

Federal Environmental Laws and Tribes

Federalism - Federal Relationship with Indian Tribes

The United State has a unique legal relationship with tribal governments based on the Constitution, treaties, statutes, executive orders, and court decisions.

Federal Trust Responsibility

All federal agencies have a trust responsibility to federally-recognized Indian tribes that arises from treaties, the historical relationship, statutes, case law, and executive orders. The trust responsibility requires EPA, among other things, to protect the sovereignty of each tribal government. Courts have distinguished between the general trust responsibility, which applies to all federal agencies, and a more specific kind of trust responsibility which involves comprehensive federal authority to manage a resource for the benefit of a tribe and which includes full fiduciary responsibilities. This latter kind of trust responsibility, generally exercised by the Secretary of the Interior, may be judicially enforceable.

EPA's Indian Policy

EPA was the first federal agency to create an Indian Policy (1984), which recognizes the unique relationship between federal government and tribes. This policy led to the establishment of the current EPA Tribal Program structure, including the American Indian Environmental Office (AIEO). The policy declares that EPA will retain responsibility for managing programs for reservations until tribal governments are willing and able to assume full responsibility for delegable programs.

Indian Environmental General Assistance Program (GAP)

In 1992, Congress passed the Indian Environmental General Assistance Program Act (42 U.S.C. 4368b) which authorizes EPA to provide General Assistance Program (GAP) grants to federally-recognized tribes and tribal consortia for planning, developing, and establishing environmental protection programs in Indian country, as well as for developing and implementing solid and hazardous waste programs on tribal lands. The goal of this program is to assist tribes in developing the capacity to manage their own environmental protection programs, and to develop and implement solid and hazardous waste programs in accordance with individual tribal needs and applicable federal laws and regulations.

Tribal Assumption of Federal Environmental Laws

In the EPA Indian Policy, EPA announced its support for Tribal Assumption of Federal Environmental Laws under federal statutes, stating, among other things, that "[t]he Agency will recognize tribal governments as the primary parties for setting standards, making environmental policy decisions, and managing programs for reservations, consistent with Agency standards and regulations." 40 CFR Parts 123, 124, 131, 142, 144, 145, 233, and 501 Indian Tribes; Eligibility for Program Authorization www.epa.gov/fedrgstr/EPA-WATER/1994/December/Day-14/pr-26.html December 14, 1994

Treatment in the Same Manner as a State (TAS)

Several federal environmental laws authorize EPA to treat eligible federally-recognized Indian tribe in the same manner as a state for implementing and managing certain environmental programs. For tribes to assume many of EPA's regulatory programs, they generally must go through the TAS process and meet the following criteria:

- The tribe must be federally-recognized
- The tribe must have or be able to exercise substantial governmental powers
- The tribe must have or have been delegated jurisdiction over the area in question
- The tribe must be reasonably expected to have the capability to effectively implement a program

EPA has made a number of "treatment in the same manner as a State" determinations for tribes, most of which involved findings that tribes are eligible for grants under the CWA. EPA has approved twenty-seven tribes to set water quality standards under section 303 of the CWA. One tribe has received primacy under the SDWA. Five tribes have received program approval under the CAA. Approximately 30 tribes operate pesticide certification or enforcement programs authorized by FIFRA under cooperative agreements with EPA.

Direct Implementation Tribal Cooperative Agreement (DITCAs)

Since 2001, Congress has approved authority for EPA to award Direct Implementation Tribal Cooperative Agreements (DITCAs) to federally-recognized tribes and eligible intertribal consortia to carry out agreed-upon activities and to assist EPA with the implementation of federal environmental programs for Indian tribes in the absence of an acceptable tribal program. EPA believes that the DITCA authority offers an important alternative for tribes who wish to work with EPA to implement environmental programs for Indian tribes. While EPA retains final decision-making authority and ultimate responsibility for the environmental programs implemented with DITCAs (including all regulatory activities), this funding mechanism allows tribes to be involved to varying degrees in assisting EPA to implement the federal program depending upon a tribe's interest and ability in carrying out specific work.

Federal Environmental Regulatory Laws

Three environmental statutes - the Safe Drinking Water Act (SDWA), the Clean Water Act (CWA), and the Clean Air Act (CAA) - explicitly authorize EPA to "treat tribes in the same manner as states" (TAS) for purposes of implementing various environmental programs.

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and the Toxic Substances Control Act (TSCA) explicitly include a provision that affords tribes substantially the same treatment as states with respect to certain provisions of the Act.

The Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), Resource Conservation and Recovery Act (RCRA) and the Emergency Planning and Community Right-to-Know Act (EPCRA) do not explicitly provide for TAS, however, EPA has taken the position that it has the discretion to approve tribes to implement certain programs in the same manner as states in order to fill gaps in how the statutes are implemented in Indian country.

<p>Safe Drinking Water Act (SDWA)</p> <p>Regulations</p> <ul style="list-style-type: none">• 40CFR124 Procedures for Decisionmaking, tribe with TAS defined as a state• 40CFR142.72 Requirements for tribal eligibility• 40CFR145.52 (Underground Injection Control Program) Requirements for tribal eligibility• 59FR Indian Tribes; Eligibility for Program Authorization• 63FR58047 Final guidelines for implementation of the drinking water infrastructure grants tribal set-aside program	<p>Clean Water Act (CWA)</p> <p>Oil Pollution Act amends CWA section 311 Indian Tribe Trustees</p> <p>Regulations</p> <ul style="list-style-type: none">• 40CFR131.8 Requirements for Indian tribes to administer a water quality standards program• 40CFR123.31 (NPDES) Requirements for tribal eligibility• 40CFR233.60 (Dredge and Fill Permits) Requirements for tribal eligibility• 40CFR501.22 (Sewage Sludge Management Program) Requirements for tribal eligibility• 76FR709 Guidelines for awarding Clean Water Act Section 319 base grants to Indian tribes	<p>Clean Air Act (CAA)</p> <p>Regulations</p> <ul style="list-style-type: none">• 63FR7254 Indian Tribes: Air Quality Planning and Management• 61FR34202 Federal Operating Permits Program• 59FR Indian Tribes; Eligibility for Program Authorization
<p>Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)</p> <p>Known as Superfund</p> <ul style="list-style-type: none">• Amended by the Superfund and Reauthorizations Act of 1986 (SARA) & the Small Business Liability Relief and Brownfields Revitalization Act of 2002 (Brownfields Law)• CERCLA Section 128(a) - Brownfields funds to states, territories, and tribes for cleanup and redevelopment• CERCLA Section 126 - TAS for many response-related purposes• CERCLA Section 104 - Eligible tribes perform or participate in Superfund-eligible site response activities	<p>Toxic Substance Control Act (TSCA)</p> <p>Lead Program</p> <p>Regulations</p> <ul style="list-style-type: none">• 40CFR745.324 (Lead Program) Authorization of state or tribal programs	<p>Federal Insecticide, Fungicide and Rodenticide Act (FIFRA)</p> <p>Regulations</p> <ul style="list-style-type: none">• 40CFR 171.10 Certification of applications on Indian reservations• 40CFR171.11 Federal certification of pesticide applicators in states or on Indian reservations where there is no approved state or tribal certification plan in effect
<p>Resource Conservation and Recovery Act (RCRA)</p> <p>Subtitle D non-hazardous waste management activities EPA can issue site-specific rules in Indian country that may provide flexibility to solid waste requirements of 40CFR258</p> <p>Subtitle C hazardous waste management activities</p> <p>Subtitle I underground storage tanks EPA maintains direct implementation authority in Indian country</p> <p>Regulations</p> <ul style="list-style-type: none">• 40CFR247, 258 solid waste collection, disposal, recycling• 40CFR280 underground storage tanks• 40CFR112 storage of oil in above ground containers (Spill Prevention Control and Countermeasures Program)	<p>Emergency Planning and Community Right-to-Know Act (EPCRA)</p> <p>Expanded under the Pollution Prevention Act of 1990 EPCRA Section 313 requires covered facilities to report waste management, releases, and transfers of toxic chemicals and sources reduction activities (EPA makes data available to the public)</p> <p>Regulations</p> <ul style="list-style-type: none">• 40CFR372 Toxics Release Inventory (TRI) reporting for facilities located in Indian country and clarification of additional opportunities available to tribal governments under the TRI program	

Federal Environmental Review Process Laws

National Environmental Policy Act (NEPA)

The National Environmental Policy Act (NEPA) established the broad national framework for analyzing the likely environmental impacts of proposed federal actions. NEPA requires that, before a federal agency makes a decision to proceed with an action that would significantly affect the quality of the human environment, the agency must first analyze the potential environmental impacts and prepare an environmental impact statement (EIS). The NEPA process is implemented through regulations issued by the Council on Environmental Quality (CEQ). When an EIS is prepared, it is released as a draft in order to inform the public about potential impacts and to seek comments from the public. After the agency responds to comments, a final EIS must be prepared before the federal agency can make a decision, which is recorded in a Record of Decision (ROD).

Under the CEQ regulations, an agency can prepare a less detailed document known as an environmental assessment (EA) to use in determining whether an EIS is required. If, based on an EA, the federal agency determines that the proposed action will not result in significant environmental impacts, the agency official signs a finding of no significant impact (FONSI), and an EIS is not required. If, based on an EA, the federal agency determines that the impacts will be significant, then an EIS must be prepared, except that, if mitigation measures can be incorporated into the proposed action that would reduce the intensity of the impacts to the point at which they will not be significant, then the agency may issue a "mitigated" FONSI, and proceed without preparing an EIS.

The CEQ regulations require each agency to adopt implementing procedures, and, in such procedures, an agency may adopt a list of categories of actions that normally do not result in significant impacts. Such actions are known as "categorical exclusions." For a proposed action that is included in an agency's list of categorical exclusions, an EA is not required, although the agency must also have procedures to review actions that are listed as categorical exclusions to determine if an "extraordinary circumstance" applies, in which case an EA is required.

For Indian country and in other tribal areas, the environmental impacts of federal agency actions may involve issues relating to water quality or quantity, air quality, land use, sacred sites, traditional cultural properties, items of cultural patrimony, wildlife habitat, and the ability to exercise hunting, fishing, and gathering rights. Documenting the range of potential environmental impacts through the NEPA process helps federal agencies to integrate environmental values into their decision-making processes.

Under the NEPA process, tribes have opportunities to inform federal agencies regarding their concerns. When a proposed federal agency action may result in effects on a reservation, the agency must invite the affected tribe(s) to participate in the scoping process and to comment on the draft EIS. In addition, CEQ encourages federal agencies to actively solicit tribal government participation as a "cooperating agency" when the proposed action would result in impacts on a tribe's reservation. Agencies may also invite tribes to comment and be a "cooperating agency" when non-reservation tribal resources are affected. A tribe may take the initiative and ask the lead federal agency to designate it a cooperating agency.

National Historic Preservation Act (NHPA)

The NHPA is the statute that provides the foundation for our national historic preservation program, which includes the National Register of Historic Places. NHPA section 106 requires that, before approving any proposed federal undertaking, a federal agency must take into account the effects of the proposed undertaking on any property that is listed on or eligible for the National Register and afford the Advisory Council on Historic Preservation (ACHP) an opportunity to comment. This review process is governed by regulations issued by the ACHP. 36 C.F.R. part 800. The regulations provide for a prominent role in the review process to be performed by the State Historic Preservation Officer (SHPO), including reviewing determinations made by the federal agency as to whether the undertaking would affect any historic property and, if so, whether the effects would be adverse. If there would be adverse effects, the agency and the SHPO may enter into a memorandum of agreement (MOA) or programmatic agreement (PA) for the resolution of adverse effects. The ACHP may be a party to such an agreement, but in most cases the ACHP defers to the federal agency and SHPO.

Pursuant to the NHPA Amendments of 1992, a tribe has the option of establishing a Tribal Historic Preservation Officer (THPO) and entering into an agreement with the National Park Service (NPS) for the THPO to perform the functions on the Tribe's reservation that would otherwise be performed by the SHPO. In addition, as amended in 1992, the NHPA expressly provides that places that hold religious and cultural significance for a tribe may be eligible for the National Register and, if a proposed federal undertaking would affect such a place, the federal agency is required to consult with the concerned tribe. This statutory consultation requirement is implemented through numerous provisions in the ACHP regulations. As such, the NHPA Section 106 process empowers tribes with procedural rights to inform federal agencies regarding the effects of proposed federal undertakings on historic places that hold religious and cultural importance for tribes, including places that are outside reservation boundaries .

Endangered Species Act (ESA)

The Endangered Species Act (ESA) establishes a program for conserving endangered and threatened species and their habitats. The ESA affords broad protection for species of plants and animals that are listed as endangered or

threatened. The Fish and Wildlife (FWS) in the Department of the Interior has the lead responsibility with respect to terrestrial and fresh water species, and the National Marine Fisheries Service (NMFS) in the Department of Commerce has the lead responsibility for marine and anadromous species. Section 9 of the ESA prohibits the "take" of any listed species, and this prohibition applies regardless of whether there is any federal agency action.

In situations in which there is a federal agency action, section 7 of the ESA establishes a review requirement that applies to any action authorized, funded, or carried out by a federal agency. Each federal agency is required to ensure that any such agency action is "not likely to jeopardize the continued existence" of any listed species or result in "destruction or adverse modification" of critical habitat. Compliance with this requirement may be accomplished through "informal consultation" or "formal consultation." In the former, the action agency prepares a biological assessment, which it submits to FWS or NMFS. If the biological assessment finds that the action will not result in adverse effects on a listed species or its designated critical habitat, and the wildlife agency concurs, then the requirements of section 7 have been fulfilled. If there will be adverse effects, then formal consultation is required, in which the wildlife agency prepares a biological opinion. If the wildlife agency determines that the proposed action will not jeopardize the continued existence of a listed species, then the action is allowed to go forward. The wildlife agency typically includes an "incidental take statement" in its biological opinion, which operates as a shield against prosecution as long as any incidental take complies with specified conditions.

Tribal governments, among others, may petition the FWS or NMFS to list species, and may comment on proposed listings, critical habitat designations, and recovery plans. Tribes may also enter into conservation agreements regarding species considered candidates for listing, with a view toward obviating the need to list the species. In 1997, the Secretary of the Interior and the Secretary of Commerce jointly issued Secretarial Order 3206, "American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act." This Secretarial Order seeks to "harmonize" the various interests at stake.

EPA's Office of Pesticide Programs (OPP) implements key portions of the Endangered Species Act.

Other Policies

Executive Orders

Executive orders are official documents through which the President of the United States manages the operations of the Federal Government. The Executive Orders listed below may be of interest to tribal governments. For a more in-depth listing of Executive Orders, please visit the [U.S. National Archives & Records Administration \(NARA\) site](#).

- [Executive Order 13175 - Consultation and Coordination With Indian Tribal Governments \(November 2000\) \(PDF\)](#) (4 pg, 144K)
 - [Statement on Signing the Executive Order 13175, \(PDF\)](#) (1 pg, 180K)
- [Executive Order 13007 on Sacred Sites \(May 1996\), \(PDF\)](#) (2 pg, 87K)
- [Executive Order 12898 on Environmental Justice \(February 1994\)](#)

EPA Policies

The 1984 EPA Indian Policy outlines nine principles to guide the Agency in dealing with tribal governments and in responding to the problems of environmental management in Indian country in order to protect human health and the environment. Subsequently, this policy has been formally reaffirmed by each EPA Administrator.

- [The 1984 EPA Indian Policy \(PDF\)](#) (4 pg, 213K)
- [Administrator McCarthy Reaffirmation the EPA Indian Policy January 9, 2014 \(PDF\)](#) (1 pg, 197Kb)
- [EPA Policy on Consultation and Coordination with Indian Tribes \(PDF\)](#) (10 pg, 213K)
- [Administrator McCarthy Reaffirmation of the EPA Indian Policy 2014 \(PDF\)](#) (1 pg, 206K)

Presidential Documents

Here you can find the Presidential documents reaffirming the government-to-government relationship between the federal government and tribal governments.

- [President Barack Obama's 2009 Indian Policy, \(PDF\)](#) (2 pg, 23K, [About PDF](#))
- [Former President George W. Bush's 2004 Indian Policy, \(PDF\)](#) (1 pg, 126K, [About PDF](#))
- [Former President William Clinton's 1994 Indian Policy, \(PDF\)](#) (2 pg, 23K, [About PDF](#))
- [Former President George H.W. Bush's 1991 Indian Policy, \(PDF\)](#) (1 pg, 13K, [About PDF](#))
- [Former President Ronald Reagan's 1983 Indian Policy, \(PDF\)](#) (4 pg, 55K, [About PDF](#))
- [Former President Richard Nixon's 1970 Indian Policy, \(PDF\)](#) (2 pg, 25K, [About PDF](#))

Much of the information in this document was derived from the following EPA website resources, June 2014:

<http://www.epa.gov/tribalcompliance/airresources/arregsdrill.html>

<http://www.epa.gov/indian/laws/>

<http://www.epa.gov/tribalportal/laws/tas.htm#related>

<http://www.epa.gov/aieo/ditcas.htm>

<http://www.epa.gov/tribalportal/laws/nepa.htm>

<http://www.epa.gov/tribalportal/laws/esa.htm>

<http://www.epa.gov/indian/basicinfo/presidential-docs.html>

Additional Website Resources

Resources Relating to the National Environmental Policy Act

Council on Environmental Quality

<http://ceq.hss.doe.gov/>

CEQ Guidance and Executive Orders Related to Native Americans

http://ceq.hss.doe.gov/nepa_information/eo_11375.html

Resources Relating to the National Historic Preservation Act

Advisory Council on Historic Preservation

<http://www.achp.gov/>

ACHP Office of Native American Affairs

<http://www.achp.gov/nap.html>

Consultation with Indian Tribes in the Section 106 Process: A Handbook

<http://www.achp.gov/nap.html>

National Park Service, National Register of Historic Preservation Program: Publications (including National Register Bulletins)

<http://www.nps.gov/nr/publications/>

National Park Service, Archeology and Historic Preservation: Secretary of the Interior's Standards and Guidelines (as Amended and Annotated)

http://www.cr.nps.gov/local-law/arch_stnds_0.htm

NPS Historic Preservation Links (including NPS offices and many non-federal entities)

http://www.nps.gov/nr/preservation_links.htm

Resources Relating to the Native American Graves Protection and Repatriation Act

NPS National NAGPRA Program

http://www.nps.gov/nr/preservation_links.htm

Resources Relating to the Endangered Species Act

Fish and Wildlife Service (FWS) Endangered Species Act Home Page

<http://www.fws.gov/angered/>

Law & Policies: Regulations and Policies

<http://www.fws.gov/angered/laws-policies/regulations-and-policies.html>

National Marine Fisheries Service (NMFS) (National Oceanic and Atmospheric Administration)

<http://www.fws.gov/angered/laws-policies/regulations-and-policies.html>

Secretarial Order 3206, American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act (1997)

<http://www.fws.gov/angered/what-we-do/tribal-secretarial-order.html>