TRIBAL LAW AND THE NATIONAL HISTORIC PRESERVATION ACT AS APPLICABLE OR RELEVANT AND APPROPRIATE REQUIREMENTS (ARARS) UNDER SUPERFUND

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**ARARs 101, Tribal Law, focus on NHPA**

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**Managing Superfund Cleanups with NHPA Concerns**

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Take Home Concepts

- Defining ARARs
- Identifying ARARs
  - Tribal Law and other federal laws
- Protecting ecological, cultural, and historical resources with the National Historic Preservation Act and other location-specific ARARs
ARARs are …

- **Applicable or Relevant and Appropriate Requirements**
  - Standards that cleanups must attain

- **Legally applicable** to the hazardous substance (or pollutant or contaminant) concerned

OR

- **Relevant and appropriate** under the circumstances of the release.
Potential ARARs examples …

- Federal Safe Drinking Water Criteria
- Tribal Water Quality Standards
- Tribal Solid Waste Management Codes

<table>
<thead>
<tr>
<th>Pollutant</th>
<th>1Indication/Concern</th>
<th>2USEPA primary drinking water standard</th>
</tr>
</thead>
<tbody>
<tr>
<td>total coliform bacteria</td>
<td>none/potentially harmful bacteria may be present</td>
<td>0 organisms/100 mL</td>
</tr>
<tr>
<td>fecal coliform bacteria</td>
<td>none/strong evidence of sewage or manure pollution and serious disease</td>
<td>0 organisms/100 ml</td>
</tr>
<tr>
<td>nitrate</td>
<td>none/”Blue baby syndrome” in infants under six months of age -45 if reported as NO₃⁻</td>
<td>10 if reported as NO₂⁻ N</td>
</tr>
<tr>
<td>lead</td>
<td>none/Infants and children: delays in physical or mental development; Adults: kidney problems; high blood pressure</td>
<td>0.015</td>
</tr>
<tr>
<td>copper</td>
<td>blue-green deposits on fixtures/short-term exposure: gastrointestinal distress. Long-term exposure: liver or kidney damage.</td>
<td>1.3</td>
</tr>
<tr>
<td>atrazine</td>
<td>none/cardiovascular system problems; reproductive difficulties -</td>
<td>0.03</td>
</tr>
<tr>
<td>arsenic</td>
<td>none/skin damage; circulatory system problems; increased risk of cancer</td>
<td>0.010</td>
</tr>
</tbody>
</table>

1 flavor, odor, or visible characteristics that may warn of a particular contaminant’s presence
2 “primary” standards are issued by USEPA for known health-related contaminants; all standards in this table are expressed in milligrams per liter (mg/L) unless otherwise noted
3 Water testing labs have the option of reporting nitrate results in two different ways (as nitrate, NO₃⁻; or as nitrate-nitrogen, NO₂-N). Take care to note which reporting units are used for your test results, and compare your results with the drinking water standard that uses the same reporting units.
National Contingency Plan

- Compliance with ARARs is a *threshold requirement* for remedy selection

- **Remedial Actions**: ARARs are site-specific requirements at the time of signature on the Record of Decision selecting the remedy

- **Removal actions**: ARARs are required *to the extent practicable* considering the exigencies of the situation
ARARS can be waived

Remedial actions **shall** attain ARARs

- Unless one of six waivers can be invoked

**Waivers include:**

- Fund Balancing
- Technical impracticability
- Inconsistent application of tribal/state standards
- And others, see CERCLA Section 121(d)(4)
ARARs Categories

Three categories for ease of identification

- Action-specific
- Chemical-specific
- Location-specific
Action-Specific ARARs

- What components are possible for remedial action?
- What requirements must be met?
- For example: incineration, capping wastes, dredging sediments
Chemical-Specific ARARs

◆ What are the Contaminants of Concern (COC)?
  ▪ Protect water, sediments, soil, land, plants and animals (including humans) from exposure to COC at risk levels
  ▪ Arsenic, Cadmium, Chromium, what else?

◆ What laws, rules, standards control the COCs?
  ▪ CWA ambient water quality criteria
  ▪ Tribal/State water quality standards (numeric or narrative)
  ▪ Soil screening levels
Location-Specific ARARs

- Control hazardous substances or direct response activities solely based on their location in a special geographic area
- Special locations include sensitive ecosystems or habitats, coastal zones, historic places, Indian Reservations, sacred sites
- Types of locations include wetlands, floodplains, federal wilderness areas, wildlife refuges, scenic rivers

Protect Sacred Sites
Indigenous People, One Nation
www.protectsacredsites.org
Location-Specific ARARs

- **National Historic Preservation Act (NHPA) of 1966**
  - Protects historic resources from effects on properties included or eligible for National Register of Historic Places.
  - Gowanus Canal Cleanup – treasures found in Brooklyn, NY
Location-Specific ARARs

- Endangered Species Act
- Fish and Wildlife Coordination Act
- Migratory Bird Treaty Act
- Clean Water Act, Dredge and Fill Rules
Location-Specific ARARs

Ϻ Native American Graves Protection and Repatriation Act (NAGPRA)
  ▪ Protects Indian graves from desecration
  ▪ Prevents removal and trafficking
  ▪ When inadvertently discovered, requires the excavation cease and the affiliated tribes must be notified and consulted
Alaskan Native, American Indian and Native Hawaiian Concerns and Cultural Resources Protection

◆ Archaeological Resources Protection Act
  ▪ Prohibits unauthorized (unpermitted) disturbance of archaeological resources on public and Indian lands
  ▪ Archaeological resources are “any material remains of past human life and activities which are of archaeological interest”
ARARs that require consultation

- Location-specific ARARs sometimes oblige consultation with federal, state and tribal partners
- Consultation examples in federal law
  - Fish and Wildlife Service on Endangered Species
  - NOAA on marine mammals
  - NHPA, State and Tribal Historic Preservation Officers on historic resources
Executive Orders are “to be considered”

- **Executive Order 13175** – Consultation with Indian Tribal Governments
- **Executive Order 13007** – Protects Indian Sacred Sites
- **Executive Order 12898** – Environmental Justice
- **Executive Order 11988** – Floodplain Management
- **Executive Order 11990** – Protection of Wetlands
- **Executive Order 13186** – Protects Migratory Birds

Valmont Butte, CO, Sacred Site, Cheyenne/Arapaho

Eastern Blue Bird
ARARs “to be considered” (TBC)

- EPA decides what is TBC on case-by-case basis
- Both lead and support agencies may, as appropriate, identify other advisories, criteria, or guidance “to be considered”
- TBCs are neither promulgated nor enforceable, proposed standards may be TBC
- Examples: health advisories, reference doses, EPA, State, and Tribal guidance

Tribal advisory guidelines, proposed standards are “to be considered” (TBC) guidance for cleanups

Once a TBC is included in a Record of Decision, it should be considered as if it is ARAR
Tribal Law as Potential ARARs

- Tribal law may be chemical, action or location specific ARARs
- Lead agency requests ARARs from support agency in writing
- Support agency provides ARARs in writing
  - Regulations define “State” to include Tribal Governments
  - States and Tribes may be lead or support agency
Limitation on Tribal Law as ARARs

Tribal law standards that meet following requirements can be potential ARARs with timely notice:

1) promulgated;
2) identified by the tribe in a timely manner; and
3) are more stringent than federal requirements.
Limitations for Tribal ARARs, con’t.

**Promulgated**
- General applicability, legally enforceable and established by tribal government or agency rule making process
- “General applicability” – precludes requirements targeted for a CERCLA site; requirement must apply to all remedial situations
- “Legally enforceable” – law or regulation which contains specific enforcement provisions or otherwise enforceable

**“More stringent”**
- Distinguish existing federal requirement
- Acknowledge exclusive state or tribal standard with no federal counterpart
- Tribal soil cleanup target levels
ARAR Resources

- CERCLA Compliance with other Laws Manual, Part I and II
- Summary of Part II, Fact Sheet
- Q&A on ARARs, Fact Sheet
- ARARs Overview, Focus on Waivers, Fact Sheet
- State and Tribal Involvement in Superfund, EPA webpages
Questions on ARARs?
Under the Superfund law, NHPA is a location – specific ARAR

Introduction to “Managing Superfund Cleanups with NHPA Concerns”

• Who are the participants in NHPA?
• What are the EPA obligations?
• How to resolve adverse effects on historic/cultural resources?
NHPA Participants

- Advisory Council on Historic Preservation
- US Dept. of Interior
- State/Tribal Historic Preservation Office
- Federal Agencies
EPA Involvement

- CERCLA involves NHPA
  - NHPA may be a location-specific ARAR
  - Remedial vs. removal actions

- Consultation, NHPA Section 106
  - Consult with SHPO/THPO
  - Provide Advisory Council opportunity to comment
Resolving Adverse Effects

- Federal agency program alternatives
  - Programmatic agreements
  - Memorandum of Agreement
- Advisory Council consulted on resolving effects, but ultimately, the decision is EPA’s
- Legal risks for EPA
  - Challenges to cleanups constrained by law
  - Parties may bring challenges through Administrative Procedure Act for alleged violation of NHPA procedures