

NATIONAL HISTORIC PRESERVATION
ACT AND THE SECTION 106 PROCESS:
ISSUES IN NRC LICENSING

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INTRODUCTION

- **The National Historic Preservation Act (NHPA) Has a Profound Effect on Federal Agency Licensing;**
- **The Nuclear Regulatory Commission's Endeavor to Review and/or Approve Proposed Licensing Actions Are No Different;**
- **It Has Been Unclear to Industry Why The Section 106 Process is So Inefficient But An Understanding of the Statute and Its Implementing Regulations & Requirements Serves As Useful Background**

NHPA STATUTORY LANGUAGE

- NHPA Section One:
- Purpose:
 - The Congress finds and declares that:
 - *The historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people;*
 - *The increased knowledge of our historic resources, the establishment of better means of identifying and administering them, and the encouragement of their preservation will improve the planning and execution of Federal and federally assisted projects and will assist economic growth and development*

NHPA STATUTORY LANGUAGE

- NHPA Section One:

- “It shall be the policy of the Federal Government, in cooperation with other nations and in partnership with the States, local governments, Indian tribes, and private organizations and individuals to:
 - “Use measures, including financial and technical assistance, to foster *conditions under which our modern society and our prehistoric and historic resources can exist in productive harmony and fulfill the social, economic, and other requirements of present and future generations.*”

NHPA REGULATIONS: 36 CFR PART 800

- **Purpose:**
- - Section 106 of the National Historic Preservation Act requires Federal agencies to take into account *the effects of their undertakings* on historic properties and afford the Council a reasonable opportunity to comment on such undertakings;
 - The procedures in this part define how Federal agencies meet these statutory responsibilities;
 - *The Section 106 process seeks to accommodate historic preservation concerns with the needs of Federal undertakings* through consultation among the agency official and other parties with an interest in the effects of the undertaking on historic properties, commencing at the early stages of project planning.

NHPA REGULATIONS: 36 CFR PART 800

- The goal of consultation is to identify historic properties potentially affected by the undertaking, assess its effects and seek ways to *avoid, minimize or mitigate any adverse effects* on historic properties;
- Timing: the agency official must complete the Section 106 process “prior to the approval of the expenditure of any Federal funds on the undertaking *or prior to the issuance of any license*”

NHPA REGULATIONS: 36 CFR PART

800: WHAT IS THE PROBLEM?

- With all this said, what is the scope and focus of these statutory and regulatory provisions?
 - The Section 106 process is not intended to *unnecessarily* impede or halt “undertakings” but rather to assure that appropriate **procedural steps** are followed:
 - To make a “reasonable” effort to identify eligible or potentially historic/cultural properties for inclusion in the National Register;
 - To assess any potentially “adverse” effects/impacts on such historic/cultural properties if eligible (i.e., “area of potential effect” (APE));
 - If no such properties are identified, proceed with conditions;
 - If “adverse” effects/impacts are identified, “to minimize harm to the maximum extent possible

NRC AND THE SECTION 106 PROCESS

RECONCILED?

- **NRC, as the licensing entity under the Atomic Energy Act (AEA), is the “lead” agency for uranium recovery license applications in non-Agreement States;**
- **NRC fulfills its NHPA responsibilities to assess a proposed licensing action or “undertaking” through its environmental review regulations at 10 CFR Part 51;**
- **However, a lack of experience in this process on NRC’s part has manifested itself in the following manner:**
 - Lack of clear understanding and decisiveness in the Section 106 process at each step, especially in the identification of historic properties stage;
 - Confusion as to whether a recent Tribal meeting was a “government-to-government meeting, a Section 106 consultation/working meeting or a planning meeting;
 - Leading to consistent delays in the licensing process

NRC AND THE SECTION 106 PROCESS

RECONCILED?

- **As the “lead” agency for NHPA matters for AEA licensing actions/undertakings, NRC must set forth:**
 - **A coherent process within the context of NRC’s jurisdictional authority under the AEA:**
 - Most Federal and State agencies have little understanding of NRC’s licensing process, much less the potentially affected Tribes;
 - Thus, NRC must clearly explain its processes and where they differ from other federal agencies to all consulting parties, particularly Tribes with little or no exposure thereto;
 - NRC also must endeavor to seek expert input and advice from agencies with extensive experience in the Section 106 process and, to the best of their ability, utilize lessons learned and tools from such agencies to improve their own process

NRC AND THE SECTION 106 PROCESS

RECONCILED?

- **Tribal authorities are not burdened merely with proposed NRC licensing actions/undertakings:**
 - Tribal organizations are overburdened with consultation efforts (e.g., 1,000-1,500 for a single Tribe)
- **Thus, NRC must construct a simple, critical path with expectations and timeframes so that:**
 - License applicants and licensees know what is expected of them and can communicate to their personnel, experts, and shareholders reasonable timelines for licensing;
 - Tribes can effectively manage the numerous consultation efforts they currently deal with every year

CHALLENGES FOR NRC IN THE SECTION 106 PROCESS

- NRC's licensing process is less than ideal regarding a smooth functioning Section 106 effort:
 - NRC cannot act until it receives a license or license amendment application; Tribes have talked about involvement in projects at the "exploration" stage which is not possible as NRC has no jurisdiction then;
 - NRC wants a Class III archaeological study with the application and tribes are reluctant to work directly with applicants (i.e., not government-to-government);
 - So NRC tribal consultation process starts late --- a conundrum that seems to have few readily apparent answers!;
 - Completing EAs and EISs/SEISs with a confusing Section 106 process can slow the license process to a crawl or outright stop it even if SER is complete; **NB: No hearing challenge can go forward until there is a FEIS**
 - One thought that has surfaced to avoid bottlenecks that cause unacceptable delays in completing NRC's environmental review process (draft and final EAs and EIS/SEISs) is to develop some standard (at least as a starting point) Programmatic Agreement (PA) format(s).

CHALLENGES FOR NRC IN THE SECTION 106 PROCESS: SOLUTIONS?

- **Some logistical mechanisms exist in the 36 CFR Part 800 regulations that can assist in the Section 106 process:**
 - **Memoranda of Understanding (MOU):**
 - Possible where consulting parties are relatively fewer in number or when mandated by an existing PA or other authority;
 - Where the proposed license boundary is already extensively affected by past development activities
 - **Programmatic Agreement (PA):**
 - Based on “phased” activities, such as ISR projects as described in the HRI litigation
 - **De-Coupling from the Part 51 process:**
 - Necessary when the Section 106 process becomes unduly delayed

TRADITIONAL CULTURAL PROPERTIES

- NHPA Section 101(d):
 - (A) Traditional religious and cultural properties may be eligible for listing in the National Register;
 - (B) Properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization may be determined to be eligible for inclusion on the National Register;
 - (C) In carrying out its responsibilities under section 106 of this Act [NHPA], a Federal agency shall consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to properties described in subparagraph (A)

TRADITIONAL CULTURAL PROPERTIES

- Only properties that are listed or eligible require the full Section 106 procedural gamut;
- Lead agency must make a “reasonable and good faith” effort to identify relevant tribes;
- So-called TCPs can be facilities, natural locations/areas/features considered sacred or culturally significant;
- So-called TCPs currently seem to be the major and most difficult Section 106 issue in the NRC licensing context

KEY QUESTIONS TO BE ADDRESSED BY **EXPERTS**

- **Questions to Be Addressed:**
 - **What is the True Legal Definition of “Reasonable and Good Faith Effort?”;**
 - **If a Tribe Shows No Interest in a Licensing Action, What Legal Standard Requires Them to Be “Kept in the Loop?”;**
 - **How Does the Agency Determine What Tribal Request(s) is “Reasonable?”;**
 - **How Does the Agency Define a TCP Without a Federal Definition?;**
 - **Why Can the Agency Not Issue a License With Conditions If the Section 106 Process is Not Completed at a Portion of a Proposed Project Site?;**
 - **What About Increased Coordination in the Process Such as MOUs Between Reviewing Agencies?**