

ENVIRONMENTAL

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NYSDEC Releases Policy for Consultation With Indian Nations Within New York

On December 10, 2008, the New York State Department of Environmental Conservation ("NYSDEC") released a policy document entitled "Contact, Cooperation and Consultation with Indian Nations" (the "Policy"), which became effective January 9, 2009. The Policy, which does not have the binding nature of a statute or regulation, has three stated objectives:

1. To formally recognize that relations between NYSDEC and Indian Nations will be conducted on a government-to-government basis;
2. To identify protocols to be followed by NYSDEC staff when working with Indian Nations; and
3. To endorse the development of cooperative agreements between NYSDEC and Indian Nations to address environmental and cultural resources of mutual concern, whether on or off current or historic Indian lands.

The Policy will apply to all nine Indian Nations which reside within or have common geographic boundaries with New York State - Mohawk, Oneida, Onondaga, Cayuga, Seneca, Tonawanda Seneca, Tuscarora (collectively, the Haudenosaunee), Unkechaug, and Shinnecock. The standard which NYSDEC will encourage, and which NYSDEC admits requires further delineation, is that consultation is required for any NYSDEC decision or action "which could foreseeably have Indian Nation implications" for the environment (air, land use, water, fish, and wildlife) and cultural resources (sacred sites, traditional cultural properties, artifacts, ancestral remains, cultural items, and significant historic sites).

The Policy is intended to encourage consultation on any proposed action or activity, whether undertaken directly by NYSDEC or by a third party requiring NYSDEC approval or a permit, which may have a direct foreseeable or ascertainable effect on environmental or cultural resources of significance to one or more Indian Nations, whether such resources are located on or outside of Indian Nation Territory. "Indian Nation Territory" is defined in the Policy as "all lands within the exterior boundaries of any Indian reservation and all lands held in trust by the federal government for any Indian nation."

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Because the Policy applies “on or off Indian Nation Territory” and because the Policy fails to define “Indian reservation,” the potential reach of this Policy is extraordinarily broad. Without pre established geographic boundaries, “resources of significance” may be identified in unexpected locations.

NYSDEC’s Office of Environmental Justice, part of the agency’s Office of General Counsel, and an appointed Indian Nations Affairs Coordinator within that office will oversee compliance with the Policy. Each NYSDEC division and regional office will have a point of contact for Indian Nation matters and may issue its own guidance to further implement the Policy, which was developed in consultation with the Office of Environmental Justice.

In furtherance of the Policy, NYSDEC staff are encouraged to engage in regular contact with Indian Nation representatives to facilitate a cordial and cooperative working relationship. While formal contacts are to be coordinated with the Office of Environmental Justice, informal contacts, including telephone calls and in person meetings, may be held as needed without prior review or approval. Such contacts may be initiated by NYSDEC or Indian Nation representatives.

In addition, NYSDEC has committed to working with the State Office of Parks, Recreation and Historic Preservation to develop a map depicting the area of aboriginal occupation of each Indian Nation in New York State in order to notify and consult with any Indian Nation claiming interest in a site affected by NYSDEC action. The Policy also raises the possibility, with little elaboration, that NYSDEC may enter written cooperative agreements with Indian Nations to achieve protection or remediation of environmental resources, and to protect culturally significant activities such as hunting or fishing.

The Policy’s Potential Impact

The Policy’s promotion of informal dialogue in addition to more formal consultation could result in an Indian Nation’s ability to comment or provide analysis separate from the ordinary public comment period, creating the potential for an Indian Nation to influence an outcome without a permit applicant or potentially responsible party (“PRP”) having an opportunity to directly respond to or refute the Indian Nation’s position. Furthermore, it is unclear how municipalities and the public will respond if Indian Nations are perceived as having greater influence over a project than the local government or area residents. The Policy does not address whether applicants, PRPs, or local governments will be involved in the consultation process, or play a part in any informal discussions.

Additionally, the Policy’s broad application to any activity which could impact resources that any Indian Nation in New York State deems significant, whether on or outside any Indian Nation’s territory, has the potential to lengthen the time required to obtain a final decision on a permit application, order on consent, or other settlement agreement with the State. Even if NYSDEC does not act upon an Indian Nation’s recommendations or comments in a particular matter, the time required for this additional layer of review and consultation will need to be built into project estimates and monitored to ensure that significant delays in NYSDEC’s decision making do not result.

The Policy Document is available on NYSDEC’s website at http://www.dec.ny.gov/docs/permits_ej_operations_pdf/indianpolicy.pdf or from any member of our Environmental or Indian Law Practice Area. ■

If you require further information regarding the information presented in this Legal Alert and its impact on your organization, please contact any of the members of the Practice Area listed on the front of this Alert.