
Enforcing Tribal Environmental Laws without “Treatment as a State”

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The Navajo Nation covers over 27,000 square miles in Arizona, New Mexico, and Utah, and within those lands are approximately 100 sites containing underground storage tanks (USTs) and twenty-five sites containing aboveground storage tanks (ASTs). Most of these sites contain multiple tanks and, over the years, many of these tanks have leaked. Releases have occurred due to improper tank closures, faulty operation and maintenance practices, and other violations of storage tank requirements.

Petroleum releases from leaking USTs and ASTs are a significant cause of soil and groundwater contamination within the Navajo Nation, impacting many Navajo communities. In 2012, the Navajo Nation Environmental Protection Agency (NNEPA) estimated that almost half of the storage tank sites on the Navajo Nation had leaking tanks. The area is arid, making groundwater even more important. Moreover,

Groundwater beneath the Navajo Nation is generally shallow . . . and often reaches the surface at sacred seeps and springs. Although most drinking water wells tap into deeper aquifers, many people on the reservation use those seeps and springs for irrigation, daily household chores and, in some cases, as their sole source of drinking water. Animals, both wild and domestic, also need the shallow water-bearing units as drinking water. . . . The Navajo Nation does not have zoning regulations and thus any area can be used for residential purposes.

Navajo Nation Leaking Storage Tank Soil and Water Cleanup Standards, *available at* <http://navajonationepa.org/main/images/pdf/CleanUp%20Standards%20AND%20Storage%20Tank%20Act%202012.pdf> at 5–6.

USTs on the Navajo Nation are subject to direct regulation by the U.S. Environmental Protection Agency (EPA) under Subtitle I of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6991–6991m, but ASTs are not covered by RCRA. EPA has assigned responsibility for USTs (and for all other EPA issues) on the Navajo Nation to its Pacific Southwest Region (Region 9), headquartered in San Francisco at some distance from Navajo lands. In the past, EPA inspectors traveled from San Francisco to the Navajo Nation to conduct periodic inspections of USTs and assist UST owners with coming into compliance with federal requirements. Follow-up did not always take place, and violations often went unenforced. Rather than being conducted throughout the year, inspections had to wait

until EPA inspectors were available for travel. Inspections generally were compressed into one-week periods, and the inspectors could not remain on the Navajo Nation for follow-up.

NNEPA believed that better compliance could be achieved with participation by Navajo inspectors. Being local, Navajo inspectors would be better able to travel to storage tank sites, conduct more inspections, and take follow-up actions. As one of the first steps toward this goal, the Navajo Nation enacted its own UST Act in 1998 (modeled on Subtitle I of RCRA). 4 N.N.C. §§ 1500–1575, *available at* www.navajonationepa.org/Pdf%20files/UG%20Storage%20Tank.pdf. The Navajo Nation UST Act (NNUSTA) authorized NNEPA to regulate USTs pursuant to requirements that are the same as or, in some cases, more stringent than the federal; to conduct inspections and enforcement; to require or undertake corrective action itself (and recover costs); and to assess various fees, which were to be used to help finance program administrative costs. The act also included a “delivery prohibition,” *Id.* § 1521(C), allowing NNEPA to prohibit deliveries of fuel to noncompliant USTs, a provision that was not added to federal law until 2005 (in the Energy Policy Act amendments to RCRA Subtitle I, Pub. L. 109-58, 119 Stat. 1094), and that is proving to be an invaluable tool for obtaining compliance, as discussed later in this article. In addition, the NNUSTA included a tariff on fuel deliveries to raise funds for a Leaking UST Trust Fund, which NNEPA could use to carry out corrective actions, as well as for a UST Fund for implementation of NNEPA’s Storage Tank Program. 4 N.N.C. § 1572.

The NNUSTA was amended in 2012 to cover ASTs as well as USTs, so that gas station owners could not simply switch to ASTs to avoid regulation. CJA-09-12, Jan. 24, 2012. The amended Navajo Nation Underground and Aboveground Storage Tank Act (Navajo Nation Storage Tank Act or NNSTA, *available at* www.navajonationcouncil.org/Navajo%20Nation%20Codes/Title%204/CJA-09-12.PDF) also requires secondary containment and under-dispenser spill containment for new and replaced tanks and fuel dispenser systems (to be codified at 4 N.N.C. § 1541(C)), provisions that EPA did not add to the federal UST regulations until June 2015. In addition, the NNSTA requires certification and financial assurances for tank installers and authorizes NNEPA to promulgate operator training and certification requirements (to be codified at 4 N.N.C. § 1541(D) and (B)(3), respectively). Also in 2012, NNEPA promulgated delivery prohibition (“red-tagging”) regulations, <http://navajonationepa.org/main/images/pdf/Delivery%20Prohibition%20Final%20Regs%203-1-12.pdf>, specifying the procedures for enforcing the delivery prohibition in the act (which was extended to ASTs), as well as cleanup standards for soil and groundwater at leaking storage tank sites.

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Both the original NNUSTA and the amended NNSTA contain significant enforcement authorities. NNEPA may issue administrative compliance orders, administrative penalty orders and—if there is an imminent and substantial threat to the public health, welfare, or environment—emergency compliance orders (similar to RCRA § 7003, 42 U.S.C. § 6973). 4 N.N.C. §§ 1552–1554. NNEPA’s penalty order authority includes the authority to develop and implement a field citation program. *Id.* § 1554(C). Alternatively, NNEPA may refer enforcement cases to the Navajo Nation Attorney General to bring as civil or criminal actions in Navajo Nation district court, the latter for intentional violations. *Id.* § 1553. The Navajo Nation’s criminal enforcement authority is limited, because it does not extend over non-Indians. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

Developing these laws, however, was just the first step in addressing petroleum contamination on the Navajo Nation. The next step was for NNEPA to obtain the training and experience needed to ensure compliance with its storage tank requirements. Once NNEPA developed its enforcement capabilities NNEPA had to consider how it would enforce its laws in the context of its relationship with EPA. RCRA does not provide for EPA to partner with tribes in implementing RCRA Subtitle I on tribal lands because, unlike several other federal environmental statutes, there is no “treatment as a state” (TAS) provision under RCRA. In general, under four of the five major environmental statutes that EPA administers—the Clean Water Act, Safe Drinking Water Act, Clean Air Act, and RCRA (with the Comprehensive Environmental Response, Compensation and Liability Act being the fifth)—EPA sets national standards and requirements, and states adopt their own programs that implement those standards and requirements. A state must demonstrate that its program meets the federal requirements and that the state has the requisite authority to implement and enforce the program, in which case EPA will approve the program and grant the state primary enforcement responsibility (“primacy”) under the federal statute. Congress amended the first three statutes to allow EPA to approve tribal programs that meet the federal requirements under those statutes and to grant primacy to tribes for those programs. Because RCRA does not contain a TAS provision, EPA cannot approve tribal UST programs or grant primacy to tribes the way it can and does with state programs under RCRA.

Turning to the first issue—the development of NNEPA’s enforcement capabilities—NNEPA began by acquiring on-the-job training from EPA. A NNEPA inspector accompanied an EPA inspector on his or her rounds, and until 2004, inspections were based on the federal UST requirements only. EPA had the lead and controlled the conduct of the inspections. The NNEPA inspector gained experience and facility owners and operators obtained assistance with compliance, but follow-up on inspections was limited, as noted above. Violations of the federal requirements often were not enforced.

NNEPA sought more control over the inspections and their outcomes in order to fulfill its obligation to protect the health and environment of the Navajo Nation. Beginning in 2004, NNEPA and EPA reached an agreement to conduct joint inspections, under which NNEPA inspected for compliance with the NNUSTA (which incorporated federal regulations by reference) and EPA inspected for compliance with RCRA and federal regulations. EPA and NNEPA decided together

how many and which inspections to conduct each year out of the list of UST sites on the Navajo Nation, prepared jointly for the inspections, and followed EPA standard operating procedures and protocols for conducting the joint inspections. NNEPA and EPA also shared the lead on the inspections, which was of particular importance to NNEPA: the two agencies decided in advance which agency would be designated the lead for which inspections. They generally selected NNEPA as the lead for sites on Navajo land or with Navajo owners and EPA as the lead for sites on private land within the reservation or with non-Indian owners.

EPA could issue federal field citations based on any of the inspections, regardless of which agency was the lead, since the NNEPA inspections covered all the federal requirements and NNEPA did not have its own field citation program. EPA issued field citations only at NNEPA’s urging, however. EPA’s reluctance to issue field citations can be attributed at least in part to the U.S. Evtl. Prot. Agency, Office of Enforcement & Compliance Assurance, Guidance on the Enforcement Principles Outlined in the 1984 Indian Policy (2001) (Enforcement Guidance). <http://www2.epa.gov/sites/production/files/documents/finaltribalguidance011701.pdf>; see also EPA’s Indian Policy, www.epa.gov/tp/pdf/indian-policy-84.pdf.

EPA’s Office of Enforcement & Compliance Assurance (OECA) developed its Enforcement Guidance “to implement the enforcement principles outlined in the Indian Policy.” Enforcement Guidance at 1. In general, the Indian Policy is a laudable document affirming EPA’s commitment to work with tribes on a government-to-government basis, support tribal self-determination, and recognize the federal government’s trust responsibility to tribes. It has been reaffirmed by each successive EPA administrator and is viewed favorably by the tribal community. Unfortunately, both the Indian Policy itself and OECA’s interpretation of it have hindered enforcement against environmental violations in Indian country.

OECA describes the Indian Policy as establishing “a policy of graduated response when addressing instances of noncompliance by” tribal facilities. “Tribal facilities” are defined as “facilities owned or managed by Tribal Governments or by facilities in which a Tribal Government has a substantial proprietary interest (and in some instances, a substantial interest that is not proprietary) or over which a Tribal Government has control.” Enforcement Guidance at 1. The Indian Policy provides that when tribal facilities are not complying with federal environmental requirements, “EPA will work cooperatively with Tribal leadership to develop means to achieve compliance, providing technical support and consultation as necessary.” Indian Policy at 4, item #8. It references “the distinct status of Indian Tribes and the complex legal issues involved,” and limits formal enforcement action to situations when EPA determines that “(1) a significant threat to human health or the environment exists, (2) such action would reasonably be expected to achieve effective results in a timely manner, and (3) the Federal Government cannot utilize other alternatives to correct the problem in a timely fashion.” *Id.*; see also Enforcement Guidance at 2 (quoting Indian Policy at 4).

In its Enforcement Guidance, OECA interpreted the Indian Policy to require a cumbersome and time-consuming process for federal enforcement against tribal facilities. Before EPA can take any such enforcement action—which includes administrative complaints, orders, and field citations, and also includes referrals of enforcement matters to the

U.S. Department of Justice (DOJ)—EPA must make a series of determinations. First, EPA must determine, in consultation with the tribe, whether the facility at issue is a “tribal facility.” Enforcement Guidance at 3. If EPA determines it is a tribal facility, EPA must provide “compliance assistance” to the facility in an attempt to have the facility remedy its violations. *Id.* at 4–5. In providing compliance assistance, EPA is required to develop a written plan specifying the nature of the assistance, the time frame for compliance, and additional cooperative measures to be taken, such as informal compliance agreements, if the initial assistance is not effective. *Id.* If this effort fails, EPA still may not undertake enforcement unless three threshold criteria are satisfied: the noncompliance must pose a significant threat to human health or the environment; the enforcement action must be reasonably expected to achieve compliance in a timely manner; and EPA must have determined that no alternatives to compliance assistance could be used instead of enforcement. *Id.* at 5–7. Even then, EPA may delay enforcement after considering good-faith efforts by the tribal facility to remedy its noncompliance in a timely manner, the resources and time EPA has expended in providing compliance assistance, any history of noncompliance by the tribe’s facilities, and the degree of willfulness pertaining to the violation. *Id.* at 7. Finally, before any formal enforcement action is taken or referred to DOJ, the appropriate regional administrator must obtain concurrence from the assistant administrator for OECA, who in turn must consult with the American Indian Environmental Office and the general counsel. A concurrence package is required, which must demonstrate that all the requirements listed above have been satisfied. *Id.* at 8–13.

Many USTs on the Navajo Nation come within EPA’s definition of a tribal facility. For example, in the past, many sites on the Navajo Nation were leased to Navajos to run as gas stations, as part of an effort by the Navajo Nation to provide business opportunities to tribal members. In addition, most gas stations within the Navajo Nation are located on tribal trust land (there is very little private fee land within the Navajo Nation), and the United States holds the legal title to that land for the benefit of the Navajo Nation. Both governments are, therefore, the landowners and lessors of the land at issue, and further complicating the issue is the fact that many of these gas stations were subject to Bureau of Indian Affairs leases that did not provide for UST ownership and liability to remain with the lessee upon termination of the lease; rather, ownership reverted to the lessor. (This situation has been corrected in the leases currently being issued for sites containing storage tanks.) OECA’s Enforcement Guidance, therefore, would be triggered in many instances.

Enforcement of EPA field citations and other administrative compliance orders can also be difficult. If a facility owner fails to comply with an EPA order, EPA is required to refer enforcement of the order to the DOJ, whose attorneys (including the U.S. attorneys in the affected states) do not in general make UST cases a priority. EPA also may not assess penalties under an administrative order without first obtaining the concurrence of OECA and DOJ. Under OECA’s Enforcement Guidance, EPA’s first remedy in enforcing against tribal facilities must be injunctive relief, and EPA may seek penalties only when necessary to achieve effective, timely results and only after other efforts to achieve such results have failed. *Id.* at 6.

There is one way to bypass some of the procedures required by OECA’s Enforcement Guidance: The Guidance contains a

provision allowing a tribe to request a waiver from the cooperative measures and compliance assistance otherwise required under the Guidance, based on the tribe’s written statement that prompt enforcement is “the most appropriate response.” *Id.* at 7. The EPA Region must agree and must go through the same concurrence process outlined above before granting the waiver. *Id.* at 7–8. NNEPA believed that prompt enforcement of the law was essential to ensuring compliance and that there should be even-handed application and enforcement of the law with respect to tribal and nontribal facilities alike. A waiver would allow the issuance of field citations to tribally owned or operated facilities with less delay. It also would allow EPA to settle or finalize such field citations or commence other administrative or judicial enforcement actions without prior OECA concurrence. Requesting a waiver for each tribal facility would still be cumbersome, however, leading NNEPA to make its waiver request to EPA on an annual basis, beginning in 2004, for all enforcement that might be undertaken throughout the year, and EPA granted its requests.

As NNEPA’s inspectors continued to gain experience, NNEPA advocated for more control over UST inspections. The NNEPA inspectors were not only the ones present on the Navajo Nation, but also the ones with knowledge of the facility operators, which should inform whatever follow-up actions might be taken. NNEPA inspectors were also the ones present to respond to emergencies. In 2008, therefore, NNEPA entered into an agreement with EPA under which NNEPA inspectors could obtain federal credentials from EPA, allowing those NNEPA inspectors to conduct UST inspections under RCRA on behalf of EPA. U.S. Envtl. Prot. Agency, Authorization Agreement between NNEPA and USEPA regarding Issuance of EPA Inspector Credentials under RCRA Subtitle I (2011). (Auth. Agrmt.). To obtain the credentials, NNEPA was required to comply with U.S. Envtl. Prot. Agency, Office of Enforcement & Compliance Assurance, Guidance for Issuing Federal EPA Inspector Credentials to Authorized Employees of State/Tribal Governments to Conduct Inspections on Behalf of EPA (2004) (Credentials Guidance). <http://www2.epa.gov/sites/production/files/201309/documents/statetribalcredentials.pdf>. Auth. Agrmt. at 1. Pursuant to the Credentials Guidance, NNEPA inspectors were required to comply with various EPA training requirements, including taking UST inspection and health and safety courses, performing a number of inspections with a senior inspector present, and taking refresher training courses annually. Auth. Agrmt. at 3; Credentials Guidance at 9–10, App. 3. NNEPA also was required to conduct a minimum number of inspections each year to maintain the credentials, which were issued subject to renewal every three years. Auth. Agrmt. at 4.

Once NNEPA inspectors obtained federal credentials, two NNEPA inspectors conducted each inspection, one under tribal authority and the other under federal authority, without an EPA inspector being present. NNEPA found the federal credentials strengthened their authority with non-Indian owners and operators, especially at facilities located on private land within the reservation where the owners and operators might otherwise object to Navajo Nation jurisdiction. It also proved helpful with federal facilities, even though federal facilities, under RCRA, 42 U.S.C. § 6991f(a), are subject to local (which, under RCRA, includes tribal) UST requirements. In addition, it gave NNEPA more control over the conduct of the inspections.

Shortly after entering into the federal credentials agreement, NNEPA entered into a field citation agreement with EPA titled "Authorization Agreement between NNEPA and USEPA regarding Implementation of a Pilot Project for Using Field Citations as Part of a Credentialed Inspectors Program under RCRA Subtitle I." The agreement, concurred in by OECA, established a two-year pilot project under which federally credentialed NNEPA inspectors were authorized to write up and deliver federal field citations to noncompliant facility owners and operators, based on inspections NNEPA conducted using federal credentials. NNEPA believed that providing its inspectors with this enforcement tool further strengthened their authority and helped increase compliance, even though EPA's signature was still required to issue the field citation. At the same time, NNEPA requested and received a waiver from OECA's Enforcement Guidance for the duration of the two-year pilot project, rather than following its usual practice of requesting a waiver on an annual basis.

At NNEPA's request, EPA made the pilot project permanent in 2011, under an agreement subject to renewal every three years along with the federal credentials agreement. NNEPA's waiver from the Enforcement Guidance also became permanent in 2011, subject to renewal every three years. The federal credentials, field citation agreements, and the OECA waivers all were renewed for a second term, through August 2014. Upon their expiration, however, NNEPA decided to proceed with its inspections solely under Navajo law, rather than renewing the agreements, and NNEPA has been proceeding in this manner throughout 2015. By this time, NNEPA's inspectors have more than enough experience to implement the Navajo program: They conducted UST inspections on their own for the past six years, and they were always the sole inspectors of ASTs (outside of the oil fields), beginning with passage of the NNSTA in 2012. Furthermore, over the past two years NNEPA gained experience in undertaking enforcement actions under the NNSTA and in fact successfully obtained compliance at the two sites where it sought to enforce NNSTA requirements.

The first of these enforcement actions took place in 2014. It involved failures to comply with NNSTA requirements to demonstrate financial responsibility for the USTs at the facility and also failures to pay annual tank fees. The violation of financial responsibility requirements was also a violation of RCRA and was listed on a notice of inspection provided to the facility in 2012, when NNEPA was still conducting inspections on behalf of EPA, but it had not been corrected nor had any formal enforcement action been taken. Once NNEPA issued a compliance order under the NNSTA, both violations were corrected within about six months. The facility owner first requested a hearing, but after a pretrial conference (held by the Navajo Nation Office of Hearings and Appeals) the owner came into compliance. *NNEPA v. Van's Trading Post*, No. OHA-EPA-001-14.

The second enforcement action took place in 2015 and involved failures to repair a cracked spill bucket (a spill prevention device) at one of the tanks, provide an annual calibration certification for the automatic tank gauging system (a spill detection issue), and pay annual tank fees. The first of these violations is considered an "imminent threat violation" under the delivery prohibition regulations promulgated under the NNSTA, and it triggers an emergency compliance order and a red tag being placed on the tank at issue. The red tag

prohibits any additional fuel from being delivered to the tank. The NNEPA inspectors were accompanied by a NNEPA compliance officer when they went to the facility to affix the red tag. The facility owner had the required repair performed soon afterward and the red tag was removed. *Black Mesa Shopping Center*, Order No. ECO 2015-001. The remaining violations were "significant violations" for which thirty days are given to comply or request a hearing before red tags are affixed to the tanks at issue. The facility owner provided the required calibration certification but did not pay the tank fees or request a hearing, resulting in additional red tags being placed on all the tanks. The facility owner then complied within about a week. *Black Mesa Shopping Center*, Order No. CO 2015-001.

NNEPA is now on the verge of having its own field citation program: The storage tank penalty regulations, field citation penalties, and associated notices and forms were in the final stages of the approval process when this article was being written. Once the field citation program goes into effect, NNEPA will have an expeditious way to pursue enforcement and obtain compliance with its requirements. Moreover, any penalties collected under the field citations (or any other administrative penalty order) can be used to help defray the administrative costs of implementing the storage tank program, in contrast to federal penalties, which are paid to the U.S. Treasury.

The final issue for NNEPA to address is the coordination of enforcement between NNEPA and EPA, now that NNEPA is enforcing only Navajo law. As noted above, there is no TAS provision in RCRA, so EPA cannot grant NNEPA primary enforcement authority under RCRA. NNEPA has been the primary enforcer of UST requirements on the Navajo Nation, however, and would like to retain that role, for the reasons already discussed. NNEPA also would like to avoid duplicative enforcement actions, including field citations and penalty assessments, being taken by EPA, to prevent undue burdens being placed on UST owners and operators.

To address this situation, NNEPA is in the process of negotiating a Memorandum of Understanding (MOU) with EPA whereby: (1) EPA would consider NNEPA inspections as satisfying the requirements of Title XV, Section 1523(a) of the Energy Policy Act of 2005 (codified in RCRA, 42 U.S.C. § 6991d(c)(2)), which requires UST inspections to be conducted at least every three years; and (2) it would be EPA's intent not to pursue enforcement of RCRA Subtitle I when it determines that NNEPA has already taken timely and appropriate enforcement action. NNEPA and EPA would continue to confer each year on the inspections to be conducted that year, and NNEPA would continue to ensure that its requirements remained as stringent as the federal requirements. EPA would, as always, retain its authority to implement and enforce the RCRA UST program. The agencies would keep each other informed of all relevant information, including information on regulatory developments, inspections, and enforcement.

NNEPA meets the three-year inspection requirement, so that is not an issue; in fact, NNEPA inspects every year the facilities it considers to be high risk (those having single-wall steel storage tanks). The MOU also would not be the first of its kind, nor does it raise novel issues. EPA already coordinates enforcement actions with the states, including with states lacking EPA-approved RCRA programs, and in some instances EPA has entered into MOUs with those states to coordinate efforts. At this writing, the MOU was expected to be approved and executed by the end of 2015. Once that occurs, NNEPA

will have completed its goal of enforcing its storage tank program with its own staff and under its own laws, with limited oversight required by the federal government.

Moreover, as NNEPA believed at the outset, its involvement in UST inspections and related enforcement has proven to be extremely effective. The participation of NNEPA staff has resulted in an increase in compliance with UST requirements from 47 percent in 2008, before the federal credential and field citation pilot project went into effect; to 59.9 percent in 2009, the first year of the pilot project; to 75 percent in 2010, the second year; to 91 percent in 2014, after NNEPA had several years not only of conducting inspections on its

own but also of issuing federal field citations and, in one instance, conducting its own enforcement. These results clearly demonstrate the success of NNEPA's initiative. Indeed, they support the proposition that it may be best for tribes to pursue their own enforcement actions for all environmental programs. Conducting their own enforcement is not only likely to be more effective than enforcement by an off-site EPA region, it also provides tribes with more control over their environments, consistent with the principles of tribal sovereignty and self-determination that are articulated in EPA's Indian Policy and that are the cornerstones of tribal government and federal Indian law. 🌳