Hearings.

- (a)** During the public comment period for a draft permit, any interested person may

submit written comments on the draft permit and may request a public hearing.

- (b) A request for a public hearing shall be in writing and shall include the following information:
 - (1) The name, address and telephone number of the individual, organization or other entity requesting a hearing; and
 - (2) A brief statement of the interest of the person making the request in the permit action.
- (c) All public comments received during the public comment period, including at any public hearing and during any reopening of the public comment period, shall be considered in making the final decision and all significant comments shall be answered as provided in § 213.

209. Public Hearings.

- (a) The Director shall hold a public hearing no sooner than thirty (30) days after publication of the hearing notice when he or she receives a request for a hearing pursuant to § 208 or finds significant public interest in a draft permit. The Director also may hold a public hearing at his or her discretion whenever, for instance, a hearing might clarify one or more issues involved in the permit decision. No public hearing is required for a denial of a request for modification, revocation and reissuance, or termination of a permit.
- (b) The Director shall designate a Hearing Moderator for the public hearing. The Hearing Moderator shall be responsible for the orderly conduct of the public hearing. Nothing in these regulations shall empower the Hearing Moderator to make any findings of fact, conclusions of law, or recommendations on permit issuance or denial. The Director, a member of the staff of the NNEPA, or any individual may serve as a Hearing Moderator, so long as the Hearing Moderator is not the applicant or an officer or employee of the applicant and does not have a financial interest or other conflict of interest, pursuant to § 105, in the outcome of the permit application.
- (c) Hearings shall be held at a time and place which facilitates attendance by interested persons and the general public. Public notice of the hearing shall be given as specified in § 207.
- (d) The Director, a member of the staff of NNEPA, or the Hearing Moderator shall inform the audience of the issues involved in the decision to be made, the considerations the agency will take into account, the agency's tentative determinations (if any), and the information which is particularly solicited from

the public.

- (e) Any person may submit oral or written statements and information concerning the draft permit in English or Navajo. The Hearing Moderator may set reasonable limits upon the time allowed for oral statements. The Director shall allow the submission of statements in writing at the hearing, but the Director or Hearing Moderator shall not require a written statement in lieu of or as a condition upon making an oral statement. The public comment period under § 207 shall automatically be extended to the close of any public hearing under this section. The Hearing Moderator may also extend the comment period by so stating at the hearing.
- (f) The Hearing Moderator and NNEPA shall make reasonable efforts to accommodate requests for English to Navajo or Navajo to English oral translations during the hearing.
- (g) A tape recording or written transcript shall be made of the hearing. At the conclusion of the hearing, the Hearing Moderator shall forward to the Director the record of the hearing, including the tape recording or written transcript and any materials submitted at the hearing. The hearing record shall be made available to the public.

210. Obligation to Raise Issues and Provide Information During the Public Comment Period.

- (a) All persons, including applicants, who believe that a permit application should be granted or denied, or that any condition of a draft permit is inappropriate or inadequate, must raise all reasonably ascertainable issues and submit all reasonably available arguments and factual grounds supporting their position, including all supporting material, by the close of the public comment period.
- (b) All supporting materials shall be submitted in full and may not be incorporated by reference, unless they are already part of the administrative record in the same proceeding or consist of Navajo or federal statutes and regulations, USEPA's or the Director's documents of general applicability, or other generally available reference materials.
- (c) The Director may grant additional time to comment to any person to the extent that a person desiring to comment demonstrates need for such time.

211. Reopening of the Public Comment Period or Issuance of a New Draft Permit.

- (a) Whenever any data, information or arguments submitted during the public comment period appear to raise substantial new questions concerning the draft

permit or NNEPA becomes aware of significant new information, the Director may take one of the following actions:

- (1)** Prepare a new draft permit, appropriately modified, under the applicable Act and regulations and provide public notice and opportunity to comment on the new draft permit;
 - (2)** Prepare a revised fact sheet under the applicable Act and regulations, and reopen the public comment period under this section; or
 - (3)** Reopen or extend the comment period under this section to give interested persons an opportunity to comment on the information or arguments submitted.
- (b)** If the Director reopens the public comment period pursuant to subsection (a)(2) or (3), the scope of the reopening shall be limited to the substantial new questions or significant new information that caused the reopening. All persons, including applicants, wanting to comment on an issue within the scope of the reopening must submit all reasonably available legal and factual grounds supporting their position, including all supporting material, by a date set by the Director no sooner than sixty (60) days after public notice under subsection (c). Thereafter, any person may file a written response to the material filed by any other person, by a date set by the Director no sooner than twenty (20) days after the date set for filing of the material. Persons desiring to comment may request longer comment periods and a longer comment period may be granted to the extent that the Director finds it necessary to effect the purpose of the reopening.
- (c)** Public notice of any action taken by the Director pursuant to subsection (a) shall be issued under § 207 of this Subpart. In addition to the requirements of § 207, the public notice for any action taken pursuant to subsection (a)(2) or (3) shall state the scope of the reopening.

212. Issuance and Effective Date of Permit.

- (a) After the close of the public comment period on a draft permit under § 207, the Director shall issue a final permit decision within a reasonable amount of time. The Director shall notify the applicant and each person who has submitted written comments or requested notice of the final permit decision. The notice shall include reference to the procedures for appealing the decision. For the purpose of this section, a final permit decision shall mean a final decision to issue, deny, modify, revoke and reissue, or terminate a permit.
- (b) A final permit decision shall become effective thirty (30) days after the service of notice of the decision unless:
 - (1) a later effective date is specified in the decision; or
 - (2) if no comments requested a change in the draft permit, the Director may make the permit effective immediately upon issuance.

213. Response to Comments and Administrative Record.

- (a) **Response to Comments.** At the time that any final permit decision is issued, the Director shall issue a response to comments. The Director shall fully consider all comments resulting from the public comment period, including any hearing, conducted under this Subpart. The response shall:
 - (1) Specify which provisions, if any, of the draft permit have been changed in the final permit decision and the reasons for the change;
 - (2) Briefly describe and respond to all significant comments on the draft permit raised during the public comment period or during any hearing; and
 - (3) Be available to the public.
- (b) **Administrative Record.** The Director shall base tentative and final permit decisions under these regulations on the administrative record defined below.
 - (1) For draft permits, the administrative record shall consist of:
 - A. The application, if required, and any supporting data furnished by the applicant;
 - B. The draft permit or notice of intent to deny the application or to terminate the permit;

- C. The fact sheet;
- D. The public notice;
- E. All documents cited in the fact sheet; and
- F. Other documents contained in the supporting file for the draft permit.

(2) For final permits, the administrative record shall consist of:

- A. The administrative record for the draft permit;
- B. All comments received during the public comment period provided (including any extension or reopening);
- C. The tape or transcript and notes of any hearing(s) held and any written materials submitted at such hearing(s);
- D. The response to comments and any new material that the Director references in the response to comments;
- E. Other documents contained in the supporting file for the permit; and
- F. The final permit.

The additional documents required under this paragraph should be added to the record as soon as possible after their receipt or publication by the Director. The record shall be complete on the date the final permit is issued.

- (3) Material readily available at the applicable program office or published material that is generally available, and that is included in the administrative record under these provisions, need not be physically included with the rest of the record as long as it is specifically referred to in the fact sheet or response to comments.
- (4) The administrative record shall be available for public inspection commencing no later than the date of the notice of the draft permit or final permit decision, as the case may be.

214. Judicial Review.

- (a) **Exhaustion.** Any person challenging the issuance, denial, modification, revocation and reissuance, termination or reissuance of a permit must follow the procedures set forth in this Subpart as a prerequisite to seeking judicial review of the final agency action.
- (b) **Final agency action.** For purposes of judicial review, final agency action occurs when the permit decision becomes effective pursuant to § 212(b).
- (c) **Filing the record.** Within 30 (thirty) days following the date that a petition for judicial review is filed pursuant to the applicable Act and regulations, the Director shall file in court a certified copy or certified index of the record on which the decision was based.

Subpart 3. Uniform Procedures for Issuing Administrative Enforcement Orders and Conducting Hearings on Administrative Enforcement Orders

A. General Provisions and Definitions

301. Scope.

This Subpart establishes uniform procedures for issuing administrative enforcement orders and conducting hearings on administrative enforcement orders, including compliance orders, emergency compliance orders, civil penalty orders, field citations, orders prohibiting a person from continuing to operate within the Navajo Nation, and any other orders issued by the Director. Part A of this Subpart contains general provisions and definitions specific to this Subpart. Part B contains procedures for the issuance of initial orders and requirements for requests for hearings. Part C contains procedures for conducting hearings on such orders. Part D contains procedures for field citations. Part E contains procedures for judicial review.

302. Other Rights and Remedies Not Affected.

Nothing contained in these regulations shall be construed to abridge or alter rights of action or remedies in equity under treaties, the common law or statutory law, nor shall any provisions of these regulations or any act done by virtue thereof be construed as preventing the Navajo Nation or individuals from the exercise of their rights under treaties, the common law or statutory law to suppress nuisances or to abate pollution.

303. Definitions.

The following definitions, in addition to the definitions in § 103, apply to this Subpart:

- (a) *Respondent* means the person to whom the initial order is directed.

- (b) *Consent Agreement* means any written document, signed by the parties, containing stipulations or conclusions of fact or law and a proposed penalty, proposed revocation or proposed suspension acceptable to all parties.
- (c) *Decision* means the decision issued by the Hearing Official based upon the record of the hearing.
- (d) *Hearing* means a hearing on the record open to the public and conducted pursuant to this Subpart.
- (e) *Hearing Clerk* means the individual designated by the Director or the Hearing Official to act as such.
- (f) *Initial Order* means any order or proposed order issued by the Director to any person pursuant to § 304 of this Subpart and the applicable Act and regulations. An order to comply, an emergency order to comply issued pursuant to § 502(C) of the NNSWA or § 502(C) of the NNUSTA, an administrative penalty order, and an order prohibiting a person from continuing to operate within the Navajo Nation are each an “initial order.” A field citation is not an “initial order,” nor is an emergency order to comply issued under § 403(b) of the NNCERCLA, § 802(A) of the NNSDWA, § 902(c) of the NNCWA or § 1105(B) of the NNAPPCA, or the corresponding provision of any other applicable Act.
- (g) *Party* means NNEPA or the Respondent.

B. Authorities and Procedures for Issuing Initial Orders

304. Initial Orders.

- (a) **Authority.** The Director may issue the following initial orders under the specified circumstances, and may combine two or more orders directed against a Respondent in a single initial order:
 - (1) **Order to comply or cease and desist order.** Whenever the Director finds that any person has violated, or is violating, any condition, schedule, or other requirement of the applicable Act and regulations or any permit issued thereunder, the Director may issue an order that requires the Respondent to comply with the requirement or to cease and desist from the activity that allegedly violates the requirement.
 - (2) **Emergency orders to comply under the NNSWA or the NNUSTA.** If the Director issues an order to comply or a cease and desist order upon a determination that there is immediate and substantial endangerment

pursuant to § 502(C) of the NNSWA or § 502(C) of the NNUSTA, the order shall be deemed an emergency order to comply.

(3) Administrative penalty order.

- A.** Whenever the Director finds that any person has violated, or is violating, any requirement of the applicable Act and regulations or any permit or order issued thereunder, the Director may issue an order that assesses a civil penalty upon the Respondent of up to \$10,000 per day per violation, or such other amount authorized by the applicable Act.
- B.** The Director's authority under this section shall be limited to matters where the total penalty sought does not exceed \$100,000 and the first alleged date of violation occurred no more than one (1) year prior to the initiation of administrative action, or such other limitations as may be established by the applicable Act, except where the Director and Attorney General of the Navajo Nation 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 shall not be subject to judicial review.
- C.** In determining the proposed amount of a civil penalty, the Director shall consider:
 - (i)** the history, severity, and duration of the violation;
 - (ii)** any good faith efforts to comply with the applicable requirements;
 - (iii)** the Respondent's full compliance history, including the severity and duration of past violations, if any;
 - (iv)** the economic impact of the penalty on the Respondent;
 - (v)** as an aggravating factor only, the economic benefit, if any, resulting from the violation; and
 - (vi)** any other factors that the Director deems relevant.
- D.** For purposes of determining the number of days of violation for which a civil penalty may be assessed, if the Director has notified the Respondent in writing of the alleged violation and a prima

facie showing is made that the conduct or events giving rise to the alleged 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 Respondent establishes that continuous compliance has been achieved, except to the extent that the Respondent 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. A written notice of violation, a written order to comply, or a complaint filed in the Navajo Nation District Court in Window Rock that alleges any violation described in subsection (a)(3)(A) shall constitute notice under this section.

(4) Order prohibiting a person from continuing to operate within the Navajo Nation. When any person has repeatedly violated any requirements of the NNAPPCA, NNSDWA, NNSWA or NNUSTA or regulations, permits or orders issued thereunder, or refused to comply with any such requirements, the Director may issue an order prohibiting such Respondent from:

- A.** continuing to operate any facility or engage in any activity governed by the applicable Act or regulations which the Respondent has repeatedly violated or has refused to comply with or under which the permit or order that the Respondent has repeatedly violated or has refused to comply with was issued; and/or
- B.** entering into any new contracts (including leases) that would permit such person to engage in any activity within the Navajo Nation governed by the applicable Act or regulations which the Respondent has repeatedly violated or has refused to comply with or under which the permit or order that the Respondent has repeatedly violated or has refused to comply with was issued.

(b) Contents. Every initial order shall:

- (1)** state with reasonable specificity the nature of each violation, including the location and factual circumstances surrounding the violation, and the provision of the applicable Act and regulations allegedly violated;
- (2)** state that the Respondent is entitled to a hearing pursuant to these regulations and the applicable Act;
- (3)** specify a schedule for compliance with the applicable Act and regulations that the Director determines is as expeditious as practicable, taking into

account the seriousness of the violation and any good faith efforts to comply with applicable requirements;

- (4) if the order is a proposed order, state that the order is a proposed order; and
- (5) if the order is an emergency order to comply issued upon the Director's determination that there is immediate and substantial endangerment pursuant to subsection (a)(2), state that the order is an emergency order and is effective immediately.

In addition, a copy of this Subpart and a copy of the applicable Act or regulations that Respondent allegedly violated shall accompany every initial order. The initial order will contain the address to send a request for a hearing.

- (c) **Additional contents for civil penalty orders.** In addition to the information required by subsection (b), civil penalty orders shall state the amount of the civil penalty which is proposed to be assessed and briefly state the basis for that amount.
- (d) **Optional requirement.** The initial order may be conditional and may require a person to refrain from particular acts unless certain conditions are met.
- (e) **Service.** The Director shall serve the initial order upon the Respondent or his authorized representative either by personal service or by certified mail, return receipt requested. If the order is issued to a corporation, the Director shall serve the registered agent of the corporation and send a copy to the appropriate corporate officers. Service of the initial order is complete when the return receipt is signed or when the initial order is delivered by personal service. The Director shall send a copy of the initial order to the appropriate USEPA region.
- (f) **Effective date.**
 - (1) Every initial order, except emergency orders to comply, shall become final and effective immediately upon the expiration of thirty (30) days after it is issued if the Respondent does not timely request a hearing pursuant to § 305. If the Respondent timely requests a hearing pursuant to § 305, then the Hearing Official shall issue a final decision pursuant to § 327.
 - (2) An emergency order to comply issued under § 304(a)(2) shall become effective immediately upon issuance, and shall remain in effect unless overturned or modified after a hearing, if a hearing is requested.
- (g) **Effect.** The issuance of an initial order shall not prevent the Navajo Nation

(including the Director) from assessing any penalties nor otherwise affect or limit the Navajo Nation's authority to enforce under other provisions of the applicable Act and regulations or under other applicable law, including but not limited to the Navajo Nation Business and Procurement Act, nor affect any person's obligations to comply with any section or requirement of the applicable Act and regulations or with a term or condition of any permit or order issued thereunder.

305. Request for Hearing.

- (a) **Availability.** The Respondent may request a hearing on an initial order.
- (b) **Timing.** The hearing shall be requested in writing within thirty (30) days after the date of issuance of the initial order.
- (c) **Disposition.** Requests for hearings shall be acted upon pursuant to § 308(a).
- (d) A request for a hearing will be made to the Director. Upon receiving a request for a hearing, the Director shall designate a Hearing Official and a Hearing Clerk within (15) days of receiving a request for a hearing and shall file a copy of the initial order with the Hearing Clerk.

306. Request for Stay of an Emergency Order to Comply.

- (a) **Availability.** Any Respondent issued an emergency order to comply pursuant to § 304(a)(2) may request in writing that the Director stay the emergency order pending the outcome of a hearing under this Subpart.
- (b) **Timing.** The stay shall be requested in writing within 30 days after the date of issuance of the emergency order to comply.
- (c) **Contents.** Any request for a stay shall state the circumstances that justify the stay.
- (d) **Disposition.** The Director shall grant or deny the stay within five days of the receipt of the request for stay. If the Director denies the stay, the denial shall be deemed final agency action for purposes of judicial review.

307. Subpoena Authority.

- (a) In connection with any administrative enforcement action under this Subpart, the Director or the Hearing Official, as the case may be, may issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books and documents, and may administer oaths.
- (b) Upon a showing satisfactory to the Director or the Hearing Official, as the case may be, by the Respondent that it would divulge confidential information or trade secrets protected under the applicable Act or regulations or other applicable law to make public any papers, books, documents or information or any portion thereof subpoenaed pursuant to subsection (a), the Director shall consider this information confidential. Notwithstanding the foregoing, the Director or Hearing Official may disclose such information to other officers, employees or authorized representatives of the Navajo Nation concerned with carrying out this Part or the applicable Act and regulations or when relevant in any proceeding thereunder.
- (c) Witnesses summoned pursuant to this section shall be paid the same fees and mileage that are paid by the courts of the Navajo Nation.

C. Procedures for Hearings on Initial Orders.

308. Timing, Location and Public Access.

- (a) **Timing.** Within fifteen (15) days of being designated by the Director to preside at an administrative hearing, the Hearing Official shall issue an order setting the hearing date and location of the hearing. The date set for the hearing shall be at least thirty (30) days after the date the order is issued. The Director may grant a continuance of the hearing upon motion and for good cause shown or sua sponte.
- (b) **Location.** The hearing shall be held in Window Rock, unless the Director determines that there is good cause to hold it at another location.

309. Purpose and Scope.

- (a) **Purpose.** The purpose of the hearing shall be to determine whether the initial order:
 - (1) Has correctly stated the extent and nature of a Respondent's violation of any condition, schedule, or other requirement of the Respondent's permit or the applicable Act and regulations under which the order is issued, including the factual basis of the violation;
 - (2) Has provided, where appropriate, a reasonable and expeditious time for

the Respondent to comply with the relevant requirements of the applicable Act and regulations; and

- (3) Where the initial order assesses a civil penalty, has assessed an appropriate civil penalty.

(b) **Scope.** The Respondent and NNEPA may present information to the Hearing Official at the hearing, or to the Hearing Official in writing before the date set for the hearing, relevant to whether:

- (1) The Respondent has violated a condition, schedule, or other requirement of his or her permit or the applicable Act and regulations, as referenced in the initial order;
- (2) The initial order, where appropriate, provides a reasonable and expeditious time for the Respondent to comply with the relevant requirements of the applicable Act and regulations; and
- (3) Where the initial order assesses a civil penalty, the amount of the civil penalty is appropriate.

310. Answer to the Initial Order.

(a) **Filing.** Whenever the Respondent requests a hearing, he or she shall file an answer to the initial order with the Hearing Official, or with the Hearing Clerk if one has been designated, within thirty (30) days after service of the initial order.

(b) **Contents.** The answer shall clearly and directly admit, deny or explain each of the factual allegations contained in the initial order with regard to which Respondent has any knowledge. Where the Respondent has no knowledge of a particular factual allegation and so states, the allegation is deemed denied. The answer shall also briefly state the facts which the Respondent intends to place at issue and the arguments which constitute his defense. Failure of the Respondent to admit, deny, or explain any material factual allegation contained in the initial order constitutes an admission of the allegation.

311. Powers and Duties of the Hearing Official; Disqualification.

(a) **Hearing Official.** The Hearing Official shall conduct a fair and impartial proceeding and shall avoid delay. The Hearing Official shall have the powers and duties to:

- (1) Conduct administrative hearings under this subpart;
- (2) Rule upon motions, requests, and offers of proof, dispose of procedural requests, and issue all necessary orders;

- (3) Administer oaths and affirmations and take affidavits;
 - (4) Examine witnesses and receive documentary or other evidence;
 - (5) For good cause, upon motion or sua sponte, order a party, or an officer or agent thereof, to produce testimony, documents, or other nonprivileged evidence, and failing the production thereof without good cause being shown, draw adverse inferences against that party;
 - (6) Admit or exclude evidence;
 - (7) Hear and decide questions of fact, law or discretion;
 - (8) Require parties to attend conferences for the settlement or simplification of the issues, or the expedition of the proceedings;
 - (9) Issue subpoenas authorized by the applicable Act or regulations; and
 - (10) Do all other acts and take all measures necessary for the maintenance of order and for the efficient, fair and impartial adjudication of issues arising in proceedings under this Part.
- (b) **Designation.** The Director shall designate the Hearing Official.
- (c) **Disqualification and withdrawal.**
- (1) The Hearing Official may not perform functions provided for in these rules of practice regarding any matter in which he or she:
 - A. has a financial interest; or
 - B. has any relationship with a party or with the subject matter which would make it inappropriate for him or her to act.
 - (2) Any party may at any time by written request to the Director request that the Hearing Official be disqualified on the grounds set forth in subsection (c)(1). The Hearing Official may at any time withdraw from any proceeding in which he or she deems him or herself disqualified or unable to act for any reason.
 - (3) If the Hearing Official is disqualified or withdraws from the proceeding, a qualified individual who has none of the infirmities listed in paragraph (b)(1) shall be assigned by the Director to replace him or her.

- (d) **Separation of functions.** The NNEPA or other Navajo Nation official(s) presenting the case against the Respondent at the hearing may not also participate in or otherwise advise in the decision issued by the Hearing Official.

312. Ex Parte Discussion of Proceeding.

- (a) **Prohibition.** At no time after a hearing is requested shall the Director, the Hearing Official, or any other person who is likely to advise these officials in the decision on the case, discuss ex parte the merits of the proceeding with any interested person outside NNEPA, with any Navajo Nation staff member who performs a prosecutorial or investigative function in such proceeding or a factually related proceeding, or with any representative of such person.
- (b) **Service and reply.** Any ex parte memorandum or other communication addressed to the Director or the Hearing Official during the pendency of the proceeding and relating to the merits thereof, by or on behalf of any party, shall be regarded as argument made in the proceeding and shall be served upon all other parties. The other parties shall be given an opportunity to reply to such memorandum or communication.

313. Motions.

- (a) **General.** At any time after the Respondent has requested a hearing, either party may file a motion which shall:
 - (1) be in writing;
 - (2) state the grounds therefor with particularity;
 - (3) set forth the relief or order sought; and
 - (4) be accompanied by any affidavit, certificate, other evidence, or legal memorandum relied upon.

All motions shall meet these requirements, except motions made orally on the record during the hearing, and shall be served as provided by § 314.

- (b) **Response to motions.** A party's response to any written motion must be filed within ten (10) days after service of such motion, unless the Hearing Official sets a shorter time or allows additional time for such response. The response shall:
 - (1) be in writing;
 - (2) respond to the grounds alleged by the opposing party;

- (3) respond to the relief or order sought by the opposing party; and
- (4) be accompanied by any affidavit, certificate, other evidence, or legal memorandum relied upon.

If no response is filed within the designated period, the parties may be deemed to have waived any objection to the granting of the motion. The Hearing Official may make such orders concerning the disposition of motions as he or she deems appropriate.

- (c) **Disposition.** The Hearing Official shall rule on all motions. Oral argument on motions will be permitted where the Hearing Official considers it necessary or desirable.

314. Filing, Service, and Form of Pleadings and Documents.

- (a) **Filing of pleadings and documents.** Except as otherwise provided, the original and one copy of all documents served in the proceeding shall be filed with the Hearing Official, or if a Hearing Clerk is designated, with the Hearing Clerk. A certificate of service shall accompany each document filed or served.

- (b) **Service of pleadings and documents.** Every document filed in the proceeding shall be served on all parties by the party filing the document. All documents may be served personally or by certified or first-class mail. The Hearing Official shall serve all parties to the proceeding with every order or decision issued.

- (c) **Form of pleadings and documents.**

- (1) Unless otherwise ordered by the Hearing Official, the first page of every pleading, letter, or other document shall contain a caption identifying the Respondent and the docket number which is assigned by the Hearing Official or Hearing Clerk.
- (2) The original of any pleading, letter, or other document (other than exhibits) shall be signed by the party filing or by counsel or other representative. The signature constitutes a representation by the signer that he or she has read the pleading, letter or other document, that to the best of his or her knowledge, information and belief, the statements made therein are true, and that it is not interposed for delay.
- (3) All documents filed by any party shall contain his or her name, address and telephone number or, if the party is represented by counsel, counsel's name, address and telephone number. Any changes to this information shall be communicated promptly to the Hearing Clerk, Hearing Official, and all parties to the proceeding. A party who fails to furnish such

information and any changes thereto shall be deemed to have waived the right to notice and service under these rules.

- (4) The Hearing Official or Hearing Clerk may refuse to file any document which does not comply with this section.

315. Computation and Extension of Time.

- (a) **Computation of time.** All time limits specified in this subpart refer to calendar days.
- (b) **Extensions of time.** The Hearing Official may grant an extension of time for the filing of any pleading, document, or motion upon timely motion of a party to the proceeding, for good cause shown, and after consideration of prejudice to the other parties.
- (c) **Service by mail.** Service of all pleadings and documents (other than the initial order) is complete upon mailing. Where a pleading or document is served by mail, five (5) days shall be added to the time allowed by these rules for the filing of a responsive pleading or document.
- (d) **Personal service.** Personal service is complete when the document is delivered.

316. Appearances.

Any party may appear in person or by counsel or other representative and in a manner consistent with the laws of the Navajo Nation. Persons who appear as counsel or other representative must conform to the standards of conduct and ethics required of practitioners before the courts of the Navajo Nation.

317. Prehearing Conference.

- (a) **Purpose of prehearing conference.** The Hearing Official may at his or her discretion at any time before the hearing begins direct the parties and their counsel or other representatives to appear at a conference before him or her to consider:
 - (1) The simplification of issues and stipulation of facts not in dispute;
 - (2) The necessity or desirability of amendments to pleadings;
 - (3) The exchange of exhibits, documents, prepared testimony, and admissions or stipulations of fact which will avoid unnecessary proof;

- (4) The limitation of the number of expert or other witnesses;
 - (5) The need for a change in the time and/or place for the hearing; and
 - (6) Any other matters which may expedite the disposition of the proceeding.
- (b) **Location of prehearing conference.** The prehearing conference shall be held in Window Rock, unless the Hearing Official determines that there is good cause to hold it at another location or by telephone.
- (c) **Correspondence.** The Hearing Official, on motion or sua sponte, may direct the parties to correspond with him or her to accomplish any of the objectives set forth in subsection (a). Any such correspondence shall be filed and served upon all parties.

318. Exchange of Witness Lists and Documents.

- (a) Each party shall make available to the other party at least fifteen (15) days prior to the hearing or within such other time ordered by the Hearing Official:
- (1) The names of the expert and other witnesses he or she intends to call, together with a brief narrative summary of their expected testimony; and
 - (2) copies of all documents and exhibits which each party intends to introduce into evidence.
- (b) Documents that have not been exchanged pursuant to subsection (a) shall not be introduced into evidence and witnesses whose names have not been exchanged shall not be allowed to testify without the permission of the Hearing Official. The Hearing Official shall allow the parties reasonable opportunity to review any new evidence.

319. Discovery.

- (a) **Discovery orders.** Except as provided by § 320(a), discovery shall be permitted only upon motion and a determination by the Hearing Official:
- (1) That such discovery will not in any way unreasonably delay the proceeding;
 - (2) That the information to be obtained is not otherwise obtainable;
 - (3) That such information has significant probative value; and

- (4) If a deposition upon oral questions is sought, that there is a substantial reason to believe that relevant and probative evidence may otherwise not be preserved for presentation by a witness at the hearing.

If the Hearing Official determines that the motion should be granted, he/she shall issue an order for the taking of such discovery together with the conditions and terms thereof.

- (b) **Failure to comply.** When a party fails to comply with an order issued pursuant to this section and the information sought is within his or her control, the Hearing Official may:
 - (1) infer that the information to be discovered would be adverse to the party who failed to comply with the discovery order; or
 - (2) issue a default order under § 323.

320. Evidence.

- (a) **General.** The Hearing Official shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, or otherwise unreliable or of little probative value. Any evidence relating to settlement which would be excluded in the Navajo Nation courts shall not be admissible in these proceedings.
- (b) **Confidential information.** In the presentation, admission, disposition, and use of evidence, the Hearing Official shall preserve the confidentiality of information or trade secrets protected under the applicable Act and regulations or other applicable law. The confidential or trade secret status of any information shall not, however, preclude its being introduced into evidence. The Hearing Official may make such orders as may be necessary to consider such evidence in camera, including the preparation of a supplemental decision to address questions of law, fact, or discretion which arise out of that portion of the evidence which is confidential or which includes trade secrets.
- (c) **Examination of witnesses.** Witnesses shall be examined orally, under oath or affirmation, except as otherwise provided in these rules of practice or by the Hearing Official. Parties shall have the right to cross-examine a witness who appears at the hearing provided that such cross-examination is not unduly repetitious.
- (d) **Verified statements.** The Hearing Official may admit into the record as evidence, in lieu of oral testimony, statements of fact or opinion prepared by a witness. The admissibility of the evidence contained in the statement shall be subject to the same rules as if the testimony were produced under oral examination. Before any such statement is read or admitted into evidence, the offering party shall deliver a

copy of the statement to the Hearing Official and the opposing party. The witness presenting the statement shall swear to or affirm the statement and shall be subject to appropriate oral cross-examination upon the contents thereof, unless the Hearing Official finds that the witness is unavailable.

- (e) **Exhibits.** Where practicable, an original and one copy of each exhibit shall be filed with the Hearing Official for the record and a copy shall be furnished to the opposing party. A true copy of any exhibit may be substituted for the original.
- (f) **Official notice.** Official notice may be taken of any matter judicially noticed in the Navajo Nation courts and of other facts within the specialized knowledge and experience of NNEPA. Opposing parties shall be given adequate opportunity to show that such facts are erroneously noticed.

321. Burden of Proof.

- (a) The NNEPA has the burden of going forward with and of proving that the violation occurred as set forth in the initial order and that the proposed civil penalty is appropriate.
- (b) Following the establishment of a prima facie case, the Respondent shall have the burden of presenting and of going forward with any defense to the allegations set forth in the initial order.
- (c) Each matter of controversy shall be determined by the Hearing Official upon a preponderance of the evidence.

322. Interpreters.

The parties may arrange for interpreters at the proceedings at their own expense. The Hearing Official shall administer an interpreter's oath to such persons.

323. Default Order.

- (a) **Grounds.** When a hearing has been set and due notice has been given and the Respondent fails to appear, the Hearing Official shall enter a default order against the Respondent. A party may also be found to be in default for failure to comply with a discovery order under § 319. If NNEPA fails to appear, the Hearing Official shall dismiss the initial order.
- (b) **Procedures and effect.** When the Hearing Official finds a default has occurred, he or she shall issue a default order against the defaulting party. This order shall constitute the decision of the Hearing Official.

- (c) **Contents.** A default order shall include findings of fact showing the grounds for the order and conclusions regarding all material issues of law.
- (d) **Set aside.** The Hearing Official may at the request of either party set aside any order issued under this section if good cause is shown. A request to set-aside a default order must be filed within 30 days from the date the default order is entered by the Hearing Official.

324. Accelerated Decision; Decision to Dismiss.

- (a) **General.** The Hearing Official, upon motion of any party or sua sponte, may at any time render an accelerated decision in favor of the NNEPA or the Respondent as to all or any part of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he or she may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law, as to all or any part of the proceeding. In addition, the Hearing Official, upon motion of the Respondent, may at any time dismiss an action without further hearing or upon such limited additional evidence as he or she requires, on the basis of failure to establish a prima facie case or other grounds which show no right to relief on the part of the NNEPA.
- (b) **Effect.**
 - (1) If an accelerated decision or a decision to dismiss is issued as to all the issues and claims in the proceeding, the decision constitutes the decision of the Hearing Official.
 - (2) If an accelerated decision or a decision to dismiss is rendered on fewer than all issues or claims in the proceeding, the Hearing Official shall determine what material facts exist without substantial controversy and what material facts remain controverted in good faith. He or she shall thereupon issue an interlocutory order specifying the facts which appear substantially uncontroverted, and the issues and claims upon which the hearing will proceed.

325. Decision.

- (a) **General.** As promptly as possible after the conclusion of the hearing, the Hearing Official shall issue a decision in which the Hearing Official may affirm, modify, or reverse the initial order based upon the evidence presented at the hearing. In rendering the decision, the Hearing Official shall consider only information in the record or officially noticed. The decision shall contain findings of fact, conclusions regarding all material issues of law, as well as reasons therefor, and a final order. Where the initial order is a civil penalty order,

the decision shall set forth the amount of the penalty and information required by subsection (b). The Hearing Official shall serve all parties with a copy of the decision.

- (b) **Amount of civil penalty.** Where the initial order is a civil penalty order and the Hearing Official determines that a violation has occurred, the Hearing Official shall determine the dollar amount of the civil penalty to be assessed in accordance with § 304(a)(3) and any criteria set forth in the applicable Act and regulations relating to the proper amount of a civil penalty. If the Hearing Official determines that a penalty different in amount from the penalty stated in the initial order should be assessed, the Hearing Official shall set forth in the decision the specific reasons for the increase or decrease. The Hearing Official shall not raise a penalty from that recommended to be assessed in the initial order if the Respondent has defaulted.
- (c) **Payment of a civil penalty.** The Respondent shall pay the full amount of the civil penalty assessed in the final order within thirty (30) days after receipt of the order. Payment shall be made as specified in the final order.

326. Record of the Proceeding.

- (a) **Record.** The Director shall maintain a complete and accurate record of the initial order. If a hearing is held, the Director shall promptly forward a copy of the record to the Hearing Official. The Hearing Official shall maintain a complete and accurate record of the hearing. A tape recording or written transcript shall be made of the hearing.
- (b) **Public inspection.** The record shall be made available for public inspection by the Hearing Official, or for proceedings in which a Hearing Clerk is assigned, by the Hearing Clerk, commencing no later than the date of the public notice of the initial order, except for documents and other parts of the record that the Director or Hearing Official has determined would divulge confidential information or trade secrets protected by the applicable Act or regulations or other applicable law, which documents shall be kept under seal. Any person may, during NNEPA business hours, inspect and copy any document in the record of the proceeding, with the exception of such confidential information or trade secrets.
- (c) **Cost of duplication.** The cost of duplicating documents in the record shall be borne by the person seeking copies of such documents. The Director or the Hearing Official may waive this cost in appropriate cases of financial hardship.

327. Informal Settlement; Consent Agreement and Order.

- (a) **Settlement policy.** NNEPA encourages settlement of a proceeding at any time if

the settlement is consistent with the provisions and objectives of the applicable Act and regulations. The Director may compromise, modify or remit, with or without any conditions, any administrative penalty imposed under this Subpart. The pendency of settlement shall not affect the Respondent's obligation to timely comply with the requirements of this Subpart or the applicable Act and regulations, or any permit or order issued thereunder.

- (b) **Consent agreement.** If the parties agree upon a settlement or compromise, the parties shall forward a written consent agreement and a proposed consent order to the Hearing Official. The consent agreement shall include any and all terms of the agreement, and shall be signed by all parties or their counsel or representatives.
- (c) **Consent order.** No settlement or consent agreement shall dispose of any proceeding under this subpart without a consent order from the Hearing Official. In preparing such an order, the Hearing Official may require that the parties to the settlement appear before him or her to answer inquiries relating to the consent agreement or order.

D. Field Citations

328. Authority.

If the applicable Act authorizes the Director to implement a field citation program and if the Director has promulgated regulations establishing minor violations of the applicable Act or regulations or permits or orders issued thereunder for which a field citation may be issued, officers or employees of NNEPA designated by the Director may issue a field citation for any minor violation established in the regulations and for an amount permitted by such regulations.

329. Contents of Field Citation.

- (a) A field citation is the equivalent of an expedited enforcement compliance order and settlement agreement.
- (b) A field citation shall:
 - (1) state with reasonable specificity the nature of each violation, including the location and factual basis of the violation, and the provision(s) of the applicable Act and regulations violated;
 - (2) state the amount of the civil penalty that is proposed to be assessed and the applicable regulation providing for the penalty;
 - (3) specify a schedule for compliance with the applicable Act and regulations

that is as expeditious as practicable; and

- (4) state that the Respondent may either agree to comply with the field citation within the time specified therein or request a hearing, pursuant to the procedure set forth in § 330.

330. Procedure.

- (a) The Respondent may sign the field citation and, by doing so, agree to pay the civil penalty stated in the field citation and agree to correct the violation within the time provided therein. By signing the field citation, the Respondent has agreed to a settlement and has waived its right to a hearing and to judicial review.
- (b) Alternatively, the Respondent may request a hearing within thirty (30) days. If a hearing is requested, the field citation will automatically be withdrawn and will be replaced with a compliance order, administrative penalty order or other order(s) authorized under § 304. The penalty amount may increase from that in the field citation in order to cover the time and expense that will be incurred by NNEPA in pursuing more formal enforcement proceedings. Once the new initial order(s) is issued, pursuant to § 304, the provisions of part B of this subpart shall apply.

331. Final Decision.

If a hearing is not requested within thirty (30) days of issuance of the field citation, the field citation becomes a final decision for purposes of § 332(b).

E. Judicial Review

332. Judicial Review.

- (a) **Exhaustion.** Any person challenging an order issued under this Subpart must request a hearing under the procedures set forth in this Subpart as a prerequisite to the seeking of judicial review of the final agency action.
- (b) **Final agency action.** For purposes of judicial review, a decision of the Hearing Official under § 324, § 325 or § 331 constitutes final agency action. An initial order, except an emergency order, and a field citation constitute final agency action thirty (30) days after they are issued if the Respondent does not request a hearing pursuant to § 305 or § 330, as the case may be, but are not reviewable because of the failure to request a hearing. An emergency order to comply issued under the NNSWA or the NNUSTA pursuant to § 304(a)(2) constitutes final agency action upon issuance unless the Respondent timely requests a hearing pursuant to § 305, but again is not reviewable. A default order against a

Respondent for failure of the Respondent to appear is also an unreviewable final agency action.

- (c) **Filing the record.** Within 30 (thirty) days following the date that a petition for judicial review is filed pursuant to the applicable Act and regulations, the Director shall file in the court a certified copy or certified index of the record on which the final agency action was based.

Subpart 4. Uniform Procedures for Rulemaking.

401. Scope.

This Subpart establishes uniform procedures for the promulgation of regulations under the NNAPPCA, NNCWA, NNCERCLA, NNPA, NNSDWA, NNSWA, and NNUSTA and other applicable Acts.

402. Public Notice of Proposed Regulations and Public Comment Period.

- (a) **Public notice required.**

- (1) The Director shall give public notice of any proposed regulation.
- (2) Public notices may describe more than one proposed regulation or set of regulations.

- (b) **Timing.**

- (1) Public notice of a proposed regulation shall allow at least thirty (30) days for public comment.
- (2) Public notice of a public hearing shall be given at least twenty (20) days before the hearing. Public notice of the hearing may be given at the same time as public notice of the proposed regulation and the two notices may be combined.

- (c) **Methods.** The public notice required under subsection (a) shall be given by each of the following methods:

- (1) A notice by mail to each of the persons listed below. Persons otherwise entitled to receive notice under this paragraph may waive their rights to receive notice for any classes and categories of regulations by expressly advising the Director in writing.

- A. Federal and Navajo agencies and agencies of affected states or Tribes with an interest in the rulemaking, such as agencies with

jurisdiction over fish and wildlife and other natural resources, the Advisory Council on Historic Preservation and the Navajo Nation Historic Preservation Department;

B. Persons on a mailing list developed by:

- (i) Including those who request to be on the list;
- (ii) Soliciting persons from participants in past proceedings related to the subject of the proposed regulation; and
- (iii) Notifying the public of the opportunity to be put on the mailing list through periodic publication in the public press and in such publications as newsletters, environmental bulletins, and Tribal law journals. The Director may update the mailing list from time to time by requesting written indication of continued interest from those listed. The name of any person who fails to respond to such a request may be deleted from the list.

- (2) A notice in a daily or weekly newspaper of general circulation in the areas of the Navajo Nation that may be affected;
- (3) A notice broadcast over local radio stations in English and Navajo; and
- (4) Such other methods as may be appropriate, including press releases, web pages or any other forum or medium to elicit public participation.

(d) Contents.

- (1) All public notices issued under this part shall contain the following minimum information:
 - A.** Name and address of the office proposing the regulation;
 - B.** A brief description of the proposed regulation;
 - C.** Name, address and telephone number of a person from whom interested persons may obtain further information, including copies of the proposed regulation;
 - D.** A brief description of the comment procedures and the time and place of any hearing that will be held (including a statement of procedures to request a hearing, unless a hearing has already been

scheduled), and other procedures by which the public may participate in the decision on the proposed regulation;

- E.** The location of the administrative record, the times at which the record will be open for public inspection, and a statement that all comments submitted are available as part of the administrative record;
- F.** Any additional information required by the applicable Act and regulations; and
- G.** Any additional information that the Director considers necessary or appropriate.

(2) **Public notices for hearings.** If the public notice for a hearing is issued separately from the public notice of the proposed regulation, it shall contain the following information in addition to the contents of a general public notice described in subsection (d)(1):

- A.** Reference to the date of previous public notices relating to the proposed regulation; and
- B.** A brief description of the nature and purpose of the hearing, including the applicable rules and procedures.

(3) Upon request, any person shall be provided a copy of the proposed regulation.

403. Public Comments and Requests for Public Hearings.

During the public comment period for a proposed regulation, any person may submit written comments on the proposed regulation.

404. Public Hearings.

- (a)** The Director shall, if requested or if deemed appropriate by the Director, hold a public hearing on a proposed regulation to allow any person the opportunity to present orally their views, data or arguments in Navajo or English.
- (b)** The Director shall designate a Hearing Moderator for the public hearing. The Hearing Moderator shall be responsible for the orderly conduct of the public hearing. Nothing in these regulations shall empower the Hearing Moderator to make any findings of fact, conclusions of law, or recommendations on the issuance of the proposed regulations. The Director, a member of the staff of the

NNEPA, or any individual may serve as a Hearing Moderator, so long as the Hearing Moderator does not have a financial interest in the outcome of the proposed regulation

- (c) Hearings shall be held at a time and place which facilitates attendance by interested persons and the general public. Public notice of a hearing shall be given as specified in § 402.
- (d) The Director, a member of the staff of the NNEPA, or the Hearing Moderator, shall inform the audience of the issues involved in the proposed rulemaking, the considerations the agency will take into account, the agency's tentative determinations (if any), and the information which is particularly solicited from the public.
- (e) Any person may submit, in English or Navajo, oral or written statements and information concerning the proposed regulation. The Hearing Moderator may set reasonable limits upon the time allowed for oral statements. The Director shall allow the submission of statements in writing at the hearing, but the Director or Hearing Moderator shall not require a written statement in lieu of or as a condition for making an oral statement.
- (f) The Hearing Moderator and NNEPA shall make reasonable efforts to accommodate requests for English to Navajo or Navajo to English oral translations during the hearing.
- (g) A tape recording or written transcript shall be made of the hearing. At the conclusion of the hearing, the Hearing Moderator shall forward to the Director the record of the hearing, including the tape recording or written transcript and any materials submitted at the hearing. The hearing record shall be made available to the public.
- (h) Unless specified otherwise in the appropriate Act or regulations, the public comment period under § 402 shall be extended if necessary to allow the record to remain open for 20 days after the close of any public hearing under this section to provide an opportunity for submission of rebuttal and supplementary information. The Director may further extend the comment period at his or her discretion to effectuate this purpose.

405. Obligation to Raise Issues and Provide Information During the Public Comment Period.

- (a) All persons, who believe that a proposed regulation should be issued, modified, or withdrawn must raise all reasonably ascertainable issues and submit all reasonably available arguments and factual grounds supporting their position,

- including all supporting material, by the close of the public comment period.
- (b) All supporting materials shall be submitted in full and may not be incorporated by reference, unless they are already part of the administrative record in the same proceeding or consist of Navajo or federal statutes and regulations, USEPA's or the Director's documents of general applicability, or other generally available reference materials.
 - (c) The Director may extend the public comment period on his or her own initiative or on request if the Director determines that such extension is necessary to obtain full public participation, and may grant additional time to comment to any person to the extent that a person desiring to comment demonstrates need for such time.

406. Reopening of the Public Comment Period.

- (a) Whenever any data, information or arguments submitted during the public comment period appear to raise substantial new questions concerning the proposed regulation or NNEPA becomes aware of significant new information, the Director may take one of the following actions:
 - (1) Withdraw the proposed regulation;
 - (2) Prepare a revised proposed regulation under the applicable Act and regulations, and reopen the public comment period under this section; or
 - (3) Reopen or extend the comment period to give interested persons an opportunity to comment on the information or arguments submitted.
- (b) If the Director reopens the public comment period pursuant to subsection (a)(2) or (3), the scope of the reopening shall be limited to the substantial new questions or significant new information that caused the reopening. All persons who believe any provision of the proposed regulation is inappropriate must submit all reasonably available legal and factual grounds supporting their position, including all supporting material, by a date not less than forty-five (45) days after public notice under subsection (c) set by the Director. Thereafter, any person may file a written response to the material filed by any other person, by a date not less than twenty (20) days after the date set for filing of the material, set by the Director. Persons desiring to comment may request longer comment periods and a longer comment period may be granted to the extent that the Director finds it necessary to effect the purpose of the reopening.
- (c) Public notice of any action taken by the Director pursuant to subsection (a) shall be issued under § 402. In addition to the requirements of § 402, the public notice for any action taken pursuant to subsection (a)(2) or (3) shall state the scope of the reopening.

407. Issuance and Effective Date of Final Regulation.

- (a) The final regulation shall be based on the record of the proceeding contained in the docket.
- (b) The Director shall give public notice of the adoption of the final regulation as soon as possible pursuant to § 402(c)(2) and (3) and shall mail a notice to the same persons as were mailed notice of the proposed regulation pursuant to § 402(c)(1) as well as to any persons who commented on the proposed regulation and any others who request to receive such notice.
- (c) Every final regulation shall be effective in accordance with its terms after approval by the Resources Committee.

408. Response to Comments and Administrative Record.

- (a) Response to Comments. The final regulation shall be accompanied by a response to comments. The response shall fully consider all comments resulting from the public comment period, including any hearing, conducted under this Subpart. This response shall:
 - (1) Specify which provisions, if any, of the draft regulation have been changed in the final regulation and the reasons for the change;
 - (2) Briefly describe and respond to all significant comments on the proposed regulation raised during the public comment period or during any hearing; and
 - (3) Be available to the public.
- (b) **Administrative Record.** The Director shall base the regulation on the administrative record.
 - (1) The administrative record shall consist of:
 - A. The proposed regulation;
 - B. The public notice;
 - C. All comments received during the public comment period (including any extension or reopening thereof);
 - D. The tape, transcript or notes of any hearing(s) held and any written materials submitted at such hearing(s);

- E. The response to comments and any new material that the Director references in the response to comments;
- F. Other documents contained in the supporting file for the regulation; and
- G. The final regulation.

The documents required under this paragraph should be added to the record as soon as possible after their receipt or publication by the Director. The record shall be complete on the date the final regulation is issued.

- (2) Material readily available at the applicable program office or published material that is generally available and that is included in the administrative record under these provisions need not be physically included with the rest of the record as long as it is specifically referred to in the fact sheet or response to comments.
- (3) The administrative record shall be available for public inspection commencing no later than the date of the public notice.

409. Reconsideration of the Regulation after Issuance.

- (a) Whenever a person can demonstrate to the Director that it was impracticable to raise an objection within the public comment period or if the grounds for the objection arose after the public comment period but within the time allowed for judicial review, and if the objection is of central relevance to the outcome of the regulation, the Director shall convene a proceeding for reconsideration of the regulation and provide the same procedural rights as would have been afforded had the information been available at the time the regulation was proposed. Whenever the Director determines that a reconsideration proceeding shall be convened, the Director may stay the effectiveness of the final regulation if necessary and for the time required to allow the reconsideration to occur. Such proceeding for reconsideration shall include a new public comment period which shall be limited in scope to the objection(s) that prompted the proceeding.
- (b) All persons, including the person(s) whose objection(s) prompted the reconsideration, who believe that the final regulation is inappropriate for any of the grounds raised by the objection(s) that prompted the reconsideration, must submit all reasonably available legal and factual grounds supporting their position, including all supporting material, by a date no sooner than thirty (30) days after public notice under subsection (c) set by the Director. Thereafter, any person may file a written response to the material filed by any other person, by a

date no sooner than twenty (20) days after the date set for filing of the material, set by the Director. Persons desiring to comment may request longer comment periods and a longer comment period may be granted to the extent that the Director finds it necessary to effect the purpose of the reconsideration.

- (c) Public notice of a reconsideration proceeding shall be issued under § 402. In addition to the requirements of § 402, the public notice shall describe the objection that prompted the reconsideration proceeding, shall state the scope of the reconsideration and shall state whether the effectiveness of the final regulation has been stayed.
- (d) The Director shall hold a public hearing on the reconsideration pursuant to § 404.
- (e) The Director shall maintain the administrative record of the reconsideration proceeding pursuant to § 408(b).
- (f) Within a reasonable time after the close of the public comment period under subsection (b), the Director shall issue a final decision on reconsideration pursuant to § 407, including a response to comments pursuant to § 408(a) and revisions to the final regulation, if any.

410. Judicial Review.

- (a) Exhaustion. Any person challenging a final regulation or the refusal of the Director to convene a proceeding for reconsideration of a final regulation must follow the procedures set forth in this Subpart as a prerequisite to the seeking of judicial review of the final agency action.
- (b) Final agency action. For purposes of judicial review, final agency action occurs when notice is first given of the final regulation.
- (c) Filing the record. Within 30 (thirty) days following the date that a petition for judicial review is filed pursuant to the applicable Act and regulations, the Director shall file in the court a certified copy or certified index of the record on which the rulemaking was based.