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A1F05: Committee on Historic and Archeological Preservation in Transportation

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Summary of DC Bar's Environment, Energy, and Natural Resources Section
Brown Bag Lunch on December 9, 1999 on:

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Integrating NEPA Compliance and The Section 106 Process: How to Make the New Section 106 Regulations an Ally and Not a Foe on Major Development Projects?

Panel:Don Klima, Advisory Council on Historic Preservation
Maryann Naber, Advisory Council on Historic Preservation
Betsy Merritt, Associate General Counsel, National Trust on Historic Preservation
Brenda Barrett, Pennsylvania Historical Museum Commission**Moderator:**

Brenda Mallory, Beveridge & Diamond, P.C.

Abstract from DC Bar

The regulatory hurdles that must be overcome on major development projects are ever increasing. Project sponsors are always looking for efficient and cost effective ways to address their regulatory obligations. This past summer, the Advisory Council on Historic Preservation issued its long awaited new regulations governing the historic review process under Section 106 of the National Historic Preservation Act. Those regulations include provisions that are designed to make the coordination of 106 requirements with the regulatory review requirements under other statutes more manageable. The regulations specifically include provisions for addressing the 106 requirements with the documents used to comply with the National Environmental Policy Act. The goal is to streamline the regulatory process for the regulated public, while ensuring that impacts to historic resources are adequately considered. This panel will discuss how to make these new regulations live up to the goal.

Summary

*prepared by Alan Summerville,
ICF Consulting,
9300 Lee Highway,
Fairfax, Virginia 22031-1207
Tel. (703) 934-3616
Fax. (703) 934-9740
Email: asummerville@icfconsulting.com*

Don Klima said that better integration of NEPA and the Section 106 process has been a Holy Grail for many years. He considers NEPA and Section 106 as twins separated at birth. They have the same parents, but a wide gulf developed between them as they were implemented over the years. Among the differences between NEPA and Section 106, is that consultation is a key component, but that is not as much the case under NEPA. He also noted as a difference, that in some cases an agency could use a categorical exclusion even though there could be major Section 106 issues. Even though the ACHP encourages agencies to begin the 106 process early, SHPOs often tell agencies to come

back when they know more about the resources that they might impact.

The ACHP recently conducted a workshop in Richmond with the southeastern states to see how the new regulations are working.

Maryann Naber said that the sections on NEPA in new regulations are intended to get agencies to think through the Section 106 issues before detailed development of the project alternatives. These include common sense measures. Agencies should identify the affected parties and the consulting parties as early as possible. Agencies should also consider public involvement early in the process. The regulations ask what is reasonable given the size and type of project? What is the appropriate level of effort and what are the concurrence points?

The old regulations had allowed the agencies flexibility on the timing of investigations and related efforts. The new regulations have explicit language on the flexibility to conduct reconnaissance surveys early on and determine any fatal flaws.

In terms of the new provision for substituting NEPA for the Section 106 process, no one has tried it yet, but one agency appears to want to try it soon. Agencies wanting to do this must notify the ACHP early in their project. The product is not necessarily a Memorandum of Agreement. The Record of Decision would be binding. In addition, NEPA and Section 106 integration does not apply to categorical exclusions.

Maryann is working with the Federal Highway Administration, Coast Guard, Army Corps of Engineers, Environmental Protection Agency, and U.S. Fish and Wildlife Service on this integration process. The FHWA Mid-Atlantic Office is the farthest along in trying to integrate the NEPA and Section 106 processes. They have developed a document that describes the NEPA process and where the other environmental processes should be relative to specific points in the NEPA process. They will publish it on the FHWA web site and it will also be available on the ACHP web site at www.achp.gov.

She observed that she has seen too many Draft EISs that have too little information on archaeological and historic resources. It is important to proactively involve the affected parties because they usually do not follow the process. Agencies cannot simply add a Section 106 tag line on a legal notice for a NEPA project.

Brenda Barrett observed that many agencies embrace the NEPA process as their responsibility, but think of the 106 process as something they have to get through or get "clearance" for their projects. They see it as the SHPO's process when it is really a Federal process. While she has not seen much integration of NEPA and Section 106 processes, the transportation agencies are taking the lead. She noted that the best way to avoid impacts is at the beginning of a project.

Betsy Merritt, who helped draft the new Section 106 regulations, had been skeptical, but is glad that the integration is moving slowly because she thinks that it needs to be done carefully. She believes that the 106 process is usually done toward the end of the NEPA process and that agencies have a bias toward "document and destroy." For these reasons, integration would be good. Agency environmental staff often has a mindset of going through the motions on NEPA: get public comments, make a decision, and respond in the Final EIS. She is glad that agencies are not rushing to implement integration and seeing this as a loophole.

In response to a question on how agencies desiring to implement the new regulation ought to proceed, the panel said that agencies should start with an

open relationship with the SHPOs and talk through the process with them. Form over substance has been a problem in the past. Agencies should not shutout parties that have information. Some agencies are driven by wanting to maintain control of a project to such an extent that they will not let others into the process and the result is compartmentalization of issues like historic and archeological resources and endangered species. Pennsylvania is trying to make a higher level of knowledge available to agencies and applicants, including a GIS system.

There was a lengthy discussion among the panel and the participants on how to enforce MOAs and their relationship to RODs. Brenda Barrett said that she enforces MOAs by writing numerous letters and copying the right people. Betsy Merritt said that with the Army of Corps of Engineers, for example, enforcement is harder if they do not prepare an EIS with a ROD. The ACHP said that the National Trust is their method of enforcement.

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