

Procedures for the Protection of Historic Properties/National Historic Preservation Act: U.S. Army Corps of Engineers Proposed Rule



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The United States Army Corps of Engineers (“Corps”) published a proposed rule in the February 9th Federal Register addressing compliance with the National Historic Preservation Act (“NHPA”). See 89 Fed. Reg. 9079.

The Corps is proposing to amend its regulatory program’s permitting regulations to utilize the Advisory Council on Historic Preservation (“ACHP”) implementing regulations.

The NHPA was enacted in 1966 to establish a National Preservation Program and a system of procedural protections. The objective was to encourage both the identification and protection of historical resources. This includes a review process known as Section 106 (54 U.S.C. § 306108) that is intended to ensure that federal agencies consider the effects of federally licensed, assisted, regulated, or funded activities on historic properties listed or eligible for listing on the National Register.

The federal agency process is required to include solicitation of comment and input from stakeholders at the local and state levels in addition to the ACHP.

The so-called 106 regulations implementing the NHPA are found at 36 C.F.R. Part 800. The ACHP developed and implemented these regulations many years ago for the federal agency review process. They are important because they define various NHPA statutory terms which can affect the scope or focus of a review.

The Corps a number of years ago issued its own regulations to address NHPA compliance. The regulations utilized by the ACHP and Corps differ in some respects. Therefore, the key focus of the proposed rule is the Corps’ proposal to instead follow the NHPA’s regulations which were developed and interpreted by the ACHP.

In doing so, the Corps states in part in the preamble of the proposed rule that it is:

. . . relying on the flexibility in those regulations for Federal agency compliance with the steps of review.

As a result, it states that it will:

. . . take into account, among other factors, the degree and scope of the Federal involvement in the undertaking and the relationship of Federal actions to the overall proposed activities.

Therefore, the proposed rule would affect the three statutes that the Corps administers:

- Section 404 of the Clean Water Act
- Sections 9 and 10 of the Rivers and Harbors Act of 1899
- Section 103 of the Marine Protection, Research, and Sanctuaries Act of 1972

A copy of the proposed rule can be downloaded [here](#).