

Federal Statutory Opportunities for the Protection of the Yukon River Watershed in Alaska and the Yukon Territory

A Handbook of Domestic Statutory Strategies

PRELIMINARY EDITION
JULY 2005

Indian Law Resource Center

Federal Statutory Opportunities for the Protection of the Yukon River Watershed in Alaska and the Yukon Territory

A Handbook of Domestic Statutory Strategies

PRELIMINARY EDITION
JULY 2005

Prepared by the Indian Law Resource Center for use by the Yukon River Inter-Tribal Watershed Council and the Tribes and First Nations of the Yukon River watershed.

Presented at the Fifth Biennial Summit of the Tribes and First Nations of the Yukon River Watershed, August 8-11, 2005, Dawson City, Yukon Territory.

Indian Law Resource Center
602 North Ewing Street
Helena, Montana 59601 USA
406.449.2006
fax 206.449.2031
www.indianlaw.org
mt@indianlaw.org

The work of the Indian Law Resource Center in preparing this Handbook was funded primarily by the Educational Foundation of America.

Those sections of the Handbook addressing federal statutory laws of the Yukon Territory, Canada were researched and prepared by Brian L. MacDonald, Barrister & Solicitor, Whitehorse, Yukon, Canada, in coordination with the Indian Law Resource Center.

ACKNOWLEDGMENTS

I would like to thank the following people for their help in developing this preliminary handbook: Amanda Wilbur, Indian Law Resource Center Staff Attorney, Andrew I. Huff, former Indian Law Resource Center Staff Attorney, Theresa Glinksi, Indian Law Resource Center 2005 Sidley Fellow, and Erin Whalen, former Indian Law Resource Center Intern.

I would also like to thank Brian L. MacDonald, Barrister & Solicitor, for his help in developing the preliminary Canadian portion of this handbook.

Finally, I would like to thank Rob Rosenfeld, the entire staff of the Yukon River Inter-Tribal Watershed Council, and all of the signatory Tribes and First Nations of the Yukon River Inter-Tribal Watershed Council for their dedication to protecting the environmental integrity of the Yukon River watershed.

Thank you.

Lucy R. Simpson
Indian Law Resource Center

YUKON RIVER INTER-TRIBAL WATERSHED COUNCIL

50 Year Vision: To Be Able to Drink Water Directly from the Yukon River.

Mission Statement: We, the Indigenous Tribes/First Nations from the headwaters to the mouth of the Yukon River, having been placed here by our Creator, do hereby agree to initiate and continue the clean up and preservation of the Yukon River for the protection of our own and future generations of our Tribes/First Nations and for the continuation of our traditional Native way of life.

INDIAN LAW RESOURCE CENTER

CENTRO DE RECURSOS JURÍDICOS PARA LOS PUEBLOS INDÍGENAS

August 8, 2005

EXECUTIVE SUMMARY

The United States' Congress and Canadian Parliament, through their lawmaking powers, have each passed various laws, often called statutes, to deal with environmental and public health issues within their jurisdictions. These domestic statutes offer various levels of protection for the health and welfare of the Yukon River watershed and the people who live there. Although some of these laws do not have specific provisions for the participation of indigenous peoples, many of them do include opportunities for general involvement by the public. By understanding how these laws work, the Tribes and First Nations of the Yukon River watershed may be better able to engage in effective advocacy to clean up and protect the River and its tributaries. The Yukon River Inter-Tribal Watershed Council can play a vital role in this advocacy by providing the Tribes and First Nations of the Yukon River watershed with the opportunity to join forces to protect the integrity of the watershed.

This preliminary handbook is divided into two general sections. Part I addresses domestic statutory strategies of the United States and Part II addresses domestic statutory strategies of Canada. Within each part, this handbook can be further divided into six broad areas: (1) general environmental assessments; (2) salmon and subsistence rights; (3) rivers and drinking water; (4) solid waste; (5) contamination clean up; and (6) cultural resources. In discussing the statutes in each area, this handbook provides a general description of how the laws work and the opportunities the laws present for protecting the Yukon River watershed. Contact information is included for key organizations that may be of assistance in work relating to each subject.

Summarized below is the core information about each statute discussed in the handbook.

PART I- United States Domestic Statutory Strategies.

- The National Environmental Policy Act- The National Environmental Policy Act (NEPA) is a procedural law that sets out a framework for federal agencies to follow when making decisions about projects that may detrimentally affect the environment. The NEPA process requires agencies to conduct scientific and cultural studies to determine whether their actions will significantly affect the quality of the human environment. If there will be significant effects, the agency must ensure that these effects are made known to the public, that further studies are completed, that alternatives action are explored, and that anyone desiring to comment on the proposed action is given an opportunity to do so.
- The Endangered Species Act- The Endangered Species Act is a substantive law that protects species in danger of or threatened with extinction. It prohibits federal agencies,

state and local governments, and sometimes private citizens, from harming threatened and endangered species or their habitat.

- The Clean Water Act- The Clean Water Act is a substantive law that attempts to protect the chemical, physical and biological integrity of waters flowing in lakes, rivers and streams. It works by creating standards for the amount of pollution that can be released into such waters and setting minimum levels of water quality for these waters. The Act is enforced primarily through a permit system which governs how much pollution can be discharged into a particular water body.
- The Safe Drinking Water Act- The Safe Drinking Water Act is a substantive law that attempts to protect the public health by protecting our nation's drinking water, both at the tap and at the source. The Act monitors public water systems, including drinking water treatment systems and sewage/wastewater treatment systems, and sets federal minimum requirements that these systems must meet in order to operate. The Act also contains federal drinking water standards that set levels for the maximum amount of contaminants allowed to be present in drinking water.
- The Resource Conservation and Recovery Act- The Resource Conservation and Recovery Act is a substantive law that promotes the reduction or elimination of solid and hazardous waste generation at the source and encourages safe waste handling and recycling. The Act works by regulating three main areas of waste management: (1) solid waste; (2) hazardous waste; and (3) underground storage tanks that contain petroleum or other hazardous wastes.
- The Comprehensive Environmental Response, Compensation and Liability Act- The Comprehensive Environmental Response, Compensation and Liability Act is a substantive law that attempts to provide efficient mechanisms to clean up hazardous pollutants that threaten the public health. The Act authorizes the clean up of hazardous waste sites, creates a "superfund" to pay for the government's costs in cleaning up such sites, and creates a liability system to force the party responsible for the hazardous waste release to compensate the government for its costs.
- The National Historic Preservation Act, the Archaeological Resources Protection Act, and the Native American Graves Protection and Repatriation Act- The National Historic Preservation Act protects properties with historic significance, including places with religious or cultural significance for Indian tribes. The Archaeological Resources Protection Act protects archeological resources on public and Indian lands from uncontrolled excavations and commercial development. The Native American Graves Protection and Repatriation Act protects Indian graves and associated cultural objects.

PART II- Canadian Domestic Statutory Strategies.

- Summary information regarding the Canadian domestic statutes discussed herein will be forthcoming in the final edition of this handbook.

Conclusion

The governments of the United States and Canada have enacted various domestic statutes that affect your efforts at protecting the Yukon River watershed. The more familiar you become with the various domestic statutory laws available, the more you will be able to take advantage of the strategies they make available. The Indian Law Resource Center offers this preliminary handbook to the Tribes and First Nations of the Yukon River watershed in the hope that the domestic procedures summarized may help you in your ongoing work to protect the watershed for future generations. A final edition of this handbook will be available in Fall 2005.

PART I

United States Domestic Statutory Strategies

TRIBAL GOVERNMENTAL POWERS IN ALASKA

The status of Alaska Native tribes is quite different from the status of other federally recognized Indian tribes in the United States due to the unique system imposed by the Alaska Native Claims Settlement Act (ANSCA), 43 U.S.C. §§ 1601-1629h. ANSCA was enacted by Congress in 1971 to settle Alaska Native claims to their aboriginal lands. It did this by providing for Alaska Native village and regional corporations under state law and setting aside 44 million acres for these native corporations, with Alaska Native individuals set up as the original shareholders of these corporations.

Despite the fact that ANSCA attempted to bring closure to the Native land situation in Alaska, it left open the question of whether the land set aside for Alaska Natives under the Act is considered “Indian country.”¹ This question was answered by the United States Supreme Court in 1998 when it decided Alaska v. Native Village of Venetie Tribal Government.² There, the village corporation of Venetie transferred its land to the Venetie tribal government, which attempted to assert jurisdiction over the land as Indian country. The Court held that ANSCA land, including the land transferred by the Venetie village corporation to the tribal government, is not Indian country, even when it is owned in fee by a tribe. As a result, tribal governments owning ANSCA land have been limited in their ability to exercise jurisdiction over certain activities occurring on the land.³

Although ANSCA fee land does not qualify as Indian country, no court has definitively ruled on whether individual Alaska Native allotments, which are held in trust, qualify as Indian country. Even though trust allotments are a small amount of land compared to ANSCA holdings, they may provide an opening for Indian country to still exist in Alaska. It therefore remains a possibility that tribes could acquire such trust allotments as Indian country and tribal jurisdiction would apply.

¹ Indian country is defined as all lands within the limits of an Indian reservation, held in trust by the federal government, all dependent Indian communities, even if located outside a reservation, and all trust and restricted allotments of land located outside an Indian reservation. See 18 U.S.C. § 1151; see also Stephen L. Prevar, The Rights of Indians and Tribes: The Authoritative ACLU Guide to Indian and Tribal Rights 22-23 (3d ed. 2002).

² 522 U.S. 520 (1998).

³ It is important to note that even with the existence of Indian country in Alaska, P.L. 280 gives the state of Alaska general jurisdiction to adjudicate causes of action in Indian country.

In addition to the possibility that individual Native allotments may qualify as Indian country, there is one Executive Order Indian Reservation in Alaska with clear Indian country status, the Metlakatla Indian Reservation. Where Indian country status exists, tribal jurisdiction over the land also exists.⁴ Nonetheless, even without Indian country, Alaska Native tribal governments still possess those sovereign governmental powers that do not require a land base, such as the power to determine tribal membership, regulate tribal domestic relations, and punish tribal members for violating tribal law.⁵

The near lack of Indian country in Alaska and the limited ability of Alaska Native tribes to assert jurisdiction over their fee land creates a significant barrier to Alaska Native tribes' ability to take advantage of environmental regulatory opportunities that are available to other Indian tribes. Certain federal environmental statutes, such as the Clean Water Act and the Safe Drinking Water Act, include provisions allowing tribes to apply for and receive "treatment as a state" (TAS) status.⁶ For example, under the Clean Water Act's TAS provisions, tribes can be treated as states for the purpose of implementing their own water quality programs.⁷ As such, tribes that have TAS status can require upstream polluters to comply with their tribal water quality standards, even where such standards are more stringent than the state standards.⁸

However, in order to qualify for treatment as a state, tribes must meet: (1) be federally recognized; (2) have a governing body capable of carrying out substantial duties and powers; (3) have jurisdiction over the area or resources proposed for regulation; and (4) be capable of carrying out the regulatory functions consistent with the Clean Water Act. The requirement of regulatory jurisdiction over the land or resources makes TAS status unlikely for most Alaska Native tribes.

Clearly, landless tribes face numerous hurdles when it comes to asserting territorial jurisdiction over their lands. However, Native village corporations can transfer land to a tribe. When that happens, the tribe can become a land manager with tribal governmental powers, including the ability to regulate harvests among tribal members for conservation purposes, where the tribal regulations are more strict than existing laws, and receive grants to fund these activities.⁹ Nonetheless, it remains particularly important for Alaska Native tribes to familiarize themselves with existing federal environmental protection mechanisms, and corresponding state programs, and how to use these domestic strategies to protect the environment and clean up the Yukon River watershed.

⁴ Brian Hirsch, Consultant, Yukon River Inter-Tribal Watershed Council.

⁵ Prevar, *supra* note 1, at 303.

⁶ See 33 U.S.C. § 1377(e) regarding the Clean Water Act; see also 42 U.S.C. § 300j-11(a)(1) regarding the Safe Drinking Water Act.

⁷ See *id.*

⁸ See *City of Albuquerque v. Browner*, 97 F.3d 415 (10th Cir. 1996), *cert. denied*, 522 U.S. 965 (1997).

⁹ Brian Hirsch, Consultant, Yukon River Inter-Tribal Watershed Council.

INCREASING TRIBAL PARTICIPATION: THE NATIONAL ENVIRONMENTAL POLICY ACT AND OTHER LAWS

Because Alaska has such a large federal land base and is so rich in natural resources, particularly oil and gas and other minerals, the federal government is often at the center of decision-making regarding natural resource development in the state. Due to the continued prominence of the subsistence lifestyle for many Alaska Native tribes, it is important that these tribal communities participate in this decision-making process in order to protect their interests in a clean and healthy environment.

The National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 et seq., is the primary statute addressing the federal decision-making process for actions affecting the environment. It was enacted by Congress in 1969 in response to growing concern about unchecked industrial development and its negative effects on the environment. The purpose of NEPA is to develop a national policy to encourage a harmonious relationship between humans and their environment. NEPA does this by providing a framework for federal agencies to follow when making decisions about projects that may detrimentally affect the environment.

How NEPA Works¹⁰

In general, NEPA outlines a decision-making process for federal agencies to follow when either undertaking certain action themselves or when considering whether to allow others to take certain actions. This process requires agencies to conduct scientific and cultural studies to determine whether their proposed actions will significantly affect the quality of the human environment. If there will be a significant effect, the agency must ensure that these effects are made known to the public, that further studies are completed, that alternatives action are explored, and that anyone desiring to comment on the proposed action is given an opportunity to do so.

It is important to realize that NEPA focuses on procedure, not substance. As such, it governs how decisions affecting the environment should be made, not what the end decision will be. Because NEPA is a procedural statute, it is important that tribes learn to integrate substantive federal laws, rules and policies into the NEPA process. This is perhaps the best way for tribes to push past being simply notified of proposed actions to becoming true participants in the decision-making process.

¹⁰ In addition to using the NEPA and the implementing CEQ regulations, 40 C.F.R. § 1500 et seq., this chapter relies heavily on the information contained in Participating in the National Environmental Policy Act, Developing a Tribal Environmental Policy Act: A Comprehensive Guide for American Indian and Alaska Native Communities (Tulalip Guide), Gillian Mittelstaedt, Dean Suagee, and Libby Halpin Nelson and the Tulalip Tribes of Washington (October 2000).

The federal office charged with general oversight of the NEPA process is the Council on Environmental Quality (CEQ). The CEQ develops the regulations that implement NEPA. However, it is important to note that each federal agency also has its own procedures for implementing NEPA.¹¹

Environmental Assessments¹²

The NEPA decision-making process applies only to major federal actions undertaken or authorized by federal agencies. Once a federal action is proposed, the first step in the NEPA process is for the agency to complete an Environmental Assessment (EA). Environmental Assessments are supposed to be short documents that examine whether a more in-depth study of environmental impacts is necessary.

If, after completion of an EA, the agency makes a determination that the proposed action will have no significant impact on the environment, it will issue a “finding of no significant impact” (FONSI), meaning no further study will occur. If the agency finds that the proposed action will result in a significant impact on the environment, it must then prepare an Environmental Impact Statement.

Environmental Impact Statements

At the beginning of the Environmental Impact Statement (EIS) process, the agency proposing the action is required to invite affected federal, state, and local agencies and affected Indian tribes to participate in the “scoping process.”¹³ This is the process to determine what physical area will be affected by the project and what specific issues related to the proposed action, as well as any alternatives, should be addressed in the EIS.

As a part of the scoping process, the lead agency may be required to consult with other agencies, including Indian tribes, that have “special expertise” relating to the proposed action.¹⁴ Scoping generally occurs through a series of meetings between the affected entities.

Based on the issues raised during the scoping process, the agency prepares a draft EIS and circulates it to the public for review and comment. After the close of the comment period, the agency will prepare a final EIS. The final EIS should address relevant concerns raised during the comment period. The final EIS should also include a discussion of alternatives to the proposed action and the environmental consequences of the action.¹⁵

¹¹ The CEQ website has links to the various agency-specific NEPA procedures. See <http://ceq.eh.doe.gov/nepa/nepanet.htm>

¹² See Tulalip Guide, Ch. 3, at 40-50.

¹³ See *id.* § 4.2, at 57; see also 40 C.F.R. § 1501.7(a)(1).

¹⁴ See *id.* § 4.2E, at 66.

¹⁵ See *id.* § 4.3D, at 70; see also 42 U.S.C. § 4332(c)(1)-(v).

Following the issuance of the final EIS, the agency will make its decision to either proceed with the proposed action or to halt further progress. The agency's decision must be documented in a public Record of Decision (ROD). Other agencies and private parties can use the ROD to compel compliance with any mitigation measures included.¹⁶

Challenging a NEPA Decision or Action

In general, any individual, tribe or other organization adversely affected by an agency's action or inaction can appeal a written decision by the agency, including a ROD, as well as a failure by the agency to act on a request for a decision. Each federal agency has its own regulations governing administrative appeals.¹⁷

Once a tribe has exhausted its administrative remedies, meaning it has already completed the entire administrative appeals process of the agency making the decision, it may appeal the decision in federal court.¹⁸ However, the courts will generally rule in favor of the agency if it can show that it followed NEPA's procedural requirements – that it took a “hard look” at the environmental issues raised by the action.¹⁹ In order for an appeal to be filed in federal court, the tribe must meet the following requirements:

- **Final Agency Action.** Tribes may only challenge a final agency action for which there is no other administrative remedy.²⁰ CEQ regulations further state that judicial review should not be available until one of three types of events has occurred: (1) the agency has made a final FONSI; (2) the agency has filed a final EIS; or (3) the agency “takes action that will result in irreparable injury.”²¹
- **Standing.** The tribe must have “standing” to sue in federal court. To establish standing, the tribe has the burden of proving: (1) it has suffered, or is threatened by, an injury in fact, generally a detrimental impact on an Indian owned resource; (2) the injury can be traced to the proposed federal action; and (3) the injury can be redressed by the court.²²
- **Statute of Limitations.** The tribe must act within the time period set by the statute, called the statute of limitations. For NEPA, the statute of limitation is six years.

¹⁶ See id. § 4.5A, at 80.

¹⁷ See Administrative Procedure Act, 5 U.S.C. §§ 701-706.

¹⁸ See id. § 7.3C, at 169.

¹⁹ See Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 368 (1989); Cabinet Mountains v. Peterson, 685 F.2d 678, 682 (D.C. Cir. 1982).

²⁰ See Administrative Procedure Act, 5 U.S.C. § 704.

²¹ See Tulalip Guide, § 7.3B, at 167; see also 40 C.F.R. § 1500.3.

²² See id.; see also Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 472 (1982); Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992).

However, this time period can vary depending on what other substantive law is involved in the case. The statute of limitation begins to run whenever the agency action becomes final.

Opportunities to Use NEPA to Improve Tribal Participation

There are many opportunities for tribal involvement throughout the various stages of the NEPA process. This section outlines some of the strategies Alaska Native tribes can use to protect their interests at each stage of the process. Whether or not a tribe wishes to use any of these strategies will depend on its priorities and the resources it has available.

General Recommendations for Increased Tribal Participation

It is important for tribes to cultivate good working relationships with the federal agency(ies) it deals with most often and to become familiar with the agency's NEPA procedures. This allows the tribe to get involved in the NEPA process as early as possible. It also enables a tribe to receive early notice of pending actions and draft copies of EAs and other decisions.

If federal agencies see tribes as actively involved, educated in their rights, and willing to protect them, they will be more willing to involve the tribes at the outset to avoid disputes down the road.

In addition, if possible, tribes should collaborate with each other or use existing collaborations to pool time and resources. This may allow them to prepare their own documents along with a lead agency, to serve as a “co-lead agency” or “cooperating agency,” or to prepare a record of challenges and alternatives to proposed agency actions.

These documents (especially any work on subsistence patterns or cultural resources of a tribe) can then be updated to serve as future resources when other federal actions are proposed.

Finally, there are many other laws that, when combined with NEPA, can strengthen the tribe's position. Some of these will be discussed in other chapters. It is important to remember that the general recommendations outlined above also apply when dealing with these other, substantive laws.

NEPA Specific Strategies for Increased Tribal Participation²³

In addition to the general recommendations above, NEPA provides numerous specific opportunities for tribes to get involved in the decision making process.

- **During the Preparation and Evaluation of the EA.** This is the stage where an agency decides whether the environmental impacts of a proposed project are significant enough to warrant the preparation of an EIS. Most actions are analyzed at this level only, so it is critical that tribes be involved here if nowhere else. Through their involvement at this level, tribes can prevent serious environmental and cultural issues from slipping through the cracks by providing information and possibly by helping to prepare the EA.

²³ See id. § 11.3, at 307-334.

Furthermore, once an agency issues a FONSI, tribes can dispute the finding by attempting to show that the EA did not consider certain “significant” environmental impacts or relevant mitigation efforts that would help alleviate some of the environmental impacts.

- **During the EIS Scoping Process.** As mentioned earlier, scoping sets the agenda for what the EIS should consider and how. It is critical that tribes be involved in this process, because if they want a particular issue to be addressed in the EIS, it usually must be raised during scoping.²⁴ In order to have effective tribal participation at the scoping meetings, tribes should do their best to make sure the lead agency is aware of resource, business, travel, and cultural issues affecting when and how tribal members will be able to participate in meetings. Tribes should also ensure that native language translation is provided and that the oral contributions of tribal members are recorded.
- **During the Consultation Phase.** CEQ regulations require that an EIS be prepared with analyses conducted to “comply with the requirements of other environmental review laws and executive orders.”²⁵ This is a key opportunity for tribal involvement, because tribes must be consulted when they have “special expertise” relating to a law that the agency must consider in its EIS. This could be an environmental law or it could be a law relating to cultural resource protection. As part of such consultation, the tribe may prepare additional studies and analyses.
- **During the Researching and Drafting of the EIS.** This can be a time-consuming and costly process, but can be very effective in putting tribal issues on the table. One way to minimize costs and maximize returns is for tribes to collaborate when they all may be affected by one proposed action. Furthermore, tribes can participate by applying to be a “co-lead” agency or a “cooperating” agency.²⁶ “Co-lead” agency status provides a tribe with responsibility over research and study preparation.²⁷ “Cooperating” agency status provides a tribe with the opportunity for involvement without the extensive responsibilities of acting as “co-lead.”²⁸ It is important to be aware that such “co-lead” or “cooperating” agency status may affect a tribe’s ability to bring later challenges in court.
- **During the Comment Phase.** Agencies usually send a copy of the draft EIS to interested parties. If the tribe has available resources to evaluate the EIS, it should do so and make comments on the draft to ensure any faults, mistakes or omissions are formally noted. Individual tribes, or the Watershed Council on behalf of all signatory tribes, may pool resources and cooperate to evaluate the draft EIS.

²⁴ See *id.* § 4.2A, at 58.

²⁵ *Id.* § 4.2E, at 66-67; see also 40 C.F.R. § 1502.25.

²⁶ A tribe can request that the lead agency provide funding to enable them to participate as such. See Tulalip Guide, § 11.3E, at 333; see also 40 C.F.R. § 1501.6.

²⁷ See *id.* § 5.1A-B, at 87-90; see also 40 C.F.R. § 1502.5(b).

²⁸ See *id.* § 5.2A, at 91; see also 40 C.F.R. § 1508.5.

- **After a Record of Decision (ROD) has been published.** As mentioned earlier, a ROD can be used to compel compliance with or execution of the mitigation measures identified therein. The lead agency is responsible for implementing those measures. If a tribe has proposed mitigation measures that are incorporated into the ROD, it can ask the lead agency to keep it informed regarding the progress of such mitigation measures. If the tribe makes this request, the lead agency is compelled to make responsive reports.

Other Relevant Laws and Policies

Following is a non-exclusive list of other, substantive laws and policies that can be used together to supplement NEPA and provide for even further tribal involvement and environmental protection.²⁹

- **Clean Air Act Amendments of 1970**, 42 U.S.C. § 7401 et seq. This Act attempts to protect and enhance the quality of the nation's air in order to promote the public health. It does this by initiating a national air emissions program. States and Indian tribes approved for treatment as a state status can apply for authority to develop their own air emissions programs provided their standards are as strict or stricter than the federal standards.
- **Emergency Planning and Community Right-to-Know Act of 1986**, 42 U.S.C. § 11001 et seq. This Act encourages contingency planning to deal with emergency chemical accidents and spills and provides local governments and the public with necessary information about possible hazards.
- **Federal Insecticide, Fungicide, and Rodenticide Act of 1947**, 7 U.S.C. § 136 et seq. This Act gives the Department of Agriculture authority to regulate the development, manufacture, sale, and application of pesticides to avoid unreasonable adverse affects on the environment or unreasonable hazard to the survival of an endangered or threatened species.
- **Federal Land Policy and Management Act of 1976 (FLPMA)**, 43 U.S.C. §§ 1701-1784. This Act creates a uniform management scheme for public lands. Under FLPMA, the Bureau of Land Management is responsible for managing oil and gas development and mining on public lands using a multiple use strategy, taking into account the need for commercial activities, public recreation and conservation of public lands. It is often invoked in relation to mining on public lands. The most environmentally relevant aspect of FLPMA is section 1732(b), which states that in managing public lands, the Secretary "shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands."
- **Marine Mammal Protection Act of 1972**, 16 U.S.C. §§ 1361-1407. This Act

²⁹ Note that the Endangered Species Act, the Clean Water Act, the Safe Drinking Water Act, the Resources Conservation and Recovery Act, the Comprehensive Environmental Response, Compensation, and Liability Act, the National Historic Preservation Act, the Archaeological Resources Protection Act, and the Native American Graves Protection and Repatriation Act will be discussed in detail in further sections of this handbook.

recognizes that certain marine mammals are or may be in danger of extinction and establishes a policy that they should be protected and managed to maintain the health and stability of the marine ecosystem.

- **National Forest Management Act of 1976**, 16 U.S.C. § 1600 et seq. This Act provides public participation in forest planning and management, and although it allows logging, it recognizes the need to protect the quality of soil, water, and air resources.
- **Outer Continental Shelf Lands Act of 1953**, 43 U.S.C. § 1332 et seq. Under the Act, the Secretary of the Interior is responsible for the administration of mineral and oil and gas exploration and development of the outer continental shelf, which is defined as all submerged lands seaward of state coastal waters (3 miles offshore) which are under the United States' jurisdiction. The Act provides that states and their local governments must be consulted in the management of the outer continental shelf under the jurisdiction of the United States.
- **Pollution Prevention Act of 1990**, 42 U.S.C. § 13101 et seq. This Act declares it to be the policy of the United States that pollution should be prevented or reduced whenever feasible and if it cannot be prevented it should be recycled in an environmentally safe manner. The disposal or other release of pollution into the environment should be employed only as a last resort.
- **Rivers and Harbors Act of 1899**, 33 U.S.C. § 403 et seq. This Act prohibits the building of structures in any port, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, unless authorized by the Secretary of the Army. The Act also prohibits filling, excavating, or modifying the course or condition of any port, harbor, canal, lake, or channel of any navigable water of the United States.
- **Toxic Substances Control Act**, 15 U.S.C. § 2601 et seq. This Act requires the EPA to test and regulate all chemicals produced or imported into the United States.
- **Wild and Scenic Rivers Act of 1968**, 16 U.S.C. §§ 1271-1287. This Act serves to protect free-flowing rivers that have "outstanding remarkable scenic, recreation, geologic, fish and wildlife, historic, cultural and other similar values."
- **Wilderness Act of 1964**, 16 U.S.C. §§ 1131-1136. This Act declares it to be American policy to secure wilderness areas, meaning undeveloped federal land retaining its wild character, for preservation and protection in their natural condition. It creates a National Wilderness Preservation System to be composed of federally owned areas designated by Congress as "wilderness areas."

Other Federal Policies and Executive Orders

Although Executive Orders are harder to enforce than statutes, because they are not passed by Congress, they are a recognition of important national policies issued by the United States President.

- **Executive Order 12898, “Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations”** (1994).³⁰ This Order calls on every federal agency to “analyze the environmental effects, including human health, economic, and social effects of federal actions, including effects on minority communities and low-income communities, when such analysis is required by the National Environmental Policy Act.” It also calls for the development of agency-specific environmental justice strategies and the collection and analysis of patterns of subsistence consumption of fish, vegetation, or wildlife. Further, it attempts to ensure effective public participation and access to information, including translation, and accessible public documents and hearings. In 1997, the CEQ issued guidelines to ensure compliance with the Executive Order. These guidelines stress tribal participation in a manner that is consistent with the government-to-government relationship between the United States and tribal governments.
- **Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments”** (2000). This Order requires the federal government to consult with Indian tribes when undertaking to formulate or implement policies that have tribal implications. It requires each agency to develop an accountable process to ensure meaningful and timely input by tribal officials.
- **Executive Order 13007, “Indian Sacred Sites”** (1996). This Order requires federal agencies to avoid negatively affecting the physical integrity of sites sacred to Indian people.
- **Executive Memorandum 13084, “Government-to-Government Relations with Native American Tribal Governments”**(1994).³¹ This Memorandum sets out principles federal agencies are to follow in their interactions with tribal governments in order to ensure that the federal government operates in a government-to-government relationship with federally recognized tribes.

Possible Sources for Further Information:

U.S. EPA, Alaska Field Office
222 West 7th Avenue #19
Anchorage, AK 99513
(907) 271-5083

U.S. EPA, Region 10
1200 6th Avenue
Seattle, WA 98101
(206) 553-1200

U.S. EPA
Office of Federal Activities
Washington, D.C.
(202) 564-7127

U.S. EPA
American Indian Environmental Office
Washington, D.C.

³⁰ See *id.* § 6.1C, at 115-125.

³¹ See *id.* § 6.1F, at 131.

(202) 260-1489
U.S. Department of Justice
Office of Tribal Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530
(202) 514-8812

U.S. Department of Justice
Environment & Natural Resources
Division
Indian Resources Section
Patrick Henry Building
601 D Street, NW
Washington, D.C. 20004
(202) 353-8596

U.S. Council on Environmental Quality
Washington D.C.
(202) 395-5750

U.S. Department of the Interior
Office of the Solicitor
Division of Indian Affairs
1849 C Street, NW
Washington, D.C. 20240
(202) 208-4361

NEPA Coordinator
BIA Juneau Area Office
P.O. Box 25520
Juneau, AK 99802
(800) 645-8397

PROTECTING THE SUBSISTENCE WAY OF LIFE: THE ENDANGERED SPECIES ACT AND OTHER LAWS

In Alaska, subsistence hunting and fishing remains an integral part of Native life. The continuation of this way of life relies in large part on the biological health of salmon and other species. In order to protect these species, as well as the health of the watershed ecosystem overall, it is vital that Alaska Natives be aware of the various legal mechanisms available to them.

The Endangered Species Act, 16 U.S.C. § 1541 et seq., is the primary statute that requires the government to protect wildlife, fish, and plant species from extinction. The Endangered Species Act (ESA) was passed by Congress in 1973 to halt the ongoing extinction of various species that are of “esthetic, ecological, educational, historical, recreational, scientific value to the Nation and its people” due to economic growth and development.³² It does this by prohibiting federal agencies, state and local governments, and in many instances, private citizens and landowners, from harming threatened and endangered species and their environment.

How the Endangered Species Act Works

As outlined in the previous chapter, the NEPA requires documentation of environmental risks, public participation in its process, and government openness. It does not, however, mandate a particular outcome once those procedural requirements have been met. The ESA, in contrast, contains substantive prohibitions through which a court may actually halt a specific development project if the project is found to threaten a particular species. In addition, the ESA authorizes federal agency enforcement of its provisions and imposes civil and criminal penalties for violations.³³ The ESA also authorizes citizen suits, that is, it allows individuals and groups to go to court to enforce compliance and recover attorney fees and costs.³⁴ Combined, the NEPA and the ESA can be a powerful tool for protecting the environment.

Federal Agency Action

³² 16 U.S.C. § 1531(a)(3).

³³ See *id.* at § 1540(a)-(b).

³⁴ See *id.* at § 1540 (g)(3)(A); (4).

The ESA requires all federal agencies to carry out programs to conserve endangered species.³⁵ It also requires federal agencies to consult with the Secretary of Interior (hereinafter “the Secretary”) to ensure that any actions they carry out, fund, or authorize do not harm threatened or endangered species or their critical habitats, meaning the ecosystem that is critical to the species’ continued existence.³⁶ It is important to note that this prohibition applies not only to the actions of federal agencies but also to the actions they authorize. This means that it applies to permits they issue to private citizens and businesses to implement projects.

There are two important exemptions to this prohibition. In 1978, Congress created the “Endangered Species Committee.” This Committee is made up of the Secretaries of Army, Agriculture, and Interior, the Administrators of the National Oceanic and Atmospheric Administration and the Environmental Protection Agency, and the Chairman of the Council of Economic Advisors.³⁷ The Committee may grant an exemption, allowing the possible extinction of a species, if it determines that:

- There are no reasonable and prudent alternatives to agency action;
- The benefits of the action outweigh the benefits of alternative courses of action, and the action is in the public interest;
- The action is of regional or national significance; and
- Neither the agency nor the applicant has made irreversible or irretrievable commitments of resources to the project.³⁸

The Committee must also establish “reasonable mitigation measures” which are necessary to minimize the adverse effects on the threatened or endangered species and its critical habitat.³⁹ These measures can include live propagation, transplantation, and habitat acquisition and improvement.⁴⁰ In addition, the Secretary may authorize agency actions that:

- Offer reasonable and prudent alternatives that ensure endangered species will not be harmed; and

³⁵ See id. at § 1536 (a)(1). Note that under previous versions of the statute, this provision was numbered “Section 7,” which is how many people still refer to it.

³⁶ See id. at § 1536 (a)(2).

³⁷ See id. at § 1536 (e)(3).

³⁸ See id. at § 1536 (h)(1)(A)(i)-(iv).

³⁹ See id. at § 1536(h)(1)(B).

⁴⁰ See id.

- Constitute incidental takes that will not result in the extinguishment of the species or the destruction of its habitat.⁴¹ An incidental take is a take or killing of a species, where the take was accidental to, and not the purpose of, an otherwise lawful activity. Incidental takes require a permit issued by the Secretary who must provide the federal agency and permit applicant with a written statement that specifies the impact of the incidental take, sets forth “reasonable and prudent measures” necessary to minimize the impact, and sets terms and conditions for implementing the required measures, including reporting requirements.⁴²

Private Individuals and Private Lands

Not only does the ESA apply to action of federal agencies and the projects they permit, but it also includes specific provisions that apply to private individuals and private lands. For example, the ESA prohibits any person from importing or exporting, possessing, selling, or transporting any endangered species.⁴³ This provision helps to conserve endangered species worldwide by closing down the U.S. market for products such as ivory.

The No Take Rule

The ESA also prohibits any person, including private individuals, from “taking” any endangered species within the U.S. and its territorial seas, or upon the high seas. Note that this prohibition applies to both privately and publicly owned lands. “Take” is defined broadly by the statute, as “harass, *harm*, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”⁴⁴ This prohibition is meaningful in part because of the way the Department of Interior defines “harm.” “Harm” is not limited to killing species, but also includes any disruption or destruction of their habitat that would interfere with critical behavioral patterns. These behavioral patterns include feeding, sheltering, and breeding.⁴⁵ The Secretary designates critical habitat for threatened and endangered species.⁴⁶

⁴¹ See *id.* at § 1536(b)(4).

⁴² See *id.* at § 1536(b)(4)(i)-(iv).

⁴³ See *id.* at § 1538 (a).

⁴⁴ See *id.* at § 1532(19) (*italics added*).

⁴⁵ 50 C.F.R. 17.3 (2004) defines harm as “an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.” This definition has been challenged in court, but has been upheld by the United States Supreme Court as reasonable. See *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, 515 U.S. 687 (1995). See also *Marbled Murrelet v. Babbitt*, 83 F.3d 1060 (1996) (future harm to habitat that will harm a species qualifies as a “take”); *Coho Salmon v. Pacific Lumber Co.*, 61 F.Supp.2d 1001 (1999) (habitat modification due to sedimentation of rivers – caused by timber harvesting on its banks – might qualify as a “take” so long as it is an imminent threat to coho salmon. No showing of a past harm to the species is necessarily required).

⁴⁶ See 16 U.S.C. § 1533(a)(3)(A)(i).

There are several important exemptions to the “no take” rule. First, Alaska Natives and non-Native permanent residents are exempted if the taking is for subsistence purposes.⁴⁷ “Subsistence” includes selling of fish and wildlife for Native consumption in Native villages and towns.⁴⁸ Alaska Natives may also use non-edible byproducts of species in authentic handicrafts and clothing.⁴⁹ When the Secretary determines that subsistence practices will have a negative impact on threatened or endangered species, however, the Secretary may regulate the taking of such species by Native and non-Native residents of Alaskan Native villages.⁵⁰ See, e.g., “Subsistence Management Regulations for Public Lands in Alaska,” which includes restrictions on many species of fish, including salmon.⁵¹

Second, the Secretary may permit a take for scientific or conservation purposes, so long as it is “incidental” to an otherwise lawful activity. The applicant is required to submit a species conservation plan to the Secretary that specifies the impact of the taking, the steps the applicant will take to minimize the impact, reasons why alternatives to the taking are not workable, and any additional measures the Secretary requires of the applicant.⁵²

Listing and Conservation

Under the ESA, the Secretary of Interior is responsible for listing species as endangered or threatened, removing them from the list when appropriate, designating critical habitat, issuing protective regulations, and developing and implementing recovery plans for listed species.⁵³ The Secretary of Commerce also conserves and manages some species.⁵⁴ The Secretary of Interior must obtain the Secretary of Commerce’s consent to remove those species from the list or change their status (e.g. from threatened to endangered).⁵⁵

⁴⁷ See id. at § 1539 (e).

⁴⁸ See id. at § 1539 (e)(3)(i).

⁴⁹ See 16 U.S.C. § 1539 (e)(1)(B).

⁵⁰ See id. at § 1539(e)(4).

⁵¹ See 36 C.F.R. § 242.1 (2005).

⁵² See 16 U.S.C. § 1539 (a)(2)(A)(i)-(iv).

⁵³ See id. at § 1533.

⁵⁴ For a summary of regulations regarding listing and federal management authority, see 50 C.F.R. § 402.01(b) (2005).

⁵⁵ See 16 U.S.C. § 1533 (a)(2)(C).

“Interested persons” may also petition to add or remove species from the list.⁵⁶ The Secretary must then determine whether a petition has presented enough substantial information to warrant the listing of the species.⁵⁷ Within a year after finding that a petition is warranted, the Secretary of Interior must find whether the action requested in the petition is warranted.⁵⁸ The Secretary then must publish the finding in the Federal Register.⁵⁹ If the petition is not granted, the petitioner may then challenge the Secretary’s finding in court.⁶⁰

Biological Assessment

Before an “irreversible or irretrievable commitment of resources” is made to a proposed action, the federal agency in charge of the action is required to ask the Secretary whether any species listed or proposed to be listed are present in the project area.⁶¹ If the Secretary finds such a species is present, the federal agency must conduct a biological assessment, to be completed within 180 days, to identify the species and its habitat.⁶² The biological assessment can be conducted as part of the NEPA process.⁶³ Private citizens and businesses whose projects are being permitted by a federal agency, who may apply to the Endangered Species Act Committee for an exemption, may also conduct a Biological Assessment, but it must be conducted under federal supervision.⁶⁴ If a biological assessment indicates that threatened or endangered species will be harmed by the action, the project cannot go forward.⁶⁵

Opportunities to Use the ESA to Protect Salmon and Subsistence Rights

The ESA can be used to protect species important to tribes and their traditional way of life, particularly when the Department of Interior is working in partnership with tribes to protect

⁵⁶ See id. at 1533(b)(3)(A).

⁵⁷ See 5 U.S.C. § 553(e); see also 16 U.S.C. § 1533 (B)(3)(A).

⁵⁸ See 16 U.S.C. § 1533 (b)(3)(A).

⁵⁹ See 16 U.S.C. § 1533 (b)(3)(B).

⁶⁰ See id. at § 1533(b)(3)(C)(ii).

⁶¹ See id. at § 1536 (d). This is to prevent agencies and private individuals and businesses from devoting large resources to doing a project in such a way as to make “reasonable and prudent alternatives” that would better protect the species at risk seem unreasonable or impossible.

⁶² See id. at § 1536 (c)(1).

⁶³ See id.

⁶⁴ See id. at § 1536 (c)(2).

⁶⁵ See Tennessee Valley Authority v. Hiram Hill, 437 U.S. 153 (1978). Although an exemption for the project in this case was pushed through Congress in a late-night amendment, this case is still good law.

trust resources.⁶⁶ Tribes and Native villages may also use the ESA to directly challenge federal agency actions, such as the failure to conduct a biological assessment, failure to conduct an adequate biological assessment, or the granting of an exemption by the Endangered Species Committee.

⁶⁶ See Carson-Truckee Water Conservation Dist. v. Clark, 741 F.2d 257 (9th Cir. 1984), cert. denied 470 U.S. 1083 (1985). The Secretary's decision to allocate water flows to preserve endangered fish living in the Pyramid Lake Paiute Tribe's reservation fishery was upheld under the ESA.

The ESA has also occasionally been used to challenge tribal hunting and fishing rights. While the U.S. Supreme Court has never held that the ESA applies to traditional hunting and fishing by tribal members, one lower court has.⁶⁷ However, as noted before, the ESA specifically exempts taking species for subsistence hunting and fishing and for use in making traditional clothing and crafts.

Other Ways to Protect Subsistence Rights

Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. § 1301 et seq.⁶⁸

This Act imposes restrictions on future leases, withdrawals, permits, etc. of public lands in Alaska. Under 16 U.S.C. § 3120, commonly referred to as section 810, of the Act, federal agencies must evaluate the effect of their action on Native subsistence and consider any alternatives to reduce or eliminate the need for action, prior to making any decision. Subsection (b) of 810 provides that if the agency has to prepare an EIS, it must include the findings from any notice and hearing in the EIS. Tribes can use section 810 to effectively integrate tribal cultural impacts into an EIS and increase the tribes' level of participation. If an agency does not comply with ANILCA in preparing its EIS, the EIS may be found inadequate.⁶⁹ Tribes should also work to have section 810 subsistence issues addressed in the earlier EA.

Coastal Zone Management Act, 16 U.S.C. § 1451 et seq.⁷⁰ Under this Act, any federal agency pursuing a development project in a coastal zone must ensure that the project is consistent with the state's management policies. The Alaska Coastal Management Program (ACMP) includes specific provisions, found at 6 AK ADC § 80.120(a)-(d), for identifying and protecting areas utilized for Alaska Native subsistence activities. Thus, the NEPA process for development projects in the Alaska coastal zone should include a finding that the proposed project is consistent with the ACMP subsistence protections. Because the Supreme Court has ruled that section 810 of ANILCA does not apply to the outer continental shelf, the subsistence provisions of the ACMP are a powerful tool for communities dependent on the coastal zone for subsistence.⁷¹

⁶⁷ See U.S. v. Dion, 476 U.S. 734 (1986). The Supreme Court upheld the criminal conviction of a Yankton Sioux tribal member for hunting eagles on the basis of the Bald Eagle Protection Act. A year later, a federal district court upheld a Seminole Indian's criminal conviction for hunting panther on the basis of the ESA. U.S. v. Billie, 667 F.Supp. 1485 (S.D. Fla. 1987).

⁶⁸ Information on how to use this Act to protect subsistence rights was compiled from the Tulalip Guide, § 11.3C at 314.

⁶⁹ E.g., City Of Tenakee Springs v. Clough, 915 F. 2d 1308 (9th Cir. 1990) (finding that an EIS did not adequately consider cumulative impacts on subsistence).

⁷⁰ Information on how to use this Act to protect subsistence rights was compiled from the Tulalip Guide, § 11.3C at 325.

⁷¹ See, Amoco Production Company v. Village of Gambell, Alaska et. al, 480 U.S. 531 (1987).

Possible Sources for Further Information:

Endangered Species Coordinator
U.S. Fish and Wildlife Service
1011 East Tudor Road MS 361
Anchorage, Alaska 99503
(907) 786-3925

Native American Liaison
U.S. Fish and Wildlife Service
1011 East Tudor Road
Anchorage, Alaska 99503-6199
(907) 786-3492

Assistant Regional Director
Fisheries and Ecological Services
U.S. Fish and Wildlife Service
1011 East Tudor Road, MS 361
Anchorage, Alaska 99503
(907) 786-3544

National Marine Fisheries Service
Alaska Region
P.O. Box 43
222 West 7th Avenue, Room 517
Anchorage, Alaska 99513-7577
(907) 271-5006

Alaska Department of Fish and Game
Division of Subsistence
1300 College Rd.
Fairbanks, AK 99701-1599
(907) 459-7320

Native American Fish and Wildlife Society
8333 Greenwood Blvd., Suite 250
Denver, CO 80221
(303) 466-1725

PROTECTING THE WATERSHED AND KEEPING IT CLEAN: THE CLEAN WATER ACT

The primary statute that addresses the protection of water flowing in lakes, rivers and streams is the Clean Water Act, 33 U.S.C. §§ 1251-1387. The Clean Water Act (CWA) was passed by Congress in 1972 to restore and maintain the chemical, physical and biological integrity of all navigable waters, meaning all surface waters of the United States.⁷² The Yukon River is considered a navigable river and is therefore regulated by the Clean Water Act. By understanding how the Clean Water Act works, individual signatory tribes, in coordination with the Watershed Council, can work to ensure that the Yukon River stays clean.

How the Clean Water Act Works⁷³

The Clean Water Act works by creating rules to govern the amount of pollution that can be released into navigable waters and setting minimum levels of water quality for these waters.

The Act applies only to surface waters and does not apply to ground water. The Act is enforced primarily through a permit system which governs how much pollution can be discharged into a particular water body.

The Clean Water Act includes provisions allowing the states to implement their own water quality standards, provided the state standards are as strict or stricter than the federally approved water quality standards, and to develop their own discharge permit system. In Alaska, the State Department of Environmental Conservation (ADEC) is responsible for setting and implementing its own water quality standards. However, the United States Environmental Protection Agency (EPA) remains responsible for issuing most discharge permits.

Water Quality Standards⁷⁴

ADEC has adopted minimum water quality standards for all navigable waters in Alaska.⁷⁵ At least once every three years, the state must hold hearings to consider revisions to these standards.⁷⁶ There are three main elements to the development of such water quality standards.

⁷² See 33 U.S.C. § 1362(7).

⁷³ In addition to using the CWA, the implementing regulations, 40 C.F.R. Part 121 et seq., and the Alaska state water quality criteria, 18 A.A.C. § 70 et seq., this chapter relies heavily on the information contained in The Clean Water Act: An Owner's Manual (CWA Manual), Don Elder, Gayle Killam, and Paul Koberstein and the River Network (1999).

⁷⁴ See 33 U.S.C. Ch. 26, Subch. III, §§ 1311-1330.

⁷⁵ See 18 AK ADC Ch.70 et seq.

⁷⁶ See 33 U.S.C. § 1313(c)(1).

- **Designating Uses.**⁷⁷ Prior to setting standards, the state must designate uses, both existing and desired, for each body of navigable water, at least one of which should be an “aquatic life” use.⁷⁸ Some examples of designated uses are: fish consumption, shellfish harvesting, drinking water supply, agriculture, aquatic life support, primary contact recreation (swimming) and secondary contact recreation (canoeing). At a minimum, the water quality standards must support all existing uses.
- **Setting Water Quality Criteria.**⁷⁹ The state is also responsible for setting relevant water quality criteria. Water quality criteria are descriptions of the chemical, physical, and biological conditions necessary to protect each designated use.⁸⁰ For waters with multiple use designations, the criteria must support the most sensitive use.⁸¹ For example, if a river is designated for swimming and drinking, the criteria must be strong enough that the water may be safely used for drinking.
- **Developing Anti-Degradation Policies.**⁸² The state must also develop an anti-degradation policy consistent with the EPA’s minimum considerations. The state’s policy must at a minimum protect and maintain all existing uses. It must also avoid, or hold to an absolute minimum, any lowering of the water quality that currently meets or exceeds standards. Finally, the policy must give the waters that are the most ecologically significant and recreationally popular, the strictest protection.⁸³

The Discharge Permit System⁸⁴

⁷⁷ See 18 AK ADC §§ 70.020(a), 70.050.

⁷⁸ See CWA Manual, at 52.

⁷⁹ See 18 AK ADC § 70.020(b).

⁸⁰ See CWA Manual, at 58.

⁸¹ See 18 AK ADC § 70.040(1); see also 40 C.F.R. § 131.11 (a) (1).

⁸² See 40 C.F.R. § 131.12; see also 18 AK ADC § 70.015.

⁸³ See CWA Manual, at 66-67.

⁸⁴ See, 33 U.S.C. Ch. 26, Subch. IV, §§ 1341-1346.

The Clean Water Act requires that all polluters apply for and receive a permit prior to discharging pollution from a “point source” into navigable waters. A “point source” is “any discernible, defined, and discrete conveyance” of pollutants into a water body.⁸⁵ This includes, but is not limited to, “any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, landfill leachate collection system, vessel or other floating craft from which pollutants are or may be discharged.”⁸⁶ A “nonpoint source” of pollution is any other source of water pollution, including storm water pollution, runoff from rain or snow, etc.⁸⁷

Permits set the limit for how much pollution a particular point source can discharge into a particular body of water. To comply, a permitted pollution source must keep the discharges within these limits. Permitted polluters must also monitor the quality of their discharges and submit Discharge Monitoring Reports (DMRs) to the EPA once a month.⁸⁸ Finally, the Clean Water Act requires that permits be reviewed and adjusted as necessary every five years.⁸⁹

The federal discharge program is called the National Pollutant Discharge Elimination System (NPDES). Although the Clean Water Act allows states to develop their own permit discharge system, in Alaska, the EPA retains the lead responsibility for developing and enforcing discharge permits.

Enforcement

Violations of the Clean Water Act can be punished in three ways.

- **Civil enforcement.** In Alaska, because the EPA maintains control over the NPDES program, the EPA is responsible for civil enforcement of permit violations. A violator can be fined up to \$25,000 for each day that the violation continues. The enforcement action can also: (1) require immediate actions to correct the violation; (2) order the facility operators to cease operations until the problems are fully addressed; (3) revoke the violator’s permit; or (4) refuse to renew the permit.⁹⁰
- **Criminal prosecution.** Criminal prosecution is generally reserved for severe violations. A major factor in determining whether criminal prosecution is appropriate is whether the

⁸⁵ 33 U.S.C. § 1362(14).

⁸⁶ Id.

⁸⁷ See CWA Manual, at 30-31.

⁸⁸ See id. at 35.

⁸⁹ See id. at 37.

⁹⁰ See CWA Manual, at 36; see also 33 U.S.C. § 1319 (b).

violation was committed intentionally and whether the violation resulted in damage to the environment. Criminal penalties can include fines and imprisonment.⁹¹

⁹¹ See id. at 36-37; see also 33 U.S.C. § 1319 (c).

- **Citizen or tribal suits.**⁹² Any person or entity, including an Alaska Native village or corporation, that is or may be adversely affected by a discharger's actions may bring a civil suit for violations of the Act. Actions may only be brought if the conditions of standing, notice and exhaustion of administrative remedies are met.⁹³

Opportunities to Use the CWA to Address Water Quality Issues

The Clean Water Act provides various opportunities for the Watershed Council and individual signatory tribes to address water quality issues in the Yukon River watershed. Following is a brief summary of some of the ways Alaska Native tribes can utilize the Clean Water Act to protect the environmental health of the Watershed.

During Development of Water Quality Standards

In order to argue for the highest possible water quality standards, tribes should provide information to the State on all the ways the public uses a particular water body (with photos, personal letters, news articles, etc.). Tribes should also periodically obtain a summary of discharge monitoring reports for the watershed basin and collect information about the water quality below point-source discharges.⁹⁴ In addition, Tribes should prepare comments for consideration by the State during its regular review of the water quality standards. In preparation for submitting useful comments, tribes should do the following:

- **Develop resource partnerships.** An excellent resource for water testing and water quality knowledge are college students and area universities. Tribes may be able to partner with a research project or a class to get the testing and scientific expertise they need to make comments.
- **Identify the critical water quality issues for the watershed.** These might include any existing uses not protected by designated uses and any outstanding high-quality or ecologically significant waters that need and deserve the highest anti-degradation protection.⁹⁵

During the NPDES Permitting Process

⁹² See *id.* at 37; see also 33 U.S.C. § 1365.

⁹³ For a further discussion of these requirements, see the chapter entitled "Increasing Tribal Participation: The National Environmental Policy Act and Other Laws" herein.

⁹⁴ See *id.* at 42, 48.

⁹⁵ See CWA Manual, at 77.

In general, tribes should be aware of how many types of permits have been developed and issued in the watershed and how the permits are being monitored and enforced.⁹⁶ Once a specific permit is drafted, tribes should examine the permit in detail. Although hearings are generally not scheduled for draft permits, it is important for tribes to prepare comments on draft permits for consideration by the State. Comments should stress alternative technologies that can be used to provide for less discharge and cleaner water.⁹⁷ In addition, tribes should encourage consideration of broader issues than simply just the concentration of pollutants in a water body, such as protecting endangered species, instream flows, wetlands, and riparian areas.⁹⁸ Essentially, tribes should comment on anything that concerns them during the brief (usually 30-day) comment period, even if they do not have the time or resources to immediately elaborate on the issue. This is important because if a tribe decides to appeal a permit decision to the EPA or in court, it can raise only those issues that were raised during the initial public comment period.⁹⁹

Involvement during the drafting phase is particularly important because it is difficult to change a final permit once it is issued. However, if a final permit is issued and it does not provide adequate safeguards, it is possible to request that the permit be considered for modification if: (1) there are significant alterations to the permitted facilities; (2) new information about the effects of the permitted discharge (including cumulative effects) has become available; or (3) the regulations upon which the permit was based have been changed or superseded.¹⁰⁰ If in the end a tribe is still not satisfied with the final permit, it can file an administrative appeal with the Environmental Appeals Board of the EPA.¹⁰¹ Even if a tribe is satisfied with the permit as issued, it should continue to monitor the river and report on any problems.

Reviewing the Anti-Degradation Policy¹⁰²

Tribes should request a copy of the anti-degradation policy for the Yukon River watershed from the State. After reviewing the anti-degradation policy, if any tribes have concerns they should put them in writing and discuss them with the State. Also, tribes should publicly

⁹⁶ See id. at 41, 48.

⁹⁷ See id.

⁹⁸ See id.

⁹⁹ See id. at 43.

¹⁰⁰ See id. at 44; see also 40 C.F.R. § 122.62 (a).

¹⁰¹ The Environmental Appeals Board is the final agency decision maker on administrative appeals under all major environmental statutes that the EPA administers. Procedures for appealing NPDES permits may be found at 40 C.F.R. §§ 124.19 and 124.21.

¹⁰² See id. at 68.

address any concerns at meetings on new or renewal permit applications and at the triennial water quality standard review.

Familiarity with Mixing Zones¹⁰³

¹⁰³ See id. at 71-72; see also 18 AK ADC §§ 70.240-270.

A mixing zone is an area of a water body where the water quality criteria have been waived to allow for dilution of pollution.¹⁰⁴ Tribes should find out whether there are any mixing zones in the watershed and argue for their phasing-out through meetings with state and federal officials, through writing campaigns, and at public meetings.

Reviewing the Impaired Waters List and TMDLs

Under the Clean Water Act, at 33 U.S.C. § 1315(b), the state develops a list of all impaired waters. Impaired waters are those bodies of water that are too polluted to meet the state's water quality standards after full implementation of existing permits.¹⁰⁵ Once a water body is listed as impaired, the state must develop a plan to solve the problem.¹⁰⁶

When developing its list of impaired waters, states are required to provide public notice and allow an opportunity for comment.¹⁰⁷ Tribes should take advantage of this opportunity to ensure that the impaired waters list includes all water bodies that have poor water quality. Tribes should also work to prevent third parties or the state from taking waters off the list too soon. Ideally, waters should stay on the impaired waters list until the desired level of water quality has been attained.¹⁰⁸

In addition to listing impaired waters, EPA regulations require listing threatened waters and developing plans for them also. "Threatened" waters are those waters expected to become impaired within the next two years if current watershed trends continue.¹⁰⁹ Tribes should ensure that waters in need of the "threatened" classification receive it by gathering information and presenting it to the state agency at hearings and/or through comments.

Protecting Wetlands

¹⁰⁴ See 18 AK ADC § 70.990(38).

¹⁰⁵ See CWA Manual, at 81; see also 33 U.S.C. § 1313(d).

¹⁰⁶ See id.

¹⁰⁷ See 40 C.F.R. §§ 130.7(b)(5)(iii) and 130.7(c)(1)(ii).

¹⁰⁸ See CWA Manual, at 87.

¹⁰⁹ See id. at 84.

The Clean Water Act provides that anyone who proposes an activity that would discharge dredged or fill material into wetlands of the United States is required to apply for a permit from the U.S. Army Corps of Engineers.¹¹⁰ The burden of proof is on the permit applicant to show that the destruction of any portion of a wetland is necessary to the project. Mitigation alternatives are therefore become a very important consideration. Mitigation can be accomplished by: (1) creation of new wetlands; (2) restoration of existing wetlands; (3) enhancement of an existing wetland; or (4) preserving a wetland.¹¹¹

Tribes can help to ensure that a permit is drafted so that a developer cannot proceed to the next stage of a project without completing required mitigation. In addition, tribes can request notice of pending permit applications from the Army Corps and comment on them during the public comment period.¹¹²

Using the State Certification Process to Reject Projects Endangering Water Quality Standards

The Clean Water Act requires that any applicant for a federal permit or license that may result in a discharge must first obtain certification from the state that the discharge will not violate state water quality standards.¹¹³ When a developer applies for certification, the state has the following four options: (1) certify the project if there will be no violations; (2) certify the project with conditions necessary to protect water quality (these conditions become part of the federal permit and are enforceable under the Act's citizen suit provisions); (3) deny certification if the discharge will violate state water quality standards; or (4) waive its certification authority if it fails or refuses to act on a request for certification within one year after receipt of such request.¹¹⁴ Tribes should request information on certifications involving their watershed and ask about opportunities for public comment and hearings.

Controlling Nonpoint Source Pollution

Even though nonpoint sources are not regulated by the NPDES permit system, they often serve as major pollution contributors. As such, the Clean Water Act has established a national program to control nonpoint sources of pollution.¹¹⁵ This program stresses a watershed-based approach and provides grant funding to states, tribes, and watershed councils that meet the EPA's requirements for a restoration plan.¹¹⁶ The Watershed

¹¹⁰ See 33 U.S.C. § 1344.

¹¹¹ See id. at 96-97.

¹¹² See id. at 100-101.

¹¹³ See 33 U.S.C. § 1341.

¹¹⁴ See id. at 90.

¹¹⁵ See 33 U.S.C. § 1329.

¹¹⁶ See id. at 103.

Council should monitor how Alaska uses its nonpoint source grant money and apply for funding where it meets all or most of the EPA's funding requirements.¹¹⁷

¹¹⁷ See id. at 106.

Monitoring State Revolving Funds¹¹⁸

The EPA gives grants to states for “state revolving funds” (SRFs) to provide low-interest loans for water quality improvement projects. States are given considerable freedom in using these funds and SRFs typically fund sewage treatment, nonpoint source pollution control, and estuary projects.¹¹⁹ The Watershed Council and individual signatory tribes can work to make sure these funds are directed to the development of projects with the highest priority. Tribes should examine the state’s annual SRF report, which shows how much money was spent on projects during the last year, and the annual Intended Use Plan, which indicates tentative priorities for future loans.¹²⁰

Cooperative Agreements

The Clean Water Act provides that Indian tribes and states can enter into cooperative agreements to jointly plan and administer the CWA.¹²¹ However, for purposes of such cooperative agreements, “Indian tribe” is defined as any federally recognized tribe exercising governmental authority over a federal Indian reservation. Because Alaska Native tribes do not have regulatory jurisdiction over their lands, this provision probably does not apply to Alaska Native tribes.

Possible Sources for Further Information:

U.S.	EPA,	Alaska	Field	Office	An
				22	ch
				2	ora
				We	ge,
				st	AK
				7 th	99
				Av	51
				en	3
				ue,	
				#1	
				9	
				(907) 271-5083	
				U.S. EPA, Region 10	
				1200 6 th Avenue	

¹¹⁸ See 33 U.S.C. Ch. 26, Subch. VI, §§ 1381-1387; see also 40 C.F.R. Ch. 1, Subch. B, Pt. 35K.

¹¹⁹ See CWA Manual, at 108.

¹²⁰ See *id.* at 111.

¹²¹ See 33 U.S.C. § 1377(d).

Seattle, WA 98101
(206) 553-1893

Division of Water
Alaska Dept. of Environmental
Conservation (ADEC)
555 Cordova Street
Anchorage, AK 99501
(907) 465-5180

Non-Point Source Water Pollution Control
ADEC
555 Cordova Street
Anchorage, AK 99501
(907) 269-7554
Wastewater Discharge Program,
ADEC410 Willoughby Avenue, Suite
303 Juneau, AK 99801-1795 (907) 465-
5308
Water Quality Standards Assessment &
Reporting Program, ADEC410 Willoughby
Avenue, Suite 303 Juneau, AK 99801-
1795
(907) 465-5185

KEEPING DRINKING WATER SAFE FROM CONTAMINATION: THE SAFE DRINKING WATER ACT

In Alaska, sewage, septic and wastewater disposal systems are common threats to drinking water quality. It is of utmost importance that the drinking water supply of village communities is protected from such contamination. In the United States, the primary statute that addresses the drinking water supply is the Safe Drinking Water Act, 42 U.S.C. § 300f et seq.. The Safe Drinking Water Act (SDWA) was adopted by Congress in 1974 to protect the public health by protecting our nation's drinking water, both at the tap and at the source. The Act regulates both ground and surface drinking water sources. By understanding how the Safe Drinking Water Act works, these Native villages, in coordination with the Watershed Council, can work to ensure that their drinking water supply remains clean and healthy.

How the Safe Drinking Water Act Works¹²²

The SDWA monitors public water systems, including village or tribal water systems, and sets federal minimum requirements that these systems must meet in order to operate.¹²³ States can apply to the EPA for the authority to implement the SDWA in their jurisdictions. They must show that they will adopt standards at least as stringent as the federal standards and will ensure water systems meet these standards.¹²⁴ In Alaska, the Drinking Water Protection Program, a subdivision of the Alaska Department of Environmental Conservation (ADEC), is authorized to ensure public water systems are in compliance with the state drinking water regulations.

Drinking Water Regulations

¹²² Information for this section was compiled from the SDWA and website material provided by the EPA and ADEC. See http://www.state.ak.us/dec/eh/dw/program_overview.htm for ADEC information. See <http://www.epa.gov/safewater/> for EPA information.

¹²³ See 42 U.S.C. § 300g-1.

¹²⁴ See *id.* at § 300g-2.

ADEC has adopted state drinking water regulations based on the minimum standards set forth in the National Primary Drinking Water Regulations. These regulations set the maximum contaminant levels (MCLs) for each identified contaminant that is allowed to be present in drinking water.¹²⁵ The contaminants regulated include both naturally-occurring and man-made pollutants such as bacteria and viruses (from septic systems), lead and copper, heavy metals like arsenic and cadmium, pesticides and herbicides, and other organic and synthetic contaminants. If it is not “feasible” to regulate a certain contaminant by setting an MCL, then the regulations specify required treatment procedures to prevent contamination.¹²⁶

The SDWA requires that drinking water regulations be reviewed and revised, as appropriate, at least every six years. However, downgrading of regulations is not permitted. Any revisions to the regulations adopted must maintain, or provide for greater, protection of the public health.¹²⁷

Source Water Assessments¹²⁸

Source water is the natural origin of drinking water. The SDWA requires states to create source water assessment plans to determine where source water may be vulnerable to contamination. In Alaska, source water assessments are conducted by ADEC. ADEC first identifies where a community’s water comes from and defines a protection area around the drinking water source. ADEC then identifies existing or potential contaminant sources found within the designated protection area. Based on the natural characteristics of the water source and the threats present, ADEC determines the vulnerability of the water source to contamination. ADEC then uses this information to develop locally relevant plans to protect drinking water sources.

Wellhead Protection Program¹²⁹

These local protection plans are developed through the state’s Wellhead Protection Program, implemented by ADEC. There are seven required elements to the state Wellhead Protection Program. It must: (1) specify the roles of state and local entities in developing and implementing local protection efforts; (2) determine the wellhead protection areas; (3) identify within each protection area all existing and potential contaminant sources; (4) describe a program to protect the water supply that includes technical

¹²⁵ See *id.* at § 300f(1)(C)(i).

¹²⁶ See *id.* at § 300f(1)(C)(ii).

¹²⁷ See *id.* at § 300g-1(b)(9).

¹²⁸ Information on Alaska’s Source Water Assessment Program is available at http://www.dec.state.ak.us/eh/docs/dw/DWP/Freq_ask_quest.pdf

¹²⁹ Information on Alaska’s Wellhead Protection Program is available at http://www.dec.state.ak.us/eh/dw/DWP/Wellhead_Resources.htm

assistance, financial assistance, education and training; (5) include contingency plans should the public water system become contaminated; (6) include a requirement that consideration be given to all potential contaminant sources within a protection area when developing a new well; and (7) encourage maximum public participation in the program development.

Underground Injection Control (UIC) Program¹³⁰

The SDWA includes provisions to monitor the underground injection of possible contaminants that might affect the water supply through the Underground Injection Control (UIC) program. Underground injection is the technology of placing fluids underground through wells or similar conveyance systems. Underground injection is often associated with oil and gas production,¹³¹ solution mining of minerals, and waste disposal systems that drain to leach fields or drainage wells.¹³² The UIC program is designed to provide safeguards so that injection wells do not endanger current and future underground sources of drinking water. The program does this by prohibiting underground injection without a permit and by setting minimum requirements for such injection.

The UIC program is administered by the EPA, except that oil and gas injection activities are regulated by the Alaska Oil and Gas Conservation Commission through a memorandum of agreement with the EPA.

Water System Operators¹³³

¹³⁰ See 42 U.S.C. § 300h. Information on the UIC Program is also available at <http://www.epa.gov/safewater/uic/whatis.html>

¹³¹ The SDWA provides that the state may not interfere with the injection of brine and other fluids essential to oil or gas recovery unless it is essential to ensure that drinking water will not be endangered. See 42 U.S.C. § 300h(b)(2).

¹³² Individual residential waste disposal systems that inject only sanitary waste and commercial waste disposal systems serving less than 20 people that inject only sanitary waste are not covered under the UIC program. See the UIC program website, *supra* note 9.

¹³³ The information for this section was taken from The Updated Plain English Guide to Alaska Drinking Water and Wastewater Regulations for Rural Utilities Serving 25 to 1,500 People (Plain Guide), Alaska Department of Community and Economic Development (June 2002). Copies of the guide can be downloaded from the ADCED website at <http://www.dced.state.ak.us/dca/ruba/pub/RevisedPEGuide.pdf>

The SDWA mandates that states have programs to certify water system operators and to ensure that new water systems have the technical, financial and managerial capacity to provide safe drinking water. Water system operators are required to abide by various testing requirements to ensure the system is functioning properly and to determine if the drinking water is within MCL levels.¹³⁴ Water system operators must also treat drinking water from the source prior to making such water available to a community at the tap. In some circumstances where certain contaminants are found to not be a threat to a particular water supply, ADEC has the authority to grant waivers.¹³⁵ In addition, if a water system is unable to meet an MCL, but the water is still considered safe, ADEC may grant a variance for the MCL.¹³⁶ Variances usually require public notice or are conditioned on the use of different treatment devices. Further, if a water system is unable to meet an MCL, but could if given time to address the problem, ADEC may grant an exemption to the MCL combined with a compliance schedule of usually no more than one year.¹³⁷ Again, exemptions usually require public notice.

Sewage/Wastewater Treatment

In addition to regulating drinking water treatment systems, ADEC governs sewage/wastewater treatment systems. The ADEC Wastewater Program governs sewage that is less than 5% solids and the ADEC Solid Waste Program governs the disposal of sewage that is greater than 5-10% solid.¹³⁸ It is important that sewage treatment issues be considered in conjunction with drinking water issues, because if sewage is not regulated properly it may result in contamination of a drinking water source. The main considerations affecting wastewater system operations are:

- **Separation Distances.**¹³⁹ Regulations require that septic tank and sewage lagoon wastewater systems be kept certain minimum distances away from drinking water sources, treatment, and piping systems.
- **Water Quality Standards.** Any discharge of wastewater into rivers is regulated under the Clean Water Act to maintain water quality levels for all surface water bodies as set by the state.
- **Permit Conditions.**¹⁴⁰ Wastewater systems must operate under the conditions set by their permits. Examples of permits that might be required are: (1) permits to discharge

¹³⁴ See id. at 56, 65, 71.

¹³⁵ See id. at 72.

¹³⁶ See id. at 75.

¹³⁷ See id.

¹³⁸ See id. at 137.

¹³⁹ See id. at 139.

wastewater into rivers, lakes, or the ocean; (2) permits to discharge wastewater into a percolating sewage lagoon (tundra pond); (3) permits to discharge sewage solids onto land; and (5) permits to burn sewage solids.

Public Information

¹⁴⁰ See id. at 132-135.

The SDWA recognizes that because everyone drinks water, everyone has the right to know what is in their water and where it comes from.¹⁴¹ Water systems regulated by the SDWA are required to provide the community with a brief water quality report called a Consumer Confidence Report (CCR).¹⁴² The report should provide information on the water source, levels of any detected contaminants, compliance with drinking water rules, notice of any violations, and other relevant educational material. The SDWA also requires that all water suppliers inform the public through public notices whenever there is a serious problem with the water quality.¹⁴³

Enforcement¹⁴⁴

Violations of the Safe Drinking Water Act can be punished in three ways.

- **Civil enforcement.** Because the State is authorized to implement the SDWA public water system requirements, ADEC has primary enforcement responsibility.¹⁴⁵ However, if the state fails to take any action on the violation, the EPA can commence a civil action against the violator, as authorized by section 300g-3(a). If found to be in violation of the Act, a violator can be required to take immediate actions to correct the violation, and can be fined up to \$25,000 for each day the violation continues.
- **Criminal prosecution.**¹⁴⁶ If a violation is found to be willful, in addition to civil penalties, a violator can be prosecuted criminally and sentenced to prison.
- **Citizen or tribal suits.**¹⁴⁷ Under the SDWA, any person or entity, including an Alaska Native village or corporation, that is or may be adversely affected by a SDWA violation may bring a citizen's suit against the EPA, a state agency, or a violator.

Opportunities to Use the SDWA to Address Drinking Water Protection Issues

The Safe Drinking Water Act provides various opportunities for the Watershed Council and individual signatory tribes to address drinking water protection issues within the Yukon River Watershed. One of the most important ways tribes can effectively utilize the SDWA is to cultivate a good working relationship with ADEC and the local public water system

¹⁴¹ See id. at 115; see also 42 U.S.C. § 300g-1(b)(3)(B).

¹⁴² See id. at 116; see also 42 U.S.C. § 300g-3(c)(4).

¹⁴³ See id. at 124, 125; see also 42 U.S.C. § 300g-3(c)(1).

¹⁴⁴ See 42 U.S.C. §§ 300g-3 and 300h-2.

¹⁴⁵ See id. at § 300g-2(a).

¹⁴⁶ See id. at § 300h-2(b)(2).

¹⁴⁷ See id. at § 300j-8.

operator. Following is a brief summary of some of the other ways tribes can utilize the Act to protect village drinking water sources and to ensure effective drinking water treatment.

During the Development of Drinking Water Regulations

The Watershed Council should determine when the last review of the state drinking water regulations occurred. If more than six years have passed since the last review of the state's regulations, the Council and tribes should prepare comments and request a hearing.

Tribes may be able to partner with university research projects or classes to get the testing and scientific expertise they need to make relevant comments.

During the Source Water Assessment Process

It is important that the Watershed Council and individual signatory tribes be involved in the source water assessment process, because it is the source water assessment that guides the state's groundwater and wellhead protection programs. Tribes should begin by collecting information about the location of their drinking water sources, as well as the surrounding areas, and share this information with ADEC to ensure that the protection area is accurately identified. Further, tribes should request and review a copy of all source water assessments for their areas. With this information, tribes can develop programs, in coordination with ADEC and their municipalities, to plan how to manage the identified contaminant sources and to prevent or minimize new threats.

During the Development of Local Wellhead Protection Programs

As previously discussed, the Wellhead Protection Program is intended to involve local communities in the development of locally relevant wellhead protection programs. In some circumstances, the village itself is the operator of the public water system. However, in circumstances where the village is not the public water system operator, the tribe should make sure that it is involved in the development of the local protection program to ensure the program addresses local needs.

During the Development of the UIC Program

The SDWA requires public hearings regarding the development of the UIC program. It also requires public hearings on the issuance of temporary permits for underground injection. Again, tribes should make sure that they take advantage of these opportunities to provide thoughtful comments, based on relevant data. In addition, tribes should request information from the EPA's UIC Program and the Alaska Oil and Gas Conservation Commission about how many underground injection permits have been developed and issued in the watershed, and how they are being monitored and enforced.

Monitoring State Revolving Funds

As discussed under the Clean Water Act section, the EPA gives grants to states for "state revolving funds" (SRFs) to provide low-interest loans for water quality improvement

projects, including water system infrastructure development. One and one-half percent (1.5%) of the money appropriated for SRFs can be used by the EPA to make grants to tribes and Alaskan Native villages that have not otherwise received money from the state or the EPA for infrastructure improvements.¹⁴⁸ The Watershed Council and individual signatory tribes can work to make sure these funds are directed to the development of projects of most importance to tribes.

Possible Sources for Further Information:

U.S. EPA, Alaska Field Office	(907)
222 West 7 th Avenue #19	262-
Anchorage, AK 99502	5210
(907)	
271-5083	Wasilla: (907) 376-5038
U.S. EPA, Region 10	Division of Water
1200 Sixth Avenue	Dept. of Environmental Conservation
Seattle, WA	(ADEC)
(206)	555 Cordova Street
	Anchorage, AK 99501
	(907) 465-5180
U.S. EPA	Alaska Department of Community and
UIC Program	Economic Development
401 M Street SW	Rural Utility Business Advisor Program
Washington, DC 20460	550 West 7 th Avenue, Suite 1640
ADEC Drinking Water Issues:	Anchorage, AK 99501
Anchorage: (907)	(907) 269-4569
269-7656	
Fairbanks:	
(907)	
451-	
2108	
Juneau:	Alaska Oil and Gas Conservation
(907)	Commission
465-	333 West 7 th Avenue, Suite 100
5350	Anchorage, AK 99501
	(907) 279-1433
Soldotna:	Alaska Native Tribal Health Consortium
	Department of Health and Engineering
	4141 Ambassador Drive
	Anchorage, AK 99508

¹⁴⁸ See id. at § 300j-12 (h) (i) (1).

(907) 729-1900

Alaska Training & Technical Assistance
1332 Seward Avenue
Sitka, AK 99835
(888) 750-3823

Alaska Water & Waste Management
Assoc.
3201 C Street, Suite 406
Anchorage, AK 99513-7588
(907) 561-9777

Rural Alaska Sanitation Coalition
4201 Tudor Centre Drive, Suite 105
Anchorage, AK 99508
(907) 743-6111

MANAGING SOLID WASTE: THE RESOURCE CONSERVATION AND RECOVERY ACT

Solid waste management has grown into a major national problem due to the huge amounts of waste generated each year in the United States. In remote areas like Alaska, however, the problem is not so much the amounts of waste generated, but the limited infrastructure in place to deal with even a small amount of waste. For Native villages, which are often located in the most remote areas of Alaska, safe waste handling and waste reduction is of utmost importance for the health and safety of the communities.

In the United States, the primary statute that addresses the regulation of solid waste is the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 et seq.¹⁴⁹ The Resource Conservation and Recovery Act (RCRA), was enacted by Congress in 1976 to promote the reduction or elimination of solid and hazardous waste generation at the source and to encourage safe waste handling and recycling.¹⁵⁰ By understanding how the Resource Conservation and Recovery Act works, Alaska Natives can ensure that the solid waste management programs in their communities provide adequate protections for the physical health of their peoples as well as the environmental health of their communities and watersheds.

How the Resource Conservation And Recovery Act Works¹⁵¹

To ensure safe waste handling and encourage recycling and waste reduction, RCRA regulates three main areas of waste management: (1) solid waste; (2) hazardous waste; (3) and underground storage tanks, or USTs. Although RCRA grants the EPA broad enforcement authority to require waste management facilities to comply with its regulations, states have primary enforcement authority within their jurisdictions.¹⁵² In Alaska, the Department of Environmental Conservation (ADEC) manages the solid waste and underground storage tank components of RCRA. However, ADEC no longer controls the hazardous waste program, as the EPA resumed control of this program in 2002.

¹⁴⁹ It is important to distinguish RCRA from CERCLA, which will be discussed in the following section of this handbook. RCRA focuses on properly managing non-hazardous and hazardous wastes before they are released, whereas CERCLA focuses on cleaning up hazardous wastes after they have been released into the environment.

¹⁵⁰ The term RCRA as used throughout this section refers to the Resource Conservation and Recovery Act as well as the implementing regulations.

¹⁵¹ In addition to using the RCRA and the implementing regulations, 40 C.F.R. Chapter 1, Subchapter I, this chapter relies heavily on the information contained in the RCRA Orientation Manual (RCRA Manual), Office of Solid Waste, Communications, Information, and Resources Management Division, U.S. EPA (January 2003) available at <http://www.epa.gov/epaoswer/general/orientat/>

¹⁵² See 42 U.S.C. § 6942 for solid waste programs and §6926 for hazardous waste programs.

The Solid Waste Program¹⁵³

For purposes of RCRA, whether a material is a “solid waste” is not based on the physical form of the material. Rather, “solid waste” is defined as: garbage, refuse, sludges from waste treatment plants, water supply treatment plants or pollution control facilities; and other discarded materials, including solid, semisolid, liquid, or contained gaseous materials resulting from industrial, commercial, mining, agricultural, and community activities.¹⁵⁴

RCRA provides that solid waste can be handled in various ways, including composting, combustion, recycling, and most commonly, landfilling. It sets minimum requirements for solid waste disposal facilities and how these facilities handle the solid waste.¹⁵⁵ In Alaska, the state’s Solid Waste Program manages nonhazardous industrial and municipal solid waste and sets the criteria for municipal solid waste landfills. The most important aspects of these landfill requirements are ground water monitoring to ensure that the landfill is not contaminating a community’s water supply and contingency planning in case contamination or other problems occur.

The Hazardous Waste Program¹⁵⁶

RCRA also establishes a program to manage hazardous waste from “cradle to grave,” meaning from the waste’s creation to its disposal or storage. The federal Hazardous Waste Program regulates the generation, transport and treatment, storage, and disposal of hazardous wastes.

A “hazardous waste” is a solid waste with properties that make it dangerous or capable of having a harmful effect on human health or the environment.¹⁵⁷ Certain materials are excluded from the definition of “hazardous waste” – household hazardous wastes, agricultural wastes, some mining wastes, spent chlorofluorocarbon refrigerants, used oil filters, etc.¹⁵⁸ In addition, the RCRA regulations allow for waste handlers to petition the EPA stating that even though a particular waste is listed as hazardous, it does not pose a sufficient hazard to merit regulation. If the waste handler can show that the waste does not pose a threat to health or the environment, then the EPA may grant a “delisting,” meaning that the particular waste will not be regulated at that particular facility.

¹⁵³ See 42 U.S.C. §§ 6941-6949a.

¹⁵⁴ See *id.* at § 6903(27).

¹⁵⁵ See *id.* at § 6942(c); see also 40 C.F.R. Ch. 1, Subch. I, Pt. 257.

¹⁵⁶ See *id.* at §§ 6921-6939(d).

¹⁵⁷ See *id.* at § 6903(5)(A)(B).

¹⁵⁸ See RCRA Manual, § III, Ch. 1, at 9-16.

- **Regulating Hazardous Waste Generators.**¹⁵⁹ A hazardous waste generator is anyone who creates or produces a hazardous waste. RCRA requires that all generators are responsible for determining if their waste is hazardous and must oversee the ultimate fate of their waste at properly permitted facilities.
- **Regulating Hazardous Waste Transporters.**¹⁶⁰ A transporter is any person engaged in the transport of hazardous waste. Transporters must comply with both EPA and Department of Transportation regulations.¹⁶¹
- **Regulating Treatment, Storage, and Disposal Facilities.**¹⁶² RCRA requires that standards be created for treatment, storage, and disposal facilities (TSDFs) to address good management policies and to prevent leaks.¹⁶³ In order to handle hazardous wastes, any new facility must obtain an operating permit, establishing the conditions under which hazardous waste at the facility must be managed.¹⁶⁴ These regulations are generally more strict for those facilities built after the standards were established and less strict for interim status facilities (those built before the standards were created).¹⁶⁵ Interim status facilities are still expected to gradually meet the stricter standards.¹⁶⁶ Further, when a TSDF closes, these regulations ensure that it does so in a safe manner and decontaminates all soils, structures, and equipment.¹⁶⁷ Finally, RCRA requires operators to monitor the groundwater that may be affected by their operation and to clean up any contamination.

¹⁵⁹ For standards for hazardous waste generators, see 40 C.F.R. Ch. 1, Subch. I, Pt. 262.

¹⁶⁰ For standards for hazardous waste transporters, see 40 C.F.R. Ch. 1, Subch. I, Pt. 263.

¹⁶¹ See RCRA Manual, § III, Ch. 4, at 49-51. DOT transporter requirements are found at 49 C.F.R. Subt. B, Ch. 1, Subch. C, Pts. 171-179.

¹⁶² For standards for hazardous waste TSDFs, see 40 C.F.R. Ch. 1, Subch. I, Pt. 264 for permitted facilities, and Pt. 265 for interim facilities.

¹⁶³ See RCRA Manual, § III, Ch. 5, at 54.

¹⁶⁴ See 42 U.S.C. § 6925; see also 40 C.F.R. Ch. 1, Subch. I, Pt. 270.

¹⁶⁵ See RCRA Manual, § III, Ch. 5, at 54.

¹⁶⁶ See 42 U.S.C. § 6925(e).

¹⁶⁷ See RCRA Manual, § III, Ch. 5, at 75.

- **Land Disposal Restrictions.**¹⁶⁸ These regulations govern land-based disposal units such as landfills to ensure that they do not allow hazardous contaminants to escape into the environment, most often into the groundwater. The restrictions require that most hazardous wastes being placed in land disposal units undergo physical or chemical changes so that they pose less of a threat to water and air when exposed. However, it is not permissible to dilute a hazardous waste in water or soil to reduce its concentration in an attempt to avoid proper treatment.
- **Combustion Regulations.** Some waste is treated, recycled, or reclaimed through controlled burning in an enclosed area. The regulations here focus primarily on the control of emissions from the combustion process. Combustion standards are composed of two types of regulations: RCRA standards and the maximum achievable control technology standards of the Clean Air Act (CAA).
- **Safe Hazardous Waste Recycling.** Except for some air emissions standards, the recycling process itself is exempt from RCRA. However, most recycled hazardous wastes are subject to full regulation as hazardous wastes.¹⁶⁹
- **Corrective Action.** Corrective action is the investigation and cleanup or remediation of hazardous releases at RCRA facilities.¹⁷⁰ Unlike the rest of RCRA, the EPA here did not create strict regulations but rather created guidance and policy documents to encourage and streamline the cleanup process.¹⁷¹ Corrective action can occur in four instances: (1) when the EPA incorporates it into the permit requirements for a facility; (2) through an administrative enforcement or lawsuit when there is a release of a hazardous waste from an interim status facility; (3) when there is a situation at any facility subject to RCRA- whether or not they have a RCRA permit- that may present an imminent and substantial endangerment to health or the environment; and (4) when a facility initiates voluntary corrective action.¹⁷²

Underground Storage Tanks¹⁷³

¹⁶⁸ These restrictions are found at 40 C.F.R. Ch. 1, Subch. I, Pt. 268.

¹⁶⁹ See RCRA Manual, § III, Ch. 2, at 30.

¹⁷⁰ RCRA corrective actions are separate from CERCLA clean-up actions, although they can occur at the same time.

¹⁷¹ See RCRA Manual, § III, Ch. 9, at 121.

¹⁷² See *id.* at 122.

¹⁷³ See 42 U.S.C. §§ 6991-6991(i); see also 40 C.F.R. Ch. 1, Subch. I, Pt. 280.

An underground storage tank (UST) is defined as a tank and any underground piping connected to the tank that has at least 10% of its combined volume underground.¹⁷⁴ RCRA regulates underground storage tanks that contain “regulated substances,” meaning petroleum or hazardous wastes.¹⁷⁵ The regulations contain performance standards for new tanks, upgrading requirements for existing tanks, and requirements to prevent, detect, and clean up substance releases at UST sites. In addition to establishing the general UST regulations outlined above, RCRA established the Leaking Underground Storage Tank (LUST) Trust Fund for states that have cooperative agreements with the EPA. This fund provides money for corrective action where the operator is unknown, unwilling, or unable to respond or where emergency action is required.

Enforcement

Violations of the Resource Conservation and Recovery Act can be enforced as follows:

- **Civil Enforcement.** These are enforcement actions taken by the administrative agency with jurisdiction over the violation. For example, if the violation involves the federal Hazardous Waste Program, the EPA will have enforcement authority. If the violation involves the state Solid Waste Program, ADEC will have enforcement authority. Generally, the agency will first take informal administrative action to notify the responsible party of a problem.¹⁷⁶

When a more severe violation is detected or the responsible party does not respond to further warnings, the agency will often issue an administrative order imposing legally enforceable duties on the party. Orders can be used to force a facility to comply with regulations, to take corrective action, to perform testing or monitoring, or to address a threat to human health or the environment. An administrative order can also include civil penalties.

The agency can also file suit in civil court against anyone who refuses to comply with an administrative order or who has contributed to a release of hazardous waste or constituents.

- **Criminal Actions.** Generally, these are reserved for only the most serious violations and carry penalties of large monetary fines and possible imprisonment.¹⁷⁷
- **Citizen or Tribal Suits.** As with the Clean Water Act and the Safe Drinking Water Act, RCRA authorizes citizen suits.¹⁷⁸

¹⁷⁴ See id. at § 6991(1).

¹⁷⁵ Id. at § 6991(2).

¹⁷⁶ See RCRA Manual, § III, Ch. 10, at 129, 131.

¹⁷⁷ See id. at 132.

Opportunities to Use RCRA to Improve Solid Waste Management

The Resource Conservation and Recovery Act provides various opportunities for the Watershed Council and individual signatory tribes to address solid waste management issues. In addition, there are various other opportunities, outside RCRA, for tribal participation in solid waste management issues.

Submitting Useful Comments

As with the Clean Water Act and the Safe Drinking Water Act, RCRA includes various provisions for public notice and comment. For example, the EPA solicits public comments during the hazardous waste labeling process. Public comments are also solicited during the TDSF permitting process. Once a permit has been issued, tribes can push the EPA to consider modifications if they can show that treatment technology or standards have changed, or that something in the environment has changed, requiring a new analysis of the permit. The Watershed Council and individual tribes should take advantage of these opportunities by obtaining relevant information on a regular basis in order to submit useful comments.

Developing Tribal Hazardous Waste and UST Programs

¹⁷⁸ See 42 U.S.C. § 6972.

RCRA allows the EPA to assist federally recognized tribes to develop and implement tribal hazardous waste and UST programs.¹⁷⁹ Although the EPA can provide technical assistance to tribes in developing UST programs, the EPA does not provide funding for such programs. However, the EPA has published information on how tribes can apply for funding from the Bureau of Indian Affairs and the Department of Health and Human Services.¹⁸⁰

Implementing Solid Waste Plans

RCRA defines “municipalities” to include “tribes or tribal organizations,” including Alaska Native villages.¹⁸¹ Through this classification as a municipality, Native Alaska villages can receive federal assistance to implement their own solid waste programs, provided the municipal program is approved by the state agency and complies with the state regulations authorized under RCRA.¹⁸²

Pursuing Grants for Recycling and Improved Solid Waste Disposal Facilities

¹⁷⁹ See Fred H. Breedlove, Implementing RCRA in Indian Country and Approaches for Amending RCRA to Better Serve Tribal Interests, 26 VTLR 881, 882 (2002)., citing 42 U.S.C. § 6908 (a) (2000).

¹⁸⁰ See id. at 883, citing Financing Underground Storage Tank Work: Federal and State Assistance Programs, EPA (1999), available at <http://www.epa.gov/swrust1/pubs/financin.htm>

¹⁸¹ See id., citing 42 U.S.C. § 6903(13).

¹⁸² See id. at 883, 889, citing 42 U.S.C. §§ 6948(a)(2)(A)-(B), 6948(g), 6942, and 6943; see also Backcountry Against Dumps v. EPA, 100 F.3d 147 (D.C. Cir. 1996).

There are various funding opportunities available for tribes with regard to solid waste management. Tribes may receive funding in the form of “rural communities assistance” monies, which are funds given to states to redistribute to local communities to aid in upgrading or closing open dumps.¹⁸³ Tribes may also receive grants for recycling programs and improved solid waste disposal facilities as long as the applicable permitting agencies approve the municipal landfills.¹⁸⁴ The only grants that do not require state approval or consistency with a state plan are grants for training and research.¹⁸⁵ Training and research grants are available to municipalities and other organizations capable of effectively carrying out a project.

Cleaning Tribal Open Dumps

The Indian Health Service is required under the Indian Lands Open Dump Cleanup Act of 1994, 25 U.S.C. § 3901-3908, to help tribes clean open dumps as defined by RCRA.¹⁸⁶ Alaska Natives should take advantage of this assistance to clean open dumps located in or around their villages.

Participating in WasteWise¹⁸⁷

This program is designed to assist communities, including tribes, to develop cost-effective strategies to reduce municipal solid waste. Under this program, communities agree to partner with the EPA to set and achieve certain goals within three areas: (1) waste prevention, (2) recycling collection, and (3) buying or manufacturing recycled products. By participating in the program, partners receive EPA technical assistance and can save money.

Participating in the Jobs Through Recycling Program¹⁸⁸

The goal of the Jobs Through Recycling Program is to foster markets for recycled goods by promoting and assisting the development of businesses using recovered materials and creating new recycling jobs. EPA awards over \$1 million a year to states and tribes under this program.

Possible Sources for Further Information:

¹⁸³ See *id.* at 883, citing 42 U.S.C. §§ 6949(a) and 6945.

¹⁸⁴ See *id.*, citing 42 U.S.C. §§ 6986, 6926, 6942, and 6943.

¹⁸⁵ See *id.*, citing 42 U.S.C. §§ 6977 and 6981.

¹⁸⁶ See *id.* at 892, citing 25 U.S.C. §§ 3901-09 (2000).

¹⁸⁷ See RCRA Manual, § II, at 9. See also <http://www.epa.gov/wastewise> for more information.

¹⁸⁸ See *id.* See also <http://www.epa.gov/jtr> for more information.

U.S. EPA, Alaska Field Office

2
2

u
e

1
9

W
e
s
t

Anchorage, AK 99513
(907) 271-5083

7
t

h

A
v
e
n

U.S. EPA, Region 10
1200 6th Avenue
Seattle, WA 98101
(206) 553-2857

Office of Solid Waste and Emergency
Response

U.S. EPA
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460
<http://www.epa.gov/oswer>

RCRA and Superfund
Call Center
(800) 424-9346

Solid Waste Program, ADEC
555 Cordova Street
Anchorage, AK 99501
(907) 269-7802

COMBATING THE EFFECTS OF CONTAMINATION: THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT

Alaska is one of the last wild landscapes in America. It is also a state rich in natural resources. Its potential for oil and gas development is so large that it has become a prime target for new development projects. In addition, Alaska continues to have sizeable deposits of gold and other minerals. It is therefore likely that Alaska will continue to be mined and developed for its natural resources at the expense of the land and environment. This creates numerous environmental and wildlife management concerns for Alaska Natives, who continue to rely on their traditional subsistence way of life.

In the United States, the primary statute to effect the clean up of hazardous waste contamination is the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675. The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) was initially enacted by Congress in 1980 in response to the discovery of a large number of abandoned and leaking hazardous waste dumps that were threatening human health and the environment. Its primary purpose is to clean up hazardous pollutants, including those pollutants released during the mining process.

How CERCLA Works¹⁸⁹

Like RCRA, CERCLA addresses hazardous wastes by implementing a program to protect the public health. However, where RCRA implements a regulatory program governing the proper handling of wastes to avoid the release of contaminants, CERCLA implements a remedial program governing the clean up wastes after they have been released. CERCLA does this by authorizing the clean up of sites where hazardous wastes have been released and forcing the landowner to pay for the clean up actions. It also created a “superfund” to pay for the government to clean up a hazardous site when the responsible party is unknown or no longer in existence.¹⁹⁰

Clean Up Actions

¹⁸⁹ In addition to using CERCLA and the implementing regulations, called the National Contingency Plan (NCP regulations), found at 40 C.F.R. § 300 et seq., this chapter relies heavily on the information contained in Section VI, Chapter 2 of the RCRA Orientation Manual (RCRA Manual), Office of Solid Waste, Communications, Information, and Resources Management Division, U.S. EPA (January 2003) available at <http://www.epa.gov/epaoswer/general/orientat/rom62.pdf>.

¹⁹⁰ CERCLA as originally enacted only authorized the fund for five years. The Superfund Reauthorization and Taxing Authority (SARA) Act of 1986 extended the CERCLA program for an additional five years and increased the clean up budget. Although Congress failed to reauthorize the extended superfund program when it expired, the superfund program still operates because Congress continues to appropriate funding to the program. See RCRA Manual, § VI, Ch. 2, at 11.

CERCLA clean up actions are triggered by the release or potential release of a hazardous substance that presents a substantial danger to the public health, including municipal solid wastes and mining wastes.¹⁹¹ Once a release or potential release is discovered, CERCLA authorizes the federal agency in charge to remove or arrange for the removal of such hazardous substances, pollutants, or contaminants.¹⁹² Prior to starting any clean up action, the EPA will conduct a preliminary assessment to determine if the site poses a potential hazard and if the hazard is immediate.¹⁹³ If the hazard poses an immediate concern, CERCLA authorizes the implementation of a “removal action.” Removal actions are short term clean up actions intended to respond to emergency situations and are usually limited to a term of one year.¹⁹⁴ If the hazard does not constitute an emergency, but still poses a threat, a “remedial action” may be conducted. Remedial actions are longer-term clean up actions intended to provide permanent solutions.¹⁹⁵ These types of clean ups can continue indefinitely.

- **National Priorities List.**¹⁹⁶ The National Priorities List (NPL) is the EPA’s list of priority sites needing hazardous waste cleanup. Sites placed on the NPL are only funded for remedial clean up actions. Because the remedial process is not responding to an immediate threat, it allows for increased public involvement. Not only must the agency inform the public of a remedial action and provide opportunities for public comment, it must also consult with the state before determining any appropriate remedial action.¹⁹⁷ Once the appropriate remedial action has been selected and implemented, the state or the responsible party assumes responsibility for the operation and maintenance of the site.

¹⁹¹ See B.F. Goodrich Co. V Murtha, 958 F.2d 1192 (2d Cir. 1992); Louisiana Pacific Corp. V. ASARCO, Inc., 13 F.3d 1378 (9th Cir. 1994).

¹⁹² See 42 U.S.C. § 9604(a)(1).

¹⁹³ See RCRA Manual, § VI, Ch. 2, at 11.

¹⁹⁴ See id.; see also 42 U.S.C. § 9601(23) for a definition of “removal.”

¹⁹⁵ See id.; see also 42 U.S.C. § 9601(24) for a definition of “remedial action.”

¹⁹⁶ See id. at 12.

¹⁹⁷ See 42 U.S.C. § 9604(c)(2). CERCLA provides that the governing body of any Indian tribe shall be treated as a state for purposes of this consultation requirement. Id. at § 9626(a).

- **Applicable or Relevant and Appropriate Requirements.**¹⁹⁸ CERCLA requires that any on-site remedial actions attain applicable or relevant and appropriate standards (ARARs).¹⁹⁹ ARARs can include standards that have been established by other substantive laws or regulations promulgated by the federal government or states, such as the Clean Water Act and RCRA.²⁰⁰ The NCP regulations extend the application of ARARs “to the extent practicable,” meaning to the extent possible, to removal actions.²⁰¹ The agency in charge of the removal action is given a certain amount of discretion to determine whether compliance with a specific ARAR is practicable.²⁰²
- **Permit Requirements.** CERCLA and the NCP regulations exempt any removal or remedial actions conducted on-site from complying with federal, state or local permits, including those permits required by other federal statutes.²⁰³ For example, an agency conducting a CERCLA clean up action does not need to obtain an NPDES permit under the Clean Water Act prior to discharging pollutants from a water treatment facility into waters. The term “on-site” denotes more than merely the geographical area within the boundaries of a particular mine or water treatment facility. The NCP defines on-site to mean the areal extent of contamination and all areas in very close proximity to the contamination necessary for implementation of the clean up action.²⁰⁴ The NCP definition, although ambiguous, is intended to provide flexibility in responding to hazardous releases as it may be “prohibitively burdensome” to conduct necessary response measures within a narrowly “contaminated” area.²⁰⁵ However, if it can be shown that the agency in charge of the clean up is abusing this flexible definition of “on-site” to deliberately bypass other environmental laws or to implement response activities far afield of contaminated areas, the “on-site” status of the site can be challenged.²⁰⁶

Compensation

¹⁹⁸ See RCRA Manual, § VI, Ch. 2, at 12.

¹⁹⁹ See *id.* at § 9621(d)(2)(a).

²⁰⁰ See 40 C.F.R. § 300.5.

²⁰¹ See *id.* at § 300.415(j).

²⁰² See *Fund for Animals v. Babbitt*, 903 F. Supp. 96, 107 (D.D.C. 1995), citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council Inc.*, 467 U.S. 837, 844 (1984).

²⁰³ See 42 U.S.C. § 9621(e)(1); see also 40 C.F.R. § 300.400(e)(1).

²⁰⁴ See 40 C.F.R. § 300.400(e)(1); see also 40 C.F.R. § 300.5 (Definitions).

²⁰⁵ *Ohio v. E.P.A.*, 997 F.2d 1520, 1549 (D.C. Cir. 1993), citing 53 FR 51394-01 (1988). The court determined that flexibility was needed to respond to a contaminated plume of ground water extending far beyond the area of contaminated soil.

²⁰⁶ See *id.* at 1550.

Under CERCLA, parties responsible for releasing hazardous substances pay for the cost of clean up. As such, where the federal government undertakes a clean up action, it may recover costs from the responsible party.²⁰⁷ States and tribes can also seek reimbursement for their clean up efforts.²⁰⁸

Strict Liability for Responsible Parties

²⁰⁷ See 42 U.S.C. § 9607(a)(4)(A).

²⁰⁸ See id.

CERCLA follows a strict liability standard, meaning that a potentially responsible party's obligation to pay for the clean up does not rest on whether the party was negligent in releasing the hazardous substance. The release of a hazardous substance alone is enough to hold the party financially responsible. Current owners and operators of a site may be liable regardless of whether the disposal of hazardous substances occurred during their ownership or operation. In addition, past owners or operators can be held liable to pay clean up costs, if the release occurred during their ownership or operation.²⁰⁹

Enforcement

- **Natural Resource Damages Claims.**²¹⁰ Natural resource damages claims can be brought by the federal government, a state, or the United States on behalf of an Indian tribe, for injury to, destruction of, or loss of natural resources resulting from a release of a hazardous substance. Natural resources as defined by CERCLA include land, fish, wildlife, water, and other such resources belonging to or managed by the United States, any State, local government or Indian tribe. Natural resource damages are defined as the difference between the resource in its original condition and the resource after clean up has occurred.²¹¹ CERCLA defines "Indian tribe" to include any Alaska Native village, but not Alaska Native village or regional corporations.²¹² A Native Alaskan village may therefore bring a natural resource damages claim where it is the owner of the damaged natural resource. However, where land or resources continue to be held by the Native corporation, the corporation may not bring a natural resource damages claim.
- **Cost Recovery Actions.**²¹³ As outlined above, the federal government, a state, or an Indian tribe that engages in clean up activities may bring an action against the responsible party to recover costs of the clean up. Again, only Alaska Native villages are considered an Indian tribe for purposes of CERCLA.
- **Private Party Response Actions.** In addition to clean up actions by a federal agency, the agency can order a responsible party to take its own clean up actions through an administrative order when there may be an imminent and substantial endangerment. The penalty for violating such an order is \$27,500 per day of noncompliance.²¹⁴

²⁰⁹ See id. at § 9607(a).

²¹⁰ See id. at § 9607(a)(4)(C).

²¹¹ See In re Acushnet River & New Bedford Harbor, 712 F.Supp. 1019, 1035 (D.Mass. 1989).

²¹² See 42 U.S.C. § 9601(36).

²¹³ See id. at § 9607.

²¹⁴ See id. at § 9606.

- **Citizen or Tribal Suits.**²¹⁵ As with many other environmental statutes, CERCLA does include citizen suit provisions. This allows citizens to sue the United States, companies or persons who are in violation of any standard or requirement under CERCLA. However, as discussed below, because CERCLA bars pre-enforcement challenges, citizen suits under CERCLA are barred while the CERCLA clean up action is ongoing.
- **Pre-Enforcement Challenges.** CERCLA specifically bars federal judicial review of clean up actions while the action is ongoing.²¹⁶ This includes CERCLA citizen suits, as well as actions authorized by other laws, such as RCRA, NEPA, and the CWA. Although federal courts are divested of jurisdiction to hear challenges to ongoing CERCLA clean ups, possible recourse does exist in state court, where the claim is based on state law, even if such law is deemed to be an ARAR. However, it should be noted that CERCLA clean up actions are only required to comply with ARARS “to the extent practicable,” which is determined by the agency in charge of the clean up.

Opportunities to Use CERCLA to Clean Up Mining Wastes

CERCLA provides various mechanisms to clean up hazardous wastes. Unfortunately, CERCLA does not provide many opportunities for Alaska Native tribes to be involved in this process.

Enforcement

As discussed above, Alaska Native tribes, as well as the public generally, are limited in their ability to enforce CERCLA clean up actions or to require improvements to an ongoing clean up action. The purpose of this limitation is to foster the government’s ability to take immediate action without necessary clean ups being bogged down with costly and time-consuming lawsuits that challenge every step of a clean up once it has begun. Clearly, the intent is to foster efficient clean ups of hazardous wastes. However, this leaves open the possibility of CERCLA being abused and invoked merely to avoid complying with other environmental requirements, such as NPDES permits under the Clean Water Act.

Consultation

CERCLA requires that the agency in charge of cleaning up a hazardous waste release must consult with states before determining any appropriate remedial action.²¹⁷ This consultation requirement has been extended to Indian tribes, including Alaska Native villages.²¹⁸ Villages should take advantage of this consultation requirement to try to make sure that their concerns are addressed during the planning stages of a remedial action.

Cultivating Relationship

²¹⁵ See *id.* at § 9659(a)(1).

²¹⁶ See *id.* at § 9613(h).

²¹⁷ See *id.* at § 9604(c)(2).

²¹⁸ See *id.* at § 9626(a).

Probably the best way tribes can ensure that they are involved in the CERCLA process is to cultivate good working relationships with the federal agency(s) they deal with most often and that may be responsible for various CERCLA processes, such as the EPA, the BLM or the Fish and Wildlife Service. This can ensure that any required consultation is meaningful.

Possible Sources for Further Information:

U.S. EPA, Alaska Field Office

1200 Pennsylvania Avenue, NW
2 Washington, D.C. 20460
2 <http://www.epa.gov/oswer>

W
e
s
t

7
t
h

A
v
e
n
u
e

1
9

Anchorage, AK 99513
(907) 271-5083

Division of Prevention and Response
ADEC
555 Cordova Street
Anchorage, AK 99501-2617
(907) 269-7543

U.S. EPA, Region 10
1200 6th Avenue
Seattle, WA 98101
(206) 553-2857

Response Fund Administration, ADEC410
Willoughby Avenue, Suite 303 Juneau,
AK 99801-1795
(907) 465-5270

Office of Solid Waste and Emergency
Response
U.S. EPA

Contaminated Sites Program, ADEC610
University Avenue
Fairbanks, AK 99709-3643

(907) 451-2143

PROTECTING CULTURAL RESOURCES: THE NATIONAL HISTORIC PRESERVATION ACT, THE ARCHAEOLOGICAL RESOURCES PROTECTION ACT AND THE NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT

Economic development is an important consideration in rural Alaska, particularly as the cash economy's impact in traditional subsistence communities continues to grow. In rural Alaska, economic development is often achieved through tourism and natural resource development. However, without adequate protections, increased economic development can have damaging effects on tribal cultural resources. In order to protect tribal cultural resources, it is important that Alaska Native villages understand the statutory protections available to them. In the United States, the primary statutes that address the preservation of tribal cultural resources are the National Historic Preservation Act, 16 U.S.C. §§ 470-470t, the Archaeological Resources Protection Act, 16 U.S.C. §§ 470aa-470mm, and the Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001-2013. By understanding how these Acts work, Alaska Native villages can work to ensure that their cultural resources are protected.

How the National Historic Preservation Act Works²¹⁹

The National Historic Preservation Act (NHPA) was adopted by Congress in 1966 to protect properties with historic significance. The primary means by which the Act does this is by creating the National Register of Historic Places, which is a list of properties recognized by the federal government as having historic significance and needing protection. The National Register is governed by the Department of Interior, which has established criteria for when properties can be included on the Register. The Advisory Council on Historic Preservation (ACHP) is the federal agency within the Department of Interior in charge of implementing the NHPA.

The NHPA's primary means of protecting historic properties is through its Section 106 process, which requires federal agencies to consider the effects of projects, including mitigation efforts, on historic properties listed on the National Register or eligible for listing.²²⁰ Properties listed on the National Register can include places with religious or cultural significance for Indian tribes, including Alaska Native tribes, villages and corporations.

²¹⁹ In addition to using the National Historic Preservation Act, this section relies heavily on the information contained in Participating in the National Environmental Policy Act, Developing a Tribal Environmental Policy Act: A Comprehensive Guide for American Indian and Alaska Native Communities (Tulalip Guide), Gillian Mittelstaedt, Dean Suagee, and Libby Halpin Nelson and the Tulalip Tribes of Washington (October 200), § 11.3C; The ACHP Policy Statement Regarding ACHP's Relationships with Indian Tribes, ACHP, available at <http://www.achp.gov/policystatement-tribes.html>; Relationship of Section 106 to Other Laws, ACHP, available at <http://www.achp.gov/relationship.html>; and The Relationship Between Executive Order 13007 Regarding Indian Sacred Sites and Section 106, ACHP, available at <http://www.achp.gov/eo13007-106.html>.

²²⁰ See 16 U.S.C. § 470f.

Pursuant to the ACHP's regulations, section 106 responsibilities are to be coordinated "with any reviews required under other authorities such as the National Environmental Policy Act, the Native American Graves Protection and Repatriation Act, the American Indian Religious Freedom Act, and the Archaeological Resources Protection Act, and agency-specific legislation."²²¹ However, it is important to note that compliance with these other statutory provisions does not substitute for compliance with the NHPA, except that federal agencies can comply with section 106 through the NEPA process.

Similar to other federal statutes, the NHPA provides that state historic preservation programs can take over implementing the NHPA, provided such state programs are consistent with the NHPA and its implementing regulations.²²² In Alaska, the Division of Parks and Outdoor Recreation is responsible for the State Historic Preservation Program.

The NHPA also provides that Indian tribes, including Alaska Native tribes, villages and corporations, may assume state historic preservation office functions.²²³ This authorization, however, only extends to tribal lands, which are defined as lands within the exterior boundaries of a reservation or dependent Indian communities.²²⁴ Alaska Native tribal or corporation lands therefore do not constitute tribal lands for purposes of the NHPA.

Opportunities to Use NHPA to Protect Cultural Resources

Under section 106 of the Act, a tribe has the right to receive notice and to be involved when a proposed federal activity might affect a place that has religious or cultural importance to the tribe, and is eligible for listing on the National Register. This applies to all properties—even those on federal land—as long as there is a federal action involved.²²⁵ Thus, tribes can use this Act to gain leverage by identifying areas on federal lands that hold cultural or religious significance for the tribe, and seeking to establish their eligibility for the National Register. This will make a federal agency obligated to formally consult with a tribe before any action is taken.

The NHPA also authorizes direct grants to Indian tribes, including Alaska Native villages or corporations, for the purpose of carrying out the NHPA as it pertains to tribes. Alaska Native tribes that have significant religious or cultural resources, as well as interests in other historic properties, should take advantage of these grants to ensure their interests are adequately protected.

²²¹ See 36 C.F.R. § 800.3(b).

²²² See 36 C.F.R. Ch. VIII, Pt. 800.

²²³ See 16 U.S.C. § 470a(d)(2). For a definition of "Indian Tribe" under the NHPA, see *id.* at § 470w(4).

²²⁴ See *id.* at § 470w(14).

²²⁵ See *id.* at § 470-1.

How the Archaeological Resources Protection Act Works²²⁶

The Archaeological Resources Protection Act (ARPA) was adopted by Congress in 1979 to protect archaeological resources on public and Indian lands from uncontrolled excavations and commercial development. Archaeological resources are the material remains, such as fossil relics and artifacts, of past human life and activities. The primary way that ARPA protects archaeological resources is by prohibiting the excavation or removal of such resources from public lands or Indian lands without a permit.

As with the NHPA, the term “Indian tribe” includes Alaska Native villages and corporations.

However, under ARPA, “Indian lands” are defined as those lands of Indian tribes or individuals that are held in trust by the United States. As such, Alaska Native tribal or corporation lands do not constitute Indian lands for purposes of ARPA.

Opportunities to Use ARPA to Protect Cultural Resources

The ARPA permit system provides limited opportunities for tribal involvement. Basically, if an excavation permit may result in harm to any Indian religious or cultural site, as identified by the federal land manager, ARPA requires that the tribe be notified of the potential harm prior to the issuance of the permit. However, notice does not necessarily include consultation. Unlike the NHPA, which provides for tribal consultation for projects anywhere, even on federal lands, if the project will effect tribal religious or cultural resources eligible for inclusion on the National Register, this Act requires formal consultations with tribes only with regard to sites on “Indian lands.” As land held by Alaska Native tribes or corporations does not meet the “Indian lands” definition, ARPA does not require any tribal consultations.

How the Native American Graves Protection and Repatriation Act Works

The Native American Graves Protection and Repatriation Act (NAGPRA) was adopted by Congress in 1990 to protect Native American graves and objects of cultural value. It does this by providing a process for federal agencies and museums that receive federal funds to return Native American cultural items to lineal descendants and culturally affiliated Indian tribes. It also governs the excavation and inadvertent discovery of graves and associated cultural items on federal or tribal lands.²²⁷

²²⁶ In addition to using ARPA, this section relies heavily on the information contained in the Tulalip Guide, at § 11.3C.

²²⁷ See 25 U.S.C. § 3002(c).

Under NAGPRA, intentional excavations of Native American cultural items from federal or tribal lands are allowed only if: (1) such items have been excavated pursuant to an ARPA permit; (2) the excavating party has consulted with the appropriate Indian tribes, and in the case of an excavation on tribal lands, has received tribal consent prior to the excavation; and (3) the items are returned to the lineal descendants or culturally affiliated tribe.²²⁸

With regard to inadvertent discoveries on federal lands, NAGPRA requires the discovering party to notify the head of the federal agency in charge of the land and the Native corporation, in the case of lands selected but not yet conveyed.²²⁹ If the discovery is on tribal lands, the party must notify the appropriate Indian tribe.²³⁰ In all cases, the cultural items should be returned to the appropriate lineal descendants or culturally affiliated tribe.²³¹ Where the discovery occurred in connection with construction, mining, or logging, the activity must immediately cease and efforts to protect the items must be made. However, the activity may resume after thirty days.²³²

Opportunities to Use NAGPRA to Protect Cultural Resources

With regard to the excavation and discovery provisions of NAGPRA, “tribal lands” means all lands, even private land, within the exterior boundaries of an Indian reservation and all dependent Indian communities.²³³ “Federal lands” means all lands, excluding tribal lands, owned or controlled by the United States government, including lands selected by but not yet conveyed to Alaska Native corporations.²³⁴ Because Alaska Native tribal lands are not considered dependent Indian communities, the “tribal lands” consent requirement for intentional excavations does not apply.²³⁵ However, if the excavation is on federal lands, the tribal consultation requirement still applies.

Possible Sources for Further Information:

National Register of Historic Places
National Park Service

U.S. Department of the Interior
P.O. Box 37127

²²⁸ See id. at § 3002(c).

²²⁹ See id. at § 3002(d)(1).

²³⁰ See id.

²³¹ See id. at § 3002(d)(2).

²³² See id. at § 3002(d)(1).

²³³ See id. at § 3001(15)

²³⁴ See id. at § 3001(5).

²³⁵ It is important to remember that there is one Executive Order Indian reservation in Alaska-Metlakatla. As such, the consent requirement would apply to Metlakatla Indian Reservation.

Washington, D.C. 20013-7127
Alaska Historic Preservation Office
Division of Parks and Outdoor Recreation

3601 C Street, Suite 1278
Anchorage, Alaska 99503-5921
(907) 269-8908

PART II

Canadian Domestic Statutory Strategies

FIRST NATION GOVERNMENTAL POWERS IN THE YUKON

The Yukon Territory is the smallest of the three northern Canadian territories. It is a largely mountainous region, with thousands of square kilometers of sparse forest. Indigenous people make up about 23 percent of the Yukon Territory's population, with most of these being First Nation peoples.

Canada, through its Constitution Act of 1982, recognizes three types of indigenous peoples, which are generally referred to as Aboriginal peoples in Canada: Indians (those indigenous people registered under the federal Indian Act,²³⁶ also referred to as "status Indians"), Inuit and Metis.²³⁷ Although the term "First Nation" has no legal definition, it became popular in the 1970's to replace the word "Indian." Canadian Indian tribes are therefore generally referred to as First Nations. Many Indian people have also adopted the term "First Nation" to replace the word "band" in the name of their community.

Section 35 of the Constitution Act of 1982 provides Canadian aboriginal constitutional protection of their aboriginal and treaty rights. This means that there is significant legal protection for aboriginal and treaty rights of Yukon First Nations people.

There are fourteen First Nations in the Yukon Territory. Thirteen of these have traditional territories that encompass portions of the Yukon River watershed (Carcross/ Tagish First Nation, Champagne and Aishihik First Nations, Kluane First Nation, Kwanlin Dun First Nation, Little Salmon/ Carmack First Nation, First Nation of Nacho Nyak Dun, Ross River Dena Council, Selkirk First Nation, Ta'an Kwach'an First Nation, Teslin Tlingit Council, Vuntut Gwitchin First Nation, White River First Nation and Tr'ondëk Hwëch'in).

When considering the legal options and opportunities for addressing environmental management issues in the Yukon River watershed of Canada, it is important to consider the relationship and jurisdictional dynamics between the federal, territorial and First Nations governments. The implementation of comprehensive land claim and self government agreements between the federal government, territorial government and First Nations, along with the delegation of various federal powers to the territorial government, have created a unique dynamic whereby all three governments have certain lawmaking and management authorities over the environment.

²³⁶ Indian Act, [R.S. 1985, c. I-5],

²³⁷ Section 35, Constitution Act of 1982, see http://www.canlii.org/index_en.html.

The Yukon Territory was established through federal legislation. The Yukon Act²³⁸ provided the territory with limited authorities with much of the authority over the resources in the territory being managed by the federal Department of Indian and Northern Affairs. In 2003, the federal and territorial governments came to an agreement called the Devolution Transfer Agreement,²³⁹ which transferred the management and jurisdiction over many of the resources, including water resources, mineral resources and forestry resources, in the Yukon to the territorial government. This means that the territorial government now has the authority to enact laws in relation to these resources.

Those First Nations with self government agreements also have authority to enact and manage laws governing activities on their settlement land. Included as part of their authority, these First Nations have jurisdiction over settlement land within their territories to do the following:

- Use, manage, control and protect settlement land.
- Use, manage and protect natural resources under their control or ownership.
- Protect fish habitat.
- Control planning, zoning and land development.
- Establish, operate, maintain and regulate local services and facilities.
- Control or prohibit activities, conditions or undertakings that may constitute a danger to the public health.
- Control or prohibit the transport of dangerous substances within their territory.²⁴⁰

Currently, eleven of the fourteen Yukon First Nations have settled their land claims with the federal government and have corresponding self-government agreements.²⁴¹ Those First Nations without agreements remain Indian Act bands under the authority and responsibilities of the federal Minister of Indian and Northern Affairs. Generally, these First Nations have limited ability to enact laws in relation to the management of the watershed area.

²³⁸ Yukon Act, [2002, c. 7]†

²³⁹ See http://www.ainc-inac.gc.ca/ps/nap/yna_e.html

²⁴⁰ See http://www.ainc-inac.gc.ca/pr/agr/index_e.html#Comprehensive%20Claims%20Agreements for further information on Yukon First Nations self government agreements.

²⁴¹ White River First Nation, Ross River Dene Council and Liard First Nation are without land claim agreements and remain Indian Act bands.

Most self governing First Nations have not enacted many laws that actually invoke any of the above authorities. However, due to the importance of wildlife and environment issues to First Nation peoples, most self governing First Nations have enacted at least some wildlife legislation. In addition, each land claim agreement sets out the establishment of a local Renewable Resource Council that is responsible for the administration of matters related to the environment, including fish, wildlife, habitat and forestry matters, within the traditional territories of the local First Nation.²⁴² The specific powers of these councils are set out under Chapter 16 of the local First Nations land claim agreement.

Renewable Resource Councils are composed of members of the local First Nation and members of the local non-native community. Generally, the role of the Council is to act in the public's interest, but it does not represent the specific interest or voice of the local First Nation, territorial or federal governments.

In coordination with the authorities of the self governing First Nations, the federal and territorial governments each have various departments that help monitor, manage and enforce various environmental protection standards. Following is a brief description of the primary entities within each government that address environmental protection issues relating to the Yukon River watershed.²⁴³

Federal Government

- **Department of Indian and Northern Development.** The Department of Indian and Northern Development (DIAND) was created through the Department of Indian and Northern Development Act.²⁴⁴ This Act provides that the Department Minister is the lead federal minister in Northern Canada. The Minister's responsibilities are delivered primarily through the services offered by the Northern Affairs Program which supports northern political and economic development through the management of federal interests and promotes sustainable development of northern communities and the North's natural resources. DIAND is also the primary Minister responsible for Indians. The Northern Contaminates Program (NCP) is a specific program managed by the DIAND in partnership with other federal departments, including the Departments of Health, Environment, and Fisheries and Oceans, the territorial governments, various indigenous organizations, including the Council of Yukon First Nations, and university researchers. The NCP's purpose is to reduce contaminants in traditionally harvested

²⁴² For further information on specific programs and legislation of the First Nations, inquiries should be made to the specific First Nations administration office.

²⁴³ There are a number of specific branches within each department of the federal and territorial governments that will be discussed in more detail in later sections of this handbook.

²⁴⁴ Department of Indian and Northern Development Act, [R.S. 1985, c. I-6].

foods and provide information to assist individuals and communities make informed decisions regarding their food use.²⁴⁵

For general information on the programs, services and publications of the DIAND:

Tel: (819) 953-3760
NAPInfo@ainc-inac.gc.ca

²⁴⁵ A summary of the management structures and processes used to implement the NCP may be found in the Operational Management Guide.

- **Department of Fisheries and Oceans.** Under the Constitution Act of 1982,²⁴⁶ the federal government has legislative responsibility for Canada's fisheries. The Department of Fisheries and Oceans (DFO) is the entity responsible for management of the fisheries and for administering the Fisheries Act.²⁴⁷ A key component of fisheries management is the protection of fish and fish habitat from disruptive and destructive activities.

For general information on the programs, services and publications of the DFO:
 Fisheries & Oceans Canada Communications Branch
 200 Kent Street 13th Floor, Station
 13228 Ottawa, Ontario Canada K1A 0E6
 Tel: (613) 993-0999 Fax: (613) 990-1866
 TDD: (613) 941-6517
 info@dfo-mpo.gc.ca

- **Environment Canada.** Environment Canada's mandate is to preserve and enhance the quality of the natural environment, including water, air and soil quality. This includes conserving Canada's renewable resources, including migratory birds and other non-domestic flora and fauna, and protecting Canada's water resources. Environment Canada is also in charge of enforcing the rules made by the Canada - United States International Joint Commission relating to boundary waters. It also coordinates all environmental policies and programs for the federal government.

For general information on the programs, services and publications of Environment Canada:

Inquiry Centre
 70 Crémazie St.
 Gatineau, Quebec
 K1A 0H3

Tel: (819) 997-2800 or 1 (800) 668-6767
 Fax: (819) 994-1412
 TTY: (819) 994-0736 (for the hearing impaired)
 enviroinfo@ec.gc.ca

Yukon Territorial Government

²⁴⁶ See http://www.canlii.org/index_en.html.

²⁴⁷ Fisheries Act, [R.S. 1985, c. F-14].

- **Environmental Health Branch.** The Environmental Health Branch is located within the Department of Health and Social Services. This branch is responsible for inspections and enforcement services on water quality, sewage and solid waste disposal, and other related matters. Many of these responsibilities are set out under the Environment Act²⁴⁸ and its regulations.

For general information on the Environmental Health Branch:

Environmental Health
Health and Social Services
Government of Yukon
Box 2703
#2 Hospital Road
Whitehorse, Yukon
Canada
Y1A 2C6

Tel: (867) 667-8391 or 1(800) 661-0408, local 8391

Fax: (867) 667-8322

- **Department of Environment.** The Department of Environment is the primary department responsible for the administration of the Environment Act.²⁴⁹ This includes conducting environment impacts analysis, monitoring contaminated sites, promoting recycling efforts, managing the permit systems for regulated activities and substances, and conducting general environmental education and awareness for the public.
- **Department of Energy, Mines and Resources.** The Department of Energy, Mines and Resources is responsible for the development and management of Yukon minerals. Much of the mining activity in the Yukon utilizes or effects the Yukon River waters. As such, the standards and regulations enforced by the Department of Energy, Mines and Resources have a direct effect on the watershed.

²⁴⁸ Environment Act, R.S.Y. 2002, c. 76.

²⁴⁹ Id.

GENERAL ENVIRONMENTAL STATUTES AND PROCESSES TO PROTECT THE WATERSHED

The Environment Act of the Yukon Territory is the primary statute governing almost all aspects of environment and resource management in the Yukon Territory. In addition to providing various substantive ways to protect the environment and manage natural resources, the Environment Act also provides procedural mechanisms to assess the environmental impact of certain activities. In addition, the federal Canadian Environmental Assessment Act and the Yukon Environmental and Socio-Economic Assessment Act also address the environmental assessment process. Because each of these Acts impact the environmental assessment process in different ways, it is important for First Nation peoples to familiarize themselves with how the different acts work and how they interact with each other.

The Environment Act (Yukon)

The Environment Act²⁵⁰ is one of the primary pieces of environmental legislation enacted by the Territory government. It addresses almost every aspect of environmental protection, including integrated resource management planning, development approval and permitting, waste management, waste reduction and recycling, hazardous substance management, and contaminant release and clean up.

Under the Environment Act, the Minister is authorized to establish regulations to help implement the Act. Some of the regulations established under the Environment Act include:

- Activities Requiring Environmental Assessment (Inclusion List) Regulation, Y.O.I.C. 2003/68
- Air Emissions Regulations, Y.O.I.C. 1998/207
- Comprehensive Study List Regulation, Y.O.I.C. 2003/70
- Contaminated Sites Regulation, Y.O.I.C. 2002/171
- Coordination of Environmental Assessment Procedures and Requirements Regulation, Y.O.I.C. 2003/69
- Exclusion List Regulation, Y.O.I.C. 2003/67
- Law List (Enactments that confer powers, duties, or functions that must have an environmental assessment) Regulation, Y.O.I.C. 2003/66
- Pesticides Regulations, Y.O.I.C. 1994/125
- Solid Waste Regulations, Y.O.I.C. 2000/11
- Special Waste Regulations, Y.O.I.C. 1995/047
- Spills Regulations, Y.O.I.C. 1996/193
- Storage Tank Regulations, Y.O.I.C. 1996/194

²⁵⁰ Environment Act, R.S.Y. 2002, c. 76.

One of the key components of the legislation is its declaration that it is in the public's interest to provide every resident of the Yukon with an adequate remedy to protect the natural environment and the public trust.²⁵¹ It provides every adult or corporate person resident in the Yukon who has reasonable grounds to believe that someone is about to or has impaired the natural environment or that the government has failed to meet its responsibilities to the public to protect the environment may commence an action in Supreme Court.²⁵² Remedies that are available to the petitioner include having the Supreme Court:

- Grant an interim, interlocutory, or permanent injunction.
- Grant a declaration.
- Award costs and damages.
- Grant another remedy that the Supreme Court considers just.²⁵³

The limitation period for bringing actions is 15 years from the date that the cause of action arose.

Canadian Environmental Assessment Act²⁵⁴

This Act provides procedural mechanisms to assess the environmental impact of certain activities throughout Canada. However, with the passage of the Yukon Environmental and Socio-economic Assessment Act²⁵⁵ (YESAA), the Canadian Environmental Assessment Act (CEAA) no longer governs environmental assessments on projects occurring strictly on territory land. Nonetheless, the CEAA will continue to apply to projects that are of a trans-boundary nature.

The CEAA requires federal departments, including Environment Canada, agencies, and crown corporations to conduct environmental assessments for proposed projects where the federal government is the proponent. It also requires environmental assessments when the project involves federal funding, permit or license.

The CEAA is administered by the Canadian Environmental Assessment Agency. The Canadian Environmental Assessment Agency is an independent agency that reports directly to the federal Minister of the Environment.

For further information on the CEAA:

²⁵¹ Id. at § 7.

²⁵² Id. at § 8.

²⁵³ Id. at § 12.

²⁵⁴ Canadian Environmental Assessment Act, [1992, c. 37].

²⁵⁵ Yukon Environmental and Socio-Economic Assessment Act, [2003, c. 7].

Environmental Assessment Branch National Programs Directorate Environment Canada 16th
Floor, Place Vincent Massey 351 St. Joseph Boulevard Gatineau, Quebec K1A
0H3 Canada Tel: (819) 934-1859 Fax: (819) 953-4093
Enviroinfo@ec.gc.ca

The Yukon Environmental and Socio-Economic Assessment Act (YESAA)

Chapter 12 of the Yukon First Nations Final Agreement required the federal government to develop a process to assess the environmental and socio-economic impact of [projects on all lands of the Yukon: federal, territorial, First Nation and private. The Council of Yukon First Nations (CYFN) and the Yukon Territorial Government agreed to work with the Government of Canada to jointly establish a unique development assessment process for the Yukon.

The federal legislation developed through this process was the Yukon Environmental and Socio-Economic Assessment Act. The intent was for this Act to functionally replace the Canadian Environmental Assessment Act, except where trans-boundary lands are involved, and the Environmental Assessment Act (Yukon).²⁵⁶ The YESAA applies to all lands in the Yukon.

The YESAA sets out how assessments will be done for a variety of activities, including projects, existing projects and plans. These assessments are to be conducted in a manner that is consistent with the purposes of the YESAA. Definitions of projects subject to the Act are currently under development and will eventually become part of the regulations.

The Act mandates assessors to look at the potential environmental and socio-economic effects (both positive and negative) of proposed activities and to recommend whether the activities should proceed, proceed with terms and conditions, or not proceed. The Act provides that all assessments should integrate scientific information, traditional knowledge and other local knowledge. The assessment process will incorporate principles that include recognizing and enhancing traditional First Nation economies and providing participation opportunities for interested persons. The participation of the public will be integral to the assessment process. There are several provisions in the legislation that will ensure the public can participate meaningfully in these assessments.

When assessments are complete, recommendations with reasons will be forwarded to the relevant decision bodies. The federal government, territorial government and/or First Nation governments, as decision bodies for the activities, will receive the recommendations from the assessor with all relevant project information. The decision body (or bodies) will then decide whether to accept, reject, or vary the recommendations of the assessor. Their decision is then issued in a final written document.

²⁵⁶ Environmental Assessment Act, S.Y. 2003, c. 2.

The federal Minister of Indian Affairs and Northern Development, following consultation with the territorial government and Yukon First Nations, has established six assessment districts in the Yukon, with a designated office for each district in the following communities: Dawson City, Haines Junction, Mayo, Teslin, Watson Lake and Whitehorse.

There is a three-person Executive Committee of Board which assesses larger projects that come to it directly, or are referred by a designated office. In some cases, Panels of the Board will be established to assess projects. This will occur when the projects have potential significant adverse effects, are likely to cause significant public concern, involve the use of new or controversial technology, or when other types of YESAA assessment bodies have been unable to come to a recommendation. The composition of Panels depends upon the location of the effects of a project.

The Board and the designated offices must establish and maintain a Public Registry containing:

- All documents related to assessments.
- A list of projects, activities and plans.
- Project location and stage of assessment.
- Lists of any authorizations, grants of interest in land & financial assistance.

These records will be stored in such a way as to facilitate public access to them. The intent is to build and maintain a system that is primarily electronic, encompassing all aspects of document management. The registry system will be deployed across the Yukon at the six designated offices, the Board office and will eventually be generally available over the Internet. It is expected that the Public Registry will be ready for use when assessments under YESAA begin, currently targeted for Fall 2005.

For further information on the YESAA:

P.O. Box 31642, Whitehorse, Yukon Y1A 6L2.

Phone: 867-668-6420

Fax: 867-668-6425

Email: yesab@yesab.ca

PROTECTING SALMON AND FISH HABITAT: THE FISHERIES ACT

The primary federal law that protects salmon and fish habitat is the Fisheries Act. The Fisheries Act²⁵⁷ is the primary federal legislation in place for the management and protection of fish and fish habitat in Canada.²⁵⁸ Along with managing and protecting fish stocks, the Act establishes mechanisms for the protection of fish habitat and waters frequented by fish.²⁵⁹

How the Fisheries Act Works

The Act establishes that it is an offense to damage fish habitat unless it is authorized by the minister of Fisheries or the regulations established under the Fisheries Act. Fish habitat is defined as “spawning grounds and nursery, rearing, food supply and migration areas on which fish depend directly in order to carry out their life cycle.” Further, the Act defines “waters frequented by fish” as all Canadian fisheries waters. This definition includes the Yukon River watershed, as the watershed is prime fishery waters.

Under the Fisheries Act, it is an offence to deposit deleterious substances into waters that are frequented by fish unless it is authorized under the Act. “Deleterious substance” is defined as:

- any substance that, if added to any water, would degrade or alter or form part of a process of degradation or alteration of the quality of that water so that it is rendered or is likely to be rendered deleterious to fish or fish habitat or to the use by man of fish that frequent that water; or
- any water that contains a substance in such quantity or concentration, or that has been so treated, processed or changed, by heat or other means, from a natural state that it would, if added to any other water, degrade or alter or form part of a process of degradation or alteration of the quality of that water so that it is rendered or is likely to be rendered deleterious to fish or fish habitat or to the use by man of fish that frequent that water.

Authorities of the Minister of Fisheries and Oceans.

²⁵⁷ Fisheries Act, [R.S. 1985, c. F-14].

²⁵⁸ It should be noted that there is still an outstanding jurisdictional issue with respect to jurisdiction over fish and fish habitat resulting from the land claim and self government agreements. At this time, the paramountcy between federal and First Nation laws has not been settled. As such, should a First Nation enact a law that is inconsistent or in conflict with the Fisheries Act it is unclear which law would be paramount.

²⁵⁹ The provisions that address the protection of fish habitat and the prevention of pollution are found under in sections 34 to 43 of the Act.

The habitat protection provisions of the Fisheries Act provide the Minister of Fisheries and Oceans with the following authorities:

- The authority to require the construction, maintenance and operation of fish passage facilities at obstructions in rivers; to require financial support for fish hatchery establishments constructed and operated to maintain runs of migratory fish; to remove unused obstructions to fish passage; and to require a sufficient flow of water at all times below an obstruction for the safety of fish and the flooding of spawning grounds.
- The authority to require the installation and maintenance of screens or guards to prevent the passage of fish into water intakes, ditches, canals and channels.
- The authority to prohibit the destruction of fish by any means other than fishing.
- The authority to modify, restrict or prohibit any work or undertaking which is likely to result in the harmful alteration, disruption or destruction of fish habitat, a term that is defined in subsection 34(l) of the Fisheries Act.
- Comprehensive powers to protect fish and fish habitat from the discharge of deleterious substances; to request plans for developments that may affect fish; to develop regulations; and to modify, restrict or prohibit certain works or undertakings.

Enforcement

Under the Act, if a person is found guilty of damaging fish habitat or depositing deleterious substances into waters that have fish, he or she can be fined up to three hundred thousand dollars (\$300,000). For second and subsequent offences, a person can also be imprisoned for up to six months. If the damage is deemed significant, the charge can be raised to an indictable offence whereby the fine is as much as one million dollars (\$1,000,000) and could include up to three (3) years in prison.

Should the damages resulting from Fisheries Act violations effect the use and enjoyment of the waters or to an individual's livelihood there is the ability to seek civil remedies through court action as well.

Role of the Yukon Fish and Wildlife Management Board

The Yukon Umbrella Final Agreement created several public bodies that bring First Nations and non-First Nations together to manage Yukon lands and resources. Chapter 16 of the Umbrella Final Agreement recognizes the Yukon Fish and Wildlife Management Board as “the primary instrument of Fish and Wildlife management in the Yukon.” At the working level, the Board deals with conservation and management of fish, wildlife, habitat and wildlife users on a territorial-wide basis.

The Yukon Fish and Wildlife Management Board is an advisory body consisting of 12 members appointed by the Minister of Environment. Six members are nominated by the

Council of Yukon First Nations and six are nominated by the Territory Government. Appointments to the Board are for a five-year term.

Since its responsibility lies with issues that affect the entire Yukon, the Board focuses its efforts on territorial policies, legislation and other measures to help guide management of fish and wildlife, conserve habitat and enhance the renewable resources economy. The Board influences management decisions through public education and by making recommendations to Yukon, Federal and First Nations governments.

In order to develop an understanding of issues and form recommendations, the Board works in partnership with federal, territorial and First Nations Governments as well as Renewable Resources Councils and other Umbrella Final Agreement boards and councils. The Board relies on its partners and the public for technical information, advice and local or traditional knowledge. The governments are responsible for gathering information on fish and wildlife resources and designing management processes, as well as day to day management of fish and wildlife and the enforcement of laws.

For further information:

Yukon Fish and Wildlife Management Board
2nd floor
106 Main Street
Box 31104
Whitehorse, YT.
Y1A 5P7

Tel: 867-667-3754
Fax: 867-393-6947
yfwmb@yknet.ca

Role of the Salmon Sub-Committee

The Yukon Salmon Sub-Committee (YSC) is a public advisory body set up under the Umbrella Final Agreement. The goal of the YSC is to preserve salmon stocks in the Yukon Territory. With this guiding principle in mind, the Committee makes recommendations to the Minister of Fisheries and Oceans or to Yukon First Nations on all matters related to Yukon salmon. Salmon Sub-Committee members also serve on the Yukon River Panel, which was established under the Yukon River Salmon Agreement.

The YSC works closely with the Department of Fisheries and Oceans, the Fish and Wildlife Management Board, Yukon First Nations, Renewable Resources Councils and the public. The YSC meets throughout the year to study, discuss and make recommendations considering vital salmon stocks in the Yukon.

Members of the YSC represent both First Nation and non-First Nation populations. The composition of the ten-member Committee is laid out in the Umbrella Final Agreement. The YSC is a forum for public involvement in all aspects of the management of salmon stocks and fisheries.

Fisheries and Oceans Canada is the federal government agency responsible for salmon management. In addition to administering the federal Fisheries Act, this agency provides technical and administrative support to the YSC.

For further information:

Yukon Salmon Sub-Committee
100-419 Range Road Whitehorse, Yukon, Y1A 3V1
Tel: (867) 393-6725
Fax: (867) 393-6738
salmon@yukonsalmoncommittee.ca

Role of Renewable Resource Councils

Renewable Resources Councils are First Nation management bodies established in areas where individual land claim agreements have been implemented. They are responsible for dealing with fish, wildlife, habitat and forestry matters specific to the First Nation's traditional territory where they have been established. They also play an important advisory role to the Yukon Fish and Wildlife Board by raising awareness of specific issues and providing local and traditional information.

Role of the Canadian Wildlife Service

The Canadian Wildlife Service (CWS), a program under Environment Canada, is the national wildlife agency that deals with federal wildlife matters. This includes the protection and management of migratory birds and nationally important wildlife habitat, endangered species, research on nationally important wildlife issues, control of international trade in endangered species, and international treaties. The CWS is also responsible for the implementation of the Species at Risk Act,²⁶⁰ which addresses the management of critical habitat for species that are deemed under the act to be at risk. As such, the CWS is often involved in matters relating to salmon and fishery protection and preservation.

For general information on the programs, services and publications of the Canadian Wildlife Service:

Canadian Wildlife Service Environment Canada Ottawa, Ontario K1A 0H3

²⁶⁰ Species at Risk Act, [2002, c. 29].

Tel: (819) 997-1095 Fax: (819) 997-2756 cws-scf@ec.gc.ca

MANAGING WATER USE TO KEEP THE WATERSHED CLEAN: THE WATERS ACT

The primary statute that addresses the protection of water and the management of its use is the territorial Waters Act. The Waters Act (Yukon)²⁶¹ was enacted in 2003 by the Yukon territorial government after the completion of the Devolution Transfer Agreement which transferred certain resource management responsibilities from the federal government to the territorial government. Originally, the federal government was the responsible authority for the management of Yukon waters under the federal Waters Act (Canada). The federal Waters Act, however, was repealed as a result of the transfer of authority to the territory. By understanding how the territorial Waters Act works, First Nations, in coordination with the Watershed Council, can work to ensure that the Yukon River stays clean.

How the Waters Act Works

The Waters Act works primarily through a permit system. The Act restricts certain water uses without a permit and prohibits the discharge of waste in waters without a permit.

Water Resources Section

The Water Resources Section (WRS) administers water-related policies, regulations and programs under the Waters Act (Yukon). The WRS operates a network of water quality and water quantity stations around the territory to monitor, research and record the Yukon's water resources. The Section also examines engineering, hydrologic and geotechnical parameters of major new proposals.

The WRS, under the Canada-Yukon Water Monitoring Agreement, also monitors water quantity with the Water Survey of Canada and provides Yukon government representation to the Yukon-Alsek River Basins Committee and the MacKenzie River Basin Agreement (Transboundary Agreements).

The Hydrology Section of the WRS manages a hydrometric monitoring network to conduct snow surveys, provide flow forecasting, monitor lake and flow levels and provide advice and predictions to industry. The Water Quality Section of the WRS operates a small lab to conduct water sampling for license audits, to assess water quality and to support environmental assessments. The Environmental Assessment and Planning Section of the WRS develops the branch's operational policies, manages water licence security deposits, conducts environmental assessments for water licence applications and designs and coordinates water studies as required. Finally, the Water Inspections Section ensures the compliance and enforcement of the Waters Act (Yukon).

For further information:

²⁶¹ Waters Act, S.Y. 2003. c. 19.

Water Resources Section
Department of Environment
Government of Yukon
Elijah Smith Building, Rm 310
300 Main Street
Box 2703
Whitehorse, Yukon
Canada Y1A 2C6

Tel: (867) 667-3171 or 1(800) 661-0408, local 3171
Fax: (867) 667-3195
heather.jirousek@gov.yk.ca

Restricted Water Uses

Under this Act, no person is allowed to use water in a water management area unless it is in accordance with the conditions of a licence or as authorized by regulations. The Yukon River, its tributaries and all river basins of the Yukon River and its tributaries are considered a management area under Schedule I of the Water Regulations.²⁶² However, under the Act there are a number of exceptions: use by a domestic user; by an instream user; for the purpose of extinguishing a fire; or on an emergency basis for controlling or preventing a flood. When a person has diverted water in the case of an emergency, once the emergency has been completed, the user must make an effort to repair and restore the original channel conditions.

Deposit of Waste Prohibition

No person is allowed to deposit or permit to be deposited, waste in the waters in a water management area unless it is permitted and done in accordance with a licence or the regulations. The exception to this is when the waste that is to be deposited is of a type and quality or under conditions prescribed by the Canada Water Act (Canada).²⁶³ If waste is deposited in contravention of the Waters Act (Yukon), the owner of the waste or the person who has contributed to the deposit of the waste is required to notify an inspector.

Role of the Yukon Waters Board

The Waters Act (Yukon) establishes the Yukon Waters Board. The Yukon Water Board (YWB) is an independent administrative tribunal which is responsible for issuing water licences for water use and the depositing of waste into Yukon waters. The mandate of the YWB is to provide for the conservation, development and utilization of water resources of the Yukon Territory.

²⁶² Water Regulations, Y.O.I.C. 2003/58; Schedule I, 2.

²⁶³ Canada Waters Act, R.S. 1985, C-11.

Water licences are issued for projects such as quartz and placer mining, hydro power generation, municipal use, agriculture, conservation, industrial, and recreational. The YWB also undertakes certain land use permits with respect to mining as part of an effort to provide placer mining applicants a 'one window' permitting process.

Under the Waters Act and Chapter 14 of the Umbrella Final Agreement, the YWB has 4-9 members, all of which are appointed by the Minister of the Executive Council. At least three persons are nominated by the Government Leader. One third of the members are nominated by the Council of Yukon First Nations (CYFN). The remaining members are nominated by the federal departments that are most directly concerned with the management of waters.

Although the Waters Board has various members that represent different perspectives, the Minister maintains ultimate authority over the Board. For example, under the Waters Act the Minister may give written policy direction to the Board with respect to the carrying out of any of the Board's functions.

Licensing Process

Under the Waters Act Regulations, a person may use water or deposit waste without a license if the proposed use or deposit has no potential for significant adverse effects; would not interfere with existing rights of other water uses or waste depositors; and satisfies the criteria established for the specific undertaking set out in the regulations.

The types of activities that require a water use licence are outlined in Schedule 2, sections 5 through 10, of the Yukon Water Regulations.²⁶⁴ Some of the variables that determine whether a water use license is required include:

- Amount of water to be used;
- Type of undertaking;
- Type of work proposed; and
- Whether water course training or diversion construction is proposed.

The Yukon Water Board may, on its own initiative, or at the written request of any person, start proceedings to cancel, renew or amend a licence. Where a person other than the licensee requests the Board to start proceedings, the request must include:

- the person's name and contact information;
- the reasons for the request;
- an indication that the person has sent a copy of the request to the licensee; and
- an indication whether the person intends to appear at a public hearing on the matter.

²⁶⁴ Water Regulations, Y.O.I.C. 2003/58; Schedule 2.

The Yukon Water Board may also place conditions on licences issued under the Board's authority. Conditions include:

- the manner of use of water;
- the quantity, concentration, and types of waste that may be deposited;
- how waste is deposited;
- studies to be undertaken, works to be constructed, plans to be submitted, and monitoring programs to be undertaken; and
- any future closing or abandonment of the appurtenant undertaken.

In fixing the conditions of a licence, the Board shall make all reasonable efforts to minimize adverse effects of the issuance of the licence on the following individuals:

- Licensees;
- Domestic users;
- Instream users;
- Authorized users;
- Authorized waste depositors;
- Owners of property;
- Occupier of property; and
- Holders of outfitting concessions, registered trapline holders and holders of other rights of a similar nature.

The Board cannot establish any conditions that may be less stringent than standards set under the federal Canada Water Act,²⁶⁵ or in the case of waters that do not form part of a water management area but which are covered by regulations under the Fisheries Act, conditions that are less stringent than those established under the Fisheries Act.

²⁶⁵ Canada Waters Act, R.S. 1985, C-11.

Licences issued by the Board shall not exceed twenty-five years. There are Type A and Type B licences. The criteria for determining whether the licence is a Type A or B is set out in the schedules attached to the Water Regulations.²⁶⁶ Type A licences are generally used for more substantive projects and have higher requirements and penalties.

Public Hearings

In undertaking public hearings in accordance with the Waters Act (Yukon), the Yukon Waters Board shall have the powers appointed under the Public Inquiries Act (Yukon).²⁶⁷

Public hearings are scheduled for new applications for type A licences, applications for amendments to a type A licence if the quality, quantity or rate of flow of a water course would be altered, or for applications for cancellation of a type A Licence. Public hearings may also be held for type B applications, if the Water Board determines that a hearing would be in the best interest of the public. Where the Water Board has discretion to hold a public hearing, a person can make a written request for a public hearing on the application.

The request must set out the reasons for the request, the person's name and contact information, who will be affected by the public hearing as well as any other information that may help the Water Board determine whether a public hearing is appropriate.

Notice of all public hearings is published in two Yukon newspapers (usually the Yukon News and the Whitehorse Star) and the Canada Gazette. The notice must contain the "intent date" which must be a day at least ten (10) days prior to the hearing date. Any one wishing to be an intervener at a hearing must submit their intervention no later than 12 noon on the intent date. Interventions are any comments submitted regarding a water licence application and may be supportive, unsupportive or neutral. Any one who submits a response to a water licence application is considered an intervener. Once a person has submitted an intervention, that person will be added to the distribution list and will receive a copy of the Board's decision.

Applications for type B licences are generally distributed to a wide list of interested parties, which may include Federal, Territorial and First Nation governments, municipalities and non-government offices. For matters affecting the Yukon River watershed, the Yukon River Inter-Tribal Watershed Council may seek to be added to the distribution list. Once the licensing officer has received all the interventions for the interested parties, an environmental assessment is conducted.

Public Registry

²⁶⁶ Water Regulations, Y.O.I.C. 2003/58.

²⁶⁷ Public Inquiries Act, R.S.Y. 2002, c. 177-89-

The Yukon Waters Board is required to maintain a public registry of board information, including written reasons for its decisions and orders relating to a license or application. The registry is accessible to the public during regular board office hours.²⁶⁸

Closed and Abandoned Projects

In situations where it is believed that a project has been closed or abandoned either temporarily or permanently, the Minister may take any reasonable measures to prevent, counteract, mitigate, or remedy any resulting adverse effect on persons, property, or the environment.²⁶⁹

Enforcement

Persons that are found to be in violation of the Waters Act (Yukon) may be fined up to \$100,000 and may be imprisoned for a term of up to one year.²⁷⁰ Offences that continue for more than one day are considered separate offences for each day that the offence occurs. The time limitation on offences under the Act is two years from when the offence occurred. In addition to being subject to criminal penalties under the Waters Act (Yukon), an individual who is disrupting another's use and enjoyment of the Yukon River can be sued for civil damages as well.²⁷¹

For further information:

Yukon Water Board
Suite 106, 419 Range Road
Whitehorse, YT
Y1A 3V1

Tel: (867) 456-3980 (you can call collect if calling long distance)
Fax: (867) 456-3890
ywb@yukonwaterboard.ca

Other Entities Responsible for Sewage and Wastewater Effluents

As outlined above, the Yukon Waters Act is the primary legislation dealing with the protection of waters for the Yukon River watershed. Further, the Yukon Waters Board is the primary entity responsible for implementing the Waters Act. However, there are a

²⁶⁸ Waters Act, S.Y. 2003. c. 19, §§ 23-24.

²⁶⁹ *Id.* at § 37.

²⁷⁰ *Id.* at § 39.

²⁷¹ *Id.* at § 41.

number of other entities, with their own regulations, that have certain responsibilities when it comes to sewage and wastewater effluents.

In Canada, all levels of government share responsibility for managing the collection, treatment and release of wastewater effluents. Most wastewater systems are owned and operated by municipalities. The Yukon Territory has the legislative authority for municipalities and works of a local and private nature. Consequently, they exercise their legislative powers to control effluents released from municipal wastewater systems. In addition, Environment Canada is taking legislative actions to address pollutants in wastewater such as ammonia dissolved in water, inorganic chloramines and chlorinated wastewater effluents.

The federal government is also responsible for managing the risks posed by substances listed under the Canadian Environmental Protection Act, 1999 (CEPA 1999) and for protecting fish and fish habitat from harm caused by deleterious substances under the Fisheries Act. In addition, the federal government manages the environmental performance of federal facilities such as wastewater treatment and collection systems through tools such as the Guidelines for Effluent Quality and Wastewater Treatment at Federal Establishments, EPS 1-EC-76-1, April 1976. The purpose of these guidelines is to indicate the degree of treatment and effluent quality applicable to all wastewater discharged from existing and proposed federal installations.

The Canadian Council of Ministers of Environment (CCME) allows the territorial and federal departments to work together on the management of the municipal wastewater sector. In November 2003, the CCME agreed to develop a Canada-Wide Strategy for the management of municipal wastewater effluents. The Strategy is to be completed by December 2006 and will include:

- a harmonized regulatory framework;
- coordinated science and research;
- an environmental risk management model.

Environment Canada intends to develop a regulation under the Fisheries Act as its principal instrument to implement the Canada-Wide Strategy.

Environment Canada's Municipal Wastewater Effluent (MWWWE) Division

The Municipal Wastewater Effluent (MWWWE) Division of Environmental Technology Advancement Directorate, is the lead for Environment Canada's activities related to policy and regulatory development on municipal wastewater effluents.

For further information:

Environmental Technology Advancement DirectorateMunicipal Wastewater Effluent
DivisionEnvironmental Protection Service, Environment Canada351 St. Joseph Blvd, 18th
FloorGatineau, Québec K1A 0H3
Tel: (819) 953-8074Fax: (819) 953-7253
wastewater@ec.gc.ca

Yukon Department of Health and Social Services' Environmental Health Branch

The Environmental Health Branch is responsible for drinking water quality in the Yukon. The Yukon Contaminated Sites Regulations,²⁷² established under the Environment Act (Yukon), contains standards to ensure that water at a site, or which flows from a site, is suitable for direct use and is clean enough to protect water uses on adjacent properties.

The Contaminated Sites Regulations contain standards based on four types of water use:

- Aquatic Life water use standards apply to water used as a habitat for any component of the freshwater or marine ecosystem;
- Drinking Water use standards apply to water used for consumption by humans;
- Irrigation water use standards apply to water used to produce agricultural products; and
- Livestock water use standards apply to water used for consumption by livestock.

The standards for contaminants regarding the water types listed above can be found in Schedule 3 of the Contaminated Sites Regulation.

²⁷² Contaminated Sites Regulation, Y.O.I.C. 2002/171.

REGULATING SOLID WASTE IN THE YUKON TERRITORY

The Solid Waste Regulations²⁷³ under the Environment Act (Yukon)²⁷⁴ set standards for the building and operating of dumps and landfill operations in the Territory. They also govern the closure and abandonment of dumps and how to address spills and other emergencies.²⁷⁵ The Department of Community and Transportation Services manages 19 solid waste sites, while incorporated municipalities manage the rest. The regulations do not apply to dumps or waste disposal sites that are located on land that is under the control of the federal government, unless the dump or waste disposal site is operated by the Government of Yukon or a municipality.

Under the Solid Waste Regulations, solid waste is defined as waste which originates from residential, commercial, industrial or other human related activities or sources.²⁷⁶ It also includes litter and waste specified in a solid waste management plan as solid waste, but does not include untreated brush or wood products that are not mixed with other materials.

The Regulations provide that the Minister of the Environment is responsible for the issuing of solid waste permits.²⁷⁷ Permits are now required for designing, operating, maintaining, and closing dumps and landfills on Commissioner land in the Yukon. Further, permits are required for owners of:

- Waste Disposal Facilities that dispose of garbage generated by the public; and
- Commercial Dumps that dispose of garbage generated by commercial activities.

Permits are issued for up to three years and are renewable. Should there be any significant change of circumstances at the disposal facility or the dump, the permittee must notify the Minister in writing of the changes. Generally, environmental protection officers are responsible for monitoring and enforcing the permits issued under the regulations.

The regulations require the maintaining of a public registry that keeps records of all persons who are issued licences. The registry is to remain open to the public during normal business hours.²⁷⁸

²⁷³ Solid Waste Regulations, Y.O.I.C. 2000/11.

²⁷⁴ Environment Act, R.S.Y. 2002, c. 76.

²⁷⁵ Solid Waste Regulations, Schedule I.

²⁷⁶ *Id.* at § 1.

²⁷⁷ *Id.* at § 8.

²⁷⁸ *Id.* at § 11.

The waste disposal facility must have a waste disposal management plan that details the capacity of waste, the type of waste handled, a description of the environment in the area, and strategies that will be used for protecting the natural environment.²⁷⁹

Though no self-governing First Nation has enacted legislation related to the management of solid waste on their settlement lands, it is likely that such legislation would displace the territorial regulations in this area.

For further information:

Environmental Programs Branch (V-8) Department of Environment Government of Yukon
Box 2703 Whitehorse, Yukon Y1A 2C6

Tel: (867) 667-5683 or 1(800) 661-0408 (extension 5683)
envprot@gov.yk.ca

²⁷⁹ Id. at § 12.

COMBATING THE EFFECTS OF MINING CONTAMINATION

Originally, the management of mining activities in the Yukon was a federal responsibility. However, as a result of the Devolution Transfer Agreement, many of the federal government's responsibilities have been transferred to the Territorial government. Despite this separation of responsibilities, the Territorial and Federal government are taking a cooperative approach to the environmental management of Type II mines. Type II mines refer to major mine sites that have potential for unfunded environmental liabilities at the time of closure. The term comes from the Devolution Transfer Agreement (DTA), which details environmental responsibilities and obligations associated with the transfer of lands from Canada to the Yukon government. Without proper closure, these mining projects could pose substantial damage to the environment.

Under the DTA, seven Type II mines were identified. Mines that are currently being cared for are:

- Clinton Creek: former asbestos mine, 100km northwest of Dawson City.
- Faro: former lead, zinc and silver mine, 15km north of Faro.
- Mount Nansen: former gold and silver mine, 180 km north of Whitehorse.
- United Keno Hill Mines: former lead, zinc and silver mine, 85 km northeast of Mayo.

The two governments have established a joint project office that is responsible for the overall coordination of work related to these mining sites. The office consists of the federal government's Type II group (which is under DIAND) and the territorial government's Assessment and Abandon Mines Unit. The objective of this office is to bring these Type II mines to closure.

In managing the sites, the joint office is required to:

- develop work plans and budgets for care and maintenance of the Type II mines;
- prepare abandonment related research and develop abandonment options;
- develop closure plans;
- prepare environmental assessments and meet regulatory requirements;
- reclaim land damaged from mining activities;
- monitor problems and progress; and
- consult with each other and other relevant entities.

Yukon Surface Rights Board

The Yukon Surface Rights Board (YSRB) is a tribunal whose primary role is to resolve access disputes between those owning or having an interest in land (surface rights holders) and others with access rights to the land. The YSRB gets involved in disputes when the parties are unable to reach an agreement.

The Board's jurisdiction is derived from several statutes. The prime authority for the YSRB is the Yukon Surface Rights Board Act (Canada).²⁸⁰ Additional responsibilities of the YSRB are set out in other statutes and agreements including the Placer Mining Act (Yukon),²⁸¹ the Quartz Mining Act (Yukon),²⁸² and individual Yukon First Nation Final Agreements.

The Board's process is guided by two documents, the YSRB Rules of Procedure and the Yukon Surface Rights Board Act. Depending upon the nature of the dispute and its jurisdictional authority, the YSRB may issue an order to:

- require a security deposit to address any loss or damage that may occur regarding the surface of the land;
- require compensation to be paid for any loss or damage that may occur regarding the surface of the land;
- designate the kind of equipment that will be allowed on the surface of the land;
- designate the route of access that must be taken when entering onto the surface of the land;
- limit the times of access. For example, access might not be allowed during spring melt due to the potential damage that may result; and
- stipulate other terms and conditions which the Board, in accordance to its enabling legislation, considers appropriate to address the issues in dispute.

The following parties may participate in a Panel hearing:²⁸³

- the parties to the dispute and any other third party the Board determines has a right or interest in the land areas affected by the dispute;
- where settlement land is an issue, the affected Yukon First Nation and any affected interest holder;
- in some cases, the Minister of Indian Affairs and Northern Development and/or a designated minister of the Government of the Yukon; and
- in the case of applications related to accessing mineral rights on non-settlement land, the mining recorder.

First Nations have both surface and subsurface rights on Category A Settlement Lands. First Nations have only surface rights on Category B Settlement Lands: the subsurface rights belong to the Crown.

For further information on the YSRB:

²⁸⁰ Yukon Surface Rights Board Act, [1994, c. 43].

²⁸¹ Placer Mining Act, S.Y. 2003, c. 13.

²⁸² Quartz Mining Act, S.Y. 2003, c. 14.

²⁸³ Yukon Surface Rights Board Act, § 29. **-96-**

Yukon Surface Rights Board
Horwood's Mall, Suite 206
100 Main Street
Box 31201
Whitehorse, Yukon
Y1A5P7
Tel: (867) 667-7695 Fax: (867) 668-5892
info@yukonsurfacerights.com

Minerals Development Branch

The Minerals Development Branch of the Yukon Territory manages the following responsibilities and services:

- coordinating major mine project environmental assessments and permitting.
- developing operating policies.

Assessment and Abandoned Mines Unit

Responsibilities and services for this unit, located within the Yukon Territory's Department of Energy and Mines, include ensuring the delivery of Yukon government responsibilities with respect to Type II sites under the Devolution Transfer Agreement.

For further information:

Assessment and Abandoned Mines Branch
Department of Energy, Mines and Resources
Yukon Government
419 Range Road, Room 210 Whitehorse, Yukon K-419 Box 2703 Whitehorse, YT Y1A 2C6

Tel: (867) 393-7098 or 1(800) 661-0408 ext. 7098 Fax: (867) 667-3861
mining@gov.yk.ca

TOURISM AND CULTURAL IMPACTS IN THE YUKON TERRITORY

The department that is primarily responsible for tourism and culture in the Yukon Territory is the Department of Tourism and Culture. Within that department, the Cultural Services Branch implements and administers all aspects of heritage protection, preservation and information. This is a resource managed program that includes preservation, research management, development and interpretation initiatives dealing with Yukon historic sites and routes. The program takes part in implementing the Historic Resources Act²⁸⁴ and meeting Yukon government heritage obligations under various land claims agreements.

The Historic Resources Act establishes various protections for designated historic sites. In addition, tourism activities that may impact the Yukon River or the environment may require permitting in accordance with the Environment Act (Yukon) or the Waters Act (Yukon). Finally, once the Yukon Environment and Socio-Economic Assessment Act is fully implemented, tourism activities that are listed as projects under the YESAA regulations will also require an assessment under the YESAA.

²⁸⁴ Historic Resources Act, R.S.Y. 2002, c. 109.