

Notes for ACHP slide presentation to NRC, NEI, and industry representatives (9/11/12)

- Slide 1

NHPA was enacted by Congress in 1966 as the first comprehensive preservation legislation at the federal level focused on preserving the irreplaceable historical and cultural foundations of the nation. It was developed in response to public concerns about the increasingly frequent destruction of or nation's historical heritage during the development boom that followed World War II. The NHPA does not mandate preservation, but incorporates a process for addressing the needs of a growing society without sacrificing the unique and irreplaceable identities of our communities.

1966: NHPA passed

1979: first iteration of the regulations issued

1986: regulations revised

1999: regulations revised: highlights importance of consulting with tribes and NHOs and the need to consider properties of religious and cultural significance to tribes; recognizes the role of applicants; includes reference to Section 110k of the NHPA; ACHP no longer participating in most reviews

2004: the most recent revision; ACHP can no longer compel an agency to revise a finding of No Historic Properties Affected or No Adverse Effect

- Slide 2

Federal agencies are the entities that must comply with Section 106 of NHPA. They do so by following the four-step process set forth in the Section 106 regulations, which we will discuss in a moment.

- Slide 3

ACHP is not a regulatory agency, and we do not have regulatory authority. We do not issue permits or other authorizations. However, we do over see the Section 106 process.

The Advisory Council on Historic Preservation (ACHP) established in 1966 by the National Historic Preservation Act (NHPA), is an independent federal agency that promotes the preservation, enhancement, and productive use of our nation's historic resources, and advises the President and Congress on national historic preservation policy.

- Slide 4

No notes.

- Slide 5

The ACHP developed and interprets the Section 106 regulations, "Protection of Historic Properties" (36 CFR 800). We provide guidance and training in the Section 106 process to federal agencies, SHPOs/THPOs, Tribes, Applicants for federal assistance, permit, or authorization, and other stakeholders

Informed by the Criteria for Council Involvement in Individual Section 106 Cases, Appendix A of our regulations, the ACHP enters formally into Section 106 consultations conducted by federal agencies in order to facilitate the Section 106 consultation when there are:

- (1) important procedural issues,

- (2) policy issues,
- (3) significant historic properties are affected, or
- (4) significant tribal issues and concerns

We provide comment on federal agency compliance with Section 106 for individual cases, programs, and in general.

- Slide 6

No notes.

- Slide 7

Federal agencies comply with Section 106 by following the four-step process set forth in the Section 106 regulations. The four steps include:

- (1) Establish undertaking and initiate the Section 106 process
- (2) Identify historic properties
- (3) Assess effects to historic properties
- (4) Consult to resolve adverse effects

- Slide 8

Section 106 and the Section 106 regulations are procedural. They don't require specific substantive outcomes. Rather, they set forth a process that must be followed. The heart of that process is consultation with identified stakeholders who are invited into the Section 106 review as consulting parties.

Consultation is defined as the process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the Section 106 process.

The regulations emphasize open, good faith consultation and the development of binding agreements.

The regulations set forth a process designed to integrate consideration of historic preservation concerns with the planning and execution of federal undertakings, and to resolve any conflicts through consultation.

- Slide 9

Step One of the Four Step Process: Initiate the Process

This step requires the federal agency to:

- Determine whether the project, activity, or program being considered is an undertaking subject to Section 106 review. Essentially that means a project sponsored by a federal agency or a project that requires federal assistance or authorization. The project also has to have the potential to affect historic properties if they are present.
- Identify appropriate State Historic Preservation Officers (SHPOs) or Tribal Historic Preservation Officers (THPOs) and other appropriate stakeholders and invite them into consultation as consulting parties.

- Slide 10

Step 2 of the Four-Step Process: Identify Historic Properties

- Determine and document the Area of Potential Effects (APE) for the undertaking: the geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist. Agency does this in consultation with SHPO/THPO as appropriate.
- Seek information as appropriate from consulting parties and other individuals and organizations about the presence of or potential for historic properties in the APE
- Gather information from Tribes and NHOs who may attach religious and cultural significance to properties that may be eligible for inclusion in the National Register
- Develop a scope for the identification effort in consultation with SHPO/THPO as appropriate and tribes who may attach religious and cultural significance to properties in the APE
- Conduct a reasonable and good faith effort to identify historic properties in the APE
  - Reasonable: logically defined to identify without being excessive or deficient
  - Good Faith: not compromised by a disregard for historic preservation responsibilities or by dishonesty (manipulating or ignoring evidence); supported by documentation; balances level of effort and resources with project benefits, costs, schedules, local issues, and other public interest considerations
- Determine whether historic properties may be affected by the undertaking. If not, Section 106 concludes. Otherwise proceed to Step 3.
- If there are disputes about determinations of eligibility or effect, they are referred to the ACHP for comment. Disputes regarding eligibility may also be referred to the Keeper of the National Register.

- Slide 11

Historic Properties are defined as Historic property means any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register of Historic Places maintained by the Secretary of the Interior. This term includes artifacts, records, and remains that are related to and located within such properties. The term includes properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization and that meet the National Register criteria.

There are four National Register Criteria:

- A: associated with specific events or broad patterns that have made a significant contribution to the development of a community, a state, or the nation
- B: association with individuals significant in our past
- C: properties that embody distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values
- D: properties that have yielded or are likely to yield important information about history or prehistory.

In order to be eligible, properties also have to have integrity of location, setting, design, materials, workmanship, association, and feeling.

There is no difference between properties that are listed on the NRHP and those that are eligible for listing on the NRHP. They are treated the same under Section 106.

- Slide 12
  - Range of historic property types affected
  - Buildings and structures
  - Historic districts
  - Historic/cultural landscapes
  - Sites (ceremonial sites, battlefields, trails, cemeteries, gardens, etc.)
  - Archaeological sites
  - Archaeological districts
  - Traditional cultural properties of assorted types
  - Indigenous cultural landscapes
  - Other properties of religious and cultural significance to federally recognized Indian tribes and Native Hawaiian Organizations
  - These can be overlapping categories

- Slide 13

#### Step 3 of the Four-Step Process: Assessing Adverse Effects

The undertaking alters the characteristics that make a property eligible for inclusion on the National Register.

An adverse effect is found when an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association. Consideration shall be given to all qualifying characteristics of a historic property, including those that may have been identified subsequent to the original evaluation of the property's eligibility for the National Register.

Adverse effects may include reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance or be cumulative.

If an agency determines there will be an adverse effect, it must notify the ACHP of the adverse effect. The ACHP has 15 days from receipt of appropriate documentation to inform the agency whether or not it will formally enter the Section 106 review for the undertaking, based on the Criteria for Council Involvement in Reviewing Individual Section 106 Cases, which is Appendix A of our regulations.

If the Agency determines there will be no adverse effect to Historic Properties from the undertaking and there are no objections, the Section 106 process ends.

Disputes regarding determinations of adverse effect are referred to the ACHP.

- Slide 14

#### Step Four of the Four-Step Process: consult to develop steps to resolve adverse effects.

Resolution is defined as avoid, minimize, or mitigate the adverse effects of the undertaking. If the federal agency decides upon steps to resolve the adverse effects, developed in consultation with consulting parties, those steps are set forth in a Memorandum of Agreement (MOA) or Programmatic Agreement (PA).

Once the MOA or PA is executed, signed by the Signatories required by the regulations including the Federal agency, SHPO and/or THPO as appropriate, and ACHP if formally entered into the consultation, the Section 106 process is completed and the Agency may formally make a decision about the undertaking, approve funding, issue permits or authorization, begin construction.

In order to remain in compliance with Section 106, the federal agency must insure that the steps set forth in the MOA or PA are carried out.

If the Federal Agency, SHPO/THPO as appropriate, or ACHP determine that consultation to resolve adverse effects is not working, any of these may terminate consultation. The ACHP then prepares comments which the head of the federal agency must take into account in reaching a final decision on the undertaking. The head of the agency must document how the ACHP's comments were taken into account.

- Slide 15

Based on a memorandum issued by the ACHP in 2000 and subsequent interpretation of the applicability of that memorandum to all federal agencies, it has been the ACHP's position that, pursuant to a delegation under 36 CFR 800.2(c)(4), applicants for federal assistance, permit, licenses, or approvals, and their authorized representatives may consult with the State Historic Preservation Officers (SHPOs) and Tribal Historic Preservation Officers (THPOs) to:

- initiate the Section 106 review process;
- identify and evaluate historic properties;
- and assess effects.

The federal agency, however, remains responsible for participating in the consultation process when:

- it is determined that the Criteria of Adverse Effect apply to an undertaking;
- there is a disagreement between the applicant or their authorized representatives and the SHPO/THPO regarding identification and evaluation, and/or assessment of effects;
- there is an objection from consulting parties or the public regarding findings and determinations, the implementation of agreed upon provisions, or their involvement in a Section 106 review;
- or, there is the potential for a foreclosure situation or anticipatory demolition as specified in Section 110(k) of the National Historic Preservation Act.

Under the Section 106 regulations (Section 36 CFR 800.2(a)), federal agencies are responsible for all findings and determinations and the adequacy of documents and studies prepared by non-federal parties including consultants working for the agency or for applicants for federal authorization or assistance.

- Slide 16:

Agencies can coordinate the Section 106 review with other environmental reviews, including National Environmental Policy Act (NEPA) compliance.

Most agencies carry out the Section 106 review more or less in parallel with their NEPA process. However, the Section 106 regulations (at 36 CFR 800.8(c)) allow an agency to integrate the Section 106 review within the NEPA review. Section 36 CFR 800.8(c) provides a specific process requiring prior written notification for using the NEPA process/documentation for Section 106 purposes.

Timing is important: the Federal Agency must conclude the Section 106 process before issuing a NEPA decision document.

- Slide 17

No notes

- Slide 18

While undertakings may vary, the challenges for the management of historic properties and completion of the Section 106 process are largely consistent and include: project timing, consideration of alternatives for project location and implementation, tribal consultation and consultation with other interested parties, and assessing impacts on natural and cultural landscapes.

- Slide 19

Issues related to project timing and coordination of Section 106 review with the planning process

- Often projects are sponsored by private entities with early planning and analysis carried out before active federal involvement
- There are often problems in compiling sufficient information about potential for effects to historic properties early enough to inform site selection to avoid potential effects to significant historic properties
- After federal involvement is underway, the assignment to applicants / project proponents of responsibilities for initiation of the Section 106 process and compiling information about the presence of historic properties can cause problems for SHPOs/THPOs, tribes and NHOs, and other consulting parties and stakeholders.

- Slide 20

Federal agencies have an obligation to engage in government-to-government consultation with federally recognized tribes, but often do not energetically coordinate with tribes to achieve a mutually agreed upon definition of gov-to-gov consultation. This can lead to roadblocks in eliciting the concerns of tribes about properties of religious and cultural significance that might be affected by the undertaking.

Tribes often are not content to consult directly with project proponents and often do not wish to share with proponents information about historic properties of religious and cultural significance that they wish to be held in confidence.

There is no specific guidance on what constitutes a reasonable and good faith effort to identify properties of religious and cultural significance to tribes.

- Slide 21

Based on our experience with a range of Section 106 cases related to energy projects and the problems encountered by federal agencies, applicants, tribes, and other consulting parties and stakeholders, we have a general set of recommendations to improve the efficiency and effectiveness of the Section 106 review process for all stakeholders across energy project types.

Central point of many of the recommendations is: consult EARLY, EARLY, EARLY.

- Slides 22 to 27

No notes.