COMMENTARY

Cultural Resources in an Environmental Assessment under NEPA

Thomas F. King

Does it "significantly affect the quality of the human environment" to bulldoze an Indian cemetery? To knock down a fine old building? To allow development that changes the character of a low-income or ethnic neighborhood? If a project subject to review under the National Environmental Policy Act (NEPA) may do any of these things, should an Environmental Impact Statement (EIS) be prepared? If not, why not? Cemeteries, old buildings, and neighborhoods are among the environmental components sometimes called "cultural resources." Impacts on them must be considered in judging impact intensity in an Environmental Assessment (EA) under NEPA. According to the NEPA regulations, an EA needs to establish—among many other things—whether "cultural," "historical," or "scientific" resources are likely to be affected, and if so, how serious the effect will be. How can NEPA analysts most efficiently do this? The first problem is to establish what to consider. "Historic resources" as defined in the National Historic Preservation Act certainly need to be addressed, but the NEPA regulations refer separately to "cultural" and "scientific" resources; several federal legal requirements besides NEPA and the National Historic Preservation Act identify classes of other-than-historic cultural resources for consideration. The next problem is to identify cultural resources and decide if they may be affected. This requires doing something that makes some NEPA analysts uncomfortable—talking with concerned people. Finally, determining impact intensity seems simple, at least with historic resources, because the regulations implementing Section 106 of the National Historic Preservation Act discriminate clearly between effects that are "adverse" and those that are "not adverse." However, equating "adverse effect" under Section 106 with "significant impact" under NEPA would have disastrous practical consequences. The other types of cultural resources are not burdened with the definitional oddities of Section 106, but measuring impact potential on each of them presents its own challenges. A defensible methodology is proposed—again, based on consultation with concerned parties.

Environmental Practice 4:137–144 (2002)

An Environmental Assessment (EA) under the US National Environmental Policy Act (NEPA) is designed to provide a yes/no answer to the question: "Is this action likely to significantly affect the quality of the human environment?" If the answer is "yes," one does an Environmental Impact Statement (EIS); if the answer is "no," one issues a Finding of No Significant Impact (FONSI). Simple. But the challenge faced by the EA analyst, of course, is to figure out the slippery term "significantly." What does an action have to do to affect environmental quality "significantly?"

The NEPA regulations at 40 CFR 1508.27 provide a definition of the word "significantly" that, in essence, constitutes an outline for an EA. Within all pertinent "contexts" the analyst is to consider the "intensity" of impacts with reference to 10 non-exclusive variables. Here, however, the regulations leave the analyst to grapple with reality. How "intense" must impacts be with reference to a single variable in order to constitute "significant" impacts? What about a concatenation of less intense impacts across a number of variables? How do we contend with the fact that some intensity variables are concrete (e.g., "the extent to which the action may adversely affect an endangered or threatened species . . ."), while others are much more subjective—even political (e.g., "the extent to which the possible effects . . . are likely to be highly controversial")?

It is safe to say that there are no hard and fast answers to such questions. However uncomfortable it may make some people, a NEPA analysis is not a hard, quantifiable endeavor; it involves a good deal of subjectivity, a good deal of professional judgment, a good deal of appreciation for

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https://doi.org/10.1017/S1466046602021221 Published online by Cambridge University Press

public perception. We are, after all, talking about impacts on the quality of the *human* environment. We humans are notoriously subjective in the ways we define ourselves and our relationships with the world around us.

Among the softer, squishier variables listed under 40 CFR 1508.27 are those that are generally lumped together under the rubric "cultural resources." The regulations refer to such resources in two subsections of 40 CFR 1508.27(b):

> (3) Unique characteristics . . . such as proximity to historic or cultural resources . . . , and
>
> (8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.

In this article I discuss three somewhat distinct but related issues that should be considered in addressing cultural resources in a NEPA-grounded EA. First, there is the foundational question of just what one is talking about when one considers "cultural resources." What are cultural resources and how do they differ from "historic resources"—that is, places included in or eligible for the National Register of Historic Places? Second, how can potential impacts on cultural resources—including, but not limited to, historic resources—be most effectively identified in the course of EA preparation? Third, when impacts on cultural resources are likely, how can we decide whether they comprise a significant impact on the quality of the human environment, hence requiring preparation of an EIS?

"Cultural Resources," "Historic Resources," and "Section 106"

In many EAs (and EISs, but EISs are not the subject of this discussion), the universe of cultural resources is collapsed into a single variable—the presence or absence of "historic resources" or "historic properties" as defined at Section 301(5) of the National Historic Preservation Act (16 USC 470w(5)). According to the National Historic Preservation Act, "historic resource" or "historic property" is any "prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion on, the National Register." The National Register of Historic Places is a list of such resources maintained by the National Park Service.[1]

To establish whether the action will adversely affect historic resources, an EA should demonstrate compliance with the regulations implementing Section 106 of the National Historic Preservation Act (16 USC 470f).[2] Section 106 requires agencies to "take into account" the effects of their actions on historic resources, and the regulations—at 36 CFR 800—spell out how this is to be done. Historic resources are identified through surveys, other studies, and consultation with knowledgeable and affected parties. Criteria are applied—again in consultation with various parties—to determine whether there will be adverse effects. If there will be such effects, consultation continues, seeking agreement on mitigation measures. Where agreed upon, these measures are laid out in a Memorandum of Agreement that the agency then makes sure is implemented. Occasionally, agreement is not reached and a comment is issued by the Advisory Council on Historic Preservation—the small, independent federal agency that oversees Section 106 review. The agency responsible for the action under review takes the Advisory Council's comments into account in reaching a decision about the action.

The "Section 106 process" is fairly widely understood among agencies, State and Tribal Historic Preservation Officers who play key roles in its implementation, and consultants who specialize in what is often called "cultural resource management." Not all of them understand it equally well, of course, and often what people think constitutes the Section 106 process bears little resemblance to what the regulations actually require. Many "cultural resource" consulting firms, for example, are made up mostly of archaeologists, who think and act as though Section 106 were solely about the identification and mitigation of impacts (usually through excavation) on archaeological sites.[3] In fact, the term "historic resources" embraces not only such sites but also historic buildings and structures, culturally important landscapes, places of cultural and religious importance to Indian tribes, and a host of other kinds of real estate.

Whether or not the regulations are accurately understood to require considering impacts on all kinds of historic resources, completion of Section 106 review is often seen as the be-all and end-all of "cultural resource" impact analysis under NEPA. Untidily, however, the simple equation of "cultural resource" with "historic resource" is logically and semantically inconsistent with the NEPA regulations. 40 CFR 1508.27(b)(3) certainly refers to "historic resources," but it does so as part of the phrase "historic *or cultural* resources." The word "or" surely indicates that "cultural resources" does not mean the same thing as "historic resources"—there are some other kinds of cultural resources that must be considered. Similarly, 40 CFR 1508.27(b)(8) refers to "districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places"—closely mirroring the language of the

https://doi.org/10.1017/S1466046602021221 Published online by Cambridge University Press

National Historic Preservation Act (though how "highways" came to be substituted for "buildings" is anyone's guess)—but it goes on to refer separately to "significant scientific, *cultural*, or historical resources." To assume that the second phrase is somehow encompassed by the first would be like assuming that "threatened" species is subsumed by "endangered" species in subsection 1508.27(b)(9), or that "public health" means the same as "public safety" in subsection 1508.27(b)(2).

So the EA analyst's first challenge with regard to assessing impacts on "cultural resources" is figuring out just what the creatures are. Clearly "historic resources" must be considered, but so must some broader range of "cultural" things. What might these be?

Federal legal requirements *besides* the National Historic Preservation Act and NEPA give us some idea of what ought to be considered, as do some executive orders and the NEPA regulations themselves. For instance:

- *The American Indian Religious Freedom Act* dictates that the rights of Indian tribes to the free exercise of their traditional religions must be respected, so impacts on tribal religious practices should be considered in an EA. If an agency action might make it difficult for a tribe's religious practitioners to gain access to a plant used for religious purposes, for example, this would need to be considered. *Executive Order 13007* explicitly directs agencies to be careful about Indian "sacred sites" on public land.
- *Executive Order 12898* tells agencies to try to avoid disproportionate adverse effects on the environments of low-income populations and minority communities. Near the town where I grew up there is a reservoir, built in the 1960s, where many African-American families go to fish on weekends. This lake is certainly a cultural resource important to a community that is both minority and low-income, though it is doubtless not old enough to be a "historic resource."
- *The Archeological Data Preservation Act of 1974* directs agencies to report the effects of their actions on "archeological, historical, or scientific data." Such data might be embodied in artifacts, sites, historical documents, or natural features of the landscape that contain, say, paleoclimatological data.
- *The Native American Graves Protection and Repatriation Act* requires attention to ancestral Native American graves and "cultural items." Such graves and items may occur in places that meet the National Historic Preservation Act's definition of "historic resources," but they may occur elsewhere too—for example, in museum collections.

Under *NEPA itself*, it has been long-established practice (though sometimes honored in the breach) to include in EAs and EISs analyses of social impacts that address, among other things, impacts on "the norms, values, and beliefs that guide and rationalize people's cognition of themselves and their society"[4]—in other words, on culture and cultures in general. Social impact assessment is justified by the fact that NEPA requires consideration of impacts on the "human environment," defined at 40 CFR 1508.14 as not only the "natural and physical environment" but the "relationship of people with that environment." One of the major ways that people relate to the natural and physical environment is through culture—through "norms, values, and beliefs" about the environment and the place of human beings in it.

When we carry out the analysis that produces an EA, then, we should be asking ourselves: *"Does this action have a potential impact on any aspect of human culture, including historic resources, historical and scientific data, Native American cultural items and religious practices, the cultural practices of low-income and minority groups, or generally the way people relate culturally to the natural and physical environment?"*

We have no detailed regulations, or even very good guidelines, that tell us how to answer this kind of question. This (together with the fact that the question is seldom even asked) is why EA analysts often fall back on what we *do* have—the detailed direction about historic resources found in the National Historic Preservation Act Section 106 regulations—and ignore all else. This, I suggest, causes EA analysts to systematically ignore project impacts on most aspects of the cultural environment.

I have discussed elsewhere how different kinds of cultural resource *ought* to be addressed in an EA, and even tried to provide guidelines for doing so in the form of a model scope of work,[5] so I do not want to belabor the matter here. In brief, however, I suggest that in scopes of work for cultural resource impact assessment in an EA, the analyst should be explicitly tasked with addressing the potential for impact on each kind of cultural resource that is the subject of each pertinent legal authority—not only historic resources under the National Historic Preservation Act, but resources important to low-income and minority groups under Executive Order 12898, tribal religious practices under the American Indian Religious Freedom Act, norms, values, and beliefs about the cultural environment under NEPA, and so on. Further, as discussed below, the analyst needs to understand that identifying and considering such impacts requires systematic, thoughtful, culturally sensitive *consulta-*

https://doi.org/10.1017/S1466046602021221 Published online by Cambridge University Press

tion with the human communities whose perceptions give cultural resources their significance.

Cultural Resource Identification and NEPA

The Section 106 process as it is ordinarily understood and carried out is most comfortably applied to the direct, physical effects of a project. In fact, it is often applied only to the direct, within-the-project-footprint impacts of an action's *preferred alternative*. This results from the fact that the regulations are widely interpreted to require the collection of a great deal of data in order to decide whether a given potentially affected building, site, neighborhood or landscape is in fact historic—that is, whether it is "eligible for inclusion in the National Register." Archaeological sites, for example, are typically identified through field survey (often but not universally called a "Phase I" or "Class I" survey), and then evaluated for National Register eligibility through a separate, later, more detailed study that often involves test excavation (sometimes called "Phase II" or "Class II"). These studies can be time consuming and expensive. Standard operating procedures with respect to old buildings, neighborhoods, landscapes, and other types of property tend to be a little less rigid, but they can still cost a good deal of money and take a good deal of time. It may be very difficult—even infeasible—to carry out all these operations with respect to *all* areas subject to *all* kinds of impacts from *all* analyzed alternatives. Thus, it is not uncommon for agencies to limit their analysis of impacts on historic resources to the direct impacts of the preferred alternative. Clearly, this is inconsistent with good NEPA practice; we are supposed to look at all types of reasonably foreseeable impacts arising from all the alternatives under consideration. An EA (or EIS) that fails to do so with respect to historic resources (to say nothing of other cultural resources) is flawed.

This problem can be solved by recognizing that the Section 106 regulations do *not* in fact require detailed studies to identify and determine the eligibility of resources. The regulations require agencies to make a "reasonable and good faith effort" to identify historic resources, and the applicable standards of the Secretary of the Interior (referenced in the Section 106 regulations) specify that the level and kind of effort devoted to identification should be defined by what is needed to inform decision making.[6] As for eligibility, the regulations explicitly allow an agency and State or Tribal Historic Preservation Officer to agree that a resource is eligible for the National Register and get on with the review. In other words, an agency can direct its contractor to provide a reasoned opinion about whether a given resource, or group or type, is eligible for the National Register, and based on this opinion consult with the state or tribe and other interested parties about whether it should be regarded as eligible. If there is agreement to treat the resource as eligible, the agency may assume that it is and proceed to the next step in the Section 106 process: determining whether and how it may be affected. Of course, agencies tend not to want resources to be regarded as eligible, and may want to argue about the matter, but in a majority of cases this is an inefficient strategy for the agency to pursue. It results in more study, more costs, more time, and usually winds up with a conclusion (by the Keeper of the National Register, a National Park Service employee, in cases of otherwise irresoluble dispute) that the resource is eligible after all.

It is important for agencies and EA analysts to remember that nothing in either NEPA or the National Historic Preservation Act requires that impacts on historic resources be avoided. Impacts are to be considered, consulted about, and in most cases mitigated in some agreed-upon manner, but it is *not* required that every (or any) National Register-eligible resource be preserved. Thus, if an agency agrees that a resource (or a type of resource, in the case of broad, diffuse impacts on many resources) can be regarded as eligible, this does not mean that it cannot approve an alternative that destroys or damages the resource; it simply means that the agency moves on to the next stage in the Section 106 process, consulting about adverse effects and how to manage them. Accepting eligibility and moving on almost always allows the agency to complete the process in a less costly, more timely way than if it fought about eligibility.

So, an agency can contract for a general study of likely historic resources in the areas subject to all kinds of effects by all project alternatives, and move on through Section 106 review based on the results of that study, without conducting detailed analyses of each site, building, landscape, and neighborhood. Section 106 experts like State Historic Preservation Officers are sometimes not particularly comfortable with this approach, since it is not in keeping with their standard ways of doing business. However, when they can be prevailed upon to cooperate, it is possible to carry out Section 106 review within time frames and under cost ceilings that are not wildly out of proportion with the time and costs devoted to analyzing other environmental impacts.[7]

Prevailing upon people like State Historic Preservation Officers to go along with a reasoned approach to impact analysis depends on early and respectful *consultation*. The Section 106 regulations, like the NEPA regulations, repeatedly emphasize the need to conduct review early in the planning

https://doi.org/10.1017/S1466046602021221 Published online by Cambridge University Press

process. Unlike the NEPA regulations, they also very strongly emphasize consultation with state and tribal authorities, local governments, property owners, resource users, and other interest groups.

Other kinds of cultural resources—community uses of the natural environment, tribal religious practices, and so forth—are not subject to the same kind of detailed evaluation that is commonly applied to historic resources, so in many ways they are easier to deal with than places that may be eligible for the National Register. But with *all* kinds of cultural resources, early, respectful consultation is a key to effective and efficient analysis and review. The cultural value of an aspect of the environment is an intangible thing; it exists in people's minds and can't be objectively measured. Resource and impact analysis necessarily involves *talking with people.* The earlier this is done, and the more flexibly and respectfully it is carried out, the more likely the result will be a thorough and responsible analysis and agreed-upon ways of avoiding or mitigating impacts.

The Section 106 regulations provide a good definition of the word "consultation" that can usefully be applied to consultation about all kinds of cultural resources: *"Consultation means the process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them. . . ."*[8]

Note the key words "discussing," "considering," and "seeking agreement." Not just notifying, not just holding a public hearing, not just receiving and responding to comments, but *talking with people* about their concerns and *trying to reach agreement* with them about how to resolve those concerns. Such consultation should not be a novel concept, and there is a growing literature on the conduct of consultation with members of the public about environmental impacts, but for some NEPA analysts the whole notion of using consultation as a means of identifying impacts, determining their importance, and seeking ways to resolve them seems to be a difficult and challenging one.

The difficulty some practitioners find in analyzing impacts on cultural resources may result in substantial part from the fact that such analysis is not regarded as "scientific." Impacts on cultural resources tend not to be easily quantifiable, if they are quantifiable at all, and professional judgments about them may be altogether irrelevant. An Indian tribe that views a river's water as having spiritual qualities may not be mollified by scientific studies indicating that a proposed project will not pollute the river. A group that favors the protection of Sasquatch habitat may not be moved from its position by biological opinions about the beast's nonexistence. The feelings that residents may have about the way their neighborhood sustains their identity may fly in the face of scientific studies showing the neighborhood to be an impoverished ghetto. Such feelings are seldom captured in socioeconomic analyses of demography, economy, and stresses on city services. To paraphrase a widely respected guideline for social impact assessment, what really counts to the people of an urban neighborhood or rural community may not be what is easy to count.[9]

How can the NEPA analyst find out about impacts on the full range of cultural resources, and consider ways such impacts might be alleviated? By consulting with people, early and often. By, in the words of the Section 106 regulations, seeking, discussing, and considering their views, and seeking agreement with them. Agreement will naturally not always be reached, but the simple act of *trying* to reach agreement, in a manner that reflects respect for a group's concerns, can work wonders.

In short, then, identifying cultural resources and impacts on them requires, first and foremost, early, systematic, continuous, and respectful consultation with all concerned parties. This consultation may lead to a decision to conduct specific kinds of scientific and other studies—archaeological surveys, ethnographic and sociological studies, historic building inventories, studies of how communities use or view the natural or built environment—but consultation comes first, and should continue throughout the course of the analysis.

Determining the Significance of Impacts

Beyond simply identifying potential impacts, of course, the EA analyst is charged with trying to measure their significance—this is the very heart of the EA enterprise. This can be a sticky problem where cultural resources are involved. How does one decide whether an impact on a cultural resource is of sufficient "intensity" to be "significant"?

With respect to historic resources, the Section 106 regulations provide what seems like a simple answer. In the Section 106 process, if an agency finds that there are historic resources in the "area of potential effects" (the area subject to direct, indirect, or cumulative impacts), it applies "criteria of adverse effect," in consultation with concerned parties, to determine whether the effect is adverse. If it *is not* adverse, the agency documents this fact and proceeds with its decision, subject to certain checks and balances. If the effect *is* adverse, the agency engages in further consultation about

https://doi.org/10.1017/S1466046602021221 Published online by Cambridge University Press

how to "resolve" the adverse effect, usually leading to a Memorandum of Agreement about mitigation measures.

So, it seems straightforward: if there's an adverse effect under Section 106, it's a significant impact on the quality of the human environment, and the agency needs to produce an EIS.

Applying such a formula for deciding significance would in fact be ridiculous, however, and would have major, unneeded impacts on agency planning budgets. There are three reasons for this:

- First, historic resources as defined by the National Historic Preservation Act are quite common things. Recognizing the diversity of the nation, and the importance of local history to its citizens, the National Register embraces all "levels of significance." A place does not have to be unique, or the best of its kind in the nation, to be eligible for the Register. It simply has to be associated with important events or people in the past, with broad historical patterns or aspects of cultural history, or with a type of architecture, engineering, landscape architecture, or art, or it must contain useful information about history or prehistory. It can be important to the whole nation (or world), or to a state, region, or Indian tribe, or to a locality. As a result, it is fair to say that any substantial piece of urban or rural land in the United States is likely to contain some kind of historic resource.
- Second, the "criteria of adverse effect" set forth in the Section 106 regulations are quite broad. An action has an adverse effect on a resource if it reduces the integrity of the qualities that make the place eligible for the National Register. This can be done not only by destroying the resource, but by altering it in a wide variety of ways, introducing incompatible elements into its setting, transferring it out of Federal ownership, or simply letting it decay. The fact that an adverse effect will occur may be of great importance to the public or of no importance at all; it may be of concern to particular professionals like archaeologists or architectural historians, or it may not. Adverse effect may be the incidental result of a project that in fact advances the purposes of historic preservation, such as the rehabilitation of a historic structure.
- Third, a fundamental (though not often very clearly articulated) principle of historic preservation in the United States is that it is not necessarily wrong to have adverse effects on historic resources. The law does not hold such resources to be inviolable; it is understood that they often *must* be altered, and often destroyed, to accommodate the needs of the present and future. The law and regulations simply require that this alteration or destruction be acknowledged in planning, and that reasonable steps be worked out through consultation among interested parties to mitigate such damage to the extent feasible.

As a result of the above factors, operating together, it is not at all uncommon for a project that is reviewed under NEPA through preparation of an EA and FONSI to *have* adverse effects on historic resources. In fact, many projects that are categorically excluded from substantial analysis under agency NEPA procedures have such effects. If agencies were to equate "adverse effect" under the Section 106 regulations with "significant impact" under the NEPA regulations, they would do many thousands more EISs every year than they do today—often on projects whose only negative effect is on an old building or two that, while historically interesting, are thoroughly unworthy of long-term protection.

The Advisory Council on Historic Preservation has explicitly recognized this disjuncture between "adverse effect" and "significant impact." In its regulations, at 36 CFR 800.8(a)(1), it articulates the "general principle" that "*A finding of adverse effect on a historic property does not necessarily require an EIS under NEPA.*"

This brings us back to where we started, of course. How is an EA analyst to decide whether an adverse effect on a historic resource (or resources) is sufficiently serious to constitute a significant impact on the quality of the human environment?

Recall that under Section 106, when it is determined that an action will have an adverse effect on a historic resource, consultation continues about how to "resolve" the adverse effect. This consultation usually results in a Memorandum of Agreement stipulating some kind of mitigation. Mitigation may range from large-scale project relocation or redesign, right down to minimal documentation before a resource is destroyed. The point is that the "resolution" is agreed to by at least the agency and the State or Tribal Historic Preservation Officer, or in some cases the Advisory Council, with other interested parties participating in various ways. In routine cases, even those involving the outright destruction of historic resources, Memoranda of Agreement are usually reached relatively easily. Where there are serious interests in preserving a resource and opposition to a project's effects—usually, but not always, meaning controversy over impacts, an "intensity" measure in its own right under 40 CFR 1508(b)—agreement is harder, or even impossible, to reach. When agreement cannot be reached, the Advisory Council renders a final advisory recommendation to the head of the responsible federal agency, who then

https://doi.org/10.1017/S1466046602021221 Published online by Cambridge University Press

considers the recommendation in deciding whether the proposed action will go forward, and if so, under what conditions.

In the late 1990s, I was privileged to work with the US General Services Administration in revising its NEPA procedures. We grappled at some length with the problem of how to measure the significance of an impact on historic resources, and concluded that an adverse effect under Section 106 would not be regarded as a significant impact, provided (a) that the major parties consulting under Section 106 executed a Memorandum of Agreement, and (b) this Memorandum stipulates mitigation that, in the view of the consulting parties, reduced the impacts of the project to a non-significant level.[10] What level of mitigation is sufficient to do this varies with the character of the resource and the nature of the mitigation. Where the resource has little long-term preservation potential, mere documentation through photography, architectural drawings, or archaeological research might be sufficient. Where the resource is of greater public value, a more extensive program of mitigation—via project redesign, relocation, or compensation of various kinds—would be appropriate. If such a Memorandum of Agreement is *not* reached, then a finding of "significant impact" should be made and an EIS prepared.

A reasonable objection to this approach is that it could allow a State Historic Preservation Officer to hold a politically or personally unpopular project hostage, forcing preparation of an EIS by refusing to sign a Memorandum of Agreement even though the best alternative has been selected and every reasonable measure has been adopted to mitigate impact. The Section 106 regulations allow for this possibility, however, by providing that if an agency and state fail to reach a Memorandum of Agreement, the Advisory Council on Historic Preservation itself may, at its discretion, enter into such an agreement with the agency.[11] While it is theoretically possible that the Advisory Council itself might frivolously hold a sister agency's project hostage, this possibility is probably a remote one.

So, a rational standard for deciding whether an impact on a historic resource is sufficient to trigger preparation of an EIS, I suggest, is whether a Memorandum of Agreement is executed under Section 106 that at least the agency and State or Tribal Historic Preservation Officer or the Advisory Council agree reduces impacts below significance. I should note again that State Historic Preservation Officers and other historic preservation specialists are not accustomed to thinking about significance in NEPA terms, but it is certainly not unreasonable to ask them to do so, and to help them understand why it makes sense for them to.

With regard to cultural resources that are *not* historic resources, an EA analyst does not have the same sort of regulatory direction about consultation and agreements that he or she does where Section 106 review must be conducted.[12] I suggest, however, that the same general rule ought to apply. If the agency and other stakeholders agree, after full and open consultation, on a program of mitigation that they feel will reduce impacts below significance, then it should be concluded that there is no significant impact on cultural resources. If they cannot reach such an agreement, then an EIS may be appropriate. At the very least in such a case, the agency should take a very close look at the matter and reach a defensible decision about whether a significant impact will occur, which should be documented in the FONSI if an EIS is not prepared.

Conclusion

In summary:

1. Addressing cultural resources in an EA should include an analysis of *all* kinds of impacts (direct, indirect, cumulative), arising from *all* analyzed alternatives, on *all* types of cultural resources—not only historic resources under Section 106, but Native American cultural items and religious practices; scientific, historical, and archaeological data; and the valued beliefs and ways of life of communities and neighborhoods, particularly low-income groups and minority communities.
2. Where Section 106 review is an important part of the EA analysis, the review process should not be viewed as a rigid one requiring massive documentation that is out of proportion with the level of documentation required by other environmental variables. A flexible approach should be employed that gathers only enough data to permit everyone involved to understand the likely impacts and negotiate what to do about them.
3. Although compliance with Section 106 must be a part of any EA analysis of impacts on cultural resources, it is not the be-all and end-all of such analysis. Other types of cultural resource, to which Section 106 review does not apply, must be considered as well.
4. Consultation with stakeholders should be at the core of the analysis, with respect not only to historic resources but to all types of cultural resource. Such consultation should be the primary vehicle both for identifying impacts and for reaching conclusions about mitigation. Consultation

https://doi.org/10.1017/S1466046602021221 Published online by Cambridge University Press

should begin early and be continuous throughout the analysis. It should involve an open and honest effort to seek and consider the concerns of stakeholders, and to achieve agreement with them where possible.

5. An impact on a cultural resource—whether a historic resource or some other kind of cultural resource—should be regarded as significant when (a) some kind of negative impact (in the case of a historic resource, an adverse effect as defined in the Section 106 regulations) *does* appear to be likely, *and* (b) the agency and key stakeholders (notably under Section 106, the State or Tribal Historic Preservation Officer and/or the Advisory Council) *do not* agree on mitigation measures that they think will reduce impacts below significance.

I am not naive enough to think that many NEPA contractors or drafters of EA contracts are likely to follow the above recommendations without encouragement from review agencies or the courts, though I do believe that attending to them would produce not only better NEPA analyses but more efficient and cost-effective progress through the NEPA review process where cultural resource issues are involved. It would be nice to imagine that Congress might be interested in legislation mandating agreement-oriented consultation with stakeholders about impacts on the cultural environment—perhaps as a replacement for such narrowly-focused legal requirements as those of Section 106. This too seems unlikely; narrow, resource-specific requirements like Section 106 have too many advocates, and promoting effective stakeholder involvement in NEPA does not seem to be on anyone's political agenda. In the end, I suppose, my hope is that this article will speak to reviewers of NEPA documents and to litigants framing complaints of NEPA noncompliance. Many EAs and (EISs) continue to substitute narrow applications of Section 106 for comprehensive treatment of impacts on cultural resources. Many "consultations" carried out under Section 106 fail to meet the standards set by the term's regulatory definition. Many FONSIs fail to demonstrate the lack of significant impact on historic resources, to say nothing of the broader range of cultural resources whose consideration is mandated by law. Such deficiencies should be pointed out to agencies by reviewers, and they create vulnerabilities that may usefully be seized by litigants.

Acknowledgments

I am grateful to the National Preservation Institute and AltaMira Press for their support in my development of some of the ideas presented in this paper in classes and books. I also thank the Editors of *Environmental Practice* and three anonymous reviewers for their aid in improving the final product.

Notes

1. Districts, sites, buildings, structures and objects are added to the National Register through a process of nomination and multi-level review, but a place need not be on the Register to be regarded as historic; it need only meet criteria spelled out in National Park Service regulations (36 CFR 60.4). Agencies are responsible for identifying resources that may be affected by their actions, and applying the "National Register Criteria" to determine whether they are eligible.

2. For a full description and analysis of the Section 106 process, see T. F. King, 2000, *Federal Planning and Historic Places: The Section 106 Process,* AltaMira Press, Walnut Creek, CA. See also T. F. King, 2002, "What Is Section 106 Anyway?" in *Thinking About Cultural Resource Management: Essays From the Edge,* AltaMira Press, Walnut Creek, CA.

3. For an extended discussion of this and related problems, see T. F. King, 1998, "How the Archeologists Stole Culture: A Gap in American Environmental Impact Assessment and What to Do About It," *Environmental Impact Assessment Review* 18(2):117-134. See also T. F. King, 2002, "Archeobias: Prevention and Cure" in *Thinking About Cultural Resource Management: Essays From the Edge,* AltaMira Press, Walnut Creek, CA.

4. Interorganizational Committee on Guidelines and Principles, 1994, "Guidelines and Principles for Social Impact Assessment," *Impact Assessment* 12(2):107-152.

5. T. F. King, 2000, "What Should Be the 'Cultural Resources' Element of an Environmental Impact Assessment?" *Environmental Impact Assessment Review* 20(2000):5-30; T. F. King, 1998, *Cultural Resource Laws and Practice: An Introductory Guide,* AltaMira Press, Walnut Creek, CA.

6. Secretary of the Interior's Standards and Guidelines for Identification of Historic Properties, 1983, 48 *Federal Register* 44720-21, Washington, DC.

7. Under the Section 106 regulations as revised and reissued by the Advisory Council in 2000 (at 36 CFR 800.8(c)), agencies can conduct NEPA analyses that meet specified standards for consultative consideration of historic resources, and substitute such analyses for the studies, consultations, and documents otherwise required for Section 106 compliance. This provision raises interesting possibilities for embedding Section 106 review in the analysis of impacts on a comprehensive range of cultural resources, and can make possible significant efficiencies. Whether one employs the NEPA substitution provisions of the Section 106 regulations or not, however, there is flexibility in the regulations; the Section 106 process does not have to be carried out in lockstep, and it does not inevitably require exhaustive documentation.

8. 36 CFR 800.15(f).

9. Interorganizational Committee on Guidelines and Principles, 1994, "Guidelines and Principles for Social Impact Assessment" (Principle 3), *Impact Assessment* 12(2):149.

10. US General Services Administration, 1998, *NEPA Desk Guide,* Washington, DC.

11. In recognition of the sovereign rights of Indian tribes, this "fail-safe" mechanism does not apply to non-agreement with Tribal Historic Preservation Officers concerning projects with impacts within the external boundaries of an Indian reservation.

12. Virtually all the cultural resource laws and executive orders, however, as interpreted by the courts, provide for some level of consultation, and the regulations implementing the Native American Graves Protection and Repatriation Act provide extensively for consultation and development of agreements and agreement-like documents.

Submitted August 17, 2001; revised April 15, 2002; accepted April 25, 2002.

https://doi.org/10.1017/S1466046602021221 Published online by Cambridge University Press