



CENWS-OD-RG

## MEMORANDUM FOR RECORD

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Date: 6 November 2008

RE: Section 106 of the National Historic Preservation Act (NHPA) process revisions and designation approval to Washington State Department of Transportation (WSDOT) for transportation projects where the U.S. Army Corps of Engineers (Corps) is the only federal lead

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**MFR PURPOSE:** This MFR is being prepared to summarize the need for changes, define the designation of the 106 process to WSDOT, provide a process revision to ensure compliance with Section 106 and 110 of the NHPA for transportation projects, and define coordination requirements between the Corps' Regulatory Branch and Environmental Resources Section (ERS). This MFR serves as the Corps approval of the designation to WSDOT to initiate 106 consultation, and approves the process summarized below for complying with Section 106 and 110 of the NHPA for transportation projects.

**PROBLEM** – Historically for WSDOT projects where the Corps is the only federal lead, WSDOT had been submitting initial consultation requests with the WSDOT defined Area of Potential Effects (APE) to the State Historic Preservation Officer (SHPO). SHPO has recently rejected these letters until the Corps expressly designates WSDOT to act on the Corps' behalf to carry out Section 106 compliance activities. This is resulting in much additional workload for the Corps, which historically had been completed by WSDOT to the same standards that would be required by the Corps.

**DESIGNATION** - Regulatory has met with the Environmental Resources Section (ERS) to prepare the following solution summarized and detailed below. In addition, the new process includes the Corps designating per 36 CFR § 800.2(c)(4), to WSDOT to initiate consultation in compliance with Section 106 and 110 of the NHPA, and consistent with Appendix C of 33 CFR § 325 and all subsequent interim guidance to Appendix C:

**Summary of process:**

This process includes three tracks: A. when the WSDOT makes a recommendation that the project has "No Potential to Cause Effects" or is not an undertaking; B. when the WSDOT has not yet made a determination that their project will need a Department of the Army (DA) permit, but the project may have the potential to cause an affect to historic properties, or C. when it is known that the WSDOT will need a DA permit

and the project may have the potential to cause an affect to historic properties.

**Detailed Track A process** applies when WSDOT determines that the project has "No Potential to Cause Effects" (NPCE), or is not an undertaking. This track will likely apply to most WSDOT maintenance activities, and to some minor construction activities. If a determination is made in either Track B or C that the project has NPCE, track A should be followed:

1. In some cases, WSDOT may determine that a project has NPCE or is not an undertaking based on the project location, activity type, or for other reasons including the rational that the project meets the conditions of the Federal Highway Administration Programmatic Agreement category of NPCA. When this occurs, WSDOT will document this information for the record. For non-reporting Nationwide Permits (NWP), no further action is needed per 106 (please note, notification may still be required per ESA etc.).
2. If WSDOT wants verification that the NPCE determination is accurate, WSDOT can e-mail the Regulatory liaison with information on the basis for the recommendation and explanation of why the project will not have the potential to cause an effect. If the Corps agrees with the recommendation, the Corps will e-mail to WSDOT the decision which will constitute compliance with Section 106 unless there is a change to the proposed project's potential to cause effects, which would require reevaluation.
3. For notification NWPs or Individual Permits (IPs), WSDOT should include the NPCE determination rational with their notification process.
4. If the Corps disagrees with the determination, they will contact WSDOT and request either monitoring, additional site evaluation, or other action.

**Detailed Track B process** applies when the project may have the potential to cause an affect to the historic properties, and a DA permit is possible but potential impacts have not been fully assessed:

1. WSDOT initiates consultation with tribes and other affected parties pursuant to the State Executive Order (EO) 05-05 process. The initiation letter to tribes and other parties will acknowledge the potential of a future Corps' regulatory role that would trigger the Corps as the federal lead. The letters will include language stating that "a permit from the Corps may be needed for this project, but it has not yet been determined. If so the Corps will be the federal lead agency, and they may also be contacting you for information and/or concerns associated with this project." The Corps' South Puget Sound Section Chief (presently Michael Lamprecht) will be copied on the initiation letter.
2. WSDOT will conduct a survey of the site for cultural resources, identify whether historic properties are present, and make a recommendation

on the determination of effect per Section 106 requirements. At this point a decision should be made as to whether a DA permit is needed. If a Corp permit is needed, the process continues with Step 4 below. If no DA permit is needed, the Corps will be so notified, and the State EO 05-05 process continues with no Corps involvement. If the Corps disagrees with the decision on the need for a permit, the Corps' Regulatory Branch will contact WSDOT to resolve.

**Detailed Track C process** applies when a project may have the potential to cause an affect to historic properties, and a DA permit will be required. WSDOT, pursuant to 36 CFR § 800.2(c)(4), Appendix C to 33 CFR § 325, and the Corps' designation letter, has the authorization to initiate consultation pursuant to the NHPA as follows:

1. WSDOT will send a letter to SHPO requesting concurrence with the APE. WSDOT will define the APE according to 36 CFR § 800 to use as the review area for all cultural resource issues on its' project.
2. WSDOT will send a letter to affected or interested tribes (the Corps is limited to federally recognized tribes), as well as initiate consultation with other consulting parties (if any), defining APE, informing them of the project actions, description, and location, and requesting any information pertinent to Section 106 consultation requirements. These letters will provide information about contacting the Corps for tribal or interested parties concerns or questions that the parties may wish to direct to the Corps, and will explain that the Corps defined APE is based on the Corps regulated area of jurisdiction and that it may be different than the WSDOT defined APE. The letter that WSDOT sends to the tribes will be copied to the Corps with a list of all of the tribes that were contacted for comments.
3. Any comments received by either WSDOT or the Corps will be shared with each other as part of the Section 106 review, subject to the confidentiality restrictions found in 36 CFR § 800.11.
4. WSDOT will conduct, or cause to be conducted, a survey of the APE for historic properties and based on their findings will make recommended determinations of eligibility and effect per Section 106 requirements. The survey report and recommendation of effects determination will be submitted to the Corps' Regulatory Branch South Sound Section Chief (presently Michael Lamprecht). The historic properties assessment and documentation shall meet federal and state requirements and guidelines. The Corps reserves the right to change the APE for federal purposes, and to determine whether survey and inventory forms are adequate prior to submission to the Washington SHPO.

5. Based on WSDOT's recommendations of eligibility and effect, the Corps will proceed as follows upon review of the information provided by WSDOT and one of the following four scenarios will occur:

- a. **No Potential to Cause Effects:** If after site or project analysis, WSDOT recommends the project has "*No Potential to Cause Effects*", follow track A above.
- b. **No Historic Properties Affected:** If WSDOT recommends to the Corps that the project will result in "*No Historic Properties Affected*" because there are none in the WSDOT overall project APE or historic properties existing there will not be affected, the Regulatory Branch Project Manager (PM) will define the Corps jurisdictional APE per the Corps' regulatory authority. The PM will submit through the Regulatory Branch's designated lead (presently Ann Urich), a request for an ERS Cultural Resource Specialist to review the Corps' APE, survey information pertinent to the Corps' APE, and effects determination within the Corps' APE. If the ERS agrees with the determination, the ERS Cultural Resource Specialist will send the final determination letter to DAHP and provide documentation to the tribes. The anticipated turn-around time for ERS, absent unusual circumstances is 14 days. The Corps must wait 30 days from the time they submit the determination to DAHP before a DA permit decision can be issued.
- c. **No Historic Properties Adversely Affected:** When historic properties will be affected, but WSDOT recommends a determination of "*No Historic Properties Adversely Affected*", the Regulatory Branch Project Manager (PM) will define the Corps' jurisdictional APE per the Corps' regulatory authority. The PM will submit through the Regulatory Branch's designated lead (presently Ann Urich) a request for an ERS Cultural Resource Specialist to review the Corps' APE, survey information pertinent to the Corps' APE, and effects determination within the Corps' APE. If ERS agrees with the determination, the ERS will send the final determination letter to DAHP and provide documentation to the tribes. The anticipated turn-around time for ERS, absent unusual circumstances is 14 days. The Corps must wait 30 days from the time they submit the determination to DAHP before a DA permit decision can be issued.
- d. **Adverse Effect:** Projects where there are historic properties and WSDOT is recommending an "*Adverse Effect*" determination, the Regulatory Branch Project Manager (PM) will define the jurisdictional APE per the Corps' regulatory authority. The PM will submit through the Regulatory Branch's designated lead (presently

Ann Uhrich) a request for an ERS Cultural Resource Specialist to review the Corps' APE, survey information pertinent to the Corps' APE, and effects determination within the Corps' APE. If the adverse effect is within the Corps' jurisdictional APE, the Corps ERS in coordination with the Regulatory Branch Project Manager will take lead on submitting the findings and determination letter to DAHP, and will send the tribal consultation letters. The Corps will be required to execute a MOA. To expedite the process, WSDOT may be requested by the Corps to prepare the draft MOA and provide the draft and final treatment plan to the Corps for review and approval.

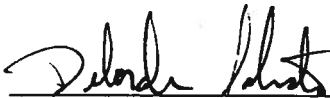
CONCLUSION The Corps' Regulatory Branch, in coordination with ERS, agrees to designate WSDOT to act on the Corps behalf to initiate consultation for Section 106 and 110 of the NHPA, and will follow the above process to ensure compliance with the NHPA.



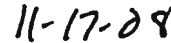
Michelle Walker  
Chief, Regulatory Branch



Date



Deborah Johnston  
Chief, Environmental Resources Section



Date



## MEMORANDUM FOR RECORD

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Date: 6 November 2008

RE: Section 106 of the National Historic Preservation Act (NHPA) process revisions and designation approval to Federal Highway Administration (FHWA) for the Washington State Department of Transportation (WSDOT) projects where the FHWA is the lead federal agency

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**MFR PURPOSE:** This MFR is being prepared to summarize the need for changes, define the designation of the 106 process to FHWA, and provide a process revision to ensure compliance with Section 106 and 110 of the NHPA for transportation projects where FHWA is the lead federal agency and a Department of the Army (DA) permit is required. This MFR serves as the Corps' approval of the designation to FHWA to initiate and conduct the 106 consultation, and approval to use the process summarized below defining the coordination and process requirements between the Corps' Regulatory Branch and Environmental Resources Section (ERS) for complying with Section 106 and 110 of the NHPA for transportation projects.

**PROBLEM** – Historically the FHWA as the lead federal agency for transportation projects would conduct the Section 106 consultation process without involving the Corps, and complete the process for approval to the State Historic Preservation Officer (SHPO) and Advisory Council on Historic Preservation (ACHP). This resulted in the following problems:

- Permitting delays for projects in cases where there was an adverse effect, and a required memorandum of agreement (MOA) that needed Corps review and approval (and preferably signature).
- Tribal issues and concerns raised, and sometimes addressed during the Section 106 coordination and consultation process are sometimes brought up again as objections to the Corps public notices for permits.
- In some cases, tribes are waiting to consult with the Corps during the permit process and are not providing information to FHWA or WSDOT during the 106 consultation process.
- ACHP has notified the FHWA that if they will be conducting the 106 consultation process as the lead, and a DA permit will be required, then the Corps must state in writing to ACHP that the Corps wishes to designate FHWA as the lead federal agency pursuant to 36 CFR § 800.2(a)(2) and Appendix C of 33 CFR § 325 to complete Section 106.

**DESIGNATION** - Regulatory has met with ERS to prepare the following solution summarized and detailed below. In addition, the new process includes the Corps

designating FHWA (Per 36 CFR § 800.2[a][2]) to act on the Corps' behalf to complete Section 106 and 110 of the NHPA consistent with Appendix C of 33 CFR § 325 and all subsequent interim guidance to Appendix C.

Summary of process:

1. The details of the procedures FHWA and WSDOT will follow for initiating consultation and conducting historic properties assessments are defined in the *First Amended Programmatic Agreement Implementing Section 106 of the National Historic Preservation Act for the Federal-aid highway Program in Washington State Administered by the Federal Highway Administration* executed in March 2007.
2. If FHWA determines the project has "No Potential to Cause Effects" (NPCE), or that the project is not an undertaking based on the location, activity type, or because the project meets the conditions of the Federal Highway Administration Programmatic Agreement category of NPCA, or for other reasons, WSDOT will include the rationale in their project file. For Nationwide Permits (NWP) with no-notification, this meets the non-reporting requirements for Section 106, please note notification for other reasons such as ESA may still be required. For NWPs that require notification, or for Individual Permits, FHWA or WSDOT will provide to the Corps' Regulatory Branch, South Puget Sound Chief (presently Michael Lamprecht) the basis for the recommendation and explanation of why the project will not have the potential to cause an effect.
3. Section 106 Consultation Initiation letters for projects that may cause an effect and are expected to require a DA permit will reference the need for the federal permit, explain that the Section 106 consultation will meet the Section 106 obligations of both the FHWA and the Corps, and note that the Corps defined Area of Potential Effects (APE) is based on the Corps regulated area of jurisdiction and that it may be different than the APE as defined by FHWA. This letter will also invite comments from the Indian tribes to be sent to the Corps if they prefer to consult with the Corps directly. The Corps will be invited to any meetings or discussions with the tribes if their concerns will be discussed as they relate to the Corps action and tribal trust responsibilities.
4. The Corps of Engineers Regulatory Branch South Sound Section Chief will be copied on all correspondence with the Washington State Department of Archaeology and Historic Preservation (DAHP) and consulting parties concerning the APE.

5. The Corps will receive a copy of the Cultural Resources Survey Report after a WSDOT cultural resources specialist has endorsed its professional suitability and findings. It is expected that the Corps ERS will review the report within 30 days and notify FHWA if it is not suitable to allow the Corps to meet its Section 106 obligations.
6. If there is an adverse effect identified, the Corps will actively participate in the consultation, will define the Corps regulated APE, and will be signatory to the MOA, unless the Corps determines that their permit action is not sufficiently related to the Section 106 effects to require their participation, or the action is outside of the Corps regulated APE.
7. Similarly, if there is a project-specific Section 106 Programmatic Agreement developed for the project, the Corps will participate in the consultation and be signatory to the agreement.

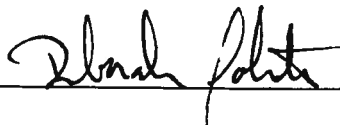
CONCLUSION The Corps' Regulatory Branch, in coordination with the Environmental Resources Section agrees to designate FHWA to act on the Corps behalf to conduct Section 106 and 110 of the NHPA, and will follow the above process to ensure compliance with the NHPA.



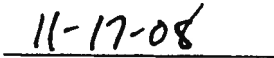
Michelle Walker  
Chief, Regulatory Branch



Date



Deborah Johnston  
Chief, Environmental Resources Section



Date





REPLY TO  
ATTENTION OF

**DEPARTMENT OF THE ARMY**  
SEATTLE DISTRICT, CORPS OF ENGINEERS  
P.O. BOX 3755  
SEATTLE, WASHINGTON 98124-3755

**RECEIVED**

**AUG 27 2007**

Environmental Services Mottman

AUG 22 2007

Regulatory Branch

Allyson Brooks, Ph.D.  
State Historic Preservation Officer  
Department of Archeology and Historic Preservation  
Post Office Box 48343  
Olympia, Washington 98504-8343

Reference: Designation to Washington State Department of Transportation to Initiate Consultation under Sections 106 and 110 of the National Historic Preservation Act for Department of the Army Permits

Dear Dr. Brooks:

The U.S. Army Corps of Engineers (Corps) is the lead federal agency responsible for complying with Sections 106 and 110 of the National Historic Preservation Act (NHPA) for Department of Army (DA) permits issued pursuant to Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act. Per 36 CFR § 800.2(c)(4), Appendix C to 33 CFR § 325 and all subsequent interim guidance to Appendix C, the Seattle District Corps hereby designates the Washington State Department of Transportation (WSDOT) to initiate consultation pursuant to the NHPA for WSDOT projects that will require a DA permit in cases where there is no other lead federal agency.

The Corps is making this designation to facilitate timely completion of NHPA requirements to meet WSDOT's project delivery commitments and comply with federal guidance to avoid duplication in processes for purposes of NHPA compliance. It is the Corps' understanding that WSDOT will follow the same process for initiating consultation and conducting historic properties assessments as is required for WSDOT's federally funded projects, and to the extent the process applies to a project with the Corps as federal lead. Except as described in the attached Appendix 1 defining process steps, the process for initiation and properties assessments is detailed in the *Amended Programmatic Agreement Implementing Section 106 of the National Historic Preservation Act for the Federal-aid highway Program in Washington State Administered by the Federal Highway Administration* executed in March 2007.

The Corps retains responsibility for all findings and determinations, final oversight regarding the adequacy and completeness of historic properties assessments, and tribal consultation for effects to historic properties within the Corps-defined Area of Potential Effects. In addition, letters sent to affected and interested Indian tribes will indicate that WSDOT is designated to initiate consultation but the Corps will maintain our status as the federal lead as the project will require a DA permit, and that tribes may choose to consult directly with the Corps if they so desire.

Should you have any questions about this designation, please contact Sandra Manning in the Regulatory Branch at (206) 764-6911 or via e-mail at [sandra.l.manning@usace.army.mil](mailto:sandra.l.manning@usace.army.mil).

Sincerely,

A handwritten signature in black ink, appearing to read "Michelle Walker". The signature is fluid and cursive, with the first name "Michelle" written in a larger, more prominent script than the last name "Walker".

*for* Michelle Walker  
Chief, Regulatory Branch

Enclosure

cc: WSDOT, Ken Stone /  
Highways and Local Programs, Brian Hasselbach  
Corps Environmental Resources Section, Michael Scuderi



REPLY TO  
ATTENTION OF

**DEPARTMENT OF THE ARMY**  
SEATTLE DISTRICT, CORPS OF ENGINEERS  
P.O. BOX 3755  
SEATTLE, WASHINGTON 98124-3755

AUG 22 2007

**RECEIVED**

**AUG 24 2007**

Environmental Services Mottman

Regulatory Branch

Ms. Katry Harris, Historic Preservation Specialist  
Advisory Council on Historic Preservation  
1100 Pennsylvania Avenue, NW, Suite 803  
Old Post Office Building  
Washington, DC 20004

Reference: Designation to Federal Highway Administration for Consultation under Sections 106 and 110 of the National Historic Preservation Act for Department of the Army Permits

Dear Ms. Harris:

The U.S. Army Corps of Engineers (Corps) is the federal agency responsible for complying with Sections 106 and 110 of the National Historic Preservation Act (NHPA) for Department of the Army (DA) permits issued pursuant to Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act. Per 36 CFR § 800.2(a)(2), Appendix C to 33 CFR § 325 and all subsequent interim guidance to Appendix C, the Seattle District Corps hereby designates the Federal Highway Administration (FHWA) to act on the Corps' behalf to complete consultation pursuant to the NHPA for transportation projects in Washington State where FHWA is the federal lead agency and the project will require a DA permit.

The Corps is making this designation to facilitate timely completion of NHPA requirements to meet project delivery commitments and comply with federal guidance to avoid duplication in processes for purposes of NHPA compliance. Except as described in the attached Appendix 1 process summary, it is the Corps' understanding that FHWA will follow the process detailed in the *First Amended Programmatic Agreement Implementing Section 106 of the National Historic Preservation Act for the Federal-aid highway Program in Washington State Administered by the Federal Highway Administration* executed in March 2007. The Corps shares with FHWA the responsibility for all findings and determinations, oversight regarding the adequacy and completeness of historic properties assessments, and tribal consultation for effects to historic properties within the Corps-defined Area of Potential Effects. In addition, letters sent to affected and interested Indian tribes will indicate that the Corps has designated FHWA to conduct the cultural resources review and requirements of consultation, but as the project will require a DA permit, the Corps will maintain their federal tribal trust responsibilities and therefore the tribe may choose to consult directly with the Corps if they so desire.

Should you have any questions about this designation, please contact Sandra Manning in the Regulatory Branch at (206) 764-6911 or via e-mail at [sandra.l.manning@usace.army.mil](mailto:sandra.l.manning@usace.army.mil).

Sincerely,

A handwritten signature in black ink, appearing to read "Michelle Walker".

*for* Michelle Walker  
Chief, Regulatory Branch

Enclosure

cc: FHWA, Sharon Love  
WSDOT, Ken Stone /  
Highways and Local Programs, Brian Hasselbach  
Corps Environmental Resources Section, Michael Scuderi