# Tribal Coal Ash Regulations

## Diné Fundamental Law (DFL)

The Diné Bi Beenahaz’áanii/[Fundamental Laws of the Diné](https://www.navajoepa.org/main/images/pdf/Dine%20Fundamental%20Law.pdf) (FLD) was approved by the Navajo Nation Council in 2002. This law articulates the origin and foundation of all Navajo life and government. It presents an authoritative Diné perspective on what are proper and acceptable ways for human beings to sustain themselves and their communities. Under this law, any credible analysis of the environmental and cultural impacts of coal plants located on the Navajo Nation must specifically address all relevant portions of the FLD. Relevant impacts of coal plants that pertain to this law include coal combustion waste, climate change, environmental justice, water impacts, health impacts, socioeconomics, and endangered species.

The FLD has come up several times regarding coal plants on Navajo Nation. The [comments on the draft EIS for Four Corners Power Plant and Navajo Mine](https://drive.google.com/file/d/1gS7smQaZocYM9qb1I8c6asidK8ibm20J/view?usp=sharing) described how the details of the DEIS fail to honor the law. With Navajo Generating Station closing, there have been public calls that this can be an opportunity to [return to the framework of the FLD](https://www.navajoequitableeconomy.org/2019/11/08/navajo-community-groups-launch-navajo-equitable-economy-initiative-call-for-healing-as-final-ngs-coal-units-retire/). When the Navajo Transitional Energy Company (NTEC) was staying quiet about negotiations regarding Navajo Mine, there were claims that NTEC was violating the FLD in doing so due to the huge risks this presents for the Navajo people.

## Executive Orders

[Executive Order (“E.O.”) 13175](https://www.federalregister.gov/documents/2000/11/09/00-29003/consultation-and-coordination-with-indian-tribal-governments), creates a federal policy “to establish regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications.” Regarding coal plants on Navajo Nation, this requires the EPA to meaningfully consult with tribal governments regarding the Permitting Proposal is contrary to both the plain language of E.O. 13175 and EPA’s own policy for implementing the order. During the rulemaking for the 2015 CCR Rule, EPA concluded that the CCR Rule “may have tribal implications” and three large coal plants are now subject to the CCR Rule are located on tribal lands. These are Navajo Generating Station (NGS), the Four Corners Power Plant (FCPP) and Bonanza Power Plant is located on tribal trust lands within the Uintah and Ouray Reservation of the Ute Indian Tribe. Since the CCR units are land-based units, the fact that these CCR facilities are located on tribal trust land means that the facility owners within the meaning of the CCR Rule are the tribal trust beneficial landowner tribes.[[1]](#footnote-0)

In the case of FCPP the FCPP operator APS said that it “interprets its lease agreement with Navajo Nation such that the tribe cannot appeal a permit or adversely comment on a permit.”[[2]](#footnote-1) Through this, APS would deprive the Navajo Nation – a sovereign entity whose limited waters depend on the proper safeguards and corrective action at the Four Corners Power Plant – of all opportunity for meaningful engagement in the permitting of the site once the permitting program has been finalized.[[3]](#footnote-2)

In the context of meaningful consultation, it is relevant to note that the coronavirus pandemic creates enormous challenges to meaningful consultation with the need for the tribal government to focus on the current crisis. In April, 2020 Navajo Nation President Jonathan Nez wrote a letter to the EPA Office of Land and Emergency Management requesting an additional sixty-day extension of the written comment period for the Permitting Proposal.[[4]](#footnote-3)

## Navajo Nation EPA Laws

The [Navajo Nation EPA](https://www.navajoepa.org/main/) (NN EPA) has the [Navajo Nation Environmental Policy Act](https://www.navajoepa.org/Pdf%20files/NN%20EnvPolicy.pdf) which describes how the Navajo Nation, acting through the Navajo Nation Environmental Protection Agency, shall exert to the fullest extent its authority to regulate, monitor and enforce performance with appropriate environmental standards throughout all of the Navajo Nation, including the exercise of its authority to limit or eliminate environmental contaminants emitted outside the Navajo Nation, but which may migrate into or otherwise adversely affect the lands, waters or air of the Navajo Nation.

In regards to the Environmental Impact Statement required for each plant, the NNEPA acts as a cooperating agency regarding the Memorandum of Understanding (MOU) between Reclamation and the Navajo Nation. Often when the land purchase lease is signed for a coal plant on Navajo Nation, this can change the jurisdiction from tribal to federal jurisdiction. Please refer to the [Federal and State Coal Ash Regulations Report](https://docs.google.com/document/d/1k-3KROE-hR1aHXe-7bEBkVpQoW5jNrnXMk2PNb8zZH8/edit?usp=sharing) for more information.

The NNEPA is the body that reviews and approves the [Clean Air Act Title V, 40 CFR Part 71](https://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&SID=3a7e222592f9ef7e6e1496363b640130&tpl=/ecfrbrowse/Title40/40cfr71_main_02.tpl) operating permit renewal application. Every 5 years, the Navajo Nation will review and issue the permit. The NNEPA is involved in government to government consultation with Reclamation on [Section 7 of the ESA](https://www.fws.gov/endangered/laws-policies/section-7.html) and special status species. Depending on the Lease Amendments, the NNEPA is also the body that decides whether to execute the option to take ownership in a certain plant, pursuant to provisions contained in the Lease Amendment No. 1. The NNEPA has the power to approve a new lease agreement with potential new owners.

The NNEPA also consults on potential impacts to cultural resources. The NNEPA also has to be consulted by performing a technical review of the Life-of-Mine application. The NNEPA approves or disapproves [Clean Water Act Section 401](https://www.epa.gov/cwa-401/basic-information-cwa-section-401-certification) water quality certifications id needed. In relation to the US EPA, the NNEPA also issues renewal of plant [federal Title V](https://www.epa.gov/title-v-operating-permits) operating permit if needed.

### Navajo Nation Clean Water Act

[Navajo Nation Water Quality Standards](https://www.epa.gov/sites/production/files/2014-12/documents/navajo-tribe.pdf) (NNWQS) are regulations adopted pursuant to §104(b) and §201 of the [Navajo Nation Clean Water Act](https://www.navajoepa.org/wastewater/Clean_Water_Act.pdf) (NNCWA). They establish surface water quality standards applicable to the surface waters of the Navajo Nation pursuant to [§303 and §518 of the Federal Clean Water Act](https://www.epa.gov/wqs-tech/tribes-and-water-quality-standards).

The [purpose](https://www.epa.gov/sites/production/files/2014-12/documents/navajo-tribe.pdf) of these surface water quality standards is “to protect, maintain, and improve the quality of Navajo Nation surface waters for public and private drinking water supplies; to promote the habitation, growth, and propagation of native and other desirable aquatic plant and animal life; to protect existing, and future, domestic, cultural, agricultural, recreational and industrial uses; and to protect any other existing and future beneficial uses of Navajo Nation surface waters. These standards provide the water quality goals for each body of surface water within the Navajo Nation and provide the basis for establishing treatment

controls and strategies through regulation.” These standards apply to all Waters of the Navajo Nation. Regarding coal plant contamination, this is relevant for effluent limitations, prohibitions on discharges, and toxic pollutant effluent standards.

The EPA keeps a [list](https://www.epa.gov/wqs-tech/epa-actions-tribal-water-quality-standards-and-contacts) of their approvals for tribes to administer a water quality standards (WQS) program, and EPA’s approvals of those tribes’ WQS. A tribe may administer a WQS program if it applies and EPA finds that it qualifies under Section 518(e) of the Clean Water Act to be treated in a manner similar to a state (“TAS”). The EPA also keeps a [list](https://www.epa.gov/wqs-tech/case-studies-video-and-publications-tribal-water-quality-standards) of case studies, videos and publications on tribal water quality standards.

Related to the Navajo Nation Clean Water Act is the [National Pollutant Discharge Elimination System (NPDES) program](https://www3.epa.gov/npdes/pubs/pwm_chapt_02.pdf). The Clean Water Act (CWA) section 402, requires the U.S. Environmental Protection Agency (EPA) to develop and implement the NPDES permit program. While Congress’ intent was established in the CWA, EPA was required to develop specific regulations to carry out the congressional mandate. An NPDES permit is typically a license for a facility to discharge a specified amount of a pollutant into a receiving water under certain conditions. Permits may also authorize facilities to process, incinerate, landfill, or beneficially use sewage sludge. The two basic types of NPDES permits issued are individual and general permits,

The EPA contains a [list](https://www.epa.gov/npdes-permits/navajo-nation-npdes-permits) of all the NPDES permits issued by EPA on Navajo Nation Tribal Lands. This includes NPDES permits for the [Arizona Public Service Company (APS) Four Corners Power Plant](https://www.epa.gov/npdes-permits/arizona-public-service-company-four-corners-power-plant-san-juan-county-nm-nn0000019) as well as NPDES permits for the [Peabody Western Coal Company (PWCC) Black Mesa/Kayenta Mine Complex](https://www.epa.gov/npdes-permits/nn0022179-peabody-western-coal-company-black-mesa-mine-complex-navajo-county-az).

### Navajo Nation Air Pollution Prevention and Control Act

[The Navajo Nation Air Pollution Prevention and Control Act](https://www.navajoepa.org/Pdf%20files/NNAQCP-NavajoNationCleanAirAct_Final.pdf) is a coordinated program from the Navajo Nation Council to control present and future sources of air pollution on the Navajo Nation. This chapter provides for the regulation of air pollution activities in a manner that ensures the health, safety and general welfare of all the residents of the Navajo Nation, protects property values and protects plant and animal life. The Council further is placing primary responsibility for air pollution control and abatement in the Navajo Nation Air Quality Control Program, a program of the Navajo Nation Environmental Protection Agency.

This is air quality control program to ensure clean air for residents of the Navajo Nation is Pursuant to § 301(d) of the Clean Air Act and the regulations thereunder, however, it is discretionary with the Navajo Nation as to whether and which Clean Air Act programs to implement, and in what order.

The [Navajo Nation Air Quality Control Program Operating Permit Regulations](https://www.navajoepa.org/Pdf%20files/NNAQCP-OperatingPermitRegs-Final.pdf) detail the permitting requirements under the Permit Program, Part H, Subchapter 2 of the Navajo Nation Air Pollution Prevention and Control Act, 4 N.N.C. §§ 1134-40 (“Navajo Nation Clean Air Act”).

### [Navajo Nation Safe Drinking Water Act](http://www.navajoepa.org/Pdf%20files/Safe%20Drinking%20Water.pdf)

[The Navajo Nation Safe Drinking Water Act](https://www.navajoepa.org/Pdf%20files/Safe%20Drinking%20Water.pdf) (NNSDWA) aims to protect the health and welfare of the Navajo people and the environment by establishing appropriate drinking water standards to ensure that drinking water is safe for consumption, and by protecting underground sources of drinking water from potential contamination by underground injection activities. [The Navajo Nation Primary Drinking Water Regulations](http://navajopublicwater.org/actsandregulations.html) (NNPDWR) was formally adopted by the Resources Committee of the Navajo Nation Council, Navajo EPA's legislative oversight. These include regulations on sanitation, public reporting, contaminants, surface water treatment, disinfectant, pollutant contamination, construction permits, groundwater regulation, and aquifer protection program.

### [Navajo Nation Solid Waste Act](http://www.navajonationepa.org/Pdf%20files/Solid%20Waste.pdf)

Through the [The Navajo Nation Solid Waste Act](http://www.navajonationepa.org/Pdf%20files/Solid%20Waste.pdf) the Navajo Nation Council intends to protect the health, safety, welfare and environment of the Navajo Nation; to manage, protect and preserve the resources of the Navajo Nation; and to maintain and improve the aesthetic appearance of the Navajo Nation, by: assuring that solid waste management practices are conducted in a manner which protects human health and the environment and minimizes the need for corrective action at a future date; prohibiting open dumping and requiring the closure of existing open dumps; prohibiting open burning at solid waste landfills; minimizing the generation of solid waste by encouraging recycling and reuse; and providing for the promulgation of guidelines for solid waste collection, transport, separation, recovery and disposal practices and systems.

The [Navajo Nation Solid Waste Regulations](http://www.navajoepa.org/Pdf%20files/Solid%20Waste2.pdf) describe the regulations are adopted pursuant to Navajo Nation Solid Waste Act 4 N.N.C. §§ 101 et seq., as amended by Navajo Nation Council Resolution No. CJY-51-9. Under these regulations, “solid waste” means “any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations and from community activities.

Among other exceptions, the definition of solid waste regulated by this does NOT include the following: fly ash waste, bottom ash waste, slag waste and flue gas emission control waste generated primarily from the combustion of coal or other fossil fuels and wastes produced in conjunction with the combustion of fossil fuels that are necessarily associated with the production of energy and that traditionally have been and actually are mixed with and are disposed of or treated at the same time with fly ash, bottom ash, boiler slag or flue gas emission control wastes from coal combustion. This waste definition does NOT include: waste from the extraction, beneficiation and procession of ores and minerals, including phosphate rock and overburden from the mining of uranium ore, coal, copper, molybdenum and other ores and minerals.

### NNEPA Superfund Sites

Within the NNEPA, there is also the Superfund Programs, which provides technical assistance and funding to assess potentially contaminated sites and develop a response. The [Superfund Program](https://www.navajoepa.org/main/index.php?option=com_content&view=article&id=46&Itemid=180) falls under one of four programs within the Navajo Nation Environmental Protection Agency (“NNEPA”) Waste Regulatory and Compliance Department.

### Relevant Case Law

In the [*Diné Citizens Against Ruining our Environment v. Bureau of Indian Affairs*](http://climatecasechart.com/case/dine-citizens-against-ruining-our-environment-v-bureau-of-indian-affairs/), No. 17-17320 (9th Cir. 2019), the U.S. Supreme Court declined to review a Ninth Circuit decision affirming the dismissal of lawsuit brought by environmental groups in 2016 to challenge federal authorizations of the expansion of coal mining and the extension of a coal plant’s operations on tribal lands in the Four Corners area of New Mexico and Arizona. The Ninth Circuit had agreed with the district court that the Navajo Transitional Energy Company (NTEC)—a corporation wholly owned by the Navajo Nation and the owner of the coal mine—was a required party that could not be joined due to tribal sovereign immunity. The Ninth Circuit further concluded that the district court had not abused its discretion in determining that the lawsuit could not proceed without NTEC. The environmental groups had asked the Supreme Court to review the question of whether the Federal Rules of Civil Procedure “require[] dismissal of an Administrative Procedure Act action challenging a federal agency’s compliance with statutory requirements governing federal agency decisions, for failure to join a non-federal entity that would benefit from the challenged agency action and cannot be joined without consent.”

The [*United States v. Navajo Nation*](https://www.law.cornell.edu/supct/html/07-1410.ZS.html), 556 U.S. 287 (2009) case explores whether the U.S. can be held liable for a breach of trust with an Indian Tribe in connection with the negotiation of a mining lease, even when the U.S. has violated no specific statutory or regulatory duty established in the Indian Mineral Leasing Act (IMLA) of 1938. The previous and related cases in 2003 ruled that the Indian Mineral Leasing Act does not provide the Secretary of the Interior with sufficient obligations to manage the Tribe’s mineral resources to entitle the Tribe to recover money damages. The 2009 case decided that additional sources of authority cited by Tribe do not create compensable trust obligation. The Court ruled that an Indian Tribe must "identify a substantive source of law that establishes specific fiduciary or other duties." The unanimous opinion by Justice Antonin Scalia held that the IMLA could not be interpreted to require the Secretary to exercise broad authority to manage the tribe's resources for the tribe's benefit. Instead, the tribe itself controls negotiations and the Secretary has a more limited role in approving the agreements. The Court concluded that no provision of the IMLA entitled the tribe to monetary damages as a result of the government's role in the negotiations.

[*Peabody Coal Company v. Navajo Nation*](https://caselaw.findlaw.com/us-9th-circuit/1296768.html)*,* No. 03-15272 (9th Cir. 2004)appeal addresses whether a district court has subject matter jurisdiction over a suit brought for enforcement of an arbitration award by a non-Indian corporation against the Navajo Nation (or “the Nation”), a federally recognized Indian tribe located primarily in Arizona.   The complaint filed by Plaintiffs Peabody Coal Company, Peabody Western Coal Company, and Peabody Holding Group, Inc., (collectively “Peabody”) seeks enforcement of an arbitration settlement agreement made between the parties in 1998 setting royalty rates for coal mined pursuant to a commercial lease.   The lease itself had been previously approved by the Department of the Interior.   Peabody contends that the federal question in this case is the enforceability of commercial Indian mineral leases approved by the Secretary of the Department of the Interior (“Secretary”) under federal law. The district court dismissed this case.

A full list of Navajo Nation Supreme Court decisions can be found [here](http://www.courts.navajo-nsn.gov/indexsuct.htm).

1. Pieces of the CCR tribal analysis comes from [2020 Comments of Earthjustice and other organizations on the EPA Docket](https://drive.google.com/file/d/1crd2z3_klM090KtKLtDaU7HoihMmrsDE/view?usp=sharing) [↑](#footnote-ref-0)
2. APS meeting on federal CCR permit proposal, June 1, 2020 2 p.m. EDT, Docket ID No. EPA-HQ-OLEM-2019-0361-0092, at 1 (June 26, 2020). [↑](#footnote-ref-1)
3. Pieces of the CCR tribal analysis comes from [2020 Comments of Earthjustice and other organizations on the EPA Docket](https://drive.google.com/file/d/1crd2z3_klM090KtKLtDaU7HoihMmrsDE/view?usp=sharing) [↑](#footnote-ref-2)
4. Jonathan Nez, Navajo Nation President, Letter to EPA Office of Land & Emergency Management, Docket ID No. EPA-HQ-OLEM-2019-0361-0023 (Apr. 16, 2020). [↑](#footnote-ref-3)