

Idaho Pollutant Discharge Elimination System

Tribal Participation Process



**State of Idaho
Department of Environmental Quality**

March 2018



Printed on recycled paper, DEQ, March 2018, PID
IPGF, CA 82988. Costs associated with this
publication are available from the State of Idaho
Department of Environmental Quality in accordance
with Section 60-202, Idaho Code.

1 Introduction

As the state's environmental permitting authority, DEQ will rely on input from residents, tribes, local governments, and other stakeholders during the permitting process. DEQ will extend coordination efforts and opportunities to tribal governments regarding concerns about potential IPDES permits that may affect their interests. This is consistent with the IPDES public participation process. However, EPA will continue to be the permitting authority for Indian country, and DEQ anticipates that EPA will engage with tribes on a government-to-government basis for NPDES permits for those facilities.

A key aspect of DEQ's efforts is a continuous improvement process based on comments and feedback from interested parties. DEQ will use comments and feedback to assess the efficacy of the permitting process and adapt approaches for the purpose of process improvement. The objective is a process that evolves in response to stakeholder's needs. DEQ will solicit and capture comments and feedback before, during, and after key permitting efforts. Comments and feedback will be compiled, analyzed, and provided in the administrative record, which will also illuminate lessons learned and help improve future efforts. An important goal in DEQ's IPDES program is to enhance access to permit information and processes in order to produce high quality permits and increase compliance with permit terms and conditions.

DEQ's administrative record includes documentation of these communications and key public concerns as well as how those concerns are addressed. According to IDAPA 58.01.25.600, the administrative record for final permits includes permit-related comments, along with agency responses, actions, decisions, and supporting information. DEQ maintains an official record of each permitting action and makes those records readily available via internet posting.

The tribal participation procedures identified here are applicable to DEQ permitting actions which include drafting and issuing, modifications to, revoking and reissuing, or terminating IPDES permits. Any of these permitting actions constitute a permit decision by DEQ and is subject to public and tribal participations rules.

DEQ seeks to be proactive in the IPDES permitting process and recognizes that often the most effective time for outreach is early in the process – before or during the process of drafting a permit. Engaging interested parties and stakeholders early on improves the odds for identifying and addressing issues and formulating solutions that may influence the agency's decisions and alter the final permit. The process and procedures identified in this document will help DEQ best work with tribal government officials interested in being apprised of the permit process including preferences for whether additional contact is desired.

Permit Issuance Plan	<ul style="list-style-type: none"> •Send notification letter to tribes, including the PIP •Prepared annually
Affected Tribal Determination	<ul style="list-style-type: none"> •Send notification letter to tribes •Done at time permit is assigned to permit writer
Permit Development	<ul style="list-style-type: none"> •Accept local and traditional knowledge •Review data submitted from affected tribe
Preliminary Draft Permit	<ul style="list-style-type: none"> •Send notification to tribes of upcoming comment opportunity
Draft Permit Public Comment	<ul style="list-style-type: none"> •Accept comments from interested parties •Schedule public meeting, if appropriate
Proposed Final Permit	<ul style="list-style-type: none"> •Draft response to comments •Allows permit applicant opportunity to respond to comments
Final Permit	<ul style="list-style-type: none"> •Post final permit on DEQ webpage •Send to tribal government upon request

Figure 1: Potential DEQ and tribal interactions during in IPDES permitting process.

2 Tribal Government Participation Process

2.1 Permit Issuance Plan and Notification Letter

DEQ prepares an annual Permit Issuance Plan (PIP) that identifies the IPDES permits DEQ proposes to issue over the next two years. The PIP identifies the receiving waters, DEQ contacts, and a ranking of the permits scheduled to be issued in the coming year. The PIP identifies facilities with potential permits up for issuance and is posted on DEQ’s web page. This allows advance notice that a permit is proposed to be issued or reissued and provides the opportunity to contact DEQ to discuss the project or schedule a meeting. The PIP does not contain draft permits.

DEQ sends a notification letter to inform tribal governments of the publication of the PIP. This letter is sent annually to federally-recognized tribal governments within the state of Idaho. This early notice will typically be provided to tribal governments by mail but may also be provided by e-mail, telephone, or a combination of methods depending upon what is requested and/or deemed most effective and efficient.

The annual PIP provides specific information, when available, such as the facility, permit number, brief description of the discharge potentially to be permitted, geographic location of the facility and/or operator, and a designated staff contact. Maps may be included in the notification letter, where appropriate and available. DEQ recognizes, in particular, the value of tribal governments using maps and imagery to determine if an activity proposing to discharge has the potential to impact them, and therefore these enclosures will be included where practicable.

After receiving the notification letter and reviewing the PIP, a tribal government is encouraged to contact the IPDES program manager for more information about specific permits, as well as self-identify as affected by specific IPDES permitting actions.

2.2 Affected Tribal Government Determination

DEQ undergoes reasonable and adequate efforts to identify tribal governments that may be potentially affected by an IPDES permitting action and provide them an opportunity to meaningfully participate in the permitting process. The term ‘affected tribal government’ is not defined in federal regulations, IPDES rules (IDAPA 58.01.25), or the IPDES Program Description.

For the purposes of this Tribal Participation Process, the IPDES program manager and permit lead use information provided by the tribes and provided in the permit application, past permits, reports, plans, studies, and/or resources to determine tribal governments potentially affected by an IPDES permitting action. When identifying potentially affected tribal governments, DEQ:

- Identifies the known and potential effects of the proposed discharge
- Identifies the tribal governments near the proposed discharge or with the potential to be affected by or interested in the discharge
- Considers specific issues and resources such as culturally important sites that may be located at a distance from the tribal government
- Develops a list of potentially affected tribes and their respective contact information
- Documents the resources consulted and issues considered
- Coordinates with the tribal representative designated by the tribal government

In general, if a proposed facility or activity to be permitted under the IPDES program may have a direct or indirect, but potentially measurable effect on a tribal government, the tribal government would be considered affected for the specific permitting action. DEQ conducts an internal determination of permitting actions on potentially affected tribal governments. If the affected tribe has not already contacted DEQ and identified as potentially affected for the specific permitting action, DEQ will inform tribal governments of the outcome of the determination.

Once notified of the determination, a tribal government can confirm that they are affected and request that DEQ coordinate with the tribal representative designated by the tribal government. The tribal government should provide their designated representative’s contact information for the permitting action. Tribal governments are encouraged to review the PIP and contact DEQ for more information about specific permits, as well as to identify themselves as affected by a proposed IPDES permitting activity.

2.3 Consideration of Local and Traditional Knowledge or Concerns during Permit Development

When the tribal government self-identifies as affected, or confirms DEQ’s determination of affected, the tribal government may provide information, knowledge, or data regarding the proposed IPDES action that would be important for DEQ to know during the development and drafting of the IPDES permit. This information can be provided for consideration by whatever

means are most efficient for the tribal government. DEQ facilitates opportunities, as needed, to understand how an IPDES permit may affect a tribal government. Early collection of traditional knowledge or other information important to residents and tribal governments allows DEQ to address them during permit development.

If the tribal government requests more information, DEQ may schedule a communication or coordination effort to understand concerns or information submitted by tribal governments or to discuss potential resolutions or alternatives to a permitting action. DEQ will consider the information provided and coordinate with the tribal representative to identify concerns and potential alternatives, address potential issues early in the permitting process, and incorporate local and traditional knowledge or concerns into permits when possible and appropriate.

Tribal information provided will be documented and become part of the administrative record, although any information that is protected under federal or state law such as information related to cultural or archaeological resources will be kept confidential. When submitting information that the tribe wishes to deem confidential or protected under federal or state law, the tribe should also provide the citation to the federal or state law that protects the information from the Public Records Act (Title 74 Idaho Code Chapter 1), for example records, maps, or other information identifying the location of archaeological sites are exempt from disclosure if not already known to the general public (IAC 74-108). DEQ responds in writing to tribal governments that submit local and traditional knowledge or concerns for consideration during permit development.

2.4 Preliminary Draft Permit

Prior to formal public notice of a draft IPDES permit, DEQ will send a letter to the appropriate designated tribal representative indicating that a draft permit will be available in 14 days for public review and comment (during that 14 days the applicant performs their errors & omissions review). DEQ will include information regarding the public comment opportunities, public meetings if scheduled, and other relevant information pertaining to the draft permit in this notification letter.

2.5 Draft Permit

DEQ provides notice that a draft permit is available for public review and comment by a combination of mailings to agencies, local government mail lists, newspaper advertisements, online public notice web posting, and other manners constituting legal notice. The public notice initiates a minimum 30-day public review and comment period.

The public notice and draft permit must be mailed to, among others, certain listed state and federal agencies as well as to any affected Indian Tribe (IDAPA 58.01.25.109.01.d.i(3)). The permit application and a fact sheet describing the terms of the permit are made available during the public notice period. DEQ may schedule a public meeting on the draft permit to describe the permitting decision, if there is significant public interest or for other good reason.

DEQ will use the local or regional paper nearest to the potentially affected local or tribal government to provide notice of a draft permit to the extent practicable. A potentially affected

tribal government may decline to receive the public notice if they notify DEQ that they are not affected and do not wish to receive any further correspondence about a specific permit.

2.6 Proposed Final Permit

After the close of the public comment period, DEQ considers information provided during the comment period, prepares a response to comments document summarizing the public comments received on the draft permit, and may make changes to the draft permit and fact sheet. After the close of the public comment period and before the issuance of the final permit, DEQ must afford the permit applicant an opportunity to provide additional information to respond to public comments. DEQ may also request that the applicant provide additional information if needed to respond to public comments.

At the end of the public comment period DEQ may decide that the best approach is to re-draft the permit. This would start the permitting and comment process all over. DEQ would continue to coordinate with the affected tribal government throughout the process.

2.7 Final Permit

After developing the response to comments, allowing the permit applicant the opportunity to provide any necessary additional information, and if there are no significant changes to the draft permit, DEQ will prepare a final permit for issuance. The final permit, response to comments, revised fact sheet, and associated permit documents will be posted on the DEQ web page.

In accordance with IDAPA 58.01.25.107.04, any entity or organization that submitted written comments or requested a notice of the final permit decision shall be notified of the issuance of the final permit.

3 Supplemental Processes

DEQ has broad authority to communicate with others in the course of conducting agency business. As part of its IPDES efforts, DEQ is committed to exercising this authority to accomplish its objectives of better permits and parity in water quality protection across the State. This section describes when DEQ will supplement its public participation efforts and the tools available for that purpose.

Additional public outreach is typically most appropriate for proposed projects that raise significant local concerns or are complex or controversial. Some circumstances that may warrant additional public outreach on permitting matters include:

- Large complex projects with multiple permitted discharges
- Projects that are locally or regionally important or controversial
- Projects that raise recreational or other resource and use concerns
- Projects that are proximal to sensitive or protected resources or areas
- Projects that may involve the use of new or complex technologies

In deciding whether to supplement permit communications with the tribes, the primary consideration is the degree of interest expressed by the tribal governments. Tribal governments may request the use of supplemental permit communications by whichever means is the most convenient (e.g., email, telephone, and/or letter), and DEQ will consider the degree of interest and respond to the request.

In all its communications, DEQ strives to communicate factually and clearly. By planning ahead, DEQ also strives to schedule communication processes so they do not adversely affect permit development schedules.

3.1 Supplemental Communication Tools

DEQ has at its disposal several tools that may be used individually or in combination to supplement required permit communications, at the request of tribal governments.

DEQ staff will strive to identify and employ the most effective ways to notify interested individuals and parties of permit actions and other matters. Notification typically consists of some combination of:

- individual notification via mailings, email, or telephone calls
- advertisements in local or regional publications
- public service announcements

In rural settings, DEQ works with tribal governments through an early notification process and encourages outreach by whatever means is typical for the community, such as bulletin board postings or local announcements.

For larger or more controversial projects, DEQ will compile lists of interested individuals and parties. The agency's experience suggests that maintaining lists of email addresses for interested parties and organizations and communicating via email is an effective and efficient means of keeping the public informed. DEQ will also use the internet to make information available to the public. Major permits under development may warrant their own web page with links from other DEQ or other agency web pages.

Additionally, DEQ regional compliance officers may conduct annual meetings, presentations, or teleconferences to discuss:

- proposed permitting activities listed in the PIP
- potential discharge characteristics
- geographic location or scope for proposed permits
- the IPDES permitting process
- opportunities for involvement

Telephone calls and teleconferences may also be used to notify tribes of activities that may affect them and to gather local input of concerns. DEQ will consider geographic distance and other unique circumstances, like cultural or community activities, when scheduling public involvement opportunities.

As part of notifying interested persons and organizations, DEQ will seek to distribute or make available pertinent information about permits and projects. Documents, data, and developments that may be of interest may be forwarded directly to interested parties or availability may be announced to interested parties with instructions for obtaining the information, such as downloading from a DEQ web page. Supplemental information distributed or made available to interested parties may include materials such as special analyses and reports on a particular issue or topic; plans, data, analysis, and reports generated by baseline monitoring programs; and project and permitting schedules.

The IPDES public participation guide describes additional outreach the agency may wish to undertake with tribal governments, with respect to proposed IPDES permitting actions that may raise significant local concerns or are complex or controversial.

In some cases, supplemental communications may rely on invoking a single supplemental activity, such as extending review periods or holding workshops during the draft public comment notice period. In other cases, DEQ may combine a number of supplemental efforts and regulatory requirements.

Supplemental communication tools are described in more detail in the IPDES Public Participation guide.

3.2 Program Effectiveness and Continuity

DEQ recognizes the importance of building relationships with tribal governments to enhance program effectiveness and continuity. DEQ encourages tribal governments to contact DEQ if changes are made to contact information and will work to maintain accurate mailing lists. DEQ hopes to mitigate challenges associated with staff turnover, and encourages the consideration of developing procedures to share information when turnover does occur.

4 Other Permit Actions: Modify, Revoke, and Reissue, or Terminate

In addition to issuing IPDES permits, DEQ may take other permit actions to modify, revoke and reissue, or terminate permits. These actions also include a public participation process. The DEQ Public Participation guide describes processes the agency may wish to undertake with interested persons, including tribal governments with respect to permit actions.

5 Appeals

Any person aggrieved by a permit action has access to a permit appeals process (IDAPA 58.01.25.204). Someone considered to be aggrieved by a permit action is limited to the permit holder (or applicant), any person or entity who filed comments regarding the permit action during the comment period, or any person or entity who participated in the public meeting on the draft permit. This would include any tribal government who filed comments with DEQ during the public comment period.

Appeal of a final IPDES permit decision begins by filing a petition for review with DEQ's hearing coordinator within 28 days after DEQ serves notice of the final permit decision. Only a person who is aggrieved by the final permit decision (i.e., the permit holder or applicant and any person or entity who filed comments or who participated in the public meeting on the draft permit) may file a petition for review. Ultimately, any person aggrieved by a final department action or determination has a right to judicial review by filing a petition for review (IDAPA 58.01.25.204.26).