

## **NUMBER EIGHTY-TWO (2021)**

### **CONSULTATION WITH FEDERALLY RECOGNIZED TRIBAL NATIONS FOR ENVIRONMENTAL AND HISTORIC PERMITS AND REVIEWS**

#### **Importance of the Initiative**

The Commonwealth of Virginia is home to Tribal Nations with whom the Commonwealth has important and unique government-to-government relationships. Virginia's Tribal Nations were firmly established on ancestral lands long before the English arrived to settle in Jamestown in 1607. Prior to English colonization, Algonquian, Siouan, and Iroquoian speaking people flourished on these lands.

These Tribal Nations had their land taken and their identities, culture, and sovereignty attacked and undermined. While Articles 3 and 4 of the 1677 Treaty of Middle Plantation promised to respect the boundaries of reserved Tribal lands in perpetuity, most tribes in the Commonwealth had their land seized and their reservations disbanded.

Over the centuries, the relationship of Virginia's Indian population and the Commonwealth varied greatly. Tribal Nations have often been forced to fight to maintain their identities in the face of racist and assimilationist policies. In recent decades, the Commonwealth has strengthened its relationship with Tribal Nations and now recognizes that Tribal Nations have always been integral to the cultural and historic fabric of the Commonwealth.

Virginia first acknowledged Tribal Nations through a formalized state recognition process in 1983. In 2015, the United States federal government finally formally acknowledged a Virginia Tribe in the modern era. Since 2018, the federal government has recognized seven Tribal Nations indigenous to the Commonwealth of Virginia.

Federal agencies are required to offer an opportunity for government-to-government consultation with federally recognized Tribal Nations when taking actions that have tribal implications.

This Order ensures the Commonwealth of Virginia provides similar opportunities for consultation with federally recognized Tribal Nations when evaluating certain state permit applications for potential impacts to environmental, cultural, and historic resources.

### **Consultation**

The Department of Environmental Quality, the Department of Conservation and Recreation, the Department of Historic Resources, and the Virginia Marine Resources Commission shall develop policies and procedures to ensure an opportunity for meaningful and culturally appropriate, written consultation with potentially impacted Indigenous tribes, nations and communities acknowledged pursuant to the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. 479.

This order shall apply to the following permits and reviews to the extent permitted by law:

- Environmental Impact Reports for major state projects, prepared pursuant to *Code of Virginia* §10.1-1188
- State Corporation Commission project reports, prepared pursuant to *Code of Virginia* § 56-46.1; 20 VAC 5-302-25
- Virginia Department of Aviation environmental reports, pursuant to *Code of Virginia* § 5.1-7
- Environmental Impact Assessments for Oil or Gas Well Drilling Operations in Tidewater Virginia, pursuant to 9 VAC 15-20
- Federal Consistency Determinations pursuant to Section 307 of the "Coastal Zone Management Act of 1972" (CZMA), 14 U.S.C. § 1456
- Ground water withdrawal permits for groundwater withdrawals greater than one million gallons per day, issued pursuant to *Code of Virginia* § 62.1-266
- Designation of historic districts, buildings, structures, or sites as historic landmarks, pursuant to *Code of Virginia* § 10.1-2206.1
- Burial Permits for Relocation of Human Remains, pursuant to *Code of Virginia* § 10.1-2305
- Cave Collection Permits, pursuant to the *Code of Virginia* § 10.1-1000, for permit applications pertaining to the study, extraction or removal of any archaeological or historic feature in caves
- Local government notifications for new and existing impoundment structures or dams, pursuant to 4 VAC 50-20-58
- Construction or Alteration of Virginia Regulated Impounding Structures Permit, pursuant to 4 VAC 50-20-70 and 4 VAC 50-20-80
- Underwater Recovery Permits, pursuant to *Code of Virginia* § 10.1-2214

### **Federal Permitting**

#### *Major Air, Waste, and Water Permits*

The Environmental Protection Agency (EPA) is required to consult on a government-to-government basis with federally recognized Tribal governments when EPA actions and decisions

may affect tribal interests. The EPA provides an opportunity for consultation with federally recognized Tribes for major air, waste, and water discharge permits issued pursuant to the federal Clean Air Act, 42 U.S.C. § 7401 et seq. and the federal Clean Water Act, 33 U.S.C. § 1251 et seq.

The Department of Environmental Quality shall continue to coordinate, as requested by both the EPA and federally recognized Tribes, in the issuance or modification of these major permits to ensure there is an opportunity for tribal input during the permit development process.

*Joint Permit Applications for shoreline erosion control projects, piers, wharfs, dredging, and construction related activities*

As part of its regulatory duties, the Virginia Marine Resources Commission (VMRC) coordinates with the Department of Environmental Quality and the U. S. Army Corps of Engineers (Corps) in its review of local, state and federal Joint Permit Applications for shoreline erosion control projects, piers, wharfs, dredging, and other marine and non-marine construction related activities.

VMRC shall continue to coordinate with the Corps and federally recognized Tribal Nations in the issuance or modification of Joint Permit Applications to ensure there is opportunity for tribal input during the development process.

**Ombudsman for Tribal Consultation**

The Secretary of the Commonwealth, with advice from the Tribal Nations, shall designate an Ombudsman for Tribal Consultation within the office of the Secretary of the Commonwealth. The Ombudsman shall:

- Facilitate communication and consultation between federally recognized Tribal Nations and the agencies identified in the Order to ensure an opportunity for meaningful consultation on the permits and reviews listed in this Order.
- In consultation with Tribal Nations and within 60 days, develop a list of localities in which federally recognized Tribal Nations should be consulted.
- In consultation with Tribal Nations, make recommendations to the Governor for additional types of permits and reviews for which consultation shall be required.
- In consultation with Tribal Nations, make recommendations to the Governor regarding circumstances under which Tribal consent should be required for issuance of certain permits.

**Implementation**

Within 90 days of the effective date of this Executive Order, each impacted agency shall establish a Tribal consultation policy to ensure an opportunity for meaningful and timely input by Tribal representatives for the permits and reviews listed in this order.

An agency Tribal consultation policy shall, to the extent permitted by law, include provisions that:

- Designate a consultation official who has the authority to define agency actions appropriate for consultation, evaluate the adequacy of the consultation, and ensure that agency programs consultation practices are consistent.
- Define appropriate means of notifying federally recognized Tribal Nations, which may be dependent on tribal preferences.
- Establish procedures to ensure that sufficient information and time is provided for Tribal officials to make an informed opinion.
- Establish procedures for the agency to provide feedback to the federally recognized Tribal Nations involved in the consultation process to explain how their input was considered.

**Effective Date of the Executive Order**

This Executive Order shall be effective upon signing and shall remain in full force and effect unless amended or rescinded by further Executive Order.

Given under my hand and under the Seal of the Commonwealth of Virginia this 18<sup>th</sup> day of November, 2021.

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Ralph S. Northam, Governor

Attest:

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Kelly Thomasson, Secretary of the Commonwealth