

INSIGHTS

FERC Staff Issues New Guidelines on Cultural Resources

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On July 31, 2017, the Federal Energy Regulatory Commission (“FERC”) staff issued new Guidelines for Reporting on Cultural Resources Investigations for Natural Gas Projects. The new guidelines include changes of potential interest and significance to developers (“project sponsors”). In addition to changes in the organization of reports and documents, the guidelines define more detailed expectations for project sponsors, particularly concerning engagement with tribes. It remains to be seen whether the changes lead to improved dialogue with tribes on cultural resources, or more divergence in expectations.

A small but important change is that the new guidelines exempt from federal and state qualification standards individuals designated as experts in historic preservation by federally recognized tribes. Designated tribal experts are presumed to be qualified. Dialogue between tribal and non-tribal experts can be complex for many reasons, and may become more so if less training and perspective are shared.

The new guidelines require materials collected on state, federal, or tribal lands to be curated in the manner chosen by the SHPO/THPO, land manager, or tribe, rather than according to federal standards. The expectations of individual SHPO/THPOs, land managers, and tribes are less transparent and less uniform than federal standards and may complicate surveys and unanticipated discoveries. Differences may also arise between THPOs and tribes.

Another important change is the requirement that project sponsors seek comment from all tribes that “attach religious or cultural significance to historic properties”—regardless of whether the tribe ever used the area in question.^[1] Previously, project sponsors were only required to seek comment from tribes that occupied the project area, whether currently or in the past. Now, project sponsors must send comment request letters to all tribes that may view a property as religiously or culturally significant, with no geographic boundary. The guidelines do not offer a limiting principle to guide project sponsors in assessing which tribes require notice and engagement, and they do not define the bases for significance that might animate tribes to participate notwithstanding the absence of present or historical connection to the area.

The new guidelines acknowledge that tribes may not respond to notices and requests for engagement by project sponsors or FERC. Project sponsors are now required to continue to follow-up despite a lack of response. The new guidelines do not establish what frequency or duration of follow-up is adequate, nor when engagement attempts can be terminated. The only instruction FERC gives to project sponsors is that they should thoroughly document efforts to

contact tribes.

Together, these changes appear to invite higher expectations among tribes, without defining limits on the correlative responsibilities of project sponsors. Whether the new guidelines improve tribal consultations and enhance the protection of historic and cultural resources remains to be seen in practice. It may be hoped that thoughtful, respectful engagement will create the context for success.

[\[1\]](#) New Guidelines, at 10.