

## CHAPTER 35

### STOCKBRIDGE-MUNSEE TRIBAL LAW AIR POLLUTION CONTROL

#### Section 35.1 Legislative Declaration

(A) In order to pro maintain, and enhance the health, welfare, culture, traditions, convenience and comfort of the members of the Stockbridge-Munsee Band of Mohicans and the health and welfare of all residents of the Stockbridge-Munsee Indian reservation and in order to facilitate the enjoyment of nature, scenery, and other resources of the Tribe, it is declared to be the policy of the Tribe to achieve the maximum practical degree of air purity in every portion of the reservation. To that end, it is the purpose of this article to require the use of all available practical methods to reduce, prevent and control air pollution throughout the entire reservation. It is further declared that the prevention, abatement, and control of air pollution throughout the entire reservation are matters of tribal concern and are affected with the public interest and that provisions of this article are enacted in the exercise of the police powers of this tribe for the purpose of protecting the health, peace, safety, cultural resources, and general welfare of the people of this reservation.

#### Section 35.2 Definitions

As used in this article, unless the context otherwise requires:

(A) "Air Contaminant" means fumes, smoke, particulate matter, vapor, gas, or any combination thereof, but it does not include water vapor or steam condensate.

(B) "Air Contaminant Source" means any source whatsoever, at, from or by reason of which there is emitted or discharged into the atmosphere any air contaminant.

(C) "Ambient Air" means the surrounding or outside air.

(D) "Commission" means the Environmental Protection Commission created by Section 34.3 of Water Pollution Control, Chapter 34.

(E) "Emission" means the discharge or release into the atmosphere of one or more air contaminants.

(F) "Emission Control Regulations" means and includes any standard promulgated by regulation which is applicable to all air contamination sources within a specified area and which prohibits or establishes limits for specific types of emissions in such area, and also any regulation which by its terms is applicable to a specified type of a facility, process, or activity for the purpose of controlling the extent, degree, or nature of contamination emitted from such type of facility, process, or activity, and also any regulation adopted for the purpose of preventing or minimizing emission or any air contaminant in potentially dangerous quantities.

(G) "Person" means any individual, public or private corporation, partnership, association, firm, trust, estate, the Tribe or its departments and agencies, and any other legal entity whatsoever which is recognized by law as the subject of rights and duties.

### **Section 35.3 Duties of Environmental Protection Control Commission**

Duties of Environmental Protection Control Commission as created in Water Pollution Control Code, Chapter 34, Section 34.3.

(A) The Commission shall develop and maintain a comprehensive program for prevention, control, and abatement of air pollution throughout the entire reservation, including a program for control of emissions from all significant sources of air pollution, and shall promulgate ambient air goals for every portion of the reservation

(B) The Commission shall adopt and modify such plans as may be necessary for the implementation of such programs. Ambient air quality standards and emission control regulations shall be adopted and promulgated in accordance with Sections 34.5 and 34.6.

(C) The Commission and the Tribal Board of Health shall hold a joint public hearing during the month of June of each year in order to hear public comment on air pollution problems within the reservation, alleged sources of air pollution within the reservation, and the availability of practical remedies therefor.

(D) On or before November 1 of each year, the Commission shall report to the Tribal Chairperson on the effectiveness of the provisions of this Article in carrying out the legislative intent, as declared in Section 35.1, and shall include in such report such recommendations as it may have with respect to any legislative changes that may be needed or desirable.

(E) The Commission shall receive all applications for hearings concerning violations and all applications for the granting of variances made pursuant to Sections 35.11 or 35.12 and may, in its discretion, either set such applications for hearing and determination by the Commission in accordance with the provisions of Sections 35.13 or 35.14 or transmit such applications to the variance board for hearing and determination in accordance with the provisions of Section 35.13.

### **Section 35.4 Commission - Additional Authority**

(A) The Commission shall have maximum flexibility in developing an effective air/water pollution control program and may promulgate such combination of regulations as may be necessary or desirable to carry out the legislative purpose set forth in Section 35.1. Such regulations may include, but shall not be limited to:

(1) Division of the reservation into such control zones or areas as may be necessary or desirable for effective administration of the air pollution control program;

(2) Classification and definition of different degrees or types of air pollution; or

(3) Emission control regulating that are applicable to the entire reservation, that are applicable only within specified areas or zones of the reservation, or that are applicable only when a specified class of pollution is present.

(B) The Commission may hold public hearings, issue notice of hearings, issue subpoenas requiring the attendance of witnesses and the production of evidence, administer oaths, and take such testimony as it deems necessary.

(C) The Commission may adopt such rules and regulations governing procedures before the board as may be necessary to assure that hearings before said board will be fair and impartial.

(D) The Commission may exercise all incidental powers necessary to carry out the purpose of this Article.

(E) The Commission may require the owner or operator, or both, of any air contamination source to:

(1) Establish and maintain reports as prescribed by the Commission;

(2) Install, use, and maintain monitoring equipment or methods as prescribed by the Commission;

(3) Record sample emissions in accordance with such methods, at such locations, at such intervals, and in such manner as the Commission shall prescribe; and

(4) Provide such other information as the Commission may require.

### **Section 35.5 Commission to Promulgate Ambient Air Quality Standards**

(A) In addition to the other powers and duties enumerated in this article, the Commission shall have the power to adopt, promulgate, amend, and modify such standards for the quality of ambient air as may be appropriate or necessary to carry out the purposes of this Article, including but not limited to:

(1) Standards which describe the maximum concentrations of specifically described contaminants that can be tolerated, consistent with the protection of the good health of the public at large; such standards may differ for different parts of the reservation as may be necessitated by variations in altitude, topography, climate, or meteorology;

(2) Standards which describe the air quality goals that are to be achieved by control programs within specified periods of time; such standards may be either reservation-wide or restricted to specified control areas; and

(3) Standards which describe varying degrees of contamination of ambient air.

(B) Ambient air standards shall include such requirements for test methods and procedures as will assure that the samples of ambient air tested are representative of the ambient air.

### **Section 35.6 Commission to Promulgate Air Emission Control Regulations**

(A) As promptly as possible, the Commission shall adopt and promulgate emission control regulations which require the use of effective practical air pollution controls for each significant source, potential source, and type of source of air contamination throughout the entire reservation and thereafter may modify such regulations from time to time. In the formulation of each emission control regulation, the Commission shall take into consideration the following:

- (1) The tribal policy regarding air pollution, as set forth in Section 35.1 ;
- (2) Federal recommendations:
- (3) The degree to which the concentrations of certain types of contaminants in certain portions of the reservation require that emission control regulations be more stringent than in other portions of the reservation;
- (4) The degree to which any particular types of emission is subject to treatment, the availability and feasibility of control, techniques, and the extent to which the emission to be controlled is significant;
- (5) The continuous, intermittent, or seasonal nature of the emission to be controlled;
- (6) Whether the emission control regulation should be applied throughout the entire reservation or only in a specified portion of the reservation; and
- (7) The need for specification of safety precautions that should be taken with respect to any source or potential source or type of source of air contamination.

(B) Such emission control regulations may include, but shall not be limited to, regulations pertaining to:

- (1) Visible pollutants;
- (2) Particulates;
- (3) Sulfur oxides, sulfuric acids, hydrogen sulfide, nitrogen oxides, carbon oxides, hydrocarbons, fluorides, and any other chemical substances;
- (4) Odors;
- (5) Open burning of incidental refuse, open burning at dumps, open burning for agricultural purposes, open burning of junk automobiles, and any other open burning activity;

- (6) Organic solvents;
- (7) Photochemical substances; and
- (8) Toxic gases.

(C) The Commission has the duty to identify each type of facility, process, and activity which produces or which potentially or accidentally might produce significant emission of air contaminants and shall promulgate an emission control regulation for each such facility, process, and activity, except for motor vehicles and airplanes to the extent prohibited by federal law. The requirements and prohibitions contained in such regulations shall be set forth with as much particularity and clarity as is practical. Upon adoption of an emission control regulation under this subsection (C) for the control of a specific facility, process, or activity, such regulation shall apply to the exclusion of other emission control regulations adopted pursuant to subsection (B) of this Section; prior to such adoption, the general regulations adopted pursuant to subsection (B) of this Section shall be applicable to such facility, process, or activity. Emission control regulations adopted pursuant to this Section may include, but shall not be limited to, regulations pertaining to the following facilities, processes, and activities:

- (1) Incinerator and incinerator design;
- (2) Storage and transfer of petroleum products and any other volatile substance;
- (3) Activities which frequently result in particulate matter becoming airborne, such as construction and demolition operations and operation of parking lots;
- (4) Specifications, prohibitions, and requirements pertaining to fuels and fuel additives, such as tetraethyl lead;
- (5) Wigwam waste burners, pulp mills, alfalfa dehydrators, asphalt plants, and any other industrial or commercial activity which tends to emit air contaminants as a by-product;
- (6) Industrial process equipment;
- (7) Industrial spraying operations; or
- (8) Storage and transfer of toxic gases.

(D) Among its emission control regulations, the Commission shall include appropriate regulations pertaining to accidents, shutdowns, and other conditions which justify temporary relief from controls.

(E) Each emission control regulation shall be operative with regard to any ambient air quality standard unless such regulation expressly provides otherwise.

### **Section 35.7 Commission - Procedures to Be Followed in Setting Standards and Regulations**

(A) Prior to adopting, promulgating, amending, or modifying any ambient air standard authorized in Section 35.5 or any emission control regulation in Section 35.6, the Commission shall conduct a public hearing thereon. Notice shall be given at least sixty (60) days prior to the hearing and shall include each proposed regulation, and shall be mailed to all persons who have filed with the Commission a written request to receive such notices.

(B) Any person desiring to propose a regulation differing from the regulation proposed by the Commission shall file such other proposal with the Commission not less than twenty days prior to the hearing, and, when on file such proposal shall be open for public inspection.

(C) Witnesses at the hearing shall be subject to cross-examination by or on behalf of the Commission and by or on behalf of persons who have proposed regulations pursuant to subsection (B) of this Section.

(D) Regulations promulgated pursuant to Sections 35.5 and 35.6 shall not take effect until thirty days after they have been filed with the Secretary, Tribal Business Council.

### **Section 35.8 Inspection and Entry**

In addition to authority specified elsewhere in this Article, the Tribe through its Environmental Protection Commission has the power to enter and inspect any property, premises, or place for the purposes of investigating any actual, suspected, or potential source of air pollution or air contamination or ascertaining compliance or noncompliance with any emission standard or any order promulgated under this Article; except that, if such entry or inspection is denied or not consented to, the Commission or its agent is empowered to and shall obtain from the Tribal Court a warrant to enter and inspect any such property, premise, or place prior to entry and inspection. The Tribal Court of this reservation is empowered to issue such warrants upon a proper showing of the need for such entry and inspection. Any information relating to secret commercial process, or method or manufacture, or production obtained in the course of the inspection or investigation shall be kept confidential.

### **Section 35.9 Air Pollution Emergencies Endangering Public Health**

(A) Whenever the Commission shall determine, after investigation, that any person is either engaging in any activity involving significant risk of air contamination or is discharging or causing to be discharged into the atmosphere, directly or indirectly, any air contaminant and such activity or discharge constitutes a clear, present, and immediate danger to the health of the public, or that any such activity or discharge of air contaminants, if permitted to continue unabated, will result in a condition of clear, present, and immediate danger to the health of the public, the Commission shall:

(1) Issue a written cease and desist order to said person requiring immediate discontinuance of such activity or discharge of such contaminant into the atmosphere,

and upon receipt of such order, such person shall immediately discontinue such activity or discharge; or

(2) Apply to the tribal court of this Tribe for a temporary restraining order, preliminary injunction, or permanent injunction as provided for in the tribal rules of civil procedure. Any such action in the Tribal Court shall be given precedence over all matters pending in such Tribal Court. The institution of such injunction proceedings by the Commission shall confer upon said Tribal Court exclusive jurisdiction to determine finally the subject matter of the proceeding; or

(3) Both issue such a cease and desist order and apply for any such restraining order or injunction.

### **Section 35.10 Air Contaminant Emission Notices and Emission Permits**

(A) After ninety days from January 1, 1990, no person shall permit emission of air contaminants from, or construction or alteration of, any facility, process, or activity except residential structures, from which air contaminants are, or are to be emitted through any permanently located chimney, stack, pipe, or other conduit unless and until an air contaminant emission notice has been filed with the Tribe. A revised emission notice shall be filed whenever a significant change in emissions is anticipated or has occurred.

(B) Each such notice shall specify the location at which the proposed emission will occur, the name and address of the person operating or owning such facility, process, or activity, the nature of such facility, process, or activity, and an estimate of the quantity and composition of the expected emission.

(C) If the information required by subsection (A) of this Section is on file with the Tribe on or after January 1, 1990, such information shall be deemed to constitute compliance with the requirements of said subsection (A) as to the emission covered thereby.

(D) No person shall construct or substantially alter any building, facility, structure, or installation, except single family residential dwellings, or install any machine, equipment or other device, or commence the conduct of any activity, or commence performance of any combinations thereof, or commence operations of any of the same which will or does constitute a new air contamination source without first obtaining or having a valid permit therefor from the Commission. The Commission shall establish rules, regulations, and procedures in accordance with the provisions of this article for the issuance or denial of permits which shall be in conformity with the purposes of this article as set forth in Section Such procedures shall include, but not limited to, the following:

(1) Filing an application with the Tribe which may include such relevant plans, specifications, air quality data, and other information as the Tribe may reasonably request;

(2) The Tribe shall prepare its preliminary analysis of the effect upon the ambient air

quality and the extent of emission control within twenty days after date on which an application is filed.

(3) For those types of projects or activities defined or designated by the Commission as warranting public comment with respect thereto, the Tribe shall within fifteen days after it has prepared its preliminary analysis give public notice of the proposed project or activity by at least on publication in a newspaper of general circulation and shall receive and consider public comment thereon for a period of thirty days thereafter.

(4) Within thirty days following the period for public comment, or within fifteen days after the preparation of its preliminary analysis where no delay for public comment is required, the Tribe shall grant the permit unless it determines that the proposed project or activity would not meet the applicable emission standards or regulations of the Commission. Any permit issued by the Tribe may contain such terms and conditions as it deems necessary for the proposed project or activity to qualify for a permit. If any of such terms or conditions of the permit are violated, the division may revoke the permit. If the Tribe fails to act upon the application within the prescribed time, the permit shall be deemed to have been granted.

(5) If the Tribe denies or revokes a permit, the applicant may request a conference with the commission or a hearing before the commission in accordance with the provisions of Section 35.13. The Commission may delegate the responsibility to hold a conference or hearing with respect to any such request to a variance board.

(6) Within thirty days after such conference or hearing, the Commission or variance board shall issue an order either affirming or reversing the decision of the Commission. If the decision or revocation of the Commission reversed, the Commission or variance board shall order the issuance or reinstatement of the permit which order may contain such terms and conditions as shall be necessary and reasonable.

(7) Orders of the Commission or Variance Board shall be final upon the date of issuance.

### **Section 35.11 Enforcement**

(A) The Tribe shall enforce compliance with the emission control regulations promulgated pursuant to the provisions of Section 35.6.

(B) In case any written and verified complaint shall be filed with the Tribe alleging that, or in case the Tribe itself shall have cause to believe that, any person is violating any emission control regulation, the Tribe shall cause a prompt investigation to be made, and, if the person who makes such investigation on behalf of the Tribe finds after such investigation that a violation of any such regulation exists, he shall promptly so notify both the alleged violator and the Commission in writing. Thereupon, the Tribe shall diligently endeavor to obtain voluntary abatement of such violation.

(C) After notice has been given pursuant to subsection (b) of this Section, but in no event later than six months after the giving of such notice, if the alleged violation has not been abated, the Tribe shall cause to be issued and served upon the person allegedly violating any such regulations a written order which shall specify the provision of the emission control regulation of which such person is said to be in violation and a statement of the manner in which such person is said to violate it, and such order shall require the person so complained against to cease and desist from such violation within such reasonable time as the Tribe may determine, but not to exceed six months.

### **Section 35.12 Variances**

(A) The Variance Board or Commission may grant a variance suspending or modifying the enforcement of any emission control regulation or any rule, regulation, or enforcement order issued pursuant to this Article against any person whenever the said Commission shall determine that:

(1) Control techniques are not available or that compliance with applicable emission control regulations from which a variance is sought would create an unreasonable economic burden; and

(2) The granting of such variance would be consistent with, and aid in, implementing the legislative policy as set forth in Section 35.1.

(B) The Commission shall grant a variance suspending or modifying the enforcement of any emission control regulation or any rule, regulation, or enforcement order issued pursuant to this Article against any person whenever the said Commission shall determine that strict compliance with any provision of, or order issued pursuant to, this Article would result in an arbitrary and unreasonable taking of property or in the practical closing of any lawful business or activity and such would be without sufficient corresponding public benefit.

(C) The variance shall be granted, terminated, or modified by the Commission only after a hearing before it held pursuant to the provisions of this Article. A variance may be granted with respect to any existing or proposed facility, process, or activity. Hearings may be requested either by the Commission, the Tribe, or by any person applying for or having received such a variance.

(D) Any variance granted pursuant to the provisions of this article shall be granted for such period of time and under such conditions as shall be specified by the Commission. The failure to meet any condition of the variance without prior written permission of the said Commission shall render such variance null and void. The Commission shall review, at least annually, and variance that has been granted to determine whether the terms and conditions of said variance have been complied with and whether the continuance of the variance is justified.

### **Section 35.13 Hearings**

(A) Not less than fifteen days after a hearing has been requested, the Commission, as the case may be, shall grant such request and set a time and place therefor.

(B) The Tribe shall appear as a party in any hearing before the Commission and shall have the same judicial review as any other Party.

(C) All testimony taken at any such hearing before the Commission shall be under oath or affirmation. A full and complete record of all proceedings and testimony presented shall be taken and filed.

(D) Any information relating to secret processes or methods of manufacture or production which may be required, ascertained, or discovered shall not be publicly disclosed in public hearings or otherwise and shall be kept confidential by any member, officer, or employee of the Commission, or the Tribe, but any person seeking to invoke the protection of this Section in any hearing for a variance shall bear the burden of proving its applicability.

(E) At any hearing, any person who is affected by the proceeding and whose interests are not already adequately represented shall have the opportunity to be a party thereto upon prior application to and approval by the Commission, in its sole discretion, as deemed reasonable and proper by said Commission, and such person shall have the right to be

heard and to cross-examine any witness.

(F) After due consideration of the written and oral statements, the testimony, and the arguments presented at any such hearing, the Commission shall enter its findings and final order, based upon evidence in the record, or make such final determination of the matter as it shall deem appropriate.

(G) In all proceedings before the Commission with respect to any alleged violation of any emission control regulation or order, the burden of proof shall be upon the Tribe.

(H) The applicant for a variance shall bear the burden of proof.

(I) Variances, orders, and determinations of the Commission shall become final within thirty days from the date on which they are issued, unless within such period the Commission grants a rehearing, or unless, within such period the Commission concludes that said variance, order or determination interferes with the attainment of the objectives of this Article, as set forth in Section 35.12. If the Commission so concludes, it shall, within said thirty-day period, notify the applicant of such conclusion, including the nature of the interference involved, and allow the applicant ten days in which to request a hearing before the Commission on said variance, order, or determination, which hearing shall be set and held in accordance with the provisions of Section 35.12. and of this Section. Following the hearing before the Commission, or if no hearing is requested, the Commission shall enter its final order affirming or modifying said variance, order, or determination.

(J) Every hearing granted by the Commission shall be conducted by a hearing officer designated by the Commission.

#### **Section 35.14 Judicial Review**

(A) Any final order or determination by the Tribe or the Commission shall be subject to judicial review in accordance with the provisions of this article and the provisions.

(B) Any party may move the court to remand the case to the Tribe or the Commission in the interests of justice for the purpose of adducing additional specified and material evidence and findings thereon; but such party shall show reasonable grounds for the failure to adduce such evidence previously before the Tribe or the Commission.

(C) Any proceeding for judicial review of any final order or determination of the Tribe or the Commission shall be filed in the Tribal Court for the district in which is located the air contamination source affected, and it shall be filed within twenty days after the date of said final order or determination.

### **Section 35.15 Injunctions**

(A) In the event any person fails to comply with a cease and desist order that is not subject to a stay pending administrative or judicial review, the Commission may request the Tribal Attorney to bring, and if so requested it is his duty to bring, a suit for an injunction to prevent any further or continued violation of such order. In any such suit the final findings of the Tribe or Commission, based upon evidence in the record, shall be prima facie evidence of the facts found therein.

### **Section 35.16 Civil Penalties**

(A) Penalties shall be determined and collected by a Tribal Court upon action instituted by the Tribe for the determination and collection of said penalty under this Section and in accordance with the following Provision:

(1) Any person who violates any final cease and desist order which is not subject to a stay pending judicial review and which has been issued pursuant to this Article shall be subject to a civil penalty of not more than five hundred dollars (\$500) per day for each day during which such violation occurs.

(B) Penalties collected shall be transmitted in a timely fashion to the Tribal Finance Office for deposit in the Tribal General Fund.

### **Section 35.17 Severability**

(A) If any provision of this article or the application thereof to any person or circumstances is held invalid, the invalidity shall not affect other provisions or applications of this article which can be given effect without regard to the invalid provision or application, and to this end the provisions of this article are severable.

### **LEGISLATIVE HISTORY**

Ordinance Committee approved to go to Tribal Council for review at the November 28, 1988 Committee meeting with appropriate changes.

Tribal Council approved February 7, 1989 - Resolution #1128.

A BIA list of approved ordinances of file there in 1993 shows they have the Air Quality Ordinance on file.