

## MOHAWK ENVIRONMENTAL REVIEW CODE

### Subtitle A. ENVIRONMENTAL REVIEW PROCESS AND PERMIT REQUIREMENTS FOR DEVELOPMENT

#### PART 1. POLICY AND PURPOSES

##### §1-01. STATEMENT OF FINDINGS

The Tribal Council of the Saint Regis Mohawk Tribe finds and declares that the environmental and cultural impacts of development activities both within the exterior boundaries of the Mohawk Territory at Akwesasne, and on or adjacent to tribal resources may threaten the political integrity, the economic security and the health and safety of the Tribe and its members.

The lands and waters of the Mohawk Territory at Akwesasne, have since time immemorial, been an important source of fish, fowl, game and medicinal plants for the Mohawk people. The Tribal Council finds that the protection of these resources for future generations requires the implementation of a review program for development in Mohawk Territory.

In recent years, Mohawk Territory has been increasingly developed by both Tribal members, and outside commercial interests. The Tribal Council finds that the uncontrolled development of the Territory has created or may create a threat to the environment and to the health and welfare of the residents of the Territory.

The Tribal Council finds further that there is an unfulfilled need to provide adequate protection for the land, air, and water resources of the Territory. Therefore, the Saint Regis Mohawk Tribe, pursuant to its inherent sovereignty and federal law, hereby enacts the following law to provide for the comprehensive regulation of environmental quality within the exterior boundaries of the Mohawk Territory at Akwesasne.

## **§1-02. POLICY**

The Tribal Council hereby declares that it is the policy of the Saint Regis Mohawk Tribe to protect the natural environment of the Mohawk Territory at Akwesasne, to take affirmative action to restore and enhance environmental quality in areas that have been subject to degradation, and to ensure that no proposed development that might cause significant environmental degradation will be permitted prior to the completion of a thorough environmental review in which alternatives and mitigation measures are fully considered.

The Tribal Council declares further that the close relationship between the Tribe's culture and the natural environment of its Territory requires the enactment of a comprehensive, environmental protection ordinance.

## **§1-03. PURPOSES**

It is the legislative purpose of the Tribal Council to protect the land, air, water, natural resources and environment of all lands within the exterior boundaries of the Mohawk Territory, and to encourage the economic use of Mohawk lands in ways that are compatible with Tribal cultural values, and to provide a mechanism through which the Tribe can establish and carry out a Tribal land use and development policy, including:

(a) designation of the Environment Division as the primary authority for protecting the environment within all Tribal Lands;

(b) designation of the Environmental Review Commission (ERC), an independent agency within the Environment Division as the primary authority for regulating land use and development in accordance with the system established in this Subtitle, including the Land Use and Development Plan prepared by the Environment Division and adopted by the Tribal Council;

(c) provision of a fair and effective means for enforcement of land use and development regulations and orders;

(d) establishment of a system for recording land use and development regulations and decisions so that Tribal policies established in or pursuant to this Subtitle can be carried out in an efficient and consistent manner;

(e) establishment of a system for ensuring that financial support for capital improvements, whether provided by federal agencies, private parties, the State of New York or the Tribe, will be used in ways that are consistent with the Tribe's land use and development policies.



## PART 2. DEFINITIONS

### §2-01. DEFINITION OF "DEVELOPMENT"

(a) "Development" means the performance of any building operation, the making of any material change in the use or appearance of any structure, or the making of any material change in the use or appearance of land (including wetlands).

The definition of "development" as used herein does not include:

- (a) the building of traditional ceremonial structures;
- (b) the temporary erection of fishing or hunting structures;
- (c) Maintenance, including emergency reconstruction of recently damaged parts of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways and bridge abutments or approaches, and transportation structures;
- (d) Construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches;
- (e) Construction of temporary sedimentation basins on a construction site which does not include placement of fill material into the navigable waters;
- (f) Construction or maintenance of farm roads or forest roads, or temporary roads for moving mining equipment, where such roads are constructed and maintained, in accordance with best management practices, to assure that flow and circulation patterns and chemical and biological characteristics of the navigable waters are not impaired, that the reach of the navigable waters is not reduced, and that any adverse effect on the aquatic environment will be otherwise minimized;
- (g) **Prior Converted Farmlands.** The Environment Division finds that due to the pressures of outside forces, certain lands once converted to agricultural uses, have been left fallow, and for various reasons may now fall within the regulatory definition of Wetlands. The Environment Division may, on a case by case basis and in its sole discretion, exempt development activities taking place on such prior converted farmlands from any or all parts of the Act. In order to qualify for the exemption, the applicant must present to the Environment Division some credible evidence of the use of the particular parcel as farmlands. In making its determinations under this subsection, the Environment Division shall favor conversion to agricultural and residential uses over conversion for commercial uses.

(h) **Single-Family Housing.** The construction and expansion of a single-family home and attendant features (such as a garage, driveway, storage shed, and/or septic field) is allowed for an individual permittee provided the activity meets all of the following criteria:

- (i) The discharge does not cause the loss of more than 1/4 acre of wetland;
  - (ii) The permittee notifies the Environment Division in accordance with rules to be promulgated thereby;
  - (iii) The permittee has taken all practicable actions to minimize the on-site and off-site impacts of the discharge;
  - (iv) The discharge is part of a single and complete project;
  - (v) This subsection applies only to single-family homes to be used for a personal residence;
  - (vi) Sufficient vegetated buffers must be maintained adjacent to all open water bodies, streams, etc., to preclude water quality degradation due to erosion and sedimentation.
- (ii) For the purposes of this subsection, the term "individual permittee" refers to a natural person and/or a married or co-habiting couple, but does not include a corporation, partnership, or similar entity.

(i) **"General" development.** All development shall be treated as general development unless it is included within the definition of "low-impact" development below.

(j) **"Low-Impact" development.** The Commission may by rule (issued pursuant to section 3-03 of this Subtitle) define as "low-impact" development a class of development activities which normally have little impact on the natural environment. Such definition must be adopted by unanimous vote of the Commissioners.

## **§2-02. OTHER DEFINITIONS**

Many terms used in this Subtitle are defined elsewhere in this Code, and their meanings remain the same.

(a) **"Applicant"** means any person or entity that applies for a development permit pursuant to this Subtitle, including a subdivision of the Tribe or a corporation chartered by the Tribe.



(b) An environmental assessment (EA) is a brief document that is used by federal agencies to aid in their compliance with the National Environmental Policy Act (NEPA) (42 U.S.C. §§4321-4370a) and implementing regulations (40 C.F.R. Parts 1500-1508) issued by the Council on Environmental Quality (CEQ). Because EAs have proven to be quite useful in federal agency decision-making and appear well-suited for the purposes set forth in section 1-03 of this Title, the Tribal Council has decided to use EAs in its development permitting process. NEPA imposes a requirement on every federal agency that, prior to taking an action that may have a significant impact on the environment, the federal agency must first prepare an environmental impact statement (EIS). An EA is typically 10 to 20 pages in length, while an EIS is typically longer and involves a formal process of public review and comment. The primary purpose of an EA is to determine whether a proposed action may result in significant environmental impacts; if so, an EIS is required. An additional purpose of an EA is to help in planning and making decisions. The preparation of an EA can also help achieve compliance with environmental review and consultation requirements established by federal laws other than NEPA. As defined in the CEQ regulations (40 CFR §1508.9), the content of an EA must include brief discussion of:

- (1) the need for the proposed action;
- (2) alternatives to the proposed action if it involves unresolved conflicts concerning alternative uses of available resources;
- (3) the environmental impacts of the proposed action and alternatives; and
- (4) agencies and persons consulted.

For purposes of this Title, an environmental assessment must also comply with any guidance provided by ERC for the use by applicants.

### **PART 3. ADMINISTRATION OF DEVELOPMENT REGULATION**

#### **§3-01. ESTABLISHMENT OF ENVIRONMENTAL REVIEW COMMISSION PROTECTION AGENCY (ERC) AND GRANT OF POWER**

(a) There is hereby established within the Environment Division an Environmental Review Commission (ERC or Commission) to administer a review and permit procedure for all development activities that are proposed for any site within the Reservation, or on resources protected by treaty in order to ensure that:

- (1) no development activity will be carried out without a permit; and

- (2) all development activities which are permitted will be carried out in accordance with all applicable Tribal and Federal environmental protection laws and regulations, and all applicable Tribal and Federal laws and policies related to the protection and preservation of burial and archeological sites.

(b) The ERC shall be governed by a Board of Commissioners consisting of the Director of the Environment Division as Commissioner, and two appointees approved by the Tribal Council. Each of the two appointed Commissioners shall serve a three-year term, except that the first time that Commissioners are appointed, one will be appointed to serve a three-year term, one a two-year term. Thereafter, one Commissioner shall be appointed each year. Commissioners shall be eligible for re-appointment without limitation.

(c) ERC shall work cooperatively with the Tribal Council and all Tribal agencies and departments to enforce Tribal and Federal environmental laws. The Environment Division shall provide staff support to ERC; provided, that ERC shall conduct an independent review of all development applications in which the Tribe itself is an applicant.

(d) ERC shall have the authority to hire employees, who shall be treated as Tribal employees and who shall be subject to Tribal Personnel Policies adopted by the Tribal Council provided that employees of the ERC shall not be dismissed from employment except through action of the ERC.

(e) ERC shall have the authority to issue rules to carry out its responsibilities under this Title of the Tribal Code.

### **§3-02. ORGANIZATION OF ERC**

The Board of Commissioners of ERC is authorized to prescribe the internal organization of ERC. The Board of Commissioners shall prescribe its own decision-making processes, except to the extent that specific requirements are established in this Subtitle. The Board of Commissioners may establish that certain categories of decisions may be made by the Chairperson or by a single designated Commissioner and that other categories of decisions must be made by the entire Board. The Board may establish that certain categories of decisions shall require a unanimous vote of the entire Board. The Board shall provide written guidance on its decisions making processes, which shall be issued as rules pursuant to section 3-03 of this Subtitle, in order to inform Tribal members and applicants for development permits.

### **§3-03. POWERS OF ERC**

By the enactment of this Subtitle, the Tribal Council delegates to the ERC all powers necessary to carry out its responsibilities under this Subtitle. These powers are derived from the powers of the Tribal Council pursuant to its reserved, sovereign powers.

### **§3-04. RULES**

The Board of Commissioners of ERC is authorized and directed to issue rules governing its procedures and supplementing the substantive law prescribed in this Subtitle. At a minimum, the Board of Commissioners shall issue its rules in proposed form and request comments, and it shall hold a legislative-type hearing to assist it in developing rules. Any rules issued by the Board of Commissioners shall not take effect until 30 days after they have been provided to the Tribal Council, except that, if the Board of Commissioners finds that there is a substantial threat to public health, safety, or welfare, it may issue rules on an emergency basis which will take effect immediately. ERC staff will make the rules available to applicants for development permits and interested persons.

### **§3-05. HEARINGS**

In carrying out its responsibilities, the Board of Commissioners is authorized to hold legislative hearings as part of the rule-making process, administrative hearings on permit applications, and adjudicatory hearings on alleged violations of this Subtitle. All hearings may be conducted in either the Mohawk language or the English language, or both as warranted by the circumstances.

(a) Rule-making hearings. In developing rules, the Commission shall hold at least one hearing in which Tribal members and others who may be affected by rules issued by the Board are given the opportunity to express their views. Notice of rule-making hearings shall be provided at least 45 days prior to the date of the hearing and the text of the proposed rules, with explanatory materials shall be made available to the public at least 30 days prior to the date of the hearing.

(b) Administrative hearings. The Commission is authorized to hold administrative hearings when it decides whether to approve an application for a development permit. In an administrative hearing, the burden is on the applicant to demonstrate to the Commission that the issuance of a permit would be consistent with the Tribe's Land Use and Development Plan. A written transcript shall not be required, but the applicant shall be entitled to a written decision. For administrative hearings, the Commission shall provide written notice to the Tribal Council at least one week prior to the scheduled date of the hearing, which notice shall be posted in the Tribal Office and at such other places as may be specified in the Commission's rules.

(c) Adjudicatory hearings. The Commission shall by issuing rules establish procedures for adjudicatory hearings, as provided for in section 8-03 of this Subtitle, to ensure that all persons whose rights and interests are adjudicated by the Commission are afforded due process of law.

### **§3-06. DEVELOPMENT ORDERS**

(a) The decision of the Commission to issue a permit, to deny a permit, or to issue a permit subject to conditions, shall be recorded in a brief document that shall be known as a "development order." Each development order will:

- (1) briefly set forth the reason(s) in support of the Board's decision;
- (2) advise the applicant of the procedure to be followed if the applicant chooses to appeal the decision;
- (3) if the permit is issued subject to conditions, inform the applicant of what the conditions are;
- (4) if the permit is denied, advise the applicant whether the Board would reconsider the application if certain changes were made; and
- (5) advise the applicant that failure to comply with the order may be ground for enforcement and penalties under sections 7-08 and 7-09 of this Subtitle.

(b) A copy of each development order shall be provided to the Tribal Council. The Commission shall take appropriate steps to inform the Reservation community regarding the orders that it issues.

### **§3-07. CONDITIONS OF PERMITS**

The Commission is authorized to include in any permit issued any conditions that it considers to be appropriate to ensure that permitted development is consistent with the Tribe's Land Use and Development Plan. The Commission is also authorized to include conditions to ensure compliance with other tribal laws and with applicable federal laws and regulations.

## **PART 4. LAND USE AND DEVELOPMENT PLANNING**

### **§4-01. LAND USE AND DEVELOPMENT PLAN**

(a) The Environment Division, in consultation with the Tribal Council shall cause to be prepared a Tribal Land Use and Development Plan for all lands under the Tribe's jurisdiction. The Environment Division is charged with lead responsibility for the preparation of this plan. The staff of ERC shall assist the staff of the Environment Division in the preparation of this Plan, as well as in the preparation of any planning studies that may be conducted.

- (b) The content of the Plan shall include:
  - (1) the Tribe's objectives, policies and standards to guide Tribal and private development within Tribal Lands over the long-term; and
  - (2) the Tribe's short-term program (one-year to five-years) of Tribal actions to achieve the long-term objectives of the Plan.

#### **§4-02. ADOPTION OF LAND USE AND DEVELOPMENT PLAN**

(a) The ERC shall hold a legislative-type hearing on the Tribal Land Use and Development Plan, during which the Plan will be explained to Tribal members and their views shall be sought.

(b) Following the hearing, the Tribal Council and the Board of Commissioners of ERC shall jointly meet to consider the Plan in light of comments expressed by Tribal members and shall attempt to reach a consensus on the specific content of the Plan.

(c) If the Tribal Council and the Board of ERC succeed in reaching consensus, the Plan shall be formally adopted by resolution of the Tribal Council pursuant to its powers as the duly elected governing body of the Saint Regis Mohawk Reservation.

(d) If the Tribal Council and the Board of ERC fail to reach consensus, the Tribal Council shall direct the Environment Division to prepare a final Tribal Land Use and Development Plan, in accordance with instructions of the Tribal Council. The Environment Division shall present the Plan to the tribal membership and the concerned public at a special meeting of the Tribal Council called for the purpose of reviewing and adopting a Land Use and Development Plan. The board of ERC is authorized but not required to present an alternative to the Tribal Council's. After providing opportunity for comment from the tribal membership and the public, the Tribal Council shall have the sole authority to adopt a Tribal Land Use and Development Plan.

#### **§4-03. ANNUAL LAND USE AND DEVELOPMENT REPORTS**

(a) The Commission shall submit annual reports to the Tribal Council regarding land use and development on lands within the Tribe's jurisdiction. These annual reports shall briefly summarize:

- (1) Progress that has been made toward the accomplishment of the short-term program and long-term objectives;
- (2) Major problems that have arisen or that remain unresolved;

- (3) The extent to which there have been changes in the assumptions or information on which the Tribe's Land Use and Development Plan was based; and
- (4) Any recommendations for changes in the Tribe's Land Use and Development Plan.

(b) The Tribal Council will consider the Commission's Annual Report and take action as may be appropriate. Action by the Tribal Council may include adopting, by resolution, changes in the Land Use and Development Plan or directing the Commission to hold a legislative-type hearing to seek the views of Tribal members and the public on any proposed changes.

#### **§4-04. DESIGNATION OF AREAS OF SPECIAL TRIBAL CONCERN**

The Land Use and Development Plan may include the designation of Areas of Special Tribal Concern in order to provide added protection for important tribal interests. The Tribal Council may designate such areas for a variety of reasons, including their importance for religious or cultural practices, their need for protection as a burial or archeological site, wildlife habitat, or sources of water supply. If there is a need to maintain confidentiality of the precise location of any such areas, their location need not be shown on maps that are incorporated into the Land Use and Development Plan, provided that the Tribal Council and the Commission may establish some confidential means of recording the locational information. Any development that is proposed within an Area of Special Tribal Concern is subject to additional review requirements prescribed in section 7-04 of this Subtitle.

### **PART 5. PERMIT REQUIREMENTS FOR DEVELOPMENT**

#### **§5-01. PERMITS REQUIRED FOR ALL DEVELOPMENT**

No development on any lands within the jurisdiction of the Tribe shall be lawful unless the developer has been issued a permit by the Tribe. This requirement for a permit applies to all Tribal members, all lessees and permittees of the Tribe, all lessees and permittees of Tribal members, the Tribe, or any agency thereof, and any other person who performs development activities on lands within the jurisdiction of the Tribe.

#### **§5-02. PROCEDURE FOR LOW-IMPACT DEVELOPMENT PERMITS**

(a) Any person proposing to perform low-impact development activities shall submit an application to ERC using such forms as ERC shall prescribe and shall include all supporting information required by ERC. The application shall include a signed

statement that:

- (1) the applicant believes that the proposed development is "low-impact" development as defined in ERC's regulations; and
- (2) the applicant will comply with any conditions that ERC decides to include in a development permit.

(b) ERC shall issue written guidance for applicants, and ERC's staff and/or staff of the Environment Division may provide assistance to applicants.

(c) Applications for low-impact development permits will be acted upon by ERC as provided in section 7-01 of this Subtitle. If ERC's staff determines that proposed development covered by an application for a low-impact development permit cannot be properly treated as low-impact development, the staff shall advise the applicant to file for a general development permit pursuant to section 5-03 of this Subtitle.

### **§5-03. PROCEDURE FOR GENERAL DEVELOPMENT PERMITS**

(a) Any person proposing to perform general development activities shall submit an application to ERC using such forms as the ERC shall prescribe in its regulations. The application shall include:

- (1) a brief description of the proposed development;
- (2) if the applicant is other than the Tribal Council or a Tribal agency or department, and the proposed development would be located entirely or partially on Indian trust or restricted lands, a certification by the Tribal Clerk that the applicant either possesses or has applied for the requisite property interest in the trust or restricted land to proceed with the development should a permit be issued;
- (3) a draft environmental assessment (EA) in accordance with section 5-05 of this Subtitle unless a categorical exclusion applies; and
- (4) all supporting information required by ERC.

(b) ERC shall issue written guidance for applicants, and ERC's staff and/or staff of the Environment Division may provide assistance to applicants.

(c) ERC's staff will screen each application to determine if it is sufficiently complete to be accepted and processed. The staff may require the applicant to revise or supplement an application, or the staff may accept a substantially complete application and perform whatever actions are necessary to complete it.



#### **§5-04. PROCEDURE WHEN THE TRIBAL COUNCIL OR A TRIBAL AGENCY OR DEPARTMENT IS THE APPLICANT**

When the Tribal Council or a Tribal agency or department is the applicant for a development permit either low-impact or general, ERC's staff may cooperate with and assist other tribal staff and officials in preparing the necessary application; provided, that in order to ensure against improper political influence in decisions made by ERC on such tribal applications, the issuance of a permit by ERC must comply with the additional requirements provided in section 7-03 of this Subtitle.

#### **§5-05. ENVIRONMENTAL ASSESSMENTS (EAs)**

(a) EA normally required. An environmental assessment (EA) is required for all applications for permits for proposed general development, except:

- (1) An EA is not required if ERC staff determines that the environmental impacts of the proposed development are adequately addressed in an earlier EA or an environmental impact statement (EIS). In such cases, a copy of the earlier EA or EIS will be used by ERC in deciding whether or not to issue the permit.
- (2) The proposed development is included within a category of development which has been excluded, through rules issued by ERC pursuant to paragraph (d) of this section, from the requirement to prepare an EA.

(b) Responsibility for preparation of the EA. The applicant is normally responsible for preparing the EA. If the applicant is the Tribal Council or a Tribal agency or department, and the proposed development involves a joint venture with any other party, responsibility for preparation of the EA may be determined by agreement between the joint venture partners.

(c) Review by ERC. ERC's staff will review each EA to determine its adequacy. The applicant may submit a draft EA for review prior to submitting the permit application or may submit a completed EA and permit application at the same time. The staff may require additional information or analyses or consultation with appropriate federal, tribal or state agencies. If an EA is almost adequate but lacking in some minor way, the staff may accept the EA without requiring revisions; provided, that in such cases, the staff shall advise the Chairperson of ERC in writing of the nature of any inadequacies in the EA.

(d) Categorical exclusions. ERC is authorized to exclude certain categories of development from the requirement for an EA if, in its sole discretion it determines that such categories of development do not result in significant environmental impacts and are not subject to any environmental review and consultation requirements established by federal laws or regulations or by Tribal laws other than this Subtitle. Such "categorical exclusions"

may be established by ERC only through rules issued pursuant to section 3-03 of this Subtitle; provided, that if any such categorical exclusions are so established, ERC shall establish a procedure for identifying any specific development included within such an exclusion that may nevertheless have a significant impact on the environment, and, in any such case, ERC will retain authority to order the applicant to prepare an EA.

#### **§5-06. OTHER ENVIRONMENTAL REVIEW AND CONSULTATION REQUIREMENTS**

The EA prepared for each permit application shall identify any environmental review and consultation requirements established by Tribal laws and regulations other than this Subtitle or by federal laws and regulations. If an EA discusses alternatives to the proposed development, the EA shall indicate whether an environmental review or consultation requirement applies to all alternatives considered or only to certain alternative(s). If any environmental review and/or consultation requirements apply to the proposed development, the EA shall document steps taken to achieve compliance. Normally, compliance should be achieved prior to submitting the application for the development permit under this Subtitle. If compliance has not been achieved at the time the development permit application is submitted, the application shall state a target date by which the applicant expects to have achieved compliance.

#### **§5-07. REQUIREMENTS FOR AREAS OF SPECIAL TRIBAL CONCERN**

If the applicant is proposing to conduct development activities within an Area of Special Tribal Concern designated pursuant to section 4-04 of this Subtitle, the EA shall include a discussion of alternative locations or an explanation of why alternative locations are not practicable. In addition, a permit authorizing development within an Area of Special Tribal Concern may be issued only after compliance with the procedural requirements provided in section 7-05 of this Subtitle.

#### **§5-08. REVIEW OF PERMIT APPLICATIONS BY ERC STAFF**

(a) ERC staff shall review each application for a development permit and shall prepare a staff report containing findings on the following:

- (1) Whether the proposed development is consistent with the Tribe's Land Use and Development Plan.
- (2) Whether the EA adequately discusses the environmental impacts of the proposed development and alternatives.
- (3) Whether the EA identifies all applicable environmental review and consultation requirements established by Tribal laws and regulations other than this Subtitle and by Federal laws and regulations, and whether compliance with such requirements has been accomplished or is likely to be

accomplished in the near future.

- (4) Whether, in the judgment of the staff, the proposed development may or will result in significant environmental impacts. If the staff reaches such a conclusion, the staff report will indicate whether any of the alternatives considered in the EA would avoid such significant environmental impacts.
- (5) Whether, if ERC issues a permit as required, any conditions should be included in the permit in order to insure that the development will: (A) be consistent with the Tribe's Land Use and Development Plan; (B) comply with any applicable other environmental review and consultation requirements; and (C) adequately mitigate any adverse environmental impacts that may result from the development. If the staff recommends that conditions be included in a permit, the staff report will include recommended conditions.

(b) The staff report shall be submitted to the Commission for action in accordance with part 7 of this Subtitle.

#### **§5-09. FILING FEES AND SERVICE CHARGES**

The Commission is authorized to charge applicants filing fees for the costs associated with processing their applications and to assess service charges for the costs of helping applicants to complete their applications, including their EAs. The Commission is also authorized to establish procedures through which filing fees and service charges may be waived. Prior to assessing any filing fees or service charges, the Commission shall establish a policy on fees, charges and waivers through rules pursuant to section 3-03 of this Subtitle.

### **PART 6. COORDINATION WITH FEDERAL ENVIRONMENTAL LAWS**

#### **§6-01. POLICY OF TRIBE TO SEEK TREATMENT AS A "STATE" BY THE U.S. ENVIRONMENTAL PROTECTION AGENCY**

Certain federal environmental laws authorize the U.S. Environmental Protection Agency (EPA) to treat Indian tribes as equal to the "states" for certain purposes. The Environment Division is directed to submit a report to the Tribal Council on an annual basis providing recommendations on whether the Tribe should seek treatment as a state under one or more federal statutes, and which purposes and programs under the federal statutes should be the Tribe's priorities.

#### **§6-02. ERC TO ISSUE INTERIM GUIDANCE ON COMPLIANCE WITH FEDERAL ENVIRONMENTAL LAWS**

Until such time as the EPA designates the Tribe a "state" for purposes of federal

environmental laws, ERC shall issue written guidance to assist applicants for Tribal development permits to identify and achieve compliance with any requirements of federal environmental laws that may be applicable to proposed development. Such guidance need not be issued through the rule-making process.

## **PART 7. ISSUANCE OF PERMITS AND ORDERS BY ERC**

### **§7-01. "LOW-IMPACT" DEVELOPMENT PERMITS**

The Chairman of the Commissioners is authorized to issue permits for "low-impact" development. The Chairman may delegate this authority to either or both of the other Commissioners. No administrative hearing shall be required for action on such permits. The Commission shall post notice of the issuance of any low-impact permit within one week after the date of issuance. Such notice shall be posted in the Tribal Offices and at such other locations as the Commission shall specify in its rules.

### **§7-02. GENERAL DEVELOPMENT PERMITS**

(a) Administrative hearing normally required. Applications for general development permits shall normally be reviewed by the Commission in an administrative hearing. This shall be an informal hearing in which the applicant will describe the proposed development, explain how it would be consistent with the Tribe's Land Use and Development Plan, describe actions taken to insure compliance with any other environmental review and consultation requirements established by Tribal or federal law, and respond to questions from the Commissioners. ERC's staff shall also make an oral presentation to the Board.

(b) Exceptions to the hearing requirement. The Commission may, through the issuance of rules, establish certain kinds of development permit applications on which the Commission may take action without first holding an administrative hearing. Such exceptions might include applications which are excluded from the requirement to prepare an EA, either by categorical exclusion or because the environmental impacts are sufficiently covered in an earlier EA or EIS. In any such case, if the Commission denies a permit without holding a hearing, the applicant may request that a hearing be held and the Commission shall do so.

### **§7-03. ADDITIONAL REQUIREMENTS WHEN THE TRIBAL COUNCIL OR A TRIBAL AGENCY OR DEPARTMENT IS THE APPLICANT**

(a) When the Tribal Council or a Tribal agency or department is the applicant, the Commission shall independently determine whether:

- (1) the proposed development would be consistent with the Tribe's Land Use and Development Plan,
- (2) the environmental assessment is adequate, and
- (3) the proposed development may have significant environmental impacts.

(b) In order to help make such an independent determination, the Commissioner shall question ERC staff on these points, but this questioning need not take place during the administrative hearing.

(c) The development order issued in any such case will include a statement the Commission has independently made the determinations listed in paragraph (a) of this section.

#### **§7-04. ADDITIONAL REQUIREMENT FOR AREAS OF SPECIAL TRIBAL CONCERN**

Any application that proposes development within any Area of Special Tribal Concern must be presented to the Tribal Council for ultimate resolution. In any such case, the Tribal Council and the Commission shall both present their views on the proposed development in a meeting of the Tribal Council called to consider such proposed development.

#### **§7-05. ISSUANCE OF DEVELOPMENT ORDERS**

The decision of the Commission on any application for development (low-impact as well as general) shall be recorded in a development order, as described in section 3-05 of this Subtitle. In the case of an application for which an administrative hearing has been held, the development order shall be issued no later than thirty days after the close of the hearing. A copy of the development order shall be provided to the applicant and to the Tribal Council.

#### **§7-06. DETERMINATION THAT AN ENVIRONMENTAL IMPACT STATEMENT (EIS) WILL BE REQUIRED FOR PROPOSED DEVELOPMENT**

In certain cases, the Commission may determine that the environmental assessment submitted with an application for development will not support a conclusion that the proposed development will not result in significant environmental impacts. In such a case, if an action by a federal agency (such as the Bureau of Indian Affairs) would be required for such proposed development to be permitted, an environmental impact statement (EIS) may be required. In any such case, the Commission shall deny the permit application and inform the applicant that an EIS will be required for the proposed development. In any such case, the applicant may revise the proposed development to avoid significant environmental impacts or may resubmit the application after an EIS has been prepared.



## **§7-07. PROCEDURE WHEN AN EIS IS REQUIRED**

When an EIS is required, the applicable procedure is specified in the federal regulations issued by Council on Environmental Quality (40 C.F.R. Parts 1500-1508). If the Tribal Council or a Tribal agency or department is the applicant, or is associated with the applicant, the Tribal Council may direct an appropriate Tribal agency or department to participate in the preparation of the EIS as a cooperating agency.

## **PART 8. ENFORCEMENT AND REVIEW**

### **§8-01. INVESTIGATIONS**

The Commission is authorized to investigate compliance with development orders that it has issued and to investigate activities that are being carried out without a permit in possible violation of this Subtitle. As part of an investigation, the Commission's staff may serve any person with a letter of inquiry. Any such letter of inquiry shall inform the person to whom it is addressed that answers must be provided to the Commission within 60 days and that failure to respond may result in the imposition of civil penalties.

### **§8-02. NOTICE OF VIOLATION; CEASE AND DESIST ORDER**

If the Commission's staff has reason to believe that a violation of this Subtitle has occurred or that there is a substantial likelihood that a violation will occur in the near future, the Commission's staff shall so advise the Chairperson of the Commission. In the case of an apparent violation of this subtitle, the Chairperson is authorized to issue a Notice of Violation to the person(s) apparently responsible for the violation, and, if the apparent violation occurred on property owned by a person other than the alleged violator, a Notice of Violation shall also be issued to the landowner.

In the case of a continuing violation or a threatened violation, the Chairperson is authorized to apply to the Tribal Council for a Cease and Desist Order to prevent the violation from continuing or occurring. Failure to comply with a Cease and Desist Order shall constitute a violation of this Subtitle. Both a Notice of Violation and a Cease and Desist Order may be issued for a single incident. A Notice of Violation will include a Summons to appear before the Commission at an enforcement hearing at a specified time and date, and shall advise the alleged violator that failure to appear may result in the imposition of civil penalties. If a Cease and Desist Order is issued without an accompanying Notice of Violation, the Order will inform the recipient that failure to comply with the Order will constitute a violation of this Subtitle which will result in the issuance of a Notice of Violation and may result in the imposition of civil penalties.

## **§8-03. ENFORCEMENT HEARINGS**

The Commission is authorized to conduct adjudicatory hearings to determine if a violation of this Subtitle has occurred. Such hearings shall be conducted in accordance with rules issued by the Commission pursuant to section 3-04 of this Subtitle. In such a hearing, the Tribe's Special Environmental Counsel, in cooperation with the Commission's staff, shall present the case to the Commission to establish that the person(s) charged has (have) committed a violation of this Subtitle. Any person so charged shall be entitled, at his or her own expense, to be represented by an attorney.

(a) Burden of Proof. The Tribe's Special Environmental Counsel shall have the burden of proving that a violation of this Subtitle has occurred and that a person charged was responsible for the violation. The Commission shall rule that a violation of this Subtitle has occurred if it finds that the charges are supported by substantial evidence and that preponderance of the credible evidence supports a finding that a violation has occurred.

(b) Enforcement Orders. Within thirty (30) days after the date of any enforcement hearing, the Commission shall issue a written decision. If the Commission determines that a violation has occurred and that the person(s) charged was (were) responsible for the violation, the Commission's decision shall include an Enforcement Order.

(c) Civil Penalties and Corrective Action. An Enforcement Order shall direct any person(s) found to have committed a violation of this Subtitle to take whatever corrective action the Commission deems appropriate under the circumstances. An Enforcement Order may impose civil penalties in accordance with the schedules of civil penalties described in the Commission's rules. Alternatively, an Enforcement Order may impose civil penalties in the event that a person found to have committed a violation does not take corrective action in accordance with the Order within a prescribed time frame. If a person who has been found to have committed a violation does not take corrective action within the prescribed time frame, and appropriate department or agency of the Tribal government may take the necessary corrective action, in which case, the amount of any civil penalty shall be increased by twice the amount of the cost incurred by the tribal department or agency in taking the corrective action.

## **§8-04. SPECIAL PROVISIONS FOR TRIBAL DEPARTMENTS AND AGENCIES**

In any case in which the Tribal Council or any Tribal agency or department is alleged to have violated the terms and conditions of a development order, or to have conducted development activity without a permit, the Chairperson of the Commission shall bring the matter to the attention of the Tribal Administrator who shall consider taking action to ensure compliance with this Subtitle. If the matter cannot be resolved informally, the Commission shall conduct an enforcement hearing for the purpose of making factual

determinations and issuing a decision recommending a course of corrective action if necessary.