



I. TITLE: Proposed FEMA Tribal Consultation Policy

II. DATE OF ISSUANCE: XX/XX/2013

III. PURPOSE

The Federal Emergency Management Agency (FEMA) is committed to enhancing its relationships with Indian tribes, and to support Indian tribes in their preparation for, mitigation of, response to, and recovery from all hazards and disasters. The purpose of this policy is to establish a process to guide FEMA officials on how to engage Indian tribes and Tribal Officials in regular and meaningful consultation and collaboration on actions that have tribal implications.

IV. SCOPE AND EXTERNAL AUDIENCE

This policy applies to all FEMA officials responsible for engaging in consultation and coordination with Tribal Officials and Indian tribes. This policy sets forth broad guidelines for enhancing FEMA's consultation and collaboration with Tribal Officials and Indian tribes and is intended to be reviewed and updated regularly, as necessary, to reflect our ongoing engagement and collaboration with our tribal partners.

V. AUTHORITY

Executive Order 13175 of November 6, 2000, *Consultation and Coordination with Indian Tribal Governments* (65 Fed. Reg. 67249, Nov. 9, 2000); Memorandum of November 5, 2009, *Tribal Consultation* (74 Fed. Reg. 57881, Nov. 9, 2009); and *FEMA Tribal Policy* (June 29, 2010).

VI. BACKGROUND

This policy is issued pursuant to Executive Order (E.O.) 13175 of November 6, 2000, *Consultation and Coordination with Indian Tribal Governments* and the Memorandum of November 5, 2009, *Tribal Consultation*, which direct agencies to engage in regular and meaningful consultation and collaboration with Tribal



Officials in the development of Federal policies that have tribal implications, and to strengthen the government-to-government relationship between the United States and Indian tribes. The guiding principles that define FEMA's commitment to build strong and lasting partnerships with Indian tribes, found in *FEMA Tribal Policy* of June 29, 2010, should continue to guide any FEMA consultation or coordination with Indian tribes and Tribal Officials.

VII. DEFINITIONS

The following definitions apply for purposes of this policy only:

- a. "Consultation" means the process for FEMA to communicate and collaborate with Tribal Officials and Indian tribes to exchange information and receive input on an action that has tribal implications.
- b. "Indian tribe or Tribe" means an Indian or Alaska Native Tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian Tribe pursuant to the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. §479a.
- c. "Action that has tribal implications" means FEMA regulations, legislative proposals, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.
- d. "Tribal Officials" means elected or duly appointed officials of Indian tribal governments or authorized intertribal organizations.

VIII. ROLES AND RESPONSIBILITIES

The following FEMA officials have specific roles and responsibilities in carrying out effective and meaningful consultation through the implementation of this policy. The roles and responsibilities of these FEMA officials reflect the fact that, while oversight and coordination of consultation occurs at FEMA headquarters, as



a practical matter, much of the actual consultation activity occurs in FEMA's program and regional offices. The responsibility for initially analyzing the need for consultation and then subsequently carrying it out, resides with these offices.

- a. **The FEMA Administrator.** The Administrator is the official designated to certify to the Office of Management and Budget (OMB) that FEMA has complied with E.O. 13175 in a meaningful and timely manner in any draft final regulation that has tribal implications. The Administrator is the official designated to certify to OMB that FEMA has complied with all relevant requirements of E.O. 13175 in any proposed legislation that has tribal implications.
- b. **National Tribal Affairs Advisor (NTAA).** NTAA is the agency's subject matter expert on Indian tribal issues and will advise Senior Agency Officials and Tribal Consultation Coordinators on issues related to consultation with Tribal Officials and Indian tribes. NTAA will lead efforts to develop specific training on tribal consultation for FEMA employees that regularly engage in actions that have tribal implications. The goal of the training will be to improve the agency's knowledge and capacity for promoting and conducting Indian tribal consultation and collaboration, improving sensitivity and understanding of Indian tribal and Alaska Native cultures and governments, and cover topics such as inherent tribal sovereignty, the trust responsibility of the United States, and tribal self-government and self-determination.
- c. **Office of External Affairs (OEA).** OEA maintains visibility regarding public and internal communications; coordinates routine and special communications; ensure accurate, useful, timely, synchronized, targeted communication; and serves as an advisor to FEMA program and support offices on decision making, development, and maintenance of policies and programs to ensure that activities are responsive to stakeholder, media, congressional and other audiences. NTAA resides within OEA's Office of Intergovernmental Affairs (IGA). IGA provides direct communication and outreach to State, local, tribal, and territorial officials.



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- d. **Senior Agency Officials.** Senior Agency Officials are the Associate Administrator, Deputy Administrator, Regional Administrator, Director, or any other official reporting directly to the Administrator, or their designated representative, responsible for all phases of consultation within their respective office. Senior Agency Officials are encouraged to develop a Standard Operating Procedure or Implementation Plan for carrying out the duties outlined in this policy, which tailors the broad concepts in this policy to the specific needs of their respective office.
 - e. **Tribal Consultation Coordinators (TCC).** Tribal Consultation Coordinators are designated by the Senior Agency Official for their respective office. TCCs assist Senior Agency Officials to implement this policy in their respective offices. TCCs should be, or receive training to be, familiar with the unique circumstances that affect Indian tribes, the cultural sensitivities that could impact tribal consultation, and the nature of the relationship between Indian tribes and the Federal government. In some regional offices, the TCC may be the Regional Tribal Liaison.
 - f. **Regional Tribal Liaison (RTL).** The Regional Tribal Liaisons are based out of the FEMA Regional Offices and have close working relationships with the Indian tribal governments in their respective region. RTLs are the first FEMA point of contact for Indian tribal governments and provide technical assistance on FEMA programs. RTLs help Senior Agency Officials and TCCs to identify appropriate Tribal Officials to contact for consultation, best methods for notification, and preferred methods of consultation. In some regional offices, the RTL may be the Tribal Consultation Coordinator.
 - g. **Office of Chief Counsel (OCC).** The Office of Chief Counsel assists Senior Agency Officials and Tribal Consultation Coordinators to determine whether consultation is appropriate. OCC will provide legal support to Senior Agency Officials and Tribal Consultation Coordinators during the consultation process, as appropriate. In general, Senior Agency Officials and TCCs should consult with their OCC attorney when undertaking consultation. The Senior Agency Official or TCC should coordinate with their program attorney to consult with OCC-Regulatory Affairs Division (RAD) for consultation on a



matter involving regulations, and with OCC-Chief of Staff for Legal Policy (OCSLP) for consultation on a matter involving legislation.

- h. **Office of Environmental and Historic Preservation (OEHP).** The Office of Environmental and Historic Preservation will initiate consultation with Indian tribes when the action is specific to environmental and historic preservation compliance issues. Some regions may have a Tribal Liaison position embedded within OEHP to focus solely on Environmental and Historic Preservation (EHP) consultation with Indian tribes who have an interest in areas where FEMA projects may be carried out. In regions without EHP Tribal Liaisons, the Senior Agency Official or Tribal Consultation Coordinator should work with the Regional Environmental Officer (REO) or the Environmental Advisor in the Joint Field Office when the action involves environmental and historic preservation issues.

IX. THE CONSULTATION PROCESS

- a. **Overview.** In general, consultation is the process for communicating and collaborating with tribes to exchange information and receive their input on actions that have tribal implications. There is no single formula for what constitutes appropriate consultation, because each action is unique. As a result, consultation should reflect the most effective and meaningful way practicable to interact with the affected tribe(s), commensurate with the scope and extent of possible effects of the agency action. FEMA offices and regions should work to build meaningful relationships with Tribal Officials and Indian tribes. This will help FEMA to successfully identify the capabilities, needs, and interests of affected Indian tribes and facilitate successful consultation efforts in the future. Consultation at FEMA consists of four phases: Identification, Notification, Input, and Follow-up.
- b. **Phase 1: Identification.** Identification should occur in two ways: (1) FEMA may identify an action that might be appropriate for consultation; or (2) an Indian tribe or Tribal Official may make a request to FEMA to consider an action appropriate for consultation.



1. **How to determine whether consultation is appropriate.** Regardless of whether FEMA or an Indian tribe highlights an action to consider for consultation, Senior Agency Officials, in coordination with their TCCs, should follow these steps to determine whether consultation is appropriate:

- i. **Is consultation required by law?** The Senior Agency Official should determine whether consultation is required by law. A statute or regulation may require FEMA to consult with Indian tribes or Congress may tell FEMA through legislation that the agency is required to consult on a particular action. For example, in accordance with the National Historic Preservation Act (NHPA), in certain circumstances related to properties that have religious or cultural significance, FEMA is required to consult with Indian tribes. Congress may tell the agency that they are required to consult with Indian tribes in the development of a specific policy or regulation. If a Senior Agency Official is uncertain whether consultation is required under statute, regulation, or legislation, the official should contact the Office of Chief Counsel (OCC). If the action involves environmental and historic preservation compliance issues, the Senior Agency Official should contact the appropriate Office of Environmental and Historic Preservation (OEHP) official for assistance.
- ii. **Does the action have tribal implications?** If consultation is not required by law or some other authority, the Senior Agency Official should determine whether the agency action has tribal implications.

An “action” can include, but is not limited to the following FEMA actions related to FEMA programs, such as, response, recovery, preparedness, flood insurance, hazard mitigation, and environmental and historic preservation compliance: regulations or rules; legislative proposals; policies, guidance documents, directives, or other policy statements.



A “tribal implication” occurs when the action has a substantial direct effect on: (1) one or more Indian tribes; (2) the relationship between the Federal government and Indian tribes; or (3) on the distribution of power and responsibilities between the Federal Government and Indian tribes. The term “substantial direct effect” generally refers to an effect or impact on an Indian tribe(s), either beneficial or adverse, that is directly caused by the FEMA action and that is significant in size or amount when compared to the effect or impact on non-tribal stakeholders. For example, when the action affects tribes, but is not a substantial direct effect, the Senior Agency Officials and TCCs should include tribes in the outreach normally conducted with other stakeholders effected by the action, such as States and local governments, emergency managers, or members of the public.

If a Senior Agency Official is uncertain whether consultation is appropriate the Official should contact the TCC and NTAA. If the action is a regulation or a legislative proposal officially initiated by the agency, the Senior Agency Official shall contact OCC for further advice on consultation. If the action involves environmental and historic preservation compliance issues, the Senior Agency Official should contact the appropriate OEHP official for assistance.

- 2. How to determine what type of consultation is appropriate.** There are several different ways to conduct consultation with Indian tribes. The type of consultation that is appropriate will depend on the complexity of the action, the number of Indian tribes impacted, and the scale of the tribal implications, agency time and resource constraints, and the stated preference of the Indian tribe(s) affected. The Senior Agency Official should work in coordination with the TCC, OEA, and NTAA early in the process to determine the most appropriate consultation approach for the action, to receive guidance on how to be mindful of the unique cultural sensitivities of Indian tribes, and for information on the stated type of consultation preferred by the Indian tribe(s) affected. It may be necessary to forgo, limit, or postpone consultation if the action is essential to saving lives and protecting and preserving property or public health and safety.



The type and extent of engagement should reflect the scope and degree of impact of the action. For example, in the case of a large-scale action, such as a national rulemaking that has a substantial direct effect on several Indian tribes, a more coordinated approach with ongoing engagement, such as a series of meetings in geographically diverse areas with Tribal Officials, may be appropriate. For more routine operational matters, a less formal process may be sufficient – such as a phone call or face-to-face interaction with the Tribal Official from the impacted Indian tribe. To the fullest extent possible, and considering the preferences of tribal stakeholders, the Senior Agency Official should use existing agency processes and mechanisms to carry out consultation. The Senior Agency Official may, for example, engage with tribes at previously scheduled meetings, or coordinate with tribes to arrange conference calls or meetings just for the purpose of exchanging information and input on the action.

If FEMA and the affected tribe(s) have divergent views about the appropriate method of consultation, every effort should be made by both parties to come to an agreement on the best method of consultation, taking into consideration factors such as the tribe's stated preference and possible FEMA resource constraints. The record of consultation should reflect any suggestions for consultation that FEMA was unable to accommodate.

- 3. How to determine whom to consult.** When appropriate, FEMA's responsibility is to consult with Tribal Officials; these individuals are elected or duly appointed officials of Indian tribal governments or authorized intertribal organizations. The Senior Agency Official should work in coordination with the TCC, NTAA, and RTLs to identify the appropriate Tribal Officials with whom FEMA should consult. It may be appropriate to consult with the tribe's Chief Executive, or their appointed designee, which may include, but is not limited to, the tribe's emergency management or disaster recovery point of contact or subject matter expert, tribal council members, or employees from public works, transportation, health, natural resources, cultural, or other offices.

If an action has a substantial direct effect on one or more Indian tribes, FEMA should consult with the Tribal Officials of those Indian tribes. If the



action has a substantial direct effect on the relationship between the Federal government and Indian tribes, on the distribution of power and responsibilities between the Federal government and Indian tribes, or on Indian tribes throughout the country, then FEMA should consult with Tribal Officials of Indian tribes across the nation.

4. **Tribal Consultation Planning Checklist.** Upon a finding that consultation is necessary, or not necessary, the Senior Agency Official or TCC should document the decision using the Tribal Consultation Planning Checklist in Appendix A. The purpose of the checklist is to help Senior Agency Officials or TCCs to determine whether an action is appropriate for tribal consultation and, if consultation is appropriate, to determine how the consultation will be carried out. For regulations, policies, or for actions where consultation is required by law, one copy of the checklist should be retained in the administrative record for the action, and a second copy should be submitted to the Director of Intergovernmental Affairs, Office of External Affairs. This checklist is not necessary for actions requiring consultation under section 106 of NHPA. For those actions, OEHP will copy the Director of Intergovernmental Affairs on any consultation notification that is sent to Indian tribes.
- c. **Phase 2: Notification.** If consultation is appropriate, the Senior Agency Official should notify the Tribal Official(s) identified in Phase 1 that consultation will occur. The Senior Agency Official should complete the following steps in an effort to give sufficient notification:
 1. **How to determine when consultation should occur.** Consultation should occur early enough in the decision-making process to allow tribes the opportunity to provide meaningful input and to give FEMA the opportunity to consider the input. Each consultation will be unique so the Senior Agency Official should work in coordination with the TCC, RTLs, NTAA, and OEA to determine the best time to begin consultation.
 2. **What notification should include.** Notification should include sufficient information for Tribal Officials to make an informed decision about whether to participate in consultation and sufficient information for Tribal



Officials to understand how to provide informed input. Notification should include an overview of the consultation process, a description of the topic(s) to be discussed, a description of how tribal input will be received and the timeframe for submitting such input, possible outcomes, and the contact information for the appropriate FEMA official who can provide any technical assistance or respond to any questions or provide any clarifications.

3. **How to notify Indian tribes that consultation will occur.** Notification can occur in a number of ways depending on the nature of the activity and the number of Indian tribes impacted. For example, FEMA may contact the Tribal Officials in person or by telephone, via mass mailing to all Indian tribes affected, publication in appropriate media, or provide notice through other agreed upon means. Senior Agency Officials should make a reasonable effort to notify the Tribal Official(s) of affected Indian tribe(s) in an appropriate manner that will be sensitive to the uniqueness of the affected Indian tribe(s) and to honor any Indian tribal preferences regarding the specific mode of contact. The Senior Agency Official should work in coordination with the TCC, RTLs, and NTAA to determine the best method of notifying the Tribal Official(s) of affected Indian tribe(s). The RTLs should assist the Senior Agency Official and TCC to contact Tribal Officials located in each region, including advice on the Tribal Officials preferred method of contact. The NTAA should assist the Senior Agency Official and TCC to contact national intertribal organizations, in addition to any affected Indian tribe(s), for issues that have a national impact.
- d. **Phase 3: Input.** In this phase, FEMA receives input from Tribal Officials and Indian tribes on the action identified appropriate for consultation. This phase should continue until FEMA officials believe that they have sufficient input to make an informed decision about the action. Subsequent rounds of input may be necessary if there are significant changes to the originally proposed action or if new issues arise.



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1. **How to arrange the details of the input phase of consultation.** During the input phase of consultation, FEMA will receive input from Tribal Officials and Indian tribes by conducting the type of consultation identified in Phase 1, which may include a range of interactions between FEMA and Indian tribes, such as written or oral communications, phone calls, face-to-face meetings, or other appropriate interactions, depending upon the specific circumstances involved. The Senior Agency Official should work in coordination with the TCC, NTAA, the RTLs, and OEA to determine logistics for the input phase of consultation, including creating an agenda, arranging conference calls, room set-up for in-person meetings, and other issues of protocol when meeting or speaking with Tribal Officials. During the Identification phase of consultation, the Senior Agency Official or TCC submitted the Tribal Consultation Form (Appendix A) to OEA; this form will help OEA to arrange the details of the input phase of consultation.
 2. **The role of FEMA officials during the input phase of consultation.** The purpose of consultation is to receive input from Tribal Officials on FEMA actions that have tribal implications. During this phase, FEMA should allow Tribal Officials the opportunity to provide input and discuss their questions and concerns. The consultation should be conducted by a Senior Agency Official or a FEMA official familiar with the unique circumstances that affect Indian tribes, the cultural sensitivities that could impact tribal consultation, and the nature of the relationship between Indian tribes and the Federal government. FEMA officials that participate in consultation should explain the scope of the FEMA action under consideration. FEMA officials should respect that this is time for Tribal Officials to inform FEMA and should actively listen and document their input, but should not comment on, agree with, or disagree with input received from Tribal Officials. The Senior Agency Official or a FEMA official facilitating the consultation (facilitator) shall begin the consultation by stating the purpose of the consultation and set the expectation that in receiving input from Tribal Officials, FEMA is not agreeing to any particular result that may be suggested during the consultation, but rather is there to listen to, receive, and document the input from Tribal Officials, so that FEMA officials may make informed decisions about the matter.



3. **How to address Federal Advisory Committee Act (FACA) requirements.**

In accordance with section 204(b) of the *Unfunded Mandates Reform Act of 1995* (Pub. L. 104-4, approved March 22, 1995), the provisions of the *Federal Advisory Committee Act* (5 U.S.C. App.) do not apply to consultations, conducted pursuant to this FEMA Tribal Consultation Policy, with elected officers of tribal governments (or their designated employees with authority to act on their behalf). Participants other than elected officers of tribal governments may be present at the consultation, such as representatives from intertribal organizations. As a result, to ensure compliance with FACA, the facilitator shall make a statement at the beginning of the consultation that FEMA is not soliciting or accepting consensus advice or recommendations on Federal laws, regulations, or policies during the meeting. Rather, the purpose of the meeting is to gather individual input from a diverse group of stakeholders. To this end, the facilitator should not steer the conversation towards consensus, but should ask open-ended questions to solicit individual input and perspectives.

4. **How input should be documented.** The Senior Agency Official or TCC should keep a record of the input phase of consultation. The Senior Agency Official or TCC should discuss how the consultation will be documented with the Indian tribe(s) participating in the consultation. Documentation should include, at a minimum, a list of FEMA and Indian tribal participants, a summary of the issues discussed, and a thorough description of the input received from Tribal Officials and Indian tribes. Examples of documentation include, but are not limited to, a FEMA note taker, a video or voice recording, a professional transcript, or comments submitted in response to a Federal Register Notice. If FEMA takes notes at the consultation, it may be appropriate to circulate the notes to all tribal participants for review and comment to ensure that the views of tribal participants are correctly captured. If FEMA creates voice or video recordings of the meetings, the facilitator should notify all participants that the meeting will be recorded. The facilitator should make an announcement at the beginning of the meeting that the meeting will be



recorded by a specific medium (e.g. voice, video, or other medium) and that continued participation in the recorded meeting will constitute consent to the recording.

- e. **Phase 4: Follow-up.** After FEMA consults with Tribal Officials and Indian tribes, FEMA officials will consider the input that was received. Once FEMA makes a decision about the action, FEMA will make a good effort to inform the Tribal Officials and Indian tribes that are impacted by the action and, if appropriate, provide feedback. For example, FEMA may provide this information through background provided in a policy or in the preamble of a rulemaking, on the external website, or by direct communication with the tribe(s).

XI. DISCLAIMER

This policy is not intended to and does not create any right to administrative or judicial review or any other right or benefit or trust responsibility, substantive or procedural, enforceable by a party against the United States, its agencies, or instrumentalities, its officers or employees, or any other persons.

XII. RESPONSIBLE OFFICE

The Office of External Affairs, in cooperation with the Office of Chief Counsel, is responsible for reviewing and amending this document.

XIII. SUPERSESSION

FEMA does not have another FEMA Tribal Consultation Policy. This policy supersedes all agency policies and guidance on this subject.



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XIV. REVIEW DATE:

This policy will be reviewed 3 years from the date of issuance in accordance with Directive 112-12.

**Craig Fugate
Administrator,
Federal Emergency Management Agency**



APPENDIX A

TRIBAL CONSULTATION PLANNING CHECKLIST

Instructions: The purpose of this checklist is to help Senior Agency Officials or Tribal Consultation Coordinators (TCCs) to determine whether an action is appropriate for tribal consultation and, if consultation is appropriate, to determine how the consultation will be carried out. For regulations, policies, or for actions where consultation is required by law, one copy of this document should be retained in the administrative record for the action, and a second copy should be submitted to the Director of Intergovernmental Affairs, Office of External Affairs. This checklist is not necessary for actions requiring consultation under section 106 of National Historic Preservation Act. For those actions, the Office of Environmental and Historic Preservation will copy the Director of Intergovernmental Affairs on any consultation notification that is sent to Indian tribes. Before filling out this checklist, please read the FEMA Tribal Consultation Policy.

1. Identifying an Action Appropriate for Consultation

Program:

- Response Preparedness
- Recovery Flood Insurance
- Other (_____) Hazard Mitigation

Program Point of Contact (i.e., Senior Agency Official or Tribal Consultation Coordinator): _____

Action:

- Environmental/Historic Preservation Regulation/Rule
- Legislative proposal Policy Guidance
- Directive Other (_____)
- Other policy statement

Title of Action: _____



B. **Is tribal consultation required by law?** Yes No

If YES, please reference legislation (i.e., Pub. L. XX-XX), statute (i.e., 42 U.S.C. XX), or regulation (i.e., 44 CFR XX) that requires tribal consultation on the action:

2. **Proposed Consultation Approach**

If you have determined that tribal consultation is appropriate because your action has tribal implications or tribal consultation is required by law, please fill out this section. If you have determined that tribal consultation is not appropriate for your action, you may leave this section blank.

Senior Agency Official or Tribal Consultation Coordinator Coordinating Consultation: _____

What type of consultation do you plan to utilize (check all that apply):

- Phone/Conference Call Email broadcast National Conference
- Face-to-face meetings Webinar Federal Register Notice
- Listening session Workshop/Training Other (_____)

Indian tribes and Tribal Officials to be consulted:

Please list the federally-recognized Indian tribe(s) impacted by the action, the Tribal Official (elected or duly appointed officials of Indian tribal government(s)) that will be consulted, and the Tribal Official’s Title (i.e., Chief Executive, Governor, Emergency Manager, Tribal Council Member, etc.). Attach additional pages if necessary.

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|------------------|------------------|--------|
| 1. Indian Tribe: | Tribal Official: | Title: |
| 2. Indian Tribe: | Tribal Official: | Title: |
| 3. Indian Tribe: | Tribal Official: | Title: |
| 4. Indian Tribe: | Tribal Official: | Title: |



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| 5. Indian Tribe: | Tribal Official: | Title: |
| 6. Indian Tribe: | Tribal Official: | Title: |
| 7. Indian Tribe: | Tribal Official: | Title: |

When would you like consultation to occur: _____

How do you plan to notify Tribal Officials of the opportunity to consult (check all that apply):

- | | | | | | |
|--------------------------------|--------------------------|--------------|--------------------------|---------------|--------------------------|
| Letter/Email | <input type="checkbox"/> | FEMA Website | <input type="checkbox"/> | Other (_____) | <input type="checkbox"/> |
| <u>Federal Register</u> Notice | <input type="checkbox"/> | Newsletter | <input type="checkbox"/> | | |

How do you plan to document input received during consultation (check all that apply):

- | | | | |
|-------------------------|--------------------------|---|--------------------------|
| FEMA Note-taker | <input type="checkbox"/> | Recording (video or voice) | <input type="checkbox"/> |
| Professional Transcript | <input type="checkbox"/> | Comments Received by <u>Federal Register</u> Notice | <input type="checkbox"/> |
| Other (_____) | <input type="checkbox"/> | | |