



Preserving America's Heritage

January 27, 2017

J. Rich McGuire, Director
Division of Gas-Environment and Engineering
Federal Energy Regulatory Commission
Washington, D.C. 20426

Ref: *Connecticut Expansion Project, Docket No. CP14-529-000*
New York, Connecticut, Massachusetts

Dear Mr. McGuire:

The Advisory Council on Historic Preservation (ACHP) has received from the Federal Energy Regulatory Commission (FERC) its finding of adverse effect dated December 29, 2016, for its compliance with the requirements of Section 106 of National Historic Preservation Act (NHPA) and its implementing regulations, "Protection of Historic Properties" (36 C.F.R part 800) for the referenced undertaking. We have also received letters from the Narragansett Indian Tribe (Narragansett) expressing concerns about FERC's compliance with Section 106 for the undertaking. Based upon the concerns that have been raised, the ACHP intends to notify FERC by a separate letter of our intent to formally enter into the consultation. We will work with FERC and the consulting parties to negotiate and execute a "two-party" Memorandum of Agreement (MOA) pursuant to 36 C.F.R § 800.7(a) (2). The purpose of this letter is to comment on the status of FERC's Section 106 consultation and address some of the concerns raised by the Narragansett.

Context and Status of Section 106

The Connecticut Expansion Project involves an upgrade of existing pipelines in New York, Connecticut, and Massachusetts, with the construction of approximately 13 miles of new pipeline loops and associated facilities connecting to the existing lines. The proponent, Tennessee Gas Pipeline Company, L.L.C. (Tennessee) (a subsidiary of Kinder Morgan), sponsored comprehensive surveys to identify historic properties that might be affected by the undertaking. FERC has determined that no historic properties will be affected in Connecticut and there will be no adverse effect on historic properties in New York. The Connecticut and New York State Historic Preservation Officers (SHPOs) respectively have concurred with the determinations regarding their states.

Four Indian tribes, the Mohegan Indian Tribe, the Mashantucket (Western) Pequot, Wampanoag Tribe of Gay Head (Aquinnah), and the Narragansett, with assistance from Ceremonial Landscapes Research, LLC, carried out a survey, funded by Tennessee, for CSAs in a portion of the project Right-of-Way (ROW) in Massachusetts. Seventy three (73) Ceremonial Stone Alignments (CSAs) were identified that the Tribes believe should be considered eligible for listing in the National Register of Historic Places. FERC has determined there will be an adverse effect to 21 of the CSAs and is requesting the ACHP's participation in finalizing a MOA with FERC to resolve the adverse effects of the undertaking and complete the Section 106 review process. The Massachusetts SHPO has declined to participate in this consultation since the tribes involved in the survey requested that the information is not shared with them. Further, the SHPO advised us that in the interests of efficiency in the Section 106 review process, the

ADVISORY COUNCIL ON HISTORIC PRESERVATION

401 F Street NW, Suite 308 • Washington, DC 20001-2637
Phone: 202-517-0200 • Fax: 202-517-6381 • achp@achp.gov • www.achp.gov

SHPO will not comment on the results of the survey; FERC's intention to treat the properties as historic properties for the purposes of Section 106; FERC's assessment of effects; and the negotiation and execution of an MOA.

Tribal Consultation and Coordination

FERC's certification process requires that applicants carry out research to identify impacts to resources in the project Right of Way (ROW) prior to formal submission of an application. As early as September, 4, 2013, it is our understanding that the proponent provided project information to nine federally recognized tribes, three non-federally recognized tribes, and several state agencies that address tribal interests in the region, and requested to be notified of any concerns tribes might have about properties of significance that might be affected. On July 24, 2014, the proponent submitted the archaeological survey reports to all of the tribes for review. Seven days later, the proponent formally filed its application with FERC. In late fall of 2014, the United South and Eastern Tribes (USET) and several tribes in the area of the proposed project notified FERC of concerns about possible effects to CSAs that might be present in ROWs of the pipeline projects in the region, including the Connecticut Expansion project.

On February 27, 2015, FERC sent letters formally initiating consultation with tribes. FERC, the proponent, and the tribes then began a lengthy coordination process focused on setting up surveys by tribal experts to be funded by the proponent to identify CSAs. Efforts to coordinate these surveys continued into August 2016 and the actual survey was not initiated until August 24, 2016. A report of the survey results was submitted on October 3, 2016. The proponent has worked with construction engineers to consider options for avoidance and protection of the historic properties. Subsequently, a field visit with FERC and the tribes was scheduled to explain and discuss proposed avoidance or treatment for each of the features. After the field visit, the proponent worked with engineers to further modify the project to avoid additional CSAs. However, due to worker safety issues, the prohibitive costs of avoidance, or constructability issues at this stage of project development, the proponent could not modify the project to avoid or fully protect 1/3 (21) of the identified CSAs during construction. The proponent has proposed documenting and dismantling those 21 CSAs prior to construction and reconstructing them after the pipeline components are installed. A draft plan specifying the treatment of each of the 73 properties was issued by the proponent in early December 2016. FERC scheduled follow-up teleconferences with tribes to consider the effects to the identified CSAs and the proposed treatment plan. In addition, FERC requested that written comments be submitted by the end of December 2016. Two tribes responded with written comments after which FERC held a teleconference with the tribes in early January 2017 to discuss the comments and proposed next steps.

Timing, Timeliness, and Efficiency in the Section 106 Review Process

The information that has been shared with the ACHP affirms that the tribes were provided a reasonable opportunity to participate in the Section 106 review process and to share their views regarding effects of the undertaking on properties of religious and cultural significance to the tribes. Nevertheless, the lack of timely engagement by FERC and the tribes resulted in a lengthy consultation and coordination process that delayed identification and assessment of effects on such properties. It is our recommendation that FERC engage more proactively to carry out tribal consultation and to facilitate coordination among tribes and proponent in order to promptly move the Section 106 review forward. FERC may also wish to remind the tribes of the benefits of their timely coordination with applicants and responses to federal agencies to ensure that their concerns are fully considered, especially when a proponent is sponsoring tribal surveys and is attempting to meet critical schedules related to the broader undertaking.

Further, FERC's practice of issuing decision documents under the National Environmental Policy Act (NEPA) and Certificates of Public Convenience and Necessity (Certificate) prior to completion of Section 106 is problematic and inconsistent with the requirements of the Section 106 regulations (36 CFR § 800.1(c)). Although FERC frequently issues a Certificate with conditions so that project proponents can

access private property to finish their surveys and analysis to inform federal reviews, these conditions must be fulfilled prior to FERC's issuance of a notice to proceed. In this particular case, FERC issued an Environmental Assessment (EA) in October 2015 and a Certificate with conditions in March 2016 prior to having the results of the tribal surveys carried out in August and September of 2016. Consequently, the proponent is limited in its ability to reasonably consider alternative routing of the pipeline outside the current ROW, which has been subject to eminent domain proceedings, extensive local, state, and federal review, and extensive commitments by the proponent.

Resolution of Adverse Effects

At this juncture in the Section 106 review, there is a disagreement among the consulting tribes regarding the appropriateness of the proposed resolution of adverse effects suggested in the treatment plan developed by the project proponent. The Narragansett Tribe has suggested that the proposed documentation, deconstruction, and reconstruction of 1/3 of the CSAs is not acceptable mitigation. The tribe believes that all of the CSAs should be preserved and further consultation is required until a more appropriate alternative can be developed. Several of the other consulting tribes have indicated their general agreement with the Narragansett Tribe's position. The Stockbridge-Munsee Community Band of Mohican Indians (Stockbridge-Munsee), in whose ancestral territory the CSAs are located, has suggested that although avoidance is preferred, the proposed steps to alter the undertaking to avoid and protect 2/3 of the CSAs and document and reconstruct the other 1/3 are reasonable and offered in good faith. Based on our review of the survey by the tribes and the draft treatment plan developed by the project proponent, we concur with the assessment of the Stockbridge Munsee Community. While complete avoidance of adverse effect to all the CSAs may have been optimal, it appears to us that the proponent has made a good faith effort to alter the pipeline project to avoid as many of the CSAs as possible at this late stage in the federal review process.

In a letter dated January 5, 2017, the Narragansett Tribe requested ACHP interpretation on the meaning of "participation in the resolution of adverse effects" as referenced in 36 C.F.R. § 800.2(c) (ii) (2) (A) of the Section 106 Regulations. The Narragansett Tribe has suggested that that this section in the regulations requires that federal agencies include tribes as active agents in carrying out any steps to resolve adverse effects to properties of religious and cultural significance for them. The ACHP wishes to clarify that that citation in the regulations refers to participation in the Section 106 consultation process, in general, and more specifically to participation in the fourth step in the consultation process as specified in 36 C.F.R. § 800.6. It does not require agencies to ensure that tribes be physically engaged in carrying out actions that are part of the resolution of adverse effects, though it does not rule such involvement out. The federal agency is the entity responsible for compliance with Section 106 and has the right and responsibility for making all the findings and determinations in the Section 106 process including determining the resolution of adverse effects. As specified in 36 C.F.R. § 800.6, the federal agency must consult with the consulting parties in an attempt to reach a consensus regarding the steps that will be required to resolve adverse effects. However, consensus cannot always be achieved and the federal agency ultimately decides on the specifics of the resolution of adverse effects, after taking into account all the issues expressed by consulting parties during the negotiation of a mitigation plan.

Conclusion

In closing, the ACHP will notify the head of FERC of our intent to enter the consultation with FERC and consulting parties to finalize a MOA that includes a balance between project needs and historic preservation values. We recommend that FERC and the tribes consider the comments provided in this letter as they prepare for further consultation regarding the treatment of properties of religious and cultural significance to tribes in the region, such as the CSAs. Given the delays that have already been experienced in coordinating the Section 106 review for this undertaking, it is incumbent upon all parties to respect the roles and responsibilities of all in the consultation process.

Should you have any questions or wish to discuss this matter further, please contact John T. Eddins, PhD at 202-517-0211, or by e-mail at jeddins@achp.gov.

Sincerely,

Charlene Dwin Vaughn, AICP
Assistant Director
Federal Permitting, Licensing, and Assistance Section
Office of Federal Agency Programs