

Title 4. Environment and Natural Resources—Chapter 401
TRIBAL ENVIRONMENTAL RESPONSE
Latihwatsyahalé·tu kayanl̄hsla?
They clean up the earth laws

401.1. Purpose and Policy	401.7. Discharge of Hazardous Substances
401.2. Adoption, Amendment, Conflicts	401.8. Remedial Actions
401.3. Definitions	401.9. Case Closure or No Further Action
401.4. Jurisdiction	401.10. Enforcement and Penalties
401.5. Tribal Environmental Response Program (TERP)	401.11. Appeals
401.6. Environmental Quality Standards	

401.1. Purpose and Policy

401.1-1. The purpose of this law is to:

- (a) regulate the identification, investigation and remediation of discharges of hazardous substances to the environment;
- (b) identify sites where the discharge of a hazardous substance into the environment has occurred; and
- (c) eliminate contamination from and control the threat of, or actual discharge of hazardous substances.

401.1-2. It is the policy of the Nation to:

- (a) respond to discharges of hazardous substances and environmental contamination concerns; and
- (b) ensure remedial action is taken to redevelop contaminated lands and maintain the health and welfare of the environment.

401.2. Adoption, Amendment, Conflicts

401.2-1. This law is adopted by the Oneida Business Committee by resolution BC-09-12-12-B and amended by resolution BC-02-25-15-C and BC-07-26-17-B.

401.2-2. This law may be amended pursuant to the procedures set out in Tribal law by the Oneida Business Committee or the Oneida General Tribal Council.

401.2-3. Should a provision of this law or the application thereof to any person or circumstances be held as invalid, such invalidity shall not affect other provisions of this law which are considered to have legal force without the invalid portions.

401.2-4. In the event of a conflict between a provision of this law and a provision of another law, the provisions of this law shall control. Provided that, nothing in this law is intended to repeal or modify any existing law, policy, regulation, rule, resolution, or motion.

401.2-5. This law is adopted under authority of the Constitution of the Oneida Nation.

401.3. Definitions

401.3-1. This section shall govern the definitions of words and phrases used within this law. All words not defined herein shall be used in their ordinary and everyday sense.

- (a) “All Appropriate Inquiries” means the process of evaluating a property’s environmental conditions and assessing the likelihood of any contamination in compliance with the All Appropriate Inquiries Final Rule at 40 CFR 312.
- (b) “Contamination” or “contaminated” means the environment has been affected by a hazardous substance to the point that remedial action is necessary to restore the environment.

- (c) “Discharge” means, but is not limited to, spilling, leaking, pumping, pouring, emitting, emptying, releasing or dumping.
- (d) “Dispose” or “disposal” means the deposit, injection, or placing of any hazardous substance in a manner which may permit the substance to be discharged to the environment.
- (e) “Free product” means a hazardous substance that is present in the environment as a floating or sinking non-aqueous phase liquid.
- (f) “Groundwater” means any water contained beneath the ground surface.
- (g) “Hazardous substance” means any substance or combination of substances, including any waste of a solid, semi-solid, liquid or gaseous form, which may cause or significantly contribute to an increase in mortality or serious irreversible or incapacitating reversible illness, or which may pose a substantial present or potential hazard to human health or the environment because of its quantity, concentration or physical, chemical or infectious characteristics. This term includes, but is not limited to:
- (1) a substance defined in the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 USC §9601 as amended, as a hazardous substance.
 - (2) those substances which are toxic, corrosive, flammable, irritants, strong sensitizers or explosives.
 - (3) petroleum, including crude oil or any fraction thereof that is liquid at standard conditions of temperature and pressure.
- (h) “Immediate action” means a remedial action that is taken within a short period of time after the discharge of a hazardous substance or contamination occurs, or after the discovery of the discharge or contamination.
- (j) “Judiciary” means the judicial system that was established by Oneida General Tribal Council resolution GTC-01-07-13-B to administer the judicial authorities and responsibilities of the Nation.
- (k) “Operator” means any person who operates a site.
- (l) “Owner” means any person who owns or who receives direct or indirect consideration from the operation of a site regardless of whether the site remains in operation and regardless of whether the person owns or receives consideration at the time contamination occurs.
- (m) “Person” means an individual, owner, operator, entity, corporation, partnership, association, municipality, interstate agency, state agency or federal agency.
- (n) “Practicable” means remedial action is capable of being implemented, taking into account:
- (1) The technical feasibility of the remedial action, considering its long-term effectiveness, short-term effectiveness, implementability and the time it will take until restoration is achieved; and
 - (2) The economic feasibility of the remedial action, considering the cost of the remedial action compared to its technical feasibility.
- (o) “Registered pesticide” means a pesticide registered or exempted by the federal Environmental Protection Agency’s Office of Pesticide Programs.
- (p) “Remedial action” means any action taken to control, minimize or eliminate the discharge of a hazardous substance at or contamination of a site and any action taken to restore the environment to the extent practicable.
- (q) “Responsible party” means any person who, under this law, is required to:

- (1) take action to prevent or abate contamination, a threat of contamination, the discharge of a hazardous substance or threat of a discharge; or
- (2) reimburse a Tribal entity for the costs incurred by the entity to take action to prevent or abate contamination or threat of contamination or the discharge of a hazardous substance or threat of a discharge.
- (r) “Restore” or “restoration” means to return the environment to its original condition before the discharge of a hazardous substance or contamination of the site occurred.
- (s) “Site” means any area where contamination has occurred or is suspected of occurring, including a place of business that handles, transports or stores hazardous substances and is required to track such materials.
- (t) “Tribal entity” means a board, committee, commission, department, division, or agency of the Nation.

401.4. Jurisdiction

401.4-1. *Personal Jurisdiction.* This law shall apply to:

- (a) all Oneida Tribal members, Tribal entities, Tribal corporations and members of other federally recognized tribes;
- (b) individuals and businesses leasing, occupying or otherwise using Tribal fee land and all Tribal trust lands; and
- (c) individuals who have consented to the jurisdiction of the Nation or as otherwise consistent with federal law. For purposes of this subsection, an individual shall have consented to the jurisdiction of the Nation:
 - (1) By entering into a consensual relationship with the Nation, Tribal entities, Tribal corporations, or Tribal members, including but not limited to contracts or other agreements; or
 - (2) By other facts which manifest an intent to consent to the authority of the Nation, including failure to raise an objection to the exercise of personal jurisdiction in a timely manner.

401.4-2. *Territorial Jurisdiction.* This law extends to all land within the exterior boundaries of the Reservation of the Nation, as established pursuant to the 1838 Treaty with the Oneida, 7 Stat. 566, any lands added thereto pursuant to federal law and all lands held in trust for the Nation within the State of Wisconsin.

401.5. Tribal Environmental Response Program (TERP)

401.5-1. The Environmental Health and Safety Division (Division) shall create a Tribal Environmental Response Program (TERP). The purpose of the TERP shall be to address the discharge or potential discharge of a hazardous substance that has resulted in or may result in contamination of the environment.

401.5-2. Under the TERP, the Division shall:

- (a) provide opportunities for public participation for the identification, restoration and reuse of contaminated sites.
- (b) conduct and/or oversee assessments and investigations of sites with contamination concerns.
- (c) identify potentially responsible parties to clean up contaminated sites.
- (d) require appropriate remedial action be taken when contaminated sites are identified and develop a plan or ensure a plan is developed for the undertaking of those remedial actions.
- (e) oversee and enforce required remedial actions.

(f) develop mechanisms for the approval, certification, and verification of remedial actions taken at a site.

(g) maintain a public record of remedial actions conducted at a contaminated site.

401.5-3. *Issuance of Administrative Orders.* The Division shall issue administrative orders, as necessary, when the discharge of a hazardous substance occurs, or when contamination, or the threat of contamination, exists. Before issuing an administrative order, the Division shall consult with other Tribal entities having expertise in the subject matter of the order. Administrative orders may include:

(a) orders to prevent the discharge of a hazardous substance.

(b) orders to allow the investigation of a site it has reason to believe is contaminated or is under threat of contamination.

(c) orders to require a responsible party to take action to prevent and/or abate contamination.

401.5-4. *Emergency Situations.* Chapter 302 of the Oneida Code of Laws, Emergency Management and Homeland Security, shall govern the response to the discharge of a hazardous substance which results in the proclamation of an emergency.

401.6. Environmental Quality Standards

401.6-1. The Division shall adopt and revise, as necessary, standards for environmental quality that are protective of public health and the environment, recognizing that different standards may be required, depending on the designated uses of the land and groundwater.

401.6-2. Before adopting or revising environmental quality standards, the Division shall publish notice in two (2) consecutive issues of the Kalihwisaks on the standards that are under consideration for adoption or revision.

(a) The notice shall contain a deadline for comments to be received from any person.

(b) The Division shall review and consider comments received before approving the new or revised standards.

401.6-3. Environmental quality standards adopted by the Division shall become effective upon Oneida Business Committee approval, except those standards that are consistent with federal standards shall be effective upon approval by the Division.

401.7. Discharge of Hazardous Substances

401.7-1. *Notification of Discharge.* Unless exempted from notifying the Division under 401.7-10, the following individuals shall notify the Division immediately of the discharge of a hazardous substance or threat of such discharge:

(a) Any person who possesses or controls a hazardous substance which is discharged;

(b) Any person who causes the discharge of a hazardous substance; and

(c) Any person who has professional knowledge that the discharge of a hazardous substance has occurred at a site, or there is a threat of such discharge.

401.7-2. *Investigation of Discharge.* When the Division is notified of or becomes aware of the discharge of a hazardous substance, or threat of such discharge, it shall identify any responsible parties and issue an administrative order for the responsible parties to have an investigation conducted of the site. The Division may also issue an administrative order requiring the responsible party take action to abate and/or prevent the discharge. The Division may specify any necessary preventative measures or remedial actions in the administrative order.

401.7-3. *Determination of Contamination.* After being issued an administrative order for an investigation, the responsible parties shall have an initial assessment conducted to determine whether the discharge of a hazardous substance has occurred and whether any

discharge has caused contamination. The initial assessment shall include sampling and/or testing of the site where the discharge of a hazardous substance has occurred.

(a) Evidence that indicates contamination of a site has occurred, or may have occurred includes, but is not limited to:

(1) visible soil contamination;

(2) presence of free product or vapors in soils, basements, sewers or utility lines, surface water or groundwater; and

(3) reports, environmental assessments or routinely gathered monitoring data that indicates contamination has occurred or may have occurred.

(b) Groundwater samples shall be collected for analysis and evaluation to determine whether the groundwater poses any public health and welfare concerns.

(c) Whether contamination exists shall be based on the level of contamination as compared to environmental quality standards adopted by the Nation.

401.7-4. The Division shall evaluate the harmfulness of the discharge of a hazardous substance based on the initial assessment and shall:

(a) publish the results of the initial assessment, along with a notice that the Division will accept comments on the results for at least thirty (30) days after the initial publication, in two (2) consecutive issues of the Kalihwisaks; and

(b) mail the results of the initial assessment, along with a notice that the Division will accept comments on the results for at least thirty (30) days after the initial publication of the results in the Kalihwisaks, to all owners of property located within one thousand two hundred (1,200) feet of the outer boundaries of the property that is the subject of the initial assessment.

401.7-5. The Division shall accept comments on the results of the initial assessment for at least thirty (30) days after the initial publication of the results in the Kalihwisaks. The Division shall compile, review and respond to all comments. Responses will be recorded and published in a document available to the public.

401.7-6. A person who possesses or controls a hazardous substance which is discharged or causes the contamination of a site shall take remedial action.

401.7-7. A person who voluntarily assumes responsibility for performance of, or payment of, remedial actions in accordance with a plan that has been approved through the TERP, shall not be subject to enforcement actions for the contamination if he or she complies with the plan.

401.7-8. Except as provided in 401.7-10, the following persons are responsible parties:

(a) The current owner and operator of the site;

(b) Any owner or operator of the site at the time the discharge or contamination occurred;

(c) Any person who arranged for the disposal or treatment of the hazardous substance, or arranged for the transportation of the hazardous substance for disposal or treatment;

(d) Any person who transports the hazardous substance and selects the disposal site; and

(e) Any person who, by any act or omission, caused or contributed to the discharge or contamination.

401.7-9. *Exemptions.* The following persons are not “responsible parties” under this law:

(a) Any person discharging in accordance with a permit or program approved under federal or Tribal law.

(b) Law enforcement officers and members of a fire department using hazardous substances in carrying out their responsibilities to protect public health, safety and welfare. However, these individuals shall notify the Division of any discharges of a hazardous substance occurring in the performance of their duties.

(c) Any person applying a registered pesticide according to the label instructions, or applying a fertilizer at or below normal and beneficial agronomic rates. These individuals are also exempted from the notification and penalty requirements of this law.

(d) Any person who can establish that the discharge or threatened discharge of a hazardous substance for which the person would be otherwise responsible was caused solely by:

- (1) An act of nature;
- (2) An act of war; or
- (3) An act or omission of a third party, including but not limited to a trespasser, other than:
 - (A) An employee or agent of the person asserting the defense; or
 - (B) Any person whose act or omission occurs in connection with a contractual relationship existing, directly or indirectly, with the person asserting the defense.

(e) Any person who is an owner, past owner, or purchaser of property and who can establish by a preponderance of the evidence that at the time the property was acquired by the person, the person had no knowledge or reason to know that the property was contaminated, or that a hazardous substance was discharged or disposed of on, in or at the property.

- (1) To establish that a person had no reason to know what the person was undertaking at the time of acquisition, All Appropriate Inquiries shall be taken into the previous ownership and uses of the property.

(f) Any person who purchases property after January 11, 2002 with knowledge that it is contaminated if:

- (1) the person did not cause the contamination on the property;
- (2) the person establishes that all disposal of hazardous substances occurred before the person acquired the property;
- (3) the person makes All Appropriate Inquiries into previous ownership and uses of the property prior to acquiring the property; and
- (4) the person is not affiliated with a party liable for any contamination.

401.7-10. Where there is an unresponsive or unknown responsible party, the Division may refer the site to the appropriate outside agency to retain contractors or consultants, and take other necessary actions to conduct remedial action or have remedial action conducted at a site.

401.8. Remedial Actions

401.8-1. A responsible party shall take immediate action to halt the discharge of a hazardous substance and to minimize the harmful effects of the discharge.

401.8-2. If, after the initial assessment, it is determined that the discharge may cause contamination or has caused contamination, the Division shall issue an administrative order to the responsible party or parties to take remedial action or have remedial action conducted on the site.

401.8-3. The Division shall determine the appropriate remedial actions, including the time frame, to be taken in the event a site is contaminated. Remedial actions may include:

- (a) the replacement and/or removal of injured plant and animal life or contaminated soil.
- (b) the treatment of contaminated soils and/or surface and/or groundwater.
- (c) adequate storage, handling and disposal methods to prevent further and/or future discharges and contamination from occurring.
- (d) the replacement or repair of faulty equipment.

(e) other remedial actions that restore the environment and/or protect the environment from the contamination, as determined by the Division.

401.8-4. Where it is determined by the Division that immediate remedial action is not being taken, but is necessary to protect the public health, safety or welfare or the environment, the Division may conduct remedial action or have remedial action conducted. Costs of any such action may be recovered from any or all responsible parties.

401.8-5. In addition to the requirements of this law, the Division shall comply with all applicable federal laws when the discharge or threat of a discharge of a hazardous substance occurs.

401.8-6. Each responsible party is strictly liable, jointly and severally, for all remedial action costs and for all damages resulting from the discharge or threatened discharge of a hazardous substance.

401.9. Case Closure or No Further Action

401.9-1. The Division may close a case concerning a site or verify that no further action is necessary, upon compliance with the applicable requirements of this law and any administrative orders issued by the Division, including the completion of remedial actions. The Division shall conduct investigations and inspections to ensure compliance with any administrative order it has issued.

401.9-2. Sampling shall be conducted at the completion of the remedial action when:

- (a) The hazardous substance discharge is in contact with groundwater.
- (b) The amount, identity or duration of the contamination is unknown.
- (c) Other site conditions indicate that sampling is necessary to confirm the adequacy of the remedial action.

401.9-3. The Division may require additional remedial actions, including monitoring, for any site, even those cases that have been closed by the Division, if information regarding site conditions indicates that contamination on or from the site poses a threat to public health, safety or welfare or the environment.

401.9-4. If additional remedial action is required for a previously closed case, the Division:

- (a) Shall indicate in writing to the responsible parties that additional remedial action is needed at the site and provide the responsible parties with information regarding the nature of the problem and type of remedial action that is needed.
- (b) May require the responsible parties to achieve compliance with the Nation's public health and environmental laws, within a time period established by the Division.

401.10. Violations, Enforcement and Appeals

401.10-1. *Compliance Orders.* If, after issuing an administrative order, the Division determines that a violation of the administrative order exists, it shall issue a compliance order which requires the responsible parties to:

- (a) Take remedial action to prevent or abate the discharge of a hazardous substance; and/or
- (b) Allow the investigation of a site believed to be contaminated or under threat of contamination.

401.10-2. *Penalty Schedule.* The Environmental Resource Board is delegated rulemaking authority to adopt a penalty schedule, upon recommendation of the Division, for violations of this law. Any person who does not comply with a compliance order issued by the Division may receive a penalty in accordance with the fine schedule. A separate offense shall be deemed committed on each day during or on which a violation occurs or continues.

(a) Any order issued pursuant to this law that is not complied with may be physically enforced by the Division at the Owner's expense.

(b) Any person who is a lessee of the Nation who violates any provision of this law or any compliance order issued by the Division shall have said case referred to the Division of Land Management to consider potential lease violations.

401.10-3. *Contested Action Hearings.* All citations, penalties, orders and declarations issued pursuant to this law shall include a pre-hearing date with the Judiciary Trial Court which shall be set for the next scheduled monthly prehearing date that is at least thirty (30) days after the citation was issued. Persons wishing to contest a citation shall appear at the prehearing, at which time the Judiciary Trial Court shall accept pleas which either contest or admit committing the act for which the citation was issued. The Judiciary shall schedule a hearing as expeditiously as possible, provided that it shall be scheduled within ninety (90) days of the date of the prehearing, for all persons entering a plea contesting the fact that they committed the act for which a citation was issued. In addition to scheduling requested hearings, the Judiciary may also make conditional orders at the prehearing which are effective until the matter is resolved.

(a) *Community Service.* Community service may be substituted for fines at the Judiciary's discretion, provided that, if so substituted, the Judiciary shall use the rate of one (1) hour per ten dollars (\$10.00) of the fine.

(b) *Allocation of Citation Revenue.* All fines and penalties issued by citations are payable to the Environmental Resource Board or its designee, the proceeds of which the Environmental Resource Board shall contribute to the Nation's general fund.

(c) *Appealing the Decision of the Judiciary Trial Court.* Any person wishing to contest the determination of the Judiciary Trial Court may appeal the applicable determination to the Judiciary's Court of Appeals in accordance with the Rules of Appellate Procedure.

(d) *Pursuing Payment of a Citation.* The Environmental Resource Board may pursue payment from parties who have failed to make the required payments through the garnishment process contained in the Garnishment law and/or by attaching a Tribal member's per capita payment pursuant to the Per Capita law.

End.

Adopted – BC-09-12-12-B
Amended – BC-02-25-15-C
Amended – BC-07-26-17-B