



Federal Permitting Improvement Steering Council

Fiscal Year (FY) 2022 Recommended Best Practices on Enhancing Early Tribal Engagement

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

Because the Permitting Council is issuing these recommendations for best practices late in FY 2022, Permitting Council agencies will not have a full year to demonstrate implementation of these recommended best practices in their annual reports to Congress assessing each agency’s performance in implementing all FAST-41 recommendations for best practices. Although these recommendations for best practices have been developed for use by the agencies for FAST-41 covered projects, the Permitting Council encourages agencies to use these best practices for non-FAST-41 covered projects to the extent possible.

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).

Category (i)(I):⁵ enhancing early stakeholder engagement, including—engaging with Native American stakeholders⁶ 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 the covered project.⁷

1. Identify Tribes that may be impacted by a project or may have knowledge and expertise related to the project by using multiple tools or sources (e.g., the [Bureau of Indian Affairs' Tribal Leaders Directory](#), the [Tribal Directory Assistance Tool](#), the [National Park Service's Tribal Historic Preservation Officer Directory](#), etc.) to verify the accuracy of contact information. Include multiple relevant contacts (e.g., Tribal Government leadership, Tribal administrators, cultural resources staff, natural resources staff, Tribal Historic Preservation Officers, etc.) when conducting outreach to maximize chances that the designated representative(s) of a Tribe are engaged at the appropriate steps in the project's environmental review and authorization process.
2. Invite identified Tribes, and any other Tribe who so requests, to participate in consultation as early as practicable in the environmental review and authorization process and, to the extent possible, maintain engagement throughout the process. This includes responding to Tribes' questions and concerns; ensuring that complete, accurate, and high-quality data and information is provided to Tribes in a timely manner for Tribes' review and comment; and actively informing Tribes of how the agency incorporated Tribal input into project-related decision making. In addition to consulting with a Tribe's designated representatives, Federal agencies should be prepared to conduct Government-to-Government consultation with a federally recognized Tribe's leadership, where appropriate.
3. Consult with Tribes to develop reasonable permitting timetables that provide sufficient time for meaningful consultation on Federal environmental reviews and authorizations. To the extent possible, coordinate agency requests for Tribal review and input on related, adjoining, or similar projects to avoid overlapping timeframes and simultaneous requests.
4. In consultation with Tribes, identify opportunities to incorporate Indigenous Traditional Ecological Knowledge (ITEK) as best available science in the development of project alternatives and scoping and proactively identify mechanisms to protect sensitive Tribal information.⁸ Request and incorporate, as appropriate, input from Tribes on the types of studies that are conducted and the ways in which studies are conducted to assess a project's potential impacts on Tribal lands and environmental and cultural resources.
5. Build trust and mutually defined relationships with Tribes on an ongoing basis and in advance of project-specific information or consultation requests. Examples of relationship-building activities include, but are not limited to, hosting biannual meetings with agency and Tribal leadership,

⁵ This is the recommendation for best practices pursuant to 42 U.S.C. § 4370m-1(c)(2)(B)(i)(I).

⁶ There is a unique Government-to-Government relationship between the United States and federally recognized Tribal Nations, which are distinct from any other stakeholder in the Federal environmental review and authorization process for infrastructure projects.

⁷ The recommendations for best practices are intended to encourage improvements in agencies' engagement with federally recognized Tribes and, to the extent practicable, with non-federally recognized Tribes. The recommendations for best practices do not impose new or modify existing legal requirements regarding Tribal engagement and, in the case of federally recognized Tribes, Government-to-Government consultation obligations.

⁸ The Council on Environmental Quality (CEQ) and the White House Office of Science and Technology Policy (OSTP) [Memorandum on Indigenous Traditional Ecological Knowledge and Federal Decision Making](#) recognizes that the Federal Government should engage with ITEK only through relationships with Tribal Nations and Native communities and in a manner that respects the rights of knowledge holders to control access to their knowledge, to grant or withhold permission to this knowledge, and to dictate the terms of the application of this knowledge. CEQ and OSTP anticipate issuing additional guidance on ITEK in Federal decision making in 2022.

visiting Tribal lands and resources that may be impacted by a project, establishing or leveraging an existing agency Tribal liaison position to maintain continuity in relationships throughout potential staff turnover, and hiring Tribal representatives to participate in the environmental review and authorization process.

6. In consultation with Tribes, develop and regularly update trainings and other resources on Tribal consultation and engagement. Trainings and resources should include topics such as Tribal sovereignty and treaty rights⁹, [Sacred Sites](#), Government-to-Government consultation requirements, employing respectful protocols, and engagement before and beyond National Historic Preservation Act Section 106 consultation. Strongly encourage Federal staff and third-party contractors to participate in training in advance of Tribal consultation or engagement with Tribal Nations.
7. Where appropriate and to the degree the agency has the authority to do so, identify and pursue opportunities to provide funding or staffing support to Tribes for participating in the environmental review and authorization process for FAST-41 projects to address Tribe's resource and capacity constraints. For example, work with Tribes to hire consultants or technical review staff to increase Tribes' capacity to participate in the environmental review and authorization process. Actively inform Tribes of the Office of the Executive Director's ability 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. Tribal Nations interested in this funding mechanism can reach out to the Permitting Council Executive Director for further discussion at fast.fortyone@fpisc.gov.

⁹ [The Tribal Treaties Database](#) includes agreements between Tribal Nations and the United States (1778-1886) and is intended to provide agencies with a resource that allows them to efficiently and effectively determine whether the project area overlaps with locations that may be subject to treaty and/or reserved rights.