

1 April 2015

Federal Energy Regulatory Commission  
888 First Street, NE  
Washington, DC 20426

Re: Outstanding Concerns, Docket No. CP14-96-000

Dear Chairman LaFleur:

On January 30, 2015, the Tribal Historic Preservation Officers representing the Narragansett Indian Tribe, Wampanoag Tribe of Gay Head (Aquinnah), Mohegan Tribe, and Mashantucket Pequot Tribal Nation filed comments formally requesting the Federal Energy Regulatory Commission's (FERC) compliance with Section 106 of the National Historic Preservation Act (NHPA) prior to FERC's issuance of a certificate of public convenience and necessity authorizing Algonquin Gas Transmission, LLC (Algonquin) to construct and operate the Algonquin Incremental Market Project (AIM Project).

In the above-mentioned letter, the Tribes requested that the FERC (1) make a "reasonable and good faith effort" to identify historic properties; (1a) provide written notification stating how the FERC intends to meet the remaining Section 106 requirements, as well as specifying if the referenced requirements will be contained within the ROD; (2) consult directly with the Tribes. The referenced THPOs shall not consult with the project sponsor or the cultural resource consultant, PAL, as it relates to CP14-96-000; and (3) enter into an agreement as permitted pursuant to 36 CFR 800.2 (c)(2)(ii)(E)<sup>1</sup> with the Tribes that shall stipulate how responsibilities will be carried out, including providing the tribes reasonable opportunity to identify its concerns about historic properties, advisement on and direct tribal participation, through field investigations, in the identification and evaluation of historic properties, articulate its views and advise on the undertaking's effects on such properties, and participation in and advisement on avoidance planning and the resolution of adverse effects.

Despite our formal requests and continued letters, the FERC has yet to provide responses directly to the tribes. Likewise, the FERC has not provided notification to the tribes stating how Section 106 responsibilities will be carried out, as formally requested in our January 30, 2015 letter. Tribal identification of significant historic properties that may be affected by the undertaking has

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<sup>1</sup> 36 CFR 800.2 (c)(2)(ii)(E): An Indian tribe or a Native Hawaiian organization may enter into an agreement with an agency official that specifies how they will carry out responsibilities under this part, including concerns over the confidentiality of information. An agreement may cover all aspects of tribal participation in the section 106 process, provided that no modification may be made in the roles of other parties to the section 106 process without their consent. An agreement may grant the Indian tribe or Native Hawaiian organization additional rights to participate or concur in agency decisions in the section 106 process beyond those specified in subpart B of this part. The agency official shall provide a copy of any such agreement to the Council and the appropriate SHPOs.



not occurred. Government-to-government consultation seeking to assess and resolve adverse effects to historic properties is also absent. Contrary to the evidence, the paragraphs below are areas noted and considered by the FERC as government-to-government consultations as documented in the final EIS at 4-201 to 4-217.<sup>2</sup>

The Tribes voiced our disappointment to the FERC on March 14, 2014 that site identification studies were conducted without our involvement.<sup>3</sup> As documented at 4-205 of the final EIS, concerns were raised by the Tribes during a meeting held on October 17, 2014, and in a letter dated October 30, 2014, in regard to ceremonial stone landscapes that may be potentially impacted by the AIM project. Therefore, the FERC was informed that there are significant sites in the area of potential effect, and yet, this information was not acted upon by the Commission. Where there is a reasonable likelihood that traditional cultural properties are present in an area, the Agency/Commission is obliged to make a reasonable effort to identify those properties. The Commission has not done so in this case. In fact, the response letter providing their position on stone landscapes from Algonquin, dated November 14, 2014, undermined tribal expertise and was not conducted in a sensitive manner respectful of tribal sovereignty. The Tribes must again note that the FERC or contract archeologists cannot identify and determine properties of significance to Indian tribes when they conduct archaeological surveys. The archeologists were never authorized by the Tribes to speak on our behalf on what is of religious and cultural significance, and therefore it should not be assumed that the archeologist possesses the appropriate expertise to carry out such identifications. The only appropriate individuals to carry out such identifications are the Tribes, and only representatives trained and designated by the Tribes are allowed to map ceremonial stone landscapes. Algonquin and the FERC have not acknowledged or facilitated the special expertise possessed by the tribes in assessing the National Register eligibility of historic properties that may possess religious and cultural significance to them, as required under 36 CFR 800.4 (c)(1).

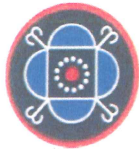
Additionally, the document issued March 3, 2015 states that Algonquin shall file the remaining survey reports and any necessary treatment plan with the SHPOs and Commission Staff. It is noted that the treatment plan will be sent to the Tribes for comments and a MOA for data recovery will be executed if necessary. If a proposed undertaking poses adverse effects, the Section 106 regulations at 36 CFR § 800.6(b)(1)(i-iv) call for the Agency/Commission to consult with the Tribes in attempt to reach an agreement on how to resolve those adverse effects to historic properties. The FERC, as one party, cannot mandate usage of an MOA with the Tribes without our participation since an MOA is a legally binding document that records the terms agreed to by the consulting parties. Moreover, an MOA assumes that all historic properties have

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<sup>2</sup> For final EIS, See:

<http://static1.squarespace.com/static/546d61b5e4b049f0b10b95c5/t/54df6ec4e4b089d9bceb673f/1423929028869/AIM+Project+FEIS+Volume+I+1+23+14.pdf>

<sup>3</sup> Final EIS at 4-205



been identified – an action that has yet to occur. FERC has not consulted with the Tribes in applying criteria of adverse effect, nor has the FERC consulted with the Tribes on ways to avoid, minimize, or mitigate the adverse effects of the project. Rather, the Commission stipulated plans for data recovery without discussing or considering the views of the represented tribal nations.

We are further shocked by a communication distributed March 27, 2015 by Eric Howard, FERC archaeologist, providing notification that a MOA will be developed to address the adverse effects of data recovery on three sites (CHC 71-33, Susquetonscut Brook Pre Contact Site 4; CHC 71-34, Susquetonscut Brook Pre-Contact Site 5; and CHC 53-10, Susquetonscut Brook Pre-Contact Site 11) for the AIM Project. It is noted that the MOA would be approved by the Connecticut SHPO and FERC prior to execution. The FERC and SHPO has arrived at a conclusion that we have not been a party to. The Tribes reiterate that letters and notifications provided to the Tribes by the FERC do not constitute consultation.<sup>4</sup> Distribution by PAL of compact disks containing PDFs of cultural resource reports and documentation filed with the FERC, on behalf of Algonquin, for the AIM Project; and evaluation reports and a draft treatment plan forwarded by Algonquin, signifies an act of information gathering – an allowable role of Algonquin under Section 106, but is not consultation. We request an opportunity to consult with the FERC and the project proponents, archeologists, and SHPOs on these considerations that we have not been consulted on.

As previously stated, despite our formal requests and continued letters, the FERC has yet to provide responses directly to the Tribes. Similarly, the FERC has not provided notification to the Tribes stating how Section 106 responsibilities will be carried out, as formally requested in our January 30, 2015 letter. Tribal identification of significant historic properties that may be affected by the undertaking has not occurred. Government-to-government consultation seeking to assess and resolve adverse effects to historic properties is also absent. To date, tribal rights to government-to-government consultation, cultural resource identification and avoidance planning pursuant to Section 106 have thus far been abrogated by the FERC. We await FERC's initiation of corrected consultation on these matters.

Sincerely,

A handwritten signature in cursive script that reads "Bettina Washington".

Bettina Washington, THPO, Wampanoag Tribe of Gay Head (Aquinnah)

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<sup>4</sup> See *Pueblo of Sandia v. United States*, 50 F. 3d 856 (10<sup>th</sup> Cir. 1995).



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