Guidelines for the Development of Historic Properties Management Plans For FERC Hydroelectric Projects

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I. INTRODUCTION AND PURPOSE OF THIS GUIDANCE

Section 106 of the National Historic Preservation Act (NHPA) requires the Federal Energy Regulatory Commission (FERC or Commission) to take into account the effect of its undertakings on historic properties and to afford the Advisory Council on Historic Preservation (Council) a reasonable opportunity to comment. An undertaking includes any project, activity, or program requiring a federal permit, license, or approval. Therefore, many FERC actions, such as issuance of new and original licenses, license amendments, surrenders, and terminations, are undertakings that are subject to Section 106. Section 106 is implemented through the Council's regulations, "Protection of Historic Properties" (36 CFR Part 800).[1] For hydropower licensing actions, FERC typically completes Section 106 by entering into a Programmatic Agreement (PA) or Memorandum of Agreement (MOA) with the license applicant, the Council, and the State and/or Tribal Historic Preservation Officer (SHPO/THPO).[2] This agreement is then incorporated by reference into the project license when it is issued.

Because it is not always possible for FERC to determine all of the effects of various activities that may occur over the course of a license, the PA or MOA typically provides, and FERC typically requires as a license condition, that the licensee develop and implement a Historic Properties Management Plan (HPMP).[3] Through an approved HPMP, FERC can require consideration and appropriate management of effects on historic properties throughout the term of the license. In so doing, FERC meets the requirements of Section 106 for its undertakings.

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[1] These regulations became effective on January 11, 2001.

[2] The 1992 amendments to the NHPA include provisions for Indian tribes to assume the responsibility of the SHPO on tribal lands. The Council's regulations use the term Tribal Historic Preservation Officer (THPO) to mean the THPO under Section 101(d)(2) of the NHPA for undertakings occurring on or affecting tribal lands.

[3] In past hydropower relicensing PAs, FERC has required licensees to develop "Cultural Resources Management Plans" (CRMPs). In this guidance, however, the term HPMP is used, because it more accurately reflects the requirements of Section 106 of the NHPA.

The purpose of this document is to provide guidance for the development of HPMPs.

What is a HPMP?

A HPMP is a plan, implemented pursuant to a FERC license, for considering and managing effects on historic properties of activities associated with constructing, operating, and maintaining hydropower projects.[4] It establishes a decision-making process for considering potential effects on historic properties, preferably early in project planning. The HPMP should consider and manage the effects on historic properties of actions taken to implement the license over its entire term. For example, the HPMP should take into account other plans that are required (or will be required), such as recreation plans, timber management plans, or fisheries plans.

A good HPMP should identify the nature and significance of historic properties that may be affected by project maintenance and operation, any proposed improvements to project facilities, and public access. It should identify goals for the preservation of historic properties; establish guidelines for routine maintenance and operation; and establish procedures for consulting with SHPOs, THPOs, Indian tribes, historic preservation experts, and the interested public concerning effects to historic properties or contributing elements of a historic district.

The HPMP should be responsive to the purposes of the Project and should be realistic in terms of those purposes. It is not the intent of Section 106 or the HPMP to transform a hydroelectric powerhouse into a "museum" or to jeopardize the ability of the licensee to produce hydroelectricity. Accordingly, the HPMP should recognize the need to fulfill all of the terms and conditions of the Project license, and should not impede the safe and efficient production of energy.

[4] "Project" means any licensed or unlicensed, existing or proposed water power project that is subject to FERC jurisdiction, including minor projects, major projects, exemptions, and major modified projects as defined in the Commission's regulations at 36 C.F.R. § 4.30 (2001).

The HPMP should be:

- ❑ Integrated into the licensee's Project decision-making process so that historic preservation needs are considered during Project planning and operation;
- ❑ Written in plain English with historic property management terms clearly defined;
- ❑ A stand-alone document (not dependent on access to previous studies, although incorporation by reference may be desirable in some cases); and
- ❑ Consistent with any other Project management plans, settlement agreements and/or long-range planning documents.

What does the HPMP propose to manage?

The HPMP should provide for the management of properties listed in or eligible for listing in the National Register of Historic Places, the National Park Service's official list of properties recognized for their significance in American history, architecture, archeology, engineering, and culture. Such places, are referred to as **historic properties** and may include the project facilities, such as the dam, powerhouse and substations; other kinds of buildings and structures; prehistoric and historic archeological sites; and properties of traditional religious and cultural significance to Indian tribes. [5]

The management of historic properties involves both the long term preservation of historic values of historic properties and consideration of the effects of a licensee's actions on historic properties. Hydroelectric projects may affect historic properties in a number of ways.[6] Modes of Project operation that cause erosion can result in the loss of archeological sites located along shorelines. Likewise, constructing recreational developments and providing greater public access can damage archeological sites. Even actions which initially seem fairly routine can undermine the integrity of a historic

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[5] An applicant may develop a management plan dealing with all cultural resources (a CRMP, for example) as part of a settlement agreement, or based on the needs of Indian tribes, federal land managers, and other agencies. This approach is not required for Section 106 review, but can improve understanding between parties, and facilitate better coordination of all the applicable laws and regulations relating to cultural resources.

[6] "Effect" as defined in the Council's regulations means "alteration to the characteristics of a historic property qualifying it for inclusion in or eligibility for the National Register" [36 CFR § 800.16(j)]

property. For example, since windows are often a character-defining feature of historic buildings, their replacement in a historic powerhouse can significantly alter that property.[7]

Who's responsible for carrying out the plan?

The Project licensee implements the HPMP, pursuant to the license conditions. Therefore, the plan should identify the project staff position (such as Cultural Resource Liaison, project operator, plant operator, etc) responsible for implementing the plan over the course of the license. However, FERC is responsible for enforcing the licensee's compliance with the license and implementation of the HPMP.

Successful implementation of the HPMP is more likely when Project staff is educated about the specific requirements of the plan within the general context of historic preservation law and practice.[8] Even with this staff training, however, consultants with specialized training may be needed to complete certain aspects of the plan, such as archeological studies, for example.

When is a HPMP prepared and filed?

We encourage applicants to draft their HPMP in consultation with the other stakeholders and submit it at the time they file a license application with the Commission. One advantage to having a draft HPMP completed when a license application is filed is that it provides a convenient means to involve the SHPO/THPO, Indian tribes and other stakeholders in consultation early on, so that they might reach agreement regarding the scope and results of studies, as well as establishing the APE (area of potential effect). Another advantage to early preparation of the HPMP is that it allows the licensee to consider historic preservation in conjunction with other aspects of the project. Completion of a final HPMP is more easily accomplished prior to issuance of a new license, thereby alleviating many delays and compliance problems after issuance.[9] This can result in a savings of both time and money for the licensee.

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[7] An "adverse effect" is found when a proposed action may alter the characteristics that qualify a historic property for inclusion in the National Register "in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling or association." [36 CFR § 800.5(a)(1)].

[8] Project staff means the licensee's staff and consultant who implement or are responsible for the project operation.

[9] When a final HPMP has been completed prior to issuance of a license, Commission staff typically develops a PA that requires the licensee to implement the HPMP upon license issuance.

A three year time frame during the prefiling stage--from the notice of intent to filing an application--allows for plenty of time to coordinate, consult, and draft a HPMP. Prefiling consultation involving the licensee and the various stakeholders and Indian tribes is already required through the Federal Power Act, and provides a good opportunity for completing a draft HPMP at this time. In addition, the revised implementing regulations for Section 106 allow FERC to authorize the licensee to initiate Section 106 consultation on its behalf, pursuant to 36 CFR §800.2(C)(4). This means that the licensee can begin early formal Section 106 consultation with the SHPO/THPO, Indian tribes, and other stakeholders at the time it files notice of intent to file a license application with the Commission. Another factor to consider is that, during the prefiling stage, FERC staff can freely consult with the licensee and other stakeholders without violating the Commission's rules concerning off-the-record communications--which take effect after a license application has been filed with the Commission and becomes contested due to interveners.

A HPMP should not be concluded without the involvement of FERC, as the responsible Federal agency for purposes of Section 106. It is, therefore, advisable to involve FERC in resolving questions or issues that arise in drafting a HPMP, even when the document is drafted prior to filing a license application.

If it is not possible to complete a HPMP before license issuance, the PA will typically require that a HPMP be developed within one year of the issuance of the FERC license.

II. HOW TO DEVELOP A HPMP

Who should prepare a HPMP?

The preparer of the HPMP should be knowledgeable about:

- ❑ Hydropower project operations and maintenance;
- ❑ Historic preservation law, policy and practice; and
- ❑ Management and treatment issues pertaining to all the types of historic properties that may be affected by Project operations.

Standards for Professional Qualification in the areas of archeology, history, architecture and architectural history have been established.[10]

Applicants and licensees are encouraged to consult these standards and to seek technical guidance from FERC, the Council, and the appropriate SHPO and/or THPO. The degree of expertise needed to develop a HPMP will depend on the complexity of the Project and its historic preservation issues.

Who should be consulted?

The licensee should develop the HPMP in consultation with various entities. Pursuant to Section 800.2 of the Council's regulations, the Commission may authorize the licensee to initiate consultation with the SHPO/THPO and others, but remains responsible for all findings and determinations.[11] The consulting parties include:

- The SHPO-- The SHPO reflects the interests of the state and its citizens in the preservation of their cultural heritage, and advises Federal agencies in carrying out their Section 106 responsibilities. Because the SHPO usually plays an important role in the implementation of a HPMP throughout the term of the license, preparers of HPMPs are strongly encouraged to involve the SHPOs in the development of the plan;
- The THPO or tribal representative--If the Project is either on tribal lands or affects historic properties on tribal lands, and the tribe has assumed the responsibilities of the SHPO for Section 106 in accordance with Section 101(d)(2) of the NHPA, the THPO must be consulted. If a tribe does not have a THPO, the applicant and FERC should consult with the tribe's officially designated tribal representative. Because Indian tribes exercise sovereign authority over tribal lands, the participation of the THPO or other designated representative is important to the development and implementation of the HPMP;
- Indian Tribes--Consultation must also involve Indian tribes or Native Hawaiian organizations that attach traditional religious or cultural significance to historic properties that may be affected by the operation of

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[10] See the Secretary of the Interior's Professional Qualification Standards [48 FR 44738-9]. Although the Secretary of the Interior published draft revised standards on June 1, 2000, these standards are not yet final.

[11] See 36 C.F.R. § 800.2 (c)(4).

the Project.[12] Such resources may be located on tribal lands, ceded lands, or other lands within the traditional territory of a tribe;

[12] See 36 C.F.R. § 800.16 (n).

- ❑ State and local governments, other federal and state agencies, non-governmental organizations, property owners, and other individuals-- These parties may wish to participate in the development of a HPMP based on the nature of their legal or economic interest in the undertaking or affected historic properties, or their concern with the undertaking's affects on historic properties. For example, the Project may be constructed on lands owned by or under the jurisdiction of the Forest Service or the Bureau of Land Management; and
- ❑ The Council--The Council oversees the Section 106 process, and may be asked to help resolve disagreements and provide guidance, advice, or technical assistance to FERC, license applicants, licensees, and other consulting parties in completing Section 106 consultation in developing a HPMP.

III. CONTENTS OF A HPMP

A Project's HPMP should be organized in a logical manner, so that information is easy to find and appropriate procedures can be quickly identified. It is only a guide, and is not meant to be rigidly applied to every Project. The following is an example of how the HPMP might be organized.

1. Overview and Executive Summary

The HPMP should begin with a statement of purpose describing the scope of the plan, how it will be used, and the authority under which it is developed (the statutory and regulatory context). This section should also identify who participated in the plan's development, as well as any ongoing commitment and procedures or protocols to continue consultation with Indian tribes, the SHPO/THPO, and other organizations in implementation of the plan. In addition, this section should summarize the contents of the HPMP.

2. Background Information

The HPMP should include:

- ❑ A description of the Project facilities and operation, its location, and the APE;
- ❑ The historic context (time, place, and theme);

- ❑ A description of surveys and/or inventories that have been completed, with maps and other graphics, as needed (including analysis of the scope and quality of existing surveys), and those that will be required to identify historic properties that may be affected by planned actions (include survey standards here, such as SHPO standards, that will be followed);
- ❑ A description of known and potential historic properties with an explanation of their significance and public values;
- ❑ Appendices which include maps, relevant correspondence, and technical studies or summaries of these studies.

3. **Project Management and Preservation Goals and Priorities**

The HPMP should include a description of the goals for operating the project and the goals for historic preservation at the project. A presentation of those preservation goals and standards in conjunction with the plan for project operation will guide implementation of the HPMP and should identify any historic resources that will be accorded special consideration. The goals and standards should take into account the type of historic properties present, such as Traditional Cultural Properties, historical buildings or equipment, or archeological resources. The HPMP should also describe the philosophy guiding management of historic properties within the Project's APE. For example, the licensee could manage a project under the continuity of use philosophy). It should also relate the plan to the specific management structure of the Project; for example, to the processes by which planning and budgetary decisions are made.

4. **Project Effects and Mitigation/Management Measures**

The HPMP should:

- ❑ Include a schedule for completing all actions required in the HPMP, and require FERC, as well as the SHPO/THPO, approval of revisions to this schedule, if any are needed;
- ❑ Identify, in consultation with the SHPO/THPO and other consulting parties, activities that will be considered exempt from further review under the HPMP because they possess little or no chance of affecting historic properties;
- ❑ Develop and implement rehabilitation standards and an oversight protocol;

- ❑ Include procedures to evaluate the effects of actions such as project-induced shoreline erosion, construction of fish passage facilities, construction of recreation facilities, and other Project activities on historic properties, and provide for consideration and treatment of adverse effects, as appropriate, in consultation with others;
- ❑ Consider relevant future, ongoing, and past effects, as appropriate;
- ❑ Include a monitoring protocol and provisions for enforcement, as appropriate;
- ❑ Provide for the treatment of human remains (distinguishing between Native American Grave Protection and Repatriation Act (NAGPRA)), if applicable, and State law requirements);
- ❑ Describe provisions for public interpretation; and
- ❑ Describe procedures to address effects when unanticipated historic properties are discovered and during project emergencies.

5. **Implementation Procedures**

The HPMP should include provisions for:

- ❑ *Designating a HPMP coordinator;*
- ❑ Training project personnel;
- ❑ An internal decision-making process (Refer to Principle #6 in Section IV);
- ❑ Consultation with the SHPO/THPO and others, including the Council if National Historic Landmarks are affected;
- ❑ Periodic reporting and meetings;
- ❑ Periodic review and revision of the HPMP;
- ❑ Actions requiring consultation with the SHPO/THPO, Indian tribes, Federal land managers, and others; and
- ❑ Dispute resolution, if not already provided in the PA or MOA.

IV. PRINCIPLES OF HPMP DEVELOPMENT AND IMPLEMENTATION

License applicants and licensees are encouraged to apply the following principles in developing and implementing a HPMP for a hydroelectric project.

***Principle 1*: The HPMP should be responsive to the purposes of the Project, including the safe and efficient production of hydroelectric power, and realistic in terms of those purposes.**

The HPMP should be responsive to the purposes of the Project and should be realistic in terms of those purposes. It is not the intent of Section 106 or the HPMP to transform a hydroelectric powerhouse into a "museum" or jeopardize the ability of the licensee to produce electricity. Accordingly, the HPMP should acknowledge the need to fulfill all of the terms and conditions of the Project license, and should not impede the safe and efficient production of energy.

***Principle 2*: The scope of the HPMP should be clearly defined, and should establish an approach to address effects on private lands.**

The HPMP is limited to the consideration of actions that fall under the jurisdiction of FERC and the licensee. The HPMP should recognize that the Project area is not necessarily the same as the area that is affected by project operations and management.[13] Because Project effects can extend beyond the Project boundary, the geographic scope of the HPMP should not necessarily be limited to Project lands. However, in order to comport with the Council's regulations, the HPMP cannot compel actions on private lands where the licensee has been denied access. In defining the scope, the plan should:

- ❑ Describe and include a map showing the APE, as defined in the Council's regulations at 36 CFR § 800.16(d);
- ❑ Where applicable, identify how to access private lands; and
- ❑ Describe outreach efforts that can encourage the treatment of effects on private lands.

***Principle 3*: The HPMP should be based on sufficient studies to predict the likely effects of Project activities on historic properties, and should provide for the conduct of additional studies that may be needed.**

The HPMP should include a description of previous inventories and historic properties that have been identified. It is not good practice to defer all identification and evaluation of historic properties until after the license is issued,

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[13] For major projects and some minor projects, the project area is also called the project boundary.

especially with large and/or complex Projects. However, it is not necessary to complete identification of each and every historic property within the APE before licensing. The HPMP should also specify whether additional identification and evaluation of historic properties are needed, and when they should be done. The HPMP should:

- ❑ Identify what additional surveys and evaluation are needed and provide a schedule for their completion;
- ❑ Establish procedures to ensure that the pertinent information will be obtained (for example, consultation with Indian tribes regarding properties of traditional religious and cultural significance), and considered prior to the implementation of any action that might affect historic properties; and
- ❑ Provide for re-evaluation of historic properties during the term of the license due to changing circumstances, such as the passage of time or changes in the property's integrity.

Principle 4: The HPMP should establish achievable and realistic goals and targets for completing specified tasks that can serve as the basis for budget decisions, staff assignments, and performance measures.

It is important to establish management goals and objectives, and to identify who will carry out the HPMP and how they will do so. In order to facilitate implementation of the HPMP, the licensee might find it useful to develop a field operations manual to provide procedures for staff. This should include a description of how staff will be trained to ensure that the HPMP is properly implemented.

Principle 5: The HPMP should establish management priorities and steps to be taken to ensure long-term preservation of historic properties.

Where historic properties of particular importance to stakeholders have been identified in the APE, the plan should provide for their consideration, avoidance of adverse effects, and, if necessary, treatment. The HPMP should also provide for and establish a schedule for implementing the protective measures, such as monitoring or stabilization; and for public education and interpretation of the historic and archeological values of the project.

<u>Principle 6</u>: The HPMP should establish a decision-making process that provides for the consideration of effects on historic properties early in project planning and include mechanisms for reaching resolution.

The plan should include procedures to consider ways to avoid, minimize, or mitigate adverse effects to historic properties, to promote their proper use, and to encourage beneficial effects. It should also provide for the review of proposed actions by the SHPO and/or THPO and other stakeholders, and should include specific standards for operation and maintenance activities. Procedures in the HPMP should:

- ❑ Address possible effects to historic properties resulting from the continued operation and maintenance of the Project;
- ❑ Provide for the preservation of historic properties that may be affected by shoreline erosion, other project-related ground disturbing activities, and vandalism--depending on the nature of the effects, could include implementing a program of shoreline monitoring on a regular basis within the APE and follow-up procedures;
- ❑ Determine ways to avoid or mitigate adverse effects on historic properties, including consultation as appropriate with the SHPO/THPO, Indian tribes and other stakeholders;
- ❑ Determine the process to be followed if previously unidentified properties or effects are discovered;
- ❑ Determine how effects on historic resources will be considered in the event of a Project emergency; and
- ❑ Establish what, if any, actions have little or no potential for affecting historic properties and can be implemented without any review (exempt activities)
- ❑ Establish procedures for dispute resolution.

<u>Principle 7</u>: The HPMP should be developed and implemented in coordination with other plans required by the license.

In addition to project operating plans, recreation plans, and wildlife mitigation plans, the HPMP should be coordinated with other plans and any approved settlement agreement developed either through the traditional or alternative licensing process.

***Principle 8:* The HPMP should provide for an appropriate level of consultation with others before decisions are made.**

The HPMP should establish procedures to identify when and how others, such as the SHPO, the THPO, and Indian tribes, will be consulted in review and decision-making about the management of historic properties. The communication protocol developed for the Alternative Licensing Process might be a useful place to start developing such procedures. It is most useful to consult with others early, before decisions are made, to allow consideration of a range of available options. The HPMP should establish procedures for reaching decisions through consultation, including resolving disputes when they occur.

***Principle 9:* The HPMP should consider other applicable federal, state, and local laws and regulations that provide authority for its implementation and may affect its scope.**

Although the focus of a HPMP is the preservation of "historic properties" and compliance with the NHPA, the treatment of historic properties and review procedures included in the HPMP should be consistent with other applicable laws and regulations. For example, if the Project is located on Federal or tribal lands, the HPMP should take into account the requirements of NAGPRA and its implementing regulations, which provide procedures for determining the treatment of Native American human remains intentionally excavated or discovered during ground disturbing activities. The HPMP should therefore:

- ❑ Identify applicable Federal, state and local laws and regulations; and
- ❑ Establish how the HPMP will be implemented in conjunction with other legal responsibilities.

This is especially important when dealing with the treatment and disposition of any human remains that may be discovered, so that the HPMP is consistent with applicable Federal, state, and local laws, and the Council's policy on the treatment of human remains.

***Principle 10 :* The HPMP should provide Project staff with ready access to pertinent information, but should also include mechanisms to protect sensitive data and to establish an appropriate level of security to discourage abuses.**

Access to relevant information--such as survey data, standards and guidelines, and points of contact for consultation--is important for the effective implementation of the HPMP. However, confidentiality, especially regarding the location of archeological sites and historic properties of traditional religious and cultural significance to Indian tribes, may be needed to provide for long term protection, particularly to protect against such activities as vandalism and looting.[14]

Principle 11*: *The HPMP should avoid the use of jargon, and should use terms consistently and correctly.

Staff at the licensed hydropower projects who will use the HPMP and supervise its implementation may not be familiar with terminology commonly used in historic preservation. If specialized terms are used, they should be defined. For example, terms such as *Phase I archeological survey, certified archaeologist, state approved contracting archeologist, Phase II survey, and Phase IA survey,* should be clearly defined so that whoever implements the HPMP is not confused about terminology and meaning.

Principle 12*: *The HPMP should not be a static document.

The HPMP should provide mechanisms for its periodic review and revision. Any steps to revise, amend, or otherwise alter the plan should be approached in the same manner as the development and approval of the initial HPMP.

Principle 13*: *Periodic reporting should be a part of the HPMP activities.

The HPMP should establish the scope, contents, and timing of a periodic report and the deadline for submission to the SHPO/THPO, other consulting parties, and FERC. Through this reporting, the licensee and others, most notably the SHPO/THPO, will be able to periodically assess the effectiveness of the plan.

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[14] Section 304 of NHPA provides that the head of a Federal agency or other public official receiving grant assistance pursuant to NHPA, after consultation with the Secretary of the Interior, shall withhold from disclosure to the public information about the location, character, or ownership of a historic resources when disclosure may (1) cause a significant invasion of privacy; (2) risk harm to the historic resource; or (3) impede the use of a traditional religious site by practitioners (see also 36 CFR § 800.11[c]).

References

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