

169 FERC ¶ 61,036
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

18 CFR Part 2

[Docket No. PL20-1-000; Order No. 863]

Revision To Policy Statement On Consultation With
Indian Tribes In Commission Proceedings

(Issued October 17, 2019)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Policy, amendment.

SUMMARY: The Commission is revising its Policy Statement on Consultation with Indian Tribes in Commission Proceedings by adding a specific reference to treaty rights; a statement that the Commission addresses tribal input in its NEPA documents and orders, and consultation with Alaska Native Corporations.

EFFECTIVE DATE: This policy is effective [**insert 30 days after date of publication in the Federal Register**].

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SUPPLEMENTARY INFORMATION

169 FERC ¶ 61,036
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Richard Glick and Bernard L. McNamee.

Revision To Policy Statement On Consultation With Indian Tribes In Commission Proceedings Docket No. PL20-1-000

REVISED POLICY STATEMENT

ORDER NO. 863

(Issued October 17, 2019)

1. By this order, the Commission is amending its Policy Statement on Consultation with Indian Tribes in Commission Proceedings (policy statement)¹ by adding a specific reference to treaty rights and noting that the Commission addresses tribal input in its National Environmental Policy Act (NEPA) documents and orders. In addition, the Commission is adding consultation with Alaska Native Corporations to the policy statement consistent with Congress' requirement that all Federal agencies consult with Alaska Native corporations on the same basis as Indian tribes under Executive Order No. 13175.

¹ *Policy Statement on Consultation with Indian Tribes in Commission Proceedings*, Order No. 635, 104 FERC ¶ 61,108 (2003). The policy statement is codified at 18 CFR 2.1c (2019).

Background and Discussion

2. In 2003, the Commission issued its Policy Statement on Consultation with Indian Tribes in Commission Proceedings. The 2003 policy statement recognizes the unique relationship between the Federal government and Indian tribes as defined by treaties, statutes, and judicial decisions and acknowledges the Commission's trust responsibilities. It states that the Commission will endeavor to work with the tribes on a government-to-government basis and will seek to address the effects of proposed projects on tribal rights and resources through consultation pursuant to trust responsibilities, the statutes governing the Commission's authority,² and in the Commission's environmental and decisional documents. Noting that the Commission functions as a neutral, quasi-judicial body and as such is bound by the Administrative Procedure Act and Commission rules regarding off-the-record communications,³ it states that the Commission will assure tribal issues and interests are considered in making decisions. For the hydroelectric program, it also states that the Commission will notify tribes before or at the time the licensee files its

² The policy statement notes that the statutes governing the Commission's authority primarily consist of the Federal Power Act, the Natural Gas Act, the Public Utilities Regulatory Policies Act of 1978, the Interstate Commerce Act, the Outer Continental Shelf Lands Act, National Environmental Policy Act, and Section 106 of the National Historic Preservation Act.

³ 18 CFR 385.2201 (2019).

notice of intent, and will consider comprehensive plans prepared by tribes or intertribal organizations.

3. In March 2017, the U.S. Government Accountability Office (GAO) commenced an engagement on tribal consultation practices, in which it sought to review tribal consultation practices of 21 federal agencies involved in permitting, review, or funding of infrastructure projects.⁴ The engagement was focused on federal agencies' compliance with government to government consultation and coordination responsibilities under Executive Order 13175; tribal consultation practices used by federal agencies during permitting and developmental processes; definition and consistent application of "meaningful tribal consultations" by federal agencies; opportunities for tribal input into contiguous, off-reservation developments that may result in pollution or other impacts on their land; and appeal options, if any, available to tribes.

⁴ The 21 federal agencies (which included 3 independent regulatory agencies, 3 departments, and 15 component agencies) were: the Department of Agriculture's Forest Service and Rural Development; Department of Commerce's National Oceanic and Atmospheric Administration (NMFS); Department of Defense's Army Corps of Engineers (Corps); Department of Energy (DOE); Environmental Protection Agency (EPA); Federal Communications Commission (FCC); Federal Energy Regulatory Commission (FERC or Commission); Department of Homeland Security's Coast Guard (Coast Guard) and Federal Emergency Management Agency (FEMA); Department of Housing and Urban Development (HUD); Department of the Interior's Bureau of Land Management (BLM), Bureau of Ocean Energy Management (BOEM), Bureau of Reclamation (Reclamation), Fish and Wildlife Service (FWS), and National Park Service (NPS); Nuclear Regulatory Commission (NRC); and Department of Transportation's Federal Aviation Administration (FAA), Federal Highway Administration (FHA), Federal Railroad Administration (FRA), and Federal Transit Administration (FTA).

4. In March 2019, GAO issued its final report entitled, “Tribal Consultation: Additional Federal Actions Needed for Infrastructure Projects (GAO-19-22).”⁵ GAO directed one of the 22 recommendations made in the report to the Commission.⁶ Specifically, the GAO recommendation stated that “[t]he Federal Energy Regulatory Commission should document in its tribal consultation policy how agency officials are to communicate with tribes about how their input from consultation was considered in agency decisions on infrastructure projects.”⁷

A. Communication

5. As noted above, the Commission functions as a neutral, quasi-judicial body and as such is bound by the Administrative Procedure Act and Commission rules regarding off-the-record communications. In order to comply with the requirements that decisions be on the record, it has been the Commission’s practice to address tribal input and concerns in its environmental documents and decisions. However, the Commission’s policy statement does not expressly include language to that effect. Therefore, the Commission is adding language stating that the Commission will set forth in its environmental

⁵ *Tribal Consultation: Additional Federal Actions Needed for Infrastructure Projects* (GAO-19-22), March 2019 (GAO Report).

⁶ The report made a similar recommendation regarding 13 of the other 21 agencies: the Department of Agriculture’s Rural Development; Corps; DOE; FCC; DHS; FEMA; HUD; BOEM, Reclamation, FWS and NPS; NRC; and DOT.

⁷ GAO Report at 58.

documents and orders how tribe's input from consultation was considered in agency decisions on infrastructure projects.

B. Treaty Rights

6. The Commission, in its final rule on Hydroelectric Licensing under the Federal Power Act issued contemporaneously with the policy statement, stated that, "tribal consultation pursuant to our trust responsibility encompasses more than implementation of [National Historic Preservation Act] Section 106. It includes every issue of concern to an Indian tribe related to a treaty, statute, or executive order where the Commission can, through the exercise of its authorities under the FPA, fulfill its trust responsibility."⁸ The policy statement states that the "Commission, in keeping with its trust responsibility, will assure that tribal concerns and interests are considered whenever the Commission's actions or decisions have the potential to adversely affect Indian tribes or Indian trust resources."⁹

7. While the Commission already considers the effect of actions on treaty rights in its NEPA and decision documents,¹⁰ the Commission is taking this opportunity to clarify that point by adding specific mention of treaty rights in the policy statement.

⁸ *Hydroelectric Licensing under the Federal Power Act, Order No. 2002*, 104 FERC ¶ 61,109, at P 279 (2003), *order on reh'g*, 106 FERC ¶ 61,037 (2004).

⁹ 18 CFR 2.1c(e).

¹⁰ See e.g. *Public Utility District No. 1 of Snohomish County, Washington*, 146 FERC ¶ 61,197, *reh'g denied*, 149 FERC ¶ 61,206 (2014); *PacifiCorp*, 133 FERC

C. Consultation with Alaska Native Corporations

8. The policy statement addresses consultation with federally-recognized Indian tribes (including Alaska Native tribes, villages, and communities) that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to the Federally Recognized Indian Tribe List Act of 1994.¹¹ It does not, however, address consultation with Corporations established pursuant to the Alaska Native Claims Settlement Act (ANCSA Corporations).¹²

9. After the Commission issued its policy statement, Congress directed that "[t]he Director of the Office of Management and Budget [and all Federal agencies] shall hereafter consult with Alaska Native corporations on the same basis as Indian tribes under Executive Order No. 13175."¹³

10. To be consistent with Congress' directive, the Commission is updating its policy to include ANCSA Corporations. The Commission recognizes and respects the distinct,

¶ 61,232 (2010), *order on reh'g*, 135 FERC ¶ 61,064 (2011); and *Bradwood Landing LLC*, 124 FERC ¶ 61,257 (2008), *order on reh'g*, 129 FERC ¶ 61,245 (2009).

¹¹ 25 U.S.C. 479a.

¹² 43 U.S.C. 1601, et seq. An ANCSA Corporation is defined as any Alaska Native village corporation, urban corporation, or regional corporation as defined in, or established pursuant to, the Alaska Native Claims Settlement Act. 43 U.S.C. 1602.

¹³ Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, Div. II. Sec. 161, 118 Stat. 3, 452 (2004) as amended by Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, Div. H., Title V. Sec. 518, 118 Stat. 2809, 3267 (2004).

unique, and individual cultural traditions and values of Alaska Native peoples and the statutory relationship between ANCSA Corporations and the Federal Government.

11. The Commission distinguishes the Federal relationship to ANCSA Corporations from the government-to-government relationship between the Federal Government and federally recognized Indian Tribes in Alaska and elsewhere, and the update to the policy will not diminish in any way that relationship and the consultation obligations towards federally recognized Indian Tribes.

Information Collection Statement

12. The Paperwork Reduction Act and implementing regulations of the Office of Management and Budget (OMB) require OMB to approve certain information collection requirements imposed by agency rule.¹⁴ However, this Revised Policy Statement does not contain or modify any information collection requirements, and is therefore not subject to OMB approval.

Environmental Analysis

13. The Commission is required to prepare an Environmental Assessment or an Environmental Impact Statement for any action that may have a significant adverse effect on the human environment.¹⁵ Part 380 of the Commission's regulations lists exemptions

¹⁴ 5 CFR 1320.12 (2019).

¹⁵ *Regulations Implementing the National Environmental Policy Act of 1969*, Order No. 486, 52 FR 47897 (Dec. 17, 1987), FERC Stats. & Regs. ¶ 30,783 (1987).) (cross-referenced at 41 FERC ¶ 61,284).

to the requirement to draft an Environmental Assessment or Environmental Impact Statement, and this revised policy statement qualifies under the exemption for procedural, ministerial or internal administrative actions.¹⁶

Regulatory Flexibility Act

14. The Regulatory Flexibility Act of 1980 (RFA)¹⁷ generally requires a description and analysis of final rules that will have significant economic impact on a substantial number of small entities. Rules that are exempt from the notice and comment requirements of section 553(b) of the Administrative Procedure Act are exempt from the RFA requirements. This revised policy statement concerns matters of internal agency procedure and, therefore, an analysis under the RFA is not required.

Document Availability

15. In addition to publishing the full text of this document in the *Federal Register*, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through the Commission's Home Page (<http://www.ferc.gov>) and in the Commission's Public Reference Room during normal business hours (8:30 a.m. to 5:00 p.m. Eastern time) at 888 First Street, NE, Room 2A, Washington, DC 20426.

¹⁶ 18 CFR 380.4(a)(1) (2019).

¹⁷ 5 U.S.C. 601-612 (2012).

16. From the Commission's Home Page on the Internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

17. User assistance is available for eLibrary and the Commission's website during normal business hours from FERC Online Support at (202) 502-6652 (toll free at 1-866-208-3676) or email at ferconlinesupport@ferc.gov, or the Public Reference Room at (202) 502-8371, TTY (202) 502-8659. E-mail the Public Reference Room at public.referenceroom@ferc.gov.

Effective Date and Congressional Notification

18. This revised policy statement is effective **[insert date 30 days after publication in the FEDERAL REGISTER]** without a period for public comment. Under 5 U.S.C. 533(b), notice and comment procedures are unnecessary where a rulemaking concerns only agency procedure or practice, or where the agency finds that notice and comment is unnecessary. This revised policy statement concerns only matters of agency procedure, and will not significantly affect regulated entities or the general public. .

19. The Revised Policy Statement will be provided to the Congress and Government Accountability Office.

List of subjects

18 CFR Part 2

General policy and interpretations

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

In consideration of the foregoing, the Commission is amending Part 2, Chapter I, Title 18, *Code of Federal Regulations*, as follows.

PART 2 – GENERAL POLICY AND INTERPRETATIONS

The authority citation for Part 2 continues to read as follows:

Authority: 5 U.S.C. 601; 15 U.S.C. 717-717z, 3301-3432; 16 U.S.C. 792-828c, 2601-2645; 42 U.S.C. 4321-4370h, 7101-7352.

§ 2.1c [Amended]

In § 2.1c(a), add “and Alaska Native Claims Settlement Act (ANCSA) Corporations” after “Indian tribes” in the first sentence.

In § 2.1c(c), add “and with ANCSA Corporations in a similar manner,” after “government-to-government basis,” in the first sentence.

In § 2.1c(e), remove “or Indian trust resources.” and add, in its place “Indian trust resources, or treaty rights. The Commission will use the agency’s environmental and decisional documents to communicate how tribal input has been considered.”.