National Regulatory Conference: NHPA Scope of Analysis

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The Spectrum of Historic Properties
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The Players in the Historic Properties (Sec. 106 NHPA) Process

- The Corps
- State/Tribal Historic Preservation Officer
- Advisory Council on Historic Preservation (in some situations, not all…)
- Tribes
- Consulting Parties
- Applicants
Native Americans And Tribes Are Part Of The Regulatory 106 Process

- Tribes are an integrated part of the Sec. 106 process
- Displaced tribes have the same voice as resident tribes
- Tribal consultation does NOT have time limits
- Important to stay involved and work through tribal concerns
Critical Documents For Sec 404/106 NHPA Scope of Analysis

33CFR325 Appendix C for permit area
33CFR325 Appendix B for scope of analysis
Interim Guidance 2005 for integrated definitions
Interim Guidance 2007 for clarification of ‘no effect’ definitions
36CFR800 for all definitions and links to the Federal 106 process.
NEPA Documents (1987 CEQ; 2007 9th Circuit Review, etc.)
Conflicts
Definition of Undertaking

36CFR800.16(y)
- 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.

33CFR325 (Appendix C 1(f))
- The term "undertaking" as used in this appendix means the work, structure or discharge that requires a Department of the Army permit pursuant to the Corps regulations at 33 CFR 320-334.

- WE determine the undertaking. SHPO/THPO/ACHP may be consulted, but it is OUR determination.
Appendix C
Permit Area For Historic Properties

Permit Area For Historic Properties Under Section 404 CWA and Section 10 RHA involve three tests.

- Defined at 33 CFR 325 Appendix C (2):
  Waters of the U.S. and Uplands directly affected where:
  1. BUT FOR
  2. INTEGRALLY RELATED
  3. DIRECTLY ASSOCIATED

- Limit of Corps’ responsibility to investigate and identify historic properties
Conflicts
APE vs. Permit Area

36CFR800.16
- (d) **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.

33CFR325 (Appendix C 1(g))
- Permit area (1) The term "permit area" as used in this appendix means those areas comprising the waters of the United States that will be directly affected by the proposed work or structures and uplands directly affected as a result of authorizing the work or structures. The following three tests must all be satisfied for an activity undertaken outside the waters of the United States to be included within the "permit area"...
Looking for Answers
36CFR800 and 33CFR325 Appendix C

- We have to have Appendix C to determine permit area. Appendix C links our Sec. 106 responsibility to impacts to WOUS and the DE’s decision. It has the tools we have to have to process 404/10 actions.

- We have to have 36CFR800 for the definitions to operate the Sec. 106 process, including the inclusion of Tribes in the process.

- The Corps uses multiple documents to achieve Sec. 106 compliance.
Permit Area Example - Limited Impacts to WOUS

- Limited Direct Impacts
- Indirect Impacts Distant From Permitted Activity
- Indirect Impacts Not Closely Related to CWA
- Limited Federal Control
- Limited geographic distribution of WOUS (small federal scope of analysis)

= Historical/Cultural Resource
Permit Area Example – Multiple Impacts

- Substantial Direct Impacts
- Indirect Impacts Close to Permitted Activities
- Several Activities Require Permits
- Federal Control Over Much of Project

= Historical/Cultural Resource
The Regulatory Sec. 106 Process Has Been Known To Create Some ‘Debate’ Among State and Federal Review Agencies
1(g)4(ii) Accordingly, in the case of the linear crossing, the permit area shall extend in either direction from the crossing to that point at which alternative alignments leading to reasonable alternative locations for the crossing can be considered and evaluated. Such a point may often coincide with the physical feature of the waterbody to be crossed, for example, a bluff, the limit of the flood plain, a vegetational change, etc., or with a jurisdictional feature associated with the waterbody, for example, a zoning change, easement limit, etc., although such features should not be controlling in selecting the limits of the permit area.
Most Vexing Sec. 106 Issues For Regulatory

- Landscapes of any sort
- Visual impacts (wind turbines)
- Tribal landscapes
- Tribal ethnographic claims
- Rapid development of small cumulative impacts (gas and oil plays)
Minimal Impact to WOUS-Visual Sec. 106 Effect?
Paleontological Resources May Also Be Considered Within The Regulatory Process
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