

How Tribes Can Influence Agency Decision Making



Why submit public comments? Big philosophical answer ...

- Public participation matters. Democratic, legal, and management principles justify why public comments make a difference in regulatory policy.
- By law, many agencies must consult the public in rulemaking.
 - Section 553 of the Administrative Procedure Act states “the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules.”

Practical Reason to Comment

- Influence decision
- Show decision maker the scope of support or opposition
- Make good media
- Build a record
 - *Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971) -- under the APA, courts should not permit additional factfinding beyond the administrative record.

Practical Reason to Comment

- Preserve standing – “Exhaust your remedies.”
- “[T]he long-settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.” *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938).

Why does commenting matter?

- 95 environmental rules and regulations repealed or being repealed (as of 12/2019)
 - <https://www.nytimes.com/interactive/2019/climate/trump-environment-rollbacks.html>
- Waters of the U.S. Rule repealed.
- Climate Change out of EPA Strategic Plan.
- Clean Power Plan repeal – and other repeals of air rules.
- U.S. out of Paris Climate Accords.
- President's Budget consistently calls for significant cuts to EPA budget.
 - 2021 Proposed Budget proposes a 26 percent cut to EPA.
- Financial Assurance Requirement for Mines dropped.

- September 13, 2009 New York Times:
 - **“Clean Water Laws Are Neglected, at a Cost in Suffering”**
 - The NY Times found that the CWA has been “violated more than 506,000 times since 2004, by more than 23,000 companies and other facilities.”

Tips for Commenting

- **Ask for government-to-government consultation!**
- **Ask for more time if you need it.**
- **Always submit written comments even if submitting oral comments (good for building record and as evidence of standing).**
- **Don't just say you support or oppose proposal – say why.**
- **Define your objectives:** Before you start writing, ask yourself: What do you hope to achieve through your comment? Are you trying to stop or delay a particular action, to ensure that the decision or document is in line with your Tribe's policies, or to catch and correct factual errors or data gaps? You should write your comment in a way that best supports your objectives.
- **Use clear organization, formatting, and language:** You should use subject headings throughout your comment to draw attention to key points. Remember that the authors may be flooded with comments and may have to review each set quickly.

Tips for Commenting

- **Suggest specific language when possible and appropriate:** This will save the reviewer time. Think about when you have received comments— isn't it quicker and easier to adopt someone's suggestion if they give you the wording?
- **Discuss specific impacts to subsistence, cultural resources. Raise trust responsibility and whether there has been consultation.**
- **State what you support as well as what you disagree with:** The agency could revise parts of a document that you agree with, as well as parts that you don't— so it is a good idea to note the sections you support.
- **Provide supplemental information to support your case:** If you have access to any facts, reports, or articles that were not included in the document, provide a copy. Obtain an expert to submit testimony or a written report? Don't just cite key documents, include copies. You need to build a record.
- **Ask for a public hearing in your region.**

Resources? How do I keep track of environmental issues?

- RTOC!
- EPA Tribal Consultation Opportunities Tracking System (TCOTS)
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- Regulatory Rollback Tracker
 - <http://environment.law.harvard.edu/policy-initiative/regulatory-rollback-tracker/>
- Federal Register
 - <https://www.federalregister.gov>
- FOIA Online
 - <https://foiaonline.gov/>
- ECHO
 - <https://echo.epa.gov>

Effective Consultation

- Define objection.
 - Learn more about proposal?
 - Provide input on impacts?
- Make sure decision makers are involved.
- Be familiar with consultation policy of agency.
 - <https://www.epa.gov/sites/production/files/2013-08/documents/cons-and-coord-with-indian-tribes-policy.pdf>
- Consult early – before decision is made!
- Develop your own consultation policy/guidelines and share with agency.
 - <https://ctclusi.org/assets/57f698a9c9e22c806e00000f.pdf>
- Ask for a response to any requested actions/information.
- Provide written summary of consultation and/or what was requested.
- If you share confidential information, ask agencies not to take notes or consider not sharing.

WORD OF CAUTION – Generally (with some exception), information shared with federal agencies in comments or consultation is considered public information and must be disclosed if requested.

- Exception for location of archaeological sites. Forest Service has broader exception that protects disclosure of information about “resources, cultural items, uses, or activities that ... have a traditional and cultural purpose.”
 - 25 U.S.C. 3056(a).

Questions?

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