DUKE ENVIRONMENTAL LEADERSHIP PROGRAM
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The Advisory Council on Historic Preservation (ACHP or the Council), at 36 C.F.R. § 800.8 (including amendments effective August 5, 2004), set out general principals for coordination of Section 106 of the National Historic Preservation Act of 1966 [16 U.S.C. 470-470w-6 (the Section 106 process)] with the National Environmental Policy Act (NEPA) and its implementing regulations issued by the Council on Environmental Quality (CEQ), in the Executive Office of the President as set out at 40 C.F.R. §§ 1500-1508.

ACHP regulations at 36 C.F.R. § 800.8(c) specifically address the use of the NEPA process for Section 106 purposes. This section begins:

An agency official may use the process and documentation required for the preparation of an EA/FONSI or an EIS/ROD to comply with Section 106 in lieu of the procedures sect forth in [36 C.F.R.] §§ 800.3 through 800.6 if the agency official has notified in advance the SHPO/THPO and the Council that it intends to do so and the following standards are met.

While 36 C.F.R. § 800.8(c) establishes a way for an agency to accomplish the required environmental and historic preservation review and documentation efforts in a single process, the Council nonetheless establishes a series of requirements that must be followed. In 36 C.F.R. § 800.8(c)(1), Standards for developing environmental documents to comply with Section 106, the Council sets out agency requirements:

During preparation of the EA or draft EIS (DEIS) the agency official shall:

(i) Identify consulting parties either pursuant to § 800.3(f) or through the NEPA scoping process with results consistent with § 800.3(f);

(ii) Identify historic properties and assess the effects of the undertaking on such properties in a manner consistent with the standards and criteria of §§ 800.4 through 800.5, provided that the scope and timing of these steps may be phased to reflect the agency official’s consideration of project alternatives in the NEPA process and the effort is commensurate with the assessment of other environmental factors;

(iii) Consult regarding the effects of the undertaking on historic properties with the SHPO/THPO, Indian tribes, and Native Hawaiian organizations that might attach religious and cultural significance to affected historic properties, other consulting parties, and the Council, where appropriate, during NEPA scoping, environmental analysis, and the preparation of NEPA documents;

(iv) Involve the public in accordance with the agency’s published NEPA procedures; and

(v) Develop in consultation with identified consulting parties alternatives and proposed measures that might avoid, minimize or mitigate any adverse effects of the undertaking on historic properties and describe them in the EA or DEIS.

In 36 C.F.R. § 800.8(c)(2), Review of environmental documents, the Council sets out additional agency requirements:
(i) The agency official shall submit the EA, DEIS, or EIS to the SHPO/THPO, Indian tribes, and Native Hawaiian organizations that might attach religious and cultural significance to affected historic properties, and other consulting parties prior to or when making the document available for public comment. If the document being prepared is a DEIS or EIS, the agency official shall also submit it to the Council.

(ii) Prior to or within the time allowed for public comment on the document, a SHPO/THPO, an Indian tribe or Native Hawaiian organization, another consulting party or the Council may object to the agency official that preparation of the EA, DEIS, or EIS has not met the standards set forth in paragraph [36 C.F.R. § 800.8] (c)(1) of this section or that the substantive resolution of the effects on historic properties proposed in an EA, DEIS, or EIS is inadequate. If the agency official receives such an objection, the agency official shall refer the matter to the Council.

The Council sets out additional agency requirements for Resolution of objections at 36 C.F.R. § 800.8(c)(3), for Approval of the undertaking at 36 C.F.R. § 800.8(c)(4), and for Modification of the undertaking at 36 C.F.R. § 800.8(c)(5).

With this guidance, it is clear that although the agency official must insure that all of the substantive provisions of Section 106 are met, even though the agency official is not required to follow precisely the Section 106 regulations.

A CLOSER LOOK AT 36 C.F.R. §§ 800.8(c)

A careful review of 36 C.F.R. §§ 800.8(c)(1) through 5, however, establishes a clear burden on the agency official. While it may be the result of careful drafting, intentional crafting, or simple inattentiveness, the provisions of 36 C.F.R. §§ 800.8(c)(1) through 5 vary in their descriptions of the parties and in their requirements of each.
The verb *can* (permissive) is used in only one instance in connection with the generic “agencies” can “meet the purposes and requirements of both statutes [NHPA and NEPA] in a timely and efficient manner. 36 C.F.R. § 800.8(a)(1) (Early coordination). This permissive verb occurs nowhere else in the provisions of 36 C.F.R. § 800.8.

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**Table 1. Analysis of particular language and identified parties in 36 C.F.R. § 800.8.**

<table>
<thead>
<tr>
<th>particular language</th>
<th>Shall</th>
<th>Should</th>
<th>May</th>
<th>Can</th>
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<td><strong>identified party</strong></td>
<td>found in subsection</td>
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<td>[The] agency official</td>
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<tr>
<td>[The] head of an agency</td>
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<tr>
<td>[The] Council</td>
<td>§ 800.8(c)(3)</td>
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<td>§ 800.8(c)(3)(i)(A) and § 800.8(c)(3)(i)(B) [agency official or the head of the agency]</td>
</tr>
<tr>
<td>SHPO/THPOs, Indian Tribes and Native American organizations</td>
<td></td>
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<td>§ 800.8(a)(2)</td>
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</tbody>
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1 Can. As a verb, to be enabled by law, agreement, or custom; to have right to; to have permission to. Often used interchangeably with “may.” Citations omitted. Henry Campbell Black, *Black’s Law Dictionary*. 5th Edition. 1979.
MAY

May\(^2\) (also similarly permissive or discretionary) is used in three instances. The first is with “the agency official may use the process and documentation required for the preparation of an EA/FONSI or an EIS/ROD to comply with Section 106 in lieu of the procedures set forth in \([36\text{ C.F.R.}] \S\S 800.3 \text{ through } 800.6\).” 36 C.F.R. § 800.8(c) (Use of the NEPA process for Section 106 purposes). The second instance is with “the Council may object to the agency official that preparation of the EA, DEIS, or EIS has not met the standards set forth in paragraph (c)(1) of this section or that the substantive resolution of the effects on historic properties proposed in an EA, DEIS, or EIS is inadequate. 36 C.F.R. § 800.8(c)(2)(ii) (Review of environmental documents). The third instance is where “the head of the agency may delegate his or her duties under this paragraph to the agency’s senior Policy Official\(^3\).” 36 C.F.R. § 800.8(c)(3)(i)(B) (Resolution of objections). This auxiliary verb occurs nowhere else in the provisions of 36 C.F.R. § 800.8.

SHOULD

Should\(^4\) (often considered the past tense of shall) is used in three instances. The first is with “agencies should consider their Section 106 responsibilities as early as possible in the NEPA process.” 36 C.F.R. § 800.8(a)(1) (General principals. Early Coordination). The second instance is with “agency officials should ensure that preparation of an environmental assessment (EA) and finding of no significant impact (FONSI) or an EIS and record of decision (ROD) includes appropriate scoping, identification of historic properties, assessment of effects upon them, and consultation leading to resolution of any adverse effects.” 36 C.F.R. § 800.8(a)(3) (Inclusion of historic preservation issues). The third is with “SHPO/THPOs, Indian Tribes and Native American organizations, other consulting parties, and organizations and individuals who

\(^2\) May. An auxiliary verb qualifying the meaning of another verb by expressing ability, competency, liberty, permission, possibility, probability, or contingency. Regardless of the instrument, however, whether constitution, statute, deed, contract or whatever, courts not infrequently construe “may” as “shall” or “must” on the end that justice may not be a slave to grammar. However, as a general rule, the word “may” will not be treated as a word of command unless there is something in context or subject matter of act to indicate that it was used in such sense. In construction of statutes and presumably also in construction of federal rules word “may” as opposed to “shall” is indicative of discretion or choice between two or more alternatives, but context in which word appears must be controlling factor. Citations omitted. Henry Campbell Black, *Black’s Law Dictionary*. 5\(^{th}\) Edition. 1979.

\(^3\) A definition of “senior Policy Official” was added to 36 C.F.R. § 800.16(z) by Final Rule [Federal Register 69(128):40555 (July 6, 2004)] to mean “the senior policy level official designated by the head of the agency pursuant to section 3(e) of Executive Order 13287.”

\(^4\) Should. The past tense of shall; ordinarily implying duty or obligation; although usually no more than an obligation of propriety or expediency, or a moral obligation, thereby distinguishing it from “ought.” It is not normally synonymous with “may,” and although often interchangeable with the word “would,” it does not ordinarily express certainty and “will” sometimes does. Citations omitted. Henry Campbell Black, *Black’s Law Dictionary*. 5\(^{th}\) Edition. 1979.
may be concerned with the possible effects of an agency action should be prepared to consult with agencies early in the NEPA process…” 36 C.F.R. § 800.8(a)(2) (Consulting party roles).

**SHALL**

Shall\(^5\) (often considered the past tense of shall) is used in twenty-three instances. In 17 (74%) instances, the term is associated with the phrase “agency official,” the “head of any agency,” or the “agency official or the head of the agency.”\(^6\)\(^,\)\(^7\) In the remaining three instances, the term is associated with the “Council.”

The “agency official shall” determine if it still qualifies as an undertaking requiring review under section 106 pursuant to § 800.3(a). If so, the agency official shall proceed with section 106 review in accordance with the procedures in this subpart.” 36 C.F.R. § 800.8(b) (Actions categorically excluded under NEPA). “During preparation of the EA or draft EIS (DEIS) the agency official shall (i) Identify consulting parties either pursuant to § 800.3(f) or through the NEPA scoping process with results consistent with § 800.3(f) [36 C.F.R. §800.8(c)(1)(i)]; (ii) Identify historic properties and assess the effects of the undertaking on such properties in a manner consistent with the standards and criteria of

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\(^5\) Shall. As used in statutes, contracts, or the like, this word is generally imperative or mandatory. In common or ordinary parlance, and in its ordinary signification, the term “shall” is a word of command, and one which has always or which must be given a compulsory meaning; as denoting obligation. It has a peremptory meaning, and it is generally imperative or mandatory. It has the invariable significance of excluding the idea of discretion, and has the significance of operating to impose a duty which may be enforced, particularly if public policy is in favor of the meaning, and when addressed to public officials, or where as public interest is involved, or where the public or persons have rights which ought to be exercised or enforced, unless a contrary intent appears. But it may be construed as merely permissive or directory (as equivalent to “may”), to carry out the legislative intention and in cases where no right or benefit to any one depends on its being taken in the imperative sense, and where no public or private right is impaired by its interpretation in the other sense. Citations omitted. Henry Campbell Black, Black’s Law Dictionary. 5th Edition. 1979.

\(^6\) While it is unclear why the drafters of this part crafted the language to include “agency official,” the “head of any agency,” or the “agency official or the head of the agency” instead simply agency official, it appears to make the provisions more complicated than necessary. There appears to be no difference in meaning from the context and this group of phrases is discussed together.

\(^7\) The Definitions section of the regulation is found at 36 C.F.R. § 800.16. Agency means agency as defined in 5 U.S.C. 551 (“agency” means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include (A) the Congress; (B) the courts of the United States; (C) the governments of the territories or possessions of the United States; (D) the government of the District of Columbia; or except as to the requirements of section 552 of this title; (E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them; (F) courts martial and military commissions; (G) military authority exercised in the field in time of war or in occupied territory; or (H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; subchapter II of chapter 471 of title 49; or sections 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix]. 36 C.F.R. § 800.16(b). Head of the agency means the chief official of the Federal agency responsible for all aspects of the agency’s actions. If a state, local, or tribal government has assumed or has been delegated responsibility for Section 106 compliance, the head of that unit of government shall be considered the head of the agency. 36 C.F.R. § 800.16(k).
§§ 800.4 through 800.5, provided that the scope and timing of these steps may be phased to reflect the agency official’s consideration of project alternatives in the NEPA process and the effort is commensurate with the assessment of other environmental factors [36 C.F.R. § 800.8(c)(1)(ii)]; (iii) Consult regarding the effects of the undertaking on historic properties with the SHPO/THPO, Indian tribes and Native Hawaiian organizations that might attach religious and cultural significance to affected historic properties, other consulting parties, and the Council, where appropriate, during NEPA scoping, environmental analysis, and the preparation of NEPA documents [36 C.F.R. § 800.8(c)(1)(iii)]; (iv) Involve the public in accordance with the agency’s published NEPA procedures [36 C.F.R. § 800.8(c)(1)(iv)]; and (v) Develop in consultation with identified consulting parties alternatives and proposed measures that might avoid, minimize or mitigate any adverse effects of the undertaking on historic properties and describe them in the EA or DEIS [36 C.F.R. § 800.8(c)(1)(v)].” 36 C.F.R. §§ 800.8(c)(1)(i - v).

(Standards for developing environmental documents to comply with Section 106).

“The agency official shall submit the EA, DEIS or EIS to the SHPO/THPO, Indian tribes and Native Hawaiian organizations that might attach religious and cultural significance to affected historic properties, and other consulting parties prior to or when making the document available for public comment. If the document being prepared is a DEIS or EIS, the agency official shall also submit it to the Council. [36 C.F.R. § 800.8(2)(i)]. Prior to or within the time allowed for public comment on the document, a SHPO/THPO, an Indian tribe or Native Hawaiian organization, another consulting party or the Council may object to the agency official that preparation of the EA, DEIS or EIS has not met the standards set forth in paragraph (c)(1) of this section or that the substantive resolution of the effects on historic properties proposed in an EA, DEIS or EIS is inadequate. If the agency official receives such an objection, the agency official shall refer the matter to the Council [36 C.F.R. § 800.8(c)(2)(ii)].” 36 C.F.R. §§ 800.8(c)(1)(i - v). (Review of environmental documents).

The only context in which the Council is commanded or otherwise obligated to act is in found at 36 C.F.R. § 800.8(c)(3) (Resolution of objections). It is also in this context where ‘agency official,’” the “head of any agency,” or the “agency official or the head of the agency” are found. “Within 30 days of the agency official’s referral of an objection under paragraph (c)(2)(ii) of this section, the Council shall review the objection and notify the agency as to its opinion on the objection. (i) If the Council agrees with the objection: (A) The Council shall provide the agency official and, if the Council determines the issue warrants it, the head of the agency with the Council’s opinion regarding the objection. A Council decision to provide its opinion to the head of an agency shall be guided by the criteria in appendix A to this part. The person to whom the Council addresses its opinion (the agency official or the head of the agency) shall take into account the Council’s opinion in reaching a final decision on the issue of the objection. (B) The person to whom the Council addresses its opinion (the agency official or the head of the agency) shall prepare a summary of the decision that contains the rationale for the decision and evidence of consideration of the Council’s opinion, and provide it to the Council. The head of the agency may delegate his or her duties under this paragraph to the agency’s senior Policy Official. If the agency official’s initial
decision regarding the matter that is the subject of the objection will be revised, the agency official shall proceed in accordance with the revised decision. If the final decision of the agency is to affirm the initial agency decision, once the summary of the final decision has been sent to the Council, the agency official shall continue its compliance with this section. (ii) If the Council disagrees with the objection, the Council shall so notify the agency official, in which case the agency official shall continue its compliance with this section. (iii) If the Council fails to respond to the objection within the 30 day period, the agency official shall continue its compliance with this section.” 36 C.F.R. §§ 800.8(c)(3)(i - iii). (Resolution of objections).

“If the agency official has found, during the preparation of an EA or EIS that the effects of an undertaking on historic properties are adverse, the agency official shall develop measures in the EA, DEIS, or EIS to avoid, minimize, or mitigate such effects in accordance with paragraph (c)(1)(v) of this section. The agency official’s responsibilities under section 106 and the procedures in this subpart shall then be satisfied when either: (i) a binding commitment to such proposed measures is incorporated in (A) the ROD, if such measures were proposed in a DEIS or EIS; or (B) an MOA drafted in compliance with § 800.6(c); or (ii) the Council has commented under § 800.7 and received the agency’s response to such comments.” 36 C.F.R. §§800.8(c)(4). (Approval of the undertaking).

And, finally, “If the undertaking is modified after approval of the FONSI or the ROD in a manner that changes the undertaking or alters its effects on historic properties, or if the agency official fails to ensure that the measures to avoid, minimize or mitigate adverse effects (as specified in either the FONSI or the ROD, or in the binding commitment adopted pursuant to paragraph (c)(4) of this section) are carried out, the agency official shall notify the Council and all consulting parties that supplemental environmental documents will be prepared in compliance with NEPA or that the procedures in §§ 800.3 through 800.6 will be followed as necessary.” 36 C.F.R. §§ 800.8(c)(5). (Modification of the undertaking).

LANGUAGE OF CONSTRUCTION

In addition to Black’s Law Dictionary definitions, principals of statutory and other construction of particular language are important when considering the importance of the words and phrases found in 36 C.F.R. § 800.8:

As a general rule the word “may,” when used in a statute, is permissive only, and operates to confer discretion, especially where the word “shall” appears in close juxtaposition in other parts of the same statute. On the other hand, the word “shall” is ordinarily imperative, operating to impose a duty which may be enforced. Of similar effect and import with “shall” is the word “must.” These words, however, are not infrequently used interchangeably, in statutes, without regard to their literal meaning, and in each case are to be given that effect which is necessary to carry out

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the intension of the legislature as determined by the ordinary rules of construction. 82 C.J.S. § 380.

Applying these general rules, and giving the words and phrases found in 36 C.F.R. § 800.8 their plain meaning, it is apparent that the burden is on agency official who chooses to combine the NEPA and NHPA processes into a single effort to show that the provisions of 36 C.F.R. § 800.8 have been met.

REPORTED CASES

Preservation Coalition of Erie County v. Federal Transit Administration
356 F.3d 444 (2d Cir. 01/26/2004)

This case was an appeal from an award by the U S District Court for the Western District of New York of attorneys’ fees to the plaintiff as a prevailing party under the National Historic Preservation Act. The Federal Transit Administration (FTA) and other defendants appealed award of attorneys’ fees to appellee as a prevailing party under the National Historic Preservation Act (“NHPA”). The court reversed the award against (some of the parties) because it concluded that the NHPA does not apply those parties. The court found that the FTA is subject to an award of fees under the NHPA and remanded for a recalculation and limitation of the award.

Appellants FTA (and others) were responsible for the Inner Harbor Project that involved an area on Buffalo’s waterfront that included the terminus of the historic Erie Canal. The Empire State Development Corporation (ESDC) was the “lead agency” for NEPA and NHPA reviews.

After the FEIS was issued, excavators discovered “a roughly eight foot section of the eastern portion of the Commercial Slip [W]all [of the Erie Canal terminus] as rebuilt in the 1880s.” On May 18, 1999, the New York SHPO informed the ESDC that the Commercial Slip Wall met the criteria for listing in the National Register of Historic Places (Register), and subsequently concluded that the Wall could not be preserved in an exposed condition. The Court then concluded NHPA regulations in effect during the relevant time period render appellee (Preservation Coalition of Erie County) a prevailing party under the NHPA as well as the NEPA.
The Court, on its own motion to supplement the submitted briefs, notes that 36 C.F.R. § 800.8 (effective June 17, 1999) permits agencies to meet their Section 106 NHPA requirements with steps taken to meet their NEPA requirements [also citing 64 Fed. Reg. 27044, 27060 (May 18, 1999)] concluding that “under the current regulations…an agency may fulfill its NHPA obligations by either following the old, non-integrated Section 106 process, see 36 C.F.R. §§ 800.3-800.6, or through the new integrated NEPA/NHPA process, see 36 C.F.R. § 800.8.”

The Court went on to find that consistent with the integration of NHPA and NEPA procedures, the regulations explicitly call for production of “supplemental environmental documents” in circumstances where an agency undertaking is modified following a final agency action as in the case of an approved “FONSI or the ROD in a manner that changes the undertaking or alters its effects on historic properties…the agency official shall notify the Council and all consulting parties that supplemental environmental documents will be prepared in compliance with NEPA or that the procedures in §§ 800.3 through 800.6 will be followed as necessary.”

The agency official (appellant FTA) argued that the new regulations (at 36 C.F.R. § 800.8) do not apply because the FEIS was completed prior to the time the regulations went into effect, and therefore it had the option of complying with the NHPA “under the old, non-integrated Section 106 process.” A review of the facts of the case by the Court found that (although the FEIS was completed in February, 1999) “the subsequent discovery of the Commercial Slip Wall rendered it inadequate, resulting in consultations between the SHPO and ESDC that continued until August, 1999” (finding the language of the new regulations does not foreclose relying on the new, integrated NHPA process once there has been a “modification of the undertaking.”)

Mid States Coalition for Progress v. Surface Transportation Board
345 F.3d 520 (8th Cir. 10/02/2003)

This was a challenge to the decision of the Surface Transportation Board giving final approval to the Dakota, Minnesota & Eastern Railroad Corporation’s (DM&E) Preservation issued new NHPA regulations that formally integrated NEPA procedures into the NHPA process.

13 36 C.F.R. § 800.8(c)(5) (effective June 17, 1999).
14 Concluding the Advisory Council’s regulation is clearly a reasonable response to a situation involving the interplay of two federal statutes.
15 Finding also that while the language of Section 800.8(c)(5) leaves it to the agency to decide how to rectify the deficiencies in the FONSI or ROD when an undertaking is subsequently modified, a court nonetheless retains the authority to enforce regulations when it finds that an agency has failed to meet its regulatory and statutory obligations under the NHPA.
16 MID STATES COALITION FOR PROGRESS, PETITIONER, ROCHESTER AREA CHAMBER OF COMMERCE; CITY OF SKYLINE, MINNESOTA; BRIAN BRADEMEYER, INTERVENORS ON APPEAL v. SURFACE TRANSPORTATION BOARD. Review of a Decision of the Surface Transportation Board.
proposal to construct a new rail line. Petitioners argue that in giving its approval the Board violated NEPA, NHPA, and the Fort Laramie Treaty of 1868. The court concluded that the Board first makes an administrative finding that the proposal is not inconsistent with the public convenience and necessity and then conducts an environmental review as required by NEPA, taking into account the potential environmental effects and the cost of required mitigation. The question then turned to whether the Board complied with Section 106 of the National Historic Preservation Act which provides that a federal agency shall “take into account” the effect of its licensing decisions on properties “included in or eligible for inclusion in, the National Register [of Historic Places]” (and following the ACHP implementing regulations).

The Mid States Coalition argued that the Board failed to include all necessary parties in its consultation process, failed to invite all relevant state historic preservation officers, tribal historic preservation officers, local government representatives, and the project applicant to participate in the NHPA process as consulting parties, and failed to invite other interested individuals or organizations. The Coalition specifically argued that the NHPA was violated because the Board failed to invite ranchers and farmers whose lands may contain historic properties to participate as consulting parties. Finding that the Board granted consulting party status to all individuals and organizations making a request, the Court concluded “the agency complied with its general duty to notify and allow comment from the public on matters of historic preservation during the environmental review process.”

As noted above, an NHPA analysis involves a three-step process of identification, assessment, and mitigation. The general expectation is that an agency will complete one step before moving on to the next, but the regulations permit an agency to use a “phased process” of identifying and evaluating properties where “alternatives under consideration consist of corridors or large land areas,” 36 C.F.R. § 800.4(b)(2). The agency’s phased process “should establish the likely presence of historic properties within the area of potential effects for each alternative... through background research, consultation and an appropriate level of field investigation, taking into account the number of alternatives under consideration, the magnitude of the undertaking and its likely effects, and the views of the [historic preservation officers] and any other consulting parties.” Id. We believe that SEA’s analysis in the early stages adheres to this approach. During the period when there were still numerous alternatives under consideration, it was permissible for SEA to delay assessing the adverse effects of the project on specific sites. But as “specific aspects or locations of an alternative are refined,” the regulation provides that the agency “shall proceed with the identification and evaluation of historic properties.” Id. By requiring that agencies identify and assess individual properties as

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17 Including approximately 280 miles of new rail line to reach the coal mines of Wyoming’s Powder River Basin (PRB) and to upgrade nearly 600 miles of existing rail line in Minnesota and South Dakota.
18 36 C.F.R. § 800.2(d)(2).
19 36 C.F.R. § 800.2(c).
20 36 C.F.R. § 800.2(c)(5) and 36 C.F.R. § 800.3(f)(3).
21 The Court found that the ACHP regulations make it apparent, however, that affected ranchers and farmers are not automatically entitled to be consulting parties but must make a request to participate.
22 36 C.F.R. §§ 800.3(e) and 800.8(c)(1)(iv).
project alternatives become more concrete, the regulations assure that the agency will be in a position to proceed to the mitigation step.

The Board argues that the ACHP regulations permit it to defer some responsibilities (including evaluation of or adoption of specific measures to avoid or mitigate any adverse effects) these actions until after the license has been approved. The Court disagreed finding:

It is true that the regulations permit an agency to “defer final identification and evaluation of historic properties if it is specifically provided for in...the documents used by an agency official to comply with [NEPA] pursuant to [36 C.F.R.] § 800.8.”

But § 800.8, in turn, requires that an agency develop measures to “avoid, minimize, or mitigate” adverse effects and then bind itself to these measures in a record of decision. The ACHP’s regulations, when read it their entirety, thus permit an agency to defer completion of the NHPA process until after the NEPA process has run its course (and the environmentally preferred alternatives chosen), but require that NHPA issues be resolved by the time that the license is issued. In this case, the Board’s final decision contains a condition requiring DM&E to comply with whatever future mitigation requirements the Board finally arrives at. We do not think that this is the type of measure contemplated by the ACHP when it directed agencies to develop measures to “avoid, minimize, or mitigate” adverse effects.

**Niagara Mohawk Power Corporation v. Fourth Branch Associates (Mechanicville)**

100 FERC P61, 185 (August 12, 2002)

Fourth Branch Associates (Mechanicville) (FBAM) and the Advisory Council on Historic Preservation (Council) sought a rehearing of the order issued in this proceeding on February 28, 2002, accepting surrender of the license for the Mechanicville Project No. 6032. FBAM and Niagara Mohawk Power Corporation (Niagara Mohawk) applied jointly to redevelop and increase the capacity of the Mechanicville Project from 4.5 megawatts (MW) to 17 MW under a new license. The nearly 100 years old project is listed on the National Register of Historic Places and was damaged by a May 1996 flood. Niagara Mohawk repaired and operated the project until October 1997, at which time it ceased power operations. After several hearings, FERC “concluded that the co-licensees have implicitly surrendered the project license,” and instituted an implied surrender proceeding. FERC then issued a draft EA and received comments from FBAM, the ACHP, and others. The final EA reached the same conclusions as the draft EA.

FBAM and the Council argued that FERC did not fulfilled its consultation responsibilities under Section 106 of NHPA and the Council’s implementing regulations at 36 C.F.R. Part 800, and, along with the New York SHPO contended that greater consideration should have been given to the alternative of another entity acquiring and

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23 36 C.F.R. § 800.4(b)(2).
24 36 C.F.R. § 800.8(c)(4).
26 This order serves the public interest by putting to rest a long-standing controversy concerning the appropriate disposition of a project license in circumstances where the co-licensees have irreconcilable differences that prevent their continued operation of the project.
operating the project works.\textsuperscript{27} On rehearing, the Council augured that because surrender of the project license would have an adverse effect on the historic property an MOA was required to avoid, minimize, or mitigate the adverse effect prior to the effective date of the surrender.\textsuperscript{28} FERC, somewhat summarily, concluded “that the procedures employed in this proceeding substantially comply with [ACHP] rules.”\textsuperscript{29}

FBAM argued that preparation of the EA did not meet the ACHP consultation requirements at 36 C.F.R. § 800.8(c)(1) in relation to coordination of the Section 106 process with preparation of NEPA documents. The Commission found that 36 C.F.R. § 800.8(c)(1) requires the agency [official] “to identify consulting parties [36 C.F.R. § 800.8(c)(1)(i)], identify historic properties and assess the effects of the undertaking on such properties [36 C.F.R. § 800.8(c)(1)(ii)], consult with the consulting parties during development of the NEPA document [36 C.F.R. § 800.8(c)(1)(iii)], and involve the public [36 C.F.R. § 800.8(c)(1)(iv)] and concluded that the February 28 order discusses in detail how these requirements were met.\textsuperscript{30}

DISCUSSION

The ACHP has established its protocol to assist in streamlining an agency’s responsibilities for Section 106 while it is complying with the requirements of NEPA at 36 C.F.R. § 800.8 (\textit{Coordination with the National Environmental Policy Act}). Review of reported cases where 36 C.F.R. § 800.8(c) was litigated or otherwise presented as an issue shows only a very few with one from the 2\textsuperscript{nd} Circuit\textsuperscript{31}, one from the 8\textsuperscript{th} Circuit\textsuperscript{32} and one from FERC\textsuperscript{33} proceedings. While it is difficult to establish a clear “line of cases” from only three examples, a reexamination of 36 C.F.R. § 800.8(c) (\textit{Use of the NEPA process for Section 106 purposes}) may be in order. The Council’s regulations state:

\begin{quote}
An agency official may use the process and documentation required for the preparation of an EA/FONSI or an EIS/ROD to comply with section 106 in lieu of the procedures set forth in §§
\end{quote}

\textsuperscript{27} FERC notes, however, that Ordering Paragraph (C) requires Niagara Mohawk to prepare and file for Commission approval, in consultation with the New York State Historic Preservation Officer (SHPO) and the Council, a plan and schedule to document the project’s historic resources to Historic American Building Survey/Historic American Engineering Record. 98 FERC at page 61, 907.

\textsuperscript{28} 36 C.F.R. § 800.6.

\textsuperscript{29} In a note, the Commission found that a review of its files shows that from 1996 through April 2000, when Section 106 consultation commenced, the SHPO made twelve filings concerning protection of the project’s historic resources. There are nine letters from the Commission to the co-licensees or Niagara Mohawk during the same period discussing Commission directives to take various actions to preserve the integrity of the project structures for reasons of safety and to preserve the historic properties. In addition, nine regular and special inspections of the project were conducted by Commission staff during the period.

\textsuperscript{30} Finding that neither FBAM nor the Council have advanced persuasive arguments that the procedures employed in this proceeding or the result are flawed, and FERC therefore denied rehearing.

\textsuperscript{31} Preservation Coalition of Erie County v. Federal Transit Administration. 356 F.3d 444 (2d Cir. 01/26/2004).

\textsuperscript{32} Mid States Coalition for Progress v. Surface Transportation Board. 345 F.3d 520 (8th Cir. 10/02/2003).

\textsuperscript{33} Niagara Mohawk Power Corporation v. Fourth Branch Associates (Mechanicville). 100 FERC P61, 185 (August 12, 2002).
An agency official may use the [NEPA] process … to comply with Section 106 in lieu\textsuperscript{34} of [the Council’s procedures] \textit{if}\textsuperscript{35} the agency official has notified\textsuperscript{36} in advance the SHPO/THPO and the Council that it intends\textsuperscript{37} to do so and the following standards are met.

From the words and phrases used in the regulation itself, it is apparent that the agency official is may (i.e., is permitted but certainly is not required, does not have to and is under to compulsion to do so) use the NEPA process (to the extent NEPA overlays with the requirements of 36 C.F.R. Part 800) \textit{if} (as a condition precedent) the agency official has notified the SHPO/THPO and the Council that it intends to do so.

As an illustration, let’s say an agency official has decided that it is in the best interests of his/her undertaking to use the NEPA process to comply with Section 106. The official has been convinced by the consultant team that an overlapping of these efforts will save time and money.

It all sounds good. But the agency official can use NEPA for Section 106 only if he/she first notifies (in advance) the SHPO/THPO and the Council. What form does this notice take? Are there regulatory requirements that must be met? To whom is the notice addressed? By whom is the notice signed? Does it need to be signed? Does the notice need to be published? How far in advance do the SHPO/THPO and the Council need to be notified? A week? Four weeks? Ninety days? Can a party object to the process if the notice is faulty in some way?

Assuming that the notice is proper (or at least not attacked because of form or substance) and is timely (sufficiently in advance), can the agency official stop, reevaluate, and return to the more traditional parallel path of the NEPA process and the Section 106 process? Because the notice is only one of intent, an intent to do a permissive act, there is no suggestion that the agency official could not, at any time, for any reason, return to the independent Section 106 process.

At this time it is unclear whether the ACHP maintains records of whether, which, or how many agency officials have noticed the Council of their intent to follow 36 C.F.R. § 800.8(c). What is apparent, however, is that if an agency official concludes that 36

\begin{itemize}
  \item \textsuperscript{34} In lieu of. Instead of; in place of; in substitution of. Henry Campbell Black, \textit{Black’s Law Dictionary}. 5\textsuperscript{th} Edition. 1979.
  \item \textsuperscript{35} If. Implies a condition precedent. Henry Campbell Black, \textit{Black’s Law Dictionary}. 5\textsuperscript{th} Edition. 1979.
  \item \textsuperscript{37} Intends. To design, resolve, propose. To plan for and expect a certain result. To apply a rule of law in the nature of a presumption; to discern and follow the probabilities of like cases. Also intent. Henry Campbell Black, \textit{Black’s Law Dictionary}. 5\textsuperscript{th} Edition. 1979. The term refers to future contemplated action, as distinguished from present action, and has been said merely to import an inclination to do an act. 46 C.J.S. § 1102.
\end{itemize}
C.F.R. § 800.8(c) is the way to proceed, they should do so only with the knowledge that there are 17 shalls in the 3½ columns that 36 C.F.R. § 800.8 covers in the Federal Register (that’s just over one out of 16 pages). That is not necessarily bad. It is just something about which the agency official needs to be aware.

MODERNIZING NEPA

The Council on Environmental Quality (CEQ) is in a continuing process of to seek ideas for and develop ways in which NEPA can and should be modernized. The NEPA Task Force report included over 50 recommendations to CEQ in this modernization effort. Included among the recommendations was the development of updated guidance and handbooks on integrating the NEPA process with environmental management systems, coordinating NEPA with other environmental consultation and coordination requirements (including Section 404 and Section 106), establishing categorical exclusions, developing concise and focused EAs with alternatives and mitigation, monitoring use of CEs and EAs, use of programmatic analyses, better training for interested and affected parties.

THE OKLAHOMA ANSWER

The Oklahoma SHPO web site has a section for Frequently Asked Questions.

Question 6. If we have already completed the NEPA process, do we still have to go through Section 106?

Answer. Yes. NEPA does not substitute for project review under Section 106. Agencies are encouraged to coordinate NEPA and Section 106 as early as possible in their planning process. The Council’s regulations (36 C.F.R. Part 800.8) now make it possible for a Federal agency to substitute its NEPA process for Section 106. But the NEPA process must be consistent with the Council’s regulations and must receive the Council’s approval.

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38 Modernizing NEPA Implementation.