Human Rights and Corporate Responsibility in the Shift to the Green Economy

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Discussion Topics

- What legal mechanisms exist that can incorporate human rights into green economy programs and projects?
  - In the U.S., same mechanisms for green and non-green programs and projects.
    - Sources of authority requiring tribal consultation; Focus on the National Historic Preservation Act (NHPA) and other sources of tribal consultations
    - Comparisons: DAPL and Ruby Pipelines; Vineyard Wind; Osage Wind

- Corporate Responsibility?

- Safeguards on Human Rights and Environmental Risks?
Extensive federal permitting process for infrastructure projects is both a challenge and an opportunity

- Sources of authority requiring significant process
- Focus on the National Historic Preservation Act (NHPA)
- Balancing values
Numerous Sources of Authority for Tribal Consultation on Off-Reservation Projects

- National Historic Preservation Act (NHPA), Section 106 (47 U.S.C. § 470f) and its implementing regulations (36 C.F.R. Part 800)
- Archaeological Resources Protection Act (ARPA) (16 U.S.C. § 470aa et seq.)
- Antiquities Act (16 U.S.C. § 431 et seq.)
More Sources of Authority for Tribal Consultation on Off-Reservation Projects

- Executive Order 13007, “Indian Sacred Sites” (May 24, 1996)
- Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments” (Nov. 6, 2000)
More Sources of Authority for Tribal Consultation on Off-Reservation Projects

- Presidential Memorandum of November 5, 2009, “Memorandum for the Heads of Executive Departments and Agencies”
- Presidential Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships (Jan. 26, 2021)
- Agency handbooks and manuals
- International Law
- Inherent Tribal Sovereignty
National Historic Preservation Act of 1966

- Sets out national policy on cultural heritage and historic preservation

Section 106 of NHPA:

- Procedural statute
- Applies to federal or federally assisted undertakings in any state on federal, state, local, tribal and private lands
- Implemented by Advisory Council on Historic Preservation’s (ACHP’s) regulations
Procedural, Not Substantive Rights

- The NHPA “creates a mechanism to promote these values neither by forbidding the destruction of historic sites nor by commanding their preservation, but instead by ordering the government to take into account the effect any federal undertaking might have on them.”

United States v. 162.20 Acres of Land More or Less Situated in Clay County, State of Mississippi, 639 F.2d 299, 302 (5th Cir. 1980)
When does section 106 apply?

- Applies when 2 thresholds are met:
  1. there’s an undertaking, and
  2. that action has the potential to affect historic properties
What is an undertaking?

- Project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a federal agency
- Projects carried out by or on behalf of a federal agency
- Projects carried out with federal financial assistance
- Projects requiring a federal permit, license, or approval
What’s a historic property?

- Prehistoric or historic district, site, building, structure, or object included in or eligible for inclusion in the National Register.

- Includes properties of traditional religious and cultural importance to Indian tribes or Native Hawaiian organizations meeting National Register criteria. 16 U.S.C. §470a(d)(6)(A); 36 C.F.R. § 800.1. A traditional cultural property (“TCP”) is defined as a property associated with cultural practices or beliefs in a living community that are: (a) rooted in history, and (b) important to maintaining its cultural identity.

- Not as broad as a “cultural resource,” which must be considered under NEPA.
The National Register of Historic Places

- Maintained by the Secretary of Interior through the National Park Service
- Keeper of the National Register responsible for listing historic properties and determining eligibility
- To be listed, property must meet Criteria for Evaluation
  - Be associated with significant events, or
  - Be associated with persons of significance in our past, or
  - Embody distinctive characteristics of a type, period, or method of construction representing the work of a master or presenting high artistic values, or
  - Yield or be likely to yield information important in prehistory or history
- Property must also possess integrity of features necessary to convey significance
Elements of the Section 106 Process

1. Identification of consulting parties
2. Identification of historic properties affected by the undertaking
3. Assessment of the undertaking’s effects on those properties
4. Development of methods to minimize or mitigate any adverse effects on historic properties

→4 steps known as “consultation process”
Monticello, Charlottesville, Virginia

“High Water Mark,” Cemetery Ridge, Gettysburg Battlefield

Three Mile Gulch, Park County, Colorado

Kuchamaa Peak, Tecate, California
What is section 106 Consultation?

- The process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters that arise in the section 106 process

- Consulting parties don’t have veto power over each other, the project, or terms of any agreement addressing adverse effects on historic properties

- As long as the agency seeks and considers the views of the consulting parties, it has met its section 106 obligations
Step 1: Identifying Consulting Parties

- Once an undertaking has been established, the federal agency must identify the parties entitled to be consulting parties and must invite them to participate as such.

- Depending on where historic properties are located, consulting parties may include:
  - SHPO
  - Tribal Historic Preservation Officer (THPO)
  - Tribe’s designated representative
  - Project proponent
  - Local governments
  - ACHP
  - Others
Indian Reservations in the Continental United States
Indian Land Areas Judicially Established 1978

Data Sources:
This map was digitized from the 1993 USGS map
"Indian Land Areas Judicially Established 1978"
(original 1:4000000 scale; Albers Projection).

Map Information:
Lambert Azimuthal Equal Area; Scale 1:5845866
The numbers on the map represent the lands of original tribal occupancy that were judicially established through the U.S. Indian Claims Commission or the U.S. Court of Claims in 1978. Please reference these numbers with the accompanying sheets entitled "Indian Lands Judicially Established- CAST 7/97".
Step 2: Identifying Historic Properties

- After identifying consulting parties, agency reviews information on historic properties in Area of Potential Effects (APE)
  - Based on information, agency makes a “reasonable and good faith effort” to carry out identification efforts
  - Includes discussions with consulting parties and tribes
  - If agency finds no historic properties, finding is documented, sent to consulting parties and public, and agency may approve the undertaking
  - If agency finds historic properties may be affected within the APE, process moves into assessment phase
Step 3: Assessing Adverse Effects

- In consultation, agency applies criteria of adverse effects to determine if undertaking will cause adverse effects on historic properties
  - Adverse effect: alteration of any of the characteristics of a historic property qualifying it for inclusion in the National Register
  - Effects can be direct (physical damage) or indirect (visual or audible)

- If agency finds undertaking will have no adverse effects, it must notify and provide documentation to consulting parties
  - If SHPO/THPO or other consulting party disagrees, federal agency must consult with the disagreeing party or ask the ACHP to review the finding and provide its own opinion
  - Finding of no adverse effects can be based on (1) no actual adverse effects, or (2) no effects once conditions are imposed to modify the undertaking

- If agency finds undertaking will have adverse effects, ACHP is notified and consultation continues to resolve adverse effects
Step 4: Resolving Adverse Effects

- In consultation with the parties, agency develops and evaluates alternatives or modifications to the undertaking that could avoid, minimize, or mitigate adverse effects.

- Agency, SHPO/THPO, and sometimes the ACHP, execute a memorandum of agreement (MOA) dictating how adverse effects will be resolved.
  - Agency official invites project proponent, and sometimes others, like tribes, to sign the MOA (a binding and enforceable contact).
  - Once executed, MOA evidences agency’s compliance with section 106 and governs the undertaking.
Typical Treatment: Data Recovery on Archaeological Sites; Recordation of Historic Structures
I. Initiating the Process

Establish Undertaking

Initially, the Agency Official (AO) must establish whether proposed action is an "undertaking," defined as a project, activity, or program funded by a federal agency, including those requiring a federal permit, license or approval.

Assess Potential for Effect on HPs

Is the undertaking the type of activity that has the potential to cause effects on historic properties?

Sec. 800.3(a)

AO has no further obligation under Section 106 of the Historic Preservation Act, or ACHP rules.

Sec. 800.3(a)(1)

Section 106 Process Concluded

No

No

Yes

Yes

Abbreviations

ACHP Advisory Council on Historic Preservation
APE Area of Potential Effects
AO Agency Official
EA Environmental Assessment
FCC Federal Communication Commission
FPO Federal Preservation Officer
HP Historic Property
MOA Memorandum of Agreement
NHO Native Hawaiian Organization
SHPO State Historic Preservation Officer
THPO Tribal Historic Preservation Officer

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II. INITIATION OF CONSULTATION
Identify SHPO and/or THPO

1) Identify appropriate SHPO(s). Sec. 800.3(c)
2(a) If undertaking is on, or APE includes, tribal lands, identify THPO. Sec. 800(c)(1)
2(b) If no THPO has been designated and qualified, identify appropriate tribal representative. Sec. 800.3(c)(1)

Initiate Consultation with SHPO/THPO

Authorized applicant or group of applicants may initiate consultation. Sec. 800.3(c)(4)
Applicants, consultants and designees may prepare information, analysis and recommendations for the Section 106 processing but AO remains responsible for findings, and documents and studies must meet applicable standards and guidelines. Sec. 800.2(a)(3)

III. Identify and Involve other Consulting Parties

1. Indian Tribes
   - Undertakings on or affecting HPs on Tribal Lands
     - Where THPO is designated, consult with THPO in lieu of SHPO. Sec. 800.2(c)(2)(ii)(B).
     - If no THPO designated, consult with tribe in addition to SHPO. Sec. 800.2(c)(2)(ii)(B)

   - Projects off of Tribal Lands
     - Early in the planning process, make a reasonable and good faith effort to identify tribes or NHOs that might attach religious and cultural significance to HPs in the APE. Sec. 800.2(c)(2)(ii)(A); Sec. 800.3(e)(2)
     - Invite all identified Indian tribes and NHOs to become consulting parties.

2. Must Invite Local Governments
   - Identify and invite any local government with jurisdiction over some or all of the APE to be a consulting party. Sec. 800.2(c)(3); 800.3(f)(1)

3. Must Plan Public Notice and Involvement
   - In consultation with SHPO, plan for involving the public.
     - Identify appropriate points for notifying the public and seeking public input. Sec. 800.3(e).
     - At a minimum, AO must:
       1. Provide the public with information about an undertaking and its effects on historic properties; and
       2. Seek public comment and input. Sec. 800.2(d)(2)

4. May Invite Other Consulting Parties
   - In consultation with the SHPO, consider written requests from groups or individuals seeking to participate, and determine whether and which to include as consulting parties. Sec. 800.3(f)(3)
IV. Identification of Historic Properties

Required Preliminary Steps

Determine APE

In consultation with SHPO, determine and document APE.
Sec. 800.4(a)

Gather Background Information

1. Review existing information on historic properties within APE, including data on possible HPs not yet identified.

2. (a) Seek information, as appropriate, from consulting parties and others likely to have knowledge of, or concerns with, historic properties in the area; and

   (b) Identify issues relating to the undertaking’s potential effects on HPs; and

3. Gather information from any identified Indian tribe or NHO to assist in identifying properties located off of tribal lands, which: (1) may be of religious and cultural significance to them; and (2) may be eligible for the National Register. Sec. 800.4(a)(4) and 800.11(c)

Identification - Degree of Effort Required

Based on the information gathered under the above-listed preliminary steps, make a reasonable and good faith effort to carry out “appropriate identification efforts.”
Sec. 800.4(b)(1)

Appropriate identification efforts may include:

1) Research;
2) Consultation;
3) Oral history interviews; or
4) Field surveys

In this regard, the AO shall take into account:

1) Past planning, research and studies;
2) Magnitude and nature of undertaking
3) Degree of federal involvement
4) Nature and extent of potential effects on HPs;
5) Likely nature and location of HPs in APE.

Guidance is available from the Secretary's Standards and Guidelines for Identification. AOs should also consider other applicable professional, state, tribal, and local laws, standards and guidelines. Secs. 800.4(b) and (b)(1)
V. Evaluation of Historic Significance

**Apply the National Register Criteria**

- In consultation with SHPO and any consulting tribe or NHO, and guided by the Secretary's Standards and Guidelines for Evaluation, apply the National Register Criteria for Evaluation to properties within the APE that either:
  1. have not been previously evaluated for National Register eligibility; or
  2. have previously been determined eligible or ineligible, but require reevaluation due to the passage of time, changing perceptions of significance, or incomplete prior evaluations. Sec. 800.4(c)(1)

**Determine Potential Eligibility**

- Applying the National Register Criteria, determine whether any properties in the APE meet the National Register Criteria. Sec. 800.4(c)(2)

**Results of Identification and Evaluation**

**No Eligible HPs Affected**

- AO finds, and SHPO/THPO agrees there are no listed or eligible properties in APE. Sec. 800.4(c)(2)

**No Agreement on Eligibility**

- AO and SHPO/THPO disagree as to the eligibility of properties in APE. Sec. 800.4(c)(2)

**Secretary Determines Eligibility**

- Obtain a determination of eligibility from the Secretary of the Interior. Sec. 800.4(c)(2); 36 CFR Part 63

**Yes, Eligible Properties Affected**

- AO finds, and SHPO agrees, that there are eligible or listed properties in APE. Sec. 800.4(e)(2)

**Proceed to Determination of Effect.**

**Sec. 106 process concluded?**

- Yes

  **Secretary says Eligible.**

- No

  **Sec. 106 process concluded?**

  - Yes
    - Sec. 106 process concluded.
    - No
      - Yes
        - Secretary says Not Eligible.
      - No
        - No
VI. Determination of Effect

Determine if undertaking may have an effect on HPs.

"Effect" is defined as "an alteration in the characteristics of a historic property qualifying it for inclusion in or eligibility for the National Register." Sec. 800.16(i)

No Eligible HPs in APE

No possibility of effect on eligible or listed HPs in the APE

AO finds that HPs are or may be affected

1) Provide full documentation to SHPO/THPO, including:
   a) Description of undertaking and APE;
   b) Photos and maps of undertaking and APE;
   c) Description of appropriate steps taken to seek information and identify HPs; and
   d) Basis for determination that no HPs are present or HPs are present but not affected.

2) Notify all consulting parties

3) Make documentation available to public and seek public input. Sec. 800.4(d)(1)

Notification of Proposed Finding of No Effect

Section 106 Process Concluded

No further obligation under Section 106 or ACHP rules. Sec. 800.4(d)(1)

Evaluation Period

SHPO/THPO and ACHP have 30-day period to object. Sec. 800.4(d)(1)

AO agrees with objection, consultation proceeds

AO disagrees with objection, one or more parties terminates consultation. Proceed to Sec. 800.7 termination procedure, infra.

Notification of Finding of Effect

AO to notify all consulting parties including participating Indian tribes and NHOs and invite their views on the effects. Sec. 800.4(d)(2)

Proceed to Effects Assess

No objection
**Assess Effects**

In consultation with SHPO/THPO, and/or participating Indian tribes and NHOs, assess effects using Criteria of Adverse Effects. Sec. 800.5(a)

**Criteria of Adverse Effects**

"An adverse affect 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." Sec. 800.5(a)(1).

**Find No Adverse Effect**

**Find Adverse Effect**

**Proposed Finding of No Adverse Effect**

In consultation with THPO/THPO, propose a finding of No Adverse Effect if:
1) Effect not adverse, or
2) Adverse effect avoided by modifying or imposing conditions on undertaking. Sec. 800.5(b)

**Notification and Documentation**

1) Notify SHPO/THPO and all consulting parties
2) Provide SHPO/THPO and all consulting parties with full documentation of finding including:
   a. Description of the undertaking, federal involvement and APE, including photos, maps and drawings, as necessary;
   b. Description of steps taken to identify HPs;
   c. Description of HPs and characteristics that qualify them for National Register;
   d. Description of effects on HPs;
   e. Explanation of why criteria of adverse effects found applicable or inapplicable, including conditions to avoid, minimize or mitigate adverse effects; and
   f. Copies or summaries of views from consulting parties or public.
Secs. 800.5(e) and 800.11(e)

**SHPO/THPO Receipt of Documentation Triggers**

**30 Day Waiting Period**

**Tribal Concurrence**

AO should seek the concurrence of any participating Indian tribe or NHO that has communicated that it attaches significance to any HPs subject to the finding. Sec. 800.5(c)(2)(ii)

Within 30 day waiting period, Indian tribe or NHO may specify its reasons for disagreeing and request ACHP to review. Sec. 800.5(c)(2)(ii)

**SHPO/THPO agrees - No Adverse Effect, or doesn't respond within 30 days. Sec, 700,5(c)(1)**

**SHPO/THPO or any consulting party disagrees with finding of No Adverse Effect, specifying reasons. Sec. 800.5(c)(2)**

SHPO/THPO has 30 days from receipt of documentation to review finding of No Adverse Effect. Sec. 800.5(3)(2)

**ACHP may request to review finding. Sec. 800.5(b)(2)(iii)**

**Proceed to VII. - Finding of Adverse Effect**

*SHPO/THPO has 30 days from receipt of documentation to review finding of No Adverse Effect.* Sec. 800.5(3)(2)
No Adverse Effect

AO must maintain record of finding and allow public access to record on request. Sec. 800.5(d)

Carry out undertaking per finding. Sec. 800.5(d)

SWPO/THPO overrules objection, finds no adverse effect. Sec. 800.5(e)(1)(3)

No agreement with objecting party.

AO can consult with objecting party. Sec. 800.5(e)(2)

Reach Agreement with Objecting Party - No Adverse Effect.

AO submits to ACHP full documentation of finding. Sec. 800.11(3)

Sec. 800.5(e)(2)(iii)

AO accedes to objection. Finds Adverse Effect

No Adverse Effect

Disagreement

ACHP finds no adverse effect. Sec. 800.6(a)(1)

ACHP invited.

Notify ACHP of finding. Sec. 800.6(a)(1)

Provide ACHP with full documentation of undertaking and Adverse Effect finding. Sec. 800.6(a)(1), Sec. 800.11(e)

Finding of Adverse Effect

VII. Finding of Adverse Effect.
Sec. 800.5(d)(2)

ACHP not invited and not participating

ACHP Request

No Adverse Effect

Disagreement

AO can request ACHP Review. Sec. 800.5(e)(2)

Yes

No agreement with objecting party.

AO can consult with objecting party. Sec. 800.5(e)(2)

ACHP finds No Adverse Effect or does not respond within 15 days, Sec. 800.5(c)(3)

ACHP Invited

ACHP finds No Adverse Effect

Notify ACHP of finding. Sec. 800.6(a)(1)

Provide ACHP with full documentation of undertaking and Adverse Effect finding. Sec. 800.6(a)(1), Sec. 800.11(e)

Finding of Adverse Effect From Assessment with SHPO/THPO

ACHP finds No Adverse Effect

Find Adverse Effect

ACHP assessment

ACHP finds No Adverse Effect

Find Adverse Effect

No

Review

No agreement with objecting party.

AO can consult with objecting party. Sec. 800.5(e)(2)

No Adverse Effect

Disagreement

AO must maintain record of finding and allow public access to record on request. Sec. 800.5(d)
With SHPO/THPO, consider involving others as consulting parties. Sec. 800.6(a)(2)

Document to Consulting Parties

Provide full documentation of undertaking and Adverse Effect finding to all consulting parties. Ongoing duty to provide any new documentation. Sec. 800.6(a)(3)

Public Involvement

Make full documentation available to public. Provide public a convenient opportunity to express views using appropriate mechanisms to ensure views will be heard. Sec. 800.6(a)(4). In planning scope of public involvement, consider magnitude of undertaking and effects and opportunity for prior comment. Sec. 800.6(a)(4).

Consider other Consulting Parties

Without SHPO/THPO, consider involving others as consulting parties. Sec. 800.6(a)(2)

Explore Mitigation and Alternatives

Without ACHP
Consult with SHPO/THPO and consulting parties to develop alternatives or modifications to undertaking that could:
- avoid
- minimize, or
- mitigate adverse effects on HPs.
Only AO and SHPO/THPO need agree for MOA. Sec. 800.6(a) and (b).
VIII. MEMORANDUM OF AGREEMENT STAGE

AO and SHPO/THPO agree on method to resolve adverse effects.

AO and SHPO/THPO disagree on method to resolve adverse effects.

ACHP disagrees with proposed method of resolving adverse effects on HPs. Sec. 800.6

THPO disagrees with proposed method. Sec. 800.7(a)(3)

AO disagrees with proposed method. Sec. 800.7(a)(i)

SHPO disagrees with proposed method. Sec. 800.7(a)(2)

All Agree

AO, SHPO, THPO and ACHP all agree on proposal method to resolve adverse effects on HPs. Sec. 800.6(b)(2)

AO, SHPO/THPO and other invited parties execute MOA. Sec. 800.6(6)(iv)

File MOA with ACHP. Sec. 800.6(6)(l)(iv)

AO approves undertaking and ensures that it is carried out in accordance with MOA. Sec. 800.6(b)(1)(iv)

ACHP decides to join consultation. ACHP decides not to join consultation. Sec. 800.6(b)(l)(v)

ACCHP may consult with Agency's Federal Preservation officer. Sec. 800.7(a)(4)

AO, ACHP, THPO and invited parties execute MOA without SHPO. Sec. 800.7(a)(2)

AO, SHPO, THPO and ACHP may submit comments. Sec. 800.7(b)

AO approves undertaking per the MOA. Sec. 800.6(c)

AO ensures that undertaking is carried out in accordance with MOA. Sec. 800.6(c)

IX. Termination

Termination of Consultation. Sec. 800.7(a)(1)-4

AO has no further obligation with Section 106 or ACHP rules. Sec. 800.6(c)

Notify all parties of termination. If AO terminates, agency head to submit to ACHP Request to Consult under Sec. 800.7(c)
IX. Section 800.7(c) Comment Procedure
ACHP

Within 45 days of either: (1) receipt of request from head of agency or (2) date of termination of consultation (AO can agree to extend time):

1) Council must provide opportunity for AO, all consulting parties, and the public to provide their views.
2) AO must:
   A) Provide additional existing information regarding undertaking; and
   B) Assist the ACHP in arranging:
      i) on site inspection; and
      ii) an opportunity for public participation.

Sec. 800.7(c)(1), (2)

Transmittal of ACHP Comments

ACHP transmits its comments to:
1) Federal Preservation Officer (FPO);
2) All consulting parties;
3) Head of Agency;
4) AO; and
5) Others as appropriate.

Sec. 800.7(c)(3)

XI. Documenting the Agency's Decision

Head of Agency must personally (may not delegate) take into account ACHP comments and document any final decision.

Documenting means:
1) Preparing a summary of decision and rationale;
2) Including evidence of consideration of ACHP comments;
3) Providing ACHP a copy prior to approving undertaking;
4) Providing a copy to all consulting parties; and
5) Notifying public and making record available.

Sec. 800.7(c)(4)

XII. Final Decision

Agency may approve or deny the undertaking.
Other Authorities For Consultation/Coordination
The Typical NEPA Process
What level of consultation is required?

“Reasonable and good faith effort”
Balance Environmental Regulation With Other National Policy Priorities

President Obama in Cushing, OK – March 22, 2012
#NoDAPL

OUR PIPELINE WILL ALWAYS FIGHT

STOP THE PIPELINE

URANIUM MINING

NATIVE LIVES MATTER

YOU CAN'T DRINK OIL OR MONEY

PIPELINE FIGHTER

#SIOUX TRANS PIPELINE
WHAT IS DAPL?

• 1,172-mile, 30-inch underground pipeline designed to transport crude oil from the Bakken Region of North Dakota through South Dakota, Iowa, and Illinois to major U.S. refining centers.

• The pipeline is located almost entirely on private land; federal jurisdiction applies to only 3 percent of the project.
INDIAN TRIBES AND OFF-RESERVATION ENERGY INFRASTRUCTURE
Army Corps Hook for DAPL

- The only federal hook for DAPL is the Army Corps of Engineers' permitting authority under § 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act for crossings of waters of the United States (streams, rivers, wetlands), including navigable rivers such as the Missouri River, Des Moines River, Mississippi River, and the Illinois River.

- The Corps' Omaha District evaluates permit requests in North Dakota and South Dakota. The Corps' Rock Island District evaluates permit requests in Iowa. The Rock Island and St. Louis Districts share permit evaluation authority in portions of Illinois. It is the actions of the Corps' Omaha District that are at issue in the litigation in the DC Circuit. The Army Corps' decision processes must comply with other federal environmental laws, including the NHPA, which plaintiffs allege was violated because inadequate process and response time was afforded to the tribes.
In July 2016, U.S. Army Corps of Engineers (USACE) released an Environmental Assessment (EA) under the National Environmental Policy Act that evaluated a proposed Section 408 permit to allow DAPL to cross Lake Oahe, a reservoir on the Missouri River.

USACE issued the 408 permit (named for Section 408 of the Rivers and Harbor Act) but continued to consider the requisite right-of-way across federal land under the Mineral Leasing Act.
Pipeline route had shifted during the project from about 10 miles north of Bismarck, North Dakota, to within a half-mile of the Standing Rock Sioux Reservation, triggering controversy from that tribe and the Cheyenne River Sioux Tribe 70 miles downstream.
DAPL: WHAT HAPPENED?

DAPL proceeded with earthmoving on private land that the Standing Rock Sioux Tribe identified in court documents as a culturally sensitive area.

• Confrontation during initial protests eventually resulted in support from more than 200 other tribes.

• Protest camps swelled to more than 10,000 people.
DAPL: WHAT HAPPENED?


This Memo determines DAPL to be in the national interest and directs USACE to “review and approve in an expedited manner, to the extent permitted by law and as warranted.”
The Litigation continues ...

- A U.S. court in 2022 ordered the federal government to undertake a more intensive environmental impact statement (EIS) of the 1,100-mile long crude pipeline's route, the latest saga in a lengthy court battle between the tribes and pipeline operator Energy Transfer.

- In a draft statement in September, the U.S. Army Corps of Engineers did not select a preferred alternative of five options, including abandoning or rerouting the pipeline around Lake Oahe, a federally protected reservoir.

- It will make its selection only after public and agency comments were received and a final version prepared, the draft report said.

- Energy Transfer said yesterday that it does not expect the U.S. Army Corps of Engineers to shut down or reroute DAPL.
Comparison to Ruby Pipeline Project

680 miles of 42-inch Pipe - Opal, WY to Malin, OR

Links Rocky Mountain Gas w/ Western US Markets

65% on public lands

44 Tribes within connections to lands

Substantial Tribal input at every phase
A lot of process to navigate, 100+ Tribal Monitors worked on Ruby; Confidential Mitigation Side Agreements
Compare to Current Offshore Wind Development
62 turbines spaced about a mile apart and rising more than 800 feet out of the water.

The logo represents the legend of Moshup, the Wampanoag Great Leader who could transform himself into a giant and led the people to Noepe, and fed them by wading out into the ocean and catching North Atlantic Right Whales, hitting them against the Cliffs to prepare them for cooking and their blood is what provides for the red colors of their Sacred Cliffs.
In NPS designation letter it states that the “boundaries” of the eligible area are “undefined;” it should have triggered far more consideration and protections for all of the shallow waters, which all contain submerged archeological cultural resources including burials; all the way out to the continental shelf break. This is where the color chart maps show the water depth going from 90’ to about 200’ deep at the break/drop. It was all dry land, and Wampanoag lived all the way out to the break/drop.
In addition to submerged burials ...

- Surrounded by turbines, tribes in New England assert that BOEM has failed to properly assess the individual and cumulative effects of 1000+ of wind turbines with respect to migratory patterns, siltation, bathometrics, photosynthesis, noise, increased marine traffic and increased temperature of the shallow waters due to 1000+ metal heat conducting monoliths, and the fact that none of their visual simulations are even close.

Wind farm off New Jersey likely to ‘adversely affect’ but not kill whales, feds say.
Wind turbines require concrete, steel, iron, fiberglass, polymers, aluminium, copper, zinc and REEs. Mineral intensities not only depend on the turbine size, but also on the turbine type.

Demand for REEs in wind – neodymium and praseodymium in particular – is set to more than triple by 2040, driven by the doubling of annual capacity additions and a shift towards turbines with permanent magnets. Copper demand reaches 600 kt per year in 2040, propelled by offshore wind requiring greater cabling. Offshore wind accounts for nearly 40% of copper demand from wind despite accounting for only 20% of total wind capacity additions.

Copper: Sulfuric Acid is used for leaching of copper from oxide ore, and some sulfide ores. The leaching solution is claimed to be diluted and recycled. However, it is recycled into lined ponds of high toxic levels of sulfuric acid.
677,000 acre feet of water to be consumed by the company’s own estimates, which will come from the complete dewatering of the site and ginormous withdrawals of raw groundwater from the East Salt River Basin, which is the primary backup drinking water for Phoenix in the event of Colorado River scarcity (i.e., NOW). Resolution Copper can withdraw UNLIMITED amounts of groundwater under antiquated Arizona mining extraction permits. Keep in mind 677,000 acre feet is the company’s own (under)estimate and 1 acre foot of water supplies four homes for one year. This is a gargantuan consumption of water.

Will become the country’s biggest Super Fund site ever, featuring a toxic pit to which all water will later run to, forming a poison lake and causing the ground in a 50-mile radius to collapse because the aquifers will collapse from the massive groundwater withdrawals, and this includes agriculture irrigation canals.

All the copper goes to China, which directly owns 15% of the project and will simply stockpile the copper.
ISLAND IS SPECIAL, 
SECRETARY UDALL 
SAYS AT GAY HEAD

Sees Need of Program to 
Conserve Resources 
of Vineyard

By Peter S. McGhee

AUG

“I don’t build that bridge,” he said, in reference to a proposal put forward recently by Boston’s Automobile Legal Association: “It’s a silly idea . . . keep the roads the way they are, don’t let the highway engineers build you some high speed roads . . . preserve your historic places . . . keep the beautiful beaches and marshes unspoiled . . . and above all else . . . keep out the speculator-developer types.”
OCEAN JUSTICE STRATEGY

A REPORT BY THE OCEAN POLICY COMMITTEE

DECEMBER 2023
The Bureau of Ocean Energy Management (BOEM) informed Vineyard Wind that it had waived a financial assurance for decommissioning costs fee in a June 15, 2021 letter.

In its June 2021 letter to Vineyard Wind, BOEM explained it would waive the fee because the project included risk reduction factors including insurance policies to cover any catastrophic event that damages operations, use of proven wind turbine technology, and the use of power purchase agreements "with guaranteed electricity sales prices that, coupled with the consistent supply of wind energy, ensure a predictable income over the life of the project."
Osage Minerals Council v. Osage Wind (Enel)

- A federal judge in Oklahoma ordered removal of an 84-turbine wind farm spread across 8,400 acres in Osage County with a final ruling that ends a decade-long legal battle over illegal mining on the Osage Reservation.

- Cost for removal of the turbines is estimated at $300 million.

- U.S. Court of International Trade Judge Jennifer Choe-Groves granted permanent injunctive relief via “ejectment of the wind turbine farm for continuing trespass.”

- Issue was whether a mining permit was required to construct the wind farm, located in tallgrass prairie between Pawhuska and Fairfax. The defendants began leasing surface rights from private landowners for the project in 2013, and construction on the wind towers began in October 2013, with excavation for the towers beginning in September 2014.

- A 2017 appellate court decision determined the construction of the wind farm constituted mining and therefore a lease from the Osage Nation’s Minerals Council was required.
Process is unsatisfying.

“Everyone has a plan until they get hit in the mouth.”

- Mike Tyson
Financing is the mouth of extractive industry; influencing the market via social and political engagement, forcing risk analysis.

Map showing how different Arizona precincts voted in the 2020 Presidential election (left). Map of tribal lands in Arizona (right).
Thank you!

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