

Attachment 3: Staff Guidance for Historic and Cultural Resource Reviews for New Reactor Environmental Impact Statements COL/ESP-ISG-026

Background

In 2007, the **U.S.** Nuclear Regulatory Commission (NRC) amended its regulations with regard to limited work authorizations (LWAs). An LWA allows certain NRC-regulated construction activities to commence before a construction permit (CP) or combined license (COL) is issued (*Federal Register* notice (FR), 72 FR 57416-) ([NRC 2007](#)). In the 2007 amendments, NRC modified the definition of “construction” to clarify that certain activities do not require NRC approval because they fall outside the NRC’s regulatory authority, including (a) preparation of a site for construction (clearing, grading, construction of temporary roads and borrow areas), (b) excavation, (c) erection of support buildings, and (d) building of service facilities (paved roads, parking lots, railroad spurs, sewage treatment facilities, and transmission lines). Because these activities are not in the definition of construction, they are also referred to as “preconstruction” activities. For purposes of the National Environmental Policy Act (NEPA), these preconstruction **activities** are addressed as cumulative impacts in NRC Environmental Impact Statements (EISs).

Rationale

The purpose of this document is to supplement the guidance provided in NUREG-1555, Environmental Standard Review Plan (ESRP), Sections 4.1.3 and 5.1.3, Historic Properties, and Section 9.3, Alternative Sites ([NRC 2000](#)), regarding the requirements of the National Historic Preservation Act ([NHPA](#)) and [NEPA](#). Specifically, this guidance supplements the ESRP guidance for: 1) Using the NEPA process to comply with NHPA requirements, 2) NHPA Section 106 consultation, 3) use of reconnaissance-level information for alternative sites, 4) cumulative impacts for historic and cultural resources, and 5) protecting historic and cultural resource information.

Staff Guidance

Using the NEPA Process to Comply With NHPA Requirements

The ESRP directs the staff’s assessment of potential impacts of the proposed action on historic, archaeological, and traditional cultural resources (referred to collectively as “historic and cultural resources”). In accordance with Title 36 of the *Code of Federal Regulations* ([36 CFR 800.8\(c\)](#)), the NRC may use its NEPA review process instead of the Section 106 procedures set forth in 36 CFR 800.3 through 800.6. Prior to commencing the review, the staff should review the requirements of 36 CFR 800.8(c).

The NRC’s NEPA review focuses on the “proposed action” under consideration – for example, issuance of a COL for construction and operation of a new nuclear reactor. If a cooperating agency participates in the development of an EIS because it has a permit/license action before it, the EIS will also identify the cooperating agency’s proposed action. Activities outside the NRC’s regulatory authority, including but not limited to preconstruction activities **and their impacts on cultural and historic properties**, are considered as cumulative impacts of the NRC’s proposed action.

By contrast, NHPA consultation focuses on the federal “undertaking” under consideration, as defined in 36 CFR 800.16(y). The definition of federal undertaking includes activities “requiring a Federal permit, license or approval.”¹

The NRC views site preparation activities with no nexus to radiological health and safety or common defense and security as private actions that would not be subject to NHPA through the NRC. However, site preparation activities may be subject to NHPA review by another Federal Agency such as the U.S. Army Corps of Engineers.

The NRC is required to comply with the NHPA including the anticipatory demolition clause, Section 110(k) of the NHPA (16 U.S.C. § 470h-2(k)). When fulfilling its NHPA obligations, the NRC views site preparation activities with no nexus to radiological health and safety or common defense and security as private actions that are not part of the NRC’s Federal undertaking. However, those site preparation activities may be subject to NHPA review to the extent they are encompassed by the Federal undertaking of another Federal Agency, such as the USACE. Certain site preparation activities may have other specific NHPA consequences. The staff during pre-application interactions should inform the applicant that if they decide to commence pre-construction or site preparation activities, the applicant should be cognizant of the anticipatory demolition statutory provision in Section 110(k) of the NHPA (16 U.S.C. § 470h-2(k)) which states:

Each Federal agency shall ensure that the agency will not grant a loan, loan guarantee, permit, license, or other assistance to an applicant who, with intent to avoid the requirements of Section 106 of this Act, has intentionally significantly adversely affected a historic property to which the grant would relate, or having legal power to prevent it, allowed such significant adverse effect to occur, unless the agency, after consultation with the Council, determines that circumstances justify granting such assistance despite the adverse effect created or permitted by the applicant.

The staff during the acceptance review and throughout the review should inform management if it appears anticipatory demolition may have occurred and if necessary consult with the Advisory Council on Historic Preservation (ACHP) to determine what action may be appropriate.

Section 106 Consultation

Section 106 Consultation is conducted for the federal undertaking. In accordance with 36 CFR 800.8(c)(1), historic properties are identified and effects of the undertaking on such properties are assessed in consultation with the identified parties. For applications where NRC chooses to substitute its NEPA review process for the Section 106 process in 36 CFR 800.3 through 800.6 (as permitted by the NHPA implementing regulations at 36 CFR 800.8), the EIS will discuss the consultation process used to identify historic properties, assess the effects of the undertaking on such properties in a manner consistent with the standards and criteria of Sections 800.4 through 800.5 and develop proposed measures to avoid, minimize or mitigate

¹ In addition, the NRC exercises its regulatory authority in a manner consistent with the fundamental principles expressed in Executive Order 13175, “Consultation and Coordination With Indian Tribal Governments” (Nov. 6, 2000). This Executive Order encourages federal agencies to consult with Indian Tribal Governments on the development of policies that have tribal implications. As a result, the NRC may have responsibilities to consult with Tribal governments on licensing actions that are not necessarily triggered by the NEPA or NHPA. The NRC staff should contact the Intergovernmental Liaison Branch (ILB) of the Division of Intergovernmental Liaison and Rulemaking, Office of Federal and State Materials and Environmental Management Programs (FSME) with any questions regarding outreach and communication with Native American Tribal communities and Tribal representatives.

any adverse effects of the undertaking on historic properties and describe them in the environmental assessment (EA) or draft EIS. The status of the consultation should also be included in Chapters 2, 4 and 5.

The area within which historic properties should be identified is referred to as the Area(s) of Potential Effects (APE(s)). The APE is defined at 36 CFR 800.16(d) as 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 APE is influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking (36 CFR 800.16(d)). The staff should consider the scope of the proposed project and the NRC's definition of construction (Title 10 of the *Code of Federal Regulations* (10 CFR) 50.10, 10 CFR 51.4), and consult with the State Historic Preservation Officer (SHPO) or Tribal Historic Preservation Officer (THPO) when determining the APE(s).

If the staff determines that adverse effects to historic properties exist, the adverse effects would be resolved via consultation with the SHPO and/or the THPO, affected federally recognized tribes, local government, members of the public, the applicant, and other affected parties. (In some cases, the ~~Advisory Council on Historic Preservation (ACHP)~~ may become involved in these site-specific negotiations.) Specifically, 36 CFR 800.8(c)(1)(v) provides that the federal agency develop proposed measures in consultation with the identified consulting parties that might avoid, minimize, or mitigate such effects. Such measures, as appropriate, should be discussed in the EIS. If the staff determines that adverse effects exist, it can develop a Memorandum of Agreement (MOA) or Programmatic Agreement (PA) (See 36 CFR 800.8(c)(4)) as a way to address adverse effects.

The federal agency also consults with the relevant parties when developing an MOA or a PA. As defined 36 CFR 800.16(o), an MOA is a document that records the terms and conditions agreed upon to resolve the adverse effects of an undertaking upon historic properties. The PA is defined in 36 CFR 800.16(t) as a document that records the terms and conditions agreed upon to resolve the potential adverse effects of a Federal agency program, complex undertaking or other situations in accordance with Section 800.14(b). Whichever is used, the MOA or PA must specify who is responsible for carrying out the agreed-upon measures. The NRC staff should consult with the Office of General Counsel on a case-by-case basis about the circumstances under which the NRC may participate in the development of an MOA/PA and about referencing any such agreement in the environmental protection plan.

Reconnaissance-level Information and Reconnaissance Activities

There is a difference between “reconnaissance-level information” as used in NRC environmental reviews and the term “reconnaissance activities” as used by cultural resource professionals. For the purpose of its NEPA review, the NRC considers reconnaissance-level information, which is information that is available from the applicant, governmental, Tribal, commercial, and/or public sources, when reviewing alternative sites.² Reconnaissance-level information does not normally require the collection of new data or field studies. For example, the historic and cultural resources subject matter expert can gather this information from the application, through visits to the alternative sites, and through interactions with the appropriate THPO/SHPO.

² ESRP Section 9.3 identifies potential sources of information.

Among cultural resource professionals, the term “reconnaissance activities” has a particular meaning. Typically, these activities include preliminary field investigations to confirm the presence or absence of historic and cultural resources. For the NEPA analysis, data about historic and cultural resources from reconnaissance activities (such as field investigations) are typically available for the proposed site but not for the alternative sites. For the alternative sites considered in the EIS, the NRC’s analysis of impacts to historic and cultural resources typically relies on available (reconnaissance-level) information rather than on collection of new data or field studies. Reconnaissance activities are not generally required for alternative sites.

Cumulative Impacts

The NEPA cumulative impacts assessment considers the impacts of the proposed action on historic and cultural resources when combined with the impacts of other past, present, and reasonably foreseeable future actions. Cumulative impacts can result from individually minor, but collectively significant, actions taking place over a period of time. The area over which cumulative impacts are considered can vary for different types of impact. For the NEPA analysis of cumulative impacts to historic and cultural resources from the proposed action, it is usually appropriate for the impacts analysis to start by considering the impacts within the APE identified for NHPA purposes, as well as the impacts on historic and cultural resources from preconstruction activities. However, the NEPA analysis should also consider cumulative impacts from other activities outside the APE (e.g., if there are past, present, or reasonably foreseeable future impacts outside the APE that would affect the same historic or cultural resources).

Discussions with the THPO/SHPO may provide information on past, present, and future actions within the APE and the potential impacts to the resources located there. Information on impacts from these past, present, and reasonably foreseeable future actions (including preconstruction activities) should be included in the applicant’s environmental report. This will both aid the staff in its NEPA cumulative impacts analysis and inform the staff’s evaluation of potential adverse effects to historic properties under NHPA, including, if appropriate, consideration of possible “anticipatory demolition” issues at the site.

Protecting Cultural Resource Information

Cultural resource information (i.e., reports, maps, site forms) that discloses locations of certain historic and cultural resources should not be made available to the public because there is a risk of looting. The NRC protects cultural resource information disclosing the location of cultural resources (e.g., maps) under Section 304 of the NHPA,³ consistent with 10 CFR 2.390(a)(3). Section 304 of NHPA requires the NRC to “withhold from disclosure to the public, information about the location, character, or ownership of a historic resource if the agency and the Secretary of the Interior agree that disclosure may (1) cause a significant invasion of privacy, (2) risk harm to the historic resource, or (3) impede the use of a traditional religious site by practitioners.”

The Secretary of the Interior acts through the Keeper of the National Register of Historic Places, a position within the National Park Service (NPS). The NRC, therefore, consults with the Keeper of the Register to make a determination to withhold information from the public if there is a request to disclose this information. Memorandum dated June 7, 2010 -(Agencywide

³ See 36 CFR 800.11(c).

Documents Access and Management System (ADAMS) Accession No. ~~No.~~ ML111080735)
“Staff Guidance for Withholding Sensitive Information About Historic Resources in Accordance
With the National Historic Preservation Act” ([NRC 2010](#)) contains detailed guidance on
withholding sensitive cultural information.

References

1. [36 CFR Part 800](#). Code of Federal Regulations, Title 36, *Parks, Forests, and Public Property*, Part 800, “Protection of Historic Properties.”
2. [National Environmental Policy Act of 1969](#), as amended (NEPA). 42 U.S.C. 4321, *et seq*
3. [National Historic Preservation Act of 1966](#), as amended (NHPA). 16 U.S.C. 470, *et seq*.
4. [Nuclear Regulatory Commission \(NRC\). 2000](#). *Environmental Standard Review Plan: Standard Plans for Environmental Reviews for Nuclear Power Plants*. NUREG-1555, Includes 2007 Updates, Office of Nuclear Reactor Regulation, Washington, D.C. Accessed at <http://www.nrc.gov/reading-rm/doc-collections/nuregs/staff/sr1555/toc/index.html>
5. [Nuclear Regulatory Commission \(NRC\). 2007](#). 72 FR 57416. October 9, 2007. “Limited Work Authorizations for Nuclear Power Plants.” *Federal Register*. U.S. Nuclear Regulatory Commission.
6. [Nuclear Regulatory Commission \(NRC\). 2010](#). Memorandum dated June 7, 2010 “Staff Guidance for Withholding Sensitive Information About Historic Resources in Accordance With the National Historic Preservation Act” (ADAMS Accession No. ML111080735)