

DEPARTMENT OF DEFENSE

Corps of Engineers, Department of the Army

33 CFR Part 325

Processing of Department of the Army Permits; Procedures for the Protection of Historic Properties

AGENCY: U.S. Army Corps of Engineers, DoD.

ACTION: Final rule.

SUMMARY: This regulation (appendix C to 33 CFR Part 325) establishes the procedures to be followed by the U.S. Army Corps of Engineers (Corps) in its regulatory program in order to comply with the National Historic Preservation Act (NHPA), as amended, and other laws dealing with historic properties. This regulation provides for full consideration of impacts on historic properties.

EFFECTIVE DATE: June 29, 1990.

FOR FURTHER INFORMATION CONTACT: Mr. Sam Collinson, Regulatory Branch, (202) 272-1782.

SUPPLEMENTARY INFORMATION:

Environmental Documentation

We have determined that this action does not constitute a major Federal action significantly affecting the quality of the human environment. Appropriate environmental documentation is prepared for all permit decisions on a case-by-case basis.

Background

On April 3, 1980, we published a proposed appendix C, which was approved by the Advisory Council on Historic Preservation for use on an interim basis. We have been operating under that appendix since that time. On May 4, 1984, we published a new proposed appendix C. In response to public comment we have made a number of changes to that proposed appendix C as discussed below.

Public Comments

We received 51 comments on the May 4, 1984, proposed regulation (49 FR 19036), which covered a full range of views. All the comments were synthesized into major issues and are discussed below. In addition, on September 2, 1986, the Advisory Council on Historic Preservation (ACHP) revised its regulation on Protection of Historic Properties at 36 CFR part 800 (51 FR 31115). We made further changes to reflect changes in that regulation. This appendix is consistent with the requirement and the flexibility contained in the ACHP regulation. We have discussed all significant changes to the proposed rule. This regulation only addresses the procedures to be followed by the Corps in implementing its regulatory program.

General Comments

Several commenters indicated that the proposed regulation did not comply with the National Historic Preservation Act (NHPA) and/or the 1979 regulation developed by the ACHP at 36 CFR part 800. These commenters indicated that sections 106 and 110(f) of the NHPA require identification of previously unrecorded properties and a regulatory / advisory role for the SHPO. The ACHP revised its regulations on September 2, 1986. This appendix has been modified in light of the revised ACHP regulations and fully implements those regulations and complies with the NHPA. Implementation of the Corps Regulatory Program, in general and particularly in regard to historic preservation, is a complex process which requires coordination and consultation with other Federal and state agencies. These agencies function in an advisory or commenting role, as specified by law. This appendix C sets forth the Corps regulatory responsibilities under the authority of various national historic preservation statutes. Further, this appendix, as revised, provides a significant role for the SHPO. We believe the SHPO to be one of the foremost authorities for identifying historic properties as well as for assessing effects of proposed activities on historic properties. Accordingly, we will seek and carefully consider the SHPO's comments through public notices, coordination, and consultation throughout the permit process.

A few commenters indicated they felt it was necessary to do a survey to determine if a previously unrecorded historic property may be present. We agree and have revised this appendix to require the district engineer to survey for the presence of historic properties in the permit area, when appropriate.

Several commenters indicated that this regulation would shift the role of the SHPO to the ACHP. They believe that under existing manpower and budget limits the ACHP would not be able to respond adequately and thus that historic resources would suffer. We have clarified throughout this appendix that the SHPO has an important role in the Corps regulatory process. It has been our experience that most of our coordination occurs with the SHPO, while the ACHP becomes involved in only a relatively few cases. We firmly intend that this should continue and that there should be no cause under this regulation for the ACHP to have to participate more actively in our permit process than it has in the past. However, the ACHP may participate as it deems appropriate.

Several commenters addressed the effect of this regulation on the reduction of excessive delays. Some commenters supported the proposal because they felt that the regulation would reduce delays, while others thought that it would create excessive delays. Most commenters supported the goal to reduce unnecessary delays. We believe this appendix will streamline the regulatory process, when appropriate, while maintaining the ACHP's statutory / advisory role in historic preservation, the goals of the NHPA, and the SHPO's important participation in the permit process.

A few commenters indicated that we should address section 110(g) of the NHPA, which provides that reasonable costs may be charged to a Federal licensee or permittee. It is our policy that applicants be responsible to perform any required mitigation as a condition to the Corps permit. When mitigation of historic properties, including preservation, is required, the permittee is required to perform (or contract for) and pay for all reasonable costs. Our policy for conditioning permits is contained at 33 CFR 325.4.

Paragraph 1. (Proposed 2) Definitions

Paragraphs 1.a. & 1.b. One commenter expressed concern about the omission of a detailed definition of "historic properties" and whether a means is necessary to correct the apparent impression that the Corps considers designated historic properties more important than undesignated historic properties. For clarification we added a definition of "historic property" which includes both designated and undesignated historic properties. It should be noted in this regard that the term "historic property" as used in this appendix is broader

than that term as used in the NHPA. This is because our public interest decision requires us to consider impacts on *all* properties with historical importance regardless of the degree of their historical importance and whether or not they may be eligible for inclusion on the National Register.

Paragraph 1.c. One commenter requested that the definition of a certified local government contain a reference to 36 CFR part 61. For clarity we have included that reference.

Paragraph 1.d (proposed Paragraph 1.e.) There were no comments on this definition and it is being adopted as proposed.

Paragraph 1.e. (proposed Paragraph 1.f.) One commenter expressed confusion regarding the use of the term "effect" and "affect" as used throughout the text. We have reviewed these two terms as used and believe they are used correctly. We added a sentence to clarify that we also consider indirect effects of the undertaking on historic properties. We also indicated that the criteria for effect and adverse effect is found in paragraph 15. of appendix C.

Paragraph 1.f. (proposed Paragraph 1.b.) There were no comments on this definition and it is being adopted essentially as proposed.

Paragraph 1.g. (proposed Paragraph 1.d.) One commenter stated that the definition of the term "permit area" does not give adequate consideration to indirect effects. The term "permit area" does not limit the consideration of indirect effects on historic properties. The Corps will consider both direct and indirect effects on historic properties. To further clarify the permit area we have added several examples that were included in the April 3, 1980, proposed regulation. We have also added an example to clarify the permit area for linear projects.

Paragraph 2. (Proposed 1. General) General Policy

Some commenters questioned the wording "directly affected" in paragraph 2.b. as it relates to NEPA. They indicated that NEPA considerations include secondary impacts. One commenter thought this paragraph would limit consideration to only "direct impacts" of a proposed activity under the NHPA. It was not the purpose of this paragraph to define the Corps responsibilities under NEPA which are included at 33 CFR part 325, appendix B, for the Corps regulatory program, nor was it to define the Corps' responsibilities under the NHPA. Rather, the purpose was to reference other Corps regulations which include additional responsibilities to consider impacts on historic properties. This paragraph was revised to clarify its intent.

We added two new paragraphs (2.e. and 2.f.) to clarify that the Corps will provide for maximum consideration of historic properties and maximum coordination within required time constraints. These paragraphs also provide that the Corps will strive to avoid or minimize effects on historic properties and adhere to the goals of the NHPA and other applicable laws dealing with historic properties.

Paragraph 3. Initial Review

Several commenters objected to the first sentence of this paragraph, pointing out that the latest published list of the National Register is never current and that there is not currently a consolidated list. They recommend that other sources, such as the SHPO, be consulted for knowledge of designated properties. We concur with these comments and have so revised this paragraph. One commenter suggested that the other appropriate sources of information be named. While we agree with the commenter that the SHPO, State Archeologist, local archeological and historical societies, universities, Indian tribes, and other organizations and individuals with historic expertise may be appropriate sources for information on historic properties, we do not believe it is necessary to list them. The appropriate sources may vary from case to case depending on the type of activity or location. Nevertheless, we recognize that our ability to communicate with these sources can be a problem. Therefore, we have added a sentence requiring district engineers to establish procedures for consulting these sources when appropriate. Because of the important role of the SHPO in the historic preservation process, the SHPO is especially identified in the added sentence.

One commenter indicated if an area has been disturbed to the point that archeological properties are not likely to exist or yield important information, it may be inappropriate to conduct any additional archeological or historic studies. This principle was included in the April 3, 1980, proposed regulations (45 FR 22113, paragraph 4.b.) and we have been operating under that provision since that time. This principle has been added to this appendix at paragraph 3.b.

One commenter stated that "early preapplication coordination and the preparation of adequate studies and project documentation" can expedite permit processing. This commenter recommended we provide a copy of the Interior's Standards and Guidelines for Archeology and Historic Preservation (48 FR 44716) to permit applicants. We agree that pre-application coordination and preparation of early studies can be very useful on some applications and have already provided for this 33 CFR 325.1(b). We have added a new paragraph 3.c. to provide that during preapplication consultation the district engineer will, in appropriate cases, inform the prospective applicant of the Department of the Interior's (DOI) Standards and Guidelines and the need to consider effects on historic properties in accordance with this Appendix.

We have also added a new paragraph 3.d. that requires district engineers to discuss with applicants, at the earliest practical time, measures or alternatives to avoid or minimize effects on historic properties.

Paragraph 4. Public Notice

There were no comments on this paragraph. It is being adopted essentially, as proposed. However, we have added a new paragraph 4.c. which provides for district engineers to withhold information from the public notice relating to the location or character of sensitive historic resources when disclosure of such information may create a substantial risk of harm, theft or destruction to such resources or to the area or place where such resources are located. This provision is to comply with section 304 of the NHPA.

Paragraph 4. b.

Commenters on proposed paragraph 8 "Designation or Discovery of a Property During Permit Processing" discussed pre-application coordination and identification, surveys, and the issue of who should bear the costs associated with historic preservation. These comments have been addressed elsewhere. We determined that this paragraph was duplicative with other provisions of appendix C and the requirements of this paragraph could be adopted and clarified by revising paragraph 4.b. and eliminating this paragraph.

Paragraph 5. Investigations

Paragraph 6. Eligibility Determinations

Paragraph 7. Assessing Effects

These paragraphs, were not included in the May 4, 1984, proposed regulation. However, they were included in the April 3, 1980, proposed regulation. The process is basically the same as that proposed in 1980 and used by the Corps since then with a few exceptions. These exceptions deal with the Corps responsibility to seek eligibility determinations. The eligibility determination process and the assessment of effects is essentially the same as that contained in the ACHP regulations. Paragraph 6.c. also contains a requirement to wait a reasonable period of time when the SHPO is nominating an historic property to the National Register.

Paragraph 8. (Proposed 6): Consultation

A few commenters questioned the adequacy of the consultation provision. Consultation can be very beneficial in resolving issues and considering alternatives to avoid or minimize adverse effects. Therefore, we fully intend to use consultation in the permit process when appropriate. We believe we have provided for adequate time to consult on the issues in most cases. However, the time may be longer depending on the complexity of the specific project. We moved this paragraph to be before the ACHP Review and Comment paragraph to clarify that consultation occurs before the formal ACHP comment process.

Paragraph 9. (Proposed 5) ACHP Review and Comment

Several commenters on the paragraph supported the proposed time periods as adequate and appropriate. The ACHP objected to the timeframes, indicating that the Corps could not define what is a "reasonable opportunity to comment" as provided in section 106 of the NHPA. Several commenters supported the time periods as adequate and appropriate. We revised this paragraph to be consistent with the September 2, 1986, ACHP regulations.

Some commenters felt that this paragraph would reduce the role of the applicant and the SHPO in the Corps decisionmaking process. This paragraph does not limit those important roles. The applicant's role in the permit process is defined in 33 CFR part 325. If the district engineer believes that mitigation or modification of the proposal may be necessary to protect historic properties, he will coordinate, as appropriate, with the applicant and the SHPO. We concur with those commenters who felt that the SHPO is the best qualified to provide information and comments on the existence of historic properties and any potential effects, and have included that principle throughout this appendix.

Paragraph 10. (Proposed 7) District Engineer Decision

One commenter supported the requirement that the district engineer would add permit conditions to reduce effects on historic properties, but suggested we reference the Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation (48 FR 44716). We agree that the Secretary's standards should be considered and have so revised this paragraph. We have also clarified that the district engineer will add conditions to avoid effects on historic properties.

One commenter thought this paragraph would limit the district engineer's decision making authority and his discretion to resolve the problem. There is no intent to do this. This paragraph is consistent with the district engineer's existing decision making authority and ability to resolve problems.

Paragraph 10.b. (Proposed 9) Recovery of Historic Properties

One commenter indicated this paragraph authorizes the district engineer to require mitigation. Another commenter questioned whose responsibility it is to implement and pay for data recovery, and questioned if the National Park Service is expected to implement the Corps mitigation plan. The Corps regulation for conditioning of permits and requiring mitigation is contained at 33 CFR 325.4.

Generally, the Corps will condition permits to avoid or mitigate by appropriate measures, including data recovery impacts on historic properties. However, in some cases it may be necessary to issue a permit although some resources may be lost. In such cases, this paragraph addresses the Secretary of the Interior's authority to provide for the protection of historic resources which may be lost if a permit is issued as provided in the Archeological and Historic Preservation Act (Pub. L. 93-291). This paragraph has been generally adopted as proposed. We added a requirement that the district engineer include permit conditions addressing historic properties in the notice to DOI. For clarity the proposed paragraph was moved to paragraph 10.b.

Paragraph 11 (Proposed 10) Historic Properties Discovered During Construction

One commenter questioned how the district engineer would determine whether or not a previously unrecorded historic property discovered during construction meets the National Register criteria. The district engineer will not determine if a previously unrecorded historic property meets the National Register criteria but only if it appears to meet the criteria. This will ensure that all those historic properties that would likely meet the criteria are considered.

Another commenter expressed concern about inequities and costs borne by the applicant should modification or revocation be sought by the district engineer and asked whether these extraordinary costs should not be paid by the public or the economic hardship minimized. The modification, suspension, and revocation procedures of 33 CFR 325.7 do take into account the equities of all parties as well as considerations of the public interest, which includes effects on historic properties. The Department of the Interior (DOI) indicated that it has certain authorities and responsibilities concerning discovery of historic properties. DOI commented that this paragraph is not consistent with its policies and procedures and recommended that it be revised in consultation with its Departmental Consulting Archeologist. We have clarified this paragraph in accordance with the DOI comments. In addition we added a requirement for the district engineer to seek voluntary avoidance of construction activities that could affect the historic property pending a DOI recommendation.

Paragraph 12. (Proposed 11 General Permits] Regional General Permits

There were no comments on this paragraph. It is being adopted as proposed with minor clarifications.

Paragraph 13. Nationwide Permits

We have added a new paragraph to address how the district engineer handles compliance with the nationwide permit condition on historic properties and requirements of 33 CFR part 330. Basically, the district engineer will use the criteria of effect and adverse effect and the notification, investigation, and eligibility determination procedures of this appendix to determine compliance with the nationwide permit condition. In appropriate cases, the district engineer will coordinate with the ACHP and the SHPO to determine compliance with the nationwide permit condition.

Paragraph 14. (Proposed 12) Emergency Procedures

The Department of the Interior indicated it has published proposed regulations (36 CFR part 78) on waiving Federal agency responsibilities under the NHPA and that the Corps consult with DOI. Under emergency procedures at 33 CFR 325.1(e)(4) we make every effort to consult with DOI on a case-by-case basis when considering emergency procedures to authorize a proposed project. Furthermore, we have added a requirement that the district engineer will comply with the provisions of appendix C to the extent time and the emergency situation allows.

Paragraph 15. (Proposed 13 - Consideration for Evaluating Effect) Criteria of Effect and Adverse Effect

One commenter thought that paragraph (a)(1) did not include indirect effects. This paragraph, as now written, does include indirect effects on historic properties.

One commenter pointed out that the definition of "effect" does not agree with that in 36 CFR 800.3 (Now 36 CFR 800.9). Another commenter questioned the Corps' authority to require a permittee to take affirmative action to maintain or improve an historic site located on private property. Another commenter expressed concern that the proposed rule appeared too broad in the use of the word "property" and should be restricted to the historic property itself. We believe these comments were based on a misunderstanding of the purpose of this paragraph. The purpose of this paragraph is to aid district engineers in evaluating if an undertaking is reasonably expected to have an effect on a historic property, not to establish criteria which must be required to restrict, maintain, or improve historic properties. Decisions on conditioning of permits are made in accordance with paragraph 7. On September 2, 1986, the ACHP adopted the criteria of effect and adverse effect at 35 CFR 800.9., which was similar but not the same as that which we had proposed. Therefore, we are revising the proposed paragraph by adopting the language from 36 CFR 800.9.

Note 1. The Department of the Army has determined that the proposed regulation is not a major rule requiring the preparation of a regulatory impact analysis under E.O. 12291. I certify pursuant to section 605(b) of the Regulatory Flexibility Act of 1980, that this regulation will not have significant economic impact on a significant number of entities.

Note 2. The term "he" and its derivatives used in these regulations are generic and should be considered as applying to both male and female.

List of Subjects in 33 CFR Part 325

Administrative practice and procedure. Dams, Environmental protection, Intergovernmental relations, Navigation (water), Water pollution control, Waterways.

Dated: June 25, 1990.

Robert W. Page,

Assistant Secretary of the Army (Civil Works).

Accordingly, the Department of the Army is amending 33 CFR part 325 as follows:

PART 325—PROCESSING OF DEPARTMENT OF THE ARMY PERMITS

1. The authority citation for part 325 continues to read as follows:

Authority: 33 U.S.C. 401 *et seq.*, 33 U.S.C. 1344, 33 U.S.C. 1413.

2. Appendix C to part 325 is added to read as follows:

Appendix C—Procedures for the Protection of Historic Properties

1. Definitions
2. General Policy
3. Initial Review
4. Public Notice
5. Investigations
6. Eligibility Determinations
7. Assessing Effects
8. Consultation
9. ACHP Review and Comment
10. District Engineer Decision
11. Historic Properties Discovered During Construction
12. Regional General Permits
13. Nationwide General Permits
14. Emergency Procedures
15. Criteria of Effect and Adverse Effect

1. Definitions

a. *Designated historic property* is a historic property listed in the National Register of Historic Places (National Register) or which has been determined eligible for listing in the National Register pursuant to 36 CFR part 63. A historic property that, in both the opinion of the SHPO and the district engineer, appears to meet the criteria for inclusion in the National Register will be treated as a "designated historic property."

b. *Historic property* is a property which has historical importance to any person or group. This term includes the types of districts, sites, buildings, structures or objects eligible for inclusion, but not necessarily listed, on the National Register.

c. *Certified local government* is a local government certified in accordance with section 101(c)(1) of the NHPA (See 36 CFR part 61).

d. The term "criteria for inclusion in the National Register" refers to the criteria published by the Department of Interior at 36 CFR 60.4.

e. An "effect" on a "designated historic property" occurs when the undertaking may alter the characteristics of the property that qualified the property for inclusion in the National Register. Consideration of effects on "designated historic properties" includes indirect effects of the undertaking. The criteria for effect and adverse effect are described in Paragraph 15 of this appendix.

f. The term "undertaking" as used in this appendix means the work, structure or discharge that requires a Department of the Army permit pursuant to the Corps regulations at 33 CFR 320–334.

g. Permit area.

(1) The term "permit area" as used in this appendix means those areas comprising the waters of the United States that will be directly affected by the proposed work or structures and uplands directly affected as a result of authorizing the work or structures. The following three tests must all be satisfied for an activity undertaken outside the waters of the United States to be included within the "permit area":

(i) Such activity would not occur but for the authorization of the work or structures within the waters of the United States;

(ii) Such activity must be integrally related to the work or structures to be authorized within waters of the United States. Or, conversely, the work or structures to be authorized must be essential to the completeness of the overall project or program; and

(iii) Such activity must be directly associated (first order impact) with the work or structures to be authorized.

(2) For example, consider an application for a permit to construct a pier and dredge an access channel so that an industry may be established and operated on an upland area.

(i) Assume that the industry requires the access channel and the pier and that without such channel and pier the project would not be feasible. Clearly then, the industrial site, even though upland, would be within the "permit area." It would not be established "but for" the access channel and pier; it also is integrally related to the work and structure to be authorized; and finally it is directly associated with the work and structure to be authorized. Similarly, all three tests are satisfied for the dredged material disposal site and it too is in the "permit area" even if located on uplands.

(ii) Consider further that the industry, if established, would cause local agencies to extend water and sewer lines to service the area of the industrial site. Assume that the extension would not itself involve the waters of the United States and is not solely the result of the industrial facility. The extensions would not be within the "permit area" because they would not be directly associated with the work or structure to be authorized.

(iii) Now consider that the industry, if established, would require increased housing for its employees, but that a private developer would develop the housing. Again, even if the housing would not be developed but for the authorized work and structure, the housing would not be within the permit area because it would not be directly associated with or integrally related to the work or structure to be authorized.

(3) Consider a different example. This time an industry will be established that requires no access to the navigable waters for its operation. The plans for the facility, however, call for a recreational pier with an access channel. The pier and channel will be used for the company-owned yacht and employee recreation. In the example, the industrial site is not included within the permit area. Only areas of dredging, dredged material disposal, and pier construction would be within the permit area.

(4) Lastly, consider a linear crossing of the waters of the United States; for example, by a transmission line, pipeline, or highway.

(i) Such projects almost always can be undertaken without Corps authorization, if they are designed to avoid affecting the waters of the United States. Corps authorization is sought because it is less expensive or more convenient for the applicant to do so than to avoid affecting the waters of the United States. Thus the "but for" test is not met by the entire project right-of-way. The "same undertaking" and "integral relationship" tests are met, but this is not sufficient to make the whole right-of-way part of the permit area. Typically, however, some portion of the right-of-way, approaching the crossing, would not occur in its given configuration "but for" the authorized activity. This portion of the right-of-way, whose location is determined by the location of the crossing, meets all three tests and hence is part of the permit area.

(ii) Accordingly, in the case of the linear crossing, the permit area shall extend in either direction from the crossing to that point at which alternative alignments leading to reasonable alternative locations for the crossing can be considered and evaluated. Such a point may often coincide with the physical feature of the waterbody to be crossed, for example, a bluff, the limit of the flood plain, a vegetational change, etc., or with a jurisdictional feature associated with the waterbody, for example, a zoning change, easement limit, etc., although such features should not be controlling in selecting the limits of the permit area.

2. General Policy

This appendix establishes the procedures to be followed by the U.S. Army Corps of Engineers (Corps) to fulfill the requirements set forth in the National Historic Preservation Act (NHPA), other applicable historic preservation laws, and Presidential directives as they relate to the regulatory program of the Corps of Engineers (33 CFR parts 320–334).

a. The district engineer will take into account the effects, if any, of proposed undertakings on historic properties both within and beyond the waters of the U.S. Pursuant to section 110(f) of the NHPA, the district engineer, where the undertaking that is the subject of a permit action may directly and adversely affect any National Historic Landmark, shall, to the maximum extent possible, condition any issued permit as may be necessary to minimize harm to such landmark.

b. In addition to the requirements of the NHPA, all historic properties are subject to consideration under the National Environmental Policy Act, (33 CFR part 325, appendix B), and the Corps' public interest review requirements contained in 33 CFR 320.4. Therefore, historic properties will be included as a factor in the district engineer's decision on a permit application.

c. In processing a permit application, the district engineer will generally accept for Federal or Federally assisted projects the Federal agency's or Federal lead agency's compliance with the requirements of the NHPA.

d. If a permit application requires the preparation of an Environmental Impact Statement (EIS) pursuant to the National Environmental Policy Act, the draft EIS will contain the information required by paragraph 9.a. below. Furthermore, the SHPO and the ACHP will be given the opportunity to participate in the scoping process and to comment on the Draft and Final EIS.

e. During pre-application consultations with a prospective applicant the district engineer will encourage the consideration of historic properties at the earliest practical time in the planning process.

f. This appendix is organized to follow the Corps standard permit process and to indicate how historic property considerations are to be addressed during the processing and evaluating of permit applications. The procedures of this Appendix are not intended to diminish the full consideration of historic properties in the Corps regulatory program. Rather, this appendix is intended to provide for the maximum consideration of historic properties within the time and jurisdictional constraints of the Corps regulatory program. The Corps will make every effort to provide information on historic properties and the effects of proposed undertakings on them to the public by the public notice within the time constraints required by the Clean Water Act. Within the time constraints of applicable laws,

executive orders, and regulations, the Corps will provide the maximum coordination and comment opportunities to interested parties especially the SHPO and ACHP. The Corps will discuss with and encourage the applicant to avoid or minimize effects on historic properties. In reaching its decisions on permits, the Corps will adhere to the goals of the NHPA and other applicable laws dealing with historic properties.

3. Initial Review

a. Upon receipt of a completed permit application, the district engineer will consult district files and records, the latest published version(s) of the National Register, lists of properties determined eligible, and other appropriate sources of information to determine if there are any designated historic properties which may be affected by the proposed undertaking. The district engineer will also consult with other appropriate sources of information for knowledge of undesignated historic properties which may be affected by the proposed undertaking. The district engineer will establish procedures (e.g., telephone calls) to obtain supplemental information from the SHPO and other appropriate sources. Such procedures shall be accomplished within the time limits specified in this appendix and 33 CFR part 325.

b. In certain instances, the nature, scope, and magnitude of the work, and/or structures to be permitted may be such that there is little likelihood that a historic property exists or may be affected. Where the district engineer determines that such a situation exists, he will include a statement to this effect in the public notice. Three such situations are:

(1) Areas that have been extensively modified by previous work. In such areas, historic properties that may have at one time existed within the permit area may be presumed to have been lost unless specific information indicates the presence of such a property (e.g., a shipwreck).

(2) Areas which have been created in modern times. Some recently created areas, such as dredged material disposal islands, have had no human habitation. In such cases, it may be presumed that there is no potential for the existence of historic properties unless specific information indicates the presence of such a property.

(3) Certain types of work or structures that are of such limited nature and scope that there is little likelihood of impinging upon a historic property even if such properties were to be present within the affected area.

c. If, when using the pre-application procedures of 33 CFR 325.1(b), the district engineer believes that a designated historic property may be affected, he will inform the prospective applicant for consideration during project planning of the potential applicability of the Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation (48 FR 44716). The district engineer will also inform the prospective applicant that the Corps will consider any effects on historic properties in accordance with this appendix.

d. At the earliest practical time the district engineer will discuss with the applicant measures or alternatives to avoid or minimize effects on historic properties.

4 Public Notice.

a. Except as specified in subparagraph 4.c., the district engineer's current knowledge of the presence or absence of historic properties and the effects of the undertaking upon these properties will be included in the public notice. The public notice will be sent to the SHPO, the regional office of the National Park Service (NPS), certified local governments (see paragraph 1.c.) and Indian tribes, and interested citizens. If there are designated historic properties which reasonably may be affected by the undertaking or if there are undesignated historic properties within the affected area which the district engineer reasonably expects to be affected by the undertaking and which he believes meet the criteria for inclusion in the National Register, the public notice will also be sent to the ACHP.

b. During permit evaluation for newly designated historic properties or undesignated historic properties which reasonably may be affected by the undertaking and which have been newly identified through the public interest review process, the district engineer will immediately inform the applicant, the SHPO, the appropriate certified local government and the ACHP of the district engineer's current knowledge of the effects of the undertaking upon these properties. Commencing from the date of the district engineer's letter, these entities will be given 30 days to submit their comments.

c. Locational and sensitive information related to archeological sites is excluded from the Freedom of Information Act (Section 304 of the NHPA and Section 9 of ARPA). If the district engineer or the Secretary of the Interior determine that the disclosure of information to the public relating to the location or character of sensitive historic resources may create a substantial risk of harm, theft, or destruction to such resources or to the area or place where such resources are located, then the district engineer will not include such information in the public notice nor otherwise make it available to the public. Therefore, the district engineer will furnish such information to the ACHP and the SHPO by separate notice.

5. Investigations

a. When initial review, addition submissions by the applicant, or response to the public notice indicates the existence of a potentially eligible property, the district engineer shall examine the pertinent evidence to determine the need for further investigation. The evidence must set forth specific reasons for the need to further investigate within the permit area and may consist of:

(1) Specific information concerning properties which may be eligible for inclusion in the National Register and which are known to exist in the vicinity of the project; and

(2) Specific information concerning known sensitive areas which are likely to yield resources eligible for inclusion in the National Register, particularly where such sensitive area determinations are based upon data collected from other, similar areas within the general vicinity.

b. Where the scope and type of work proposed by the applicant or the evidence presented leads the district engineer to conclude that the chance of disturbance by the undertaking to any potentially eligible historic property is too remote to justify further investigation, he shall so advise the reporting party and the SHPO.

c. If the district engineer's review indicates that an investigation for the presence of potentially eligible historic properties on the upland locations of the permit area (see paragraph 1.g.) is justified, the district engineer will conduct or cause to be conducted such an investigation. Additionally, if the notification indicates that a potentially eligible historic property may exist within waters of the U.S., the district engineer will conduct or cause to be conducted an investigation to determine whether this property may be eligible for inclusion in the National Register. Comments or information of a general nature will not be considered as sufficient evidence to warrant an investigation.

d. In addition to any investigations conducted in accordance with paragraph 6.a. above, the district engineer may conduct or cause to be conducted additional investigations which the district engineer determines are essential to reach the public interest decision. As part of any site visit, Corps personnel will examine the permit area for the presence of potentially eligible historic properties. The Corps will notify the SHPO, if any evidence is found which indicates the presence of potentially eligible historic properties.

e. As determined by the district engineer, investigations may consist of any of the following: further consultations with the SHPO, the State Archeologist, local governments, Indian tribes, local historical and archeological societies, university archeologists, and

others with knowledge and expertise in the identification of historical, archeological, cultural and scientific resources: field examinations; and archeological testing. In most cases, the district engineer will require, in accordance with 33 CFR 325.1(e), that the applicant conduct the investigation at his expense and usually by third party contract.

f. The Corps of Engineers' responsibilities to seek eligibility determinations for potentially eligible historic properties is limited to resources located within waters of the U.S. that are directly affected by the undertaking. The Corps responsibilities to identify potentially eligible historic properties is limited to resources located within the permit area that are directly affected by related upland activities. The Corps is not responsible for identifying or assessing potentially eligible historic properties outside the permit area, but will consider the effects of undertakings on any known historic properties that may occur outside the permit area.

6. Eligibility determinations

a. For a historic property within waters of the U.S. that will be directly affected by the undertaking the district engineer will, for the purposes of this Appendix and compliance with the NHPA:

(1) Treat the historic property as a "designated historic property," if both the SHPO and the district engineer agree that it is eligible for inclusion in the National Register; or

(2) Treat the historic property as not eligible, if both the SHPO and the district engineer agree that it is not eligible for inclusion in the National Register; or

(3) Request a determination of eligibility from the Keeper of the National Register in accordance with applicable National Park Service regulations and notify the applicant, if the SHPO and the district engineer disagree or the ACHP or the Secretary of the Interior so request. If the Keeper of the National Register determines that the resources are not eligible for listing in the National Register or fails to respond within 45 days of receipt of the request, the district engineer may proceed to conclude his action on the permit application.

b. For a historic property outside of waters of the U.S. that will be directly affected by the undertaking the district engineer will, for the purposes of this appendix and compliance with the NHPA:

(1) Treat the historic property as a "designated historic property," if both the SHPO and the district engineer agree that it is eligible for inclusion in the National Register; or

(2) Treat the historic property as not eligible, if both the SHPO and the district engineer agree that it is not eligible for inclusion in the National Register; or

(3) Treat the historic property as not eligible unless the Keeper of the National Register determines it is eligible for or lists it on the National Register. (See paragraph 6.c. below.)

c. If the district engineer and the SHPO do not agree pursuant to paragraph 6.b.(1) and the SHPO notifies the district engineer that it is nominating a potentially eligible historic property for the National Register that may be affected by the undertaking, the district engineer will wait a reasonable period of time for that determination to be made before concluding his action on the permit. Such a reasonable period of time would normally be 30 days for the SHPO to nominate the historic property plus 45 days for the Keeper of the National Register to make such determination. The district engineer will encourage the applicant to cooperate with the SHPO in obtaining the information necessary to nominate the historic property.

7. Assessing Effects

a. *Applying the Criteria of Effect and Adverse Effect.* During the public notice comment period or within 30 days after the determination or discovery of a designated history property the district engineer will coordinate with the SHPO and determine if there is an effect and if so, assess the effect. (See Paragraph 15.)

b. *No Effect.* If the SHPO concurs with the district engineer's determination of no effect or fails to respond within 15 days of the district engineer's notice to the SHPO of a no effect determination, then the district engineer may proceed with the final decision.

c. *No Adverse Effect.* If the district engineer, based on his coordination with the SHPO (see paragraph 7.a.), determines that an effect is not adverse, the district engineer will notify the ACHP and request the comments of the ACHP. The district engineer's notice will include a description of both the project and the designated historic property; both the district engineer's and the SHPO's views, as well as any views of affected local governments, Indian tribes, Federal agencies, and the public, on the no adverse effect determination, and a description of the efforts to identify historic properties and solicit the views of those above. The district engineer may conclude the permit decision if the ACHP does not object to the district engineer's determination or if the district engineer accepts any conditions requested by the ACHP for a no adverse effect determination, or the ACHP fails to respond within 30 days of the district engineer's notice to the ACHP. If the ACHP objects or the district engineer does not accept the conditions proposed by the ACHP, then the effect shall be considered as adverse.

d. *Adverse Effect.* If an adverse effect on designated historic properties is found, the district engineer will notify the ACHP and coordinate with the SHPO to seek ways to avoid or reduce effects on designated historic properties. Either the district engineer or the SHPO may request the ACHP to participate. At its discretion, the ACHP may participate without such a request. The district engineer, the SHPO or the ACHP may state that further coordination will not be productive. The district engineer shall then request the ACHP's comments in accordance with paragraph 9.

8. Consultation.

At any time during permit processing, the district engineer may consult with the involved parties to discuss and consider possible alternatives or measures to avoid or minimize the adverse effects of a proposed activity. The district engineer will terminate any consultation immediately upon determining that further consultation is not productive and will immediately notify the consulting parties. If the consultation results in a mutual agreement among the SHPO, ACHP, applicant and the district engineer regarding the treatment of designated historic properties, then the district engineer may formalize that agreement either through permit conditioning or by signing a Memorandum of Agreement (MOA) with these parties. Such MOA will constitute the comments of the ACHP and the SHPO, and the district engineer may proceed with the permit decision. Consultation shall not continue beyond the comment period provided in paragraph 9.b.

9. ACHP Review and Comment

a. If: (i) The district engineer determines that coordination with the SHPO is unproductive; or (ii) the ACHP, within the appropriate comment period, requests additional information in order to provide its comments; or (iii) the ACHP objects to any agreed resolution of impacts on designated historic properties; the district engineer, normally within 30 days, shall provide the ACHP with:

(1) A project description, including, as appropriate, photographs, maps, drawings, and specifications (such as, dimensions of structures, fills, or excavations; types of materials and quantity of material);

(2) A listing and description of the designated historic properties that will be affected, including the reports from any surveys or investigations;

(3) A description of the anticipated adverse effects of the undertaking on the designated historic properties and of the proposed mitigation measures and alternatives considered, if any; and

(4) The views of any commenting parties regarding designated historic properties.

In developing this information, the district engineer may coordinate with the applicant, the SHPO, and any appropriate Indian tribe or certified local government.

Copies of the above information also should be forwarded to the applicant, the SHPO, and any appropriate Indian tribe or certified local government. The district engineer will not delay his decision but will consider any comments these parties may wish to provide.

b. The district engineer will provide the ACHP 60 days from the date of the district engineer's letter forwarding the information in paragraph 9.a., to provide its comments. If the ACHP does not comment by the end of this comment period, the district engineer will complete processing of the permit application. When the permit decision is otherwise delayed as provided in 33 CFR 325.2(d) (3) & (4), the district engineer will provide additional time for the ACHP to comment consistent with, but not extending beyond that delay.

10. District Engineer Decision

a. In making the public interest decision on a permit application, in accordance with 33 CFR 320.4, the district engineer shall weigh all factors, including the effects of the undertaking on historic properties and any comments of the ACHP and the SHPO, and any views of other interested parties. The district engineer will add permit conditions to avoid or reduce effects on historic properties which he determines are necessary in accordance with 33 CFR 325.4. In reaching his determination, the district engineer will consider the Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation (48 FR 44716).

b. If the district engineer concludes that permitting the activity would result in the irrevocable loss of important scientific, prehistoric, historical, or archeological data, the district engineer, in accordance with the Archeological and Historic Preservation Act of 1974, will advise the Secretary of the Interior (by notifying the National Park Service (NPS)) of the extent to which the data may be lost if the undertaking is permitted, any plans to mitigate such loss that will be implemented, and the permit conditions that will be included to ensure that any required mitigation occurs.

11. Historic Properties Discovered During Construction

After the permit has been issued, if the district engineer finds or is notified that the permit area contains a previously unknown potentially eligible historic property which he reasonably expects will be affected by the undertaking, he shall immediately inform the Department of the Interior Departmental Consulting Archeologist and the regional office of the NPS of the current knowledge of the potentially eligible historic property and the expected effects, if any, of the undertaking on that property. The district engineer will seek voluntary avoidance of construction activities that could affect the historic property pending a recommendation from the National Park Service pursuant to the Archeological and Historic Preservation Act of 1974. Based on the circumstances of the discovery, equity to all parties, and considerations of the public interest, the district engineer may modify, suspend or revoke a permit in accordance with 33 CFR 325.7.

12. Regional General Permits

Potential impacts on historic properties will be considered in development and evaluation of general permits. However, many of the specific procedures contained in this appendix are not normally applicable to general permits. In developing general permits, the district engineer will seek the views of the SHPO and, the ACHP and other organizations and/or individuals with expertise or interest in historic properties. Where designated historic properties are reasonably likely to be affected, general permits shall be conditioned to protect such properties or to limit the applicability of the permit coverage.

13. Nationwide General Permit

a. The criteria at paragraph 15 of this Appendix will be used for determining compliance with the nationwide permit condition at 33 CFR 330.5(b)(9) regarding the effect on designated historic properties. When making this determination the district engineer may consult with the SHPO, the ACHP or other interested parties.

b. If the district engineer is notified of a potentially eligible historic property in accordance with nationwide permit regulations and conditions, he will immediately notify the SHPO. If the district engineer believes that the potentially eligible historic property meets the criteria for inclusion in the National Register and that it may be affected by the proposed undertaking then he may suspend authorization of the nationwide permit until he provides the ACHP and the SHPO the opportunity to comment in accordance with the provisions of this Appendix. Once these provisions have been satisfied, the district engineer may notify the general permittee that the activity is authorized including any special activity specific conditions identified or that an individual permit is required.

14. Emergency Procedures

The procedures for processing permits in emergency situations are described at 33 CFR 325.2(e)(4). In an emergency situation the district engineer will make every reasonable effort to receive comments from the SHPO and the ACHP, when the proposed undertaking can reasonably be expected to affect a potentially eligible or designated historic property and will comply with the provisions of this Appendix to the extent time and the emergency situation allows.

15. Criteria of Effect and Adverse Effect

(a) An undertaking has an effect on a designated historic property when the undertaking may alter characteristics of the property that qualified the property for inclusion in the National Register. For the purpose of determining effect, alteration to features of a property's location, setting, or use may be relevant, and depending on a property's important characteristics, should be considered.

(b) An undertaking is considered to have an adverse effect when the effect on a designated historic property may diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association. Adverse effects on designated historic properties include, but are not limited to:

- (1) Physical destruction, damage, or alteration of all or part of the property;
 - (2) Isolation of the property from or alteration of the character of the property's setting when that character contributes to the property's qualification for the National Register;
 - (3) Introduction of visual, audible, or atmospheric elements that are out of character with the property or alter its setting;
 - (4) Neglect of a property resulting in its deterioration or destruction; and
 - (5) Transfer, lease, or sale of the property.
- (c) Effects of an undertaking that would otherwise be found to be adverse may be considered as being not adverse for the purpose of this appendix:
- (1) When the designated historic property is of value only for its potential contribution to archeological, historical, or architectural research, and when such value can be substantially preserved through the conduct of appropriate research, and such research is conducted in accordance with applicable professional standards and guidelines;
 - (2) When the undertaking is limited to the rehabilitation of buildings and structures and is conducted in a manner that preserves the historical and architectural value of affected designated historic properties through conformance with the Secretary's "Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings", or
 - (3) When the undertaking is limited to the transfer, lease, or sale of a designated historic property, and adequate restrictions or conditions are included to ensure preservation of the property's important historic features.

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