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## REPORT



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### **EDITOR'S NOTE: NUCLEAR WASTE**

Victoria Prussen Spears

### **DOE'S LATEST EFFORT TO EXPEDITE CLEANUP OF COLD WAR SITES WILL SHAVE CLEANUP COSTS—AND COULD HIT COMMERCIAL NUCLEAR UTILITIES IN THE WALLET**

Jeffrey S. Merrifield, Sheila McCafferty Harvey, Jay E. Silberg, and Robert B. Ross

### **PENNSYLVANIA'S NEW REVISED STATUTORY ARBITRATION ACT: WHAT THE OIL AND GAS INDUSTRY NEEDS TO KNOW**

Kenneth J. Witzel

### **FERC AND NERC ADVANCE DRAMATICALLY EXPANDED MANDATORY CYBERSECURITY REPORTING STANDARDS**

Norma M. Krayem

### **GAO ISSUES RECOMMENDATIONS FOR IMPROVING TRIBAL CONSULTATION ON INFRASTRUCTURE PROJECTS**

Jody A. Cummings

### **FERC CONSIDERING MAJOR UPDATE TO ENERGY INFRASTRUCTURE INVESTMENT POLICIES**

Robert S. Fleishman, Brooksany Barrowes, and Brett Nuttall

### **REMIT ENFORCEMENT INTENSIFIES**

Leigh Hancher, Matthew Levitt, and Paul Lugard

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VOLUME 19

NUMBER 8

September 2019

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**Editor's Note: Nuclear Waste**

Victoria Prussen Spears

255

**DOE's Latest Effort to Expedite Cleanup of Cold War Sites Will Shave Cleanup Costs—and Could Hit Commercial Nuclear Utilities in the Wallet**

Jeffrey S. Merrifield, Sheila McCafferty Harvey, Jay E. Silberg, and Robert B. Ross

257

**Pennsylvania's New Revised Statutory Arbitration Act: What the Oil and Gas Industry Needs to Know**

Kenneth J. Witzel

262

**FERC and NERC Advance Dramatically Expanded Mandatory Cybersecurity Reporting Standards**

Norma M. Krayem

271

**GAO Issues Recommendations for Improving Tribal Consultation on Infrastructure Projects**

Jody A. Cummings

276

**FERC Considering Major Update to Energy Infrastructure Investment Policies**

Robert S. Fleishman, Brooksany Barrowes, and Brett Nuttall

284

**REMIT Enforcement Intensifies**

Leigh Hancher, Matthew Levitt, and Paul Lugard

287

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# GAO Issues Recommendations for Improving Tribal Consultation on Infrastructure Projects

*By Jody A. Cummings\**

*The author of this article discusses a recent Government Accountability Office report, Tribal Consultation: Additional Federal Actions Needed for Infrastructure Projects, which examines a range of factors identified by tribal governments and federal agencies that hinder effective consultation on infrastructure projects.*

The U.S. Government Accountability Office (“GAO”) has publicly released a new report, *Tribal Consultation: Additional Federal Actions Needed for Infrastructure Projects*,<sup>1</sup> examining a range of factors identified by tribal governments and federal agencies that hinder effective consultation on infrastructure projects. The report also considers the extent to which federal agencies have taken steps to facilitate tribal consultation on infrastructure projects. GAO’s analysis is the product of interviews with nearly 60 tribes and 21 federal agencies,<sup>2</sup> as well as comments submitted by 100 tribes to the U.S. Department of the Interior (“DOI”), U.S. Department of the Army, and U.S. Department of Justice during late 2016 on improving the consultation process for infrastructure projects.

The report identifies one matter for Congressional consideration: legislative action to resolve longstanding issues between the U.S. Army Corps of Engineers (“USACE”) and the Advisory Council on Historic Preservation (“ACHP”)

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<sup>1</sup> <https://www.gao.gov/assets/700/697694.pdf>.

<sup>2</sup> GAO’s report examines the tribal consultation policies and practices of 21 federal agencies—three independent regulatory agencies (Federal Communications Commission; Federal Energy Regulatory Commission; Nuclear Regulatory Commission), three departments (Department of Energy; Environmental Protection Agency; Department of Housing and Urban Development), and 15 component agencies located within other departments (Department of Agriculture: Forest Service, Rural Development; Department of Commerce: National Oceanic and Atmospheric Administration; Department of Defense: Army Corps of Engineers; Department of Homeland Security: Coast Guard, Federal Emergency Management Agency; Department of the Interior: Bureau of Land Management, Bureau of Ocean Energy Management, Bureau of Reclamation, Fish and Wildlife Service, National Park Service; Department of Transportation: Federal Aviation Administration, Federal Highway Administration, Federal Railroad Administration, Federal Transit Administration). Twenty of these agencies (or their departments) are members of the Federal Permitting Improvement Steering Council and consult with tribes on infrastructure projects.

concerning USACE's procedures for implementing Section 106 of the National Historic Preservation Act ("NHPA"), which directs federal agencies to take into account the effects of their undertakings on historic properties through consultation with tribes, among others. The report also includes a number of recommendations for executive action, including developing/clarifying agency consultation policies for Alaska Native Corporations; documenting how federal agencies should communicate with tribes about how tribal input during consultation is considered in agency decision making on infrastructure projects; and developing a central information system for identifying and notifying tribes who should be consulted as part of the federal government's infrastructure permitting activities.

GAO's report should provide some insight to federal agencies for improving tribal consultation policies and practices that may not adequately account for tribal perspectives. Likewise, infrastructure project proponents working on and near tribal lands might find GAO's report helpful in formulating more effective strategies for interacting with tribal governments and addressing concerns arising out of infrastructure permitting-related activities.

### **FACTORS IDENTIFIED BY TRIBES THAT HINDER EFFECTIVE CONSULTATION**

GAO reviewed tribal comments provided to federal agencies in 2016, and interviewed more than 50 tribes and eight tribal organizations to analyze a range of factors identified by tribes that hinder effective tribal consultation for infrastructure projects. GAO organized tribal comments into five categories:

- (1) Processes for initiating consultation;
- (2) Practices for engaging with tribes to obtain and use their input;
- (3) Respect for Indian law and accountability for consultation;
- (4) Tribal resources for participating in consultation; and
- (5) Agency knowledge/training on consultation.

GAO highlighted the following tribal concerns:

- *Processes for Initiating Consultation*—Tribes raised concerns that agencies initiate consultation too late in project development; invest resources into and/or make decisions about projects before consulting tribes; fail to consistently identify tribes that should be consulted for proposed projects where tribes may have treaty hunting, fishing or gathering rights and/or sites of cultural or religious significance; and often rely on archaeologists or other experts who do not have the requisite expertise or traditional knowledge to identify tribal resources.
- *Practices for Engaging with Tribes to Obtain and Use Their Input*—Tribes

indicated that agencies do not adequately consider tribal input collected during consultation. Rather, the consultation process is often a “check a box” exercise done to meet procedural requirements. GAO also reported tribal concerns that the consultation process lacks two-way, back-and-forth dialogue, with agencies failing to communicate with tribes about the agency’s final decision, the rationale for decisions, or how the agency considered (or planned to consider) tribal input. Tribes also indicated that agencies too narrowly scope geography and time frames for the potential effects of infrastructure project approvals, and fail to take issues like environmental justice and climate change into account during consultations and agency decision making.

- *Agencies’ Respect for Indian Law and Accountability*—Tribes raised concerns that federal agencies may not have sufficient respect for tribal sovereignty and the government-to-government relationship between the United States and federally recognized tribes. Examples of this lack of respect include limiting consultation to tribal participation in general public meetings, sending low level agency staff to represent the United States in consultations, and delegating consultation to project applicants. Tribes also stated that agencies have failed to adequately honor tribal treaty rights by not consulting with tribes who hold treaty rights in areas to impacted by infrastructure projects and by not adequately examining the potential effects of a project on treaty rights.
- *Tribal Resources for Participating in Consultation*—A number of tribes cited a lack of sufficient resources (*e.g.* limited funding or staff) as limiting tribal participation in infrastructure project consultations. The need to travel from remote locations to consultation sessions, having adequate time to respond to consultation notices, and insufficient funding for tribal historic preservation officers were among the challenges that tribal interviewees identified.
- *Agency Officials’ Knowledge/Training on Tribal Consultation*—Agency officials’ knowledge or training on tribal consultation was also identified as a factor hindering effective consultation. Tribes cited concerns about lack of agency knowledge or training on tribal culture and history, agency consultation responsibilities, as well as Indian law, the federal trust responsibility, and tribal sovereignty.

## **FACTORS IDENTIFIED BY AGENCIES THAT HINDER EFFECTIVE CONSULTATION**

As to federal agency perspectives on factors that may hinder effective tribal consultation on infrastructure projects, GAO organized agency comments into four categories:



- (1) Initiating consultation when there may be tribal implications;
- (2) Tribal participation in consultation and response to consultation notifications;
- (3) Agency capacity to conduct tribal consultation; and
- (4) Interagency coordination on tribal consultation.
  - *Initiating Consultation*—Agencies cited difficulty in identifying relevant tribes with whom to consult (including tribes with treaty rights or interests in certain geographic areas). They also identified problems in obtaining and maintaining accurate contact information for tribes in order to notify them of consultation activities. GAO states that a potential remedy has been identified by the Federal Permitting Improvement Steering Council (“FPISC”), which suggested in a late 2017 best practices report that a central federal information system be developed concerning tribal areas of interest and points of contact for consultation. In response, the Department of Housing and Urban Development (“HUD”) has submitted a proposal to FPISC to scale up HUD’s Tribal Directory Assessment Tool for broader federal agency use. However, no decision has been made as to whether HUD’s proposal might be accepted by FPISC and its member agencies.
  - *Tribal Participation in Consultation*—Roughly half of the agencies interviewed by GAO reported that tribal response rates to consultation opportunities on infrastructure projects are often low and that agencies may not hear back from tribes even when they make multiple attempts to contact tribes. Agencies offered several possible explanations for this lack of responsiveness, including a need by tribes to prioritize other matters over consultation as well as reluctance by tribes to engage with project applicants who may have an incentive to minimize tribal concerns about a project.
  - *Agency Capacity to Conduct Consultation*—A majority of agencies interviewed cited limitations on agency staff and/or financial resources to support tribal consultation. A number of agencies also noted difficulties in responding to tribes’ requests for reimbursement for consultation activities. Interviewed agencies also highlighted workload as a factor that hinders tribal consultation, citing the large number of tribes that may need to be consulted for any particular infrastructure project, high volumes of consultations, and lengthy consultations, among other concerns.

Limited agency staff knowledge and training were also identified as hindering consultation. Agency concerns in this area included untrained staff potentially lacking cultural awareness on matters such as the need to collaborate on consultation meeting agendas, and allowing tribes to discuss historical and other issues during consultation meetings.

- *Interagency Coordination on Tribal Consultation*—Some interviewed agencies also indicated that there can be difficulties coordinating with other federal agencies when multiple agencies are involved in infrastructure project approvals. Agency coordination and interagency agreements on how to coordinate on consultation with tribes can be complicated by preexisting agreements that some agencies could have with tribes. Coordination can also be limited based on timing of when certain agency reviews are conducted or when funding is made available across the agencies involved in the project. Further, the lack of consistency in agency approach to tribal consultation across coordinating agencies was also cited as a potential obstacle. For example, preferences for in-person versus telephonic consultation meetings, and general agency attitudes towards the importance of tribal consultation were noted as factors here.

## USACE'S NHPA SECTION 106 PROCEDURES

GAO's report also touches on an issue that has been a subject of controversy for tribes: the decision of USACE's Regulatory Program to use its own NHPA Section 106 regulations—33 C.F.R. Part 325 Appendix C ("Appendix C")—instead of the ACHP's regulations for implementation of Section 106.<sup>3</sup> The NHPA explicitly authorizes ACHP to issue regulations implementing Section 106. ACHP regulations recognize that other agencies may develop their own procedures to implement Section 106 as a substitute for using ACHP regulations. However, such substitute procedures must be consistent with ACHP regulations, and are to be reviewed and approved by ACHP before going into effect.<sup>4</sup>

GAO's report indicates that USACE finalized Appendix C in 1990, and issued Appendix C guidance in 2005, as well as a clarifying memorandum on its guidance in 2007. However, ACHP states that it has neither concurred with

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<sup>3</sup> GAO's report contrasts the USACE Regulatory Program's approach on Section 106 implementation with the approach taken by the USACE Civil Works Program, which uses ACHP's Section 106 regulations.

<sup>4</sup> See 36 C.F.R. § 800.14(a).

USACE's 1990 regulations nor approved the 2005 memorandum or 2007 guidance. According to GAO's report, USACE takes the position that it has authority to issue its own Section 106 regulations.

The conflicts between ACHP's Section 106 regulations and USACE's Appendix C procedures have raised a number of concerns for tribes, among other observers, including that USACE's procedures:

- Too narrowly define the geographic area that is analyzed;
- Improperly assign USACE's analytical responsibilities to third parties; and
- Have limited opportunities for consultation.

GAO's report describes some attempts made by USACE to resolve the inconsistencies with ACHP's Section 106 regulations, including: work during the George W. Bush administration to consider changes to USACE's procedures; a 2009 conclusion reached by the USACE Regulatory Program that its procedures fully comply with NHPA Section 106; and a January 2017 commitment from USACE to update its procedures in response to tribal comments calling for the rescission or revision of Appendix C. Despite the 2017 commitment, USACE's 1990 regulations, 2005 guidance and 2007 memorandum remain in place. The USACE Regulatory Program has subsequently indicated that it does not intend to revise or replace its procedures given that they are, in USACE's view, fully consistent with the ACHP Section 106 regulations.

## CONSULTING WITH ALASKA NATIVE CORPORATIONS

While all 21 federal agencies identified in GAO's report have tribal consultation policies that cover infrastructure projects, only nine of those agencies' policies address consulting with Alaska Native Corporations ("ANCs").

- Among the authorities that call for federal agencies to consult with tribes is Executive Order 13175, *Consultation and Coordination with Indian Tribal Governments* (November 6, 2000), which directs agencies to establish an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.
- In 2004, Congress passed as appropriations measure that requires federal agencies to consult with ANCs "on the same basis as Indian tribes under Executive Order ("EO") 13175," even though ANCs are not federally-recognized Indian tribes and do not have a government-to-government relationship with the United States.
- GAO reports that three agencies—USACE, the Federal Aviation

Administration (“FAA”), and the Federal Emergency Management Agency (“FEMA”)—intend to develop policies in fiscal year 2019 to address consultation with ANCs. The US Coast Guard and DOI’s Fish and Wildlife Service (“FWS”) indicate plans to address consultation with ANCs, but have not provided definitive time frames for doing so. The Department of Energy (“DOE”), HUD, and the Environmental Protection Agency (“EPA”) told GAO that ANC consultation is not included in their agencies’ tribal consultation policies because ANCs are not federally-recognized Indian tribes.

## **GAO’S RECOMMENDATIONS**

### **Legislative Action**

GAO’s report identifies one matter for Congressional consideration: legislative action to resolve the differences between USACE and ACHP over conflicting procedures for implementing NHPA Section 106. The report states that without legislative action, USACE may continue to use procedures that have not been approved by ACHP and may not be consistent with ACHP regulations.

### **Executive Action**

GAO’s report identifies 22 recommendations for executive action—20 actions for federal agencies and two actions for the FPISC Office of the Executive Director, including:

- HUD, EPA, and DOE should develop or clarify agency policy to implement the statutory requirement to consult with ANCs on the same basis as Indian tribes under EO 13175.
- DOI FWS and the Department of Homeland Security (“DHS”) should establish time frames for developing or updating agency policy to implement the statutory requirement to consult with ANCs on the same basis as Indian tribes under EO 13175.
- USDA Rural Development, USACE Civil Works, DOI Bureau of Ocean Energy Management, DOI Bureau of Reclamation, DOE, FCC, FEMA, FERC, Federal Highway Administration, DOI FWS, DHS, HUD, DOI National Park Service, Nuclear Regulatory Commission, and Department of Transportation should all document in their respective tribal consultation policies how agency officials are to communicate with tribes about how tribal input from consultation was considered in agency decisions on infrastructure projects.
- FPISC Office of the Executive Director should work with the FPISC member agencies to develop a plan to establish a central information

system for identifying and notifying tribes that includes: (1) well-defined goals for the system; (2) specifies each FPISC member's responsibilities for establishing and maintaining the system; and (3) identifies resources required for developing and maintaining the system.

- FPISC Office of the Executive Director should collaborate with FPISC member agencies to determine how they will communicate with and involve tribes in maintaining accurate tribal data in the central information system.