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Governor

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Anne L. Head
Commissioner

To: Representative Anne Perry, Chair
Senator Donna Bailey, Chair
Members of the Health Coverage, Insurance and Financial Services Committee

From: Anne L. Head, Commissioner

Subject: Tribal-State Implementation Act Biennial Report

Date: January 9, 2023

This report is submitted pursuant to 5 M.R.S. 11055(2), which requires the Department of Professional and Financial Regulation to file biennial reports with this Committee describing our implementation of the Tribal-State Implementation Act.

Background:

In 2022, representatives of the Houlton Band of Maliseet Indians, the Passamaquoddy Tribe, the Penobscot Nation, and the Governor's Office negotiated the terms of legislation intended to expand economic opportunities for, and improve the welfare of, the Wabanaki Nations and their citizens, and to make structural changes in certain state agency decision-making to promote government-to-government dialogue with the Wabanaki Nations. That legislation, enacted as Public Law 2021, c. 681, contains three parts. First, it amends Maine's tax laws both to provide financial benefits to Tribal citizens residing on Tribal lands, and to encourage economic development on Tribal lands. Second, it provides each of the four Wabanaki Nations located in Maine the exclusive opportunity to conduct mobile sports wagering operations within the state. Third, it establishes in law a Tribal-State collaboration process designed to promote meaningful communication on issues of particular significance to the Tribes and their citizens.

The Tribal-State Collaboration Act:

The Tribal-State Collaboration Act, 5 M.R.S. 11051 *et seq.*, requires 15 agencies identified in the statute to engage in a Tribal collaboration process regarding contemplated programs, rules, or services that substantially and uniquely affect Maine's four federally recognized Tribes or their citizens. It is intended to be a user-friendly process free from unnecessary bureaucracy that will be implemented within existing resources.

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Title 5 M.R.S. 11053(1) requires each agency covered by the statute to adopt a collaboration policy. The Department of Professional and Financial Regulation adopted its collaboration policy, which is appended to this report, on December 14, 2022. The Department's Tribal liaison, as required by 5 M.R.S. 11053(3), is Joan Cohen, who can be reached at joan.cohen@maine.gov or 207-592-0156. On December 6, 2022, the Governor's Office provided training on how to implement the statute in a manner that promotes effective communication and positive government-to-government relations with the Tribes. The Governor's Office has also requested that the Maine Indian Tribal State Commission (MITSC) help to facilitate training of state agency Tribal liaisons on issues of cultural competency, and MITSC has agreed to do so. We look forward to that training as soon as it can be arranged in 2023.

The Tribal-State Collaboration Act became law on August 8, 2022. The Department of Professional and Financial Regulation has not yet had occasion to engage in Tribal collaboration under the statute, but will be vigilant in looking for opportunities to do so in the coming biennium. We have no recommendations for changes to the statute at this time.

TRIBAL-STATE COLLABORATION ACT POLICY

This policy governs the Department of Professional and Financial Regulation's implementation of the *Tribal-State Collaboration Act*, 5 M.R.S. §§ 11051 *et seq.* The purpose of the Act is to promote respectful, government-to-government dialogue, and improve communication between state agencies and the Houlton Band of Maliseet Indians, the Mi'kmaq Nation, the Passamaquoddy Tribe, and the Penobscot Nation. Staff should interpret and apply the provisions of the law consistent with this purpose. The Act is intended to be implemented within existing resources, and therefore should be administered in a way that is practical, user-friendly, and efficient. The goal is to ensure the Tribes are afforded a reasonable opportunity to be heard – in addition to the public process – during the development of programs, rules and services that substantially and uniquely affect them or their citizens, while minimizing administrative burdens for both state and tribal staff. This policy incorporates *Tribal-State Collaboration Agency Guidance* of November 29, 2022, which is attached and incorporated herein.

I. Collaboration Required

Staff shall engage in tribal collaboration regarding a contemplated program, rule or service that substantially and uniquely affects an Indian Tribe or its members. In determining whether a contemplated action triggers the need for collaboration, staff should consider whether it will have a meaningful and significant impact on an Indian Tribe or its members that is distinct from the general population. This will always be a subjective determination, and should be informed by the Act's purpose of improving communication between the State and the Tribes. When in doubt, staff should consider whether some initial, informal communication with potentially affected Tribes would assist in making this determination. If the standard for collaboration is not met, but some communication with one or more Tribes would nonetheless be beneficial, staff should ensure that occurs. Decisions about whether and how to engage in collaboration should not be formalistic, but should be driven by common sense and good judgement. The overarching goal is to increase and improve communication with the Tribes, rather than technical compliance with the Act for its own sake.

A. The Process of Collaboration

The Act requires the agency to provide the Tribes with written notice of the contemplated action, allow the Tribes a reasonable opportunity to provide information, advice and opinions on the contemplated action, and consider the comments it receives.

1. **Notice (sub-§ 11053(1)(D)(1)).** Once the determination has been made that collaboration is appropriate, the tribal liaison or project manager should email the point of contact that each of the four Tribes has provided for the purpose

of collaboration. This email should explain that the agency is initiating the collaboration process, provide a description of the proposed action, identify the date within which comments are requested, and offer to answer any questions.

2. **Opportunity to Comment (sub-§ 11053(1)(D)(2)).** There is no statutorily required comment period for tribal collaboration. The schedule should take into account the nature of the proposed action, its relative complexity, the magnitude of its impact, the relative urgency to act, and other factors. The schedule may be extended or truncated as appropriate, depending on the level of interest the Tribes may express. Comments may be submitted in writing, or provided orally in a meeting or via teleconference. The comment period and the manner in which information is exchanged should be flexible to accommodate the needs of tribal and state agency staff, and to promote efficiency and good communication. The agency must use reasonable efforts to complete the process before taking final action.
3. **Consideration of Comments (sub-§ 11053(1)(D)(3)).** The agency must consider in good faith the information, advice, and opinions it receives from the Tribes in the course of collaboration. The agency is not required to provide a written response to submissions it receives from the Tribes, but it may choose to provide feedback, including informally, in the interests of respectful dialogue. The agency should include any written materials received or generated in the collaboration process in the record of its decision-making. To the extent the Tribes provide comments orally, the agency should prepare a memorandum summarizing those comments for its record.
4. **Collaboration in Rulemaking (sub-§§ 11053(1)(D) & (D)(4)).** In the context of rulemaking, agencies must engage in collaboration consistent with applicable provisions of the Administrative Procedures Act, 5 M.R.S. §§ 8051 *et seq.* (APA), as well as the Tribal-State Collaboration Act, 5 M.R.S. §§ 11051 *et seq.* The Act directs the agency to use reasonable efforts to complete collaboration before formal publication of a proposed rule pursuant to 5 M.R.S. § 8053(5). Completing collaboration before publication of a proposed rule will also avoid procedural confusion that could arise from collaboration occurring at the same time as the public notice and comment process under the APA. If it is necessary to engage in collaboration following publication of the proposed rule, the agency should work closely with the Attorney General's Office to ensure compliance with both statutes.

In the context of emergency rulemaking pursuant to 5 M.R.S. § 8054, the agency must provide notice and engage in collaboration to the extent practicable.

Informing Agency Staff (sub-§ 11053(1)(E)). The tribal liaison shall promote awareness of the Tribal-State Collaboration Act and this policy within the agency by conspicuously posting this policy on the agency's website and ensuring appropriate references are made to the policy in agency employment manuals and training materials.