Managing Superfund Cleanups with National Historic Preservation Act Concerns

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US EPA (on detail from Region 10)
Purpose and Goals

- Provide a basic overview of NHPA requirements and relationship to EPA Superfund response actions
- Describe the NHPA Section 106 process
- Examples
- Additional sources of information
National Historic Preservation Act of 1966 (as amended)

- Multifaceted statute to protect historical and archeological sites
- Response to increasing loss of significant historic properties
- Goal of preserving historic and cultural resources
- 1992 amendments increased protection for Native American resources
NHPA - Section 106

- Establishes principal **procedural** responsibilities for federal agencies to consider the effects of their **undertakings** on **historic properties** and provide the Advisory Council on Historic Properties an opportunity to comment.
NHPA - Section 106 Cont’d

- No substantive preservation mandate
- Requirements generally non-delegable
- Triggered prior to the approval of the expenditure of funds or issuance of a license for a federal undertaking
- Process is laid out in *Advisory Council on Historic Preservation (ACHP)* regulations at 36 CFR Part 800
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 the agency;
- Carried out with Federal financial assistance
- Requiring a Federal permit, license, or approval
- Subject to state/local regulation administered pursuant to a delegation or approval by a federal agency
What is a Historic Property?

“historic properties” under NHPA:

- District, site, building, structure, objects…listed or eligible for listing in the National Register of Historic Places

- Traditional religious and cultural sites of importance to Tribes (*dance grounds, waterways, campsites, etc.*)
State Historic Preservation Officers & Tribal Historic Preservation Officers

- State Historic Preservation Officers (SHPOs) administer the national historic preservation program at the State level.
- Tribal Historic Preservation Officers (THPOs) have responsibility for preservation of significant historic properties on federally recognized tribal land.
Potentially Relevant Superfund Actions

- Remedial Actions
  - Compliance with ARARs threshold criteria

- Removal Actions
  - Compliance with ARARs to the *extent practicable under the exigencies* of the circumstances
  - Non-emergency – case-by-case

- Emergency Responses
Emergency Response Programmatic Agreement – 1997

- Emergency – Whenever response to release/spill must be so expeditious that normal section 106 process is not reasonably practicable

- Responsibility to protect public health and safety is paramount

- Area Contingency Plans

- Pre-Incident Planning

- Response Activities
**Public involvement Important throughout**
Section 106 – Key Steps

- Establish “undertaking”

- Identify appropriate State and/or Tribal Historic Preservation Officer(s) and initiate consultation process

- Involve appropriate additional consulting entities

- Plan for public involvement
Section 106 – Key Steps Cont’d

- Determine Area of Potential Effects (APE)
  - Geographic area within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if such properties exist
  - Identify historic properties within APE
  - Carried out by qualified professionals
  - Confer with SHPO and THPO
Section 106 – Key Steps Cont’d

❖ Identify historic properties

❖ Evaluate historic significance – may consist involve:
  ▪ Literature survey
  ▪ Environmental & cultural setting
  ▪ Field investigation & survey findings
  ▪ Analysis, conclusions & recommendations

❖ Reasonable and good faith effort
Section 106 – Key Steps Cont’d

◆ Assess effects of undertaking on historic properties

◆ Apply criteria of adverse effect

  ▪ Will undertaking alter, directly or indirectly, any of the characteristics of the 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
Section 106 – Key Steps Cont’d

▶ Resolve adverse effects, if any

▶ Consider in good faith alternatives or modifications to avoid, minimize, or mitigate adverse effects

▶ Resolution often documented in memorandum of agreement

▶ No substantive requirement to avoid adverse effects
Section 106 – Tribal Roles

◆ Serve as Tribal Historic Preservation Officer
  ▪ Tribes may apply to DOI to assume all or part of functions of SHPO’s, including role of consulting party in Section 106 process, with respect to Tribal lands

◆ Tribal lands include all lands within Indian reservations and all dependent Indian communities
Section 106 – Tribal Roles Cont’d

- Traditional religious and cultural sites may be determined to be eligible for inclusion in the National Register

- Potential tribal cultural properties – viewsheds, ceremonial areas, areas of traditional use, others.
Section 106 – Tribal Roles Cont’d

- Undertakings on or affecting Tribal lands
  - Consult with THPO or designated Tribal representative – SHPO may also have a role
  - Required party to any resolution of adverse effects

- Undertakings affecting historic properties (wherever located) of religious and cultural significance to a Tribe or Native Hawaiian Organization
  - Consult with Tribal representative
  - Reasonable and good faith effort to identify interested tribes
Tips for a Successful NHPA Section 106 Review

- Communicate early and often with SHPO, THPO, the public and others
- Involve tribal archeologist, if available
- Plan ahead - allow adequate time
- Cultural resource survey report may contain sensitive information – handle properly
Tips for Working with Tribes

- Engage tribes early in the process
- Respect the gov’t-to-gov’t relationship
- Be sure you are consulting with an authorized representative of the tribe
- Failure of a tribe to respond to a particular inquiry may not indicate lack of interest
- Multiple tribes may be interested in the same historic property
- Document consultation but be sensitive to confidentiality concerns
NHPA Example - Upper Columbia River

- Adjacent to Colville Indian Reservation, the Spokane Tribe Indian Reservation, and U&A area

- A cultural resources working group was formed and as part of planning for Superfund sediment sampling

- Identified areas acceptable for sampling and areas not to be sampled – but did not disclose cultural resource specifics

- Tribal and NPS observers monitored sampling → net result was that no cultural resources were impacted
NHPA Example: Coeur d’Alene Basin Superfund Site

- Remediation of mine waste impacted area by EPA in coordination with Natural Resource Trustees
- Cooperative Agreement with Coeur d’Alene Tribe - project area is within ancestral ceded territory
- Cultural resource survey by Tribe archeologist
- Coordination with Tribe and State
- Monitoring by Tribe during construction – no artifacts found
Example and Lessons Learned

- Historic Tri-State Mining District
- Three Superfund Sites, two EPA Regions
- Ten Tribes
  - Quapaw, et al
- Three states
  - KS, OK, MO

- Cherokee County, KS Superfund Site EPA R7
Tar Creek Superfund Site, OK, EPA R6

Reservations in Kansas, circa 1846
19. Quapaw Strip

Quapaw Tribe, Mine-Scarred Lands

Tribal Lands Forum
Coos Bay, Oregon  ♦  August 21, 2012
Programmatic Agreement

- EPA, Quapaw Tribe, THPO, KS SHPO, Advisory Council
- Remedial action
- Historical homeland of Tribe in KS
  - Quapaw strip
  - Area of potential effects
- Document reviews
EPA R7
Interim Guidance on NHPA for Superfund

- Screening Tool to identify historic resources
- Summary for CERCLA & NHPA regulation
- Guidance on working with SHPO & THPO
  - Planning
  - Consultation
  - Coordination
  - Dispute Resolution
- R7 Interim Regional Guidance, Jan. 8, 2002
For More information

- Contact your SHPO, THPO, site attorney and regional practices/guides

- EPAHQ NHPA contact:
  Matt Nowakowski, Office of Federal Activities
  202-564-7156 / nowakowski.matt@epa.gov

- EPA Region 10 contact:
  Ted Yackulic, Office of Regional Counsel
  206-553-1218 / yackulic.ted@epa.gov
For More Information Cont’d

- CERCLA Compliance with Other Laws Manual, Part II – Ch. 4.1
- Historic & Archeological Resource Protection (EPA, ‘09)
- National Association of THPOs - www.nathpo.org/main.html
Summary

- EPA is responsible for ensuring Section 106 compliance
- Respect the government-to-government relationship
- Engage SHPO, THPO(s) and tribal representatives early
- Documentation is important – be sensitive to confidentiality concerns
- If at any point, it is determined that cultural resources are not present or will not be affected, then no further action is needed
- Allow adequate time for NHPA Section 106 process