

Tribal Participation Guide for FERC Environmental Reviews

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Introduction

As noted in its *Policy Statement on Consultation with Indian Tribes in Commission Proceedings*, the Federal Energy Regulatory Commission (FERC) recognizes the unique relationship between the United States and Tribes as defined by treaties, statutes, and judicial decisions. FERC has committed to promote a government-to-government relationship between itself and federally recognized Indian Tribes. This guide reviews FERC's role in the environmental review process for energy infrastructure projects under the National Environmental Policy Act (NEPA) and highlights how federally recognized Indian Tribes may engage with and participate in FERC's review.

This guide is organized with six major sections:

- [Key Terms](#)
- [Background](#)
- [Restricted *Ex Parte* Communications](#)
- [FERC's Responsibilities under NEPA](#)
- [Participation Options](#)
- [Considerations](#)

Key Terms

Contested On-the-Record Proceeding – for FERC infrastructure proceedings, a proceeding where one or more parties have intervened and disputed any material issue.

Cooperating Agency – a federal agency, other than a lead agency, that has jurisdiction by law or special expertise with respect to any environmental impact involved in a proposal or reasonable alternative.

Decisional Staff – FERC employees who participate in merits-based discussions regarding open proceedings, such as drafting an environmental document or order or advising the

Commission, and who are otherwise not identified as “non-decisional” staff.

eLibrary – the online library, available to the public, that serves as FERC’s official administrative record for all docketed proceedings.

Environmental Assessment – a concise public document that evaluates the consequences of a proposed action on the environment. An Environmental Assessment is prepared for a proposed action that is not likely to have significant environmental effects as required by NEPA.

Environmental Impact Statement – a concise public document that provides a full and fair discussion of the significant environmental impacts of a proposed action and informs decision makers and the public of reasonable alternatives that would avoid or minimize adverse impacts or enhance the quality of the environment. It also discusses the consequences of the no-action alternative and possible alternatives. This document is required by NEPA for actions significantly affecting environmental quality.

Lead Agency – the federal agency primarily responsible for preparing an Environmental Assessment or Environmental Impact Statement. Other agencies may be cooperating agencies that assist in the preparation of the document.

Non-Decisional Staff – FERC staff who have no role in the decision-making process for a proceeding. They do not assist in the drafting of environmental documents or FERC orders and do not advise the Commissioners. Examples of non-decisional staff include FERC’s Dispute Resolution Service and Office of Public Participation (OPP).

Off-the-Record or Ex Parte Communications – any verbal or written communication to FERC decisional staff, including Commissioners and their staff, that is relevant to the merits of a contested proceeding and is not filed on the record. There are some exceptions to the *ex parte* rule, which FERC staff can explain. For example, procedural questions, such as how to make filings and questions about FERC process, are not *ex parte* communications.

Party – someone who has intervened in a proceeding and so has the right to seek rehearing and judicial review.

Pre-filing – the time between when (1) a project proponent (applicant) alerts FERC it intends to file an application for a project and (2) the project proponent files the application for the project. This time is generally when the project proponent engages with agencies, Tribes, and the public, and conducts studies, if needed, to prepare and file its application.

Proceedings – for FERC-jurisdictional infrastructure projects, docketed actions where a formal application has been filed with FERC and a final decision has not yet been issued.

Public Notice (Notice) – the primary method of informing people of a proposed federal action or activity. It is usually posted on FERC’s website, as well as in a local paper or in the [Federal Register](#).

Background

FERC is an independent federal agency that regulates the siting, construction, operation, and/or removal of certain energy infrastructure projects, such as interstate natural gas pipelines, liquefied natural gas terminals, non-federal hydropower facilities, and, under certain circumstances, interstate transmission facilities. FERC’s responsibilities regarding different types of infrastructure are established by the Natural Gas Act and the Federal Power Act.

As part of the approval process for energy infrastructure projects, and as required by NEPA, FERC prepares an environmental document: either an Environmental Assessment or an Environmental Impact Statement. For energy infrastructure projects requiring multiple federal permits, FERC generally serves as the lead agency for NEPA review.

During the NEPA process, FERC seeks broad participation, including from federal and state agencies, Tribes, local governments, non-governmental organizations (NGO), and the public. The participation of Tribes, Tribal members, and Indigenous peoples’ organizations helps FERC ensure that it considers a range of perspectives in its decision making.

Restricted Ex Parte Communications

FERC is a quasi-judicial agency, meaning that FERC acts like a court by resolving disputes among multiple parties, and that parties may challenge FERC decisions and seek review of FERC decisions by a federal court of appeals. To develop a complete record for use in proceedings, all information used by FERC’s staff and Commissioners during the decision-making process must be formally filed with FERC. FERC’s official administrative record, [eLibrary](#), contains all docketed information related to FERC’s decision making.

The Administrative Procedure Act (APA) and FERC’s rules ensure that all participants in a proceeding have access to the same information. To achieve this, the APA and FERC’s rules prohibit off-the-record communications with FERC Commissioners and decisional staff about the merits of a contested proceeding. These types of prohibited communications are known as *ex parte* communications.

Any participant, including a Tribal representative, may ask to meet with FERC Commissioners or decisional staff about a proceeding. Generally, if a proceeding is contested, either a meeting will be declined, or the meeting will be limited to procedural discussions. In limited circumstances, a meeting about a contested proceeding may be accepted and include substantive discussion; however, because the proceeding is contested, the meeting time and location would be noticed in advance, and other parties to a proceeding, stakeholders, or

members of the public may attend. During these on-the-record meetings, FERC cannot restrict attendance but may limit participation in the meeting's discussions, such as limiting participation to the Tribe and FERC staff. After the meeting, a transcript or summary of any discussions of the merits of the project will be filed in FERC's eLibrary. Certain sensitive (privileged) information may be protected from public view, but that information may still need to be made part of the record to inform FERC decision making.

The bar on *ex parte* communications does not apply during a project's pre-filing period, so this period is often when FERC staff invite federally recognized Indian Tribes to engage in government-to-government consultation. Meetings in this phase allow FERC Commissioners or staff and Tribes to discuss the project and Tribal perspectives without running afoul of *ex parte* restrictions. For natural gas facilities, pre-filing may last six months or more; for hydropower projects, the pre-filing phase lasts about three years. It is important to note that not all infrastructure proposals require a formal pre-filing process. In such circumstances, FERC staff will invite Tribes to participate as soon as possible after an application is filed. Some proceedings (e.g., hydropower preliminary permits) do not have pre-filing. However, the Commission encourages developers to engage in consultation before filing any application with FERC, and lack of consultation may be evaluated and considered as part of the record.

Please note that Tribal representatives may contact [FERC's Office of Public Participation \(OPP\)](#) at any time for information about a project or participation in a proceeding without concern about the *ex parte* rule. This is because OPP staff have been designated as non-decisional, meaning that OPP staff have no role in, or access to, the decision-making process for contested FERC proceedings.

FERC's Responsibilities under NEPA

NEPA requires all federal agencies to assess the environmental effects of major proposed federal actions before making decisions. Under NEPA, FERC evaluates the environmental, social, and economic effects of a proposed project. As participants in the NEPA process, Tribes can provide valuable insight on various topics, including:

- **Scope of environmental analysis**, which includes the range of actions, alternatives, and impacts to be considered;
- **Quality of available information**, such as the need for additional studies or information to fill data gaps;
- **Purpose and need** for the project;
- **Reasonable alternatives** that are technically and economically feasible and meet the purpose and need for the proposed action;
- **Environmental resource impacts**, which are effects on both the natural and human environment that result directly, indirectly, or as a cumulative effect from a proposed project; and

- **Recommendations for potential protection or mitigation measures**, such as ways to avoid, minimize, rectify, reduce, or eliminate impacts to resources or communities that result from a proposed project.

FERC solicits input from interested stakeholders and potentially affected Tribes at various points during the NEPA process, including:

- During any pre-filing process that occurs before an application is filed;
- When the application is first noticed (scoping period); and
- When a draft Environmental Impact Statement is issued.

Participation Options

Tribes may participate in FERC proceedings in several ways by:

- Engaging in consultation;
- Making on-the-record comments;
- Intervening in the proceeding; or
- Participating in the preparation of the environmental document as a cooperating agency.

Consultation

Early in a proceeding, FERC staff invite Tribal representatives to participate in consultation, which may include virtual or in-person meetings with FERC staff regarding a specific project of concern. FERC outreach extends both to federally recognized Tribes located in the project area and to those Tribes with a historic interest in the project area. Typically, such outreach involves FERC staff notifying potentially affected Tribes by notice, letter, email, or telephone.

Through consultation, Tribal representatives may choose to engage with FERC staff on various aspects of a NEPA analysis, including treaty rights and obligations, potential impacts of the project to Tribal resources, and specific Tribal knowledge that could affect FERC staff's analysis of the project. FERC staff can also help clarify technical aspects of a specific project, discuss the review process for a project proposal, and identify important deadlines.

In addition to FERC-initiated consultation, Tribal representatives may request consultation with FERC any time by contacting TribalRelations@ferc.gov, the point of contact listed in a letter or notice they received from FERC staff, or [FERC's Commissioners](#). Unlike certain executive agencies, FERC does not have one decision-making leader; it has five Commissioners who each vote on FERC matters. Requests to meet with Commissioners should generally be submitted individually to each Commissioner's office.

On-the-Record Comments

Commenting on the record is an effective and valued means of providing input in the NEPA process as well as in a natural gas certificate or hydropower license proceeding. During different phases of the process, FERC will request comments to be filed by a specific comment deadline. It is important for commenters, including Tribes, to maintain awareness of comment due dates by monitoring the FERC issuances in the docket.

Tribes may provide on-the-record comments through the following methods:

- **eFiling**, which allows filing attachments, such as Word or PDF documents, and allows filing on behalf of a company, agency, Tribe, or organization, as well as by an individual Tribal member;
- **eComment**, which is a simple text-only and character-limited format for use only by an individual Tribal member filing comments;
- **U.S. Postal Service**, to Secretary of the Commission, Federal Energy Regulatory Commission, 888 First Street NE, Washington, D.C. 20426;
- **Courier**, to Secretary of the Commission, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852; and
- **Speaking at FERC-sponsored Meetings and Technical Conferences**, where in-person comments are transcribed by a court reporter and included in the record.

It is important to note that making comments in a proceeding does not make the commenter an intervening party.

Intervention

Another option available to Tribes is to intervene in a proceeding. Intervention is the formal process of becoming a “party” to a proceeding and carries with it certain additional legal rights and responsibilities beyond those afforded to commenters.

Filing a motion to intervene is simple. FERC provides a [step-by-step instruction guide for how to intervene](#) that explains the intervention process for proceedings.

If a Tribe is authorized by the Environmental Protection Agency to issue water quality certifications under the Clean Water Act, it may file a timely notice of intervention rather than a motion to intervene.

Cooperating Agency Status under NEPA

NEPA’s implementing regulations allow FERC to invite other agencies with specialized expertise relevant to the environmental analysis—including Tribes—to participate as cooperating agencies. This participation may stem from either FERC requesting a Tribe become

a cooperating agency or a Tribe requesting designation as a cooperating agency. When requests are made, they are evaluated on a case-by-case basis.

With cooperating agency status, Tribes may assist FERC staff in the preparation of NEPA documents. Tribes that are designated as cooperating agencies contribute their skills and expertise (e.g., traditional knowledge) and offer FERC staff the benefit of incorporating Tribal knowledge directly into the NEPA analysis. Requesting to be a cooperating agency is a valuable way to ensure expertise is offered in the analysis of impacts and design of mitigation measures presented in the NEPA document. Furthermore, Tribes that participate as cooperating agencies may review early drafts of FERC staff's analysis and provide comments before the analysis is issued publicly. Cooperating agencies must commit to keeping draft working documents confidential because those documents are not subject to public release.

Acting as a cooperating agency does require an investment of resources and time, which may be significant. FERC is not authorized to provide funding for Tribal participation in the NEPA process. In addition, cooperating agencies should be prepared to consult with FERC in developing the NEPA schedule and commit the necessary resources (staff and time) to meet the schedule established by FERC. Whether and how a Tribe contributes to FERC's NEPA process will be guided by the individual circumstances of a specific proceeding.

Importantly, cooperating agencies generally may not also intervene in the proceeding and cannot seek rehearing of or appeal the final Commission action. This restriction is rooted in the APA and FERC's *ex parte* rule and ensures the process is fair for all parties. This is because cooperating agencies assist in the drafting of environmental documents and participate in off-the-record discussions with decisional FERC staff, while parties to the proceeding cannot play those roles.

Unique Circumstances

In unique circumstances, Tribes may request to act both as a cooperating agency and intervene in the proceeding. In such circumstances, the entity must agree and ensure that Tribal staff working on the environmental documents and Tribal staff participating as intervenors in the contested proceeding will remain separated and not exchange information. Such arrangements are permitted at FERC's discretion. FERC must first review and approve of the mechanisms proposed by the cooperating agency and, typically, enter into a memorandum of understanding or similar agreement to memorialize the agreed upon procedures.

Considerations

Whether and how to participate in a proceeding is an important decision driven by the needs of the individual Tribe with focus on the advantages and limits of each method.

- **Tribes should try to participate as early in the process as possible.** FERC staff frequently reach out to potentially affected Tribes during a project's pre-filing phase to schedule consultation meetings. Tribes wishing to participate should engage during the pre-filing process, if possible, to ensure that FERC staff are aware of the Tribe's concerns and avoid *ex parte* restrictions and public notice requirements that could arise later.
- **Tribes may request consultation with FERC at any time.** While FERC encourages Tribes to work with project proponents to voice their concerns, share information, and shape the development of a project, Tribes also may contact FERC and request consultation meetings to discuss the project. As noted above, consultation before a proceeding becomes contested is unrestricted, while consultation in contested proceedings is not.
- **Tribes should file comments.** It is important for Tribes to file comments on the record noting the Tribe's concerns and making recommendations for measures that might mitigate the concerns.
- **Tribes may act as a cooperating agency for the purposes of preparing an Environmental Assessment or Environmental Impact Statement.** Acting as a cooperating agency allows Tribes to have their specific knowledge and expertise incorporated into the NEPA document during its drafting.
- **Tribes may intervene in a proceeding so that they can seek rehearing or challenge FERC action in court.** Typically, Tribes cannot be both an intervenor and a cooperating agency, so being a cooperating agency may restrict a Tribe's ability to seek rehearing and appeal. Tribes wishing to both act as a cooperating agency and intervene in a proceeding should discuss with FERC options for using separated staff.

Quick Links

- [FERC Tribal Relations](#)
- [WorkshOPP: Filing Comments](#)
- [WorkshOPP: Tips for Powerful Comments](#)
- [Top 5 Tips for Powerful Comments \(English\)](#)
- [Top 5 Tips for Powerful Comments \(Spanish\)](#)
- [Top 5 Tips for Filing an Intervention \(English\)](#)

Contact Information

Tribal Relations

Email: TribalRelations@ferc.gov

Office of Public Participation (OPP)

Telephone: [202-502-6595](tel:202-502-6595)

Email: OPP@ferc.gov

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