

RESPONSIVENESS SUMMARY

U.S. Environmental Protection Agency

Federal Register Notice EPA–R05–OW–2019–0705; FRL–10007–93–Region 5

“Request for Comments on Michigan Underground Injection Control Class II Program Application”

SUMMARY:

On April 15, 2020, the U.S. Environmental Protection Agency (EPA) gave public notice that the EPA received a complete application from the State of Michigan requesting federal authorization for its Underground Injection Control (UIC) Program for wells that are used to inject fluids associated with oil and natural gas production only, known as Class II injection wells. EPA determined the application contained all the required elements. EPA approval of this application would allow the Michigan Department of Environment, Great Lakes, and Energy (EGLE) to regulate all Class II injection wells in Michigan except for those in Indian Country as that term is defined in 18 U.S.C. § 1151 and 40 C.F.R. § 144.3. The application was placed on the EPA website for review.

EPA accepted comments through the regulations.gov website and by mail until midnight June 5, 2020. The Federal Register notice included notice of a public hearing on May 27, 2020, and stated that EPA may change the format and time for the hearing if appropriate to protect public health in the face of Coronavirus Disease 2019 (COVID 19) risks and that EPA would publish notice of any such change on or before May 20, 2020 on its Region 5 website. The in-person hearing was changed to a virtual hearing due to restrictions on meetings imposed by the State of Michigan related to COVID 19 and to protect public health. On May 20, 2020, EPA notified the public of the changes. EPA held two two-hour virtual public hearings by teleconference line on May 27, 2020, at 10:00 am and 6:00 pm Eastern Standard Time.

At the beginning of each hearing session, EPA explained that the hearing allows an opportunity for the public to formally and publicly make EPA aware of their views on the State of Michigan’s application. EPA stated that EPA representatives would neither ask nor respond to questions or comments during the hearing. EPA also stated that a response to all comments (“Responsiveness Summary”) would be posted in regulations.gov.

COMMENTS

EPA received a total of 22 written comments in the electronic docket and by paper mail. Of the written comments:

- 20 comments contained general expressions of support for Michigan’s application.
- One letter was from a tribal government, offering comments and requesting specific information. (Please see the Response to Comments section below.)
- One electronic docket statement was out of scope, insofar as it expressed a general desire for Michigan to adopt a clean energy statute, which is outside the scope of the federal UIC program and the Michigan UIC Class II application.

At the hearing, 18 participants gave oral comments. Of the speakers:

- 17 speakers gave oral comments in general support of the application and EGLE’s ability to manage the UIC Class II program.

- One speaker asked several specific questions about the number of EGLE inspectors and their level of experience and how EGLE will consult with tribal governments. The speaker did not make a comment or statement about the application. EPA representatives referred the speaker to the EPA staff person identified in the public notice for discussion on those questions.

RESPONSE TO COMMENTS

EPA contacted the tribal government representative who submitted the letter into the electronic docket, and ascertained that the representative intended EPA to consider the letter as tribal consultation, a separate process undertaken directly with relevant tribes pursuant to the *EPA Policy on Consultation and Coordination with Indian Tribes* (2011). EPA has responded to the tribal government's comments and questions separately as part of consultation. EPA's response is attached for incorporation in this response document insofar as the Tribe's letter was sent to the public comment docket.

EPA notes the general support comments received.

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Date: 2020.09.16
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Kurt Thiede, Regional Administrator, Region 5

Attached: EPA letter to John Rodwan, Environmental Director, Pine Creek Indian Reservation, Nottawaseppi Band of the Potawatomi.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 5
77 WEST JACKSON BOULEVARD CHICAGO,
IL 60604-3590

REPLY TO THE ATTENTION OF:

WP-16J

September 11, 2020

John Rodwan
Environmental Director
Pine Creek Indian Reservation
1485 Mno-Bmadzewen Way
Fulton, Michigan 49052

Dear Mr. Rodwan:

On March 9, 2020, EPA sent a letter to the Nottawaseppi Huron Band of the Potawatomi (NHBP), notifying the Tribe that the U.S. Environmental Protection Agency (EPA) received an application from the Michigan Department of Environment, Great Lakes, and Energy (EGLE) for federal authorization of the Underground Injection Control (UIC) Class II Program. EGLE submitted the application under Section 1425 of the Safe Drinking Water Act (SDWA), 42 U.S.C. § 300h-4. Under this provision, a state or tribe may receive federal authorization if it demonstrates that its program meets basic criteria in SDWA § 1421¹ and represents an effective program to prevent underground injection which endangers drinking water sources. Federal authorization would allow EGLE to administer the permit and enforcement program for most Class II wells in Michigan. EPA would continue to issue and manage UIC Class II permits for wells located within Indian country and would maintain an oversight role for the State program.

In the letter of March 9, EPA offered to consult with NHBP in accordance with the *EPA Policy on Consultation and Coordination with Indian Tribes*. Subsequently, EPA held an informational conference call with interested tribes on April 14, 2020. The NHBP submitted comments dated June 5, 2020, into the public comment docket. Anna Miller, of my staff, established through a conversation with you, that the Tribe's comments were also meant to be included as input for the tribal consultation process. Therefore, EPA is responding directly to the NHBP and is including this response as part of EPA's response to public comments.

EPA reviewed and considered the NHBP comments during our review of the EGLE primacy application. Because a number of the Tribe's comments concerned action by EGLE, EPA reached

¹ The criteria set forth at SDWA § 1421(b)(1)(A)–(D), 42 U.S.C. § 300h(b)(1)(A)–(D) includes: (A) prohibiting any unauthorized Class II underground injection, (B) requiring that the applicant demonstrate that the proposed injection will not endanger drinking water sources and in the case of a program which provides for such authorization by rules, that no rule may be promulgated which authorizes any underground injection which endangers drinking water sources, (C) inspection, monitoring, recordkeeping and reporting requirements, and (D) demonstrating that the State has authority to regulate injection activities by Federal agencies and by any other person on property owned or leased by the United States.

out to the EGLE Oil, Gas, and Minerals Division (OGMD) to discuss the issues raised by NHBP. In response, OGMD sent a letter to EPA dated August 6, 2020, outlining its commitments to coordinate with the Tribe, and that information is referenced below in certain responses to the NHBP comments. A copy of the OGMD letter is also attached for your use. In an attachment to this letter, EPA has provided responses to the comments submitted by NHBP.

EPA appreciates this opportunity to work with the NHBP during the review of the Michigan UIC Class II program primacy application. Please do not hesitate to contact me if you have any questions.

Sincerely,

Tera L. Fong
Division Director, Water Division

Attachments

cc: Jamie Stuck, NHBP Tribal Chairman

Comment 1: In its letter of June 5, 2020, NHBP requested “that the State of Michigan notifies and consults with the Tribe for the proposed permitting of UIC Class II Wells within a 100-mile radius of the Pine Creek Reservation. Adequate time to prepare comments and/or directly contact the well inspectors is also requested.”

Response: EPA acknowledges and appreciates the concern noted. However, the comment pertains to proposed implementation of the UIC Class II program. EPA has a responsibility to consult and to coordinate with federally-recognized tribes under Executive Order 13175, the EPA Indian Policy for the Administration of Environmental Programs on Indian Reservations, and the EPA Policy on Consultation and Coordination with Indian Tribes. States do not share in the federal trust responsibility, nor does EPA transfer this responsibility to states in the context of a state primacy decision. However, EPA encourages NHBP and EGLE to work cooperatively to establish a suitable notification and engagement process. In the August 6, 2020 letter from OGMD, EGLE indicated that it “will provide notification of permitting actions of Class II UIC Wells to the NHBP and will consult with the tribe during the period which the action is being considered and public comment is being received.” EPA recognizes EGLE’s commitment to consult and coordinate with tribes regarding these permit applications for wells adjacent to Indian country (defined in accordance with 18 U.S.C. § 1151) and within the ceded territory where tribes hold off-reservation treaty rights. EPA stands ready to assist in addressing any specific questions about jurisdiction as needed by EGLE and the involved tribe(s).

Comment 2: “Please note that NHBP[I] [sic] , as part of prior consultations with the State of Michigan, also request notification and consultation with proposed permitting related to oil and gas wells, new air pollution source permits, CAFO permits, or other significant EGLE permits issued within 100 miles of the Pine Creek Reservation.”

Response: EPA acknowledges and appreciates the concern noted. The action before EPA is confined to Michigan’s application for the UIC Class II program; therefore, concerns about other types of permits are out of scope for consideration. We encourage NHBP to pursue its concerns with other program offices in EGLE and with EPA’s Tribal Office.

Comment 3: “NHBP requests the contact information for the State of Michigan UIC Class II well inspectors and the districts they represent. NHBP will reciprocate with Tribal contacts.”

Response: EPA acknowledges and appreciates the concern noted, but EPA does not keep specific information about OGMD staff; that information is best supplied by EGLE. In the OGMD letter dated August 6, 2020, the State committed to providing a map of Area Geologists and their contact information. EPA encourages NHBP to work directly with OGMD to obtain this information.

Comment 4: “NHBP, requests the possible review of the proposed construction details of the wells, including details of the local geology, anticipated capacity of the receiving formation, well installation and casing specifications, well logs, grouting/annular space sealing details, setbacks from municipal, agricultural or residential wells, setbacks from surface water features and methods of monitoring the performance of the proposed wells.”

Response: EPA appreciates and acknowledges the concern noted in the comment. The comment pertains to proposed implementation of the UIC Class II program. Under Michigan rules R 324.201 and R 324.802, applicants are required to submit specific information in permit applications. Pursuant to Michigan administrative rules MAC R (R) 324.802(b), applicants must provide a plat that shows the location and total depth of the proposed injection well, each oil, gas, injection, abandoned, permitted well location, and dry hole within a 1,320-foot radius around the proposed injection well location (the area of review). The plat must also show all fresh water wells, irrigation wells, and public supply wells within 1,320 feet of the proposed Class II well location as detailed under R 324.802(b)(v) and R 324.201(G) and (H). Applicants are required to identify surface water features such as surface waters, floodplains, wetlands, and rivers within a 1,320-foot radius around the well (R 324.201(A)-(D)). Applicants are required to provide well construction records and plans for the proposed well, including cementing details (R 324.802(e)) and well logs and construction records for wells within the area of review (R 324.802(d)). Generalized “local geology” information is not required, but State rules specifically require site-specific geology information, including the geological formation name(s), true vertical depth, thickness, and lithology of the injection interval and confining interval and the geological name and the top and bottom depths of underground sources of drinking water (R 324.802(e)). Applicants must also identify and describe all faults, structural features, karst, mines, and lost circulation zones within the area of review that can influence fluid migration, well competency, or induced seismicity. In its letter of August 6, 2020, OGMD states that information EGLE receives from well applicants “will be made available to the NHBP as part of permitting actions and consultation with NHBP.”

State monitoring requirements, but not monitoring methods, are in R 324.810. EPA’s requirements and review for programs submitted under SDWA § 1425 extend only to the type of data to be collected, the monitoring frequency and reporting schedules, and not to methods of monitoring; EPA encourages EGLE to share its policies or practices with regard to monitoring methods and its knowledge base on industry standards and practices with NHBP. One item listed by the NHBP, the anticipated capacity of the receiving formation, is not required by State rules for permit applications, but EPA encourages EGLE to share any relevant site-specific information that arises during the application review process.

Comment 5: “Upon significant violations or failure of the proposed wells, NHBP requests that the Tribe be notified for possible consultation.”

Response: The NHBP comment pertains to proposed implementation of the UIC Class II program and EPA encourages the Tribe to work with EGLE on a procedure for sharing this information. In the August 6, 2020, letter from OGMD, the State commits to working “with NHBP to identify the specific types [of] violations and failures that are of interest and the area the NHBP is interested in if greater than 100 miles from the Pine Creek Reservation. The OGMD will commit to notification of NHBP for those instances of significant violations and failures for possible consultation.”

Comment 6: “NHBP is very concerned that the permit review process will no longer include consideration of National Environmental Policy Act (NEPA), Endangered Species Act (ESA), and the National Historic Preservation Act (NHPA). USEPA Primacy had included attention to these keystone pieces of federal legislation during the permitting process.”

Response: EPA appreciates and acknowledges the concern raised in this comment. Requirements under the NEPA, ESA, and NHPA apply to federal actions, including EPA's direct implementation of the UIC Class II program. When a state or tribe is federally authorized by EPA to assume UIC program primacy, the actions of the authorized program are generally deemed to be state (or tribal) actions and therefore federal "cross-cutting" statutes, such as the NHPA, which apply to federal actions, no longer apply. If a state (or tribal) action taken under an approved program has a federal component (such as project-specific federal funding, a federal license or permit, or a fee-to-trust property transfer), then federal cross-cutting requirements may apply to the federal action.



GRETCHEN WHITMER
GOVERNOR

STATE OF MICHIGAN
DEPARTMENT OF
ENVIRONMENT, GREAT LAKES, AND ENERGY
LANSING



LIESL EICHLER CLARK
DIRECTOR

August 6, 2020

CERTIFIED MAIL

Ms. Tera Fong
Water Division
U.S. Environmental Protection Agency (W-15J)
77 West Jackson Boulevard
Chicago, Illinois 60604

Dear Ms. Fong:

The Department of Environment, Great Lakes, and Energy's (EGLE), Oil, Gas, and Minerals Division (OGMD), has received and reviewed copies of correspondence from the Little River Band of Ottawa Indians (LRBOI) and Nottawaseppi Huron Band of the Potawatomi (NHBP). These letters were sent to the U.S. Environmental Protection Agency (US EPA) as part of consultation, as we understand it, related to the State of Michigan's Application for Class II Underground Injection Control (UIC) Program Primacy. Although, these letters were part of federal consultation with tribal governments, the letters make several requests of the State of Michigan, as well as note some concerns.

First, OGMD would like to inform the US EPA that EGLE has finalized its policy for consultation and coordination with tribal governments on state actions. The EGLE policy has been created and finalized pursuant to Governor Whitmer's Executive Directive No. 2019-17 and the 2002 Government-to-Government Accord. EGLE Policy and Procedure 09-031 "Consultation and Coordination with Indian Tribal Governments" has been attached for your reference. The policy outlines a process for meaningful communication and coordination with tribes to identify activities that may be appropriate for consultation, provide notification to the tribe(s), consider input regarding the activity, and provide feedback to explain how the input was considered in the final decision or action. This policy applies to all interested tribes, and OGMD intends to follow this policy as it relates to Class II injection wells.

In regard to the additional requests for specific engagement by the LRBOI and the NHBP, OGMD offers the following comments and commitments for each tribal government in response to their respective letters.

The NHBP letter basically contained 5 requests and noted one concern which are listed below, with agency response and commitment:

1. NHBP requests that the State of Michigan notifies and consults with the Tribe for the proposed permitting of UIC Class II Wells within a 100-mile radius of the Pine Creek Reservation. Adequate time to prepare comments and/or directly contact the well inspectors is also requested.

OGMD commitment: The OGMD of EGLE will provide notification of permitting actions of Class II UIC Wells to the NHBP and will consult with the tribe during the period which the action is being considered and public comment is being received. The OGMD permitting specialists are available for discussion and consultation on Class II UIC well actions and status.

2. Please note that NHBPI, as part of prior consultations with the State of Michigan, also requests notification and consultation with proposed permitting related to oil and gas wells, new air pollution source permits, CAFO permits, or other significant EGLE permits issued within 100 miles of the Pine Creek Reservation.

OGMD commitment: This request is outside of the purview of the US EPA as it pertains to Michigan's Application for Class II UIC Primacy. The request involves multiple divisions and programs within EGLE. However, the OGMD can speak to the request as it pertains to oil and gas wells. Again, oil and gas wells are not Class II UIC wells; however, the OGMD will commit to working with the NHBP to create an area within 100 miles of the Pine Creek Reservation and as requested, the OGMD permit specialists will ensure that the NHBP is notified of all oil and gas well permitting actions within that review area in addition to Class II UIC well actions. The OGMD would encourage the NHBP to work with our EGLE Tribal Liaison, Katie Kruse to address the request for notification of other programs outside of OGMD's oversight.

3. NHBP requests the contact information for the State of Michigan UIC Class II well inspectors and the districts they represent. NHBP will reciprocate with Tribal contacts.

OGMD Commitment: The OGMD maintains an online District Map showing coverage area of each Area Geologist and their contact information. The OGMD will provide that map and encourage relationship building between the NHBP tribal contacts and the appropriate area geologists as well as our permitting specialists.

4. NHBP, requests the possible review of the proposed construction details of the wells, including details of the local geology, anticipated capacity of the receiving formation, well installation and casing specifications, well logs, grouting / annular space sealing details, setbacks from municipal, agricultural or residential wells, setbacks from surface water features and methods of monitoring the performance of the proposed wells.

OGMD Commitment: A permit application for a Class II UIC well includes most of the details specified in this request. Part 615, Supervisor of Wells, of the Natural Resources and Environmental Protection Act, Public Act 451 of 1994, as amended (NREPA) identifies those requirements. All of those details will be made available to the NHBP as part of permitting actions and consultation with NHBP. Some of the specified items such as local geology and anticipated capacity of the receiving formation are not items required as part of an application. The applicant must, however, identify any geologic hazards which may impact the integrity of well construction and operation, and they are required to provide specific information related to the injection zone, confining zone, and injection rates and pressures.

5. Upon any significant violations or failure of the proposed wells, NHBP requests that the Tribe be notified for possible consultation.

OGMD Commitment: The OGMD will work with the NHBP to identify the specific types violations and failures that are of interest and the area the NHBP is interested in if greater than 100 miles from the Pine Creek Reservation. The OGMD will commit to notification of NHBP for those instances of significant violations and failures for possible consultation.

6. NHBP is very concerned that the permit review process will no longer include consideration of National Environmental Policy Act (NEPA), Endangered Species Act (ESA), and the National Historic Preservation Act (NHPA). USEPA Primacy had included attention to these keystone pieces of federal legislation during the permitting process.

OGMD Comment: NHBP has expressed a concern here and not a request of the state, the OGMD has a similar protocol for ensure protection of our environment, threatened and endangered species, and historic resources. The Part 615 of the NREPA process also reviews the impacts to surface resources associated with the project and not the construction and operation of the well itself. The OGMD conducts, as part of permit review, a review of not only the applicant supplied information but also databases and inventories available to permit reviewers to determine the presence of known natural features and interests such as state and federal endangered species, registered historic places, wetlands, lakes, streams, floodplains, and other resources. The OGMD permitting specialists work in concert with the Area Geologists to review these potential issues and compare to on-site conditions. Where appropriate other state and federal sister agencies are notified and requested to provide any comments they may have as they pertain to the project. The application is also subject to Part 17, Michigan Environmental Protection Act (MEPA), of the NREPA. Like NEPA, MEPA is an umbrella type regulation which establishes the expectation that alternatives are considered and that the activity will not pollute, impair, or destroy the air, water, or other natural resources or the public trust in these resources. The OGMD is confident that the state process is equally effective as the federal process in this regard.

The LRBOI letter basically contained four categories of concerns are listed below, with agency response and a commitment if appropriate to the concern:

1. Notification for the tribes about proposed wells near reservation and within the ceded territories and appropriate opportunity for consultation.

OGMD comment and commitment: The OGMD notes that LRBOI uses the term tribes and the OGMD is unsure of which tribes are being referred to. It is the understanding of the OGMD, that not all tribes desire the same level of engagement for a specific issue. The OGMD manages a weekly permit list available by list serve to all who express interest in being notified of pending oil and gas permit actions, including Class II UIC wells. For some tribes, this has been and may be sufficient. THE LRBOI is expressing a special level of engagement desired as it relates to Class II UIC permitting actions. EGLE will commit to working with LRBOI to identify the area of notification for wells on the reservation and ceded territory. The OGMD will provide notification of permitting actions of Class II UIC Wells to the NHBP and will consult with the tribe during the period which the action is being considered and public comment is being received. The OGMD permitting specialists and area geologists are available for discussion and consultation on Class II UIC well actions and status. The state permitting level for Class II UIC wells is low enough, that if desired, the OGMD can send notification of permitting actions within 1836 and 1842 ceded territory to appropriate Michigan and Wisconsin tribes. As a note,

because Class II wells are associated with oil and gas wastes and enhanced hydrocarbon recovery, there are not any Class II wells in the Upper Peninsula of Michigan as it pertains to the 1842 ceded territory because Michigan's oil and gas resources are located in the Lower Peninsula. To date, there are no active oil, gas, or Class II UIC wells in the Upper Peninsula and any future development is unlikely.

2. Jurisdictional issues for wells within Indian Country.

OGMD comment and Commitment: First and foremost, there are no jurisdictional issues for Indian Country, nothing changes for wells proposed and operating within Indian Country. The US EPA remains the Class II UIC administrator for those wells and Part 615 of the NREPA also applies as a second, state level regulation. The OGMD and US EPA will continue to operate as the agencies have for decades, with the one exception LRBOI notes that the OGMD will make sure that the US EPA does in fact receive applications within Indian Country and coordinate as appropriate. This will provide a failsafe notification, if for some reason, an operator/permittee is not aware of Indian Country and the continued need to permit through both agencies. When Michigan receives an application for a Class II well within Indian Country, it will forward a copy to the US EPA and then coordinate parallel reviews as has been done in the past. Currently there are approximately 15 Class II UIC wells within Indian Country, and as Michigan receives Class II UIC primacy the two agencies will take steps to identify each and communicate them to the appropriate tribes.

3. Variations between Michigan and Federal UIC rules.

OGMD Comment: The OGMD acknowledges some difference between state and federal permitting rules, including the two cited by the LRBOI. A state seeking primacy of the Class II UIC program under Section 1425 of the Safe Drinking Water Act is not required to have an identical program, instead it must demonstrate that it has an equally effective program. The OGMD has co-regulated injection wells with the US EPA for decades with little or no conflict between programs. The bonding, compliance, and enforcement toolbox of Part 615 of the NREPA is not identical to federal program, rather different and equally effective at protecting underground sources of drinking water. The State of Michigan Part 615 program also goes further than the federal program when considering matters of surface waste in addition to subsurface waste. Part 615 and Part 13 of the NREPA, as referenced by LRBOI, does have different timelines and permitting review steps than the federal program. Permit review, understanding of Michigan specific geology and regional concerns is a strong suite of the regulatory program administered by the OGMD. Part 13 of the NREPA will ultimately be updated to coincide with timeframes listed in Part 615 administrative rule R 324.803. Until that time, Rule 803 is controlling for the OGMD. Missing a deadline under Part 13 has reporting consequences and partial refund of permit fee consequences, but there is no automatic issuance of a Part 615 permit based on missed Part 13 permitting timeframe targets. The timeframes outlined in R 324.803 are believed to be reasonable for public engagement on Class II well permit actions, and the OGMD believes that tribal engagement can also be accomplished in parallel within the same timeframe for most proposed Class II wells.

The LRBOI has noted concerns related to other programs and reports which are not related to the subject Class II UIC Primacy. The concern is noted by the OGMD, and the Michigan Application for Class II UIC Primacy does indicate commitment to all required

annual reporting to the US EPA, transparent communication with the US EPA, and regular evaluation of the program. The OGMD has pursued three rounds of administrative rule changes to make an already effective regulatory program better and ensure that it is equally effective as the federal Class II UIC program.

4. Proper reporting and notifications of spills and other incidents under the program.

OGMD Comment and Commitment: The OGMD acknowledges the LRBOI's expressed interest in spills and incidents that may impact water quality or impact traditional medicines. The OGMD has worked with LRBOI and other tribes recently to improve communication of spills. As committed to for the NHBP, the OGMD will also work with the LRBOI to foster relationships, improve communication, and to identify the specific types of spills, significant violations, and failures that are of interest for the LRBOI reservation and ceded territory. The OGMD will commit to notification of LRBOI for those instances of spills, significant violations, and failures for possible consultation.

If you have any question regarding this matter, please contact me at 517-284-6823; wyganta@michigan.gov; or Department of Environment, Great Lakes, and Energy, Oil, Gas, Minerals Division, P.O. Box 30256, Lansing, Michigan 48909-7756.

Sincerely,



Adam W. Wygant
Director and State Geologist
Oil, Gas, and Minerals Division

cc: Mr. Stephen Jann, US EPA
Ms. Anna Miller, US EPA
Mr. Mark Snow, EGLE
Ms. Katie Kruse, EGLE



DEPARTMENT POLICY AND PROCEDURE

09-031

Consultation and Coordination with Indian Tribal Governments

Original Effective Date: July 24, 2020

Distribution: All EGLE Employees and EGLE Web Site

ISSUE

On October 28, 2002, the State of Michigan entered into a Government-to-Government Accord (the “Accord”) [\[link\]](#) with the twelve federally recognized Indian tribes located in Michigan. The Accord served as an acknowledgement by the State of each tribes’ sovereignty and right to self-governance and self-determination, and as a commitment by the State to use a process of consultation with the tribes to minimize and avoid disputes.

On October 31, 2019, Governor Gretchen Whitmer issued Executive Directive No. 2019-17 (the “Directive”) [\[link\]](#) to reaffirm, implement, formalize, and extend the commitments made by the State of Michigan in the Accord. First, it ensures all state departments are aware of and adhere to certain fundamental principles regarding government-to-government relations with federally recognized Indian tribes located in Michigan. Second, it describes a process of tribal consultation. And third, it builds into the operations of the State of Michigan the infrastructure necessary to ensure that the objectives of the directive and the Accord are realized as fully as possible.

One of the primary goals of this policy and procedure is to fully implement both the Accord and the Directive, with the ultimate goal of strengthening the consultation, communication, coordination, and collaboration between tribal governments and EGLE.

POLICY

EGLE recognizes that tribal governments are sovereign entities with the inherent authority to exercise jurisdiction over their respective lands and citizens. Furthermore, federally recognized Indian tribes possess the right to self-governance and self-determination. Accordingly, it is the goal of this policy and procedure to better communicate with each of the federally recognized Indian tribes located in Michigan on a government-to-government basis on actions and decisions that may have tribal implications.

Consultation is a process of meaningful communication and coordination between EGLE and tribal officials prior to EGLE taking actions or implementing decisions that may affect tribes. Effective communication and coordination are important to ensure tribes have input in department actions and decisions. As a process, consultation includes several methods of interaction that may occur at different levels. The appropriate level of interaction is determined

by past and current practices, adjustments made through this policy and procedure, and the continuing dialogue between EGLE and tribal governments.

This policy and procedure establishes guidelines for consultation across EGLE and seeks to strike a balance between providing sufficient guidance for purposes of achieving consistency and predictability while allowing for, and encouraging, the tailoring of consultation approaches to reflect the circumstances of each consultation situation and to accommodate the preferences of tribal governments.

EGLE recognizes that open communication and robust collaboration with tribal partners is essential to accountability and success. The intent of this policy and procedure is not to preclude or replace existing, ongoing, and future meetings; communication and exchanges of information; or collaboration that occurs between EGLE staff and tribes. These interactions are expected to continue on a regular basis. The main difference between consultation and more routine communication is that consultation includes formal steps to identify issues, notify parties, and provide follow up on input provided during the consultation process.

Ultimately, EGLE recognizes the shared partnership with the tribes in achieving our mission to protect Michigan's environment and public health and recognizes the importance of tribal consultation and coordination to ensure meaningful and mutually beneficial communication and collaboration on matters of shared concern.

This policy and procedure applies to all EGLE divisions, offices, and other organizational units that fall within its jurisdiction, including Type I agencies, broadly referred to as "divisions" in this document.

PROCEDURE

A. Consultation Process

EGLE must follow this policy and procedure and associated guidance documents before taking an action or implementing a decision that may affect one or more of the federally recognized Indian tribes located in Michigan. This consultation process must adhere to the framework and requirements set forth below, which are designed to ensure that the process is consistent and predictable across divisions but also flexible enough to meet the particular needs and circumstances of each consultation. Meaningful communication and collaboration on matters of shared concern must always be the core and driving objective of this consultation process.

1. **Step One – Identification:** The first step in the consultation process is the identification of an activity (i.e., an action or decision) that may be appropriate for consultation. Identification includes a determination of the complexity of the activity, the identity of the tribe(s) potentially affected by the activity, the activity's potential implications for tribes, and any time or resource constraints relevant to the application of the consultation process to the activity.

As spelled out in the Directive, “‘Implications for tribes’ means an express reference to Indians, Indian tribes, bands or groups, or Indian organizations, or a direct effect on their collective or individual treaty rights, natural-resource or environmental interests, economic or commercial interests, civil or criminal jurisdiction, or other rights or benefits secured under Michigan or federal law by virtue of their status as Indians or tribal governments.”

EGLE will use the following mechanisms to identify activities appropriate for consultation:

- a) **EGLE Identification:** When undertaking an activity, EGLE must evaluate whether an action or decision may affect tribal interests such that consultation would be appropriate. When evaluating whether an activity is appropriate for consultation, EGLE will apply the standard broadly and, when in doubt, err on the side of notification.
- b) **Tribal-Government-Initiated Identification:** A tribal government may initiate the consultation process by identifying an activity that may be appropriate for consultation. EGLE must then determine the appropriate level of response to the request for consultation, for example, informal conversations between environmental staff vs. formal executive level meetings between high ranking officials with decision-making authority within EGLE and the tribe, and it must afford substantial weight to the tribal government’s request in performing that determination.
- c) **Other Resources:** EGLE must also utilize other relevant resources, such as tribal partnership groups in which the tribes may be participants, to assist them in identifying activities that may be appropriate for consultation.

Activities that may be appropriate for consultation include, but are not limited to, actions or decisions regarding rules or regulations; policies, guidance documents, or directives; permits; civil enforcement and compliance monitoring; emergency preparedness and response; federal authorizations or delegations; and efforts to carry out state obligations under a state compact or agreement.

EGLE and tribal governments may develop a process for eligible activities that are numerous, frequent, and/or reoccurring (i.e., annual permits or hundreds of similar activities) such that consultation does not need to be undertaken separately and independently for each occurrence.

- 2. **Step Two – Notification:** Once an activity is identified that may be appropriate for consultation, EGLE must notify the tribe(s) potentially affected by the activity as early in the process as possible. Notification must include sufficient information to permit the potentially affected tribe(s) to make an informed decision regarding whether to proceed with consultation and must inform the tribe(s) of how to provide input regarding the activity. Notification must also include a time frame for consultation and input. Notification may occur by regular or electronic mail, telephone, or other agreed-upon means, depending on the nature of the activity and the number of tribes potentially affected.

EGLE will strive to honor tribal preferences regarding the specific method of notification, subject to applicable time and resource constraints, including statutory deadlines.

3. Step Three – Input: EGLE must then receive and consider input regarding the activity from any potentially affected tribe(s) that may choose to offer it. Input may be provided in whatever format the tribe and EGLE may mutually deem appropriate. EGLE must coordinate with the tribe(s) throughout this step to ensure that the tribe(s) participating in the consultation: (1) receive all information necessary to provide meaningful input regarding the activity; (2) are afforded due opportunity to discuss that input; (3) are informed of any significant changes to the activity, or any other issues that may arise as to it, over the course of the consultation process; and (4) are afforded due opportunity to provide and discuss any additional input the tribe(s) may have regarding those changed circumstances.

EGLE will coordinate with the tribe(s) when sharing information about culturally significant resources that may be sensitive and/or confidential in nature.

4. Step Four – Follow-up: EGLE must then provide feedback to the tribe(s) involved in the consultation to explain how their input was considered in the final decision or action. When feasible, taking into consideration regulatory and/or procedural time frames, EGLE will provide preliminary feedback before the final decision is made or action is taken. This feedback must be in the form of a written communication from the most senior EGLE official involved in the consultation to the most senior tribal official involved in the consultation.

B. Communication, Coordination, and Collaboration

EGLE recognizes that open communication and robust collaboration with tribal partners is essential to accountability and success and encourages the development of meaningful partnerships and collaborative efforts with the tribes. It is the policy of EGLE to continually improve communication, coordination, and collaborations with tribes. This can be accomplished through a variety of methods, including:

1. Regularly scheduled interactions between EGLE and tribal staff (i.e., District meetings between EGLE staff and tribal staff, joint field activities, workshops and conferences, and annual meetings among the EGLE Director and Tribal Leaders).
2. Participation and attendance at tribal meetings and outreach events (i.e., quarterly Michigan Tribal Environmental Group Meetings and wild rice camps).
3. Providing and partnering in technical assistance, grants, and training opportunities.
4. Collaboration on nonregulatory programs, such as air quality monitoring, water quality monitoring, and watershed management.

C. Roles and Responsibilities

1. Department Tribal Liaison: The responsibilities of EGLE's Tribal Liaison include the following:
 - a) Monitoring and ensuring EGLE's implementation of and compliance with the Accord, the Directive, and this policy and procedure.
 - b) Coordinating with EGLE divisions to develop procedures for implementation of this policy and procedure.
 - c) Coordinating with tribal governments to determine the preferred method of notice and to identify the contact information of all positions or persons to whom the notice must be sent.
 - d) Coordinating EGLE's interactions with the governments of federally recognized Indian tribes located in Michigan.
 - e) Coordinating and implementing the tribal consultation process, including serving as a point-of-contact for EGLE staff, tribal governments, and other parties interested in the process.
 - f) Communicating regularly with the Governor's advisor on tribal-state affairs regarding EGLE's compliance with the Directive and the Accord and EGLE's interactions with federally recognized Indian tribes located in Michigan.
 - g) Participating in Tribal-State meetings, summits, and conference calls as coordinated by the Governor's office and tribal governments.
 - h) Producing an annual report regarding EGLE's implementation of the Directive and the Accord. The report must be submitted to the Governor's advisor on tribal-state affairs and to the EGLE Director no less than 21 days before the annual meeting or summit identified in Section C(1)(g).
2. Division Directors: Division Directors or their designee oversee the consultation process in their respective divisions. Division Directors also designate a Division Tribal Liaison. Each division is responsible for coordinating with the Department Tribal Liaison to implement this policy and procedure.
3. Division Tribal Liaisons: Division Tribal Liaisons serve as a point-of-contact for the Department Tribal Liaison as subject matter experts related to division programs and contacts to assist with implementation of this policy and procedure and interactions with Tribes. Division Tribal Liaisons will also serve as a point-of-contact for division staff to assist in the implementation of this policy and procedure.

4. EGGLE Staff: EGGLE staff can include staff from all levels within the department. EGGLE staff assist in identifying matters appropriate for notification and consultation within their respective programs and districts and provide updates to the Division Tribal Liaisons and Department Tribal Liaison on tribal interaction.
5. Tribal Official: The Tribal Official is an elected, appointed, or designated official who is determined by each tribe. Each tribe will determine their own roles and responsibilities within the consultation process.

D. Reporting

EGLE is required to produce an annual report that includes a description of the most significant interactions, including collaborations and conflicts, between the department and federally recognized Indian tribes located in Michigan over the past year to be submitted to the Governor's advisor on tribal-state affairs and to the EGGLE Director. EGGLE staff are required to report a summary of any interactions and communication with tribes to their Division Tribal Liaisons and the Department Tribal Liaison.

E. Training

In compliance with the Directive, EGGLE must provide annual training on tribal-state relations for all department and agency employees who have direct interactions with tribes or who work on matters that have direct implications for tribes. This training must teach the fundamentals of tribal sovereignty, tribal treaty rights, and tribal governance and must also provide a historical overview of Indian tribes in Michigan, with lessons on indigenous dispossession and Indian boarding schools. The Governor's advisor on tribal-state affairs will provide the necessary training materials.

F. Annual Review

This policy and procedure will be reviewed on an annual basis.

LINKS TO ADDITIONAL INFORMATION

[2002 Government-to-Government Accord between the State of Michigan and the Federally Recognized Indian Tribes in the State of Michigan](#)

[Executive Directive No. 2019-17](#)

APPROVING AUTHORITY



Liesl Eichler Clark, Director

HISTORY

Policy No.	Action	Date	Title
09-031	Original	July 24, 2020	Consultation and Coordination with Indian Tribal Governments

CONTACT/UPDATE RESPONSIBILITY

Any questions or concerns regarding this policy and procedure should be directed to Katie Kruse, Environmental Justice and Tribal Liaison, Executive Office, at KruseK2@Michigan.gov or 517-249-0906.

An EGLE policy and procedure cannot establish regulatory requirements for parties outside of EGLE. This document provides direction to EGLE staff regarding the implementation of rules and laws administered by EGLE. It is merely explanatory, does not affect the rights of or procedures and practices available to the public, and does not have the force and effect of law. EGLE staff shall follow the directions contained in this document.