

Regulatory Historic Properties Review

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Historic Property



Any prehistoric or historic structure, district, site, building or object included in or eligible for inclusion in the National Register of Historic Places.



The Spectrum of Historic Properties



The Spectrum of Historic Properties





Where Sec. 404 CWA and Sec. 10 RHA Meet Historic Properties: Critical Documents For Sec.106 NHPA Review in Regulatory

- **33CFR325 Appendix C** for permit area and DE authority
- **33CFR325 Appendix B** for scope of analysis
- **Interim Guidance 2005** for integrated definitions with 36CFR800
- **Interim Guidance 2007** for clarification of 'no effect' definitions
- **36CFR800** for all definitions and links to the Federal 106 process





National Historic Preservation Act

Section 106

Section 106 of the National Historic Preservation Act requires a Federal agency head with jurisdiction over a federal, federally assisted, or federally licensed undertaking to take into account the effects of the agency's undertakings on properties included in or eligible for the National Register of Historic Places. In addition, the agency must afford the Advisory Council a reasonable opportunity to comment on such undertakings.



National Register of Historic Places (NRHP)

- Register of districts, sites, buildings, structures and objects significant in American History, architecture, archeology, engineering and culture. Maintained by Secretary of the Interior (“Keeper”).
- Prehistoric or historic sites which meet on or more of the specific criteria listed in 36 CFR 60.4:
 - A) Association with Events
 - B) Association with People
 - C) Distinctive Design/Construction
 - D) Information Potential





Eligibility for NRHP

Undetermined Eligibility

- All historic sites have an undetermined eligibility
- Considered under Section 106 until determined otherwise

Eligible for the NRHP

- Meets 36 CFR 60.4 criteria and agreement by SHPO & USACE required
- May not be listed on the register

Ineligible for the NRHP

- Agreement by SHPO & USACE required
- Section 106 does not apply after this determination





Assess Effects to Historic Properties

Section 106 process is complete:

- undertaking has **no potential to cause effects** (800.3(a)(1)) and Appendix C (3)(b) - this determination is made by the USACE alone
- no historic properties **present** or **affected**, with concurrence from SHPO (800.4 (d)(1))
- sites determined **Not Eligible for the NRHP**, with SHPO concurrence





The Full Section 106 Process Only Continues When...

There is a historic property eligible, or potentially eligible, for inclusion in the NRHP that will be ADVERSELY affected ...

36CFR800.5-6



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



- The Corps
- State Historic Preservation Officer
- Applicants
- Advisory Council on Historic Preservation
- Tribes and Tribal Historic Preservation Officer
- Consulting Parties



Historic Properties Must Be Considered When Using Nationwide Permits

33CFR330

- 17. Tribal Rights. No NWP activity may cause more than minimal adverse effects on tribal rights (including treaty rights), protected tribal resources, or tribal lands.
- 20. Historic Properties. (a) In cases where the district engineer determines that the activity may have the potential to cause effects to properties listed, or eligible for listing, in the National Register of Historic Places, the activity is not authorized, until the requirements of Section 106 of the National Historic Preservation Act (NHPA) have been satisfied. (Etc.)



Nationwide Permits Historic Properties Review

Applicant Responsibilities

- **Pre-Construction Notification** – automatically triggered when the proposed work MAY have the potential to effect ANY historic property – this effect does not have to be direct! See NWP Condition 20.
- **NWP Work Without a PCN** – Applicant must determine that no historic properties will be effected and no notification is necessary. Unanticipated impacts to any historic property during non-PCN construction triggers notification under NWP Condition 21.
- NWPs can be conditioned for work on historic properties like any other Regulatory authorization
- GENERALLY NWPs have smaller permit areas for historic properties than Individual Permits



Individual Permits Historic Properties Review

Applicant Responsibilities

- Start planning for historic properties at the pre-application stage – consider early identification and **avoidance** ALWAYS! It is cheaper, saves time, and is better for the resources.
- Advance coordination with SHPO (and if necessary, Tribes and ACHP) likewise gives the greatest chance to address historic property issues at the earliest possible stage
- Individual Permits will generally have a larger permit area for historic property review relative to NWP
- Individual Permits that result in adverse effects to historic properties can be time consuming with the development of mitigation and agreement documents – another reason to avoid or redesign to reduce or avoid impacts



REMEMBER! Permit Area for Historic Properties Can Differ From Direct WOUS Impacts or ESA Impacts!



The Regulatory Sec. 106 Process Has Been Known To Create Some 'Debate' Between SHPO and ACHP





Conflict:

Area of Potential Effect vs. Permit Area

ACHP - 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.

USACE - 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''...



Common Applicant Errors in Providing Sec. 106 Information

- Failure to distinguish ‘nothing is present’ from ‘never been surveyed or assessed for historic properties’
- Failure to use cultural resources specialists to develop or filter critical Sec. 106 information
- Failure to provide USACE sufficient information to support a negative finding



Common Applicant Errors in Providing Sec. 106 Information (con't)

- Assuming the USACE permit area – always best to check in advance to verify
- Waiting for USACE to review application for the need for additional Sec. 106 work – time is money and the more information provided in advance, the greater the chance to avoid effects to historic and prehistoric sites, or begin critical reviews with SHPO and tribes
- Remember: SHPO comments are through USACE process – coordination must be through us in absence of other authorities



Tips for a Good Sec. 106 Statement in ANY Permit Application

- Statement of presence or absence of historic properties and WHY – maps help
- If historic properties are located nearby – a one mile review radius is a good general rule to use
- Provide a survey if already done
- We will accept work undertaken by TxDOT and for compliance with Antiquities Code of Texas as long as it covers our Federal Sec. 106 review responsibilities



Discovery of Historic Properties Nationwide Permit Condition 21

33CFR330 Nationwide Permits

21. Discovery of Previously Unknown Remains and Artifacts. If you discover any previously unknown historic, cultural or archeological remains and artifacts while accomplishing the activity authorized by this permit, you must immediately notify the district engineer of what you have found, and to the maximum extent practicable, avoid construction activities that may affect the remains and artifacts until the required coordination has been completed. The district engineer will initiate the Federal, Tribal and state coordination required to determine if the items or remains warrant a recovery effort or if the site is eligible for listing in the National Register of Historic Places.





Discovery of Historic Properties During Construction Individual Permit Condition #3

33 CFR Part 325.10- Appendix A- Permit Form

“3. If you discover any previously unknown historic or archeological remains while accomplishing the activity authorized by this permit, you must immediately notify this office of what you have found. We will initiate the Federal and state coordination required to determine if the remains warrant a recovery effort or if the site is eligible for listing in the NRHP.”



Historic Property Survey Along Linear Projects

- Appendix C 1(g)4(ii): (discussion of linear crossings):
“Such a point may often coincide with a 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 limits of the permit area.
- Essentially, Ft. Worth District uses a ‘terrace-to-terrace’ definition for survey of linear water crossings



What Constrains Permit Area for Historic Properties?



- Limited scope/minor impacts to WOUS
- Small Federal handle and a lack of other Federal authorities
- Previous impact
- Areas created in modern times



What Expands Permit Area?



- Understanding the association with uplands
- Understand DE has final authority
- Using three tests for permit area in Apx C
- Using 33CFR325 Appendix B for scope of analysis
- Complex projects with cumulative impacts
- Public interest (Apx C 5d and 33CFR320.4)
- Cumulative Federal control and responsibility



Six Mandatory Steps For 404/106 Success

- Determine **scope of analysis/permit area** for your project
- **Identify** historic properties in the permit area (or the reason no identification is necessary)
- Determination of **eligibility** of historic properties (USACE and SHPO determination with input of applicant and consultants)
- USACE determines **effects** to NRHP eligible historic properties
- Determine **avoidance, minimization, or mitigation** of affected NRHP eligible historic properties
- Concluding the process: use of **agreement documents and conditions** in the permit to seal the deal on site protection and adverse effects.



Regulatory Historic Properties Review Questions?



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