

THE NHPA

NATIONAL HISTORIC PRESERVATION ACT:
Overcoming the Obstacle of Developing Renewable Energy Projects



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NATIONAL HISTORIC PRESERVATION ACT: *Overcoming the Obstacle of Developing Renewable Energy Projects*

by L. Poe Leggette, Dawn Martin, Jennifer Cadena

I. INTRODUCTION

As a developer or supporter of the development of renewable energy, you have a special interest in the National Historic Preservation Act (NHPA). This is “special” not because renewable developers have any greater fascination with the artifacts of antiquity than anybody else, but because your interest arises only in special circumstances.

The two chief circumstances are, first, that you need something from the federal government and, second, that your development is going to affect something of historical significance. Now, you might be thinking, “Wait a minute. Our federal government seems to be growing like a teenager, and things of historical significance could be anywhere. If you’re using the word ‘special’ to mean ‘limited,’ you might be sadly mistaken.”

If you were thinking that, you would be right. Sadly right. You will be encountering the NHPA far more often than not. Your encounters will be close, and often of the third kind, by which I mean a Class III archaeological survey, a point I’ll discuss later.

In a nutshell, from a developer’s perspective, the NHPA is really nothing more than the consultation process under section 106 of that Act. That process comes into play if the developer has a project that needs any one of three kinds of things from the federal government:

- a. federal funds,
- b. federal financial assistance, or
- c. federal approval.

Those three things are called by the statute “undertakings,” and the federal agency involved is properly thought of as your project’s undertaker, though that term is not officially sanctioned and is rarely taken by federal employees in good humor.

When your project comes to the attention of the federal agency, your project becomes the agency’s undertaking. The agency then asks itself a series of short questions, each usually having a laboriously long answer.

¹ This article is an informal summary of oral presentations given by Mr. Leggette and Ms. Martin at a June 25, 2010 introductory-level workshop sponsored by EUCI.

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1. Is the project of a type that might cause effects on historic properties? (16 C.F.R. § 800.3(a)).
2. What is the area around the project in which these effects might occur? (16 C.F.R. § 800.4(a)(1)).
3. Are there historic properties within that area? (16 C.F.R. § 800.4(b)).
4. Will the properties be harmed by the project's activities? (16 C.F.R. § 800.5(a)).
5. Can the harm be avoided or reduced? (16 C.F.R. § 800.6(a)).
6. Should the agency condition its funding, its assistance, or its approval on the developer to avoid or to minimize the harms identified?

These six questions are the core of the section 106 process, presented in a way that you could fit into a roller bag to take into the cabin of an airplane. In candor, I must confess that these six questions do not appear in this way in the regulations. As I have framed the questions, it would be difficult to turn the phrases into acronyms, and acronyms are the soul food of bureaucrats.

So, we will now unpack our carry-on bag item by item. More specifically, we will look at the following issues:

1. What is an undertaking?
2. What are "historic properties"?
3. How does an agency decide if your project is "of a type" that might affect historic properties?
4. How does an agency determine whether your project will harm historical properties?
5. How does the agency conduct an individual review?
 - ✓ Planning to consult
 - ✓ Determining the area of potential effects (APE)
 - ✓ Identifying eligible historic properties within the APE
 - ✓ Using phased identification
 - ✓ Determining the eligibility of properties not already on the National Register
 - ✓ Evaluating the effects of the project
6. Resolving fights over how much to mitigate the effects.

II. UNDERSTANDING AN "UNDERTAKING"

The regulations tell the federal agency to determine first whether the proposed Federal action is an undertaking as defined in § 800.16(y). The text of that rule is:

Undertaking means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; and those requiring a Federal permit, license or approval.

For those of you who like your law on the simple side, let me restate this legal test. If you have to ask whether your project is an undertaking, it's most likely an undertaking. For those of you who like your law more finely nuanced, let me illustrate.

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1. The Bureau of Land Management wants to offer a parcel of federal land for oil and gas leasing. Undertaking? Sure. Why? Not as obvious as you might think. Is a federal oil and gas lease a Federal permit or approval? Well, yes. But it is BLM proposing to offer the lease, and BLM doesn't need a permit or approval to offer the lease. So in this case the decision to offer the lease is an activity funded under the direct jurisdiction of a Federal agency.
 2. Cape Wind Associates, LLC, wants to place monopiles into the seabed of Nantucket Sound, an area where the federal government has jurisdiction and ownership. At the time it first proposed to do this, the only apparent approval needed was a permit from the Army Corps of Engineers to create an obstruction to navigation. Undertaking? Yes. Why? The project required a federal permit.
 3. Same Cape Wind scenario, but a few years later. Now Cape Wind needs a commercial lease and an easement from the Minerals Management Service. Still an undertaking? Sure. Why? The easement is a required permit, like the Corps permit. The lease? Well, it's either like the federal oil and gas lease described above or, because Cape Wind in some sense applied for it to start the process, it's a federal approval. Either way, it's an undertaking.
 4. A developer wants to construct a wind generation facility on a ridge line in a national forest. The developer needs to obtain a Forest Service special use permit. Undertaking? Sure. It's a federal permit.

Now, the first four examples all concerned activities on lands owned by the federal government. That common fact made the answers pretty easy. Let's move off federal lands.

5. A developer wants to build a wind facility on Pa and Ma Jorgensens' farm in western North Dakota. The tips of the turbine blades at their apex will be 420 feet off the ground. Assume that the only federal involvement here is through the Federal Aviation Administration's authority to regulate obstructions in navigable airspace. Is FAA's action an undertaking? The answer is maybe. FAA requires a developer to give notice of a potential obstruction. The rule of thumb is that if the structure exceeds 200 feet, you need to give notice. FAA then conducts a study which ultimately results in a finding of no obstruction, which has an 18-month lifespan. FAA's rules do not explicitly treat this method of regulation as a permit or approval, but the system essentially functions as a form of authorization. It is the aeronautical equivalent of the Army Corps of Engineers permit to obstruct navigation described in the Cape Wind example.
6. On July 16, 2009, Energy Secretary Steven Chu announced that 28 new wind energy projects would receive \$14 million in federal funds. Were the 28 decisions to award the money undertakings? Yes.
7. A developer wants to build a wind facility in the Albemarle Sound of North Carolina. An initial biological survey of the area discovers what is apparently a new species of marine mammal, tentatively named Leggette's generic miscellaneous marine mammal. Concerns are raised about the effects of the sound of piledriving the monopiles on the foraging and reproductive practices of the mammal, so the developer seeks incidental take permits from the National Marine Fisheries

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Service. Undertaking? Maybe; maybe not. The answer here has more to do with the nature of the incidental take permit than it does with the NHPA. A developer doesn't need an incidental take permit to construct the monopiles. He needs it to avoid liability for unauthorized "takings" of mammals under the Marine Mammal Protection Act. The answer to whether an incidental take permit triggers section 106 is fuzzy.

Now for a change of pace. Is there anything involving the federal government that isn't an undertaking? Yes.

8. Under the Public Utilities Regulatory Policies Act, the Federal Energy Regulatory Commission issued a certification that a facility delivering power to the Potomac Electric Power Company qualified as a small power production facility. FERC's issuance of that certification is not an undertaking for two reasons: (1) the certification did not authorize the facility to operate or to be constructed, and (2) once the facility met certain criteria, FERC was required by law to issue the certification. FERC had no discretion.²
9. Here's another example, perhaps a teaser because it seems to be an outlier. The State of New York wanted to establish a state park on state-owned land on the east bank of the Hudson River. One way to establish public access to the park was to build a road and bridge across some federal land managed by the Army Corps of Engineers. The State obtained a permit from the Corps and began construction. The Corps did not engage in any process under section 106. The Western Mohegan Tribe and Nation claimed that the park land (but not necessarily the federal land) had cultural significance to them. They sued.

The district Court looked at the definition of "undertaking" and said that it was not enough that the Corps had issued a permit for the bridge. The "project" was the state park. The NHPA would not come into play, the court said, unless the state park was at least partly funded with federal money. Since no federal funds were involved, NHPA did not apply.³

Think of the implications of this. A very large percentage, probably a majority, of consultations under the NHPA are conducted because a federal permit is involved. In the vast majority of those consultations, the project in question is privately funded. If *Western Mohegan Tribe* was correctly decided, the reach of the NHPA in law is far less than it has been in practice. A search has revealed no other cases following this reasoning.

III. WHAT ARE HISTORIC PROPERTIES?

The core purpose of the section 106 consultation process is to take into account the effects of agency undertakings on historic properties. As you might guess, "historic property" is a defined term. Here's the key part of the regulation:⁴

² *Sugarloaf Citizens Association v. FERC*, 959 F.2d 508 (4th Cir. 1992).

³ *Western Mohegan Tribe & Nation v. New York*, 100 F. Supp. 2d 122 (N.D.N.Y. 2000).

⁴ 16 C.F.R. § 800.16(l).

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.

The term “historic property” includes “artifacts, records, and remains that are related to and located within such properties.” The Jamestown settlement in Virginia is an historic property. The early 17th Century trash that the settlers threw down into the water well within the fort at Jamestown are themselves pieces of historic property. The skeletons of the settlers buried within the walls of the fort are historic properties. The National Park Service, which administers the National Register of Historic Places (National Register), states that there are more than 80,000 property sites in the National Register and over 1.8 million buildings, structures, and artifacts deemed part of those sites.

The term also “includes properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization and that meet the National Register criteria.”

Most troublesome for energy developers, however, is the issue of properties eligible for inclusion in the National Register. Under the regulations the term “eligible for inclusion” means not only properties formally determined to be eligible, but also properties not yet determined to be eligible, but which meet National Register criteria.

So let’s take a couple of minutes to discuss what the National Register is, what criteria govern eligibility, and what process governs eligibility determinations.

The National Register is a listing, a registry, of “districts, sites, buildings, structures and objects significant in American history, architecture, archeology, engineering and culture.”⁵ It is an “authoritative guide” for identifying “the Nation’s cultural resources and to indicate what properties should be considered for protection from destruction or impairment.”⁶ There are four basic criteria used to determine whether a property is eligible for inclusion.

- Criterion A is whether the property is associated with events that have made a significant contribution to the broad patterns of our history.
- Criterion B is whether the property is associated with the lives of persons significant in our past.
- Criterion C is whether the property embodies distinctive characteristics of a type, period, or method of construction, or possesses high artistic values. I consider this criterion to be focused on architectural distinction.
- Criterion D is whether the property has yielded, or may be likely to yield, information important in prehistory or history.⁷ Criterion D is far and away the most widely invoked.

5 16 C.F.R. § 60.1.

6 36 C.F.R. § 60.2.

7 16 C.F.R. § 60.4.

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The regulations of the National Park Service provide what is often called the formal process for eligibility determinations, in which State Historic Preservation Officers (SHPO) or Federal agencies can nominate properties for inclusion.⁸ Distinct from the National Register process is a process for designating National Historical Landmarks. Landmarks are included in the National Register, but are separately designated to emphasize that they are properties of exceptional value to the nation as a whole.⁹

Most of the time, however, a project developer will be contending with properties not nominated for inclusion, but informally agreed by a SHPO and an agency to be eligible for inclusion.¹⁰ The issue becomes interesting when an agency and a SHPO disagree over a property's eligibility.¹¹ Then the issue is resolved by the Keeper of the National Register.

Such a dispute arose in connection with Cape Wind's proposed development of the Nantucket Sound. The MMS and the Massachusetts SHPO disagreed over whether the whole of Nantucket Sound was eligible for the Register: MMS thought not, of course. On January 4, 2010, the Keeper found the Sound eligible.

“Nantucket Sound is eligible for listing in the National Register as a traditional cultural property and as an historic and archeological property associated with and that has yielded and has the potential to yield important information about the Native American exploration and settlement of Cape Cod and the Islands. . . . The Sound is eligible as an integral, contributing feature of a larger district, whose boundaries have not been precisely defined”¹²

8 16 C.F.R. §§ 60.5-60.15.

9 16 C.F.R. § 65.2(a).

10 16 C.F.R. §§ 800.4(a), 36.3.

11 16 C.F.R. §§ 63.2(c) – 63.3.

12 National Park Service letter to Christopher E. Horrell, MMS Federal Preservation Office (Jan. 4, 2010), available at <http://www.nps.gov/nr/publications/guidance/NantucketSoundDOE.pdf> (last accessed Sept. 27, 2010).

You will find the Keeper's full determination interesting. If you do take the time to read it, remember to ask yourself whether the Keeper's reasoning would not apply with equal force to the Chesapeake Bay, the Mississippi River, or even the Great Lakes as a whole.

IV. IS YOUR PROJECT "OF A TYPE" THAT MIGHT AFFECT HISTORIC PROPERTIES?

An agency is to look to see whether your project is of a "type" that does not have the potential to affect historic properties. What's the purpose of this? The idea here is that there are certain categories of activities which an agency can say cannot harm historic properties, even without knowing what the conditions are "on the ground," so to speak.

The benefit of falling within one of these categories is from § 800.3(a)(1):

1. If the undertaking is a type of activity that does not have the potential to cause effects on historic properties, assuming such historic properties were present, the agency official has no further obligations under section 106 or this part.
2. If the undertaking is of this "type," then, it is excluded from review. For those of you familiar with the National Environmental Policy Act (NEPA), this issue of "type" is very similar to the idea of categorical exclusions from NEPA review.

How can an agency tell whether an activity is of a "type" that is free from further process under the NHPA? There may be more than one right way, but there certainly are more than one wrong way. Let's discuss a wrong way.

This is taken from a case decided last year by the Interior Board of Land Appeals (Board), the chief administrative appeal body within the Department of the Interior that handles issues of energy development on federally owned land. The case is known by the name of the organization that brought the appeal: the Southern Utah Wilderness Alliance, the aptly acronymed "SUWA," a prodigious source of litigation in Utah.

There the Bureau of Land Management offered parcels of land for oil and gas leasing. BLM determined that the issuance of leases had no potential to affect historic properties, which in this instance were primarily Native American rock art along the Nine-Mile Canyon. The parcels were 2 to 10 miles away from the Canyon. BLM was unclear in its paperwork about why the lease sale had no potential to affect properties. It appeared to rely on the view that issuing a lease is a paper exercise, and that no activities disturbing the surface of the leases would occur until after the lessee had obtained additional federal approvals. Stated differently, BLM thought it fair to postpone section 106 consultation until that later time.

The Board thought differently. It held that the offering of the parcels alone was an undertaking under the statute, and that BLM had to demonstrate some basis for concluding that the sale would have no effect. So, in response, BLM had to conduct an initial information review about the potential for historic properties to be in the area, something in BLM parlance called a "Class I archeological review." BLM did

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not do any on the ground surveys on the parcels themselves. Instead, it had a consultant review existing files about discovered sites. BLM consulted with the Utah SHPO and with tribes that had some record of interest in the Nine-Mile Canyon area. The tribes failed to comment.

At the end of the process, BLM and the SHPO agreed that, based on the available information, the lease sale itself would not cause an adverse effect. The Board added, “that is not the same as a categorical ‘no potential to affect’ determination that excuses the agency from any further NHPA compliance in view of the type of activity involved.”¹³ In other words, an oil and gas lease sale is not a type of activity that categorically would have no effect on historic properties.

BLM’s course of action here delayed the oil and gas lessees’ access to their leases for approximately six years. Could BLM have handled this issue differently? Probably. For example, BLM would have had a better chance of winning if it had a programmatic agreement with Utah that listed oil and gas lease sales as types of undertakings having no effect. Why so? Because its conclusion would have been in an agreement signed by the SHPO after consultation with the SHPO, and with some degree of approval by, or at least awareness by, the Advisory Council. More on programmatic agreements in a few minutes. I raise the illustration here simply to point out that committees of trade associations representing renewables energy developers might profit from considering whether programmatic agreements might streamline the permitting process.

V. METHODS BY WHICH AN AGENCY DETERMINES THAT HISTORIC PROPERTIES WILL BE HARMED

The agency starts by considering what the project might do. Does it dig up ground? Does it make loud noises? Does it emit pollutants that can mar visibility or corrode the surface of buildings? Does it create the architectural equivalent of placing a New Mexico adobe dwelling in the middle of colonial Williamsburg?

More precisely, the agency is to consult with the SHPO or Tribal Historic Preservation Officer (THPO) and with any tribe which attaches religious or cultural significance to historic properties within the area that might be affected. That area, called the APE for area of potential effects, will be discussed later. The agency is also to seek the views of the public.¹⁴

Then the agency is apply what the rules call the “criteria of adverse effect.” Here’s the legal test:¹⁵

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. . . . 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.

13 177 IBLA at 107.

14 16 C.F.R. § 800.5(a).

15 16 C.F.R. § 800.5(a)(1).

Let's consider some examples. Replacing the grass around the Washington Monument with asphalt for a street-level parking lot would arguably diminish the property's "setting," or "feeling," or "association" with the rest of the National Mall. Running a high-voltage electric transmission line directly over Mount Vernon on the Potomac River might alter the integrity of the property's location.

Lest you accuse me of holding some aesthetic bias, let me give you a different illustration. For example, let's focus on the Flanders Duck. It is a shop located near Flanders, New York. This duck was included in the Register because it represents a phenomenon of the early years of widespread use of the automobile in Twentieth Century America. To attract business from travelers, roadside shops would go to unusual lengths to catch the motorist's eye. The Flanders Duck is one of those artifacts of America's highway culture.

What if someone proposed to use federal funds to create a sculpture garden, filled with Henry Moore's outdoor sculpture pieces, right next to this national treasure in Flanders? Would that undertaking create an adverse effect? I should think so. Moore's sculptures would diminish the feeling or association of tackiness created by the duck; and it would mar the setting with a dissonant presence of artistic refinement.

Let me get back to the point. The agency applies the criteria. It decides: adverse effect or not. If the decision is one of "no adverse effect," that decision is really just a proposed decision and is subject to further consultation with the SHPO or THPO and interested tribes, and potentially the Advisory Council itself. The Council may give its opinion to the agency. Ultimately, the agency is free to make its own decision, but its record must show that it took the Council's views into account in reaching its final position.¹⁶

If, on the other hand, the agency finds an adverse effect, then it moves onto what will be my last topic on resolving mitigation for the project.

But we are not ready to get there yet. Let's take a moment to consider the Cape Wind project in Nantucket Sound. How did it fare under the criteria for adverse effect? MMS prepared a 200-page report documenting its finding of adverse effect. It first considered the effects of construction of the wind array and decommissioning. Within the area that potentially could be affected by ground disturbing activities, like line laying or road building, MMS found no historic properties or archaeological resources were likely to be affected. But MMS determined that it would include a "Chance Finds Clause" in its authorization, which would require Cape Wind to stop construction or operations if an unexpected archaeological discovery were made.

The big issue for Cape Wind was the finding that its array of generators would visually alter the "historic Nantucket Sound setting." With regard to the concerns of two local tribes who claimed that an unobstructed horizon was essential to their religious observances, MMS noted that no mitigation would be effective. Only relocating the project outside of Nantucket Sound would suffice.

¹⁶ 16 C.F.R. § 800.5(c)(ii)(A)

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So these are the rules for determining whether an undertaking will have an adverse effect on an historic property. It is time to fit the rules into the process of consultation.

VI. CONDUCTING AN INDIVIDUAL REVIEW

In many cases your project will be subjected to an individual or standard review under the section 106 process. Before I turn to that process, let me call your attention to two other avenues that the regulations permit. One is called a “program alternative.” This is a set of alternate procedures, developed through consultation and subject to Advisory Council review, that substitute for the regulations in 36 C.F.R. Part 800. I have not encountered a program alternative in my practice, so I have no wisdom to add on this topic.

The other alternative is called a “programmatic agreement,” and we’ve mentioned that concept already. It is an agreement negotiated between the Advisory Council and a federal agency, and often the National Conference of State Historic Preservation Officers, which in turn may lead to secondary agreements between the federal agency and SHPOs or THPOs.

One of the more prominent features of a programmatic agreement is that it can identify types of activities that are exempt from the section 106 process if they meet certain criteria: such as the likelihood that effects would be minimal or not adverse.¹⁷ Let me provide you with a cumbersome example.

It comes from a series of programs administered by the Department of Energy. The programs have to do with using energy more efficiently, mostly in a residential context. One of them is the Weatherization Assistance Program which funds projects to make low-income dwellings less energy-leaky. In February 2010, the Department of Energy issued a “Prototype Programmatic Agreement” with the concurrence of the Advisory Council on Historic Preservation and the National Conference of State Historic Preservation Officers. The idea is that each state agency receiving DOE money under these programs would sign an agreement with DOE and the relevant SHPO.

One of the features of these programmatic agreements is that they list categories of activities that are deemed to have no potential to cause effects on historic properties. For example, installing caulking or weather stripping on windows and doors is excluded from consultation, provided it is done in a way that “does not harm or obscure historic windows or trim.”

Let’s turn to the individual review of an undertaking. Here we begin to draw together the answers to the questions we’ve been looking at separately.

The federal agency must consult, but with whom? The agency must consult with “consulting parties,” of course. Consulting parties are of two main types. First are those with a right to participate in the consultation. These include the SHPO, the THPO, tribes claiming that the affected area possesses a tradition of religious or cultural significance to them, the applicants for the federal money or approval, representatives of local governments, and the Advisory Council.

¹⁷ 16 C.F.R. § 800.14(c).

Note one point about tribes. Tribes may claim areas far outside their reservation boundaries to have cultural significance to them. The Nine-Mile Canyon area in Utah is a good illustration, as is the Nantucket Sound. Basically, relying on whatever information is at hand, the federal agency may have to cast a broad initial net to try to get tribes to respond as to whether they attach significance to the project area.

The second kind of consulting parties are those whom the agency allows to participate. These can include persons with legal or economic interests in the undertaking or in the affected properties, and others with some special knowledge of or interest in affected properties.

Next the agency determines the area of potential effects, or APE. The APE is a defined term.

Area of potential effects means 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. The area of potential effects is influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking.¹⁸

There are words here that have all the concreteness of pudding: “indirectly cause,” “character,” and “scale and nature.” As you might guess from the language used, the area of potential effects is almost never limited to the construction footprint of the project. If you are seeking a linear right-of-way to transmit generated electricity, you can count on the APE being much wider than the width of the right-of-way.

But often the most important effects of concern are those on properties within the footprint. The Advisory Council uses archaeological sites to illustrate the point. “Most archaeological sites are considered eligible for the National Register principally under Criterion D, because of their potential to yield information ‘important in prehistory or history.’ This important information lies in the site’s artifacts and features and their association (or context) Accordingly, any action that would alter a site’s context would have an effect on its ability to yield information and thus its eligibility for the National Register. The most easily envisioned effect occurs when potential information (the site context) is threatened with destruction [because] the site or parts of it are bulldozed or plowed away.”¹⁹

The final point about defining the APE is that the area is three-dimensional, not two-dimensional. The agency is to consider the engineering characteristics of the project. If the project simply is spreading pine bark mulch on bare ground, the likely effect of the project on buried sites is negligible. If the project includes scraping a four-foot deep pit to be used in drilling an oil well, the risk is greater. If the project is the construction of foundations for a heavy load bearing structure, the compaction of the soil from all the weight might put sites buried at significant depth at risk. The depth of the APE would vary among these examples.

¹⁸ 16 C.F.R. § 800.16(d).

¹⁹ ADVISORY COUNCIL ON HISTORIC PRESERVATION, SECTION 106 ARCHAEOLOGY GUIDANCE at 19, available at <http://www.achp.gov/docs/ACHP%20ARCHAEOLOGY%20GUIDANCE.pdf> (last accessed Sept. 27, 2010) (hereinafter “SECTION 106 ARCHAEOLOGY GUIDANCE”).

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For an illustration of defining an APE, let's look at the Cape Wind project. The Cape Wind project can be divided into two categories of effects: (1) surface effects; and (2) seabed effects.

The APE for the onshore component of the proposed project includes areas where physical ground disturbance would occur during construction, operation and maintenance, and decommissioning (e.g., the areas along the overland route to the Barnstable Switching Station where the transmission cable will tie-in), as well as those areas within view of the site of the proposed project (e.g., historic properties on Cape Cod, Martha's Vineyard, and Nantucket from which open views of the visible components of the proposed project, e.g., WTGs would be possible).

The APE for offshore archaeological resources includes the footprints of the WTG structures on the sea floor; the work areas around each WTG where marine sediments may be disturbed; the jet plowed trenches for installation of the inner-array cables connecting the WTGs to the ESP; the jet plowed trenches for the transmission cable system from the ESP to the landfall site; and associate marine work areas such as anchor drop areas.

One thing you might have noticed about this description is that it sounds two dimensional. And it is vague as well. MMS addressed these shortcomings by imposing conditions on the commercial lease it decided to issue to Cape Wind. For example, it is requiring a supplemental survey of the proposed transmission line corridor of at least 300 meters width. It is requiring a high-resolution survey, using side-scan sonar, of the entire array of monopiles "out to 1000 feet beyond the Area of Potential Effect."²⁰ One might ask the reason for going 1000 feet beyond the area of potential effect if the APE had been correctly designated to begin with. And MMS is requiring at least one core be taken of the seabed at the location of each monopile to be used to determine the presence or absence of what it calls "preserved landscapes" beneath the seafloor. The depth of the coring still remains unspecified. Here is another example of a kind of "phased decisionmaking," perhaps not quite what the regulation had in mind, but certainly of a kind defensible under decisions like one I will discuss in a moment called *SUWA v. Norton*.

The next significant task the agency must undertake is to identify historic properties within the APE. That task is completed through consultation and research. The agency must, at a minimum, ask the consulting parties for information on properties that are on the National Register or are eligible for inclusion in it. On the research side, the practice of the Bureau of Land Management illustrates the levels of effort that might be conducted. BLM calls the research an "inventory," and it categorizes inventories into three classes.

- Class I is a file search of repositories of information on cultural sites. Usually these are files located in the offices of state archaeologists, in offices of federal land managing agencies, or in tribal files. Included are the results of prior on-the-ground cultural resource surveys.

²⁰ Record of Decision for the Cape Wind Energy Project at 41 (Apr. 28, 2010), available at <http://www.boemre.gov/offshore/RenewableEnergy/PDFs/CapeWindROD.pdf> (last accessed Sept. 27, 2010).

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- Class II is a field survey, but it is limited to a sampling of potential sites.
 - Class III is a full field survey of the affected area.

There is also a special rule governing identification of properties. It is called phased identification, which is defined as:

Where alternatives under consideration consist of corridors or large land areas, or where access to properties is restricted, the agency official may use a phased process to conduct identification and evaluation efforts.²¹

There's a bit more to the rule than what is quoted here, but the quote is enough to introduce the concept. Let's look at an example found in a court decision in *Southern Utah Wilderness Alliance v. Norton*, 277 F. Supp.2d 1169 (D. Utah 2003).

The case concerned a geophysical survey in eastern Utah. This sort of survey generates sound waves through the earth and measures the return of the waves as they reflect off of different layers in the earth's surface. These surveys are usually performed by using equipment to generate the noise along a relatively straight line, then repeating the process on parallel lines, then again on perpendicular lines. The goal is to come with a lattice-shaped pattern of data that can be processed to create three-dimensional images of the subsurface.

The survey in question here covered an area of almost 2 million acres, but it did so by traversing only 380 acres of land in the lattice. It involved a total of 17 lines of surveys.

Before approving the project, BLM began with file searches of its own office and of the Utah State Historical Society. These searches located 121 prior field surveys and 33 historic sites. Of the 33, 11 sites were deemed eligible for inclusion in the National Register. BLM then conducted Class III surveys on 12 of the 17 survey lines. BLM then approved the project with the condition that the geophysical company would have to fund Class III surveys on the remaining 5 lines. The Utah SHPO concurred in BLM's approach.

The plaintiff, SUWA, argued that BLM should have withheld approval until all 17 lines had been surveyed. The court disagreed, saying that because the project "is a linear Project spread over a very large area (though affecting only a very small part of that area), it is a good candidate for the flexibility implied by the statute and discussed by the Council" in the rule on phased decision-making.²²

In the context of renewable energy, the approach followed in *SUWA v. Norton* might be profitably employed if the project is going to have more than one take-away transmission line, if you're lucky enough to find a take-away line at all, or if a geothermal project is actually going to use a geophysical

²¹ 16 C.F.R. § 800.4(b)(2).

²² *Southern Utah Wilderness Alliance*, 277 F.Supp.2d at 1195.

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survey to delineate the scope of the geothermal resource. But it can be useful in other ways as well, such as delaying a precise delineation of the area of potential effects, as I suggested a minute ago when discussing Cape Wind.

So, whether it is through consultation, or file searches, or field surveys, or phased identification, the agency identifies historic properties within the APE. During this process the federal agency, through consultation, considers whether any of the properties identified are eligible for inclusion in the National Register, a matter we've already discussed.

The agency then determines whether properties or eligible properties will be adversely affected, another matter we've already discussed.

Finally, the agency gives notice of its findings of adverse effects. The rules governing that process are my final topic today, for they raise the question of mitigation and resolving disputes over mitigation.

VII. RESOLVING MITIGATION DISPUTES

At the end of the day, it is not the SHPO, or the THPO, or even the Advisory Council on Historic Preservation who decides how much mitigation your project must put in place. It is the agency issuing the permit or the funds.

The official position of the Advisory Council is that there is “no hard and fast rule” defining how much consultation is enough.²³ If there is a dispute, however, it can take several more rounds of consultation to put the agency in a position to decide how much mitigation is needed.

From the perspective of historic preservation, it is the consultation that provides the agency with the best available information on what mitigation might be the most effective to preserve the characteristics that make the historic property significant. So, as you now expect, the agency is to consult with all the relevant parties to the process – the SHPO, the THPO, and relevant tribes – to evaluate modification to the project to avoid or minimize adverse effects on historic properties.²⁴ Any of the parties can invite the Advisory Council to participate.

And, of course, the public also gets to participate. The agency is to provide the public with six categories of information so that it can comment intelligently. The agency must: (1) describe the undertaking; (2) describe the steps it took to identify historic properties; (3) describe the historic properties that will be affected, and note the characteristics that qualify them for the National Register; (4) describe the project's effect on the properties; (5) explain how the agency determined the effects are adverse and note actions to mitigate those adverse effects; and, (6) provide copies of views provided by consultants.²⁵

After the consultation is completed and the comments received, the agency then tries to obtain the agreement of the SHPO or THPO on what mitigation should be imposed. If they agree, then they

23 SECTION 106 ARCHAEOLOGY GUIDANCE AT 9.

24 16 C.F.R. § 800.6(a).

25 16 C.F.R. § 800.11(e).

are to sign a memorandum of agreement.²⁶ The agreement and all of the information from those six categories I described are then sent to the Advisory Council before the agency approves the undertaking.

If they don't agree, what then? More consultation. This time the agency must invite the Advisory Council to the table. The Council may or may not participate. If it does, and if the agency, SHPO, THPO, and Council reach agreement, then they are all to sign a memorandum of agreement.

And if they still don't agree, what then? More consultation. Or one of the parties throws in the towel. In the parlance of the regulations, throwing in the towel is called terminating consultation. "Any party that terminates consultation shall notify the other consulting parties and provide them the reasons for terminating in writing."²⁷ If the agency terminates consultation, it must notify the Advisory Council. The Council then has a chance to let all parties provide more views on the termination and even help arrange an onsite inspection by the Council.²⁸ The Council has 45 days to comment on the termination.

After the agency receives the Council's comments, the head of the agency has to issue a written response when reaching the agency's final decision.²⁹

Cape Wind's project went all the way to the end of the process for resolving disputes. On March 1, 2010, after he met with leaders of the two tribes and visited their sites of special concern, Secretary Salazar wrote to the Advisory Council to advise that further consultation would not be fruitful. On March 22, 2010, five members of the Council appointed by the Chairman conducted a site visit and held a public meeting. On April 2, 2010, the Council provided its comments.

One might be tempted to dismiss one of the two sides to the controversy as beyond the spectrum of responsible thinking. One might disparage MMS as a culturally-insensitive creature of industrialism or the Advisory Council as retrograde ancestor-worshippers who would yoke the living with the consequences of decisions made by those long dead. So we must first be aware of two sets of facts to set our stage.

First are the facts of cultural history. Two tribes have been in the area for a long time. One, the Wampanoag Tribe of Gay Head, is called the Aquinnah. The other, the Mashpee Wampanoag Tribe, is called the Mashpee. Collectively, the two are called the Wampanoags.

Ten thousand years ago the world was icier, the seas lower, and Nantucket Sound drier. There is a significant probability that the seabed contains evidence of aboriginal Wampanoag habitation. The Wampanoags claim that for religious purposes an uninterrupted view across Nantucket Sound of the rising sun is a defining feature of their culture.

Then the Europeans came. Two hundred years ago America was less industrial, and transportation (before the railroads) was predominantly maritime. The town of Nantucket on Nantucket Island is

26 16 C.F.R. § 800.6(b)(1)(iv).

27 16 C.F.R. § 800.7(a).

28 16 C.F.R. § 800.7(c)(1)

29 16 C.F.R. § 800.7(c)(4).

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said to be “one of the finest surviving architectural . . . examples of an early 19th century seaport town in New England.”³⁰ Thirty-four historic properties surround the Sound. Two of them are National Historic Landmarks. The Nantucket Historic District is one of them, and it is comprised of the entire island. The other is the Kennedy Compound in Hyannis Port on the north shore of the island. Furthermore, as I noted earlier, the Keeper of the National Register determined that the entire Sound is eligible for inclusion in the National Register, in part because of its potential to yield information about the native American exploration and settlement of Cape Cod and the islands to the south.

Second are the technological facts. Cape Wind placed its proposed project where it did because that part of Nantucket Sound is sheltered by Nantucket Island from the force of waves off the Atlantic. The water depth is manageable. The access to New England population centers is significant. MMS considered other locations, but each was inferior for one or more reasons.

On April 2, 2010, the Council commented. Boiled down, the Council had two points. The first point was substantive, and I quote it at some length: “The Project will introduce visual elements that are out of character with the properties and will change the character of the historic properties’ setting that inextricably contributes to their historic significance. The adverse effects would result from the visual intrusions of a high concentration of large-scale modern WTGs [wind turbine generators] within the historic viewsheds. . . . According to the NPS, . . . the adverse effect stems from the partial obstruction of long-distance, open-to-the-horizon views historically associated with the resources.”³¹

Now, one might point out that eventually the project will be decommissioned and the monopiles removed. The Council had a response to that point. In constructing the monopiles, Cape Wind would unavoidably damage or alter the seabed and might, as a result, disturb archaeological resources. So, the Council concluded, “Even though the Project would be decommissioned, some of these adverse effects would be permanent, unavoidable, and not subject to satisfactory mitigation.”³² Accordingly, the Council recommended that the Secretary disapprove the project.³³

The Council’s second point was procedural. It complained that MMS started the consultation process too late. The delay, it claimed, kept the agency from considering alternatives. One might point out the Council had already concluded that no alternative development within Nantucket Sound was acceptable, so a complaint about timing seems beside the point. The Council, however, was offering a paraphrase of the “bureaucratic commitment” argument from NEPA litigation. Its point was that if MMS has started consultation even sooner than it did, then Cape Wind and MMS might have given more serious consideration to sites outside of Nantucket Sound. By the time consultation started in earnest, the Council believed, Cape Wind and MMS were already committed to the proposed location.

30 Advisory Council on Historic Preservation, *Comments of the Advisory Council on Historic Preservation on The proposed authorization by the Minerals Management Service for Cape Wind Associates, LLC to construct the Cape Wind Energy project on Horseshoe Shoal in Nantucket Sound, Massachusetts*, Apr. 2, 2010, at 2, available at <http://www.achp.gov/docs/CapeWindComments.pdf> (last accessed Sept. 28, 2010).

31 *Id.* at 2-3.

32 *Id.* at 3.

33 *Id.* at 5.

On April 28, Secretary Salazar responded – with two pages of response for every page of Council comments. On the Council’s procedural point, he responded with a six-page history of the consultation process for Cape Wind’s proposal. Suffice it to say, Mr. Salazar did not think the Council’s point was well-taken.

On the Council’s substantive point, we need some additional procedural history to understand the Secretary’s response. In June 2009, the Council wrote MMS asking that it address the project’s potential to have adverse visual effects on the two National Historic Landmarks: the Island and the Kennedy Compound. MMS turned to the National Park Service for its guidance. In October 2009, NPS agreed that the project would have adverse effects on the view from the two Landmarks. Some of NPS’s responses:

“[W]hile these long-distance interruptions visually ‘diminish’ each National Historic Landmark’s (NHL) overall integrity of setting, they will not impair the far more significant, essential character-defining aspects and high integrity associated with the immediate coastal waterfront settings. . . .”³⁴

“The adverse effect involved results solely from the visual intrusiveness caused by the introduction of a concentration of modern WTGs within the historic viewsheds of both NHLs. . . .”³⁵

“Given that the adverse effect to each NHL is visual only, limited in overall scope and impact, and does not diminish the core significance of either NHL, NPS concludes that the adverse effect of the undertaking that is the subject of this comment is indirect rather than direct.”³⁶

These excerpts are from a fuller justification for why the effects are “indirect” rather than “direct.” You may recall from earlier that federal agencies are to consider both direct and indirect effects, so why was NPS spending energy drawing a distinction between the two?

The answer is found in section 110(f) of the NHPA, 16 U.S.C. § 470h-2(f):

Prior to the approval of any Federal undertaking which may *directly* and adversely affect any National Historic Landmark, the head of the responsible Federal agency shall, to the maximum extent possible, undertake such planning and actions as may be necessary to minimize harm to such landmark, and shall afford the Advisory Council on Historic Preservation a reasonable opportunity to comment on the undertaking.

(Emphasis added.) A historic preservationist might argue that disapproving Cape Wind’s project was necessary to minimize harm, and that disapproval was within the realm of the possible, especially within

³⁴ Comments reprinted in Letter from Ken Salazar, Secretary of the Department of Interior, to Mr. John L. Nau III, Chair, Advisory Council on Historic Preservation at 5 (Apr. 28, 2010), available at http://www.achp.gov/docs/Salazar_Cape_Wind_Response.pdf (last accessed Sept. 27, 2010).

³⁵ *Id.*

³⁶ *Id.*

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the realm of the “the maximum extent possible.” Here, on April 28, 2010, Secretary Salazar disavowed a duty to minimize harm to the maximum extent possible by relying on the Park Service’s finding that the impacts to the two Landmarks were “indirect,” not “direct.”

I have discussed at length the mitigation dispute over the Cape Wind project to emphasize the effects that the NHPA can have on renewable energy development. Far more than the fossil-fuels used for electric generation, renewable sources require open spaces: ridge lines, open prairies, deserts, or seascapes. Wind farms, for example, will often be visible from places eligible for inclusion in the National Register. After 10 years of public process and alterations to its proposed generator array to accommodate public concerns, the Cape Wind project finished hanging by a thread: the thin difference between a direct and an indirect effect.

You, who are engaged in developing renewable energy, are part of an important historical trend. In time, renewable energy will replace fossil fuels, not necessarily because we will run out of fossil fuels, but because eventually we will make renewable energy cheaper than fossil fuels, and will also enjoy substantial environmental benefits, or so we currently think.

Keep in mind, however, that fossil fuels were also a transformative development in our civilization. The automobile’s internal combustion engine was once a green technology that substituted invisible engine exhaust for very visible deposits of horse manure along city streets. And the renewables industry will go through many of the same legal and permitting difficulties that have plagued fossil fuel development. If that seems strange, consider that the Cape Wind project is being required to purchase air pollution offsets for its construction emissions. It is not being allowed to treat its future air emission benefits as an offset for its own project.

Statutes like the NHPA can have real effects on your ability to keep your project on schedule. Those effects will be direct, indirect, and adverse. But they can be managed.

VIII. EXPEDITING THE SECTION 106 CONSULTATION PROCESS

As well-described in the previous sections, consultation under Section 106 of the NHPA and Tribal consultation are federal agency responsibilities guided by multiple, complex, and often confusing implementing regulations. However, there are numerous opportunities for project applicants to assist and expedite consultation requirements for historic properties of religious and cultural significance.

The Secretary of Interior’s Standards and Guidelines for Federal Agency Historic Preservation Programs Pursuant to the National Historic Preservation Act offers the following definition for consultation: “Consultation means the process of seeking, discussing, and considering the views of others, and, where feasible, seeking agreement with them on how historic properties should be identified, considered, and managed.”³⁷ As a project developer, you can be instrumental in ensuring a successful consultation

³⁷ Department of Interior, The Secretary of the Interior’s Standards and Guidelines for Federal Agency Historic Preservation Programs Pursuant to the National Historic Preservation Act (Apr. 24, 1998), available at http://www.nps.gov/history/hps/fapa_110.htm (last accessed Sept. 27, 2010).

process by being informed, actively engaged, and assertive through every phase and requirement of this consultation process. In the following sections, we will discuss strategies for managing cultural resource compliance and consultation under Section 106 of the NHPA.

A. Understand the Project-Specific Issues and Requirements

As an energy developer or project manager it's critical that you identify the site-specific cultural resource and Tribal consultation requirements for your project and project area during the preliminary planning stage. You must understand whether the project has cultural resource concerns, complete all pre-project due diligence, and determine if there are site-specific stipulations that will limit your development opportunities.

The best method by which to accomplish this goal is to speak with the relevant agencies and/or affected Tribes. It is important to work with the agencies to determine the key cultural resource concerns and the types of site-specific stipulations which apply that may limit development and/or project timing.

Another key component to ensuring cultural resource compliance is understanding and fulfilling your archaeological survey requirements. You should ask yourself, as a developer, whether you are required to fund a Class I literature review, Class II sampling, or Class III clearance surveys. If Class III surveys are required, will the agency only require site-specific surveys (i.e., limited to proposed areas of disturbance) or will the agency require larger, comprehensive block surveys? Additionally, the timing for Class III surveys can have limitations in certain areas; you cannot complete a site-specific survey if there's a foot of snow on the ground. Knowing your survey requirements and planning for them ahead of time can save you both valuable time and money.

B. Choose your Archaeological Consultant Carefully

Archaeologists are vital to the Section 106 Consultation Process under the NHPA. With that in mind, as a developer, you should choose your consulting archaeologist with great care. Most federal agencies retain approved vendor lists of archaeologists that are authorized to work on federal lands. If your project area has cultural resource issues, you should request the agency's list of approved archaeologists during the preliminary planning stages. If the agency is willing to share its candid opinion and recommendation, ask it for additional information: which archaeologist has been good to work with, who has been the most responsive, and who has experience in your project area.

Also, if your project is on Tribal land, the archaeologist may have to be permitted by the Tribe to work on that Reservation. In addition, field surveys on Tribal lands may require your archaeologist to be escorted by a Tribal technician or Tribal elder to ensure that all sites and artifacts of importance to that Tribe are satisfactorily documented. For example, on the Blackfeet Indian Reservation in Montana, the regional archaeologist for the Bureau of Indian Affairs recently recounted a cultural resource inventory where more than 75 eligible sites were documented by the consulting archaeologist during Class III inventories. However, when the Tribe's trained cultural resource technicians returned to re-survey the same area, they documented an additional 90 sites that held traditional significance to the Tribe.

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This anecdotal account was used to demonstrate the importance of, and rationale for, having a Tribal technician escort the permitted archaeologist. With this in mind, you should be certain to select an archaeologist that has established a good rapport with the Tribe. Your archaeologist's relationship with Tribal members can be instrumental in the timing of the surveys—the better they get along, the more likely the archaeologist is to be first in line.

Finally, you should choose an archaeological firm that has the staffing and resources to complete both surveys and reports in a timely manner. In geographic areas that have weather limitations for cultural clearances, archaeological firms can get very busy in the snow-free months, which leaves only a small amount of time for completion of reports that are imperative to the Section 106 Consultation process. Thus, when interviewing potential archaeologists or archaeological firms, ask targeted questions about their ability to complete surveys and associated reports within your project timeframe.

C. Develop Cultural Resources Fluency

As with all regulatory processes, in order to be successful in navigating the process, you must understand the terminology. The field of cultural resources and archaeology has a language of its own. Have your consulting archaeologist educate you on the terminology that is important to your project and project area so that you can understand critical dialogue when it comes to things like, for example, defining the APE, knowing whether your project is in compliance under the Native American Graves Protection and Repatriation Act (NAGPRA), or recognizing the difference between a lithic scatter and a rock shelter and how it affects your project. Understanding this specialized vocabulary will assist you in asking the right questions and aid your ability to identify red flags and overcome potential obstacles.

Additionally, be certain to understand the differences between and the roles of SHPOs, THPOs, Tribal Liaisons, the ACHP, and other agencies and interest groups.

D. SHPO, THPO, and Other Important Stakeholders

If the project occurs off Tribal lands, the SHPO is the regulatory authority for completing consultation under Section 106 of NHPA. If the Tribe does not have THPO (discussed more in the following paragraph), the agency must consult with a representative designated by the Tribe in addition to the SHPO. However, the agency must still consult with Tribes that attach religious and cultural significance to historic properties off Tribal lands; they must also consult with Tribes that may be affected by the undertaking. Know your SHPO, their budget constraints, and staffing limitations because all of these factors can influence the timing of your project-specific consultation.

In 1992, Congress adopted amendments to the NHPA (P.L. 102-575) that allows federally recognized Indian tribes to take on more formal responsibility to preserve significant historic properties on tribal lands. Specifically, section 101(d)(2) allows tribes to assume any or all of the functions of a SHPO with respect to tribal land. The decision to participate or not participate in the program rests with the tribe. Thus, if your project occurs on Tribal lands and the Tribe has a recognized THPO, the THPO is the regulatory authority for completing consultation under Section 106. With this in mind, always know your THPO. As of December 15, 2009, there are 87 NPS-recognized THPOs. The lead federal agency

and your archaeological consultant should know whether the Tribal lands on which your project lies has a THPO. Additionally, the National Association of Tribal Historic Preservation Officers maintains a current list of currently recognized THPOs within the U.S.; a site worth checking as you initiate any project on Tribal lands: <http://www.nathpo.org/map.html>. Finally, be certain to know the Tribal representative and be certain that the archaeologist you employ has both a good relationship with that person and the Tribal elders. Once again, these relationships can impact the timing of the cultural resource compliance elements of your project.

On or off tribal lands, consultation between agencies and Indian tribes is intrinsic to the Section 106 process. Similarly, an understanding of the necessary components is critical. Tribal consultation is regarded as the right approach to decision-making for federal undertakings that might affect sites of interest to Native American Tribes. Requirements for consultation with Indian Tribes are mandated under several statutes, Executive Orders, and federal agency policies (NHPA, NEPA, NAGPRA, ARPA, EO 12875, etc.). It is therefore imperative that as a developer, you understand your agency's requirements for Tribal consultation (whether on or off Indian Reservation lands) and that you tactfully push to ensure that the agency makes a good faith effort to complete Tribal consultation.

When it comes to Tribal consultation, always remember that an educational field visit can go a long way to resolving issues. If an affected Indian Tribes indicates concerns about a federal undertaking, an organized visit by agency representatives, Tribal representative(s), Tribal elders or members, your archaeologist, and you as the developer can be very effective in alleviating misperceptions and concerns, identifying mitigation measures, and most importantly, establishing communication and trust between the involved parties. If you anticipate substantial issues or concerns by Tribes for your project area, you should also consider enlisting the support of a third-party liaison that specializes in Tribal consultation and coordination support – someone who can focus solely on ensuring that you and the agency meet your obligations for Tribal consultation.

E. Engaging the Public in Consultation

Playing an active role in Section 106 consultation means understanding the level of public involvement required and/or warranted for your project. The agency official for your federal undertaking has the obligation to make a “good faith effort” to identify consulting parties early in the planning process. Also, the federal agency is specifically obligated to provide the ACHP a “reasonable opportunity” to identify concerns about effects on historic properties, and advise on identification and evaluation of such properties, including traditional cultural properties, and “participate in the resolution of adverse effects.”

Failing to provide the ACHP and other consulting parties a reasonable opportunity to comment on federal undertakings can cause salient project delays. Federal actions that require analysis under NEPA can utilize the NEPA public involvement process to satisfy public involvement for federal undertakings under Section 106. But as a developer, you should not assume that the public involvement process completed for your NEPA document is sufficient to satisfy Section 106 public involvement requirements.

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In a recent and well-publicized EIS, the BLM held the position for several years that it was satisfying Section 106 consultation requirements through public involvement opportunities associated with the project's EIS. The ACHP disagreed and toward the latter part of more than a 3-year EIS process, the EIS was stalled for more than a year while the agency went through a lengthy programmatic agreement process with more than 19 consulting parties involved. The end result was the signing of a successful programmatic agreement that concluded the Section 106 process, which was followed shortly thereafter by the signing of a Record of Decision for the associated EIS. However, had ACHP's involvement in the NEPA process been more clearly defined at the front end of the project, more than a year could have been shaved off the overall project schedule.

F. Document Consultation Efforts

As a project developer, be certain to paper the trail regarding consultation efforts. Meaningful consultation is predicated on informed participants. A meeting without a previously disclosed agenda is not a consultation. Similarly, a meeting where a participant is not informed prior to the meeting of the project specifics, including the project scope and areas of potential impact, is not a consultation.

G. Follow up with Your Responsible Agency

Additionally, while Section 106 consultation is technically an agency-to-agency or agency-to-Tribe process, you should not make any presumptions that consultation requirements with the SHPO and/or Tribes are "being handled" by your agency. Federal agency staffing for cultural resource programs is generally limited or non-existent, which can and does often hinder the agency's ability to initiate Section 106 and Tribal consultations early in the planning process. Don't presume that the agency is taking care of its consultation requirements; instead, be certain to ask the right people the right questions to make sure the process is in motion. For example, throughout the EA process in 2007, a NEPA contractor and archaeological contractor completed their respective due diligence in terms of executing responsibilities and communicating with the agency project lead about Section 106 consultation and Tribal Consultation. The Class I and Class III survey work was completed, the cultural resource report was submitted to the BLM and the SHPO, consultation letters from the BLM project lead were sent to affected Indian Tribes, and responses were received from the affected Tribes thereby concluding Tribal consultation. However, at no point during the 2-year process did the agency's archaeologist send a letter to the SHPO requesting consultation under Section 106. All individuals assumed the agency had accomplished that critical task, but no one, including the agency project manager, had asked the agency archaeologist if the consultation request letter had been sent. So, when the Decision Record for the EA was ready to be signed, the signature process was delayed by another month while the agency scrambled to complete consultation with the SHPO.

H. Summary and Take Home Tips for Successful, Timely Consultations

In conclusion, there are several take home tips to help facilitate timely and successful consultation for cultural resources. First, you should become educated about the issues, the players, and the process. Second, be as involved as possible or allowed from the preliminary planning phase to conclusion of Section 106 consultation. And third, be flexible and patient, but also persistent. The federal agency you are working with, SHPO, ACHP, and Tribe(s) may have varying goals and different concerns as it relates to cultural resources, and those issues and concerns need to be resolved in some manner (even if it means agreeing to disagree) before your federal undertaking can move ahead. By being proactive and engaged, as the developer, you have an opportunity to assist in resolving cultural resource issues and concerns. By playing an active role in this process, you can generally help facilitate and expedite the Section 106 consultation process.

IX. CONCLUSION

As a developer, if your project involves federal funds, federal financial assistance, or federal approval, you are required to comply with NHPA. Luckily, for developers, although NHPA seems to be baffling and complicated upon first blush, the Act itself is really merely a consultation process under Section 106. However, since this consultation process can delay your project for months, as a developer, it's important that you be informed, actively engaged, and assertive through every phase and requirement.





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