

Direct v. Indirect Effects after *NPCA v. Semonite*

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Purpose of This Talk

- ACHP's clarification of the meaning of effects after *NPCA v. Semonite*
- 4 case studies that discuss “old” meanings of direct and indirect effects



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The ACHP Weighs In June 7, 2019

ACHP Office of General Counsel memo to clarify the meaning of *direct* . . .

In March 2019, the D.C. circuit court issued an opinion that clarified the meaning of the term “directly” in Section 110(f) of the National Historic Preservation Act as referring to the causality, and not the physicality, of the effect to historic properties. This means that if the effect comes from the undertaking at the same time and place with no intervening cause, it is considered “direct” regardless of its specific type (e.g., whether it is visual, physical, auditory, etc.). “Indirect” effects to historic properties are those caused by the undertaking that are later in time or farther removed in distance but are still reasonably foreseeable.

This clear statement should assist federal agencies not only in determining when Section 110(f) may apply to an undertaking that is subject to review under Section 106 of the NHPA, but also how to characterize the types of effects that may be caused by an undertaking. *For many, this will change the approach to defining effects based on physicality and recognize instances when direct effects may be visual, auditory, or atmospheric. This clarification should inform an agency’s efforts to determine areas of potential effects and consideration of how an undertaking may affect historic properties.*



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So, if nothing has really changed, what does this mean for my 106/110(f) project?

Short answer: It depends.

Long answer: It's complicated.



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Quick Review of Effects Types

Direct

- Physical
- Audible
- Vibration
- Visual
- Sociocultural

Indirect

- “Occurring in time or further removed in distance but still reasonably foreseeable”

Cumulative

- Not defined in regs but generally understood to mean a combination of past, present, and future effects.
- Now excluded from NEPA



Quick Review of How to Assess Effects . . . *Accurately, Adequately, and Assiduously*

- Why is the historic property significant? (i.e., the NRHP criteria under which it is eligible/listed)
- What characteristics or character-defining features convey the property's significance?
- How and if so, to what degree will the project under review diminish the integrity of those characteristics (i.e., location, design, setting, materials, workmanship, feeling, or association)
- Does the diminishment of the integrity of those characteristics lessen one's ability to understand or appreciate the property?
- If integrity IS diminished, how so and to what degree?
 - This is a subjective assessment, but if a project diminishes the integrity of a property so much that it can no longer convey its significance, then you have met the criteria of adverse effect.



Quick Review of Adverse Effects - 36CFR800.5(a)(1)

Criteria of adverse effect.

- An adverse effect is found when an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the NRHP in a manner that would **diminish the integrity** of the property's location, design, setting, materials, workmanship, feeling, or association.
- Consideration shall be given to **all qualifying characteristics** of a historic property, including those that may have been identified subsequent to the original evaluation of the property's eligibility for the NRHP.
- Adverse effects may include **reasonably foreseeable effects** caused by the undertaking that may occur later in time, be farther removed in distance, or be cumulative.



Case Study 1: FERC New License Process



A cairn on the Alpine Garden Trail in New Hampshire's White Mountains. Source: <https://www.outdoors.org/articles/amc-outdoors/cairns-history-building-maintenance>. NOTE: This photo is not related to the project I am discussing, which is both confidential and not in New Hampshire.



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Case Study 2: New Construction within NHL

Area of Potential Effects



- Recommended Area of Potential Effects
- Area of Ground Disturbance
- NHL
- Contributing Resource to the NHL
- Noncontributing Resource to the NHL

*NHL Contributing Resources
in the Project Vicinity*



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Case Study 2: New Construction within NHL



Figure 12. Aerial photograph showing Revetment A11 (left) and A12 (right, with Building 23 in center) in 1944.



Figure 13. Revetment A11, view southeast (2016).



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Case Study 2: New Construction within NHL



Seaplane ramps, Hangar 1, and Hanger 3 (*foreground left*)

1944 (*left*) and 1950s (*right*)



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Case Study 2: New Construction within NHL



Hangar 3, 1952



Hangar 3, 2017



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Case Study 3: Case Study: Demolition within NHL

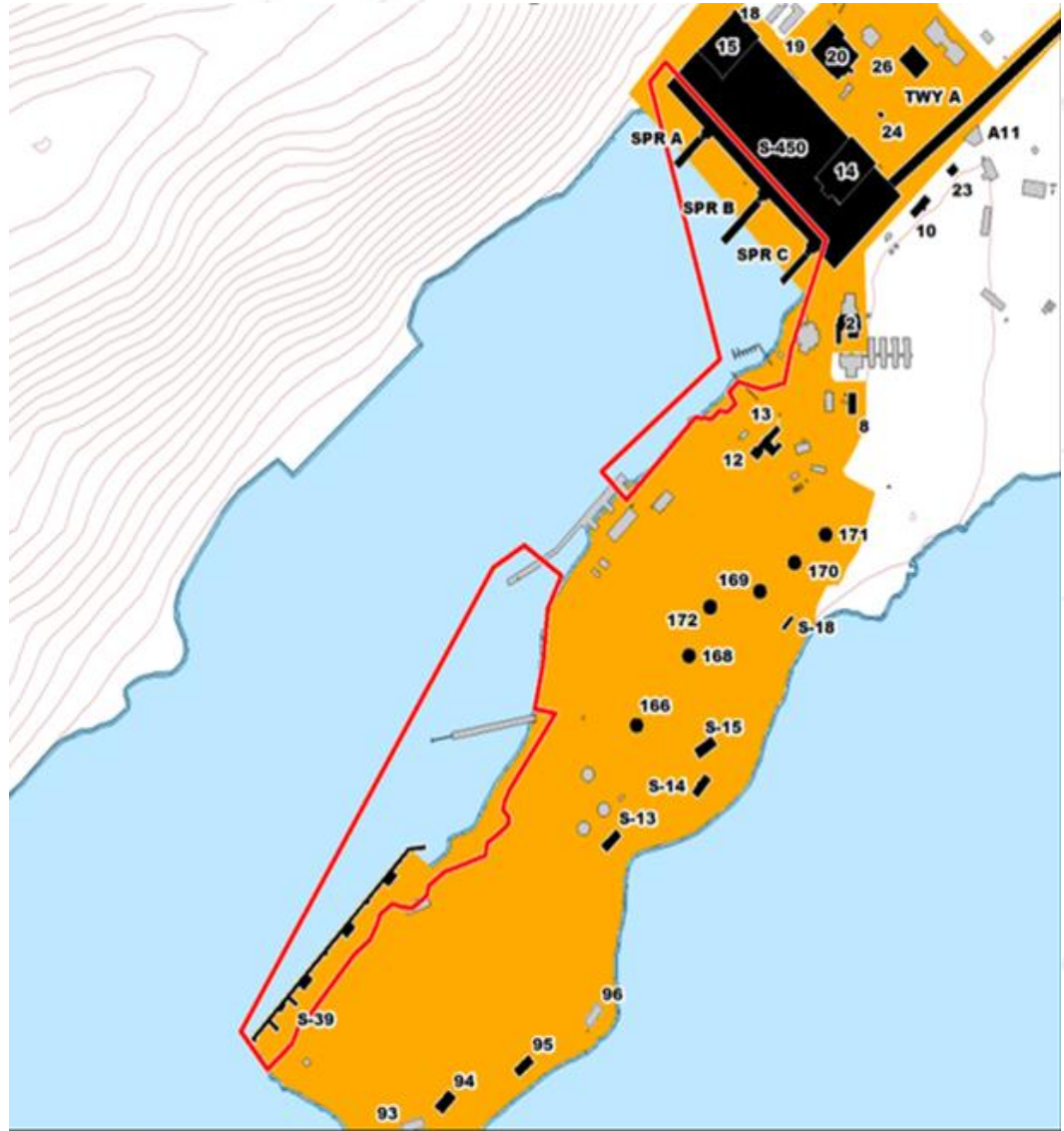


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Figure 2. Viewshed study, view of project effects from Marginal Wharf removal in yellow; salt water intake removal in blue.

Case Study 3: Case Study: Demolition within NHL

Recommended APE



Case Study 3: Case Study: Demolition within NHL



Saltwater intake (barely visible, top middle), 1978 (*above*) and 2016 (*right*)



Figure 9. Salt water intake structure, view west.



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Case Study 3: Case Study: Demolition within NHL



Marginal Wharf, 1944



Figure 8. Section of the Marginal Wharf, view northwest.



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Case Study 4: Washington State Convention Center

- Large “addition” (new construction) to existing facility (6 stories)
- Demo of an existing bus base and extensive ground disturbance to create foundation for new building
- 2 parcels to be used for later development (proposed up to 20 stories or more on one or both)
- Public benefit opportunities
 - Vacating city right-of-way, so benefits required
 - Unknown project elements
 - Bike lanes, funds for housing, park improvement, etc.
 - DAHP required consideration of the effects of these (but for . . .)



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Case Study 4: Washington State Convention Center

- Drafted APE included project area and adjacent parcels
- Considered and dropped large visual APE
- Drafted APE 4 times due to changing project elements.



Case Study 4: Washington State Convention Center

1017 Olive Way



Figure 5-5. 1017–1025 Olive Way, c. 1930, façade, view southwest, courtesy of the Puget Sound Regional Archives, Bellevue, Washington (PSRA).



Figure 5-2. 1017–1025 Olive Way, view southwest.



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A Few Takeaways

- **APE definition and consultation** is perhaps even more essential now than ever before
 - DON'T ASSUME it's just the project's physical footprint
 - Carefully consider ALL **potential** effects, **direct, indirect, cumulative** (not presumptive effects)
 - Make sure that federal agency is fully involved in APE definition from the beginning and has initiated meaningful consultation with Tribes and other stakeholders
 - Especially important regarding potential TCPs or resources that are perhaps not immediately obvious (views, access, etc.)
- Cultural resources practitioners may need to explain these definitions early in a project to clients who are maybe unaware (or resistant to the idea) that their past expectations may no longer be accurate, and the impact these clarifications may have on their schedule and budget.
- Essential to clearly specify **character-defining features** of historic properties and the surrounding areas, especially those related to setting, feeling, and association (a little more intangible and harder to assess integrity for later projects)
 - Ask yourself as if you were a future evaluator, "What did/does the setting, feeling, association look like during the period of significance and will future diminishment of those aspects' integrity adversely affect the property?"



Discussion



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