



THE STATE
of **ALASKA**
GOVERNOR MIKE DUNLEAVY

**Department of Environmental
Conservation**

DIVISION OF ADMINISTRATIVE SERVICES

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February 11, 2022

The Honorable Dan Ortiz
Chair, House Finance Subcommittee
State Capitol Room 513
Juneau AK, 99801

Dear Representative Ortiz:

Thank you for the opportunity to provide additional information about the Department of Environmental Conservation on February 8th. The following question arose during this meeting that required additional information. I have responded to the question below.

➤ ***Does the Department currently maintain a written Tribal Consultation policy?***

In the Program Description for implanting primacy for Clean Water Act Section 402 permitting, Appendix H outlines the Department's public participation guidance and strategies. Several paragraphs of the document discuss consultation efforts, including section 4.0 - Supplemental Communication Tools, which outlines a consultation process led by the Division of Water's Local and Tribal Government Liaison. This consultation and process is in addition to the routine public participation process available to the general public and takes place prior to issuance of a public notice of a draft permit. Additionally, the Division of Water maintains a helpful document on our "APDES Information for Tribes" website titled APDES Guidance for Local and Tribal Governments. This document explains the public participation process described in the Program Description in an easy to access and use format.

The DEC Commissioner has also appointed a DEC Tribal Government Liaison who coordinates with division liaisons and other state agencies and works closely on tribal concerns. DEC also maintains a Tribal relations website at <https://dec.alaska.gov/commish/tribal/> that includes a 2002 document describing the DEC Tribal consultation process.

➤ ***Is Florida involved in a lawsuit over whether that takeover [of the 404 Program] is adequate?***

A coalition of environmental groups sued the federal government to prevent Florida from taking over the issuance of 404 permits under the Clean Water Act. The question in Committee was getting primarily at the legal support and cost it would take to defend a lawsuit like that in Alaska, but it is important to note that the Florida suit was brought against the federal agencies – the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers – not the state.

If you would like more information or have additional questions, I am happy to assist.

Sincerely,

A handwritten signature in blue ink, appearing to read "Ruth Kostik".

Ruth Kostik
Administrative Services Director

Representative Ortiz

February 11, 2022

Page **2** of **2**

Cc: Michael Partlow, Legislative Finance Division
Josie Stern, Office of Management and Budget
Liz Harpold, Staff to Representative Ortiz

Department of Environmental Conservation

Policy on Government-to-Government Relations with the Federally-Recognized Tribes of Alaska

Purpose:

This policy reinforces government-to-government relationships between the Department of Environmental Conservation and the tribes in Alaska through consultation on significant matters of mutual concern.

This department policy procedures provide guidance to all employees of the department involved in any department action(s) that significantly or uniquely affect a tribe, and pertaining to any tribal action that significantly or uniquely affects this department. It also reinforces the foundation for establishing and maintaining effective government-to-government communications between the department and tribes, and promotes consultation and coordination with these tribes, with the goal of ensuring that the department conducts consultation in a culturally sensitive manner.

Policy:

The department is committed to consulting with tribes as early in the department's decision-making process as practicable, and as permitted by law, before taking department action, except that the department is not committed to consulting with tribes in those instances described in "Limitations on Consultation" below. Consultation will provide meaningful participation by the affected tribe, with the goal of achieving informed decision-making.

Responsibilities, Process, and Protocols:

To ensure that the department's processes and procedures throughout all of Alaska are generally uniform and consistent, while maintaining necessary flexibility, the department will adhere to the following steps when consulting with a tribe:

1. Notice to Affected Tribe. The department will make a good faith effort to notify a tribe, at the earliest practicable time, of any proposed department actions. When circumstances permit, the department will afford the tribe a reasonable time to respond to any notification and to participate in consultation with the department. Consultation should continue throughout the department's decision-making process, except where prohibited by law or subject to limitations described in paragraph 10 below. If the department determines that any state or federal law prohibits continued consultation at a specified point in the decision-making process, the department shall so inform the tribe at the outset of the consultation process, or as soon as possible after the department becomes aware of the prohibition.

2. Dissemination of Information. At the outset of the consultation process, the department will provide the affected tribe with sufficient information about the proposed action to ensure that the tribe can properly assess and respond to such proposed action.
3. Identification of the Participants. The department and the affected tribe will identify their respective representatives for the consultation process. The department should work with the tribal representative of the affected tribe to identify any other affected tribe that should be involved in the consultation.
4. Authorized Initiators. Any member of the department with decision-making authority regarding an action that significantly or uniquely affects a tribe is authorized to initiate a request for consultation with the tribe. The department will likewise accept an unsolicited request for consultation from any representative of a tribe who has decision-making authority on behalf of that tribal government. The department member will provide timely notification to the department's "key contact" regarding any consultation.
5. Consultation Process. Consultation should include processes for ongoing communications between the parties that will be established by mutual agreement whenever possible. The department will, at the beginning of the consultation, work with the affected tribe to develop a mutually agreed upon list of participants, establish a timeline, and establish the method and frequency of communication to be used during the consultation. At the conclusion of the consultation, the department will notify the tribe of any final department decisions on a proposed action in a reasonable time period prior to the time that the decision takes effect, unless extraordinary or emergency circumstances preclude it.
6. Tribal Request for Consultation. The department will maintain a list of its "Key Contacts" and will provide a copy of this list to the tribes. This list will include any information that the tribes may need to contact the "Key Contacts." Any time a tribal government desires to request government-to-government consultation regarding a matter that significantly or uniquely affects the tribe, or to notify the department of any tribal action that may significantly or uniquely affect the department, the tribe should contact one of the Key Contacts and provide them with this information.
7. Inter-Departmental Cooperation. The department will work cooperatively with other state agencies, and as appropriate, with federal agencies to accomplish the goals and responsibilities outlined in this policy. Requests for consultation which are determined to be out of the department's purview will be referred to the appropriate "Key Contact" of another state agency.
8. Working Group Participation. The department recognizes the importance of participation in the Working Groups established within the State-Tribal Forum to facilitate meaningful dialogue regarding issues of concern to the state and the tribes. The department will make a good faith effort to ensure that its Key Contacts participate in all meetings of any Working Group that includes the department.

9. Exclusions. Department activities relating to actual or suspected violations of state law, or to criminal investigations or initiation of the criminal justice process, civil law enforcement investigations, initiation of the civil law enforcement process, or civil litigation are exempt from this policy. Nothing in this policy is intended to prohibit communication between authorized representatives of parties in litigation.
10. Limitations on Consultation. The Department of Environmental Conservation is not committed to consulting with tribes if such consultation could result in an infringement or breach of any applicable privileges, including but not limited to the attorney-client privilege, executive privilege, work product doctrine, deliberative process privilege, and law enforcement confidentiality requirements or privileges.
11. Other Considerations. Consultation on development of regulations will occur in accordance with the Administrative Procedure Act and pertinent laws and regulations. Nothing in this policy is intended to supercede or replace the department's obligation to comply with the Constitution, statutes, and regulations of the State of Alaska. Nothing in this policy is intended to prohibit constructive communication between the department and a tribe.

General Provisions:

1. This policy is intended to assure consistency within the different divisions and offices of the department and to improve the internal management of the department.
2. This policy clarifies the department's protocol for consulting with tribes in a government-to-government relationship. Each division may further amplify its protocols with staff instructions to support these policies and procedures.
3. This policy shall be effective upon signature of the Commissioner of the Department of Environmental Conservation.
4. This Policy is not intended to expand, contract, or otherwise diminish or limit the sovereignty held by the State of Alaska or any tribe.

Definitions for the purposes of this Policy:

1. "Tribe" means any tribe in Alaska that is on the list of federally-recognized tribes published by the federal Bureau of Indian Affairs.
2. "Consultation" means the timely process of meaningful inter-governmental dialogue between department divisions or offices and tribes regarding a proposed department action. When assessing what action will be subject to consultation, the department will take into account the cultural and tradition activities of tribes and any relevant state or federal law. "Consultation" may take place by in-person meeting, teleconference, videoconference, exchange of written documents or e-mail, or other means appropriate to the circumstances.
3. "Department Action" means any proposed action, activity, decision, legislation submitted by the

governor to the legislature, development of regulations, permits (other than general permits and permits issued by rule), plan, policy, procedure, program, project, service, or other action that has a significant or unique effect on a tribe, including the tribe's cultural and traditional activities, other than those described below under Exclusions provision.

4. "Department" means the State of Alaska, Department of Environmental Conservation.

Dated: February 27, 2002

A handwritten signature in black ink, appearing to read "Michael R. ...", with a long horizontal flourish extending to the right.

Commissioner
Department of Environmental Conservation