

## TITLE 14-1: ENVIRONMENTAL PROTECTION CODE

### CHAPTER 14-1-1 FINDINGS AND PURPOSE

#### Preamble

The Ni Mii Puu people have lived, utilized and relied upon the natural resources of present-day north-central Idaho, southwestern Washington, northeastern Oregon and western Montana for subsistence, ceremonial, commercial and religious purposes since time immemorial. In Article III of the Treaty of 1855, the Tribe reserved the continued use of much of this territory for fishing, hunting, gathering and pasturing animals. Treaty of June 9, 1855, with the Nez Perce Tribe, 12 Stat. 957 (1859). Protecting these treaty-reserved rights is the highest priority of the Tribe and necessarily requires tribal management of the lands and waters that support these rights.

**§ 14-1-1-1 Objectives of the Code.** The Nez Perce Tribe and all of its departments and subdivisions shall seek to further, the objects of this Code, which are:

- (a) To protect tribal treaty-reserved rights and the resources on which these rights are based;
- (b) To protect the people of the Nez Perce Reservation from adverse human health effects resulting from contamination of the land, air, and water;
- (c) To protect and promote the ability of the Nez Perce Reservation to serve as a homeland for the Ni Mii Puu people;
- (c) To prevent, reduce, minimize, and where practicable, eliminate harm to the environment by fostering relationships to encourage and assist action by industry, public authorities and the community aimed at pollution prevention, clean production and technologies, reduction, re-use and recycling of material and natural resources, and waste minimization; and
- (d) To coordinate activities, policies and programs necessary to prevent, reduce, minimize or eliminate environmental harm and ensure effective environmental protection, restoration and enhancement;
- (e) To coordinate with other governments to create appropriate intergovernmental arrangements promoting greater uniformity and effectiveness in environment protection; and
- (f) To prevent potentially harmful activities and to progressively make environmental improvements (including reduction of pollution or changes in activities).

#### **§ 14-1-1-2 Sovereign Immunity**

The Nez Perce Tribe, and all its constituent parts are immune from suit in any jurisdiction, except to the extent that such immunity has been expressly and unequivocally waived by the Tribe in this Title or elsewhere. Nothing in this Chapter shall be construed as waiving the

sovereign immunity of the Tribe or any of its constituent parts. Nothing in this Title, nor any appeal to the Tribal Court, nor any enforcement action taken pursuant to this Chapter, shall constitute a waiver of such sovereign immunity as to any claim for damages, attorneys fees or costs, regardless of whether any such claim arises out of the same transaction or occurrence, or in any other respect. Nothing in this Title shall be construed as a legislative acknowledgement of tribal liability under federal, tribal or state environmental laws or as a waiver of tribal sovereign immunity with respect thereto.

## **CHAPTER 14-1-2 RESPONSIBILITY TO PROTECT THE ENVIRONMENT**

### **§ 14-1-2-1 Prevention of Environmental Harm and Protection of the Environment**

**(a)** A person shall not undertake an activity that will, or has the possibility, to pollute or harm the environment unless the person takes all reasonable measures to prevent or minimize any resulting environmental harm.

**(b)** In determining what measures are required to be taken under subsection (a), regard is to be had, amongst other things, to:

**(1)** The nature of the activity and the potential harm and the sensitivity of the receiving environment; and

**(2)** The current state of technical knowledge and likelihood of successful application of the various measures that might be taken.

**(c)** Where environmental harm can only be minimized through the application of reasonable and practical measures, the person causing the harm should mitigate for the harm by replacing, restoring or acquiring equivalent resource services as those lost or potentially lost due to the harm.

### **§ 14-1-2-2 Site Contamination**

**(a)** Site contamination is considered an environmental harm. For the purposes of this Title, site contamination exists at a site if:

**(1)** Pollution is present on or below the surface of the site in concentrations above the background concentrations (if any); and

**(2)** The pollution has, at least in part, come to be present there as a result of an activity at the site or elsewhere; and

**(3)** The presence of the pollution in those concentrations has resulted in:

**(i)** Actual or potential harm to the health or safety of human beings that is not trivial, taking into account current or proposed land uses; or

**(ii)** Actual or potential harm to water that is not trivial; or

(iii) Other actual or potential environmental harm that is not trivial, taking into account current or reasonably potential land uses.

(b) For the purposes of this Title, pollution can result in environmental harm regardless of whether:

(1) The harm is a direct or indirect result of the presence of the pollution; and

(2) The harm results from the presence of the pollution alone or the cumulative effects of the presence of the pollution and other factors.

(c) Where site contamination exists due to a violation of the duty of reasonable care with respect to substances with the potential to pollute the environment and cause an environmental harm, site contamination may be considered environmental negligence.

#### **§ 14-1-2-3 Cleanup of Contaminated Sites**

NPTEC directs the Natural Resources Department to develop an Environmental Protection Guidance related to the proper cleanup and remediation process for contaminated sites on the Reservation.

#### **§ 14-1-2-4 Action by Tribe in Case of Unauthorized Release of Pollutant**

(a) Where the Tribe knows of, or has reason to suspect, the unauthorized release or deposition of a pollutant into surface water, groundwater, or onto the land, and is of the opinion that the pollutant has harmed or is likely to harm the environment, the Tribe may take appropriate actions to abate the harm as necessary under the circumstances in order to protect the public health and welfare, and the beneficial uses of the environment.

#### **§ 14-1-2-5 Storage Tanks; Potential for Environmental Harm; Direction from NPTEC**

The Nez Perce Tribal Executive Committee (NPTEC) finds and declares that the release of petroleum products and other hazardous substances from storage tanks presents a significant danger to public health, safety, welfare, the economy, natural resources, and the environment of the Nez Perce Reservation by contaminating surface water, groundwater, subsurface soils and by their potential to create fires and explosions.

Therefore, it is the intent of NPTEC to protect the public health, safety, welfare, the economy, natural resources, and the environment to create a Guidance document for the proper installation, use, maintenance, and monitoring of above and below ground storage tanks on the Nez Perce Reservation. NPTEC directs the Water Resources Division to develop such a Guidance, which should cover processes and procedures for the appropriate installation, operation, retrofitting, upgrading, removal and abandonment of storage tanks, cleanup actions as well as closure and post closure care for leaking tanks, and financial assurances for facilities using qualifying tanks.

### **§ 14-1-2-6 Compliance with Other Laws**

Compliance with this Title does not obviate the need to comply with other applicable laws, nor does compliance with this Title necessarily indicate that a common law duty of care has been satisfied.

### **§ 14-1-2-7 Territorial and Extra-Territorial Application of the Code**

(a) This Code extends in application to all waters and lands of the Reservation, including the air above and substances beneath all lands and waters.

(b) Where a person causes significant environmental harm to occur within the Reservation by conduct engaged in outside the Reservation; and the conduct would, if engaged in within the Reservation, constitute a contravention of this Title, the activity shall be considered in contravention of this Title.

(c) For the purposes of subsection (b), a reference to engaging in conduct includes a reference to failure to act.

### **§ 14-1-2-8 Authority to Promulgate Environmental Protection Guidance**

In furtherance of the objectives of this Title, any department or division of the Nez Perce Tribe may draft environmental protection guidance to clarify the scope and extent of this Title.

**(1) Process for Promulgation of Guidance.** Before drafting guidance, unless otherwise directed by NPTEC, the proposing department or division should bring the issue to NPTEC for review and approval. Once administrative approval is received, the department or division may create the draft guidance. The draft should be circulated through the other Tribal departments or divisions for review and comment for a period of forty-five (45) days. The proposing department or division should attempt to incorporate comments received to the extent practicable, while still accomplishing the goals of the draft guidance. If a dispute arises between Tribal departments or divisions, both parties shall appear before the Natural Resource Subcommittee of NPTEC, with the Subcommittee having final say on how to resolve the dispute. If no dispute arises, the department or division should bring the proposal to both the Natural Resources and Law and Order Subcommittees for approval to present to NPTEC. NPTEC shall make the final decision whether or not to approve the draft proposal.

**(2) Final Approval.** Draft guidance becomes official upon the signing of the Resolution to approve by the Chairman and Secretary of the Tribal Council.

## **CHAPTER 14-1-3 SURFACE WATER AND GROUNDWATER QUALITY**

[Reserved]

## **CHAPTER 14-1-4 PROCESS FOR THE ADOPTION OF TRIBALLY APPROVED BEST MANAGEMENT PRACTICES FOR ENVIRONMENTAL PROTECTION**

### **§ 14-1-4-1 Purpose.**

Best Management Practices designed to protect the environment allow for efficient and effective regulation of potentially harmful practices. In order to ensure consistency within the Departments/Divisions within the Tribe, and to formalize the process of adopting Best Management Practices to further the environmental protection measures mandated by this Title, NPTEC adopts this Chapter. Best Management Practices must be adopted pursuant to the terms of this Chapter in order to be officially endorsed by the Nez Perce Tribe.

All Best Management Practices approved pursuant to the terms of this Chapter may be attached to this Chapter as additional Sections.

### **§ 14-1-4-2 Nature and Contents of Best Management Practices**

(a) Best Management Practices (BMPs) may be made in accordance with this Chapter for any purpose directed towards securing the objects of the Nez Perce Tribe Environmental Protection Code, Title 14-1, *et seq.*

(b) A BMP may do one or more of the following according to its terms:

(1) Set out matters to be taken into account by the Tribal Resource Departments;

(2) Set out requirements, standards, goals and guidelines;

(3) Specify that certain requirements or standards (mandatory provisions) are to be enforceable under the terms of the Environmental Protection Code.

(c) Where a best management practice contains a mandatory provision, the BMP may contain provisions that:

(1) Prevent the granting of an exemption from compliance with a mandatory provision; or

(2) Specify the circumstances in which such an exemption may be granted or the conditions that must be attached to it, or both.

(d) The provisions of a BMP may:

(1) Be of general application or limited application;

(2) Make different provisions according to the matters or circumstances to which they are expressed to apply;

(3) Provide that a matter or thing is to be determined according to the discretion of the Tribal Resource Departments or another administering division.

(e) The use of the abbreviation BMP in this Chapter shall interchangeably refer to an individual best management practice, or a set of logically grouped best management practices, as is applicable.

**§ 14-1-4-3 Procedure for Adopting Best Management Practices.** This section sets out the normal procedure to be followed in adopting BMPs. For a BMP to become an official Nez Perce authorized BMP, it must be approved through this process.

**(a) Authority to Prepare.** The Tribal Resource Departments may prepare draft BMPs.

**(b) Preliminary Briefing.** Before commencing to prepare a draft BMP, the Tribal Resource Departments must brief NPTEC, or the designated NPTEC subcommittee, on the general purpose and intended effect of the proposed BMP.

**(c) Preparation of Summary Report.** The Tribal Resource Departments must, when they have prepared a draft BMP, prepare a brief report containing:

(1) An explanation of the purpose and effect of the draft BMP; and

(2) A summary of any background and/or issues relevant to the draft BMP and of the analysis and reasoning applied in formulating the BMP.

**(d) Input from Other Tribal Departments/Divisions.** After preparing the report, the Tribal Resource Department must forward the report and draft BMP package to the other Tribal Resource Departments, and their subdivisions for input and comment.

**(e) Formal Submission to NPTEC.** The Tribal Resource Department must then present the report, draft BMP package, and any substantive comments to NPTEC for consideration whether to approve the BMP. After taking into account the report and any recommendations of the Tribal Resource Department on the matter, NPTEC can:

(1) Approve the draft BMP; or

(2) Alter the draft BMP and approve the draft BMP as altered; or

(3) Decline to approve the draft BMP.

**(f) Official Nez Perce BMPs.** A draft BMP approved by NPTEC shall become an official BMP of the Nez Perce Tribe, and shall be labeled and described as such. Approved BMPs shall be a required management practice on the reservation where activities fall within the scope of the purpose of the BMP.

#### **CHAPTER 14-1-4-4 [RESERVED FOR FUTURE USE]**

**§ 14-1-5 Definitions.** In this Code, unless the contrary intention appears:

- (1) **Activity** includes the storage or possession of a pollutant;
- (2) **Air** includes any layer of the atmosphere;
- (3) **Amenity Value** of an area includes any quality or condition of the area that conduces to its enjoyment;
- (4) **Chemical Substance** means any organic or inorganic substance, whether a solid, liquid or gas (or combination thereof), and includes waste;
- (5) **De Minimis** means having no measurable or cumulative adverse effect on the environment;
- (6) **Document** means a paper or record of any kind, including a disk, tape or other article from which information is capable of being reproduced (with or without the aid of another article or device);
- (7) **Environment** means land, air, water, organisms and ecosystems, and includes:
  - (a) Human-made or modified structures or areas; and
  - (b) The amenity values of an area;
- (8) **Environmental Harm.** For the purposes of this Title, environmental harm is any action that actually or likely results in injury to the environment (of whatever duration), which is not de minimis.
  - (a) For the purposes of this Title, term “environmental harm” specifically includes:
    - (a) Environmental negligence;
    - (b) An environmental nuisance; and
    - (c) Anything declared by Code amendment, regulation, or environmental protection guidance issued by any Tribal Resource Department pursuant to the procedures described in this Chapter to be environmental harm.
  - (b) For the purposes of this Title, potential harm includes risk of harm and future harm.
  - (c) For the purposes of this Title, environmental harm is caused by pollution or actions:
    - (1) Whether the harm is a direct or indirect result of the pollution or actions; and
    - (2) Whether the harm results from the pollution or action alone, or from the cumulative effects of the pollution or action and other factors.

**(9) Environmental Nuisance** means:

(a) Any adverse effect on an amenity value of an area that:

(i) Is caused by pollution; and

(ii) Unreasonably interferes with or is likely to interfere unreasonably with the enjoyment of the area by persons occupying a place within, or lawfully resorting to, the area; or

(b) Any unsightly or offensive condition caused by pollution;

**(10) Environmental Negligence** means the failure to meet the duty of reasonable care with respect to potentially hazardous or environmentally harmful substances or activities.

**(11) Injury** means an observable or measurable adverse change in a natural resource or impairment of a natural resource service. Injury may occur directly or indirectly to a natural resource and/or service. Injury can include adverse changes in the chemical or physical quality, or viability of a natural resource (i.e., direct, indirect, delayed, or sub-lethal effects). Potential categories of injuries include adverse changes in: survival, growth, and reproduction; health, physiology and biological condition; behavior; community composition; ecological processes and functions; physical and chemical habitat quality or structure; and services to the public. Injury can also occur to non-living natural resources (e.g., oiled sand on a recreational beach), as well as injuries to natural resource services (e.g., lost use associated with a fisheries closure to prevent harvest of tainted fish, even though the fish themselves may not be injured)

**(12) Land** means, according to context:

(a) Land as a physical entity, including land covered with water; or

(b) Any legal estate or interest in, or right in respect of, land;

**(13) Noise** includes vibration;

**(14) Occupier**, in relation to a place, includes a person with a right to occupy the place or a licensee or any holder of a right to use or carry on operations at the place, but does not include a mortgagee in possession unless the mortgagee assumes active management of the place;

**(15) Place** includes any land, water, premises or structure;

**(16) Pollutant and Pollution** means:

(a) Chemical, biological, or biogeochemically active substances including sediment, sludges, or byproducts with the potential to adversely alter soil, surface water, or groundwater geochemistry, that is not a planned consequence of an approved best management practice, including pH alterations, mobilization of metals or ions, depletion of dissolved oxygen in surface or groundwater, and leaching of nutrients (e.g. boiler ash,

cement truck washouts, poorly managed wood waste, compost, manure piles, and other substances likely to produce adverse biogeochemical conditions); or

(b) Noise; or

(c) Heat; or

(d) Anything declared by an environment protection guidance to be a pollutant;

**(17) Pollute** means:

(a) Discharge, emit, deposit or disturb pollutants; or

(b) Cause or fail to prevent the discharge, emission, depositing, disturbance or escape of pollutants,

**(18) Site** means an area of land (whether or not in the same ownership or occupation);

**(19) Vehicle** includes any vessel or aircraft;

**(20) Waste** means:

(a) Any discarded, rejected, abandoned, unwanted or surplus matter, whether or not intended for sale or for recycling, reprocessing, recovery or purification by a separate operation from that which produced the matter; or

(b) Anything declared by regulation or by an environment protection policy to be waste, whether of value or not;

**(21) Water** means:

(a) Water occurring naturally above or under the ground; or

(b) Water introduced to an aquifer or other area under the ground; or

(c) An artificially created body of water or stream that is for public use or enjoyment;