Preserving America's Heritage

FEDERAL OVERSIGHT AND ASSISTANCE FOR SHALE GAS DEVELOPMENT AND SECTION 106

The Advisory Council on Historic Preservation (ACHP) frequently receives inquiries regarding the applicability of reviews conducted in accordance with Section 106 of the National Historic Preservation Act (NHPA) to shale gas development projects. Given that much of the nation's shale gas development occurs on private property and is carried out by private developers, there remains some confusion as to whether and when federal permits, approvals, or licenses that may invoke Section 106 review are required for these activities. Recognizing the public interest in the potential for shale gas development to affect historic properties, the ACHP has prepared this primer to assist stakeholders and the public in understanding when opportunities for participating in the Section 106 review of such activities may exist.

A review of applicable federal statutes and agency responsibilities establishes that there are a number of agency programs related to shale gas development that may require compliance with the requirements of Section 106. As noted in *Modern Shale Gas Development in the United States: A Primer* (April 2009) (http://www.netl.doe.gov/technologies/oil-gas/publications/EPreports/Shale_Gas_Primer_2009.pdf), "All of the laws, regulations, and permits that apply to conventional oil and gas exploration and production activities also apply to shale gas development, including the hydraulic fracking or fracturing process." The U.S. Environmental Protection Agency (EPA) administers many of the federal environmental laws and regulations that are applicable. However, many of the permitting programs associated with EPA's laws and regulations are delegated to the states, and there are some exemptions for gas and oil exploration. The U.S. Army Corps of Engineers (Corps), land managing agencies, and agencies providing grants or other assistance may also have to comply with Section 106 for actions related to such projects.

The following is a list of federal agencies that may have a role in shale gas development projects, the actions they conduct in relation to shale gas development, and a consideration of whether those actions make the project an undertaking subject to Section 106 review.

ENVIRONMENTAL PROTECTION AGENCY

1. The EPA administers the **National Pollutant Discharge Elimination System** (NPDES) program of the Clean Water Act (CWA) which seeks to control water pollution by regulating point sources that discharge pollutants into waters of the United States. Industrial, municipal, and other facilities must obtain permits if their discharges go directly to surface waters. The NPDES program also includes the regulation of storm water discharge from construction sites. The NPDES permitting program may be applicable to the management and discharge of fracture-water which is utilized in shale gas development. However, NPDES permits are generally managed through state programs, with the exception of Idaho, Massachusetts, New Hampshire, New Mexico, the U.S. territories, and Indian lands.

- As a result of the changes to the Section 106 regulations in 2004, the issuance of a permit by a state in a federal regulatory program that has been delegated to the state does not make the project requiring the permit an undertaking subject to Section 106 compliance. Where it retains permitting authority, EPA must comply with Section 106 for NPDES

permits that it issues. When a state has an EPA approved permit program, state requirements regarding historic preservation may apply.

- Consistent with the Energy Policy Act of 2005, EPA published a final rule, effective June 12, 2006, that exempts storm water discharges of sediment from construction activities at oil and gas sites from the requirement to obtain an NPDES permit except in very limited instances. Section 402(l)(2) of the CWA provides this exemption, which extends to site preparation and associated activities (i.e., construction of access roads, drilling sites, waste management pits, pipelines, etc.). However, facilities that have a discharge of a reportable quantity release or that contribute pollutants (other than non-contaminated sediment) to the level of a violation of a water quality standard are required to obtain and maintain NPDES permit coverage for storm water for the entire operating life of the facility.

To summarize, where EPA retains authority to issue an NPDES permit required by a shale gas project, it needs to comply with Section 106 for the issuance of such individual permits. Where the NPDES permit program has been delegated to a state or tribe, those state- or tribe-issued NPDES permits do not trigger Section 106 review for such permitted projects. Though not focused on individual shale gas or other projects, EPA should also comply with Section 106 for the delegation of the NPDES permitting program (or parts thereof) to a state or tribe and for the development of general permits, such as the construction general permit, whether EPA ultimately retains permit authority or delegates to a state or tribe.

2. The **Safe Drinking Water Act (SDWA) Underground Injection Control (UIC) program** is usually administered by states. State issued permits under the UIC do not subject the permitted projects to Section 106.

- To date, 40 states have obtained primacy (i.e., have received primary enforcement responsibility for UIC,) for oil and gas injection wells (Class II).
    - All injection wells require authorization under general rules or specific permits.
    - Class II wells inject fluids associated with oil and natural gas production and include enhanced recovery wells, disposal wells, and hydrocarbon storage wells.
- The U.S. EPA administers UIC programs for 10 states, seven of which (AZ, KY, TN, VA, PA, NY, MI) are oil and gas producing states, and all other federal jurisdictions and Indian lands. When EPA issues an UIC permit for a project, such a project would be subject to Section 106 review.

3. EPA **Clean Air Act** permits are usually issued through state programs. State-issued permits do not subject such permitted projects to Section 106.

4. EPA **Resource Conservation and Recovery Act** (RCRA) does not appear to be a trigger for Section 106 compliance related to hydraulic fracking. EPA has ruled that "control of oil and gas exploration and production wastes under RCRA Subtitle C is not warranted" and thus RCRA would be unlikely to provide a basis for Section 106 compliance for these projects.

FEDERAL ENERGY REGULATORY COMMISSION (FERC)

1. FERC issues permits for the siting and abandonment of interstate natural gas pipelines and storage facilities. These pipelines are considered transmission lines. FERC does comply with Section 106 for authorizations it provides to interstate gas transmission pipelines. However, FERC does not have jurisdiction over intra-state gathering lines associated with the recovery of gas from shale fields.

U.S. ARMY CORPS OF ENGINEERS (Corps)

1. The Corps of Engineers issues Clean Water Act Section 404 permits for impacts to the waters of the U.S. The Corps has conducted permit reviews related to gas shale development during the last five years, and complies with Section 106 for the issuance of such permits.

- Most Section 106 consultations are resolved in individual reviews made in consultation with State Historic Preservation Officers (SHPO). The Corps often uses special conditions on permits to avoid adverse effects. Because these conditions typically avoid adverse effects to historic properties, the ACHP is typically not involved in consultation.
- Most Clean Water Act Section 404 permitting for pipeline construction is carried out under Nationwide Permits (NWP) #12 (utility line activities) and #14 (linear transportation projects), while most well pads are reviewed under a General Permit.
    - Permits for these might include well pad construction, frack water/reserve pits, haul roads, gathering pipelines, and processing facilities.
- Many companies are using directional drilling to place pipelines under water crossings and other areas of Corps jurisdiction, thus avoiding the need for a Corps permit.

LAND MANAGING AGENCIES

1. Land managing agencies such as the Bureau of Land Management (BLM) or the Forest Service (FS) issue Special Use permits for projects that may include hydraulic fracking exploration and production from gas shales on federally managed lands**,** making such projects undertakings subject to Section 106.

AGENCIES WITH GRANT PROGRAMS

1. Agencies such as the Department of Energy (DOE) may provide grants for research and pilot projects or loan guarantees for projects.

- DOE's National Energy Technology Laboratory (NETL) provides grants that may require compliance with Section 106 based on the nature of the activities.

UNITED STATES DEPARTMENT OF TRANSPORTATION, OFFICE OF PIPELINE SAFETY

1. The Office of Pipeline Safety (OPS), within the Pipeline and Hazardous Materials Safety Administration (PHMSA), has overall regulatory responsibility for hazardous liquid and gas pipelines under its jurisdiction in the United States. The federal government has established minimum pipeline safety standards for the construction, operation, and maintenance of certain pipelines as authorized by Congress in the Natural Gas Pipeline Safety Act of 1968 and Hazardous Liquid Pipeline Safety Act of 1979 (collectively known as Pipeline Safety Act {49 USC 60101, et seq.}), using regulations specified at 49 CFR 190-199. Through certification by OPS, states can regulate, inspect, and enforce intrastate gas and liquid pipeline safety requirements. State agencies participate in the federal program under 49 U.S.C. 60105.

- For natural gas, PHMSA jurisdiction includes:
    - Interstate natural gas transmission lines;
    - Refined product transmission lines; and
    - Natural gas liquid transmission lines.
- Thus, federal (or delegated state) jurisdiction does not include most of the intra-state gas gathering lines that would be associated with recovery of natural gas through hydraulic fracking in shale gas development projects. Only gathering pipelines of certain characteristics located within non-rural areas characterized by significant population concentrations might be under federal jurisdiction or state jurisdiction. Therefore, OPS'

obligation to comply with Section 106 for construction and operation of gathering pipelines associated with hydraulic fracking operations appears somewhat limited.

SUMMARY

This review of the role of federal agencies in gas shale development has attempted to be comprehensive, but is not exhaustive. Based on ACHP experience, it appears that many shale gas development projects are carried out on private lands without the need for federal permits, assistance, or other authorization. As a result, such projects would not be subject to Section 106 review. However, projects on private land requiring Corps permits, and projects carried out on federally managed lands would be subject to Section 106 review. Though a number of federal statutes and regulations appear to give other federal agencies jurisdiction over some of the activities associated with shale gas development projects, delegation of permitting programs to the states and exemptions have limited the federal relationship to the projects, and concomitantly limited the necessity for Section 106 review.

If questions arise regarding the applicability of Section 106 to any of the activities that support gas shale development, the ACHP recommends that interested individuals consult not only the federal agencies listed above, but also notify state agencies that must disclose the federal approval or oversight role in state regulations. Interested individuals should also always check with the SHPO to determine whether state laws may afford some protection to historic properties.

The ACHP advises that when federal agencies carry out reviews of shale gas projects, Section 106 reviews should be coordinated with other environmental reviews to the greatest extent possible. Such coordination allows consulting parties, other stakeholders, and the public to be involved early in project planning. More importantly, it enables applicants to develop project schedules and deliverables that recognize the need for appropriate reviews and approvals. Likewise, reviews can be conducted in a manner that avoids duplication of effort and that makes important background information on historic and cultural properties available for consideration.

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