

**PONCA TRIBE OF NEBRASKA
TITLE XVII
ENVIRONMENT**

**CHAPTER 1
GENERAL PROVISIONS**

Section 17-1-1. Purpose. The Tribe wishes to exercise its sovereignty and federal delegated authority to protect the environment within the territory of the Tribe and, therefore, the purpose of this Title is:

1. To protect the Tribe's rights reserved under treaties and the environment and natural resources within the territory of the Tribe;

2. To protect the Tribe and its members from adverse health effects resulting from contamination of the land, air, and water;

3. 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, education, re-use and recycling of material and natural resources, and waste minimization;

4. To coordinated activities, policies, and programs necessary to prevent, reduce, minimize, or eliminate environmental harm and ensure effective environmental protection, restoration, and enhancement;

5. To coordinate with other governments to create appropriate intergovernmental arrangements promoting greater uniformity and effectiveness in environmental protection; and

6. To prevent potentially harmful activities and to progressively make environmental improvements.

Section 17-1-2. Definitions. Unless the context requires otherwise or another definition is provided for a particular chapter or section, in this Title:

1. "Department" means the Ponca Tribe of Nebraska Environmental Protection Department.

2. "Environment" means any and all surface water, ground water, drinking water supply, land surface, subsurface, air, fish,

wildlife, plant life, and other biota within the territory of the Tribe or otherwise under the jurisdiction of the Tribe.

3. "Operator" means any person, other than the Tribe, who operates, controls, or has responsibility for the operation of a site, property, or activity.

4. "Owner" means any person, other than the Tribe, who alone, or jointly or severally with others, has legal title to any site, property, or activity or has care, charge, or control of any site, property, or activity as agent, executor, administrator, trustee, lessee, commercial lessee, or guardian of the estate of the holder of legal title, or is the contract purchaser of a site, property, or activity.

5. "Pollutant" means any element, substance, compound, or mixture, including disease-causing agents, which:

a. After release into the environment and upon exposure, ingestion, inhalation, or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, will or may reasonably be anticipated to cause harm, death, disease, behavioral abnormalities, cancer, genetic mutation, physiological malfunctions (including malfunctions in reproduction), or physical deformations in such organisms or their offspring; or

b. By itself or in connection with any other element, substance, compound, or mixture, will or tends to create a public nuisance or be detrimental or injurious to the public health, safety, or welfare, or harmful to the environment or domestic, commercial, industrial, agricultural, recreational, or other legitimate beneficial uses of the environment or livestock, wildlife, fish, or other biota;

c. Is considered or declared a pollutant, hazardous substance, hazardous waste, hazardous chemical substance, toxic substance, or otherwise dangerous or injurious to humans, wildlife, biota, or the environment by any law of the United States; or

d. Otherwise alters the physical, chemical, or biological properties of the environment, including change in temperature, taste, color, turbidity, silt, or odor.

Section 17-1-3. Territorial Jurisdiction.

1. The effective area of this Title shall extend to all waters and lands in the territory of the Tribe, including the air above and substances beneath all such lands and waters.

2. Where a person, whether by action or inaction, causes significant environmental harm to occur within the territory of the Tribe by conduct engaged outside the territory of the Tribe and the conduct would, if affecting the area within the territory of the Tribe, constitute a violation of this Title, the activity shall be considered in violation of this Title.

Section 17-1-4. Severability. If any chapter, section or provision of this Title or amendment made by this Title is held invalid, the remaining chapters, sections and provisions of this Title and amendments made by this Title shall continue in full force and effect.

Section 17-1-5. Sovereign Immunity. Nothing in this Title shall be construed as limiting, waiving, or abrogating the sovereignty or the sovereign immunity of the Tribe or any of its agencies, departments, enterprises, agents, officers, officials, or employees or as establishing or acknowledging any liability of the Tribe under any law.

**CHAPTER 2
ENVIRONMENTAL PROTECTION DEPARTMENT**

Section 17-2-1. Establishment.

1. There is hereby established an Environmental Protection Department as an agency of the Tribe, under the authority of the Tribe, and delegated the powers, duties, and responsibilities set forth in this Title and as otherwise provided by the laws of the Tribe.

2. The Department shall consist of an Environmental Manager and such other personnel and employees as may be required.

Section 17-2-2. General Authority. The Department shall have the following powers, duties, and responsibilities:

1. To administer, implement, and enforce this Title and enforce and assist in the enforcement of all laws of the Tribe relating to the protection and regulation of the environment;

2. To make recommendations to the Tribal Council concerning amendments to this Title and other laws of the Tribe protecting and regulating the environment;

3. To bring legal action in the name of the Tribe to enforce this Title;

4. To conduct investigations and gather information necessary for the enforcement of this Title and other laws of the Tribe protecting and regulating the environment;

5. To monitor, inspect, and ensure entities and persons covered by this Title are in compliance with this Title and other laws of the Tribe protecting and regulating the environment;

6. To obtain any information, including records and reports, from any owner or operator necessary to determine whether the owner or operator or any activity regulated pursuant to this Title is in compliance with this Title and other laws of the Tribe protecting and regulating the environment;

7. To conduct any independent monitoring or testing necessary to ensure compliance with this Title or other laws of the Tribe protecting and regulating the environment;

8. To collaborate and cooperate with such other agencies of the Tribe, other tribes, the United States and the states as necessary to implement and enforce this Title or other laws of the Tribe protecting and regulating the environment;

9. To utilize or adopt forms, guidance, and other standards from other appropriate jurisdictions to use as its own so long as such forms, guidance, or other standards meet the requirements of the laws of the Tribe for which such forms, guidance, or other standards are utilized;

10. To promulgate rules and regulations, subject to approval of the Tribal Council and consistent with the laws of the Tribe, which are necessary for carrying out this Title;

11. To perform all other duties delegated or assigned to the Department by this Title or other laws of the Tribe or the Tribal Council and otherwise implement this Title.

Section 17-2-3. Rules and Regulations. The Department may promulgate rules and regulations, not inconsistent with this Title

and subject to the approval of Tribal Council, as it deems necessary or desirable in the public interest in carrying out the duties of the Department.

Section 17-2-4. Use of Other Resources. In carrying out its duties and responsibilities:

1. The Department may, subject to any laws or rules governing confidentiality of information, use the services, information, or records of other departments and agencies of the Tribe or otherwise available to the Tribe, both from within and without the Tribe, and such departments, agencies, and others shall furnish such services, information or records upon request of the Department;

2. The Department may refer matters for investigation to state or federal authorities or other appropriate professionals or authorities and the Department may adopt and treat the results of any such referred investigation, including any determinations therein, as its own, which shall then be treated as though conducted directly by the Department; and

3. The Department may rely upon and adopt an investigation, including any determinations therein, made by another investigating agency or authority as its own and such investigation shall be treated as though conducted directly by the Department.

Section 17-2-5. Inspection Authority.

1. For the purpose of enforcing the provisions of this Title, the Department shall have the authority to enter and inspect any property, premises, or place during regular business hours in which a pollutant is reasonably believed to be located or in which relevant records may be located for the purpose of determining the compliance or noncompliance with any provision of this Title or any rule or regulation of the Department.

2. If entry or inspection pursuant to this Section is denied or not consented to, the Department may obtain from the Tribal Court a warrant to enter and inspect any such property, premises, or place prior to entry and inspection. The Tribal Court shall issue such warrants upon a showing that such entry and inspection is required to verify that the purposes of this Title are being carried out.

Section 17-2-6. Cease and Desist Orders.

1. If the Department determines that there exists a violation of any provision of this Title or any rule or regulation of the Department, the Department may issue a cease and desist order. Such order shall set forth:

- a. The specific provisions of this Title or rule or regulation of the Department alleged to have been violated;
- b. The facts alleged to constitute the violation; and
- c. The time by which acts or practices complained of must be terminated.

2. In the event any person fails to comply with a cease and desist order, the Department may bring an action in the Tribal Court for a temporary restraining order, preliminary injunction, permanent injunction, or other appropriate relief to prevent any further or continued violation of such order.

3. In addition to any other consequences for a violation of this Title or rule or regulation of the Department, any person who fails to comply with any cease and desist order, including necessitating the enforcement of such order in Tribal Court, shall be subject to a civil fine of up to ten thousand dollars (\$10,000) per day for each day during which such violation occurs.

Section 17-2-7. Notice of Violation.

1. If the Department has reason to believe that a violation of this Title or rule or regulation of the Department has occurred, the Department shall issue a notice of violation to all persons accused of the violation.

2. A notice of violation shall state:

- a. The specific provisions of this Title or rule or regulation of the Department alleged to have been violated;
- b. The Department will consider any written response to the notice of violation from the accused before determining whether to proceed with the notice of violation; and
- c. The accused may respond in writing to the notice of violation within fourteen (14) calendar days of service of the notice.

3. If a notice of violation is not delivered to a person accused of the violation personally at the time of issuance, it shall be served on such person in the manner provided for service of a summons in the rules of procedure governing civil actions in Tribal Court.

4. The accused shall have the right to respond to a notice of violation within the time stated in the notice of violation. The accused may include copies of any documents which the accused believes support his or her position.

5. After the time has expired for the accused to respond to a notice of violation, the Department shall consider any written response to the notice of violation and determine how to proceed with the notice of violation. Based on its review, the Department may:

a. Close the notice of violation if satisfied by the accused's response; or

b. Conduct or cause to be conducted a thorough investigation of the notice of violation.

6. If an investigation is conducted and such investigation reveals that there is evidence to support that a violation of this Title or rule or regulation of the Department has occurred, the Department shall determine an appropriate sanction for such violation as provided in this Title, including civil fine, cease and desist, cleanup, and/or remediation, and impose such sanction in accordance with the provisions of this Title.

7. Written notice shall be provided of the Department's decision under this Section.

Section 17-2-8. Appeal and Review. The Department may permit or require, pursuant to the rules and regulations of the Department, one or more levels of review of its orders and decisions by its employees or delegates, provided that the failure to proceed to a next required level of review shall constitute a waiver of any further appeal or judicial review.

Section 17-2-9. Judicial Review.

1. If a party is aggrieved by any final order or decision of the Department, the party may challenge the final order or decision by filing a petition requesting judicial review of the order or decision in the Tribal Court.

2. Judicial review of the Department's order or decision shall proceed in accordance with the following:

a. The petition for judicial review shall be filed within thirty (30) days of the issuance of the Department's final order or decision;

b. No new or additional evidence may be introduced, but the matter shall be heard on the record established before the Department;

c. No new or additional issues may be raised and only issues raised before the Department may be heard regardless of the Department's authority to hear the issue;

d. The Tribal Court shall uphold all factual findings of the Department unless the Tribal Court concludes that such findings are not supported by the substantive evidence in the record established before the Department;

e. In reviewing legal conclusions reached by the Department, the Tribal Court shall give proper weight to the Department's interpretation of this Title and any rules and regulations of the Department;

f. The Tribal Court may affirm, reverse, modify, or vacate and remand the Department's order or decision, but shall affirm the order or decision unless the Tribal Court concludes that the order or decision of the Department is:

i. Not supported by the evidence;

ii. Arbitrary or capricious;

iii. An abuse of discretion;

iv. Beyond the Department's authority; or

v. Otherwise contrary to the laws of the Tribe.

3. The Tribal Court shall dismiss any action brought against the Department if the person filing the action has not exhausted all administrative remedies before the Department.

4. Notwithstanding anything to the contrary in this Title, the Tribal Court shall not have jurisdiction or authority to award or order the payment of damages or other monies or provide any

remedy to a party except for affirming, reversing, modifying, or vacating and remanding the decision of the Department.

5. The Tribal Court's jurisdiction to review a final order or decision of the Department shall be exclusive and a final decision of the Department shall not be subject to appeal, review, challenge, or other action in any court or tribunal except as provided in this Section.

Section 17-2-10. Reporting of Violations. The Department may report any violation of this Title or other applicable law regulating or protecting the environment to the appropriate officials of other jurisdictions and request an investigation and, if appropriate, prosecution of such violation as a violation of the laws of that jurisdiction, including the criminal laws of that jurisdiction.

Section 17-2-11. Civil Penalties. In addition to any other consequences for a violation of this Title or rule or regulation of the Department, any person who violates any provision of this Title or any rule or regulation of the Department shall be subject to a civil fine of up to ten thousand dollars (\$10,000) per day for each day during which such violation occurs.

Section 17-2-12. Sovereign Immunity in Enforcement.

1. Except for valid judicial review of a final order or decision of the Department as provided in this Chapter, nothing in this Title shall be construed as limiting, waiving, or abrogating the sovereignty or the sovereign immunity of the Department or any of its agents, officers, officials, personnel or employees.

2. An action brought or taken by the Department, including without limitation, the bringing of suit for the collection of fines, enforcing an order, or enjoining an activity, shall not constitute a waiver of sovereign immunity as to any counterclaim, regardless of whether the asserted counterclaim arises out of the same transaction or occurrence or in any other respect.

3. No economic enterprise of the Tribe may claim sovereign immunity as a defense to any action brought or taken by the Department, including a suit for the collection of fines, enforcing an order, or enjoining an activity of such economic enterprise and, to the extent necessary, the Tribe waives the sovereign immunity of its economic enterprises in any action brought or taken by the Department against such economic enterprise.

CHAPTER 3
GENERAL ENVIRONMENTAL PROTECTION

Section 17-3-1. Protection of Environment Generally.

1. No person shall undertake any activity in the territory of the Tribe that will, or has the possibility to, pollute or harm the environment.

2. Every person shall take all reasonable measures to prevent or minimize any environmental harm from any activity conducted within the territory of the Tribe. In determining what measures are required to be taken under this subsection, regard shall be taken to, amongst other things:

a. The nature of the activity and the potential harm and the sensitivity of the receiving environment; and

b. The current state of technical knowledge and likelihood of successful application of the various measures that might be taken.

3. Where environmental harm can only be minimized through the application of reasonable and practical measures, the person causing the harm shall mitigate for the harm by replacing, restoring, or acquiring equivalent resources as those lost or potentially lost due to the harm.

Section 17-3-2. Waste Disposal. The storage, burial, or disposal of any pollutant within the territory of the Tribe is absolutely prohibited.

Section 17-3-3. Contamination of Sites.

1. For purposes of this Title, contamination exists at a site if:

a. One or more pollutants are present on or below the surface of the site in concentrations above the background concentrations, if any;

b. The pollutant has, at least in part, come to be present there as a result of an activity at the site or elsewhere; and

c. The presence of the pollutant has resulted in actual or potential harm to water, the environment, or the

health or safety of human beings, animals, plants, or wildlife that is not trivial, taking into account current or reasonable potential land uses.

2. For the purposes of this Title, a pollutant can result in harm regardless of whether:

a. The harm is a direct or indirect result of the presence of the pollutant; and

b. The harm results from the presence of the pollutant alone or the cumulative effects of the presence of the pollutant and other factors.

3. Contamination of a site is an environmental harm. Where contamination of a site exists due to a violation of the duty of reasonable care with respect to pollutants or other substances with the potential to pollute the environment and cause an environmental harm, contamination of a site shall be considered environmental negligence.

Section 17-3-4. Notice of Site Contamination. Any person who is an owner or operator where contamination of a site has occurred or is at substantial risk of occurring (other than a release expressly permitted by the Tribe or the United States) shall immediately notify the Department of such contamination as soon as he or she has knowledge of such contamination, but not more than twenty-four (24) hours from the time of knowing of the contamination. The Department shall convey the notification expeditiously to all appropriate departments and agencies of the Tribe and other governments.

Section 17-3-5. Clean Up of Contaminated Sites.

1. Whenever there is a contamination of a site or a substantial threat of contamination of a site, the Department is authorized to act to remove or arrange for the removal of such contamination and provide for remedial action relating to such site at any time.

2. Whenever the Department is authorized to act pursuant to this Section, the Department may undertake such investigations, monitoring, surveys, testing, and other information gathering as it deems necessary or appropriate to identify the existence and extent of the contamination, the source and nature of the contamination, the pollutants involved, and the extent of danger to the public health or welfare or to the environment. In

addition, the Department may undertake such planning, legal, fiscal, economic, engineering, architectural, and other studies or investigations as it may deem necessary or appropriate to plan and direct response actions, to recover the costs thereof, and to enforce the provisions of this Title.

Section 17-3-6. Clean-up Orders.

1. The Department may issue orders to any person to clean up any contamination at a site which he or his employee or agent has accidentally or purposely dumped, spilled, or otherwise deposited at the site.

2. In the event any person fails to comply with a clean-up order, the Department may bring an action in the Tribal Court for any appropriate relief to force such person to comply with the order.

3. In addition to any other consequences for a violation of this Title or rule or regulation of the Department, any person who fails to comply with a cleanup order, including necessitating the enforcement of such order in Tribal Court, shall be subject to a civil fine of up to ten thousand dollars (\$10,000) per day for each day during which such violation occurs.

Section 17-3-7. Voluntary Cleanup Plans.

1. When the Department determines that removal and remedial action of a contaminated site will be done properly and promptly by the owner or operator or by any other responsible party, the Department may allow such person to carry out the removal and remedial action in accordance with this Section.

2. Any owner or operator may submit an application for the approval of a voluntary cleanup plan to the Department under the provisions of this Section.

3. A voluntary cleanup plan shall include:

a. An environmental assessment of the site which describes the contamination or risk of contamination on the site and the risk the contamination currently poses to public health and the environment and includes:

i. The legal description of the site and a map identifying the location and size of the site;

ii. The physical characteristics of the site and areas contiguous to the site, including the location of any surface water bodies and groundwater aquifers;

iii. The location of any wells located on the site or on areas within a one-half (1/2) mile radius of the site and a description of the use of those wells;

iv. The current and proposed use of on-site groundwater;

v. The operational history of the site and the current use of areas contiguous to the site;

vi. The present and proposed uses of the site;

vii. Information concerning the nature and extent of any contamination and releases of pollutants which have occurred at the site including any impacts on areas contiguous to the site;

viii. Any sampling results or other data which characterizes the soil, groundwater, or surface water on the site; and

ix. A description of the human and environmental exposure to contamination at the site;

b. A proposal, if needed, to clean up and remediate any contamination or condition which has or could lead to contamination and a timetable for implementing the proposal and for monitoring the site after the proposed measures are completed; and

c. An agreement and consent to allow the Department to enter and inspect the site, property, or activity at any time until the voluntary cleanup plan is completed without the requirement of any warrant or order of the Tribal Court.

4. Any environmental assessment submitted to the Department under this Section shall be prepared by a qualified environmental professional. A qualified environmental professional is a person with education, training, and experience in preparing environmental studies and assessments.

5. Remediation alternatives in any voluntary cleanup plan shall be based on the actual risk to human health and the

environment currently posed by any pollutant on the site, considering the following factors:

a. The present or proposed uses of the site;

b. The ability of the pollutant to move in a form and manner which would result in exposure to humans and the surrounding environment; and

c. The potential risks associated with proposed cleanup alternatives and the economic and technical feasibility and reliability of such alternatives.

6. The Department shall provide formal written notification that a voluntary cleanup plan has been approved or disapproved within no more than forty-five (45) days after a request by an applicant, unless the applicant and the Department agree to an extension of the review to a date certain. Such review shall be limited to a review of the materials submitted by the applicant and documents or information readily available to the Department.

7. The Department shall approve a voluntary cleanup plan if, based on the information submitted by the applicant, the Department concludes that the plan will attain a degree of cleanup and control of pollutants that complies with all applicable laws, requirements, criteria, or standards or otherwise reduces concentrations such that the site does not present an unacceptable risk to human health or the environment.

8. In the event that a voluntary cleanup plan is not approved by the Department, the Department shall promptly provide the applicant with a written statement of the reasons for such denial. An applicant shall be permitted to resubmit a voluntary cleanup plan with appropriate changes based on the Department's reasons for denial.

9. The approval of a voluntary cleanup plan by the Department applies only to conditions on the site and standards that exist as of the time of submission of the application.

10. An approval by the Department of a voluntary cleanup plan pursuant to this Section shall be rendered void if the applicant:

a. Fails to materially comply with the voluntary cleanup plan; or

b. Submits materially misleading information in the context of the voluntary cleanup plan.

11. If a voluntary cleanup plan is not initiated within twelve (12) months and completed within twenty-four (24) months after approval by the Department, such approval shall lapse. The Department may grant an extension of the time limit for completion of a voluntary cleanup plan if the applicant submits a written request for re-application accompanied by written certification of a qualified environmental professional that the conditions on the site are substantially similar to those that existed at the time of the original approval. Any re-application where the conditions at the site have substantially changed since approval of the original voluntary cleanup plan shall be treated as a new application.

12. Within forty-five (45) days after the completion of a voluntary cleanup described in the voluntary cleanup plan approved by the Department, the applicant shall provide to the Department a certification from a qualified environmental professional that the plan has been fully implemented.

13. If an applicant or owner or operator fails to materially comply with a voluntary cleanup plan or initiate and complete the voluntary cleanup plan within the time permitted, the Department may issue a cleanup order pursuant to this Chapter.

14. In no event shall a potentially responsible party be subject to a lesser standard of liability, receive preferential treatment, or in any other way, whether direct or indirect, benefit from any voluntary cleanup arrangement.

Section 17-3-8. Owner and Operator Liability.

1. The owner and operator of any property or activity shall be jointly and severally liable and responsible for the full costs of any and all cleanup, remediation, and testing of contamination at a site as well as the Department's fees and costs of administering notices and enforcing cleanup, remediation, and testing of the site.

2. In addition to any other methods allowed by the laws of the Tribe or other applicable law, the Department may collect any costs for which an owner or operator is responsible under this Section through an action in Tribal Court or any other court of competent jurisdiction.

3. Nothing in this Section shall limit an owner's, an operator's, or the Tribe's right to recover costs from persons contributing to the contamination of a site.

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