



FEDERAL PERMITTING IMPROVEMENT STEERING COUNCIL

## Tribal Consultation Policy and Plan

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# Federal Permitting Improvement Steering Council (Permitting Council) Tribal Consultation Policy and Plan

## **Section 1: Background**

Established in 2015 by Title 41 of the Fixing America’s Surface Transportation Act (FAST-41),<sup>1</sup> the Federal Permitting Improvement Steering Council (Permitting Council) is a unique Federal agency charged with improving the transparency and predictability of the Federal environmental review and authorization process for FAST-41 infrastructure projects. The Permitting Council is comprised of the Permitting Council Executive Director, who serves as the Council Chair; [13 Federal agency Council members](#) (including deputy secretary-level designees of the Secretaries of Agriculture, Army, Commerce, Interior, Energy, Transportation, Defense, Homeland Security, and Housing and Urban Development, the Administrator of the Environmental Protection Agency, and the Chairs of the Federal Energy Regulatory Commission, Nuclear Regulatory Commission, and the Advisory Council on Historic Preservation), and additional Council members, the Chair of the Council on Environmental Quality and the Director of the Office of Management and Budget.

This document comprises the Permitting Council’s Policy and Plan for consulting with Tribal sovereign nations with respect to those activities undertaken by the Permitting Council that may affect Tribal interests and equities. The Permitting Council has held four tribal consultation sessions in 2021 to discuss approaches to Tribal engagement in infrastructure permitting and has considered the comments provided in those sessions in developing this Policy and Plan. The Permitting Council held a consultation session in 2024 to seek input on versions of this Policy and Plan. This document reflects the outcomes of those consultations as well.

## **Section 2: Authority**

The United States government has a unique relationship with federally recognized American Indian and Alaska Native Tribes (Tribes) as set forth in the Constitution of the United States, treaties, statutes, and court decisions. The Federal Government recognizes the right of self-determination and self-governance for Tribes and the obligation to work with federally recognized Tribes in a Nation-to-Nation relationship.

On January 26, 2021, President Biden issued a “[Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships](#)” (Presidential Memorandum) directing Federal agencies to adopt action plans to implement [Executive Order \(E.O.\) 13175, “Consultation and Coordination With Indian Tribal Governments,”](#) and noting that “Tribal consultation under this order strengthens the Nation-to-Nation relationship between the United States and Tribes.” It also reaffirms the policy announced in the November 5, 2009, “[Presidential Memorandum On Tribal Consultation](#)” ([Tribal Consultation Memorandum](#)). This Policy and Plan implements E.O. 13175 and the implementing Presidential Memoranda. Accordingly, the Permitting Council

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<sup>1</sup> 42 U.S.C. §§ 4370m *et seq.*

affirms and respects Tribal sovereignty and self-governance, and is committed to fulfilling Federal trust and treaty responsibilities to Tribes, and regular, meaningful, and robust consultation with Tribes as described herein.

### **Section 3: Scope**

The Permitting Council administers the FAST-41 statute, which, among other things, can bring transparency, predictability, and accountability to the Federal environmental review and authorization process for FAST-41 projects. The Permitting Council coordinates Federal environmental reviews and authorizations for infrastructure projects that seek and obtain FAST-41 coverage. FAST-41 covered projects are entitled to comprehensive Federal permitting timetables, and transparent, collaborative management of those timetables on the Federal Permitting Dashboard by the appropriate Federal agencies. For a full list of current FAST-41 covered projects, please refer to the [Permitting Dashboard – “FAST-41.”](#)

However, the Permitting Council does not itself issue any environmental reviews or authorizations for FAST-41 covered infrastructure projects. All Tribal consultations related to the environmental review and authorization of FAST-41 covered projects are carried out by relevant Federal agencies consistent with law and applicable policy.

Instead, the Permitting Council engages in other FAST-41 activities that may implicate the interests of Tribes, including, but not limited to: (i) identifying best practices for agencies to implement when engaging in environmental reviews and authorizations for FAST-41 “covered” projects; (ii) determining sectors of infrastructure projects potentially subject to FAST-41; and (iii) transferring funds from the FAST-41 Environmental Review and Improvement Fund to Tribal governments to facilitate timely and efficient environmental reviews and authorizations for FAST-41 projects. Accordingly, the Permitting Council will engage in Tribal consultations for policies and actions that have Tribal implications that are administered or undertaken by the Permitting Council

### **Section 4: Responsibilities**

Tribal Governance Officer (TGO). The TGO will be the Permitting Council Executive Director or an individual with delegated authority by the Executive Director. The TGO is responsible for carrying out the following responsibilities:

- Will be present during consultation sessions.
- Ensuring coordination with Tribal Liaison Officer (TLO) to determine whether Tribal consultation is required or appropriate in any given circumstance, consistent with FAST-41 and E.O. 13175.
- Overseeing the Permitting Council’s compliance with this policy, E.O. 13175, and other Nation-to-Nation consultation requirements and policies.
- Approving Record of the Consultation (*See Sec. 9*).

Tribal Liaison Officer. The TLO is responsible for:

- Serving as the Permitting Council’s principal point of contact for Tribal consultation matters.
- Leading and managing the Permitting Council’s consultation efforts to ensure effective Nation-to-Nation relationships with Federally recognized Tribes.

- Supporting analysis of whether Tribal consultation is required pursuant to FAST-41, E.O. 13175, and other Nation-to-Nation consultation requirements and policies, and identifying Tribes that may be impacted or affected by the Permitting Council policy or action.
- Promoting and facilitating consultation and collaboration among Tribes and the Permitting Council.
- Identifying any new consultations with any Federally recognized Tribe and notifying the TGO.
- Maintaining consultation documentation and internal reporting, including development and distribution of the Record of the Consultation.
- Submitting any progress reports on implementation of this Consultation Policy and Plan, if required by Executive Order or Presidential memorandum.

Joint Federal-Tribal Team (Team). As necessary, the Permitting Council TLO may convene a Team to support implementation, monitoring, reporting and modifications to this policy. If convened, the Team would be responsible for making recommendations to the Permitting Council on the implementation of this policy. The Team members would include at least one representative designated by a Permitting Council member other than the Executive Director, a representative of the Executive Director, and representatives from relevant Tribes. Members of the Team would serve at the pleasure of the Executive Director. The Team would meet as frequently as needed to identify opportunities for improvements in Permitting Council's Tribal consultation policy and plan implementation. The TLO will identify Tribes which will designate representatives to sit on the Team. Such Tribes will include a representative cross-section of Tribes involved or who may be involved in Permitting Council consultations. Tribal Team members shall be authorized representatives (or tribal employees designated by the Tribe with authority to act on the Tribe's behalf for proposals of the Team) from the respective Tribes identified by the TLO. Tribal Team members will act in an official capacity on behalf of the Tribe they represent. Team meetings will not replace Tribal Consultation.

Training. The Permitting Council requires annual Tribal consultation training for agency employees who work with Tribes or on actions or policies that have Tribal implications. The TLO will coordinate training opportunities and administration.

## **Section 5: Consultation Principles**

Tribal consultation is a two-way, Nation-to-Nation exchange of information and dialogue between official representatives of the United States and of a Tribe regarding Federal policies and actions that have Tribal implications. Consultation recognizes Tribal sovereignty and the Nation-to-Nation relationship between the United States and a Tribe and acknowledges that the United States maintains certain treaty and trust responsibilities with respect to a Tribe.

Consultation requires the United States to give meaningful consideration to information obtained from Tribes. Federal agencies, such as the Permitting Council, should strive for consensus with Tribes or a mutually desired outcome. Consultation should include both Federal and Tribal officials who have decision-making authority regarding the proposed policy or action that has Tribal implications. Consultation will help ensure that relevant information is readily available to all parties, that Federal and Tribal officials have adequate time to communicate, and that there is

ongoing dialogue for Tribes to understand how their input has influenced Federal decision-making. All these principles, including the principles that the Permitting Council intends to follow with respect to Tribal consultations and engagement (see Addendum) will be applied to the extent practicable and permitted by law.

## **Section 6: Determining Whether Consultation Is Appropriate**

The TGO will ensure that Permitting Council staff undertake an analysis as early as possible to determine whether Tribal consultation is required or appropriate for any action undertaken pursuant to FAST-41, consistent with E. O. 13175. This analysis should occur regardless of whether a Tribal government requests consultation.

When a Tribal government requests consultation, the TGO and relevant staff will conduct that analysis as soon as possible and respond to the Tribe within a reasonable time. The analysis may take into consideration the Section 3 of this Permitting Council Consultation Policy and Plan. If there is a reasonable basis to believe that a Permitting Council policy or action may have Tribal implications, consistent with E. O. 13175, the TGO and TLO will follow the applicable consultation requirements. The TGO may engage in Tribal consultation even if the TGO determines that a policy or action will not have Tribal implications, and will consider doing so if it determines that a policy or action is of interest to a Tribe or Tribes.

## **Section 7: Notice of Consultation**

The TGO, working with the TLO, will provide notice to, and begin consultation with, Tribes as early as possible when considering a policy or action with Tribal implications, and provide Tribes a meaningful opportunity to participate in the consultation process. Providing notification of an action or policy to one or more Tribes is not considered consultation.

The TGO will ensure that staff responsible (TLO or those supervised by the TLO) for sending notice of consultation to interested or potentially affected Tribes use available tools, databases, and agency documentation to identify Tribes that would be implicated by a Permitting Council policy or action. Such efforts should account for the fact that Tribes may have connections or legally protected rights to locations and resources beyond their current Tribal lands and Tribal government offices, including ancestral homelands, off-reservation fishing, hunting, gathering, or other rights.

Notification of a consultation shall be provided by the Executive Director or the TGO. The notification should include sufficient detail of the topic to be discussed to allow Tribal leaders an opportunity to fully engage in the consultation. Adequate notification entails providing a description of the topic(s) to be discussed, a timeline of the process, and possible outcomes. The notification should also give Tribal leaders the opportunity to provide feedback prior to the consultation, including time to request technical assistance and/or clarification on how the consultation process conforms to the requirements in this policy. To the extent feasible, notification of consultation should also include available technical data or information necessary to support Tribal leaders' feedback.

The Permitting Council TGO will strive to ensure that notification is given at least 30 days prior to a consultation meeting. If exceptional circumstances prevent notification within 30 days of the

consultation, an explanation for less than 30 days' notification will be provided in the notice. A Tribe may request that the Permitting Council provide more than 30 days' notice prior to a consultation meeting, and, at its discretion, the Permitting Council may grant such a request.

The Permitting Council will make at least 3 attempts to notify Tribes through various modes of communication of a consultation meeting. The TLO also should make reasonable and periodic efforts to repeat the invitation to consult and, when feasible, should allow a Tribe to join an ongoing consultation.

A Tribe may request that the Permitting Council initiate consultation when the Tribe believes that the Permitting Council is considering or pursuing a policy or action with Tribal implications. The TGO and TLO will treat an official request for consultation in an expedited fashion, and respond in writing that the Permitting Council has received the request using the most expedient methods to communicate to the Tribe.

## **Section 8: Conducting the Consultation**

The Tribal consultation process includes iterative and ongoing dialogue between the Permitting Council TGO and Tribes. Throughout consultation, the Permitting Council Executive Director, TGO, and other Permitting Council representatives, will recognize and respect Tribal self-government and sovereignty; identify and consider Tribal treaty rights, reserved rights, and other rights; respect and elevate Indigenous Knowledge, including cultural norms and practices relevant to such consultations; and meet the responsibilities that arise from the unique legal relationship between the Federal Government and Tribal governments. The Permitting Council will ensure, to the extent practicable, that the Executive Director, TGO, and relevant staff with decision making authority regarding the proposed policy are present at the Tribal consultation.

A consultation session is, but is not limited to, in-person meetings, video-conferences, teleconferences, and correspondence to discuss a specific issue or set of issues. In the case of in-person meetings, video-conferences, and teleconferences, the consultation may be expanded upon through subsequent correspondence after consultation is initiated. On a case-by-case basis, consultation may be held through a series of written correspondence with the Tribal leadership, but this process of utilizing written correspondence should only be used when other methods of dialogue are not feasible.

The Permitting Council TLO will solicit the views of affected Tribes regarding the consultation process and timeline. The Permitting Council TLO should work with Tribes to structure a process, to the extent practicable, that considers specific Tribal structures, cultural and traditional needs, and schedules of the Tribes.

The Permitting Council TLO will work with other Federal agencies, where appropriate, to coordinate consultations. To minimize duplication and burden on Tribal officials, the Permitting Council will strive to engage in consultation with Tribes at a time and location coordinated with existing meetings of Tribal governments or in collaboration with other Federal agencies.



## **Section 9: Record of the Consultation**

The consultation process, including engagement efforts and meetings, will be appropriately documented, and records maintained. The Permitting Council TGO, supported by the TLO, will follow-up on Tribal input relating to matters within the Permitting Council Scope and Authority (See Sections 2 & 3). The Permitting Council TGO will communicate how Tribal input was considered in the decision-making process, explore alternatives and additional data as needed, and work to create shared understanding with Tribes through the consultation process.

Upon completion of the consultation, the Permitting Council TLO will prepare a Record of the Consultation, which summarizes the consultation activities, and which the TGO will approve. When appropriate, the Permitting Council TGO or TLO may also implement a post-consultation review process that invites Tribal feedback or considers the need for training or technical assistance concerning the Permitting Council's action. The post-consultation review process shall not limit the Permitting Council's deliberative process privilege regarding internal considerations or any other applicable privilege.

When the matter under consultation involves confidential or culturally sensitive information, the Permitting Council will work with the Tribe to develop a consultation process that addresses the sensitivity of the information and will protect Tribal information to the extent permitted by Federal law. If applicable, the consultation process will also clarify distribution of the Record of the Consultation to protect Tribal information to the extent permitted by Federal law, while ensuring the Record of Consultation is available to the Tribe. If litigation or legal requirements impact the Permitting Council's ability to conduct consultation, the Permitting Council will explain the constraints to the Tribe. If a determination is made that the Administrative Procedure Act or other Federal law or regulation prohibits continued discussion at a specified point in the decision-making process, the Permitting Council will inform the Tribes at the earliest opportunity.

## **Addendum**

### **Application of Policy and Plan**

This policy and plan applies to consultations with Tribes that the United States Government acknowledges to exist as an Indian Tribe pursuant to the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. 479a. (see Definitions). The Permitting Council may seek input from indigenous communities and groups that are not defined as Tribes. To the extent practicable, the Permitting Council will meet and seek input with non-federally recognized indigenous communities. The Permitting Council may follow similar procedures as outlined in this policy and plan.

ANCSA Corporations. If the Permitting Council proposes a policy or action that may impact or affect indigenous rights held by Alaska Native Corporations Settlement Act of 1971 Corporations (ANCSA Corporations), the Permitting Council Tribal consultation policy and plan will apply.



Native Hawaiian Community and Native Hawaiian Organizations. Congress recognizes the Native Hawaiian Community (NHC) by establishing a special political and trust relationship through over 150 enactments. This political and trust relationship exists even though there is currently no NHC government formally recognized by the United States. To ensure that the requirements of the United States' relationship with the NHC are met, Congress requires Federal agencies to consult with Native Hawaiian Organizations (NHO) as the informal representatives of the NHC. The Permitting Council will follow the procedures in this policy, as practicable, to seek input from the Native Hawaiian Community for policies and actions that may impact the NHC.

## Definitions

Tribe or Tribal Nation. Any American Indian or Alaska Native Tribe, band, nation, pueblo, village, or community that the United States Government acknowledges to exist as an Indian Tribe pursuant to the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. 479a. The terms "Tribal officials," "policies that have Tribal implications," and "agency" as used in this policy are as defined in Executive Order 13175.

ANCSA Corporation. Any Alaska Native village corporation, urban corporation, or regional corporation as defined in, or established pursuant to, the Alaska Native Claims Settlement Act, 43 U.S.C. 1601 *et seq.*

Tribal Governance Officer (TGO). The Executive Director or other individual designated by the Permitting Council Executive Director to carry out responsibilities described in this policy. The TGO will have decision-making authority for the consultation at hand.

Tribal Liaison Officer (TLO). One or more individuals officially designated by the Permitting Council Executive Director to carry out responsibilities described in this policy. The TLO name and contact information is available here: <https://www.permits.performance.gov/about/office-executive-director>

The Federal Permitting Improvement Steering Council (Permitting Council): The federal agency established pursuant to Title 41 of the Fixing America's Surface Transportation Act, 42 U.S.C. § 4370m-1.

The Federal Permitting Improvement Steering Council Executive Director (Executive Director): The Executive Director of the Permitting Council identified at 42 U.S.C. § 4370m (12).

## Permitting Council Recommendations on Best Practices

The Permitting Council must issue recommendations on best practices for improving the Federal permitting process for FAST-41 covered projects. [42 U.S.C. § 4370m-1\(c\)\(2\)\(B\)](#). The Permitting Council Executive Director facilitates the development of these best practices. Each Federal agency that participates in the review and authorization of a FAST-41 covered project agency must submit to Congress and the Director of the Office of Management and Budget an annual report self-assessing the agency's performance in implementing the best practices pursuant to [42](#)

[U.S.C. § 4370m-7\(a\)\(3\)](#). The Bipartisan Infrastructure Law, enacted on November 15, 2021, modified FAST-41 and established a new best practice category for improving the Federal permitting process for FAST-41 covered projects, including best practices for early Tribal engagement.

The Permitting Council periodically will seek to amend and update the FAST-41 Tribal best practices and will formally consult with Tribal governments during the amendment process pursuant to this policy. The Permitting Council will consult with Tribes in the event of proposed changes to the best practices for early Tribal engagement.

## **Permitting Council Consultation Principles**

In addition, the following are principles that the Permitting Council intends to follow with respect to Tribal consultations and engagement. To the extent practicable, the Permitting Council will:

- Identify Tribes that may be impacted by the proposed agency policy or action or may have unique knowledge and expertise related to the agency policy or action by using multiple tools or sources (e.g., the [Bureau of Indian Affairs' Tribal Leaders Directory](#), the [Tribal Directory Assistance Tool](#), [National Association of Tribal Historic Preservation Officers' 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 increase chances that the appropriate member(s) of a Tribe receives and can respond to the request to consult on the agency policy or action.
- Invite identified Tribes to participate in Nation-to-Nation consultation as early as practicable. Clearly discuss timelines with Tribes and incorporate feedback to the extent possible to proactively extend timetables as needed for meaningful consultation.
- Build relationships with Tribes by engaging with them on an ongoing basis outside of specific agency actions and initiatives and as early as possible. Foster Tribal relationships by informing Tribes of how Tribal input was incorporated into agency decision-making.
- Be mindful of Tribes' capacity for engagement and, to the extent possible, coordinate with other agencies with Tribal consultation requirements to consolidate requests and avoid overlapping timeframes.
- If applicable and consistent with Permitting Council Scope and Authority, Identify opportunities to work with Tribes, including working closely with Tribes to understand and incorporate [Indigenous Traditional Ecological Knowledge \(ITEK\)](#) in developing agency policies and actions that affect Tribes.
- Ensure Permitting Council staff have knowledge of and access to internal and/or external agency resources and training available for Tribal engagement to ensure staff understand unique Nation-to-Nation relationships and requirements to facilitate proactive engagement and relationship building.