



Federal Permitting Improvement Steering Council Executive Director

Summary Report: Government-to-Government Consultation Sessions on Recommended Best Practices for Enhancing Early Tribal Engagement

September 2022

Introduction

The Federal Permitting Improvement Steering Council (Permitting Council) is required to issue annual recommendations on best practices for improving the Federal permitting process for “covered projects” under Title 41 of the Fixing America’s Surface Transportation Act (FAST-41).¹ Each Permitting Council agency must submit to Congress and the Director of the Office of Management and Budget an annual report assessing the agency’s performance in implementing the best practices.² FAST-41 identifies several categories of best practices.³ The Infrastructure Investment and Jobs Act (IIJA), enacted on November 15, 2021, established a new best practice category for enhancing early engagement with Tribes: “Enhancing early stakeholder engagement, including engaging with Native American stakeholders to ensure that project sponsors and agencies identify potential natural, archeological, and cultural resources and locations of historic and religious significance in the area of a covered project” (42 U.S.C. § 4370m-1(c)(2)(B)(i)(I)).⁴

After conducting Government-to-Government consultations with Federally recognized Tribes in September 2021, and in coordination with Permitting Council Agency Chief Environmental Review and Permitting Officers (CERPOs), the Permitting Council Executive Director drafted recommended best practices within the new Tribal engagement best practices category. In Spring 2022, the Permitting Council Executive Director conducted additional Government-to-Government consultations with Tribes to receive input on the draft recommended best practices on enhancing early Tribal engagement from federally recognized Tribal Nations. The Permitting Council Executive Director hosted three consultation sessions via Zoom on April 28, May 2, and May 5, 2022. Tribes also provided written comments on the draft recommended best practices in advance of and following the consultation sessions. The Permitting Council Executive Director revised the best practices in response to the collected input from Tribes, and the Permitting

¹ 42 U.S.C. § 4370m-1(c)(2)(B).

² 42 U.S.C. § 4370m-7(a)(3).

³ 42 U.S.C. § 4370m-1(c)(2)(B).

⁴ Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429, 1287 (Nov. 15, 2021).

Council subsequently reviewed the proposed final recommendations for best practices. The resulting Best Practices on Enhancing Early Tribal Engagement are provided below.

This report summarizes written and verbal comments from Tribal representatives during the consultations in 2022. It also includes a response statement indicating how the Executive Director addressed and incorporated the comments received from Tribal representatives in the draft recommended best practices. In instances where the Executive Director did not incorporate comments into the draft recommended best practices, the response statement describes the reason and, if applicable, how the Tribes' inputs are being addressed through efforts beyond the FAST-41 recommended best practices.

Summary of Consultations

This section summarizes Tribal representatives' comments on the draft recommended best practices on enhancing early Tribal engagement. Tribal representatives provided comments during the three consultations described above and submitted additional comments via comment form or email. The content summarized below represents the views of the federally recognized Tribes who shared comments during consultation or via written comment. The "Executive Director Response" sections explain if and how the Executive Director incorporated the Tribal representatives' comments into the draft recommended best practices and notes other activities that Permitting Council agencies are undertaking beyond the recommended best practices.

Capacity and Resources to Consult on Environmental Reviews and Authorizations for FAST-41 Projects

Tribal representatives expressed that many Tribes are overwhelmed with the number of requests for Tribal review and consultation during the Federal environmental review and authorization process for FAST-41 projects and other projects. In particular, Tribes located in the northeastern United States have been overwhelmed with concurrent requests for review and consultation for offshore wind projects, many of which are FAST-41 projects. Tribal representatives stated that they are often asked to engage at the local, county, state, and Federal levels for a variety of different projects concurrently or receive uncoordinated requests for review from multiple agencies on a single project. Segmented reviews of single projects, spanning across multiple agency jurisdictions and areas of oversight, can create lengthy, time-consuming review processes that demand significant time and resources from Tribes. Additionally, Tribal representatives shared that environmental review and authorization timelines are frequently determined without involvement and input from Tribes and without consideration of Tribes' other obligations, overlapping reviews, and limited capacity.

Tribal representatives expressed that many Tribes have limited staffing and funds to provide technical input on projects. Not all Tribes have Tribal Historic Preservation Officers (THPOs) or other staff dedicated to participating in environmental reviews and authorizations. THPOs or other cultural and natural resource staff, if available, are often stretched thin between multiple

requests for review and consultation. Further, Tribal representatives expressed that permit applications and associated studies can often be lengthy, poorly written, or lacking adequate data or information. Tribes then must spend time to track down the correct or higher quality information, review it for accuracy, and provide a response in a short timeframe, thus contributing to capacity issues.

Tribal representatives recommended that agencies and/or project sponsors provide funding for Tribes' participation in the environmental review and authorization process for FAST-41 projects to help address capacity and resource challenges. Tribal representatives suggested that Federal agencies may:

- Actively identify and provide staff or funding support early in project planning to assist Tribal government staff in the review of FAST-41 project proposals and permit applications. For example, Federal agencies may fund a consultant or technical team to assist Tribes in their reviews. In these instances, Tribes should be involved in interviewing and selecting the consultants to ensure it is a good fit.
- Work with Tribes to determine appropriate funding levels to fulfil consultation and review requirements.
- Encourage project sponsors to fund Tribes' engagement in the environmental review and authorization process, emphasizing that funding Tribes' participation is likely less costly than the delays from legal challenges that may result from inadequate Tribal consultation.

Executive Director's Response

FAST-41, as amended by the IJA, provides the Executive Director, with the approval of the Director of OMB, authority to transfer funds from the Environmental Review Improvement Fund to Tribal governments to facilitate timely and efficient environmental reviews and authorizations for FAST-41 projects (42 U.S.C. § 4370m-8(d)(3)). Tribal Nations interested in this funding mechanism can reach out to the Executive Director for further discussion at fast.fortyone@fpisc.gov.

The draft recommended best practices address Tribal representatives' comments on capacity and resources in the following ways:

- Best practice #2 encourages Federal agencies to engage Tribes in consultation as early as practicable in the environmental review and authorization process and to provide complete, accurate, and high-quality data and information to Tribes in a timely manner for their review and comment.
- Best practice #3 encourages Federal agencies to consult with Tribes in the development of permitting timetables to help ensure timetables include sufficient timeframes for meaningful consultation. This best practice also encourages agencies to coordinate

requests for Tribal review and input on related, adjoining, or similar projects to avoid overlapping timeframes and simultaneous requests.

- Best practice #7 encourages Federal agencies to identify and pursue opportunities to provide funding or staffing support to Tribes for participation in the environmental review and authorization process.

Early and Ongoing Meaningful Engagement

Tribal representatives expressed frustration with the timing and quality of Federal agencies' engagement of Tribes in the environmental review and authorization process. Despite discussions at the Federal level about equity and environmental justice, Tribal representatives expressed that they often do not experience these principles in practice. Tribal representatives shared the following specific concerns regarding Tribal engagement:

- Tribes are often engaged late in the environmental review and authorization process, potentially at a point at which decisions have already been made or studies have already been completed. Agencies often request reactions to decisions rather than meaningfully involving Tribes in the decision-making process.
- States frequently identify locations of renewable energy projects without appropriately consulting with federally recognized Tribes within the state. State agencies often do not contact Tribes for input on Indigenous Traditional Ecological Knowledge (even when acting under delegated authority of Federal agencies). Proposed project locations often fall within areas that are significant to Tribes and have the potential to negatively impact Tribes and their cultural resources, sacred or ceremonial places, and/or places to which Tribes attach great cultural or spiritual significance. Inadequate Tribal consultation during project development can lead to loss or destruction of irreplaceable places and cultural resources important to Tribal traditions, cultures, and understanding of early life and ancient history of the region.
- Tribes are often regarded as stakeholders or cooperating agencies in the environmental review and authorization process, which does not acknowledge or respect Tribal sovereignty.
- Tribes' comments, objections, recommendations, and questions, such as those related to potential adverse effects from construction, operation, and decommissioning of projects, are often unanswered.
- The Bureau of Ocean Energy Management (BOEM) initiates Tribal consultation on a proposed project five years in advance of the formalization of a construction proposal and before the FAST-41 Initiation Notice (FIN) is submitted. Therefore, consultation begins before the Coordinated Project Plan requirement under FAST-41 (which requires agencies to discuss potential avoidance, minimization, and mitigation strategies, if required by applicable law and known, and to discuss plans and a schedule for public and tribal outreach and coordination, to the extent required by applicable law) and there is little transparency or accountability in these important early discussions. Tribes suggested

that BOEM's early (pre-FIN) Tribal consultation processes include mechanisms for more transparency and accountability, similar to the mechanisms provided under FAST-41.

Tribal representatives made the following recommendations for improving the quality and timeliness of Tribal engagement:

- Federal agencies should identify and engage Tribes that may be affected by, or have an interest in, the proposed project as early as possible in the process. Engagement should then continue throughout every stage of the project development and construction process.
- Federal agencies should engage Tribes to understand how a proposed project can be designed to ensure that Tribes receive the economic, environmental, and community benefits of the project, especially when located on Tribal lands, rather than just seeking to avoid adverse effects.
- Federal agencies should proactively request input from Tribes regarding which studies should be conducted and how the studies are conducted to help ensure that Tribes have access to adequate information to make informed comments and decisions. For example, Tribes expressed concerns about impacts to marine mammals, air and light pollution, climate change, and water quality related to offshore wind projects and would like to be involved in making sure all appropriate information is being collected and evaluated.
- Federal agencies should engage Tribes in the development of project timetables to help ensure that timetables allow sufficient time for Tribes to meaningfully participate in the review process.
- Federal agencies should refer to the Secretary's list of federally recognized Tribes⁵ to determine which Tribes need to be engaged in Government-to-Government consultation.
- Federal agencies should clearly acknowledge in policies and regulations that Tribes are not stakeholders or cooperating agencies, but sovereign Nations.
- Federal agencies should encourage project sponsors to engage with Tribes from project inception through decommissioning.
- The Permitting Council should develop a Tribal overlay feature on the Permitting Dashboard project map that displays the current and ancestral territory of federally recognized Tribes. Tribal representatives noted that the Permitting Dashboard does not currently include information on the location of Tribal lands, particularly Tribal lands on which FAST-41 projects are located. This information would help agencies identify Tribes with whom they need to consult.
- The Permitting Council should establish an office with direct responsibility for ensuring Tribal consultation and coordination is adequately conducted for projects on or near Tribal lands.

⁵ The Secretary of the Interior, through the Bureau of Indian Affairs, annually publishes a list of federally recognized Tribes, pursuant to 5 U.S.C. 5131 (Pub. L. 103-454, title I, § 104, Nov. 2, 1994, 108 Stat. 4792).

- The Permitting Council should develop, in consultation with Tribal Nations, policies, procedures, and guidance for member agencies. These materials should provide information on how member agencies should engage in follow-up dialogue and consultation with Tribes to assess and evaluate the ongoing operations and impacts of completed FAST-41 projects.
- The Permitting Council should monitor its member agencies' consultation and coordination with Tribal Nations and actively enforce strict adherence to early engagement and consultation directives for FAST-41 projects.

Executive Director's Response

The Executive Director and her staff are working with the Department of Housing and Urban Development to implement enhancements, including geographic information system functionalities, to the Tribal Directory Assistance Tool to improve its usefulness and accuracy in identifying appropriate Tribal contacts for engagement and consultation.

Although the enhanced coordination, transparency, and predictability in the environmental review and authorization process that FAST-41 provides can help improve Tribal consultation and engagement practices, the statute does not authorize the Permitting Council to establish an office that oversees Tribal consultation and coordination; to monitor or enforce Tribal consultation; or develop policies, procedures, or guidance related to Tribal engagement and consultation. These recommendations from the Tribal representatives are therefore out of scope of the recommended best practices required by FAST-41.

The draft recommended best practices do incorporate the Tribal representatives' input on early and ongoing meaningful engagement in the following ways:

- Best practice #1 encourages Federal agencies to use multiple tools to identify and verify contacts for Tribes that may be impacted by or interested in a proposed project, and to include multiple contacts to help ensure the Tribe's designated representative(s) receives and is able to respond to requests for consultation.
- Best practice #2 encourages Federal agencies to invite Tribes to participate in consultation as early as practicable and on an ongoing basis in the environmental review and authorization process. The best practice also emphasizes providing high-quality information for Tribes to review and actively informing Tribes of how the agency incorporated Tribal input into project-related decision making.
- Best practice #3 encourages Federal agencies to develop timetables in consultation with Tribes to help ensure timeframes accommodate meaningful consultation.
- Best practice #4 encourages Federal agencies to work with Tribes to identify the types of studies to be conducted in an environmental review and authorization process and to consider and incorporate Indigenous Traditional Ecological Knowledge, as appropriate, as best available science.

Building Relationships for Meaningful Engagement

Tribal representatives stated that strong relationships between Federal agencies and Tribal Nations are critical for consistent, meaningful Tribal engagement and for Tribes to trust that their perspectives will be heard and valued. Tribal representatives shared that it takes time to build trust and create relationships. Frequent Federal staff turnover makes it more difficult to do this or requires Tribes to repeat the education and relationship-building process with new Federal agency staff. A lack of strong foundational relationships between agencies and Tribes can lead to lack of consultation or engagement when it is needed; for example, an agency may not understand that a Tribe has interest in land or resources beyond geographic boundaries due to cultural connections to land and resources.

Tribal representatives shared the following recommendations to improve relationship building:

- Federal agencies should proactively reach out to Tribes to begin the relationship building process before there is a specific project-based request, and before the Tribe feels forced to request engagement. For example, agencies should facilitate biannual meetings with Tribes (including leaders and decision makers from Tribes and from Federal agencies) to begin early dialogue on planned projects (for example, BOEM's Tribal Ocean Summit).
- Federal agencies should recognize that relationship building takes time and should also take into consideration the Tribes' internal governance and decision-making processes. Agencies should be patient and consistent in outreach to Tribes (i.e., do not rely on a single letter for outreach – follow up with a phone call or email).
- Federal agencies should visit sites that will be affected by project development to better understand the land and the Tribes' ties to the land and resources.
- Federal agencies should hire Tribal representatives to guide the engagement process and help with communication and discussion of mitigation measures.
- Federal agencies should create a permanent Tribal liaison position that can help maintain trust and communication amidst division-level staff turnover.
- Federal agencies should work to understand and accommodate Tribes' preferences in the review process. For example, share draft documents with Tribes for comment before they are finalized and work with Tribes to determine realistic timeframes for review based on Tribes' capacity.
- Federal agencies should leverage other agencies' existing relationships with Tribes.

Executive Director's Response

The Tribal representatives' input on the need for relationship building for meaningful engagement is captured in the draft recommended best practices in the following ways:

- Best practice #2 encourages Federal agencies to engage Tribes early and on an ongoing basis in the environmental review and authorization process, including following up with Tribes on how their input has been incorporated in decision making.
- Best practice #5 encourages Federal agencies to build trust and relationships with Tribes on an ongoing basis and in advance of project-specific requests, including by hosting biannual meetings with agency and Tribal leadership, visiting Tribal lands and resources that may be impacted by proposed projects, establishing or leveraging an agency Tribal liaison position to maintain continuity in relationships amidst potential staff turnover, and/or hiring Tribal representatives to participate in the review process.

Federal Agency Training

Tribal representatives expressed that agency staff exhibit a lack of education and understanding regarding the Federal government's fiduciary trust and treaty obligations. This lack of education and understanding has and continues to contribute, at least in part, to Federal failures to properly consult with Tribal Nations. Representatives suggested that Federal agency staff should be required to complete training on trust and treaty obligations, working and effectively communicating with Tribes, employing respectful protocols, and understanding the Government-to-Government relationship and Federal obligation to promote Tribal sovereignty and self-determination. Training should be designed in consultation with Tribal Nations and should be updated and revised regularly based on lessons learned. Tribal representatives suggested that third-party contractors hired to assist with environmental and cultural reviews should also take the training to increase awareness of the Federal government's unique trust and treaty obligations and how to appropriately engage with Tribes (outside of formal Government-to-Government consultation).

Executive Director's Response

The Permitting Council partners with the Udall Foundation's John S. McCain III National Center for Environmental Conflict Resolution to provide services to support Permitting Council member agencies' Tribal engagement, including by providing training, consultation, assessment, capacity building, and facilitation support. The Executive Director will continue to work with the National Center for Environmental Conflict Resolution to develop training increase agency awareness of the Federal government's unique trust and treaty obligations.

The draft recommended best practices address Tribal representatives' comments on the need for Federal agency training in the following ways:

- Best practice #6 encourages Federal agencies to develop and regularly update training and other resources on Tribal consultation and engagement in consultation with Tribes and to encourage staff and third-party contractors to participate in training before engaging with Tribal Nations.

Awareness of FAST-41 and the Permitting Council

Tribal representatives expressed that the Permitting Council is a relatively unknown Federal entity among Tribes and suggested that there is a need for consistent and transparent engagement, coordination, and consultation with Tribal Nations to increase awareness of the Permitting Council and FAST-41. Specifically, Tribal representatives requested that the Executive Director actively inform Tribal Nations of the FAST-41 authorization to transfer funds from the Environmental Review and Improvement Fund to Tribal governments to facilitate timely and efficient environmental reviews and authorizations for FAST-41 projects. Permitting Council agencies may also make Tribes aware of this resource early in the Tribal engagement process for FAST-41 projects.

Executive Director's Response

FAST-41 established the Permitting Council in 2015 and the Executive Director recognizes the need for continued efforts to share information with Tribes about the Permitting Council and FAST-41. In particular, the Executive Director is endeavoring to increase Tribal awareness about FAST-41's transparency and predictability benefits and the authority to transfer funds from the Environmental Review and Improvement Fund to Tribal governments. In 2022, the Executive Director intends to publish an e-Learning course for Tribal Nations that provides an introduction to FAST-41 and the Permitting Council.

The draft recommended best practices address Tribal representatives' comments on the lack of awareness of FAST-41 and the Permitting Council in the following ways:

- Best practice #7 encourages Federal agencies to actively inform Tribes of the Executive Director's ability to transfer funds from the Environmental Review Improvement Fund to Tribal governments to facilitate timely and efficient environmental reviews and authorizations for FAST-41 projects.

Next Steps

The recommended best practices on enhancing early Tribal engagement will be posted on the Permitting Dashboard, [here](#). Permitting Council agencies will report their progress in implementing the best practices to Congress and the Director of OMB no later than April 15, 2023. The Executive Director expects to engage Tribal Nations in annual consultation on the best practices on enhancing early Tribal engagement. Tribal Nations may contact the Executive Director at any time for individual consultation or discussion at fast.fortyone@fpisc.gov.