



Preserving America's Heritage

**June 7, 2019**

**Memorandum**

**To: ACHP Staff**

**From: ACHP Office of General Counsel**

***Re: Recent court decision regarding the meaning of “direct” in Sections 106 and 110(f) of the National Historic Preservation Act***

The purpose of this memorandum is to provide an update to staff on a legal development relevant to Sections 106 and 110(f) of the National Historic Preservation Act (NHPA). A recent decision by the D.C. circuit court has provided federal agencies with greater clarity on requirements for carrying out additional planning to minimize adverse effects to National Historic Landmarks (NHLs). Because the applicability of Section 110(f) is informed by a finding of adverse effect under Section 106 of the NHPA and the clear statutory intent for both provisions to address “effects” to historic properties, this decision also clarifies how effects in the Section 106 process may be defined as direct or indirect. Importantly for both Section 106 and Section 110(f), the court recognized that visual effects to historic properties can be direct effects under the NHPA.

Section 110(f) of the NHPA requires a federal agency to undertake such planning and actions as may be necessary to minimize harm to any NHL that may be directly and adversely affected by an undertaking.<sup>1</sup> While there is general consensus that the term “adversely” in this context has the same meaning it does in the regulations implementing Section 106,<sup>2</sup> there has been considerable debate in recent years over the meaning of “directly.” This debate has prompted disagreement among federal agencies and stakeholders regarding when Section 110(f) applies to an undertaking.

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<sup>1</sup> 54 U.S.C. § 306107. The section states in full: “Prior to the approval of any Federal undertaking that may directly and adversely affect any National Historic Landmark, the head of the responsible Federal agency shall to the maximum extent possible undertake such planning and actions as may be necessary to minimize harm to the landmark. The head of the Federal agency shall afford the Council a reasonable opportunity to comment with regard to the undertaking.”

<sup>2</sup> See 36 CFR § 800.5(a)(1), stating, “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 National Register in a manner that would diminish the integrity of the property’s location, design, setting, materials, workmanship, feeling, or association.... 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.”

In Section 106, it is important that federal agencies determine whether an undertaking may have the potential to affect historic properties. “Affect” in this context includes both direct and indirect effects, and an “effect” is defined in the Section 106 regulations as an “alteration to the characteristics of a historic property qualifying it for inclusion in or eligibility for the National Register [of Historic Places].”<sup>3</sup> When determining an undertaking’s area of potential effects, a federal agency must consider both direct and indirect effects.<sup>4</sup> Further, in assessing effects, the regulations note that “[a]n adverse effect is found when an undertaking may alter, directly or indirectly, any of the characteristics of a historic property...”<sup>5</sup> However, the terms “direct effect” and “indirect effect” are not defined in the NHPA or in the Section 106 regulations.<sup>6</sup>

In March 2019, the D.C. circuit court issued an opinion in *National Parks Conservation Association v. Semonite*,<sup>7</sup> concluding that the meaning of the term “directly” in Section 110(f) refers to the causality, and not the physicality, of the effect. 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 are those caused by the undertaking that are later in time or farther removed in distance but are still reasonably foreseeable.

To briefly summarize the salient points of the case, the Virginia Electric and Power Company retired 2 coal-fired power generators and applied in 2013 for a permit from the Army Corps of Engineers (Corps) to construct a new electrical switching station and 2 transmission lines. Supported by 17 250ft steel-lattice transmission towers, the line would stretch for 8 miles; four of those miles would cross the James River and transect the historic district including Jamestown and other historic properties. The Corps was responsible for complying with the National Environmental Policy Act (NEPA) and Section 106 for this project. The Corps prepared an environmental assessment under NEPA and developed a Memorandum of Agreement (MOA) to resolve the adverse effects under Section 106. While the ACHP signed the MOA, it also issued formal comments to the Corps, noting the agency’s concerns with the Section 106 process and outcome. The Corps had determined that the project would not directly and adversely affect the Carter’s Grove NHL and therefore, that Section 110(f) did not apply.

The Corps argued that because the project would not physically intrude on the plantation’s grounds, rather several towers would be visible from the grounds, there was no direct effect to the NHL. However, during the Section 106 review, the ACHP and other consulting parties stated that “direct” in the context of the NHPA meant “having no intervening cause;” thus, visual effects could be direct effects and Section 110(f) should apply to this undertaking. While the district court agreed with the Corps, on appeal the circuit court found the Corps’ position to be mistaken. It looked to the statutory language of the NHPA first and recognized that while Section 110(f) clearly includes physical effects, it is not limited to them. The court referenced the dictionary definition of “direct” to find the meaning, “free from extraneous influence” or “immediate.” And the court noted that the Congress could have easily restricted Section

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3 36 CFR § 800.16(i).

4 36 CFR § 800.4(a)(1).

5 36 CFR § 800.5(a)(1).

6 As the term “effect” is also found in the National Environmental Policy Act, it is useful to review the definition in the Council on Environmental Quality’s implementing regulations, which states, “[d]irect effects, which are caused by the action and occur at the same time and place” and “[i]ndirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.” 40 CFR § 1508.8(a)-(b).

7 USCA Case #18-5179, D.C. Cir. Mar. 1, 2019.

110(f)'s reach if it had intended to do so by using the word "physically" instead of "directly" in the statute. It is also important to note that the court recognized the deference that should be owed to the ACHP and the National Park Service (NPS) in interpreting the NHPA, as those are the agencies responsible for administering the statute. The court instructed the Corps to reconsider its historic preservation analysis using the "proper definition" of "directly."

This is not the first time Section 110(f)'s applicability and the meaning of "directly" has come up in the course of a Section 106 review. In regard to the 2009 Section 106 review for the Cape Wind project in Massachusetts, the NPS stated that visual intrusions could, in certain circumstances, constitute direct and adverse effects to an NHL. Further, in 2017, and in the context of the Section 106 review for the Charleston Union Pier Terminal project, the NPS said, "[t]he NPS does not agree with the [Army Corps of Engineers'] position that Section 110(f) applies only when an undertaking may physically impact a National Historic Landmark. NPS staff has reviewed Section 110(f) and NPS guidance pertaining to Section 110(f), and has not found published guidance that specifically interprets the term 'directly' as used in Section 110(f). The NPS is, therefore, considering issuing additional published guidance regarding the interpretation of the term 'directly' in Section 110(f) to clarify this issue."

While the NPS has not yet published such guidance, it is clear from the circuit court's opinion that "directly" in the NHPA specifically refers to the causation of the effect, not its physical nature. This court decision clarifies when Section 110(f) applies and will have implications for how agencies' assess effects to NHLs. While it does not impact when Section 106 applies, it does instruct how effects should be categorized in Section 106 review. 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.