

HOW TO PREPARE FOR AND MANAGE AN OSHA INSPECTION

by George J. Miller Wyatt, Tarrant & Combs 250 West Main Street Lexington, KY 40507

Few things are potentially more disruptive or disconcerting than an OSHA inspection for which an employer is not prepared. The key to successfully completing an OSHA inspection is to be well prepared. This article provides employers with a checklist for anticipating and completing an OSHA inspection.

Under federal law,¹ Compliance Safety and Health Officers ("CO's") of the Department of Labor are authorized to enter an employer's workplace to conduct an inspection "without delay and at reasonable times." 29 C.F.R. §§ 1903.3, 1926.3. They have the right to inspect and investigate during regular working hours and at other reasonable times, within reasonable limits and in a reasonable manner. Ordinarily, advance notice of an inspection is not given unless (1) there is apparent imminent danger and the employer needs that notice in order to abate the dangerous condition as quickly as possible, or (2) circumstances indicate that inspection after hours is appropriate or where special preparations must be made to accommodate the inspection, or (3) it is necessary in order to assure the presence of employer personnel necessary for the inspection, or (4) there are other circumstances which, in the opinion of the Area Director of OSHA, indicate advance notice would enhance the probability of an effective and thorough inspection. 29 C.F.R. § 1903.6.

Compliance Officers may question privately any employer, owner, operator, agent, or employee, and review records which are required by law to be maintained and retained, so long as those documents are "directly related to the purpose of the inspection." Compliance Officers may also do any of the following: observe the safety and health conditions and practices of the workplace; take photographs, videotapes, and instrument readings; collect air samples; measure noise levels; survey existing engineering controls; and monitor employee exposure to toxic fumes, gases, and dusts. Violations found during an inspection can, of course, result in citations, monetary penalties, and, in some cases, criminal prosecution. Therefore careful preparation is imperative.

Anticipating the Inspection

The following steps should be taken to prepare for an OSHA inspection.

1. Conduct a self-audit to identify and correct hazardous conditions.²
2. Thoroughly investigate all accidents, identify their causes, and correct the causes.

3. Create a plan for handling an OSHA inspection which includes the following:
 - a. Drafting a written policy for dealing with OSHA during an inspection;
 - b. Designating one person within the organization (e.g., the Safety Director) to be contacted when the CO arrives and who will be responsible for participating in the inspection and dealing with OSHA after the inspection.
 - c. Identifying other personnel from other departments (e.g., engineering) to assist the company's representative and, if permitted, participate in the inspection, when the inspection will involve areas of the facility or issues about which they have special knowledge.

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...OSHA cont.

- d. Training all designated personnel so that they thoroughly understand their roles and are familiar with An employer's rights and obligations under the law. This should include an understanding of the inspection procedure and the limits of OSHA's authority.
- e. Deciding whether to require the CO to have a search warrant, if he/she has not already obtained one. OSHA may inspect the workplace in one of two ways:
 - (1) by obtaining a validly executed search warrant; or
 - (2) through the consent of the employer, in which case no search warrant is required. It can take OSHA several days to obtain a search warrant. Company management should decide in advance whether or not it will consent to an OSHA inspection or require OSHA to obtain a search warrant.
- f. Knowing how to respond to a CO's questions. This includes instruction on what not to say.
- g. Complying with all posting and recordkeeping requirements of the law, including maintaining and posting the OSHA Form 200 and OSHA Workplace Roster (OSHA Form 2203). Recordkeeping violations can be minimized or avoided by conducting regular self-audits.

Conducting the Inspection

The following procedure should be followed when a Compliance Officer arrives for an inspection.

1. The designated company representative should be contacted immediately. That person, in turn, should inform upper management.
2. Upper management should contact legal counsel immediately if there are special concerns (e.g., if the CO does not have a search warrant).
3. The designated company representative should greet the CO and ask for his or her credentials. The company representative should stay calm and be professional at all times.
4. Before permitting the CO to conduct the inspection, request an opening conference to determine the purpose of the inspection and how it was prompted or initiated. If it was initiated by an employee complaint, a copy of the complaint, as well as the applicable safety and health standard, should be requested.
5. If the CO requests copies of company documents, he or she should be told that company policy is that all such requests should be in writing and be submitted to the designated document custodian. Before turning over any records or documents, make copies and preserve them. If any documents contain confidential trade secrets, they should be so marked, and the CO should be requested to maintain their confidentiality.
6. If the employees are represented by a labor organization, then the appropriate representative of the labor organization should be notified in order to designate an employee representative to participate in the walk around. Similarly, if a plant safety and health committee exists, then the committee will generally designate an employee representative. Otherwise, the CO may ask to meet with the employees so that they can designate a representative to participate in the inspection.
7. Company representatives should stay with the CO at all times.
8. If the CO takes photographs or industrial hygiene samples, company representatives should take their own photographs and samples.
9. Company representatives should take detailed notes about the inspection, including any matters which appear of special interest to the CO. These notes should not be shown to the CO or OSHA.
10. If the CO points out violations which can be corrected immediately, they should be corrected immediately. This will help in judging the employer's good faith and desire to comply with the law, in the event a penalty is assessed later. Demonstrated good faith can result in reduced penalties.
11. If the CO wants to interview employees, which she/he has a right to do in private, she/he should be notified that the company objects to any impromptu employee interviews during working time which are unreasonably lengthy or unreasonably interfere with efficient operations of the business. However, employees should not be discouraged from speaking to the CO.

12. The company should never retaliate against any employee for talking to a CO, filing a complaint, or otherwise exercising his or her legal rights. If, following an inspection, the company has what it believes are legitimate grounds for disciplining or is charging an employee who also happens to have talked to a CO, filed a complaint, etc., then the company should consult with legal counsel before taking any such adverse action.
13. Request a closing conference at the conclusion of the inspection. The company representative should discuss any problems identified by the CO, including potential corrective action. The company representative should at that time ask for a copy of OSHA Form 3000 (Employer Rights and Responsibilities Following An OSHA Inspection). At this time, the company representative should, if consistent with company policy, produce records to show compliance efforts and provide other information which may help OSHA determine how much time is needed to abate any alleged violation. The company representative should avoid making any admissions of liability.

Conclusion

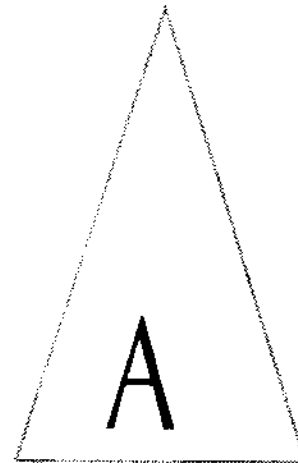
In conclusion, an employer which is well prepared for an OSHA inspection will manage it with a minimum of disruption and anxiety and will avoid making mistakes which could result in otherwise avoidable penalties. What is more important, the well-prepared employer will have a safer, healthier workplace.

¹ In states which have their own safety and health programs, such as California, Kentucky, and North Carolina, among others, the laws of those states may apply. But to meet federal approval, a state plan must give state inspectors the right to enter covered workplaces. 29 C.F.R. § 1902.3(e). However, employers engaged in work on federal lands or property will be subject to inspection by federal inspectors.

² A self-audit checklist has been developed by the California Chamber of Commerce and is reprinted in part, with permission, in the appendix to Understanding Occupational Safety & Health Issues, by Edwin S. Hopson (Kentucky Chamber of Commerce, 1995).

Post-Inspection Procedure

1. If a citation is issued, post the citation at or near the areas where the alleged violation(s) occurred so as to be readily visible to all affected employees.
2. Within fifteen (15) working days after receipt of the citation, file a written Notice of Contest, contesting the citation in all respects, including the alleged violation(s), the proposed penalties, and the abatement period, unless the employer is willing to comply with the citation in all respects, including payment of the proposed penalties. Employers are advised to consult with legal counsel before filing a Notice of Contest.
3. If appropriate, request an informal conference within fifteen (15) days of receipt of the citation, to gain a better understanding of the bases for the citation, emphasize evidence which OSHA may have overlooked or misunderstood, and offer additional mitigating evidence. At this time, the employer may also wish to attempt to negotiate reduction in the proposed penalties, based upon the employer's perception of the evidence regarding the alleged severity of the violation, and the employer's size, good faith, and history (or lack thereof) of prior violations. The employer has the right to legal representation at the informal conference.



MESSAGE FROM THE EXECUTIVE DIRECTOR

Tom Wheaton

In our desire to promote and professionalize the cultural resources industry, ACRA is constantly striving to find ways to provide useful services for our members. Among other things, we employ a governmental relations firm to keep track of what is happening in Congress, to maintain contact with other organizations and to provide guidance on how to get our point of view across in Washington. We have actively participated in negotiations with the Department of Labor and federal agencies to obtain fair and objective job descriptions. We provide a newsletter to all of our members with news about the industry, providing a way to network and keep in touch with each other. We support an Internet mailing list where over 500 private sector, agency and academic subscribers (mostly nonmembers) partake in ongoing discussions of all kinds of issues related to CRM. We have conducted and will continue to conduct workshops on such topics as basic business practices to SHPO and agency staffs, OSHA, and TCPs. We organize annual conferences for our members that provide educational opportunities, as well as opportunities to network with each other, and to interact with our clients and agency representatives. We have a website on the Internet that is updated periodically where, among other things, each of our members is listed, and those of you who have given permission also have pertinent company information listed (including E-mail links to you).

I would like to touch upon three other issues that are important for the continued viability of ACRA in its efforts to professionalize the industry. One has to do with a new service ACRA is trying to provide, our errors and omissions insurance program. The second has to do with marketing ACRA and by extension, each of its members. The third is increasing our membership.

Errors and Omissions Insurance Program

As you should all know by now, we have finally developed an errors and omissions (E&O) insurance policy with an exceptionally low premium. This policy has an aggregate limit of \$2,000,000 and an individual limit of \$250,000 with a \$5,000 deductible. Finding an underwriter and insurance carrier and developing this plan has taken three years. In our recent mailing, our deadline for applications was December 1, but if you act soon we may be able to get you on board. If we do not get enough companies to sign up, your check will be returned and the program will be called off. It would be a shame for this to happen after all of the hard work that went into this and the chance for even the smallest firm to be covered.

Marketing ACRA

ACRA's website (<http://www.mind-spring.com/~wheaton/ACRA.html>) not only provides information on ACRA and links to interesting and useful sites, it also lists all of our corporate and associate members. Each listing typically includes a member's name, address, contact person, phone, fax, e-mail link, and the disciplines the member provides. This is basically the information we have sent in the past to SHPOs across the country. For various reasons the SHPO campaign does not seem to have been very effective, but our website could be a gold mine as more and more clients gain access to it. Two years ago none of my firm's competitors were listed when I did an internet search. Now there are from a half dozen to over a dozen companies listed in a similar search (many of them ACRA members). ACRA's web page is occasionally listed in such searches, providing access to your company information with only one or two clicks of a mouse. However, how many of our clients know to look for ACRA and a list of qualified consultants when they have a project in a new region? How many will use the local yellow pages or local historical society instead? Since the beginning, I have

A C R A B o a r d o f D i r e c t o r s

Duane Peter
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sted ACRA with most of the important search engines and will continue to check our listings, but that is not enough. In the coming weeks, I will be contacting other trade associations about getting the word out to their members that there is a professional cultural resources trade association and in particular how to access our website to find subcontractors. I am asking the membership to let me know about trade associations (Interstate Natural Gas Assoc., American Institute of Architects, state engineering councils, etc.) that have memberships that use cultural resource services. Publishers of newsletters and lists of firms in particular field (Pipeline Digest, for example) would also be welcome. Please provide me with names, addresses, phone numbers and E-mail addresses.

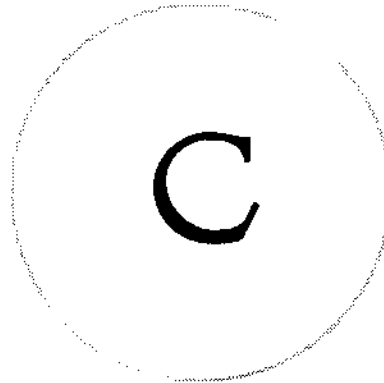
Membership

The third point is increasing our membership. We presently have over 35 members. This is not a majority of the firms out there, but it includes many, not most, of the multi-state firms and those who see themselves as serious businesses. To be able to continue doing the

things we are doing and expanding them to include new things like the OSHA workshops, we need the funds and the ability to say that we truly represent the industry. These mean more members.

Our past efforts at membership were initially very successful. From our first organizing meetings to the end of our first year, membership increased from a dozen to around 100 members. We did pretty well with mailings, brochures, phone calls from the Board of Directors, and conference get-togethers. These techniques are no longer effective, however. The people who joined initially were just waiting for something like ACRA to come along, and it did not take much more than letting them know we existed. The remaining folks know we exist for the most part. Perhaps they toss out promotional material without looking at it (not too surprising). Perhaps they have never seen why it is important for them that the entire industry becomes more professional. Perhaps they see us as just another ineffectual group. Perhaps they see us as a clique.

I am convinced, however, that if properly explained, ACRA would be attractive to the majority of them. We need to explain ACRA on a one to one basis. Phone calls and brochures are not enough. We need to sit down with folks for an hour or so and discuss the industry, their problems and how ACRA can help. This is difficult to do if you are competing with someone and may have a poor history of communications with them. This is where the board and I can help. If members give us leads we can follow up. Perhaps in turn, you could talk to someone from a different region that you do not compete with. We have a list of nearly 2,000 companies, but we lack the personal touch, the mutual contact. As before, please provide me with names, addresses, phone numbers and e-mail addresses of potential members. You can contact me at tomwheaton@newsouthassoc.com.



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MESSAGE FROM THE PRESIDENT

Patrick O'Bannon

Welcome to the new-look *ACRA Edition*. Cory Breternitz and Jeanne Harris have supervised an overhaul of our newsletter that is designed to grab your attention and entice you into reading every word from start to finish!

The changes in *ACRA Edition* reflect changes in ACRA as an organization. In its fewer than four years of existence ACRA has achieved a remarkable degree of success and recognition. We were instrumental in beating back congressional efforts to eliminate the Advisory Council on Historic Preservation. We've taken a leading role in educating the CRM community about health and safety issues associated with cultural resources investigations. We've represented our member firms in negotiations with the Department of Labor over the enforcement of the Service Contract Act (SCA). Our listserve, ACRA-L, is widely regarded as an important voice and source of information for all CRM professionals. ACRA is maturing, and the redesign of *ACRA Edition* embodies this process.

I suppose in some sense the election of a historian as President of ACRA also reflects the organization's maturation. I recall sitting in the first organizational meeting in Lexington, Kentucky, and

reminding speakers and the audience that CRM and archaeology are not synonymous! I believe we've moved a long way as an organization towards a general recognition and appreciation of the roles played by the host of professional disciplines whose work falls within the parameters of CRM. As president I want to continue to spread that message of diversity, and I believe the best way to accomplish this goal is to increase the number of member firms whose primary business emphasis is some aspect of CRM other than archaeology.

Membership is an issue of vital concern to ACRA's future. If the organization is to continue to grow and prosper we must increase our membership. The Board of Directors performed yeoman service over the past couple of years, cajoling, persuading, and wheedling friends, colleagues, and competitors into joining ACRA, as many of you know all too well. This one-on-one approach can

only get us so far. We need to develop new means for reaching out to non-member firms (particularly nonarchaeological firms), convincing them of the importance of ACRA's work and the benefits of joining the organization.

We should all continue to actively recruit those of our colleagues who have not yet joined ACRA. But we should all also be thinking of ways to reach out to those firms that are outside our own circles. How can we entice historians, architects, architectural historians, and the rest of the broad spectrum of CRM firms and practitioners to join ACRA? Please post your ideas to ACRA-L or contact a member of the Board or the Membership Committee. A significant percentage of the CRM industry has joined ACRA, but I think we can, and must, increase that percentage for the organization to continue to grow and mature.

REMINDER 1998 ACRA AWARDS

This is a reminder to *ACRA Edition* readers to send in your nominations for ACRA awards for 1998. You have until March 15, 1998, to send your nominations to the Awards Committee Chair. This year, we plan to make the awards early enough in the summer (July 1, 1998) to arrange for winners to be present at the fall ACRA conference. Please use the enclosed form when sending in your nominations.

advertising space available

ACRA Edition offers advertising space to our members. Does your company have a special product, service, or publication that would be of interest to some aspect of the CRM community?

Why not consider placing an ad in ACRA Edition?

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DOCUMENTATION NEEDED FOR ACRA ARCHIVES

In September, former ACRA President Mike Polk asked me to fill the newly create position of ACRA Historian/Archivist. As part of the responsibilities of this position I am charged with collecting, organizing, and maintaining an archive of important documents generated by ACRA's Board of Directors, its officers, and committees. To date all I have in the archives is back issues of the *ACRA Edition*, a few photos from board meetings and our first annual meeting, and the banner from the 1997 annual meeting.

This is a request to the Board of Directors, officers, committee member, and the membership at large for documents that should be included in the archives. Initially, ACRA's archives should include important documents, such as significant papers regarding ACRA's origins, its function as a force in the promotion of cultural resource management in this country, and its interaction with private industry, government, universities, the preservation community, and the public. In addition, the archives should contain copies of conference materials (programs, banners, photos, etc.), minutes of board meetings and annual meetings, photos of ACRA activities, published articles written about ACRA or on behalf of ACRA, and any pertinent correspondence.

Please search your files to see if you might have anything that should be included in our permanent archives. If you have any questions about placement of something in ACRA's archives, please call or E-mail me.

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LABOR RELATION COMMITTEE REPORT

On Wednesday November 12, 1997 the DOL, represented by Nila Stoval and Bill Gross, hosted a meeting with UAFT, representatives of the AFL-CIO and the International Union of Operating Engineers, the USDA Forest Service, the Corps of Engineers, Barbara Garrow (TCR-Garrow), and ACRA. ACRA was represented by our lawyer Maury Baskin, Kevin Pape, and Kay Simpson. The purpose of the meeting was to discuss the new 3-tiered structure for Archaeological Field Technician. Specifically, the UAFT contends that the 3-tiered structure is difficult to implement, hard to monitor, inconsistently applied, and not relevant to actual duties.

The DOL indicated that they would revisit the descriptions at any time but suggested that the agencies and the UAFT should work together for a consensus description before returning to the DOL. The UAFT is going to redraft the 3-tiered category to a 2-tiered system. Barbara Garrow is also going to consider a redefinition with a 2-tiered system. It was the consensus of the agencies and ACRA that 1) the old system was untenable and 2) the new system is not perfect but at present we do not have sufficient information to conclude that the 3-tiered system does not work. In fact, ACRA's concern is that reopening the issue may result in a regression to job descriptions and wage grades for Archaeological Technician which are significantly outside of mainstream practice.

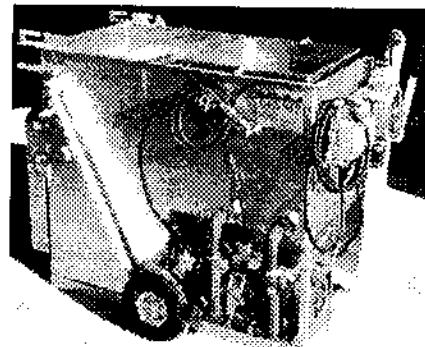
The Labor Relations Committee is monitoring the situation. We have asked both the U.S. Forest Service and the Corps to inform us of any revised descriptions they might receive. In addition, we have offered to review Barbara Garrow's efforts to redraft the descriptions. We have also filed a Freedom of Information Act request to review all correspondence concerning this issue to date. Finally, we are preparing an analysis of the difference between prevailing wages and Federal wage determinations. If you have any wage determinations for Federal contracts please send rate and location information to Kevin Pape. Our ultimate goal is to take the analysis to the Bureau of Labor Statistics, identify how the rates were determined, and assist with a realignment of the wage to a rate more equitable to the area.

In the mean time, if you receive wage determination rates which seem out of line for the region, you may challenge the wage rate and request specific information about how the rate was determined.

Other items under study by the committee include investigating the possibility of providing health benefits for temporary employees. We examined the SAA program of health insurance for its members and determined that it was not adaptable to our needs. At present we are working with an independent insurance agencies to explore the feasibility of a health program, but honestly, it appears that the process is cumbersome and may be difficult to administer. We have not given up yet, however.

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SUBMISSION REQUIREMENTS

1. Who Can Enter

Architects, archaeologists, historians, students, and professionals working in the cultural resources management field in the United States, either in the public or private sector, may submit a nomination for any of the 10 categories. For projects, nominations must have been directed and substantially executed in the United States not more than five (5) years ago. Nominations for the following categories must have been executed by an ACRA member in good standing:

- Quality Product Award
- Research Award
- Preservation Award
- Public Service Award

2. Providing Additional Material and Publication

If the nomination should win, the entrant agrees to make available further information and graphic material as needed by ACRA. *ACRA Edition* is granted the first opportunity for first publication of all work.

3. Projects Fact Page

To ensure the jury's clear understanding, each entry must contain a single page that lists, in English, the nomination's facts under the following headings:

- Award Category
- Name of Nominee
- Basis of Eligibility

In addition, for Categories 6 (Quality Product Award) and 7 (Research Award), you must augment your submission with the following information:

- Start and Finish Dates
- Client or Source of Funding
- Project Budget
- Name and Location of Client
- Project Setting
- Form of Final Products

4. Narrative

Nominations must contain a one-page synopsis that explains how the nominee meets the submission requirements.

5. Graphic Materials

Please submit one copy of graphic material in 8-1/2"x11" format (no more than three pages). This requirement is mandatory for project entries only. However, non-project entrants are also encouraged to submit applicable supplementary material (newspaper clippings, etc.) in a bounded 8-1/2"x11" format.

6. Entry Forms

Each nomination must be accompanied by a signed entry form. Reproductions of the form are acceptable.

7. Submission Format

All required pages of each entry shall be firmly bound in binders. No slides, original drawings, videos, or unbound materials will be reviewed. Materials not in 8-1/2"x11" format will not be reviewed.

8. Return of Entries

ACRA will return entries ONLY if they are accompanied by a self-addressed stamped envelope. Copies of project facts and narratives may not be returned. ACRA assumes no liability for loss or damage.

9. Entry Deadline

Deadlines for sending entries is March 15, 1998. All entries must show a postage mark as evidence of being in the carrier's hands by that date. Hand-delivered entries must arrive at ACRA's Award Chair office by 6:00 pm on March 15. To ensure timely arrival, ACRA recommends using a carrier that guarantees delivery within a specified number of days.

ADDRESS ENTRIES TO:

**ACRA AWARDS CHAIR
c/o Hardlines: Design & Delineation
4608 Indianola Avenue
Columbus, OH 43214**

1998 ACRA AWARDS
Nomination Form
Deadline for Submission: MARCH 15, 1997

Please complete each section and submit with the required documentation. Please see the October 1997 ACRA *Edition* for details on each award category.

- Category: 1 Award of Appreciation
 2 Legislative Award
 3 SHPO Award
 4 Government Award
 5 ACRA Company Award
 6 Quality Product Award
 7 Research Award
 8 Preservation Award
 9 Public Service Award
 10 Industry Award

Nominee: _____
Name of firm, agency, or individual(s) being nominated

Project: _____
Name of associated project (if applicable)

Entered By: _____
Name of firm or individual(s) submitting the nomination

I certify that the nominated individual, agency, project, or firm meets all eligibility requirements. I understand that any entry that fails to meet the submission requirements may be disqualified.

Signature: _____

Name (typed or printed): _____

STRAIGHT FROM THE T-SQUARE

Associate Editor Donald M. Durst, Architect

"The Slippery Slope of Ethics"

We all knew it would happen—even back when we were all sitting in that stuffy conference room in Denver, trying to give a forward direction to this new entity called ACRA. Someone would one day claim that some other member was being unethical. It was only a question of when this would happen. Mr. David Rotenstein's complaint against Mr. Terrence Epperson and Cultural Heritage Research Services is just the first to surface.

For this discussion the actual complaint is irrelevant. The most important issue here is how can ACRA resolve claims of unethical behavior. The current ACRA policy does not have any substance nor does it have any mechanism to allow complaints to be independently reviewed. The discussions posted on the ACRA-L continue the original philosophy from the initial meeting in Denver: that ACRA's Code of Ethics are intended *only* as a set of guidelines. Someone even stated that other professional organizations have similar approaches to their code of ethics.

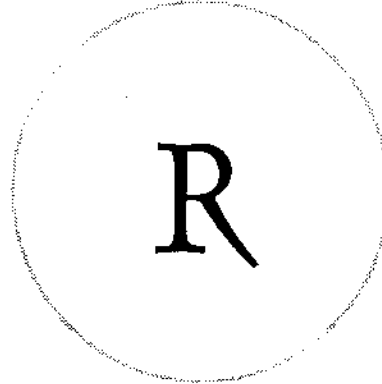
This is UNTRUE. For design professionals such as architects, engineers, and planners, I assure you that our code of ethics from our organizations are not "guidelines." They are enforceable rules that come with potentially severe penalties that includes termination of membership. One example is the American Institute of Architects (AIA), which has established a Code of Ethics and Professional Conduct (Code).

The AIA Code is arranged in three tiers. There are Canons, Ethical Standards, and Rules of Conduct. Canons are *broad principles* of conduct. Ethical Standards are more specific goals toward which AIA members *should aspire* in professional performance and behavior. Rules of Conduct are *mandatory*. Violation of a Rule is grounds for disciplinary action by the AIA.

The Code applies to the professional activities of all AIA members. The Code sets the responsibilities that AIA members have to the public, to the client, to the profession, and to our colleagues. The enforcement of the Code is administered through a National Ethics Council, which is appointed by the AIA Board of Directors. Formal charges are filed directly with the Council. If the complaint merits further consideration, a hearing will be established to allow both parties to present their arguments. If the Council finds a violation of the Code, it can impose a penalty in the form of admonition, censure, suspension, or termination of membership. The Council's decision may be appealed to the Executive Committee of the AIA Board of Directors.

Who is right or wrong in our case is not the issue here. The issue is the lack of due process in which ACRA ensures that we, as CRM professionals, are truly looking out for the client, the public, and our colleagues. It is time for all of us to step up and renew our dedication to the highest standards of professionalism, integrity, and competence. The first step should be the creation and implementation of an enforceable code of conduct and ethics. Our code must be enforced by an independent committee that can freely make decisions and rulings.

It is time for us to start thinking about the future. What will ACRA be like five years, ten years, or even fifty years from now? I guarantee that as ACRA grows, there will be many more accusations. A simple letter will not always work. As the archaeological side of the CRM profession learned in a painful lesson regarding the union issue, if we do not step up and take charge, someone else will do it for us, and on their terms.



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Labor Relation Committee
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ASC Group Inc.

Membership Committee
Dana McGowan
Cultural Resource Analysts, Inc.

LOWELL BLIKRE:

New Associate Editor for Archeology and Geomorphology

Hello to the ACRA membership and welcome to the introductory issue of the Archeology/Geomorphology column. I'd like to begin my term as A.E. by providing some information about myself. I received my Bachelors Degree from the University of North Dakota and my Masters Degree from Northern Arizona University. I've been involved in contract archeology for over 12 years, during which time I followed the usual progression from crew member to P.I. I began as an employee of the contract branch of UND, Department of Anthropology and I've spent the last few years working for Bear Creek Archeology in Cresco, Iowa. Additionally I spent a year and a half reviewing the cultural resources management programs at U.S. Air Force bases for the National Park Service and the Georgia Trust for Historic Preservation.

I requested this position because of my interest in many of the topics that could be addressed by a column of this nature. These topics include geological aspects of site location and preservation, recognition of landform types, and field

techniques for the testing of landforms for archeological sites or site potential. Additionally, I hope to solicit submissions concerning other archeological and geological topics such as remote sensing, sampling strategy, analysis techniques, paleoenvironmental determination, and material studies. Most importantly, I want this column to interest as many of the readers as possible. For this to occur, I need input from the readers. I'd like to know what topics you want to read about, or even better, any topics you'd like to write about. This is the Archeology and Geomorphology column and that's a broad subject. Anyone with something to contribute is warmly encouraged to contact me. Also, suggestions concerning possible contributors outside of the ACRA ranks are welcome. The majority of my experience is in the upper Midwest and the northern Plains, so I would especially appreciate contributions concerning projects and research in other regions.

Again, I hope to make this column interesting and informative to as many of you as possible. Please help me accomplish this by providing me with comments, requests, and contributions for the column. I can be contacted by most of the modern means: e-mail to either emhol2@pitnet.net or flint26@salamander.com. Mail can be sent to me at either P.O. Box 34, Decorah IA 52101 or c/o Bear Creek Archeology, Inc., P.O. Box 347, Cresco IA 52136. FAX: 319-547-5403. Finally, voice phone numbers (good luck catching me) home: 319-382-4642 office: 319-547-4545. E-mail and the postal service are preferred, as I'm often in the field.

I am looking forward to putting this column together and working with those of you who have information to share. I believe we can make this an interesting and worthwhile enterprise.



R

LEGISLATIVE UPDATE

Interior Appropriations Bill Signed into Law.

On November 14, 1997, President Clinton signed into law H.R. 2107, the bill to provide appropriations for the Department of the Interior and related agencies. Now termed Public Law 105-83, this bill funds Department of the Interior agencies such as the National Park Service (including the Historic Preservation Fund), Fish and Wildlife Service, and Bureau of Land Management and related agencies (including the U.S. Forest Service, National Endowments for the Arts and Humanities, the Smithsonian Institution, and the Advisory Commission on Historic Preservation). This bill was protested by environmental groups because of the six "riders" in the bill affecting logging road subsidies and forest planning. Despite pressure from these groups, the President did sign the bill on the last possible day.

TEA 6-Month Bill Passed by Congress

On December 1, 1997, President Clinton signed into law S. 119, to provide a 6-month extension of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA). The bill was the result of intense, last-minute negotiations between the House and the Senate, each of which had very different versions of the bill. The bill provides \$9.7 billion in spending authority, using the structure provided in the previous Senate version of the extension bill. Each state is guaranteed at least 50 percent of its previous year's limitations to spend on any transportation project or program. States may spend their balance on any Federal-aid highway, transit, or safety program category. To prevent environmental programs, including noise abatement and air quality programs, from being unfairly disadvantaged, the Secretary of Transportation must restore the transferred funds back to these programs when the long-term reauthorization bill is enacted.

House Passes Taking Bill

In late October the House voted to pass H.R. 1534, the "Private Property Rights Implementation Act." The bill would effectively allow private developers to circumvent local zoning processes by providing direct access to federal courts in private property "takings" cases. While the version that passed the House did make a few changes in the bill, these were insufficient to assuage its opponents, a massive coalition of preeminent national, state, and local groups, such as the National Governors Association, U.S. Conference of Mayors, and the National League of Cities. The bill is also opposed by virtually every conservation and historic preservation organization in the country. The Clinton Administration has threatened to veto.

The House Resources Committee Votes to Kill Rivers Initiative

On October 22, 1997, the House Resources Committee approved H.R. 1842, which would terminate the American Heritage Rivers Initiative that President Clinton launched by Executive Order in September. The program is intended to direct federal assistance to aid 10 designated rivers, which would be nominated by the communities around them. Committee Republican staff indicate that the report on the bill will not be filed until Congress returns in January. Meanwhile, Committee Democrats are gathering supporters for "dissenting views" to go along with the report. In late November the Senate defeated an amendment to the Interior Appropriation bill to eliminate funding for this initiative.

Taken from: ACRA/SOPA
Weekly On-Line News
A service of CEHP, Inc.,
by Loretta Neuman
October-December, 1997

R

STEPHEN MIKESELL:

New Associate Editor for Public History

Mr. Mikesell had some 20 years experience in conducting historical property surveys, including a number of years at the California SHPO and at the California Department of Transportation (Caltrans). He has been a partner at JRP since 1991. JRP has a very active cultural resource staff, including 3 partners and 10 staff historians and architectural historians.

My statement:

My goal is to see the ACRA newsletter address issues of interest to public historians. To do this, I need to establish a network with the readers of the newsletter to attract articles that address those concerns. My sincere hope is that I will receive too many good ideas for relatively brief articles and not have to solicit submissions. I see this as an opportunity for ACRA readers to bring up matters that are perhaps too detailed, or too formative, to warrant publication in a major professional journal but which nonetheless are worth putting out for discussion. What are some examples of good articles? I see a need to discuss everything from nuts and bolts to more lofty methodological issues. A nuts and bolts example: How do the various states establish an APE for historic buildings and structures, and does it differ from the APE for archaeological properties? In California, the typical practice is to develop two different APEs to account

for indirect effects. Is that common? What criteria are used to establish the wider APE? A loftier issue: when is a building a building and when does it begin to be a historic archaeological site? Is there a useful criteria or definition of a building, e.g. four walls and a roof? How do historians, architectural historians, and historic archaeologists team on dealing with deteriorated buildings? I'm sure the readers can come up with many more, and probably better examples; that's the point of this appeal to the readership. I look forward to receiving suggestions from the readers - better too many than too few!

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R

Remarks Presented at the Annual Meeting of the ACRA PLENARY SESSION:

Finding Common Ground

September 20, 1997
 St. Louis, Missouri

by Joel I. Klein, Ph.D.
 John Milner Associates, Inc.

Let me start by saying that I am flying somewhat under the radar. Although for the past 20 years I was an employee of large multidisciplinary engineering firms, most recently Foster Wheeler Environmental, I have for the last two months been working for an ACRA member firm—John Milner Associates. My perspective on our industry has not, however, changed along with my business card.

I think it's also relevant to note that I am one of a select group of individuals who have been turned down for an associate membership in ACRA. The reasons for that rejection relate directly to some of the points I want to try to make here today. I was refused membership because the ACRA board felt that rather than my joining as an associate member, Foster Wheeler would join as a corporate member, something they would not do. It was not that Foster Wheeler couldn't find \$1000 from their \$3 billion in annual revenues, it was just that they would not support an organization which they see as acting against their best interests. This would not have been the case only a few years ago.

The role, goals, and structure of consulting environmental engineering have been changing steadily for the last 10 years and it is within the last two or three that the effects of this change have begun to profoundly affect CRM. About 10 years ago the principal kinds of work conducted by environmental consulting firms began to shift away from NEPA-based/EIS type work, (bugs and bunnies, and stones and bones) to hazardous waste-related work. The reasons are varied and complex, but two inter-related and dominant ones can be identified. These are money and a change in mission.

The amount of money involved in hazardous waste work is incredible—a single hazardous waste clean-up contract can represent several billion dollars. When the shift in corporate attention to hazardous waste work first began to occur I was personally optimistic. I anticipated that because of the federal funding and licensing involved most hazardous waste projects would include a significant CRM component. I also thought that

because of the large amount of money involved, the costs of CRM—even when one takes into the account the added costs associated with doing CRM in a haz-waste context—would become a smaller percentage, and therefore less controversial aspect of project funding. I was wrong.

Engineers have always been uncomfortable with environmental assessment work because the end product is not something that gets built. The results are usually intangible. After all, the purpose of most environmental work is to make sure something *doesn't* happen. (The something being undesirable environmental consequences).

The CRM industry developed and grew in a climate where environmental engineers viewed environmental impact work as something that was required, something that clients could be made to pay for, and something that was a good loss leader—if you got the licensing work for a project you had a leg up on getting the design contract—and that's where the money was. If you could make money doing the upfront environmental work—such as CRM—so much the better.

That attitude is disappearing. When it became apparent that huge sums of money could be made in the hazardous waste business the large A/E firms rushed to get a piece of the pie. Over the last 10 years the focus of environmental consulting has shifted almost completely away from environmental impact assessment work to hazardous waste cleanups. The result of this shift is that environmental assessment work—and this is not unique to CRM, but applies to areas such as T&E studies as well—not directly related to engineering solutions to the problem, has come to be seen *not* as something that is the first step in a project, but as *something that is obstructionist and interferes with the firm's assigned mission*—project completion.

... continued on page 14

Finding Common Ground cont....

A second change that I've observed in the last few years is an increasing tendency for environmental engineering firms to simply ignore certain environmental requirements that are seen, from their perspective, as obstructionist or not relevant. At or near the top of this list are historic preservation requirements. As an aside here, I would note that at the same time, environmental engineering firms are rushing to come out with mission statements saying it's their policy to protect the environment, and that they support initiatives such as ISO 14000. The problem is that they no longer seem to consider cultural resources to be part of the "environment." The truth of the matter is that it is only when a federal agency regulating their work places specific emphasis on the need to comply with, for example, Section 106, that anything is ever done. Even when the feds do refer to the NHPA, unless there is an agency CRM specialist involved, the tendency is to do the necessary work in a "down and dirty" manner. The attitude of project managers is "let's get the archeology out of the way so we get onto the real work—any delay results in peoples lives being placed at risk!" Even if one ignores the hyperbole here, the reality is that when one talks about peoples lives being at risk, there is a noted lessening on the part of some SHPOs and regulators to press for surveys.

Ignoring the obvious exceptions where the source of the contamination is of historical significance—and there are such exceptions—the Roebing Steel site and the Marathon Battery site come to mind—a large percentage of hazardous waste sites have been so badly disturbed that it can be legitimately argued that they have no potential to contain intact historic properties. This has resulted in an unofficial shifting of the burden of proof away from the project proponent, who typically must prove that an area is disturbed to avoid having to conduct a survey, to the SHPOs and agency CRM specialists, who now must demonstrate that there is a high probability that a historic property *would* be affected before a survey will be suggested.

The attitude that many engineering firms now have towards CRM work—when they bother to think about it at all—is the same as the advice I've always given to graduate students who spend more than five years writing their dissertations—It doesn't matter if its any good—it just has to be finished and out of the way. Unfortunately, with certain notable exceptions such

as FERC licensed projects, this attitude may be spreading beyond the realm of hazardous waste work to other types of major construction and development projects.

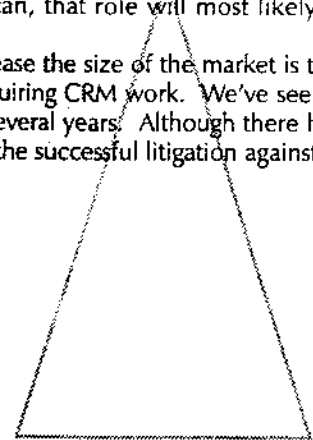
The unofficial and unspoken attitude of many environmental engineering companies is now: "we're going to ignore CRM requirements unless specifically told to do otherwise by our client- -and if we must do something lets get the cheapest job possible." Engineers are not fools. They know that that cheap usually means poor quality, and that poor quality in the case of CRM means a smaller likelihood that something will be found. The engineers see this as a win-win situation. The implications of this for our industry are obvious and serious. Quality work costs money, and money spent on CRM work is, more than at any time in the last 20 years, being viewed by project proponents and their engineering consultants as wasted money.

Compounding the problem of the peripheralization—is that a word?—of CRM in environmental engineering firms is the simultaneous consolidation of the engineering industry through mergers and acquisitions. The result is that environmental divisions (other than those directly involved with design and construction) are becoming more peripheral within their own corporate structures. The purchases of Woodward Clyde by URS, EBASCO Services by Raytheon, and Enserch Environmental by Foster Wheeler typify this trend.

What all this means is that business as usual is not going to be the order of the day for much longer. We are going to have to adapt. If the market for CRM services is to grow, the source of that growth must come from new areas.

One potential area is the international market. Environmental engineering firms are devoting more and more of their marketing efforts overseas. It has yet to be demonstrated that CRM firms from this country will be able to find a role overseas. While I think they can, that role will most likely not be doing simple fieldwork.

Another way to increase the size of the market is to enlarge the universe of projects requiring CRM work. We've seen this universe shrink over the past several years. Although there have been some exceptions—notably the successful litigation against OSM—



things such as the institution of the Corps of Engineer's "but for" test and Nationwide Permit system have had a profound impact on the number and scope of CRM surveys carried out.

There are two ways that the CRM universe can be expanded: expanding state requirements that protect cultural resources and increasing enforcement of existing federal requirements. While neither of these will be easy, the latter may be more so.

In 1991 Chuck Niquette, writing in the *SOPA Newsletter* about the successful suit against OSM, pointed out that "there are numerous other examples, such as EPA's National Pollutant Discharge Elimination System program, where the federal government has delegated responsibilities to the states but has not passed on the mandated historic preservation obligations." To the NPDES program I would add the PSD permitting process which all fossil-fuel burning power plants must go through.

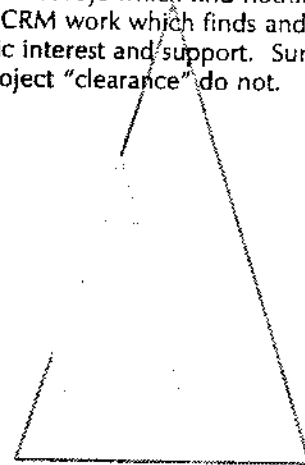
Chuck made his observation before the passage of the 1992 NHPA amendments. One of the 1992 changes is particularly relevant and has not really been talked about. Since 1992 section 301 has defined "undertaking" to include projects, activities, and programs "subject to state and local regulation pursuant to delegation or approval by a Federal agency." Current ACHP regulations do not reflect this change—although the most recent draft of the proposed revisions to 36 CFR 800 do. While it has always been understood that such delegated programs were covered under Section 106, the clarification in both statute and regulation should make easier future legal challenges of state agencies that ignore historic preservation obligations.

If organizations like ACRA and the various professional societies (and possibly even the UAFT) are willing to devote the time, energy, and money to demanding enforcement of these requirements, there will be a significant increase in the number of projects which come under some form of historic preservation review. Presumably at least some of those projects will require cultural resource surveys.

I'm going to conclude with what I think are some interesting statistics from England, and then leave you with the task of deciding whether as an industry we are better off seeking to increase revenues through enlargement of the universe in which we work, or through trying to squeeze more blood from a stone which may be getting smaller. The seemingly constant demands for tightening shovel test intervals, and most recently the discussions on ACRA-L about what percentage of a site should be excavated for data recovery, seem to suggest that we pursuing the latter course. We all need to think about whether these demands for more and more are based on our concern for the resource or our need to put bread on the table. Either way we also need to be concerned about how our zealotry is perceived by the public which is footing the bill. Are we approaching the point at which the cost-benefit ratio of what we do will be felt by the public to have become excessive? My own feeling is that it is coming close to doing just that.

A recent study by English Heritage of the effects of the implementation of PPG 16, the British counterpart of 36 CFR 800, found that of approximately 500,000 planning applications reviewed each year, only 0.12 percent were required to have archeological field evaluations undertaken. However, sixty percent of these evaluations resulted in significant archeological remains being found. Although I have no accurate statistics, I am certain that SHPOs in this country review far less than 500,000 projects a year. I am also certain that there are many more projects undertaken in the U.S. than in the UK.

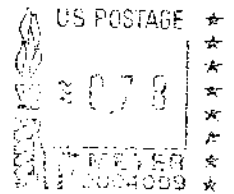
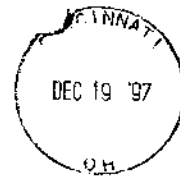
If we can increase the size of the regulated universe, would we be willing to accept a higher threshold for requiring surveys? Such a change should result in an increase in the percentage of surveys which find significant sites and a reallocation of CRM moneys away from surveys which find nothing of importance to those which do. CRM work which finds and saves significant sites generates public interest and support. Surveys which generate nothing but a project "clearance" do not.



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ACRA Edition

Please address comments to:

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