

Environmental Alert

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New Guidance Issued: Integrating the National Environmental Policy Act and Section 106 of the National Historic Preservation Act

AUTHORS

Gregory S. Braker
Kathryn K. Floyd
Margaret N. Strand
Jay C. Johnson
Amy J. McMaster

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On March 6, 2013, the Council on Environmental Quality (CEQ) and the Advisory Council on Historic Preservation (ACHP) jointly released a Handbook addressing integration of the National Historic Preservation Act (NHPA) and the National Environmental Policy Act (NEPA) in order to achieve more efficient reviews under NEPA. Businesses needing federal permits will have new options for completing the required federal reviews.

The NEPA and Section 106 review processes are often costly for the project proponent, time consuming, duplicative, and fail to result in an administrative record capable of withstanding litigation challenging federal permits for private projects. The Handbook provides project proponents with a starting point for developing a tailored strategy to navigate, manage, and streamline the NEPA and Section 106 review processes. This *Environmental Alert* summarizes some of the key concepts conveyed in the Handbook, which are often at fault when a review process goes off the tracks.

Applicants for federal permits bear the cost and the time required for preparation and evaluation of studies needed to comply with NEPA and the NHPA. This burden can be managed with good strategies that integrate the multiple federal permitting requirements. Venable works with clients to develop and implement such strategies. The new Handbook will provide additional tools to make compliance with federal law less burdensome.

The Handbook

The NHPA, enacted in 1966, and NEPA, enacted in 1969, together require federal officials to “stop, look, and listen” before making decisions, including issuing permits, leases, or other approvals to private parties, that will impact historic properties and the environment. Essentially, NEPA requires federal agencies to consider the potential impacts of their action, and any reasonable alternatives, before deciding whether and in what manner to take an action. Section 106 of the NHPA similarly requires that federal officials identify any effects of their action on historic properties, attempt to avoid adverse effects, and minimize or mitigate the adverse effects that cannot be avoided. The CEQ and ACHP administer regulations implementing NEPA and Section 106 of the NHPA, respectively.

The Handbook was issued as part of President Obama’s “Open Government Initiative,” which began in December 2009 with a Presidential Directive that “calls on executive departments and agencies to adopt the principles of transparency, participation, and collaboration in their activities to make the Federal Government more accountable and more effective.”¹ Since this Presidential Directive, the CEQ has pursued numerous initiatives, including issuing guidance documents, the Handbook, a project pilot program, and restructuring its website, in order to modernize and reinvigorate NEPA. Through integration of the NEPA and Section 106 review processes, the Handbook proclaims that the “ultimate goal” of both NEPA environmental reviews and Section 106 will be achieved: “to ensure the Federal Government considers the effects of its actions upon the environment, acts in the public interest, works efficiently, and makes decisions in an open, efficient, and transparent manner.”²

The Handbook is meant to further streamline the environmental review processes by combining NEPA and NHPA guidelines that may be duplicative and thus costly and time-consuming to the project proponent. Current NEPA and Section 106 regulations already recognize the benefits of integrating the two programs, including how an appropriate NEPA analysis of historic properties can, in appropriate circumstances, substitute for the Section 106 process. The Handbook attempts to “value-add” to these regulations by providing “real world” advice on how the regulations should be implemented. For instance, the Handbook includes a checklist of information needed to complete a “legally sufficient” substitution process “to help agencies make an informed decision about which approach is most practical in a specific situation.”³

The Handbook identifies the following “key concepts” for integrating NEPA and Section 106:

- Integration of NEPA and Section 106 processes should begin as early in the review as possible.
- The benefits of integrating NEPA and Section 106 processes, either through coordination or substitution, should be clearly explained to all stakeholders.
- Comprehensive planning schedules and tracking mechanisms should be developed in order to keep the two review processes synchronized.
- Comprehensive communication plans – which specify whether the agency will use coordination or substitution – should be developed in order to meet agency outreach and consultation requirements, as well as minimize duplication of efforts by agency staff and maximize opportunities for public and consulting party involvement.
- NEPA documents should be used to inform the Section 106 consultation process, and information developed during the Section 106 review should be used to inform the development and selection of NEPA alternatives.
- An integrated strategy should be developed in order to generate any specialized studies, information, or analysis needed under NEPA and Section 106.
- A final agency decision should only be issued after the Section 106 and the appropriate NEPA reviews (Categorical Exclusion, EA, or EIS) have been completed.

The Handbook also addresses certain nuances between the two programs, for instance, by noting that: “An ‘effect’ under Section 106 means an alteration to the characteristics of an historic property qualifying it for inclusion in or eligibility for the National Register of Historic Places. A Federal agency must assess the effects of the proposed undertaking on historic properties prior to applying the criteria of adverse effect.”

The Handbook provides numerous other practical tips, suggestions, and check-lists designed to streamline and integrate the NEPA and Section 106 review processes, with an apparent eye towards those areas that experience suggests are often poorly understood or integrated. For instance, the Handbook notes that the Section 106 process does not require agencies to identify and evaluate historic properties in the area of potential effects for all NEPA alternatives; however, this is caveated slightly by the acknowledgement that the preferred alternative may not be selected until late in the NEPA review, or may change during that review. The Handbook also comments upon the appropriate level of effort that must be exerted by the agencies in identifying historic properties under the two programs, which is an often-contested area between public commentators and project proponents.

Implications

The NEPA process can be time-consuming and often leads to litigation challenging federal permits for private projects. With the current push by the Obama administration to improve regulatory procedures, release of the Handbook provides industries with a useful reference for working with federal agencies to ensure the NEPA and Section 106 review processes are being integrated and conducted in as efficient and timely a manner as possible. Industries stand to benefit from the effective integration of the two programs, as such integration should result in cost savings (NEPA and Section 106 review costs are borne by the project proponent), reduced delays, and a stronger administrative record to withstand judicial review.

Further Information

Venable has broad experience assisting clients in working with federal and state agencies and has developed effective strategies to help project proponents navigate, manage, and streamline the NEPA and Section 106 review processes. Mapping out the big picture strategy required to minimize inefficiencies and maximize resources to keep the review process moving expeditiously is just one of the strengths that makes Venable an industry leader in this area. Venable also has extensive experience negotiating permit terms with federal, state, and local authorities, and defending those permits in court when necessary. If you would like further information concerning this alert, or are in need of assistance regarding NEPA or Section 106 review processes, please contact the authors or another attorney in [Venable’s Environmental Practice Group](#).

¹ CEQ, Open Government Initiative, available [here](#).

² CEQ and ACHP, NEPA and NHPA: A Handbook for Integrating NEPA and Section 106 (March 6, 2013) (hereinafter “Handbook”), available [here](#).

³ Handbook at p. 5; see *id.* at Attachment C.