



CENWS-OD-RG

## MEMORANDUM FOR RECORD

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Date: 1 August 2007

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 two tracks: A. when the WSDOT has not yet made a determination that their project will need a Department of the Army (DA) permit, or B. when it is known that the WSDOT will need a DA permit.

Track A: When it is not known whether the project will need a DA permit, WSDOT will initiate consultation pursuant to the State Executive Order (EO) 05-05, and send a notice to affected/interested Tribes and other

parties acknowledging the potential of a future Corps' regulatory role that would trigger the Corps as the federal lead. WSDOT will notify the Corps' Regulatory Branch if they determine no DA permit is needed for the project, and the State 05-05 process will be completed with no Corps involvement. If it is determined a DA permit is needed, Section 106 consultation will be completed as defined in Track B.

Track B: When it is known the project will need a DA permit and there is no other lead federal agency, 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. This designation entails WSDOT sending the notice of the WSDOT preliminary APE to SHPO for concurrence and WSDOT contacting the affected and interested tribes and other consulting parties to request knowledge and concerns about the site using an agreed upon letter template. These letters will explain that the Corps APE is based on the Corps' regulated jurisdictional area, and may differ from the APE defined by WSDOT. Copies of both letters will be provided to the Corps' Regulatory Branch.

If a DA permit is needed, WSDOT will conduct the survey of the APE and provide to the Corps their recommendation for a determination of effect. At that time, the Corps' Regulatory Branch will review the project, and either concur with the APE as defined, or adjust the APE to be consistent with the Corps' regulated APE as defined in Appendix C to 33 CFR § 325. The Corps' ERS will also review the project, and based on the WSDOT recommendation of effect, will complete the coordination with the tribes and SHPO (see below). The letter of designation will allow the cultural resources survey to commence, and will include the Corps review as technical documentation is completed.

Detailed Track A process steps when a DA permit is possible but potential impacts have not been fully assessed:

1. WSDOT initiates consultation with Tribes and other affected parties under the State EO 05-05 process. The initiation letter to Tribes and other parties 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 they may also be contacting you for information and/or concerns associated with this project." The Corps' South Puget Sound Section Chief (presently Beth Coffey) 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 DA 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. If the Corps disagrees with the decision on the need for a permit, the Corps' Regulatory Branch will contact WSDOT to resolve.

Detailed Track B steps when it is known that a DA permit will be required:

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 Beth Coffey). 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. If WSDOT recommends the project has "*No Potential to Cause Effects*" WSDOT will provide to the Corps' Regulatory Branch, South Puget Sound Section Chief, the basis for the recommendation. If the Corps' Regulatory Branch agrees, the

Corps will notify WSDOT and the determination will be documented in a memorandum to the record for the permit file. No further action is required unless there is a change to the proposed undertaking's potential to cause effects that require reevaluation.

- b. 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 will define the Corps jurisdictional APE per the Corps' regulatory authority, and 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 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 before a permit decision can be issued.
- c. When historic properties will be affected, but WSDOT recommends a determination of "*No Historic Properties Adversely Affected*", the Regulatory Branch Project Manager will define the Corps' jurisdictional APE per the Corps' regulatory authority, and 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 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 before a permit decision can be issued.
- d. Projects where there are historic properties and WSDOT is recommending an "*Adverse Effect*" determination, the Regulatory Branch will define the jurisdictional APE per the Corps' regulatory authority, and 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.

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Michelle Walker  
Chief, Regulatory Branch

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Date

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Mark Ziminske  
Chief, Environmental Resources Section

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Date