



# Minnesota Pollution Control Agency

*Office of the Commissioner*

## **MINNESOTA POLLUTION CONTROL AGENCY GUIDANCE ON WATER QUALITY CONSULTATION WITH MINNESOTA TRIBAL NATIONS**

**May 2016**

Whereas, in April 2009, the Minnesota Pollution Control Agency (“MPCA”) adopted “MPCA Guidance on Water Quality Permit Consultation with Indian Tribal Governments” pursuant to Executive Order 03-05 signed by Minnesota Governor Tim Pawlenty;

Whereas, since 2009 and pursuant to the 2009 Guidance, the MPCA has consulted with Minnesota tribes on water quality permits proposed to be issued by the MPCA;

Whereas, on August 8, 2013, Minnesota Governor Mark Dayton signed Executive Order 13-10 titled “Affirming the Government-to-Government Relationship between the State of Minnesota and the Minnesota Tribal Nations: Providing for Consultation, Coordination, and Cooperation; Rescinding Executive Order 03-05” (A copy of Executive Order 13-10 is attached to this Guidance on Water Quality Consultation with Minnesota Tribal Nations);

Whereas, Executive Order 13-10 affirmed the government-to-government relationship between the State of Minnesota and the 11 federally recognized Minnesota Tribal Nations;

Whereas, Executive Order 13-10 affirmed that the State of Minnesota recognizes and supports the unique status of the Minnesota Tribal Nations and their right to existence, self-government, and self-determination;

Whereas, Executive Order 13-10 affirmed that meaningful and timely consultation between the State of Minnesota and the Minnesota Tribal Nations will facilitate better understanding and informed decision making by allowing for collaboration on matters of mutual interest, and helping to establish respectful relationships between the State and the Minnesota Tribal Nations; and

Whereas, Executive Order 13-10 requires certain executive agencies, including the MPCA, to: (1) recognize the unique legal relationship between the State of Minnesota and the Minnesota Tribal Nations, respect fundamental principles that establish and maintain this relationship, and accord tribal governments the same respect accorded to other governments; (2) develop and implement consultation policies to guide agency work and interaction with the Minnesota Tribal Nations; (3) consult, as appropriate and at the earliest opportunity, with the Minnesota Tribal Nations prior to undertaking actions or policies related to the list of priority issues for consultation developed after annual consultation with Minnesota Tribal Nations and consider input generated from Minnesota Tribal Nations in the decision-making process; and (4) designate a staff person to assume responsibility for implementation of the agency’s tribal consultation policy and to serve as the principal point of contact for the Minnesota Tribal Nations.

Now, therefore, based on Executive Order 13-10, the MPCA has developed this Guidance on Water Quality Consultation with Minnesota Tribal Nations (Guidance) as follows:

#### **A. MPCA Notification to Minnesota Tribal Nations**

The consultation process begins with written notification from the MPCA to a Minnesota Tribal Nation of: the receipt of an application for a water quality permit listed in B. 1. or 2., below; or the receipt of information for a Clean Water Revolving Fund loan listed in B.3., below; or at the time the MPCA initiates development of certification provisions for a Clean Water Act section 401 certification listed in B.4., below. After receipt of such application or information, the MPCA will notify a Minnesota Tribal Nation's designated contact for a facility proposed to be located in a county of interest identified under Part B.

#### **B. Tribal Designation of Counties of Interest**

Each Minnesota Tribal Nation will provide to the MPCA a list of Minnesota counties of interest where the Minnesota Tribal Nation could be potentially affected by the following types of water quality actions:

1. National Pollutant Discharge Elimination System (NPDES)/State Disposal System (SDS) permits for industrial facilities that are required to go through the Environmental Assessment Worksheet or Environmental Impact Statement processes;
2. NPDES/SDS permits for major facilities for new or expanding facilities, permit reissuances, variance requests, or proposed schedules of compliance. Major facilities are municipal wastewater treatment facilities with a design average wet weather flow of 1.0 million gallons or more per day, and other dischargers that score more than 80 points on the U.S. Environmental Protection Agency (EPA) NPDES Permit Rating Worksheet.;
3. Review of project information related to funding under the state Clean Water Revolving Fund program when the MPCA is required to comply with Section 106 of the National Historic Preservation Act (54 U.S.C. § 306108 and rules 36 CFR Part 800) as a result of EPA providing funds to implement a Clean Water Revolving Fund program.;
4. Certifications by the MPCA required under Clean Water Act Section 401 for individual Section 404 permits for: proposed mining projects (ferrous, non-ferrous, peat, and silica sand); projects that propose filling or excavating fifteen acres or more of wetlands; and projects that propose filling or excavating a non-wetland surface water such that the proposed project would effectively take or remove part of the surface water.

#### **C. Designation of Contacts**

The MPCA has designated a Tribal Liaison to ensure that MPCA staff is engaged, communicating, and sharing information with Minnesota Tribal Nations. The MPCA's Tribal Liaison is J. David Thornton or his designee. Each Minnesota Tribal Nation will provide to the MPCA Tribal Liaison the name, address, e-mail address, and telephone number of the Minnesota Tribal Nation's main environmental contact person for purposes of this Guidance. To ensure reliable and prompt communication, when a designated contact changes, the Minnesota Tribal Nation and the MPCA shall immediately inform the other of the change. Once per calendar year the MPCA will contact each Minnesota Tribal Nation and request an update of information on the tribal environmental contact person and the list of counties of interest.

## **D. Sharing of Information and Offers to Meet**

### **1. For water quality permit actions listed under Part B. 1. and 2.**

- i. The notification from the MPCA to a Minnesota Tribal Nation will include an offer to meet and share information, including the application and project schedule documents, with the Minnesota Tribal Nation. The MPCA recognizes that some Minnesota Tribal Nations have small environmental departments. To ensure meaningful and timely consultation, the MPCA will provide the draft permit to the Minnesota Tribal Nation as soon as practicable in order to provide sufficient time for the Minnesota Tribal Nation to provide meaningful comments.
- ii. The MPCA sometimes visits an applicant's site as part of the permitting process. The Minnesota Tribal Nation notified under Part A. can request to accompany the MPCA if the MPCA intends to visit a site to better understand the operations undergoing permitting. The visit is subject to the applicant's approval.
- iii. The MPCA solicits comments on water quality permits from the public through formal public comment periods. The Minnesota Tribal Nations notified under Part A. can request to meet with the MPCA during the pre-public comment period and/or during the public comment period.

### **2. For Section 106 actions listed under Part B. 3.**

- i. The notification from the MPCA to a Minnesota Tribal Nation will include a project description, location of the area of potential effect, a discussion of known historic or archaeological sites, and contact information for the project proposer and MPCA lead staff.
- ii. The notification from the MPCA to a Minnesota Tribal Nation will establish a time period for submitting comments or requesting consultation. If the MPCA receives a request for consultation from a Minnesota Tribal Nation, the MPCA and the Minnesota Tribal Nation will meet to discuss the project.

### **3. For 401 certifications listed under Part B. 4.**

- i. The notification from the MPCA to a Minnesota Tribal Nation will include the U.S. Army Corps of Engineers Public Notice for the project and the project application.
- ii. The notification from the MPCA to a Minnesota Tribal Nation will establish a time period for submitting comments or requesting consultation. If the MPCA receives a request for consultation from a Minnesota Tribal Nation, the MPCA and the Minnesota Tribal Nation will meet to discuss the project.

4. In addition to the MPCA's offers to meet described in this Guidance, a Minnesota Tribal Nation may request a meeting with the MPCA at any time.

## **E. Limitations**

This Guidance does not constitute an agreement by the State of Minnesota or the MPCA on the location of the boundaries of a Minnesota Tribal Nation's Reservation.

This Guidance shall not be construed to limit any jurisdiction or authority of the MPCA or the State of Minnesota or a Minnesota Tribal Nation.

This Guidance is not intended to, and does not create, any right to administrative or judicial review, or any other right or benefit or responsibility, substantive or procedural, enforceable against the State

of Minnesota or the MPCA, or its officers or employees. Nothing in this guidance prohibits or limits the State of Minnesota or the MPCA from asserting any rights or pursuing any administrative or judicial action under state or federal law to effectuate the interests of the State of Minnesota or the MPCA.

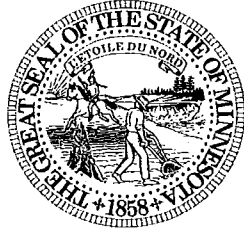
A handwritten signature in blue ink, appearing to read 'J. Thornton', followed by a long horizontal line extending to the right.

By: J. David Thornton, MPCA Tribal Liaison

Dated: May 2, 2016

# STATE OF MINNESOTA

## EXECUTIVE DEPARTMENT



**MARK DAYTON**  
**GOVERNOR**

### **Executive Order 13-10**

#### **Affirming the Government –to-Government Relationship between the State of Minnesota and the Minnesota Tribal Nations: Providing for Consultation, Coordination, and Cooperation; Rescinding Executive Order 03-05**

**I, Mark Dayton, Governor of the State of Minnesota,** by virtue of the power invested in me by the Constitution and applicable statutes, do hereby issue this Executive Order:

**Whereas,** the United States and the State of Minnesota have a unique legal relationship with federally recognized Tribal Nations, as affirmed by the Constitution of the United States, treaties, statutes, and case law; and

**Whereas,** the State of Minnesota is home to 11 federally recognized Tribal Nations (“the Minnesota Tribal Nations”) with elected or appointed Tribal Governments; and

**Whereas,** the State of Minnesota recognizes and supports the unique status of the Minnesota Tribal Nations and their right to existence, self-government, and self-determination; and

**Whereas,** the Minnesota Tribal Nations are comprised of a majority of the State’s 61,000 American Indians and provide significant employment in the State; and

**Whereas,** members of the Minnesota Tribal Nations are citizens of the State of Minnesota and possess all the rights and privileges afforded by the State; and

**Whereas,** the State of Minnesota and the Minnesota Tribal Nations significantly benefit from working together, learning about one another, and partnering where possible; and

**Whereas,** meaningful and timely consultation between the State of Minnesota and the Minnesota Tribal Nations will facilitate better understanding and informed decision making by allowing for collaboration on

matters of mutual interest, and helping to establish respectful relationships between the State and the Minnesota Tribal Nations.

**Now, Therefore,** I hereby order that:

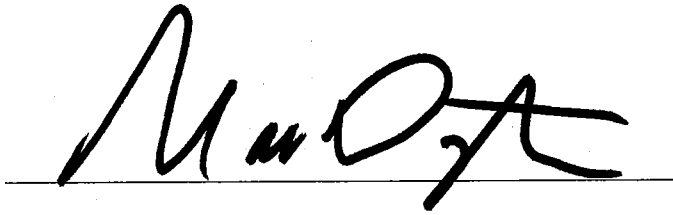
1. All Executive Branch agencies of the State of Minnesota shall recognize the unique legal relationship between the State of Minnesota and the Minnesota Tribal Nations, respect the fundamental principles that establish and maintain this relationship, and accord Tribal Governments the same respect accorded to other governments.
2. By March 10, 2014, the following Cabinet-level Executive Branch agencies (hereinafter “Cabinet Agency” and “Cabinet Agencies”) shall, in consultation with the Minnesota Tribal Nations, develop and implement tribal consultation policies to guide their work and interaction with the Minnesota Tribal Nations: the Department of Corrections, Department of Education, Department of Health, Housing Finance Agency, Department of Human Rights, Department of Human Services, Department of Natural Resources, Pollution Control Agency, Department of Public Safety, Department of Transportation, and Department of Veterans Affairs. All other Cabinet-level Executive Branch agencies shall coordinate, as needed, with the tribal liaison in the Governor’s Office to consult with the Minnesota Tribal Nations. Prior to February 1 of each year, each Cabinet Agency shall consult with each of the Minnesota Tribal Nations to identify priority issues for consultation.
3. As appropriate, and at the earliest opportunity, Cabinet Agencies shall consult with the Minnesota Tribal Nations prior to undertaking actions or policies related to the list of priority issues identified in Paragraph 2. Cabinet Agencies shall consider the input generated from tribal consultation into their decision-making processes, with the goal of achieving mutually beneficial solutions.
4. Each Cabinet Agency shall designate a staff member to assume responsibility for implementation of the tribal consultation policy and to serve as the principal point of contact for the Minnesota Tribal Nations. Each Cabinet Agency’s designated staff member shall work with a representative(s) designated by the Minnesota Tribal Nations, who shall serve as the Cabinet Agency’s principal point of contact.
5. All Cabinet Agencies shall provide training for designated staff who work with the Minnesota Tribal Nations in an effort to foster a collaborative relationship between the State of Minnesota and the Minnesota Tribal Nations.

Nothing in this Order shall require state agencies to violate or ignore any laws, rules, directives, or other legal requirements or obligations imposed by state or federal law, or set forth in agreements or compacts between one or more of the Minnesota Tribal Nations or any other Tribal Nation and the State or its agencies. This Order is not intended to, and does not create, any right to administrative or judicial review, or any other right or benefit or responsibility, substantive or procedural, enforceable against the State of Minnesota, its agencies or instrumentalities, its officers or employees, or its subdivisions or any other persons. Nothing in this Order prohibits or limits any state agency from asserting any rights or pursuing any administrative or judicial action under state or federal law to effectuate the interests of the State of Minnesota or any of its agencies.

If any provision in this Order conflicts with any laws, rules, or other legal requirements or obligations imposed by state or federal law, state and federal laws shall control.

Under Minnesota Statutes, section 4.035, subdivision 2, this Executive Order is effective 15 days after publication in the State Register and filing with the Secretary of State and shall remain in effect until rescinded by proper authority or it expires in accordance with Minnesota Statutes, section 4.035, subdivision 3.

In Testimony Whereof, I have set my hand on this 8<sup>th</sup> day of August, 2013.

A handwritten signature in black ink, appearing to read "Mark Dayton", written over a horizontal line.

Mark Dayton  
Governor

Filed According to Law:

A handwritten signature in black ink, appearing to read "Mark Ritchie", written over a horizontal line.

Mark Ritchie  
Secretary of State