

# MAINE STATE LEGISLATURE

The following document is provided by the  
**LAW AND LEGISLATIVE DIGITAL LIBRARY**  
at the Maine State Law and Legislative Reference Library  
<http://legislature.maine.gov/lawlib>



Reproduced from electronic originals  
(may include minor formatting differences from printed original)



STATE OF MAINE  
DEPARTMENT OF LABOR  
54 STATE HOUSE STATION  
AUGUSTA, MAINE 04333-0054

JANET T. MILLS  
GOVERNOR

LAURA A. FORTMAN  
COMMISSIONER

To: The Honorable Senator Mike Tipping, Chair  
The Honorable Representative Amy J. Roeder, Chair  
Members of the Joint Standing Committee on Labor and Housing

From: Laura Fortman, Commissioner

Date: January 4, 2023

RE: Biennial Report for the Tribal-State Collaboration Act

5 M.R.S. 11055(2) requires state agencies to file biennial reports describing our implementation of the Tribal-State Collaboration Act. In accordance with the Act, the Maine Department of Labor is providing information on its action.

### **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.

Title 5 M.R.S. 11053(1) requires each agency covered by the statute to adopt a collaboration policy. The Department of Labor adopted its collaboration policy, which is appended to this report, on December 8, 2022. The Department's Tribal liaison, as required by 5 M.R.S. 11053(3), is Deputy Commissioner Kimberly Smith, who can be reached at 207-621-5095. 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 Labor has not yet had occasion to engage in Tribal collaboration under the statute and 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.

## **Maine Department of Labor Policy 027: Tribal-State Collaboration**

**Issued December 8, 2022**

This policy governs the Maine Department of Labor'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.

## **TRIBAL-STATE COLLABORATION – AGENCY GUIDANCE**

**November 29, 2022**

**Overview and Purpose:** The Tribal-State Collaboration Act of 2022 requires certain state agencies to engage in a tribal collaboration process regarding contemplated programs, rules or services that substantially and uniquely affect Maine’s four federally-recognized Indian Tribes or their members. The Act is codified at 5 M.R.S. §§ 11051 *et seq.* Its purpose is to promote respectful dialogue and improve communication between state government and the four Tribes: the Houlton Band of Maliseet Indians, the Mi’kmaq Nation, the Passamaquoddy Tribe, and the Penobscot Nation. The Act is intended to be implemented within existing resources, and designed not to create a cumbersome new bureaucracy. Instead, it is intended to allow each agency discretion to administer the law in a manner that is efficient and user-friendly, and that accommodates the unique circumstances of the agency’s work. Although there are no penalties for non-compliance with the Act, each agency should strive to ensure that tribal collaboration, when it occurs, is both a meaningful process and one that does not result in unnecessary administrative burdens for tribal or state governments.

**Agencies subject to the collaboration requirement (sub-§§ 11052(1)(A)-(P)):** Only those agencies identified in the Act are subject to its requirements: DACF, DOC, DECD, DOE, DEP, DHHS, DIFW, DOL, DPS, DAFS, DPFR, DDVEM, DMR, DOT, PUC, and the Office of the Public Advocate. Administrative divisions of these agencies are not required to comply with the Act’s requirements separately. So, for example, DPFR need only designate a single tribal liaison for the entire agency, and each professional licensing board within the agency is not required to do so independently. The same is true for filing bi-annual reports – only a single report is required on behalf of the entire agency.

Some agencies will have occasion to engage in tribal collaboration more frequently than others, and some may do so only rarely. The fact that a given agency was included in the Act should not be interpreted to mean that it is expected to engage in tribal collaboration regularly – only that it is possible that it could at some point have occasion to do so. Each agency should thus be vigilant in ensuring that it engages in the collaboration process when appropriate.

**Actions triggering collaboration (sub-§ 11053(D)):** The scope of the Act applies only to “programs, rules and services that substantially and uniquely affect the Indian Tribes or tribal members.” Note that it does not apply to any specific licensing and permitting decisions. Because the statute applies only to agency decision-making that both “substantially and uniquely” affects Tribes or tribal members, it will not cover most programs, rules and services of general applicability. The narrow focus of the Act is to ensure that the time and energy that goes into the collaboration process will be spent on the issues that matter most to tribal communities. Agencies should not be legalistic in assessing which decisions trigger collaboration, and should instead use common sense and good judgment to make that determination consistent with the Act’s purpose of improving tribal-state communication. When in doubt, it may make sense for agencies to have

some initial, informal communication with potentially affected Tribes to inform the determination of whether a contemplated action may substantially and uniquely affect the Tribe or its members.

**Agency obligations:** The Act calls upon agencies to designate a tribal liaison, ensure the liaison and other appropriate staff receive appropriate training, adopt a collaboration policy, and file a report every two years describing its activity under the collaboration law.

**-Designate a tribal liaison (sub-§ 11053(3)).** Agencies must designate a tribal liaison who reports directly to the head of the agency and who is responsible for facilitating effective communication between the agency and the Tribes. The agency’s existing legislative liaison would be an appropriate choice for this role. The liaison will serve as the agency’s point of contact on tribal issues and oversee implementation of the collaboration Act’s requirements within the agency.

**-Adopt a collaboration policy (sub-§ 11053(1)).** The core requirement of the Act is that the agency adopt a policy that sets forth the process it will follow to engage in tribal collaboration. The policy must include provisions which provide for reasonable written notice of the contemplated action, allow the Tribes a reasonable opportunity to comment, require agency consideration of the comments received, and require that the agency make reasonable efforts to complete collaboration before making a final decision. The policy must also ensure agency staff are informed of the requirements of the Act. The agency must seek and consider comments on its draft collaboration policy from the Tribes and the Maine Indian State Tribal Commission.

**-Training (§ 11054):** Tribal liaisons and other agency staff “whose work substantially and uniquely affects Indian tribes or tribal members” must receive training under the Act. The Governor’s office will offer training on effective communication and collaboration under the Act, and will request the Tribes to provide training on cultural competency.

**-Filing of reports (sub-§ 11055(2)).** Beginning on January 10, 2023, the law requires agencies to file reports every two years with their legislative committee of jurisdiction and with the Maine Indian Tribal State Commission. The reports must include a copy of the agency’s collaboration policy, the name and contact information of the agency’s tribal liaison, a description of training received, a description of any actions contemplated during the upcoming biennium – to the extent known – that would trigger collaboration, a summary of any collaboration the agency engaged in during the preceding biennium, and any recommendations for changes to the Act.