

**UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION**

Guidelines for Reporting on Cultural Resources Investigations for Pipeline Projects ) ) )  
Docket No. AD15-10-000

**COMMENTS OF THE INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA**

Pursuant to the Federal Energy Regulatory Commission’s (“FERC” or “Commission”) January 25, 2017 *Notice of Availability of the Revised Guidelines for Reporting on Cultural Resources Investigations for Pipeline Projects and Request for Comments* (“the Notice”),<sup>1</sup> the Interstate Natural Gas Association of America (“INGAA”) respectfully submits the following comments.<sup>2</sup>

INGAA appreciates the Commission’s efforts under the National Historic Preservation Act (“NHPA”), 54 U.S.C. §§ 300101 *et seq.* to consult with federally-recognized Native American tribes in order to protect cultural resources that may be identified or discovered during the planning and construction of interstate natural gas pipeline projects. INGAA also appreciates the Commission’s willingness to update and improve its *Guidelines for Reporting on Cultural Resources Investigations for Pipeline Projects* (the “2002 Guidelines”)<sup>3</sup> by issuing the *Draft Guidelines for Reporting on Cultural Resources Investigations for Natural Gas Projects* (the “Draft Guidelines”)<sup>4</sup> and soliciting comments in this proceeding. While the Draft Guidelines provide clarity and guidance regarding communication and outreach with Native American tribes

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<sup>1</sup> *Notice of Availability of the Revised Guidelines for Reporting on Cultural Resources Investigations for Pipeline Projects and Request for Comments*, Docket No. AD15-10-000, Jan. 25, 2017.

<sup>2</sup> INGAA is comprised of 26 members, representing the majority of the interstate natural gas transmission pipeline companies in the United States and comparable companies in Canada. Its United States members are regulated by the Commission pursuant to the Natural Gas Act, 15 U.S.C. §§ 717-717w.

<sup>3</sup> The Guidelines, which were issued in December 2002, are referenced in 18 C.F.R. § 380.12(f) (providing the environmental report requirements for Resource Report 4 of a Natural Gas Act application).

<sup>4</sup> *Draft Guidelines for Reporting on Cultural Resources Investigations for Natural Gas Projects*, Docket No. AD15-10-000, Jan. 25, 2017.

on both tribal and private land that may contain Native American cultural artifacts or occupy land with cultural significance, INGAA proposes some suggestions and requests further clarification regarding the processes for facilitating interactions between FERC, interstate natural gas pipeline project sponsors, and Native American tribes.

In that regard, INGAA respectfully requests that the FERC establish multiple full-time Tribal Coordinators who will have various duties to improve communications between tribes and project sponsors, and establish a budget for Tribal Coordinators so that they can adequately perform those duties. In addition, INGAA requests revisions to clarify that the Guidelines are not a substitute for regulation and are only intended as recommendations and when project sponsors can proceed under blanket authority. INGAA also requests revisions to Section 4.1 so that it is made consistent with Section 2.2.3 and does not unduly delay the beginning of cultural resources field work. Lastly, INGAA seeks clarifications regarding the use of the word “consultation” in Sections 5.0 and 5.1 and the scope of the term “permit” in Section 2.2.2. INGAA believes that these requests, detailed further below, will help all parties involved by facilitating early communications between project sponsors and Native American tribes and by clarifying the roles of project sponsors, FERC staff, and the Native American tribes during the Commission’s consultation process.

I. The Guidelines Are Not a Substitute for Regulation

As FERC staff recognizes, a guidance document, while providing helpful information, does not substitute for regulations. Project sponsors are not required to use all the recommendations provided in the Draft Guidelines. INGAA also is concerned that agencies, consulting parties, or the public may view the Draft Guidelines as binding. Accordingly, INGAA recommends that FERC staff explicitly state, as it did in the recently released *Guidance*

*Manual for Environmental Report Preparation* (“Guidance Manual”),<sup>5</sup> that the Draft Guidelines document is intended solely as guidance to the industry. The Draft Guidelines do not substitute for, amend, or supersede the Commission’s regulations under the Natural Gas Act, or the Commission’s and the CEQ’s regulations under NEPA. Moreover, because FERC staff’s application of the Commission’s regulations may change more frequently than the Guidelines are updated, INGAA respectfully requests that FERC staff include a statement in Section 1.0 (“Introduction”) similar to the statement in the recently released Guidance Manual to confirm the intended use of the Guidelines for stakeholders in Commission proceedings.<sup>6</sup>

## II. Role of Tribal Coordinators

INGAA supports the FERC’s decision to establish the role of the FERC Tribal Coordinator and INGAA acknowledges the evolving nature of this new position.<sup>7</sup> Creating this role is a critical first step toward improving communications and relationships with Native American tribes. However, the FERC Tribal Coordinator will not be able to make significant strides towards improving communications and long-term relationships with tribes unless his or her sole job is to serve as a Tribal Coordinator, as opposed to being additionally responsible for managing ongoing pipeline certificate cases.

A Tribal Coordinator’s primary duty should be to foster relationships with tribes by meeting with and learning about the 566 different federally-recognized tribes outside of the

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<sup>5</sup> See e.g., FERC Final Guidance Manual for Environmental Report Preparation, Docket No. AD16-3-000, at p. 1-3, Feb. 22, 2017.

<sup>6</sup> See *id.* at p. 1-2 (“We intend only to provide guidance to the industry. The manual does not substitute for, amend, or supersede the Commission’s regulations under the Natural Gas Act of 1938 (NGA) or the Commission’s and Council on Environmental Quality’s (CEQ) regulations under NEPA ... It imposes no legal obligation and grants no additional rights...However, you can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations.”)

<sup>7</sup> In order to avoid the need to update the Guidelines if or when the staff filling the Tribal Coordinator position changes, FERC may want to create a generic email address for the role (e.g., [FERCTribalcoordinator@ferc.gov](mailto:FERCTribalcoordinator@ferc.gov)). A generic email address would help ensure a seamless transition between changing personnel. If FERC adopts such an email, the contact information on page 12 of the Draft Guidelines should be updated.

context of a specific project. However, given the number of federally-recognized tribes in the U.S., these duties are likely too extensive for just one staff member. Ideally, these duties should be spread among several full-time FERC staff members who are solely dedicated to working as Tribal Coordinators – meaning that they are not also project managers or resource leads. A larger program staff would allow the FERC to take a regional approach to tribal coordination. Establishing geographically distinct, or regional, Tribal Coordinator positions (much like the U.S. Army Corps of Engineers’ regional system<sup>8</sup>) would enable the Tribal Coordinators, and by extension the FERC, to build meaningful long-term relationships, develop a strong understanding of the histories and cultures of the tribes within their region, meet with those tribes on tribal lands, regularly attend tribal functions, and facilitate and improve communication between the tribes and project sponsors on an as-needed basis.

In order to establish relationships built upon trust and mutual understanding, it is imperative that the Tribal Coordinators be able to dedicate time and attention to learning about each tribe’s customs, values, beliefs, cultural artifacts, land and water resources, and other issues of cultural significance. If Tribal Coordinators are also assigned to work on specific projects as project managers or resource leads, it is unlikely that the tribes will view these staff members as impartial parties. Rather, if the role of a Tribal Coordinator is dedicated to improving understanding, consultation, and communication with the tribes and he or she is able to establish meaningful relationships with the tribes in a given region (such that he or she has an awareness of tribal concerns, potential locations of cultural significance, and communication preferences), the Tribal Coordinator will be in a better position to serve as a credible intermediary or facilitator if a project does arise that has the potential to impact cultural resources. This in turn will

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<sup>8</sup> See “US Army Corp of Engineer Tribal Nations Program” <http://www.usace.army.mil/Missions/Civil-Works/Tribal-Nations/>

encourage more cooperation, compromise, and agreement during project planning and development and allow the project sponsor the opportunity to identify and address tribal concerns earlier in the process.

As to when project sponsors should be communicating with the tribes, Section 4.0 (“Communications Under Section[s] 3 and 7 of [the] NGA”) of the Draft Guidelines states that project sponsors should identify and communicate with consulting parties as soon as possible. Section 4.0 of the Draft Guidelines further states that in cases where a project sponsor learns that a tribe wishes to consult with FERC directly, the project sponsor should notify the FERC Tribal Coordinator or the Project Manager so that FERC staff can contact the tribe directly. This recommendation to contact FERC is crucial, because, as discussed further below, early involvement of Native American tribes in the project planning process may benefit the FERC, tribes, and project sponsors. As FERC is aware, some Native American tribes prefer to communicate directly with Commission staff rather than with project sponsors. While the tribes have that option, the Draft Guidelines do not clearly delineate the responsibility of the Tribal Coordinator. For example, it would be helpful for the final Guidelines to specify how the Tribal Coordinator can help to ensure that tribal communications do not occur too late in the process to timely identify the tribe’s concerns so that they can be addressed during the project planning and review process.

Accordingly, Section 4.2 should clarify that the Tribal Coordinator will respond by initiating early communication with the tribe. To be clear, this effort to facilitate communication between tribes and project sponsors would not replace the Commission’s consultation process, which is usually conducted after the issuance of a Notice of Intent to Issue an Environmental Assessment or Environmental Impact Statement. Rather, this outreach from the Tribal

Coordinator, when requested by a project sponsor, would provide information on how tribal involvement can best be facilitated during the early stages of a project, including during pre-filing or before the filing of any formal application at the Commission, when project sponsors are developing pipeline routes, siting facilities, conducting necessary environmental surveys, and preparing applicable resource reports. By initiating a dialogue early in the planning process, the Tribal Coordinator could work as an intermediary to ensure that interested Native American tribes and project sponsors would have the ability and time needed to work together cooperatively to ensure that tribal interests and important cultural resources are identified and appropriately addressed during the planning or construction of a project. The Tribal Coordinator also should facilitate communications between a project sponsor and tribe, as may be needed. INGAA additionally requests that Section 4.0 be updated to state that the project sponsor should notify the Tribal Coordinator and the Project Manager if a tribe expresses a preference to communicate with FERC.

### III. Establishment of a Tribal Coordinator Budget

As discussed above, INGAA believes that FERC should establish regional Tribal Coordinators in order to improve communications and relationships with the 566 federally-recognized Native American tribes. The FERC Tribal Coordinators will need to develop a strong understanding of tribal values, which would serve as the foundation for establishing credibility as a trustworthy and impartial source of information for the tribes in that region, as well as someone who understands those tribes' interests and cultural resources. A relationship based on trust and mutual respect will not develop between the regional Tribal Coordinator and the Native American tribes in that region unless FERC Tribal Coordinators are able to meet periodically with the tribes on tribal lands, foster relationships with tribal leaders, attend

ceremonial gatherings, learn about the history of the tribes, and develop a deeper level of understanding of tribal values and culture. Meeting with the tribes and learning about tribal values will help foster trust and confidence between Native American tribes and the Commission. In turn, by improving relationships with the tribes, the regional Tribal Coordinators will be better able to facilitate communications between project sponsors and tribes, communicate tribal concerns, encourage compromises, and facilitate agreements.

To that end, FERC's Tribal Coordinators need to be allocated an adequate budget to fulfill these duties. This budget should be designated to fulfillment of the Tribal Coordinators' duties, including developing relationships, addressing concerns of Native American tribes and facilitating tribes' effective and timely participation in the pre-filing and formal certificate process. Establishing a designated budget for the Tribal Coordinators would increase their effectiveness and would improve communications with federally-recognized tribes so that important cultural resources may be protected.

IV. The Draft Guidelines Should Clarify that a Project Sponsor Can Proceed under its Blanket Authority if its Project is Relocated to Avoid Effects to any Listed Properties, as Agreed to by the SHPO and/or THPO, as appropriate.

Section 3.2 ("Blanket Certificate Program") of the Draft Guidelines creates the possibility for confusion of whether an applicant can proceed under blanket certificate authority, because it is not consistent with FERC regulations.<sup>9</sup> Section 3.2 states that in order for project activities to satisfy the requirements of the blanket certificate program, the State Historic Preservation Officer ("SHPO") must find that: (1) no survey is necessary; (2) no historic properties are

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<sup>9</sup> See 18 C.F.R. § 157.206(b)(3)(ii) (*citing* 18 C.F.R. Part 157, Subpt. F, App. II which states that "...the project shall not be authorized under the blanket certificate unless such properties can be avoided by relocation of the project to an area where the SHPO, or THPO, as appropriate, agrees that no listed properties or unlisted properties that satisfy the National Register Criteria for Evaluation occur.").

present; and (3) no historic properties are affected. Section 3.2 further states that a full application under Section 3 or 7 of the Natural Gas Act must be filed if the SHPO fails to make any of the three findings described above. Yet, both Appendix II of Part 157 and FERC's recently released Guidance Manual<sup>10</sup> states that a project sponsor *can* proceed under its blanket authority if the project is relocated to avoid effects to any listed properties, as agreed to by the SHPO and/or THPO, as appropriate. Section 3.2 of the Draft Guidelines, however, could be interpreted to mean that a "no adverse effect" or "adverse effect to historic properties" determination automatically requires a project sponsor to file an application under Sections 3 and/or 7 of the Natural Gas Act and the project sponsor cannot conduct further efforts to obtain a "no effect" determination by relocating the project to avoid impacts.

Section 3.2 of the Draft Guidelines must be consistent with 18 C.F.R. § 157.206(b)(3)(ii) and Appendix II.<sup>11</sup> Section 3.2 should be revised to explicitly state that projects may move forward under blanket authority if the SHPO or THPO, as appropriate, agrees that the project sponsor has relocated the project from its originally planned location to avoid effects to listed or unlisted Criteria-satisfying properties. Without such a clarification, the Guidelines could create confusion about whether a "no adverse effect" or "adverse effect" determination based on the originally planned route would automatically foreclose the ability for a project sponsor to use blanket authority or if the project sponsor could reroute the project and receive a subsequent determination of "no effect" based on a revised route.

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<sup>10</sup> See FERC Final Guidance Manual for Environmental Report Preparation, Docket No. AD16-3-000, at p. 7-3, Feb. 22, 2017.

<sup>11</sup> Section 7 of the Guidance Manual provides a brief discussion of the NHPA-implementing procedures in Appendix II. Different discussion of cultural resource consultation for blanket certificates in two separate guidance manuals creates the potential for conflict. Moreover, pg. 7-3 of the Guidelines has multiple references to "Criteria-satisfying property," which is not defined in the Guidelines and appears to differ from the requirements prescribed in Appendix II. Accordingly, INGAA recommends that the Guidance Manual reference the instant Guidelines instead of separately describing any requirements.



V. Communication Versus Consultation

INGAA appreciates the changes that FERC staff made in response to concerns about the 2002 Guidelines interchangeably using the terms “consultation” and “communication.” Consultation is FERC’s obligation, whereas project sponsors are required to make efforts to communicate with the tribes – these are, of course, very different legal obligations. By using these terms interchangeably, the 2002 Guidelines inadvertently caused confusion about who had what obligation. Much of this confusion has been eliminated in the Draft Guidelines; INGAA identified two instances where the Guidelines still use the term “consultation” when it should state “communication.” Specifically, Section 5.0 (“Plan for Unanticipated Cultural Resources and Human Remains”) and Section 5.1 (“Cultural Resources That May Qualify as Historic Properties”) still contain references to “consultation” when discussing the project sponsor’s obligations to coordinate with other parties. INGAA requests clarification that in these sections, the term “consultation” is used to convey a need for the project sponsor to coordinate, cooperate or confer with other parties and it is not meant to refer to the FERC’s statutory mandate to consult with Native American tribes under the NHPA. Such a clarification will eliminate any potential for confusion and ensure consistency with other portions of the document, such as Section 4.2 (“Communication with Tribes”), which explicitly states that the Commission does not delegate its government-government tribal consultation responsibilities. In the alternative, INGAA recommends that the Draft Guidelines be revised so that the references to “consultation” in Sections 5.0 and 5.1 be changed to “coordination.”

VI. Section 4.1 of the Draft Guidelines Should Be Revised to Be Consistent with Section 2.2.3

Section 4.1 of the Draft Guidelines recommends “no cultural resources field work begin until after the project sponsor has initiated communications with consulting parties, *and provided*

*the parties with the opportunity to review and comment on project-specific research designs and survey strategies.*”<sup>12</sup> Section 2.2.3 of the Draft Guidelines recommends, in relevant part, “Project sponsors should consider having their survey designs reviewed by the appropriate SHPOs and other potential consulting parties, prior to conducting any field work.”<sup>13</sup> While it is crucial to note that Section 4.1 is a recommendation, and therefore has no binding effect on project sponsors, INGAA remains concerned that initiation of cultural resources field work could be delayed if one or more consulting parties fail to respond to requests for comment on project-specific research designs and survey strategies in a timely manner. INGAA requests that Section 4.1 of the Draft Guidelines be revised, as redlined below, to be consistent with Section 2.2.3 and recommend that:

[N]o cultural resources field work *should* begin until after the project sponsor has initiated communications with consulting parties. *Project sponsors should consider having their survey designs reviewed by the appropriate SHPOs and other potential consulting parties, prior to conducting any field work.* ~~and provided the parties with the opportunity to review and comment on project-specific research designs and survey strategies.~~

(emphasis added to identify new language)

## VII. Requests for Clarification

Section 2.2.2 of the Draft Guidelines (“Property Access”) references “permits” that are needed to conduct field work on private, state, federal, and tribal lands. However, not every approval necessary to conduct this work is a “permit.” For example, an access agreement (not a

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<sup>12</sup> Draft Guidelines at p. 10 (emphasis added).

<sup>13</sup> *Id.* at p. 7.

formal permit) may be required prior to conducting field work. Accordingly, INGAA requests that FERC replace the term “permits” with “any necessary approvals”.

Additionally, Section 7.1 of the Draft Guidelines (“Agreement Documents”) discusses the FERC’s use of memorandums of agreement and programmatic agreements, but makes no reference to the definitions of these terms as defined by the Advisory Council on Historic Preservation (“ACHP”) regulations.<sup>14</sup> In order to ensure clarity regarding the definitions of these terms, INGAA respectfully requests that the Draft Guidelines be revised to add the definitions of “memorandums of agreement” and “programmatic agreements” in Section 10.1, as the terms are defined in the ACHP regulations at 36 C.F.R. §§ 800.16 (o) and (t). Specifically, Memorandum of Agreement “means the document that records the terms and conditions agreed upon to resolve the adverse effects of an undertaking upon historic properties.” Programmatic Agreement “means a document that records the terms and conditions agreed upon to resolve the potential adverse effects of a Federal agency program, complex undertaking or other situations in accordance with § 800.14(b).”

Lastly, INGAA recommends that throughout the Draft Guidelines (and in Section 4.1, in particular), any references to terms defined in Section 10.1 be capitalized (e.g., “Consulting Parties”) to clarify that these are defined terms.

#### VIII. Conclusion

INGAA respectfully requests the Commission modify its Draft Guidelines, as requested by INGAA, and provide further clarification as requested above. INGAA also requests that the Commission provide a budget to fund regional Tribal Coordinators. These enhancements will help all parties – project sponsors will be better positioned to identify and address cultural

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<sup>14</sup> 36 C.F.R. §§ 800.16 (o) and (t).

resources associated with proposed pipeline projects, the tribes will have opportunity for early and more effective engagement in the project planning process, and the FERC Tribal Coordinators will be able to more effectively and efficiently facilitate communication and develop relationships.

Respectfully Submitted,



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