

- (a) In order to provide a national center to commemorate and encourage the building arts and to preserve and maintain a nationally significant building which exemplifies the great achievements of the building arts in the United States, the Secretary and the Administrator of the General Services Administration are authorized and directed to enter into a cooperative agreement with the Committee for a National Museum of the Building Arts, Incorporated, a nonprofit corporation organized and existing under the laws of the District of Columbia, or its successor, for the operation of a National Museum for the Building Arts in the Federal Building located in the block bounded by Fourth Street, Fifth Street, F Street, and G Street, Northwest in Washington, District of Columbia. Such museum shall —
- (1) collect and disseminate information concerning the building arts, including the establishment of a national reference center for current and historic documents, publications, and research relating to the building arts;
 - (2) foster educational programs relating to the history, practice and contribution to society of the building arts, including promotion of imaginative educational approaches to enhance understanding and appreciation of all facets of the building arts;
 - (3) publicly display temporary and permanent exhibits illustrating, interpreting and demonstrating the building arts;
 - (4) sponsor or conduct research and study into the history of the building arts and their role in shaping our civilization; and
 - (5) encourage contributions to the building arts.

[16 U.S.C. 470w-5(b) — Cooperative agreement]

- (b) The cooperative agreement referred to in subsection (a) of this section shall include provisions which —
- (1) make the site available to the Committee referred to in subsection (a) of this section without charge;
 - (2) provide, subject to available appropriations, such maintenance, security, information, janitorial and other services as may be necessary to assure the preservation and operation of the site; and
 - (3) prescribe reasonable terms and conditions by which the Committee can fulfill its responsibilities under this Act.

[16 U.S.C. 470w-5(c) — Grants to Committee]

- (c) The Secretary is authorized and directed to provide matching grants-in-aid to the Committee referred to in subsection (a) of this section for its programs related to historic preservation. The Committee shall match such grants-in-aid in a manner and with such funds and services as shall be satisfactory to the Secretary, except that no more than \$500,000 may be provided to the Committee in any one fiscal year.

[16 U.S.C. 470w-5(d) — Site renovation]

- (d) The renovation of the site shall be carried out by the Administrator with the advice of the Secretary. Such renovation shall, as far as practicable —
- (1) be commenced immediately,
 - (2) preserve, enhance, and restore the distinctive and historically authentic architectural character of the site consistent with the needs of a national museum of the building arts and other compatible use, and
 - (3) retain the availability of the central court of the building, or portions thereof, for appropriate public activities.

[16 U.S.C. 470w-5(e) — Annual report]

- (e) The Committee shall submit an annual report to the Secretary and the Administrator concerning its activities under this section and shall provide the Secretary and the Administrator with such other information as the Secretary may, from time to time, deem necessary or advisable.

[16 U.S.C. 470w-5(f) — Definition of "building arts"]

- (f) For purposes of this section, the term "**building arts**" includes, but shall not be limited to, all practical and scholarly aspects of prehistoric, historic, and contemporary architecture, archaeology, construction, building technology and skills, landscape architecture, preservation and conservation, building and construction, engineering, urban and community design and renewal, city and regional planning, and related professions, skills, trades, and crafts.

Section 307

[16 U.S.C. 470w-6(a) — Effective date of regulations]

- (a) No final regulation of the Secretary shall become effective prior to the expiration of thirty calendar days after it is published in the Federal Register during which either or both Houses of Congress are in session.

[16 U.S.C. 470w-6(b) — Congressional disapproval of regulations]

- (b) The regulation shall not become effective if, within ninety calendar days of continuous session of Congress after the date of promulgation, both Houses of Congress adopt a concurrent resolution, the matter after the resolving clause of which is as follows: "That Congress disapproves the regulation promulgated by the Secretary dealing with the matter of _____, which regulation was transmitted to Congress on _____," the blank spaces therein being appropriately filled.

[16 U.S.C. 470w-6(c) — Inaction by Congress]

- (c) If at the end of sixty calendar days of continuous session of Congress after the date of promulgation of a regulation, no committee of either House of Congress has reported or been discharged from further consideration of a concurrent resolution disapproving the regulation, and neither House has adopted such a resolution, the regulation may go into effect immediately. If, within such sixty calendar days, such a committee has reported or been discharged from further consideration of such a resolution, the regulation may go into effect not sooner than ninety calendar days of continuous session of Congress after its promulgation unless disapproved as provided for.

[16 U.S.C. 470w-6(d) — Definitions]

- (d) For the purposes of this section-
 - (1) continuity of session is broken only by an adjournment sine die; and
 - (2) the days on which either House is not in session because of an adjournment of more than three days to a day certain are excluded in the computation of sixty and ninety calendar days of continuous session of Congress.

[16 U.S.C. 470w-6(e) — Effect of Congressional inaction]

- (e) Congressional inaction on or rejection of a resolution of disapproval shall not be deemed an expression of approval of such regulation.

Section 308

[16 U.S.C. 470w-7(a) — National historic light station program]

- (a) In order to provide a national historic light station program, the Secretary shall —
 - (1) collect and disseminate information concerning historic light stations, including historic lighthouses and associated structures;
 - (2) foster educational programs relating to the history, practice, and contribution to society of historic light stations;
 - (3) sponsor or conduct research and study into the history of light stations;
 - (4) maintain a listing of historic light stations; and
 - (5) assess the effectiveness of the program established by this section regarding the conveyance of historic light stations.

[16 U.S.C. 470w-7(b) — Conveyance of Historic Light Stations]

- (b)
 - (1) Not later than 1 year after the date of the enactment of this section, the Secretary and the Administrator shall establish a process and policies for identifying, and selecting, an eligible entity to which a historic light station could be conveyed for education, park, recreation, cultural, or historic preservation purposes, and to monitor the use of such light station by the eligible entity.
 - (2) The Secretary shall review all applications for the conveyance of a historic light station, when the agency with administrative jurisdiction over the historic light station has determined the property to be 'excess property' as that term is defined in the Federal Property Administrative Services Act of 1949 (40 U.S.C. 472(e)), and forward to the Administrator a single approved application for the conveyance of the historic light station. When selecting an eligible entity, the Secretary shall consult with the State Historic Preservation Officer of the State in which the historic light station is located.
 - (3) (A) Except as provided in subparagraph (B), the Administrator shall convey, by quitclaim

deed, without consideration, all right, title, and interest of the United States in and to the historic light station, subject to the conditions set forth in subsection (c) after the Secretary's selection of an eligible entity. The conveyance of a historic light station under this section shall not be subject to the provisions of the Stewart B. McKinney Homeless Assistance Act (42 U.S.C. 11301 et seq.) or section 416(d) of the Coast Guard Authorization Act of 1998 (Public Law 105-383).

- (B) (i) Historic light stations located within the exterior boundaries of a unit of the National Park System or a refuge within the National Wildlife Refuge System shall be conveyed or sold only with the approval of the Secretary.
- (ii) If the Secretary approves the conveyance of a historic light station referenced in this paragraph, such conveyance shall be subject to the conditions set forth in subsection (c) and any other terms or conditions the Secretary considers necessary to protect the resources of the park unit or wildlife refuge.
- (iii) If the Secretary approves the sale of a historic light station referenced in this paragraph, such sale shall be subject to the conditions set forth in subparagraphs (A) through (D) and (H) of subsection (c)(1) and subsection (c)(2) and any other terms or conditions the Secretary considers necessary to protect the resources of the park unit or wildlife refuge.
- (iv) For those historic light stations referenced in this paragraph, the Secretary is encouraged to enter into cooperative agreements with appropriate eligible entities, as provided in this Act, to the extent such cooperative agreements are consistent with the Secretary's responsibilities to manage and administer the park unit or wildlife refuge, as appropriate.

[16 U.S.C. 470w-7(c) — Terms of Conveyance]

- (c) (1) The conveyance of a historic light station shall be made subject to any conditions, including the reservation of easements and other rights on behalf of the United States, the Administrator considers necessary to ensure that —
 - (A) the Federal aids to navigation located at the historic light station in operation on the date of conveyance remain the personal property of the United States and continue to be operated and maintained by the United States for as long as needed for navigational purposes;
 - (B) there is reserved to the United States the right to remove, replace, or install any Federal aid to navigation located at the historic light station as may be necessary for navigational purposes;
 - (C) the eligible entity to which the historic light station is conveyed under this section shall not interfere or allow interference in any manner with any Federal aid to navigation, nor hinder activities required for the operation and maintenance of any Federal aid to navigation, without the express written permission of the head of the agency responsible for maintaining the Federal aid to navigation;
 - (D) the eligible entity to which the historic light station is conveyed under this section shall, at its own cost and expense, use and maintain the historic light station in

accordance with this Act, the Secretary of the Interior's Standards for the Treatment of Historic Properties, 36 CFR part 68, and other applicable laws, and any proposed changes to the historic light station shall be reviewed and approved by the Secretary in consultation with the State Historic Preservation Officer of the State in which the historic light station is located, for consistency with 36 CFR part 800.5(a)(2)(vii), and the Secretary of the Interior's Standards for Rehabilitation, 36 CFR part 67.7;

- (E) the eligible entity to which the historic light station is conveyed under this section shall make the historic light station available for education, park, recreation, cultural or historic preservation purposes for the general public at reasonable times and under reasonable conditions;
 - (F) the eligible entity to which the historic light station is conveyed shall not sell, convey, assign, exchange, or encumber the historic light station, any part thereof, or any associated historic artifact conveyed to the eligible entity in conjunction with the historic light station conveyance, including but not limited to any lens or lanterns, unless such sale, conveyance, assignment, exchange or encumbrance is approved by the Secretary;
 - (G) the eligible entity to which the historic light station is conveyed shall not conduct any commercial activities at the historic light station, any part thereof, or in connection with any associated historic artifact conveyed to the eligible entity in conjunction with the historic light station conveyance, in any manner, unless such commercial activities are approved by the Secretary; and
 - (H) the United States shall have the right, at any time, to enter the historic light station conveyed under this section without notice, for purposes of operating, maintaining, and inspecting any aid to navigation and for the purpose of ensuring compliance with this subsection, to the extent that it is not possible to provide advance notice.
- (2) Any eligible entity to which a historic light station is conveyed under this section shall not be required to maintain any Federal aid to navigation associated with a historic light station, except any private aids to navigation permitted under section 83 of title 14, United States Code, to the eligible entity.
- (3) In addition to any term or condition established pursuant to this subsection, the conveyance of a historic light station shall include a condition that the historic light station, or any associated historic artifact conveyed to the eligible entity in conjunction with the historic light station conveyance, including but not limited to any lens or lanterns, at the option of the Administrator, shall revert to the United States and be placed under the administrative control of the Administrator, if —
- (A) the historic light station, any part thereof, or any associated historic artifact ceases to be available for education, park, recreation, cultural, or historic preservation purposes for the general public at reasonable times and under reasonable conditions which shall be set forth in the eligible entity's application;
 - (B) the historic light station or any part thereof ceases to be maintained in a manner that ensures its present or future use as a site for a Federal aid to navigation;
 - (C) the historic light station, any part thereof, or any associated historic artifact ceases to

be maintained in compliance with this Act, the Secretary of the Interior's Standards for the Treatment of Historic Properties, 36 CFR part 68, and other applicable laws;

- (D) the eligible entity to which the historic light station is conveyed, sells, conveys, assigns, exchanges, or encumbers the historic light station, any part thereof, or any associated historic artifact, without approval of the Secretary;
- (E) the eligible entity to which the historic light station is conveyed, conducts any commercial activities at the historic light station, any part thereof, or in conjunction with any associated historic artifact, without approval of the Secretary; or
- (F) At least 30 days before the reversion, the Administrator provides written notice to the owner that the historic light station or any part thereof is needed for national security purposes.

[16 U.S.C. 470w-7(d) — Description of Property]

- (d)
 - (1) The Administrator shall prepare the legal description of any historic light station conveyed under this section. The Administrator, in consultation with the Commandant, United States Coast Guard, and the Secretary, may retain all right, title, and interest of the United States in and to any historical artifact, including any lens or lantern, that is associated with the historic light station and located at the light station at the time of conveyance. Wherever possible, such historical artifacts should be used in interpreting that station. In cases where there is no method for preserving lenses and other artifacts and equipment in situ, priority should be given to preservation or museum entities most closely associated with the station, if they meet loan requirements.
 - (2) Artifacts associated with, but not located at, the historic light station at the time of conveyance shall remain the personal property of the United States under the administrative control of the Commandant, United States Coast Guard.
 - (3) All conditions placed with the quitclaim deed of title to the historic light station shall be construed as covenants running with the land.
 - (4) No submerged lands shall be conveyed under this section.

[16 U.S.C. 470w-7(e) — Definitions]

- (e) For purposes of this section:
 - (1) The term “**Administrator**” shall mean the Administrator of General Services.
 - (2) The term “**historic light station**” includes the light tower, lighthouse, keepers dwelling, garages, storage sheds, oil house, fog signal building, boat house, barn, pumphouse, tramhouse support structures, piers, walkways, underlying and appurtenant land and related real property and improvements associated therewith; *provided* that the ‘historic light station’ shall be included in or eligible for inclusion in the National Register of Historic Places.
 - (3) The term “**eligible entity**” shall mean:

- (A) any department or agency of the Federal Government; or
- (B) any department or agency of the State in which the historic light station is located, the local government of the community in which the historic light station is located, nonprofit corporation, educational agency, or community development organization that —
 - (i) has agreed to comply with the conditions set forth in subsection (c) and to have such conditions recorded with the deed of title to the historic light station; and
 - (ii) is financially able to maintain the historic light station in accordance with the conditions set forth in subsection (c).
- (4) The term “**Federal aid to navigation**” shall mean any device, operated and maintained by the United States, external to a vessel or aircraft, intended to assist a navigator to determine position or safe course, or to warn of dangers or obstructions to navigation, and shall include, but not be limited to, a light, lens, lantern, antenna, sound signal, camera, sensor, electronic navigation equipment, power source, or other associated equipment.
- (5) The term “**Secretary**” means the Secretary of the Interior.

Section 309

[16 U.S.C. 470w-8(a) — Historic Light Station Sales]

- (a) In the event no applicants are approved for the conveyance of a historic light station pursuant to section 308, the historic light station shall be offered for sale. Terms of such sales shall be developed by the Administrator of General Services and consistent with the requirements of section 308, subparagraphs (A) through (D) and (H) of subsection (c)(1), and subsection (c)(2). Conveyance documents shall include all necessary covenants to protect the historical integrity of the historic light station and ensure that any Federal aid to navigation located at the historic light station is operated and maintained by the United States for as long as needed for that purpose.

[16 U.S.C. 470w-8(b) — Net sale proceeds]

- (b) Net sale proceeds from the disposal of a historic light station —
 - (1) located on public domain lands shall be transferred to the National Maritime Heritage Grant Program, established by the National Maritime Heritage Act of 1994 (Public Law 103-451) within the Department of the Interior; and
 - (2) under the administrative control of the Coast Guard shall be credited to the Coast Guard's Operating Expenses appropriation account, and shall be available for obligation and expenditure for the maintenance of light stations remaining under the administrative control of the Coast Guard, such funds to remain available until expended and shall be available in addition to funds available in the Operating Expense appropriation for this purpose.

There are hereby authorized to be appropriated to the Secretary of the Interior such sums as may be necessary to carry out this Act.

TITLE IV

Section 401

[16 U.S.C. 470x — National initiative to coordinate and promote research, distribute information and provide training about preservation skills and technologies]

The Congress finds and declares that, given the complexity of technical problems encountered in preserving historic properties and the lack of adequate distribution of technical information to preserve such properties, a national initiative to coordinate and promote research, distribute information, and provide training about preservation skills and technologies would be beneficial.

Section 402

[16 U.S.C. 470x-1— Definitions]

For the purposes of this title —

- (1) The term "**Board**" means the National Preservation Technology and Training Board established pursuant to section 404 of this Act.
- (2) The term "**Center**" means the National Center for Preservation Technology and Training established pursuant to section 403 of this Act.
- (3) The term "**Secretary**" means the Secretary of the Interior.

Section 403

[16 U.S.C. 470x-2(a) — Establish a National Center for Preservation Technology and Training]

- (a) There is hereby established within the Department of the Interior a National Center for Preservation Technology and Training. The Center shall be located at Northwestern State University of Louisiana in Natchitoches, Louisiana.

[16 U.S.C. 470x-2(b) — Purposes of Center]

- (b) The purposes of the Center shall be to —
 - (1) develop and distribute preservation and conservation skills and technologies for the identification, evaluation, conservation, and interpretation of prehistoric and historic resources;
 - (2) develop and facilitate training for Federal, State and local resource preservation professionals, cultural resource managers, maintenance personnel, and others working in the preservation field;
 - (3) take steps to apply preservation technology benefits from ongoing research by other agencies and institutions;
 - (4) facilitate the transfer of preservation technology among Federal agencies, State and local governments, universities, international organizations, and the private sector; and

- (5) cooperate with related international organizations including, but not limited to the International Council on Monuments and Sites, the International Center for the Study of Preservation and Restoration of Cultural Property, and the International Council on Museums.

[16 U.S.C. 470x-2(c) — Programs]

- (c) Such purposes shall be carried out through research, professional training, technical assistance, and programs for public awareness, and through a program of grants established under section 405 of this Act.

[16 U.S.C. 470x-2(d) — Executive Director]

- (d) The Center shall be headed by an Executive Director with demonstrated expertise in historic preservation appointed by the Secretary with advice of the Board.

[16 U.S.C. 470x-2(e) — Assistance from Secretary]

- (e) The Secretary shall provide the Center assistance in obtaining such personnel, equipment, and facilities as may be needed by the Center to carry out its activities.

Section 404

[16 U.S.C. 470x-3(a) — Establish a Preservation Technology and Training Board]

- (a) There is established a Preservation Technology and Training Board.

[16 U.S.C. 470x-3(b) — Duties]

- (b) The Board shall —

- (1) provide leadership, policy advice, and professional oversight to the Center;
- (2) advise the Secretary on priorities and the allocation of grants among the activities of the Center; and
- (3) submit an annual report to the President and the Congress.

[16 U.S.C. 470x-3(c) — Membership]

- (c) The Board shall be comprised of —

- (1) The Secretary, or the Secretary's designee;
- (2) 6 members appointed by the Secretary who shall represent appropriate Federal, State, and local agencies, State and local historic preservation commissions, and other public and international organizations; and
- (3) 6 members appointed by the Secretary on the basis of outstanding professional qualifications who represent major organizations in the fields of archaeology, architecture, conservation, curation, engineering, history, historic preservation, landscape architecture, planning, or preservation education.

Section 405

[16 U.S.C. 470x-4(a) — Grants for research, information distribution and skill training]

- (a) The Secretary, in consultation with the Board, shall provide preservation technology and training grants to eligible applicants with a demonstrated institutional capability and commitment to the purposes of the Center, in order to ensure an effective and efficient system of research, information distribution and skills training in all the related historic preservation fields.

[16 U.S.C. 470x-4(b) — Grant Requirements]

- (b)
 - (1) Grants provided under this section shall be allocated in such a fashion to reflect the diversity of the historic preservation fields and shall be geographically distributed.
 - (2) No grant recipient may receive more than 10 percent of the grants allocated under this section within any year.
 - (3) The total administrative costs, direct and indirect, charged for carrying out grants under this section may not exceed 25 percent of the aggregate costs.

[16 U.S.C. 470x-4(c) — Eligible applicants]

- (c) Eligible applicants may include Federal and non-Federal laboratories, accredited museums, universities, non-profit organizations; offices, units, and Cooperative Park Study Units of the National Park System, State Historic Preservation Offices, tribal preservation offices, and Native Hawaiian organizations.

[16 U.S.C. 470x-4(d) — Standards]

- (d) All such grants shall be awarded in accordance with accepted professional standards and methods, including peer review of projects.

[16 U.S.C. 470x-4(e) — Authorization of appropriations]

- (e) There is authorized to be appropriated to carry out this section such sums as may be necessary.

Section 406

[16 U.S.C. 470x-5(a) — Center may accept grants, donations, and other Federal funds; may enter into contracts and cooperative agreements]

- (a) The Center may accept —
 - (1) grants and donations from private individuals, groups, organizations, corporations, foundations, and other entities; and
 - (2) transfers of funds from other Federal agencies.

[16 U.S.C. 470x-5(b) — Contracts and cooperative agreements]

- (b) Subject to appropriations, the Center may enter into contracts and cooperative agreements with

Federal, State, local, and tribal governments, Native Hawaiian organizations, educational institutions, and other public entities to carry out the Center's responsibilities under this title of the Act.

[16 U.S.C. 470x-5(c) — Authorization of appropriations]

- (c) There are authorized to be appropriated such sums as may be necessary for the establishment, operation, and maintenance of the Center. Funds for the Center shall be in addition to existing National Park Service programs, centers, and offices.

Section 407

[16 U.S.C. 470x-6 — Improve use of existing NPS centers and regional offices]

In order to improve the use of existing National Park Service resources, the Secretary shall fully utilize and further develop the National Park Service preservation (including conservation) centers and regional offices. The Secretary shall improve the coordination of such centers and offices within the National Park Service, and shall, where appropriate, coordinate their activities with the Center and with other appropriate parties.

[Addendum]

[National Historic Preservation Act Amendments of 1980, Public Law 96-515, December 12, 1980, 94 Stat. 3000

This addendum contains related legislative provisions enacted in the National Historic Preservation Act Amendments of 1980 but that are not part of the National Historic Preservation Act.]

Section 401

[16 U.S.C. 470a-1(a) — International activities and World Heritage Convention]

- (a) The Secretary of the Interior shall direct and coordinate United States participation in the Convention Concerning the Protection of the World Cultural and Natural Heritage, approved by the Senate on October 26, 1973, in cooperation with the Secretary of State, the Smithsonian Institution, and the Advisory Council on Historic Preservation. Whenever possible, expenditures incurred in carrying out activities in cooperation with other nations and international organizations shall be paid for in such excess currency of the country or area where the expense is incurred as may be available to the United States.

[16 U.S.C. 470a-1(b) — Nominations of properties to World Heritage List]

- (b) The Secretary of the Interior shall periodically nominate properties he determines are of international significance to the World Heritage Committee on behalf of the United States. No property may be so nominated unless it has previously been determined to be of national significance. Each such nomination shall include evidence of such legal protections as may be necessary to ensure preservation of the property and its environment (including restrictive covenants, easements, or other forms of protection). Before making any such nomination, the Secretary shall notify the Committee on Natural Resources of the United States House of Representatives and the Committee on Energy and Natural Resources of the United States Senate.

[16 U.S.C. 470a-1(c) — Concurrence of non-Federal property]

- (c) No non-Federal property may be nominated by the Secretary of the Interior to the World Heritage Committee for inclusion on the World Heritage List unless the owner of the property concurs in

writing to such nomination.

Section 402

[16 U.S.C. 470a-2 — International Federal activities affecting historic properties]

Prior to the approval of any Federal undertaking outside the United States which may directly and adversely affect a property which is on the World Heritage List or on the applicable country's equivalent of the National Register, the head of a Federal agency having direct or indirect jurisdiction over such undertaking shall take into account the effect of the undertaking on such property for purposes of avoiding or mitigating any adverse effects.

APPENDIX 4:
CODE OF FEDERAL REGULATIONS
36 CFR Part 800

Electronic Code of Federal Regulations (e-CFR)

BETA TEST SITE

e-CFR Data is current as of August 18, 2006

Title 36: Parks, Forests, and Public Property

[Browse Next](#)

PART 800—PROTECTION OF HISTORIC PROPERTIES

Section Contents

Subpart A—Purposes and Participants

[§ 800.1 Purposes.](#)

[§ 800.2 Participants in the Section 106 process.](#)

Subpart B—The section 106 Process

[§ 800.3 Initiation of the section 106 process.](#)

[§ 800.4 Identification of historic properties.](#)

[§ 800.5 Assessment of adverse effects.](#)

[§ 800.6 Resolution of adverse effects.](#)

[§ 800.7 Failure to resolve adverse effects.](#)

[§ 800.8 Coordination With the National Environmental Policy Act.](#)

[§ 800.9 Council review of section 106 compliance.](#)

[§ 800.10 Special requirements for protecting National Historic Landmarks.](#)

[§ 800.11 Documentation standards.](#)

[§ 800.12 Emergency situations.](#)

[§ 800.13 Post-review discoveries.](#)

Subpart C—Program Alternatives

[§ 800.14 Federal agency program alternatives.](#)

[§ 800.15 Tribal, State, and local program alternatives. \[Reserved\]](#)

[§ 800.16 Definitions.](#)

[Appendix A to Part 800—Criteria for Council Involvement in Reviewing Individual section 106 Cases](#)

Authority: 16 U.S.C. 470s.

Source: 65 FR 77725, Dec. 12, 2000, unless otherwise noted.

Subpart A—Purposes and Participants



[top](#)

§ 800.1 Purposes.



[top](#)

(a) *Purposes of the section 106 process.* Section 106 of the National Historic Preservation Act requires Federal agencies to take into account the effects of their undertakings on historic properties and afford the Council a reasonable opportunity to comment on such undertakings. The procedures in this part define how Federal agencies meet these statutory responsibilities. The section 106 process seeks to accommodate historic preservation concerns with the needs of Federal undertakings through consultation among the agency official and other parties with an interest in the effects of the undertaking on historic properties, commencing at the early stages of project planning. The goal of consultation is to identify historic properties potentially affected by the undertaking, assess its effects and seek ways to avoid, minimize or mitigate any adverse effects on historic properties.

(b) *Relation to other provisions of the act.* Section 106 is related to other provisions of the act designed to further the national policy

of historic preservation. References to those provisions are included in this part to identify circumstances where they may affect actions taken to meet section 106 requirements. Such provisions may have their own implementing regulations or guidelines and are not intended to be implemented by the procedures in this part except insofar as they relate to the section 106 process. Guidelines, policies, and procedures issued by other agencies, including the Secretary, have been cited in this part for ease of access and are not incorporated by reference.

(c) *Timing.* The agency official must complete the section 106 process “prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license.” This does not prohibit agency official from conducting or authorizing nondestructive project planning activities before completing compliance with section 106, provided that such actions do not restrict the subsequent consideration of alternatives to avoid, minimize or mitigate the undertaking's adverse effects on historic properties. The agency official shall ensure that the section 106 process is initiated early in the undertaking's planning, so that a broad range of alternatives may be considered during the planning process for the undertaking.

§ 800.2 Participants in the Section 106 process.



[top](#)

(a) *Agency official.* It is the statutory obligation of the Federal agency to fulfill the requirements of section 106 and to ensure that an agency official with jurisdiction over an undertaking takes legal and financial responsibility for section 106 compliance in accordance with subpart B of this part. The agency official has approval authority for the undertaking and can commit the Federal agency to take appropriate action for a specific undertaking as a result of section 106 compliance. For the purposes of subpart C of this part, the agency official has the authority to commit the Federal agency to any obligation it may assume in the implementation of a program alternative. The agency official may be a State, local, or tribal government official who has been delegated legal responsibility for compliance with section 106 in accordance with Federal law.

(1) *Professional standards.* Section 112(a)(1)(A) of the act requires each Federal agency responsible for the protection of historic resources, including archeological resources, to ensure that all actions taken by employees or contractors of the agency shall meet professional standards under regulations developed by the Secretary.

(2) *Lead Federal agency.* If more than one Federal agency is involved in an undertaking, some or all the agencies may designate a lead Federal agency, which shall identify the appropriate official to serve as the agency official who shall act on their behalf, fulfilling their collective responsibilities under section 106. Those Federal agencies that do not designate a lead Federal agency remain individually responsible for their compliance with this part.

(3) *Use of contractors.* Consistent with applicable conflict of interest laws, the agency official may use the services of applicants, consultants, or designees to prepare information, analyses and recommendations under this part. The agency official remains legally responsible for all required findings and determinations. If a document or study is prepared by a non-Federal party, the agency official is responsible for ensuring that its content meets applicable standards and guidelines.

(4) *Consultation.* The agency official shall involve the consulting parties described in paragraph (c) of this section in findings and determinations made during the section 106 process. The agency official should plan consultations appropriate to the scale of the undertaking and the scope of Federal involvement and coordinated with other requirements of other statutes, as applicable, such as the National Environmental Policy Act, the Native American Graves Protection and Repatriation Act, the American Indian Religious Freedom Act, the Archeological Resources Protection Act, and agency-specific legislation. The Council encourages the agency official to use to the extent possible existing agency procedures and mechanisms to fulfill the consultation requirements of this part.

(b) *Council.* The Council issues regulations to implement section 106, provides guidance and advice on the application of the procedures in this part, and generally oversees the operation of the section 106 process. The Council also consults with and comments to agency officials on individual undertakings and programs that affect historic properties.

(1) *Council entry into the section 106 process.* When the Council determines that its involvement is necessary to ensure that the purposes of section 106 and the act are met, the Council may enter the section 106 process. Criteria guiding Council decisions to enter the section 106 process are found in appendix A to this part. The Council will document that the criteria have been met and notify the parties to the section 106 process as required by this part.

(2) *Council assistance.* Participants in the section 106 process may seek advice, guidance and assistance from the Council on the application of this part to specific undertakings, including the resolution of disagreements, whether or not the Council is formally involved in the review of the undertaking. If questions arise regarding the conduct of the section 106 process, participants are encouraged to obtain the Council's advice on completing the process.

(c) *Consulting parties.* The following parties have consultative roles in the section 106 process.

(1) *State historic preservation officer.* (i) The State historic preservation officer (SHPO) reflects the interests of the State and its citizens in the preservation of their cultural heritage. In accordance with section 101(b)(3) of the act, the SHPO advises and assists Federal agencies in carrying out their section 106 responsibilities and cooperates with such agencies, local governments and organizations and individuals to ensure that historic properties are taking into consideration at all levels of planning and development.

(ii) If an Indian tribe has assumed the functions of the SHPO in the section 106 process for undertakings on tribal lands, the SHPO shall participate as a consulting party if the undertaking takes place on tribal lands but affects historic properties off tribal lands, if requested in accordance with §800.3(c)(1), or if the Indian tribe agrees to include the SHPO pursuant to §800.3(f)(3).

(2) *Indian tribes and Native Hawaiian organizations.* (i) *Consultation on tribal lands.* (A) *Tribal historic preservation officer.* For a tribe that has assumed the responsibilities of the SHPO for section 106 on tribal lands under section 101(d)(2) of the act, the tribal

istic preservation officer (THPO) appointed or designated in accordance with the act is the official representative for the purposes of section 106. The agency official shall consult with the THPO in lieu of the SHPO regarding undertakings occurring on or affecting historic properties on tribal lands.

3) *Tribes that have not assumed SHPO functions.* When an Indian tribe has not assumed the responsibilities of the SHPO for section 106 on tribal lands under section 101(d)(2) of the act, the agency official shall consult with a representative designated by such Indian tribe in addition to the SHPO regarding undertakings occurring on or affecting historic properties on its tribal lands. Such Indian tribes have the same rights of consultation and concurrence that the THPOs are given throughout subpart B of this part, except that such consultations shall be in addition to and on the same basis as consultation with the SHPO.

i) *Consultation on historic properties of significance to Indian tribes and Native Hawaiian organizations.* Section 101(d)(6)(B) of the act requires the agency official to consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to historic properties that may be affected by an undertaking. This requirement applies regardless of the location of the historic property. Such Indian tribe or Native Hawaiian organization shall be a consulting party.

A) The agency official shall ensure that consultation in the section 106 process provides the Indian tribe or Native Hawaiian organization a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance, articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effects. It is the responsibility of the agency official to make a reasonable and good faith effort to identify Indian tribes and Native Hawaiian organizations that shall be consulted in the section 106 process. Consultation should commence early in the planning process, in order to identify and discuss relevant preservation issues and resolve concerns about the confidentiality of information on historic properties.

B) The Federal Government has a unique legal relationship with Indian tribes set forth in the Constitution of the United States, treaties, statutes, and court decisions. Consultation with Indian tribes should be conducted in a sensitive manner respectful of tribal sovereignty. Nothing in this part alters, amends, repeals, interprets, or modifies tribal sovereignty, any treaty rights, or other rights of an Indian tribe, or preempts, modifies, or limits the exercise of any such rights.

C) Consultation with an Indian tribe must recognize the government-to-government relationship between the Federal Government and Indian tribes. The agency official shall consult with representatives designated or identified by the tribal government or the governing body of a Native Hawaiian organization. Consultation with Indian tribes and Native Hawaiian organizations should be conducted in a manner sensitive to the concerns and needs of the Indian tribe or Native Hawaiian organization.

D) When Indian tribes and Native Hawaiian organizations attach religious and cultural significance to historic properties on tribal lands, section 101(d)(6)(B) of the act requires Federal agencies to consult with such Indian tribes and Native Hawaiian organizations in the section 106 process. Federal agencies should be aware that frequently historic properties of religious and cultural significance are located on ancestral, aboriginal, or ceded lands of Indian tribes and Native Hawaiian organizations and should consider that when complying with the procedures in this part.

E) An Indian tribe or a Native Hawaiian organization may enter into an agreement with an agency official that specifies how they will carry out responsibilities under this part, including concerns over the confidentiality of information. An agreement may cover all aspects of tribal participation in the section 106 process, provided that no modification may be made in the roles of other parties to the section 106 process without their consent. An agreement may grant the Indian tribe or Native Hawaiian organization additional rights to participate or concur in agency decisions in the section 106 process beyond those specified in subpart B of this part. The agency official shall provide a copy of any such agreement to the Council and the appropriate SHPOs.

F) An Indian tribe that has not assumed the responsibilities of the SHPO for section 106 on tribal lands under section 101(d)(2) of the act may notify the agency official in writing that it is waiving its rights under §800.6(c)(1) to execute a memorandum of agreement.

(3) *Representatives of local governments.* A representative of a local government with jurisdiction over the area in which the effects of an undertaking may occur is entitled to participate as a consulting party. Under other provisions of Federal law, the local government may be authorized to act as the agency official for purposes of section 106.

(4) *Applicants for Federal assistance, permits, licenses, and other approvals.* An applicant for Federal assistance or for a Federal permit, license, or other approval is entitled to participate as a consulting party as defined in this part. The agency official may authorize an applicant or group of applicants to initiate consultation with the SHPO/THPO and others, but remains legally responsible for all findings and determinations charged to the agency official. The agency official shall notify the SHPO/THPO when an applicant or group of applicants is so authorized. A Federal agency may authorize all applicants in a specific program pursuant to this section by providing notice to all SHPO/THPOs. Federal agencies that provide authorizations to applicants remain responsible for their government-to-government relationships with Indian tribes.

(5) *Additional consulting parties.* Certain individuals and organizations with a demonstrated interest in the undertaking may participate as consulting parties due to the nature of their legal or economic relation to the undertaking or affected properties, or their concern with the undertaking's effects on historic properties.

(d) *The public—(1) Nature of involvement.* The views of the public are essential to informed Federal decisionmaking in the section 106 process. The agency official shall seek and consider the views of the public in a manner that reflects the nature and complexity of the undertaking and its effects on historic properties, the likely interest of the public in the effects on historic properties, confidentiality concerns of private individuals and businesses, and the relationship of the Federal involvement to the undertaking.

(2) *Providing notice and information.* The agency official must, except where appropriate to protect confidentiality concerns of affected parties, provide the public with information about an undertaking and its effects on historic properties and seek public comment and input. Members of the public may also provide views on their own initiative for the agency official to consider in decisionmaking.

(3) *Use of agency procedures.* The agency official may use the agency's procedures for public involvement under the National Environmental Policy Act or other program requirements in lieu of public involvement requirements in subpart B of this part, if they provide adequate opportunities for public involvement consistent with this subpart.

Subpart B—The section 106 Process



§ 800.3 Initiation of the section 106 process.



(a) *Establish undertaking.* The agency official shall determine whether the proposed Federal action is an undertaking as defined in §800.16(y) and, if so, whether it is a type of activity that has the potential to cause effects on historic properties.

(1) *No potential to cause effects.* If the undertaking is a type of activity that does not have the potential to cause effects on historic properties, assuming such historic properties were present, the agency official has no further obligations under section 106 or this part.

(2) *Program alternatives.* If the review of the undertaking is governed by a Federal agency program alternative established under §800.14 or a programmatic agreement in existence before January 11, 2001, the agency official shall follow the program alternative.

(b) *Coordinate with other reviews.* The agency official should coordinate the steps of the section 106 process, as appropriate, with the overall planning schedule for the undertaking and with any reviews required under other authorities such as the National Environmental Policy Act, the Native American Graves Protection and Repatriation Act, the American Indian Religious Freedom Act, the Archeological Resources Protection Act, and agency-specific legislation, such as section 4(f) of the Department of Transportation Act. Where consistent with the procedures in this subpart, the agency official may use information developed for other reviews under Federal, State, or tribal law to meet the requirements of section 106.

(c) *Identify the appropriate SHPO and/or THPO.* As part of its initial planning, the agency official shall determine the appropriate SHPO or SHPOs to be involved in the section 106 process. The agency official shall also determine whether the undertaking may occur on or affect historic properties on any tribal lands and, if so, whether a THPO has assumed the duties of the SHPO. The agency official shall then initiate consultation with the appropriate officer or officers.

(1) *Tribal assumption of SHPO responsibilities.* Where an Indian tribe has assumed the section 106 responsibilities of the SHPO on tribal lands pursuant to section 101(d)(2) of the act, consultation for undertakings occurring on tribal land or for effects on tribal land is with the THPO for the Indian tribe in lieu of the SHPO. Section 101(d)(2)(D)(iii) of the act authorizes owners of properties on tribal lands which are neither owned by a member of the tribe nor held in trust by the Secretary for the benefit of the tribe to request the SHPO to participate in the section 106 process in addition to the THPO.

(2) *Undertakings involving more than one State.* If more than one State is involved in an undertaking, the involved SHPOs may agree to designate a lead SHPO to act on their behalf in the section 106 process, including taking actions that would conclude the section 106 process under this subpart.

(3) *Conducting consultation.* The agency official should consult with the SHPO/THPO in a manner appropriate to the agency planning process for the undertaking and to the nature of the undertaking and its effects on historic properties.

(4) *Failure of the SHPO/THPO to respond.* If the SHPO/THPO fails to respond within 30 days of receipt of a request for review of a finding or determination, the agency official may either proceed to the next step in the process based on the finding or determination or consult with the Council in lieu of the SHPO/THPO. If the SHPO/THPO re-enters the Section 106 process, the agency official shall continue the consultation without being required to reconsider previous findings or determinations.

(d) *Consultation on tribal lands.* Where the Indian tribe has not assumed the responsibilities of the SHPO on tribal lands, consultation with the Indian tribe regarding undertakings occurring on such tribe's lands or effects on such tribal lands shall be in addition to and on the same basis as consultation with the SHPO. If the SHPO has withdrawn from the process, the agency official may complete the section 106 process with the Indian tribe and the Council, as appropriate. An Indian tribe may enter into an agreement with a SHPO or SHPOs specifying the SHPO's participation in the section 106 process for undertakings occurring on or affecting historic properties on tribal lands.

(e) *Plan to involve the public.* In consultation with the SHPO/THPO, the agency official shall plan for involving the public in the section 106 process. The agency official shall identify the appropriate points for seeking public input and for notifying the public of proposed actions, consistent with §800.2(d).

(f) *Identify other consulting parties.* In consultation with the SHPO/THPO, the agency official shall identify any other parties entitled to be consulting parties and invite them to participate as such in the section 106 process. The agency official may invite others to participate as consulting parties as the section 106 process moves forward.

(1) *Involving local governments and applicants.* The agency official shall invite any local governments or applicants that are entitled to be consulting parties under §800.2(c).

(2) *Involving Indian tribes and Native Hawaiian organizations.* The agency official shall make a reasonable and good faith effort to identify any Indian tribes or Native Hawaiian organizations that might attach religious and cultural significance to historic properties in the area of potential effects and invite them to be consulting parties. Such Indian tribe or Native Hawaiian organization that requests in writing to be a consulting party shall be one.

j) *Requests to be consulting parties.* The agency official shall consider all written requests of individuals and organizations to participate as consulting parties and, in consultation with the SHPO/THPO and any Indian tribe upon whose tribal lands an undertaking occurs or affects historic properties, determine which should be consulting parties.

k) *Expediting consultation.* A consultation by the agency official with the SHPO/THPO and other consulting parties may address multiple steps in §§800.3 through 800.6 where the agency official and the SHPO/THPO agree it is appropriate as long as the consulting parties and the public have an adequate opportunity to express their views as provided in §800.2(d).

800.4 Identification of historic properties.



a) *Determine scope of identification efforts.* In consultation with the SHPO/THPO, the agency official shall:

1) Determine and document the area of potential effects, as defined in §800.16(d);

2) Review existing information on historic properties within the area of potential effects, including any data concerning possible historic properties not yet identified;

3) Seek information, as appropriate, from consulting parties, and other individuals and organizations likely to have knowledge of, or concerns with, historic properties in the area, and identify issues relating to the undertaking's potential effects on historic properties; and

4) Gather information from any Indian tribe or Native Hawaiian organization identified pursuant to §800.3(f) to assist in identifying properties, including those located off tribal lands, which may be of religious and cultural significance to them and may be eligible for the National Register, recognizing that an Indian tribe or Native Hawaiian organization may be reluctant to divulge specific information regarding the location, nature, and activities associated with such sites. The agency official should address concerns raised about confidentiality pursuant to §800.11(c).

b) *Identify historic properties.* Based on the information gathered under paragraph (a) of this section, and in consultation with the SHPO/THPO and any Indian tribe or Native Hawaiian organization that might attach religious and cultural significance to properties within the area of potential effects, the agency official shall take the steps necessary to identify historic properties within the area of potential effects.

(1) *Level of effort.* The agency official shall make a reasonable and good faith effort to carry out appropriate identification efforts, which may include background research, consultation, oral history interviews, sample field investigation, and field survey. The agency official shall take into account past planning, research and studies, the magnitude and nature of the undertaking and the degree of Federal involvement, the nature and extent of potential effects on historic properties, and the likely nature and location of historic properties within the area of potential effects. The Secretary's standards and guidelines for identification provide guidance on this subject. The agency official should also consider other applicable professional, State, tribal, and local laws, standards, and guidelines. The agency official shall take into account any confidentiality concerns raised by Indian tribes or Native Hawaiian organizations during the identification process.

(2) *Phased identification and evaluation.* Where alternatives under consideration consist of corridors or large land areas, or where access to properties is restricted, the agency official may use a phased process to conduct identification and evaluation efforts. The agency official may also defer final identification and evaluation of historic properties if it is specifically provided for in a memorandum of agreement executed pursuant to §800.6, a programmatic agreement executed pursuant to §800.14(b), or the documents used by an agency official to comply with the National Environmental Policy Act pursuant to §800.8. The process should establish the likely presence of historic properties within the area of potential effects for each alternative or inaccessible area through background research, consultation and an appropriate level of field investigation, taking into account the number of alternatives under consideration, the magnitude of the undertaking and its likely effects, and the views of the SHPO/THPO and any other consulting parties. As specific aspects or locations of an alternative are refined or access is gained, the agency official shall proceed with the identification and evaluation of historic properties in accordance with paragraphs (b)(1) and (c) of this section.

(c) *Evaluate historic significance—(1) Apply National Register criteria.* In consultation with the SHPO/THPO and any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to identified properties and guided by the Secretary's standards and guidelines for evaluation, the agency official shall apply the National Register criteria (36 CFR part 63) to properties identified within the area of potential effects that have not been previously evaluated for National Register eligibility. The passage of time, changing perceptions of significance, or incomplete prior evaluations may require the agency official to reevaluate properties previously determined eligible or ineligible. The agency official shall acknowledge that Indian tribes and Native Hawaiian organizations possess special expertise in assessing the eligibility of historic properties that may possess religious and cultural significance to them.

(2) *Determine whether a property is eligible.* If the agency official determines any of the National Register criteria are met and the SHPO/THPO agrees, the property shall be considered eligible for the National Register for section 106 purposes. If the agency official determines the criteria are not met and the SHPO/THPO agrees, the property shall be considered not eligible. If the agency official and the SHPO/THPO do not agree, or if the Council or the Secretary so request, the agency official shall obtain a determination of eligibility from the Secretary pursuant to 36 CFR part 63. If an Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to a property off tribal lands does not agree, it may ask the Council to request the agency official to obtain a determination of eligibility.

(d) *Results of identification and evaluation—(1) No historic properties affected.* If the agency official finds that either there are no historic properties present or there are historic properties present but the undertaking will have no effect upon them as defined in §800.16(i), the agency official shall provide documentation of this finding, as set forth in §800.11(d), to the SHPO/THPO. The agency official shall notify all consulting parties, including Indian tribes and Native Hawaiian organizations, and make the

documentation available for public inspection prior to approving the undertaking.

(i) If the SHPO/THPO, or the Council if it has entered the section 106 process, does not object within 30 days of receipt of an adequately documented finding, the agency official's responsibilities under section 106 are fulfilled.

(ii) If the SHPO/THPO objects within 30 days of receipt of an adequately documented finding, the agency official shall either consult with the objecting party to resolve the disagreement, or forward the finding and supporting documentation to the Council and request that the Council review the finding pursuant to paragraphs (d)(1)(iv)(A) through (d)(1)(iv)(C) of this section. When an agency official forwards such requests for review to the Council, the agency official shall concurrently notify all consulting parties that such a request has been made and make the request documentation available to the public.

(iii) During the SHPO/THPO 30 day review period, the Council may object to the finding and provide its opinion regarding the finding to the agency official and, if the Council determines the issue warrants it, the head of the agency. A Council decision to provide its opinion to the head of an agency shall be guided by the criteria in appendix A to this part. The agency shall then proceed according to paragraphs (d)(1)(iv)(B) and (d)(1)(iv)(C) of this section.

(iv) (A) Upon receipt of the request under paragraph (d)(1)(ii) of this section, the Council will have 30 days in which to review the finding and provide the agency official and, if the Council determines the issue warrants it, the head of the agency with the Council's opinion regarding the finding. A Council decision to provide its opinion to the head of an agency shall be guided by the criteria in appendix A to this part. If the Council does not respond within 30 days of receipt of the request, the agency official's responsibilities under section 106 are fulfilled.

(B) The person to whom the Council addresses its opinion (the agency official or the head of the agency) shall take into account the Council's opinion before the agency reaches a final decision on the finding.

(C) The person to whom the Council addresses its opinion (the agency official or the head of the agency) shall then prepare a summary of the decision that contains the rationale for the decision and evidence of consideration of the Council's opinion, and provide it to the Council, the SHPO/THPO, and the consulting parties. The head of the agency may delegate his or her duties under this paragraph to the agency's senior policy official. If the agency official's initial finding will be revised, the agency official shall proceed in accordance with the revised finding. If the final decision of the agency is to affirm the initial agency finding of no historic properties affected, once the summary of the decision has been sent to the Council, the SHPO/THPO, and the consulting parties, the agency official's responsibilities under section 106 are fulfilled.

(D) The Council shall retain a record of agency responses to Council opinions on their findings of no historic properties affected. The Council shall make this information available to the public.

(2) *Historic properties affected.* If the agency official finds that there are historic properties which may be affected by the undertaking, the agency official shall notify all consulting parties, including Indian tribes or Native Hawaiian organizations, invite their views on the effects and assess adverse effects, if any, in accordance with §800.5.

[65 FR 77725, Dec. 12, 2000, as amended at 69 FR 40553, July 6, 2004]

§ 800.5 Assessment of adverse effects.



[top](#)

(a) *Apply criteria of adverse effect.* In consultation with the SHPO/THPO and any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to identified historic properties, the agency official shall apply the criteria of adverse effect to historic properties within the area of potential effects. The agency official shall consider any views concerning such effects which have been provided by consulting parties and the public.

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

(2) *Examples of adverse effects.* Adverse effects on historic properties include, but are not limited to:

(i) Physical destruction of or damage to all or part of the property;

(ii) Alteration of a property, including restoration, rehabilitation, repair, maintenance, stabilization, hazardous material remediation, and provision of handicapped access, that is not consistent with the Secretary's standards for the treatment of historic properties (36 CFR part 68) and applicable guidelines;

(iii) Removal of the property from its historic location;

(iv) Change of the character of the property's use or of physical features within the property's setting that contribute to its historic significance;

(v) Introduction of visual, atmospheric or audible elements that diminish the integrity of the property's significant historic features;

(vi) Neglect of a property which causes its deterioration, except where such neglect and deterioration are recognized qualities of a property of religious and cultural significance to an Indian tribe or Native Hawaiian organization; and

ii) Transfer, lease, or sale of property out of Federal ownership or control without adequate and legally enforceable restrictions or conditions to ensure long-term preservation of the property's historic significance.

3) *Phased application of criteria.* Where alternatives under consideration consist of corridors or large land areas, or where access to properties is restricted, the agency official may use a phased process in applying the criteria of adverse effect consistent with phased identification and evaluation efforts conducted pursuant to §800.4(b)(2).

c) *Finding of no adverse effect.* The agency official, in consultation with the SHPO/THPO, may propose a finding of no adverse effect when the undertaking's effects do not meet the criteria of paragraph (a)(1) of this section or the undertaking is modified or conditions are imposed, such as the subsequent review of plans for rehabilitation by the SHPO/THPO to ensure consistency with the Secretary's standards for the treatment of historic properties (36 CFR part 68) and applicable guidelines, to avoid adverse effects.

c) *Consulting party review.* If the agency official proposes a finding of no adverse effect, the agency official shall notify all consulting parties of the finding and provide them with the documentation specified in §800.11(e). The SHPO/THPO shall have 30 days from receipt to review the finding.

1) *Agreement with, or no objection to, finding.* Unless the Council is reviewing the finding pursuant to paragraph (c)(3) of this section, the agency official may proceed after the close of the 30 day review period if the SHPO/THPO has agreed with the finding or has not provided a response, and no consulting party has objected. The agency official shall then carry out the undertaking in accordance with paragraph (d)(1) of this section.

2) *Disagreement with finding.* (i) If within the 30 day review period the SHPO/THPO or any consulting party notifies the agency official in writing that it disagrees with the finding and specifies the reasons for the disagreement in the notification, the agency official shall either consult with the party to resolve the disagreement, or request the Council to review the finding pursuant to paragraphs (c)(3)(i) and (c)(3)(ii) of this section. The agency official shall include with such request the documentation specified in §800.11(e). The agency official shall also concurrently notify all consulting parties that such a submission has been made and make the submission documentation available to the public.

ii) If within the 30 day review period the Council provides the agency official and, if the Council determines the issue warrants it, the head of the agency, with a written opinion objecting to the finding, the agency shall then proceed according to paragraph (c)(3)(ii) of this section. A Council decision to provide its opinion to the head of an agency shall be guided by the criteria in appendix A to this part.

iii) The agency official should seek the concurrence of any Indian tribe or Native Hawaiian organization that has made known to the agency official that it attaches religious and cultural significance to a historic property subject to the finding. If such Indian tribe or Native Hawaiian organization disagrees with the finding, it may within the 30 day review period specify the reasons for disagreeing with the finding and request the Council to review and object to the finding pursuant to paragraph (c)(2)(ii) of this section.

(3) *Council review of findings.* (i) When a finding is submitted to the Council pursuant to paragraph (c)(2)(i) of this section, the Council shall review the finding and provide the agency official and, if the Council determines the issue warrants it, the head of the agency with its opinion as to whether the adverse effect criteria have been correctly applied. A Council decision to provide its opinion to the head of an agency shall be guided by the criteria in appendix A to this part. The Council will provide its opinion within 15 days of receiving the documented finding from the agency official. The Council at its discretion may extend that time period for 15 days, in which case it shall notify the agency of such extension prior to the end of the initial 15 day period. If the Council does not respond within the applicable time period, the agency official's responsibilities under section 106 are fulfilled.

(ii)(A) The person to whom the Council addresses its opinion (the agency official or the head of the agency) shall take into account the Council's opinion in reaching a final decision on the finding.

(B) The person to whom the Council addresses its opinion (the agency official or the head of the agency) shall prepare a summary of the decision that contains the rationale for the decision and evidence of consideration of the Council's opinion, and provide it to the Council, the SHPO/THPO, and the consulting parties. The head of the agency may delegate his or her duties under this paragraph to the agency's senior policy official. If the agency official's initial finding will be revised, the agency official shall proceed in accordance with the revised finding. If the final decision of the agency is to affirm the initial finding of no adverse effect, once the summary of the decision has been sent to the Council, the SHPO/THPO, and the consulting parties, the agency official's responsibilities under section 106 are fulfilled.

(C) The Council shall retain a record of agency responses to Council opinions on their findings of no adverse effects. The Council shall make this information available to the public.

(d) *Results of assessment—(1) No adverse effect.* The agency official shall maintain a record of the finding and provide information on the finding to the public on request, consistent with the confidentiality provisions of §800.11(c). Implementation of the undertaking in accordance with the finding as documented fulfills the agency official's responsibilities under section 106 and this part. If the agency official will not conduct the undertaking as proposed in the finding, the agency official shall reopen consultation under paragraph (a) of this section.

(2) *Adverse effect.* If an adverse effect is found, the agency official shall consult further to resolve the adverse effect pursuant to §800.6.

[65 FR 77725, Dec. 12, 2000, as amended at 69 FR 40553, July 6, 2004]

§ 800.6 Resolution of adverse effects.

(a) *Continue consultation.* The agency official shall consult with the SHPO/THPO and other consulting parties, including Indian tribes and Native Hawaiian organizations, to develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize, or mitigate adverse effects on historic properties.

(1) *Notify the Council and determine Council participation.* The agency official shall notify the Council of the adverse effect finding by providing the documentation specified in §800.11(e).

(i) The notice shall invite the Council to participate in the consultation when:

(A) The agency official wants the Council to participate;

(B) The undertaking has an adverse effect upon a National Historic Landmark; or

(C) A programmatic agreement under §800.14(b) will be prepared;

(ii) The SHPO/THPO, an Indian tribe or Native Hawaiian organization, or any other consulting party may at any time independently request the Council to participate in the consultation.

(iii) The Council shall advise the agency official and all consulting parties whether it will participate within 15 days of receipt of notice or other request. Prior to entering the process, the Council shall provide written notice to the agency official and the consulting parties that its decision to participate meets the criteria set forth in appendix A to this part. The Council shall also advise the head of the agency of its decision to enter the process. Consultation with Council participation is conducted in accordance with paragraph (b)(2) of this section.

(iv) If the Council does not join the consultation, the agency official shall proceed with consultation in accordance with paragraph (b)(1) of this section.

(2) *Involve consulting parties.* In addition to the consulting parties identified under §800.3(f), the agency official, the SHPO/THPO and the Council, if participating, may agree to invite other individuals or organizations to become consulting parties. The agency official shall invite any individual or organization that will assume a specific role or responsibility in a memorandum of agreement to participate as a consulting party.

(3) *Provide documentation.* The agency official shall provide to all consulting parties the documentation specified in §800.11(e), subject to the confidentiality provisions of §800.11(c), and such other documentation as may be developed during the consultation to resolve adverse effects.

(4) *Involve the public.* The agency official shall make information available to the public, including the documentation specified in §800.11(e), subject to the confidentiality provisions of §800.11(c). The agency official shall provide an opportunity for members of the public to express their views on resolving adverse effects of the undertaking. The agency official should use appropriate mechanisms, taking into account the magnitude of the undertaking and the nature of its effects upon historic properties, the likely effects on historic properties, and the relationship of the Federal involvement to the undertaking to ensure that the public's views are considered in the consultation. The agency official should also consider the extent of notice and information concerning historic preservation issues afforded the public at earlier steps in the section 106 process to determine the appropriate level of public involvement when resolving adverse effects so that the standards of §800.2(d) are met.

(5) *Restrictions on disclosure of information.* Section 304 of the act and other authorities may limit the disclosure of information under paragraphs (a)(3) and (a)(4) of this section. If an Indian tribe or Native Hawaiian organization objects to the disclosure of information or if the agency official believes that there are other reasons to withhold information, the agency official shall comply with §800.11(c) regarding the disclosure of such information.

(b) *Resolve adverse effects—(1) Resolution without the Council.* (i) The agency official shall consult with the SHPO/THPO and other consulting parties to seek ways to avoid, minimize or mitigate the adverse effects.

(ii) The agency official may use standard treatments established by the Council under §800.14(d) as a basis for a memorandum of agreement.

(iii) If the Council decides to join the consultation, the agency official shall follow paragraph (b)(2) of this section.

(iv) If the agency official and the SHPO/THPO agree on how the adverse effects will be resolved, they shall execute a memorandum of agreement. The agency official must submit a copy of the executed memorandum of agreement, along with the documentation specified in §800.11(f), to the Council prior to approving the undertaking in order to meet the requirements of section 106 and this subpart.

(v) If the agency official, and the SHPO/THPO fail to agree on the terms of a memorandum of agreement, the agency official shall request the Council to join the consultation and provide the Council with the documentation set forth in §800.11(g). If the Council decides to join the consultation, the agency official shall proceed in accordance with paragraph (b)(2) of this section. If the Council decides not to join the consultation, the Council will notify the agency and proceed to comment in accordance with §800.7(c).

(2) *Resolution with Council participation.* If the Council decides to participate in the consultation, the agency official shall consult with the SHPO/THPO, the Council, and other consulting parties, including Indian tribes and Native Hawaiian organizations under §800.2(c)(3), to seek ways to avoid, minimize or mitigate the adverse effects. If the agency official, the SHPO/THPO, and the Council agree on how the adverse effects will be resolved, they shall execute a memorandum of agreement.

(c) *Memorandum of agreement.* A memorandum of agreement executed and implemented pursuant to this section evidences the agency official's compliance with section 106 and this part and shall govern the undertaking and all of its parts. The agency official shall ensure that the undertaking is carried out in accordance with the memorandum of agreement.

1) *Signatories*. The signatories have sole authority to execute, amend or terminate the agreement in accordance with this subpart.

i) The agency official and the SHPO/THPO are the signatories to a memorandum of agreement executed pursuant to paragraph b)(1) of this section.

ii) The agency official, the SHPO/THPO, and the Council are the signatories to a memorandum of agreement executed pursuant to paragraph (b)(2) of this section.

iii) The agency official and the Council are signatories to a memorandum of agreement executed pursuant to §800.7(a)(2).

2) *Invited signatories*. (i) The agency official may invite additional parties to be signatories to a memorandum of agreement. Any such party that signs the memorandum of agreement shall have the same rights with regard to seeking amendment or termination of the memorandum of agreement as other signatories.

ii) The agency official may invite an Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to historic properties located off tribal lands to be a signatory to a memorandum of agreement concerning such properties.

iii) The agency official should invite any party that assumes a responsibility under a memorandum of agreement to be a signatory.

iv) The refusal of any party invited to become a signatory to a memorandum of agreement pursuant to paragraph (c)(2) of this section does not invalidate the memorandum of agreement.

3) *Concurrence by others*. The agency official may invite all consulting parties to concur in the memorandum of agreement. The signatories may agree to invite others to concur. The refusal of any party invited to concur in the memorandum of agreement does not invalidate the memorandum of agreement.

4) *Reports on implementation*. Where the signatories agree it is appropriate, a memorandum of agreement shall include a provision for monitoring and reporting on its implementation.

5) *Duration*. A memorandum of agreement shall include provisions for termination and for reconsideration of terms if the undertaking has not been implemented within a specified time.

6) *Discoveries*. Where the signatories agree it is appropriate, a memorandum of agreement shall include provisions to deal with the subsequent discovery or identification of additional historic properties affected by the undertaking.

7) *Amendments*. The signatories to a memorandum of agreement may amend it. If the Council was not a signatory to the original agreement and the signatories execute an amended agreement, the agency official shall file it with the Council.

8) *Termination*. If any signatory determines that the terms of a memorandum of agreement cannot be or are not being carried out, the signatories shall consult to seek amendment of the agreement. If the agreement is not amended, any signatory may terminate it. The agency official shall either execute a memorandum of agreement with signatories under paragraph (c)(1) of this section or request the comments of the Council under §800.7(a).

9) *Copies*. The agency official shall provide each consulting party with a copy of any memorandum of agreement executed pursuant to this subpart.

§ 800.7 Failure to resolve adverse effects.



top

(a) *Termination of consultation*. After consulting to resolve adverse effects pursuant to §800.6(b)(2), the agency official, the SHPO/THPO, or the Council may determine that further consultation will not be productive and terminate consultation. Any party that terminates consultation shall notify the other consulting parties and provide them the reasons for terminating in writing.

(1) If the agency official terminates consultation, the head of the agency or an Assistant Secretary or other officer with major department-wide or agency-wide responsibilities shall request that the Council comment pursuant to paragraph (c) of this section and shall notify all consulting parties of the request.

(2) If the SHPO terminates consultation, the agency official and the Council may execute a memorandum of agreement without the SHPO's involvement.

(3) If a THPO terminates consultation regarding an undertaking occurring on or affecting historic properties on its tribal lands, the Council shall comment pursuant to paragraph (c) of this section.

(4) If the Council terminates consultation, the Council shall notify the agency official, the agency's Federal preservation officer and all consulting parties of the termination and comment under paragraph (c) of this section. The Council may consult with the agency's Federal preservation officer prior to terminating consultation to seek to resolve issues concerning the undertaking and its effects on historic properties.

(b) *Comments without termination*. The Council may determine that it is appropriate to provide additional advisory comments upon an undertaking for which a memorandum of agreement will be executed. The Council shall provide them to the agency official when it executes the memorandum of agreement.

(c) *Comments by the Council—(1) Preparation*. The Council shall provide an opportunity for the agency official, all consulting parties, and the public to provide their views within the time frame for developing its comments. Upon request of the Council, the agency official shall provide additional existing information concerning the undertaking and assist the Council in arranging an onsite inspection and an opportunity for public participation.

(2) *Timing.* The Council shall transmit its comments within 45 days of receipt of a request under paragraph (a)(1) or (a)(3) of this section or §800.8(c)(3), or termination by the Council under §800.6(b)(1)(v) or paragraph (a)(4) of this section, unless otherwise agreed to by the agency official.

(3) *Transmittal.* The Council shall provide its comments to the head of the agency requesting comment with copies to the agency official, the agency's Federal preservation officer, all consulting parties, and others as appropriate.

(4) *Response to Council comment.* The head of the agency shall take into account the Council's comments in reaching a final decision on the undertaking. Section 110(l) of the act directs that the head of the agency shall document this decision and may not delegate his or her responsibilities pursuant to section 106. Documenting the agency head's decision shall include:

(i) Preparing a summary of the decision that contains the rationale for the decision and evidence of consideration of the Council's comments and providing it to the Council prior to approval of the undertaking;

(ii) Providing a copy of the summary to all consulting parties; and

(iii) Notifying the public and making the record available for public inspection.

§ 800.8 Coordination With the National Environmental Policy Act.



[top](#)

(a) *General principles—(1) Early coordination.* Federal agencies are encouraged to coordinate compliance with section 106 and the procedures in this part with any steps taken to meet the requirements of the National Environmental Policy Act (NEPA). Agencies should consider their section 106 responsibilities as early as possible in the NEPA process, and plan their public participation, analysis, and review in such a way that they can meet the purposes and requirements of both statutes in a timely and efficient manner. The determination of whether an undertaking is a "major Federal action significantly affecting the quality of the human environment," and therefore requires preparation of an environmental impact statement (EIS) under NEPA, should include consideration of the undertaking's likely effects on historic properties. A finding of adverse effect on a historic property does not necessarily require an EIS under NEPA.

(2) *Consulting party roles.* SHPO/THPOs, Indian tribes, and Native Hawaiian organizations, other consulting parties, and organizations and individuals who may be concerned with the possible effects of an agency action on historic properties should be prepared to consult with agencies early in the NEPA process, when the purpose of and need for the proposed action as well as the widest possible range of alternatives are under consideration.

(3) *Inclusion of historic preservation issues.* Agency officials should ensure that preparation of an environmental assessment (EA) and finding of no significant impact (FONSI) or an EIS and record of decision (ROD) includes appropriate scoping, identification of historic properties, assessment of effects upon them, and consultation leading to resolution of any adverse effects.

(b) *Actions categorically excluded under NEPA.* If a project, activity or program is categorically excluded from NEPA review under an agency's NEPA procedures, the agency official shall determine if it still qualifies as an undertaking requiring review under section 106 pursuant to §800.3(a). If so, the agency official shall proceed with section 106 review in accordance with the procedures in this subpart.

(c) *Use of the NEPA process for section 106 purposes.* An agency official may use the process and documentation required for the preparation of an EA/FONSI or an EIS/ROD to comply with section 106 in lieu of the procedures set forth in §§800.3 through 800.6 if the agency official has notified in advance the SHPO/THPO and the Council that it intends to do so and the following standards are met.

(1) *Standards for developing environmental documents to comply with Section 106.* During preparation of the EA or draft EIS (DEIS) the agency official shall:

(i) Identify consulting parties either pursuant to §800.3(f) or through the NEPA scoping process with results consistent with §800.3(f);

(ii) Identify historic properties and assess the effects of the undertaking on such properties in a manner consistent with the standards and criteria of §§800.4 through 800.5, provided that the scope and timing of these steps may be phased to reflect the agency official's consideration of project alternatives in the NEPA process and the effort is commensurate with the assessment of other environmental factors;

(iii) Consult regarding the effects of the undertaking on historic properties with the SHPO/THPO, Indian tribes, and Native Hawaiian organizations that might attach religious and cultural significance to affected historic properties, other consulting parties, and the Council, where appropriate, during NEPA scoping, environmental analysis, and the preparation of NEPA documents;

(iv) Involve the public in accordance with the agency's published NEPA procedures; and (v) Develop in consultation with identified consulting parties alternatives and proposed measures that might avoid, minimize or mitigate any adverse effects of the undertaking on historic properties and describe them in the EA or DEIS.

(2) *Review of environmental documents.* (i) The agency official shall submit the EA, DEIS, or EIS to the SHPO/THPO, Indian tribes, and Native Hawaiian organizations that might attach religious and cultural significance to affected historic properties, and other consulting parties prior to or when making the document available for public comment. If the document being prepared is a DEIS or EIS, the agency official shall also submit it to the Council.

(ii) Prior to or within the time allowed for public comment on the document, a SHPO/THPO, an Indian tribe or Native Hawaiian organization, another consulting party or the Council may object to the agency official that preparation of the EA, DEIS, or EIS has

not met the standards set forth in paragraph (c)(1) of this section or that the substantive resolution of the effects on historic properties proposed in an EA, DEIS, or EIS is inadequate. If the agency official receives such an objection, the agency official shall refer the matter to the Council.

3) *Resolution of objections.* Within 30 days of the agency official's referral of an objection under paragraph (c)(2)(ii) of this section, the Council shall review the objection and notify the agency as to its opinion on the objection.

i) If the Council agrees with the objection:

A) The Council shall provide the agency official and, if the Council determines the issue warrants it, the head of the agency with the Council's opinion regarding the objection. A Council decision to provide its opinion to the head of an agency shall be guided by the criteria in appendix A to this part. The person to whom the Council addresses its opinion (the agency official or the head of the agency) shall take into account the Council's opinion in reaching a final decision on the issue of the objection.

B) The person to whom the Council addresses its opinion (the agency official or the head of the agency) shall prepare a summary of the decision that contains the rationale for the decision and evidence of consideration of the Council's opinion, and provide it to the Council. The head of the agency may delegate his or her duties under this paragraph to the agency's senior Policy Official. If the agency official's initial decision regarding the matter that is the subject of the objection will be revised, the agency official shall proceed in accordance with the revised decision. If the final decision of the agency is to affirm the initial agency decision, once the summary of the final decision has been sent to the Council, the agency official shall continue its compliance with this section.

ii) If the Council disagrees with the objection, the Council shall so notify the agency official, in which case the agency official shall continue its compliance with this section.

iii) If the Council fails to respond to the objection within the 30 day period, the agency official shall continue its compliance with this section.

(4) *Approval of the undertaking.* If the agency official has found, during the preparation of an EA or EIS that the effects of an undertaking on historic properties are adverse, the agency official shall develop measures in the EA, DEIS, or EIS to avoid, minimize, or mitigate such effects in accordance with paragraph (c)(1)(v) of this section. The agency official's responsibilities under section 106 and the procedures in this subpart shall then be satisfied when either:

(i) A binding commitment to such proposed measures is incorporated in:

(A) The ROD, if such measures were proposed in a DEIS or EIS; or

(B) An MOA drafted in compliance with §800.6(c); or

(ii) The Council has commented under §800.7 and received the agency's response to such comments.

(5) *Modification of the undertaking.* If the undertaking is modified after approval of the FONSI or the ROD in a manner that changes the undertaking or alters its effects on historic properties, or if the agency official fails to ensure that the measures to avoid, minimize or mitigate adverse effects (as specified in either the FONSI or the ROD, or in the binding commitment adopted pursuant to paragraph (c)(4) of this section) are carried out, the agency official shall notify the Council and all consulting parties that supplemental environmental documents will be prepared in compliance with NEPA or that the procedures in §§800.3 through 800.6 will be followed as necessary.

[65 FR 77725, Dec. 12, 2000, as amended at 69 FR 40554, July 6, 2004]

§ 800.9 Council review of section 106 compliance.



top

(a) *Assessment of agency official compliance for individual undertakings.* The Council may provide to the agency official its advisory opinion regarding the substance of any finding, determination or decision or regarding the adequacy of the agency official's compliance with the procedures under this part. The Council may provide such advice at any time at the request of any individual, agency or organization or on its own initiative. The agency official shall consider the views of the Council in reaching a decision on the matter in question.

(b) *Agency foreclosure of the Council's opportunity to comment.* Where an agency official has failed to complete the requirements of section 106 in accordance with the procedures in this part prior to the approval of an undertaking, the Council's opportunity to comment may be foreclosed. The Council may review a case to determine whether a foreclosure has occurred. The Council shall notify the agency official and the agency's Federal preservation officer and allow 30 days for the agency official to provide information as to whether foreclosure has occurred. If the Council determines foreclosure has occurred, the Council shall transmit the determination to the agency official and the head of the agency. The Council shall also make the determination available to the public and any parties known to be interested in the undertaking and its effects upon historic properties.

(c) *Intentional adverse effects by applicants—(1) Agency responsibility.* Section 110(k) of the act prohibits a Federal agency from granting a loan, loan guarantee, permit, license or other assistance to an applicant who, with intent to avoid the requirements of section 106, has intentionally significantly adversely affected a historic property to which the grant would relate, or having legal power to prevent it, has allowed such significant adverse effect to occur, unless the agency, after consultation with the Council, determines that circumstances justify granting such assistance despite the adverse effect created or permitted by the applicant. Guidance issued by the Secretary pursuant to section 110 of the act governs its implementation.

(2) *Consultation with the Council.* When an agency official determines, based on the actions of an applicant, that section 110(k) is applicable and that circumstances may justify granting the assistance, the agency official shall notify the Council and provide

documentation specifying the circumstances under which the adverse effects to the historic property occurred and the degree of damage to the integrity of the property. This documentation shall include any views obtained from the applicant, SHPO/THPO, an Indian tribe if the undertaking occurs on or affects historic properties on tribal lands, and other parties known to be interested in the undertaking.

(i) Within thirty days of receiving the agency official's notification, unless otherwise agreed to by the agency official, the Council shall provide the agency official with its opinion as to whether circumstances justify granting assistance to the applicant and any possible mitigation of the adverse effects.

(ii) The agency official shall consider the Council's opinion in making a decision on whether to grant assistance to the applicant, and shall notify the Council, the SHPO/THPO, and other parties known to be interested in the undertaking prior to granting the assistance.

(3) *Compliance with Section 106.* If an agency official, after consulting with the Council, determines to grant the assistance, the agency official shall comply with §§800.3 through 800.6 to take into account the effects of the undertaking on any historic properties.

(d) *Evaluation of Section 106 operations.* The Council may evaluate the operation of the section 106 process by periodic reviews of how participants have fulfilled their legal responsibilities and how effectively the outcomes reached advance the purposes of the act.

(1) *Information from participants.* Section 203 of the act authorizes the Council to obtain information from Federal agencies necessary to conduct evaluation of the section 106 process. The agency official shall make documentation of agency policies, operating procedures and actions taken to comply with section 106 available to the Council upon request. The Council may request available information and documentation from other participants in the section 106 process.

(2) *Improving the operation of section 106.* Based upon any evaluation of the section 106 process, the Council may make recommendations to participants, the heads of Federal agencies, and the Secretary of actions to improve the efficiency and effectiveness of the process. Where the Council determines that an agency official or a SHPO/THPO has failed to properly carry out the responsibilities assigned under the process in this part, the Council may participate in individual case reviews conducted under such process in addition to the SHPO/THPO for such period that it determines is necessary to improve performance or correct deficiencies. If the Council finds a pattern of failure by a Federal agency in carrying out its responsibilities under section 106, the Council may review the policies and programs of the agency related to historic preservation pursuant to section 202(a)(6) of the act and recommend methods to improve the effectiveness, coordination, and consistency of those policies and programs with section 106.

§ 800.10 Special requirements for protecting National Historic Landmarks.



[top](#)

(a) *Statutory requirement.* Section 110(f) of the act requires that the agency official, to the maximum extent possible, undertake such planning and actions as may be necessary to minimize harm to any National Historic Landmark that may be directly and adversely affected by an undertaking. When commenting on such undertakings, the Council shall use the process set forth in §§800.6 through 800.7 and give special consideration to protecting National Historic Landmarks as specified in this section.

(b) *Resolution of adverse effects.* The agency official shall request the Council to participate in any consultation to resolve adverse effects on National Historic Landmarks conducted under §800.6.

(c) *Involvement of the Secretary.* The agency official shall notify the Secretary of any consultation involving a National Historic Landmark and invite the Secretary to participate in the consultation where there may be an adverse effect. The Council may request a report from the Secretary under section 213 of the act to assist in the consultation.

(d) *Report of outcome.* When the Council participates in consultation under this section, it shall report the outcome of the section 106 process, providing its written comments or any memoranda of agreement to which it is a signatory, to the Secretary and the head of the agency responsible for the undertaking.

§ 800.11 Documentation standards.



[top](#)

(a) *Adequacy of documentation.* The agency official shall ensure that a determination, finding, or agreement under the procedures in this subpart is supported by sufficient documentation to enable any reviewing parties to understand its basis. The agency official shall provide such documentation to the extent permitted by law and within available funds. When an agency official is conducting phased identification or evaluation under this subpart, the documentation standards regarding description of historic properties may be applied flexibly. If the Council, or the SHPO/THPO when the Council is not involved, determines the applicable documentation standards are not met, the Council or the SHPO/THPO, as appropriate, shall notify the agency official and specify the information needed to meet the standard. At the request of the agency official or any of the consulting parties, the Council shall review any disputes over whether documentation standards are met and provide its views to the agency official and the consulting parties.

(b) *Format.* The agency official may use documentation prepared to comply with other laws to fulfill the requirements of the procedures in this subpart, if that documentation meets the standards of this section.

(c) *Confidentiality—(1) Authority to withhold information.* Section 304 of the act provides that the head of a Federal agency or other public official receiving grant assistance pursuant to the act, after consultation with the Secretary, shall withhold from public disclosure information about the location, character, or ownership of a historic property when disclosure may cause a significant

invasion of privacy; risk harm to the historic property; or impede the use of a traditional religious site by practitioners. When the head of a Federal agency or other public official has determined that information should be withheld from the public pursuant to these criteria, the Secretary, in consultation with such Federal agency head or official, shall determine who may have access to the information for the purposes of carrying out the act.

2) *Consultation with the Council.* When the information in question has been developed in the course of an agency's compliance with this part, the Secretary shall consult with the Council in reaching determinations on the withholding and release of information. The Federal agency shall provide the Council with available information, including views of the SHPO/THPO, Indian tribes and Native Hawaiian organizations, related to the confidentiality concern. The Council shall advise the Secretary and the Federal agency within 30 days of receipt of adequate documentation.

3) *Other authorities affecting confidentiality.* Other Federal laws and program requirements may limit public access to information concerning an undertaking and its effects on historic properties. Where applicable, those authorities shall govern public access to information developed in the section 106 process and may authorize the agency official to protect the privacy of non-governmental applicants.

d) *Finding of no historic properties affected.* Documentation shall include:

- 1) A description of the undertaking, specifying the Federal involvement, and its area of potential effects, including photographs, maps, drawings, as necessary;
- 2) A description of the steps taken to identify historic properties, including, as appropriate, efforts to seek information pursuant to §800.4(b); and
- 3) The basis for determining that no historic properties are present or affected.

e) *Finding of no adverse effect or adverse effect.* Documentation shall include:

- 1) A description of the undertaking, specifying the Federal involvement, and its area of potential effects, including photographs, maps, and drawings, as necessary;
- 2) A description of the steps taken to identify historic properties;
- 3) A description of the affected historic properties, including information on the characteristics that qualify them for the National Register;
- 4) A description of the undertaking's effects on historic properties;
- 5) An explanation of why the criteria of adverse effect were found applicable or inapplicable, including any conditions or future actions to avoid, minimize or mitigate adverse effects; and
- 6) Copies or summaries of any views provided by consulting parties and the public.

f) *Memorandum of agreement.* When a memorandum of agreement is filed with the Council, the documentation shall include, any substantive revisions or additions to the documentation provided the Council pursuant to §800.6(a)(1), an evaluation of any measures considered to avoid or minimize the undertaking's adverse effects and a summary of the views of consulting parties and the public.

(g) *Requests for comment without a memorandum of agreement.* Documentation shall include:

- (1) A description and evaluation of any alternatives or mitigation measures that the agency official proposes to resolve the undertaking's adverse effects;
- (2) A description of any reasonable alternatives or mitigation measures that were considered but not chosen, and the reasons for their rejection;
- (3) Copies or summaries of any views submitted to the agency official concerning the adverse effects of the undertaking on historic properties and alternatives to reduce or avoid those effects; and
- (4) Any substantive revisions or additions to the documentation provided the Council pursuant to §800.6(a)(1).

§ 800.12 Emergency situations.



[top](#)

(a) *Agency procedures.* The agency official, in consultation with the appropriate SHPOs/THPOs, affected Indian tribes and Native Hawaiian organizations, and the Council, is encouraged to develop procedures for taking historic properties into account during operations which respond to a disaster or emergency declared by the President, a tribal government, or the Governor of a State or which respond to other immediate threats to life or property. If approved by the Council, the procedures shall govern the agency's historic preservation responsibilities during any disaster or emergency in lieu of §§800.3 through 800.6.

(b) *Alternatives to agency procedures.* In the event an agency official proposes an emergency undertaking as an essential and immediate response to a disaster or emergency declared by the President, a tribal government, or the Governor of a State or another immediate threat to life or property, and the agency has not developed procedures pursuant to paragraph (a) of this section, the agency official may comply with section 106 by:

- (1) Following a programmatic agreement developed pursuant to §800.14(b) that contains specific provisions for dealing with historic

properties in emergency situations; or

(2) Notifying the Council, the appropriate SHPO/THPO and any Indian tribe or Native Hawaiian organization that may attach religious and cultural significance to historic properties likely to be affected prior to the undertaking and affording them an opportunity to comment within seven days of notification. If the agency official determines that circumstances do not permit seven days for comment, the agency official shall notify the Council, the SHPO/THPO and the Indian tribe or Native Hawaiian organization and invite any comments within the time available.

(c) *Local governments responsible for section 106 compliance.* When a local government official serves as the agency official for section 106 compliance, paragraphs (a) and (b) of this section also apply to an imminent threat to public health or safety as a result of a natural disaster or emergency declared by a local government's chief executive officer or legislative body, provided that if the Council or SHPO/THPO objects to the proposed action within seven days, the agency official shall comply with §§800.3 through 800.6.

(d) *Applicability.* This section applies only to undertakings that will be implemented within 30 days after the disaster or emergency has been formally declared by the appropriate authority. An agency may request an extension of the period of applicability from the Council prior to the expiration of the 30 days. Immediate rescue and salvage operations conducted to preserve life or property are exempt from the provisions of section 106 and this part.

§ 800.13 Post-review discoveries.



[top](#)

(a) *Planning for subsequent discoveries—(1) Using a programmatic agreement.* An agency official may develop a programmatic agreement pursuant to §800.14(b) to govern the actions to be taken when historic properties are discovered during the implementation of an undertaking.

(2) *Using agreement documents.* When the agency official's identification efforts in accordance with §800.4 indicate that historic properties are likely to be discovered during implementation of an undertaking and no programmatic agreement has been developed pursuant to paragraph (a)(1) of this section, the agency official shall include in any finding of no adverse effect or memorandum of agreement a process to resolve any adverse effects upon such properties. Actions in conformance with the process satisfy the agency official's responsibilities under section 106 and this part.

(b) *Discoveries without prior planning.* If historic properties are discovered or unanticipated effects on historic properties found after the agency official has completed the section 106 process without establishing a process under paragraph (a) of this section, the agency official shall make reasonable efforts to avoid, minimize or mitigate adverse effects to such properties and:

(1) If the agency official has not approved the undertaking or if construction on an approved undertaking has not commenced, consult to resolve adverse effects pursuant to §800.6; or

(2) If the agency official, the SHPO/THPO and any Indian tribe or Native Hawaiian organization that might attach religious and cultural significance to the affected property agree that such property is of value solely for its scientific, prehistoric, historic or archeological data, the agency official may comply with the Archeological and Historic Preservation Act instead of the procedures in this part and provide the Council, the SHPO/THPO, and the Indian tribe or Native Hawaiian organization with a report on the actions within a reasonable time after they are completed; or

(3) If the agency official has approved the undertaking and construction has commenced, determine actions that the agency official can take to resolve adverse effects, and notify the SHPO/THPO, any Indian tribe or Native Hawaiian organization that might attach religious and cultural significance to the affected property, and the Council within 48 hours of the discovery. The notification shall describe the agency official's assessment of National Register eligibility of the property and proposed actions to resolve the adverse effects. The SHPO/THPO, the Indian tribe or Native Hawaiian organization and the Council shall respond within 48 hours of the notification. The agency official shall take into account their recommendations regarding National Register eligibility and proposed actions, and then carry out appropriate actions. The agency official shall provide the SHPO/THPO, the Indian tribe or Native Hawaiian organization and the Council a report of the actions when they are completed.

(c) *Eligibility of properties.* The agency official, in consultation with the SHPO/THPO, may assume a newly-discovered property to be eligible for the National Register for purposes of section 106. The agency official shall specify the National Register criteria used to assume the property's eligibility so that information can be used in the resolution of adverse effects.

(d) *Discoveries on tribal lands.* If historic properties are discovered on tribal lands, or there are unanticipated effects on historic properties found on tribal lands, after the agency official has completed the section 106 process without establishing a process under paragraph (a) of this section and construction has commenced, the agency official shall comply with applicable tribal regulations and procedures and obtain the concurrence of the Indian tribe on the proposed action.

Subpart C—Program Alternatives



[top](#)

§ 800.14 Federal agency program alternatives.



[top](#)

(a) *Alternate procedures.* An agency official may develop procedures to implement section 106 and substitute them for all or part of subpart B of this part if they are consistent with the Council's regulations pursuant to section 110(a)(2)(E) of the act.

1) *Development of procedures.* The agency official shall consult with the Council, the National Conference of State Historic Preservation Officers, or individual SHPO/THPOs, as appropriate, and Indian tribes and Native Hawaiian organizations, as specified in paragraph (f) of this section, in the development of alternate procedures, publish notice of the availability of proposed alternate procedures in the Federal Register and take other appropriate steps to seek public input during the development of alternate procedures.

2) *Council review.* The agency official shall submit the proposed alternate procedures to the Council for a 60-day review period. If the Council finds the procedures to be consistent with this part, it shall notify the agency official and the agency official may adopt them as final alternate procedures.

3) *Notice.* The agency official shall notify the parties with which it has consulted and publish notice of final alternate procedures in the Federal Register.

4) *Legal effect.* Alternate procedures adopted pursuant to this subpart substitute for the Council's regulations for the purposes of the agency's compliance with section 106, except that where an Indian tribe has entered into an agreement with the Council to substitute tribal historic preservation regulations for the Council's regulations under section 101(d)(5) of the act, the agency shall follow those regulations in lieu of the agency's procedures regarding undertakings on tribal lands. Prior to the Council entering into such agreements, the Council will provide Federal agencies notice and opportunity to comment on the proposed substitute tribal regulations.

(b) *Programmatic agreements.* The Council and the agency official may negotiate a programmatic agreement to govern the implementation of a particular program or the resolution of adverse effects from certain complex project situations or multiple undertakings.

(1) *Use of programmatic agreements.* A programmatic agreement may be used:

(i) When effects on historic properties are similar and repetitive or are multi-State or regional in scope;

(ii) When effects on historic properties cannot be fully determined prior to approval of an undertaking;

(iii) When nonfederal parties are delegated major decisionmaking responsibilities;

(iv) Where routine management activities are undertaken at Federal installations, facilities, or other land-management units; or

(v) Where other circumstances warrant a departure from the normal section 106 process.

(2) *Developing programmatic agreements for agency programs.* (i) The consultation shall involve, as appropriate, SHPO/THPOs, the National Conference of State Historic Preservation Officers (NCSHPO), Indian tribes and Native Hawaiian organizations, other Federal agencies, and members of the public. If the programmatic agreement has the potential to affect historic properties on tribal lands or historic properties of religious and cultural significance to an Indian tribe or Native Hawaiian organization, the agency official shall also follow paragraph (f) of this section.

(ii) *Public participation.* The agency official shall arrange for public participation appropriate to the subject matter and the scope of the program and in accordance with subpart A of this part. The agency official shall consider the nature of the program and its likely effects on historic properties and take steps to involve the individuals, organizations and entities likely to be interested.

(iii) *Effect.* The programmatic agreement shall take effect when executed by the Council, the agency official and the appropriate SHPOs/THPOs when the programmatic agreement concerns a specific region or the president of NCSHPO when NCSHPO has participated in the consultation. A programmatic agreement shall take effect on tribal lands only when the THPO, Indian tribe, or a designated representative of the tribe is a signatory to the agreement. Compliance with the procedures established by an approved programmatic agreement satisfies the agency's section 106 responsibilities for all individual undertakings of the program covered by the agreement until it expires or is terminated by the agency, the president of NCSHPO when a signatory, or the Council. Termination by an individual SHPO/THPO shall only terminate the application of a regional programmatic agreement within the jurisdiction of the SHPO/THPO. If a THPO assumes the responsibilities of a SHPO pursuant to section 101(d)(2) of the act and the SHPO is signatory to programmatic agreement, the THPO assumes the role of a signatory, including the right to terminate a regional programmatic agreement on lands under the jurisdiction of the tribe.

(iv) *Notice.* The agency official shall notify the parties with which it has consulted that a programmatic agreement has been executed under paragraph (b) of this section, provide appropriate public notice before it takes effect, and make any internal agency procedures implementing the agreement readily available to the Council, SHPO/THPOs, and the public.

(v) If the Council determines that the terms of a programmatic agreement are not being carried out, or if such an agreement is terminated, the agency official shall comply with subpart B of this part with regard to individual undertakings of the program covered by the agreement.

(3) *Developing programmatic agreements for complex or multiple undertakings.* Consultation to develop a programmatic agreement for dealing with the potential adverse effects of complex projects or multiple undertakings shall follow §800.6. If consultation pertains to an activity involving multiple undertakings and the parties fail to reach agreement, then the agency official shall comply with the provisions of subpart B of this part for each individual undertaking.

(4) *Prototype programmatic agreements.* The Council may designate an agreement document as a prototype programmatic agreement that may be used for the same type of program or undertaking in more than one case or area. When an agency official uses such a prototype programmatic agreement, the agency official may develop and execute the agreement with the appropriate SHPO/THPO and the agreement shall become final without need for Council participation in consultation or Council signature.

(c) *Exempted categories—(1) Criteria for establishing.* The Council or an agency official may propose a program or category of undertakings that may be exempted from review under the provisions of subpart B of this part, if the program or category meets the

following criteria:

- (i) The actions within the program or category would otherwise qualify as “undertakings” as defined in §800.16;
- (ii) The potential effects of the undertakings within the program or category upon historic properties are foreseeable and likely to be minimal or not adverse; and
- (iii) Exemption of the program or category is consistent with the purposes of the act.

(2) *Public participation.* The proponent of the exemption shall arrange for public participation appropriate to the subject matter and the scope of the exemption and in accordance with the standards in subpart A of this part. The proponent of the exemption shall consider the nature of the exemption and its likely effects on historic properties and take steps to involve individuals, organizations and entities likely to be interested.

(3) *Consultation with SHPOs/THPOs.* The proponent of the exemption shall notify and consider the views of the SHPOs/THPOs on the exemption.

(4) *Consultation with Indian tribes and Native Hawaiian organizations.* If the exempted program or category of undertakings has the potential to affect historic properties on tribal lands or historic properties of religious and cultural significance to an Indian tribe or Native Hawaiian organization, the Council shall follow the requirements for the agency official set forth in paragraph (f) of this section.

(5) *Council review of proposed exemptions.* The Council shall review an exemption proposal that is supported by documentation describing the program or category for which the exemption is sought, demonstrating that the criteria of paragraph (c)(1) of this section have been met, describing the methods used to seek the views of the public, and summarizing any views submitted by the SHPO/THPOs, the public, and any others consulted. Unless it requests further information, the Council shall approve or reject the proposed exemption within 30 days of receipt, and thereafter notify the relevant agency official and SHPO/THPOs of the decision. The decision shall be based on the consistency of the exemption with the purposes of the act, taking into consideration the magnitude of the exempted undertaking or program and the likelihood of impairment of historic properties in accordance with section 214 of the act.

(6) *Legal consequences.* Any undertaking that falls within an approved exempted program or category shall require no further review pursuant to subpart B of this part, unless the agency official or the Council determines that there are circumstances under which the normally excluded undertaking should be reviewed under subpart B of this part.

(7) *Termination.* The Council may terminate an exemption at the request of the agency official or when the Council determines that the exemption no longer meets the criteria of paragraph (c)(1) of this section. The Council shall notify the agency official 30 days before termination becomes effective.

(8) *Notice.* The proponent of the exemption shall publish notice of any approved exemption in the Federal Register.

(d) *Standard treatments—(1) Establishment.* The Council, on its own initiative or at the request of another party, may establish standard methods for the treatment of a category of historic properties, a category of undertakings, or a category of effects on historic properties to assist Federal agencies in satisfying the requirements of subpart B of this part. The Council shall publish notice of standard treatments in the Federal Register.

(2) *Public participation.* The Council shall arrange for public participation appropriate to the subject matter and the scope of the standard treatment and consistent with subpart A of this part. The Council shall consider the nature of the standard treatment and its likely effects on historic properties and the individuals, organizations and entities likely to be interested. Where an agency official has proposed a standard treatment, the Council may request the agency official to arrange for public involvement.

(3) *Consultation with SHPOs/THPOs.* The Council shall notify and consider the views of SHPOs/THPOs on the proposed standard treatment.

(4) *Consultation with Indian tribes and Native Hawaiian organizations.* If the proposed standard treatment has the potential to affect historic properties on tribal lands or historic properties of religious and cultural significance to an Indian tribe or Native Hawaiian organization, the Council shall follow the requirements for the agency official set forth in paragraph (f) of this section.

(5) *Termination.* The Council may terminate a standard treatment by publication of a notice in the Federal Register 30 days before the termination takes effect.

(e) *Program comments.* An agency official may request the Council to comment on a category of undertakings in lieu of conducting individual reviews under §§800.4 through 800.6. The Council may provide program comments at its own initiative.

(1) *Agency request.* The agency official shall identify the category of undertakings, specify the likely effects on historic properties, specify the steps the agency official will take to ensure that the effects are taken into account, identify the time period for which the comment is requested and summarize any views submitted by the public.

(2) *Public participation.* The agency official shall arrange for public participation appropriate to the subject matter and the scope of the category and in accordance with the standards in subpart A of this part. The agency official shall consider the nature of the undertakings and their likely effects on historic properties and the individuals, organizations and entities likely to be interested.

(3) *Consultation with SHPOs/THPOs.* The Council shall notify and consider the views of SHPOs/THPOs on the proposed program comment.

(4) *Consultation with Indian tribes and Native Hawaiian organizations.* If the program comment has the potential to affect historic properties on tribal lands or historic properties of religious and cultural significance to an Indian tribe or Native Hawaiian

rganization, the Council shall follow the requirements for the agency official set forth in paragraph (f) of this section.

5) *Council action.* Unless the Council requests additional documentation, notifies the agency official that it will decline to comment, or obtains the consent of the agency official to extend the period for providing comment, the Council shall comment to the agency official within 45 days of the request.

i) If the Council comments, the agency official shall take into account the comments of the Council in carrying out the undertakings within the category and publish notice in the Federal Register of the Council's comments and steps the agency will take to ensure that effects to historic properties are taken into account.

ii) If the Council declines to comment, the agency official shall continue to comply with the requirements of §§800.3 through 800.6 for the individual undertakings.

6) *Withdrawal of comment.* If the Council determines that the consideration of historic properties is not being carried out in a manner consistent with the program comment, the Council may withdraw the comment and the agency official shall comply with the requirements of §§800.3 through 800.6 for the individual undertakings.

f) *Consultation with Indian tribes and Native Hawaiian organizations when developing program alternatives.* Whenever an agency official proposes a program alternative pursuant to paragraphs (a) through (e) of this section, the agency official shall ensure that development of the program alternative includes appropriate government-to-government consultation with affected Indian tribes and consultation with affected Native Hawaiian organizations.

1) *Identifying affected Indian tribes and Native Hawaiian organizations.* If any undertaking covered by a proposed program alternative has the potential to affect historic properties on tribal lands, the agency official shall identify and consult with the Indian tribes having jurisdiction over such lands. If a proposed program alternative has the potential to affect historic properties of religious and cultural significance to an Indian tribe or a Native Hawaiian organization which are located off tribal lands, the agency official shall identify those Indian tribes and Native Hawaiian organizations that might attach religious and cultural significance to such properties and consult with them. When a proposed program alternative has nationwide applicability, the agency official shall identify an appropriate government to government consultation with Indian tribes and consult with Native Hawaiian organizations in accordance with existing Executive orders, Presidential memoranda, and applicable provisions of law.

2) *Results of consultation.* The agency official shall provide summaries of the views, along with copies of any written comments, provided by affected Indian tribes and Native Hawaiian organizations to the Council as part of the documentation for the proposed program alternative. The agency official and the Council shall take those views into account in reaching a final decision on the proposed program alternative.

[65 FR 77725, Dec. 12, 2000, as amended at 69 FR 40554, July 6, 2004]

§ 800.15 Tribal, State, and local program alternatives. [Reserved]



[top](#)

§ 800.16 Definitions.



[top](#)

(a) *Act* means the National Historic Preservation Act of 1966, as amended, 16 U.S.C. 470–470w-6.

(b) *Agency* means agency as defined in 5 U.S.C. 551.

(c) *Approval of the expenditure of funds* means any final agency decision authorizing or permitting the expenditure of Federal funds or financial assistance on an undertaking, including any agency decision that may be subject to an administrative appeal.

(d) *Area of potential effects* means the geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist. The area of potential effects is influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking.

(e) *Comment* means the findings and recommendations of the Council formally provided in writing to the head of a Federal agency under section 106.

(f) *Consultation* means the process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the section 106 process. The Secretary's "Standards and Guidelines for Federal Agency Preservation Programs pursuant to the National Historic Preservation Act" provide further guidance on consultation.

(g) *Council* means the Advisory Council on Historic Preservation or a Council member or employee designated to act for the Council.

(h) *Day* or *days* means calendar days.

(i) *Effect* means alteration to the characteristics of a historic property qualifying it for inclusion in or eligibility for the National Register.

(j) *Foreclosure* means an action taken by an agency official that effectively precludes the Council from providing comments which the agency official can meaningfully consider prior to the approval of the undertaking.

(k) *Head of the agency* means the chief official of the Federal agency responsible for all aspects of the agency's actions. If a State, local, or tribal government has assumed or has been delegated responsibility for section 106 compliance, the head of that unit of government shall be considered the head of the agency.

(l)(1) *Historic property* means any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register of Historic Places maintained by the Secretary of the Interior. This term includes artifacts, records, and remains that are related to and located within such properties. The term includes properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization and that meet the National Register criteria.

(2) The term *eligible for inclusion in the National Register* includes both properties formally determined as such in accordance with regulations of the Secretary of the Interior and all other properties that meet the National Register criteria.

(m) *Indian tribe* means an Indian tribe, band, nation, or other organized group or community, including a native village, regional corporation, or village corporation, as those terms are defined in section 3 of the Alaska Native Claims Settlement Act (43 U.S.C. 1602), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(n) *Local government* means a city, county, parish, township, municipality, borough, or other general purpose political subdivision of a State.

(o) *Memorandum of agreement* means the document that records the terms and conditions agreed upon to resolve the adverse effects of an undertaking upon historic properties.

(p) *National Historic Landmark* means a historic property that the Secretary of the Interior has designated a National Historic Landmark.

(q) *National Register* means the National Register of Historic Places maintained by the Secretary of the Interior.

(r) *National Register criteria* means the criteria established by the Secretary of the Interior for use in evaluating the eligibility of properties for the National Register (36 CFR part 60).

(s)(1) *Native Hawaiian organization* means any organization which serves and represents the interests of Native Hawaiians; has as a primary and stated purpose the provision of services to Native Hawaiians; and has demonstrated expertise in aspects of historic preservation that are significant to Native Hawaiians.

(2) *Native Hawaiian* means any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii.

(t) *Programmatic agreement* means a document that records the terms and conditions agreed upon to resolve the potential adverse effects of a Federal agency program, complex undertaking or other situations in accordance with §800.14(b).

(u) *Secretary* means the Secretary of the Interior acting through the Director of the National Park Service except where otherwise specified.

(v) *State Historic Preservation Officer (SHPO)* means the official appointed or designated pursuant to section 101(b)(1) of the act to administer the State historic preservation program or a representative designated to act for the State historic preservation officer.

(w) *Tribal Historic Preservation Officer (THPO)* means the tribal official appointed by the tribe's chief governing authority or designated by a tribal ordinance or preservation program who has assumed the responsibilities of the SHPO for purposes of section 106 compliance on tribal lands in accordance with section 101(d)(2) of the act.

(x) *Tribal lands* means all lands within the exterior boundaries of any Indian reservation and all dependent Indian communities.

(y) *Undertaking* means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; and those requiring a Federal permit, license or approval.

(z) *Senior policy official* means the senior policy level official designated by the head of the agency pursuant to section 3(e) of Executive Order 13287.

[65 FR 77725, Dec. 12, 2000, as amended at 69 FR 40555, July 6, 2004]

Appendix A to Part 800—Criteria for Council Involvement in Reviewing Individual section 106 Cases



top

(a) *Introduction*. This appendix sets forth the criteria that will be used by the Council to determine whether to enter an individual section 106 review that it normally would not be involved in.

(b) *General policy*. The Council may choose to exercise its authorities under the section 106 regulations to participate in an individual project pursuant to the following criteria. However, the Council will not always elect to participate even though one or more of the criteria may be met.

(c) *Specific criteria*. The Council is likely to enter the section 106 process at the steps specified in the regulations in this part when an undertaking:

(1) *Has substantial impacts on important historic properties*. This may include adverse effects on properties that possess a national

vel of significance or on properties that are of unusual or noteworthy importance or are a rare property type; or adverse effects to
rge numbers of historic properties, such as impacts to multiple properties within a historic district.

) *Presents important questions of policy or interpretation.* This may include questions about how the Council's regulations are
eing applied or interpreted, including possible foreclosure or anticipatory demolition situations; situations where the outcome will
at a precedent affecting Council policies or program goals; or the development of programmatic agreements that alter the way the
ction 106 process is applied to a group or type of undertakings.

) *Has the potential for presenting procedural problems.* This may include cases with substantial public controversy that is related
historic preservation issues; with disputes among or about consulting parties which the Council's involvement could help resolve;
at are involved or likely to be involved in litigation on the basis of section 106; or carried out by a Federal agency, in a State or
ality, or on tribal lands where the Council has previously identified problems with section 106 compliance pursuant to
800.9(d)(2).

) *Presents issues of concern to Indian tribes or Native Hawaiian organizations.* This may include cases where there have been
oncerns raised about the identification of, evaluation of or assessment of effects on historic properties to which an Indian tribe or
ative Hawaiian organization attaches religious and cultural significance; where an Indian tribe or Native Hawaiian organization has
equested Council involvement to assist in the resolution of adverse effects; or where there are questions relating to policy,
terpretation or precedent under section 106 or its relation to other authorities, such as the Native American Graves Protection and
epatriation Act.

[Browse Next](#)

For questions or comments regarding e-CFR editorial content, features, or design, email ecfr@nara.gov.

For questions concerning e-CFR programming and delivery issues, email webteam@gpo.gov.

[Section 508 / Accessibility](#)

Last updated: August 7, 2006

APPENDIX 5:
DEPARTMENT OF VETERANS AFFAIRS
SECTION 106



OFFICE OF FACILITIES MANAGEMENT: HISTORIC PRESERVATION

Section 106 of the National Historic Preservation Act Regulations Codified: 36 CFR Part 800

Advisory Council on Historic Preservation Site: [Full Regulations](#) and [Flow Chart](#)

Brief Explanation:

Requires Federal agencies to take into account the effects of their activities and programs on historic properties and provide the President's Advisory Council on Historic Preservation, an independent federal agency with a reasonable opportunity to comment with regard to such undertaking. It states:

"The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under Title II of this Act a reasonable opportunity to comment with regard to such undertaking."

Purpose of the Section 106 Process: The Council seeks through the Section 106 process to balance historic preservation concerns with the needs of Federal undertakings. It is designed to identify potential conflicts between the two and to help resolve such conflicts in the public interest.

What is Section 106 review? This term refers to the federal review process designed to ensure that historic properties are considered during federal project planning and execution. The review process is administered at the Federal level, by the President's Advisory Council on Historic Preservation, and at the state level by the State Historic Preservation Office.

Who established Section 106? The Congress did, as part of the National Historic Preservation Act of 1966 (NHPA). NHPA, strengthened and expanded by several subsequent amendments, today has become the cornerstone of this country's historic preservation policy.

Why was Section 106 created? NHPA was enacted because of public concern that so many of our Nation's historic resources were not receiving adequate attention as the Government sponsored public works projects. In the 1960's, federal preservation law applied only to a handful of nationally significant properties, and Congress recognized that new legislation was needed to protect the many other historic properties that were being harmed by federal activities.

What does NHPA say? Section 106 of NHPA requires that every federal agency "take into account" how each of its undertakings could affect historic properties. An agency must also afford the Council a reasonable opportunity to comment on the agency's project. This is in order to balance the federal undertaking and mission of the agency against the historic properties to best represent the public interest and to prevent arbitrary destruction of historic resources with federal funds.

What is a federal undertaking? This term includes a broad range of federal activities: construction, rehabilitation, and repair projects; licenses, permits, loans, loan guarantees, and grants; leases; federal property transfers; and many other types of federal involvement. Whenever one of these activities affects an historic property, the sponsoring agency is obligated to seek Council comments.

What is historic property? For the Purposes of Section 106, any property listed in or eligible for listing in the National Register of Historic Places is considered historic. The National Register of Historic Places is this country's basic inventory of historic resources and is maintained by the Secretary of the Interior and managed by the National Park Service. The List includes buildings, structures, objects, sites, districts, and archaeological resources. The listed

properties are not just of nationwide importance; most are significant primarily at the State or local level. It is important to note that the protections of Section 106 extend to properties that possess significance but have not yet been listed or formally determined eligible for listing. Even properties that have not yet been discovered (such as archaeological properties), but that possess significance, are subject to Section 106 review.

How does Section 106 Work? The standard review process is spelled out in federal regulations issued by the Advisory Council on Historic Preservation, entitled "Protection of Historic Properties." The regulations appear in the U.S. Code of Federal Regulations at 36 CFR Part 800.

The process involves 5 basic steps:

Step 1: Identify and evaluate historic properties. The Federal agency responsible for an undertaking begins by identifying the historic properties the undertaking may affect. To do this, the agency first reviews background information and consults with the State Historic Preservation Office (SHPO) and others who may know about historic properties in the area. Based on this review, the agency determines what additional surveys or other field studies may be needed, and conducts those studies. If properties are found that may be eligible for inclusion in the National Register of Historic Places, but have not yet been included, the agency evaluates them against criteria published by the National Park Service, which maintains the Register. This evaluation is carried out in consultation with the SHPO, and if questions arise about the eligibility of a given property, the agency may seek a formal determination of eligibility from the Secretary of the Interior.

Step 2: Assess effects. If historic properties are found, the agency then assesses what effect its undertaking will have on them. Again, the agency works with the SHPO, and considers the views of others. The agency makes its assessment based on criteria found in the Council's regulations and can make one of three determinations:

No effect: the undertaking will not affect historic properties;

No adverse effect: the undertaking will affect one or more historic properties, but the effect will not be harmful;

Adverse effect: the undertaking will harm one or more historic properties.

Step 3: Consultation. If an adverse effect will occur, the agency consults with the SHPO and others in an effort to find ways to make the undertaking less harmful. Others who are consulted, under various circumstances, may include local governments, Indian tribes, property owners, other members of the public, and the Council. Consultation is designed to result in a Memorandum of Agreement (MOA), which outlines measures agreed upon that the agency will take to reduce, avoid, or mitigate the adverse effect. In some cases, the consulting parties may agree that no such measures are available, but that the adverse effect must be accepted in the public interest.

If consultation proves unproductive, the agency or SHPO, or the Council itself, may terminate consultation. The agency must submit appropriate documentation to the Council and request the Council's written comments.

Step 4: Council Comment: The Council may comment during Step 3 of the process by participating in consultation and signing the resulting MOA. Otherwise, the agency obtains Council comment by submitting the MOA to the Council for review and acceptance. The Council can accept the MOA, request changes, or opt to issue written comments. If consultation was terminated, the council issues its written comments directly to the agency head, as the agency head had requested.

Step 5: Proceed: If an MOA is executed, the agency proceeds with its undertaking under the terms of the MOA. In the absence of an MOA, the agency head must take into account the Council's written comments in deciding whether and how to proceed.

Alternative approaches:

Programmatic Agreements among an agency, the Council, SHPO(s), others;

Counterpart regulations developed by an agency and approved by the Council;

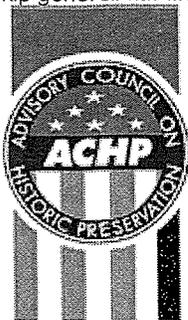
An agreement between the council and a State, which substitutes a State review system for the standard Section 106 review process.

Send inquiries about this page to steve.kuper@va.gov.

[Español](#) | [VA Forms](#) | [Facilities Locator](#) | [Contact the VA](#) | [Frequently Asked Questions \(FAQs\)](#)
[Privacy Policy](#) | [Web Policies & Important Links](#) | [Annual Performance and Accountability Report](#)
[Freedom of Information Act](#) | [Small Business Contacts](#) | [Site Map](#)
[FirstGov](#) | [White House](#) | [USA Freedom Corps](#)

Reviewed/Updated Date: May 1, 2006

APPENDIX:6:
ADVISORY COUNCIL
SECTION 106 PROCESS WITH EXPLANATORY MATERIAL



Section 106 Regulations Flow Chart Explanatory Material

Initiate the Section 106 process (800.3)

- Establish undertaking (800.3(a))
- Identify appropriate SHPO/THPO (800.3 (c)-(d))
- Plan to involve the public (800.3(e))
- Identify other consulting parties (800.3(f))
- 800.3(g)

No undertaking/no potential to cause effects (800.3(a)(1))

Undertaking might affect historic properties Identify historic properties (800.4)

- Determine scope of efforts (800.4(a))
- Identify historic properties (800.4(b))
- Evaluate historic significance (800.4(c))

No historic properties affected (800.4(d)(1))

Historic properties are affected (800.4(d)(2)) Assess adverse effects (800.5)

- Apply criteria of adverse effect (800.5(a))

No historic properties are adversely affected (800.5(d)(1))

Historic properties are adversely affected (800.5(d)(2)) Resolve adverse effects (800.6)

- Continue consultation

Memorandum of Agreement (800.6(b))

Failure to resolve adverse effects (800.7) ACHP comment and agency response

Initiate the Section 106 process (800.3)

Federal agencies are encouraged to integrate the Section 106 process into agency planning at its earliest stages.

Establish undertaking (800.3(a))

The determination of whether or not an undertaking exists is the Agency Official's decision. However, ACHP may render advice on the existence of an undertaking. If there is an undertaking, but it does not present a type of activity that has the potential to have an effect on an historic property, then the agency is finished with its Section 106 obligations. If the action is subject to a program alternative, such as

About ACHP

ACHP News

National Historic
Preservation
Program

Working with
Section 106

Federal, State, &
Tribal Programs

Training &
Education

Publications

Search

Programmatic Agreement or an alternate agency procedure, then the agency should follow that process.

800.3(b) This section emphasizes the benefit to an agency of coordinating compliance with related statutes to increase efficiency and avoid duplication of efforts. However, this coordination is not mandatory and is up to the Agency Official. Although agencies are encouraged to use the information gathered for these other processes to meet Section 106 needs, the information must meet the standards in these regulations.

Identify appropriate SHPO/THPO* (800.3 (c)-(d))

The Federal agency has the responsibility to properly identify the appropriate State Historic Preservation Officer (SHPO) and/or appropriate Tribal Historic Preservation Officer * (THPO) that must be consulted. If the undertaking is on or affects historic properties on tribal lands, then the agency must determine what tribe is involved. If the relevant tribe has assumed the SHPO's responsibilities for Section 106 under Section 101(d)(2) of NHPA, thereby having a THPO*, the agency must consult with such THPO* **in lieu of** the SHPO. A list of THPOs is available from the National Park Service. Certain owners of property on tribal lands can request SHPO involvement in addition to the THPO in a Section 106 case in accordance with NHPA. If the relevant tribe has not assumed SHPO responsibilities for Section 106 under Section 101(d)(2) of NHPA, the agency consults with such tribe **and** the SHPO.

Other related points include:

- A group of SHPOs may agree to designate a lead SHPO to act on their behalf for a specific undertaking.
- The manner of consultation may vary depending on the agency's planning process, the nature of the undertaking, and the nature of its effects.
- Failure of a SHPO/THPO* to respond within the time frames set by the regulation permit the agency to assume concurrence with the finding or to consult about the finding or determination with ACHP in the SHPO/THPO*'s absence. Subsequent involvement by the SHPO/THPO* is not precluded, but the SHPO/THPO* cannot reopen a finding or determination that it failed to respond to earlier.

For undertakings occurring, or affecting historic properties, on tribal lands, the Section 106 process may be completed even when the SHPO has decided not to participate in the process. A SHPO and a THPO* may develop tailored agreements for SHPO participation in reviewing undertakings on the tribe's lands.

Plan to involve the public (800.3(e))

The Agency Official must decide early how and when to involve the public in the Section 106 process. A formal "plan" is not required, although that might be appropriate depending upon the scale of the undertaking and the magnitude of its effects on historic properties.

Identify other consulting parties (800.3(f))

The Agency Official, at an early stage of the Section 106 process, is required to

consult with the SHPO/THPO* to identify those organizations and individuals that will have the right to be consulting parties under the terms of the regulations. These may include local governments, Indian tribes, and Native Hawaiian organizations, and applicants for Federal assistance or permits. Others may request to be consulting parties, but that decision is ultimately up to the Agency Official.

800.3(g) An Agency Official can combine individual steps in the Section 106 process with the consent of the SHPO/THPO*. Doing so must protect the opportunity of the public and consulting parties to participate fully in the Section 106 process as envisioned in Section 800.2.

No undertaking/no potential to cause effects (800.3(a)(1))

If the Agency Official determines that there is no undertaking as defined in Section 800.16(y), or there is an undertaking but it is not the type of activity that has the potential to cause effects on historic properties, there are no further obligations under Section 106 or ACHP's regulations. Agencies are strongly advised to keep appropriate records of such findings in case questions are raised by members of the public or other parties at a later date.

Undertaking might affect historic properties

Assuming that the Agency Official has determined that the undertaking is the type of activity that has the potential to cause effects on historic properties, the agency proceeds to identify properties that might be affected.

Identify historic properties (800.4)

The step known as "identification" includes preliminary work, actual efforts to identify properties, and an evaluation of identified properties to determine whether they are "historic;" i.e., they are listed on, or eligible for inclusion in, the National Register of Historic Places.

Determine scope of efforts (800.4(a))

At the beginning stages of the identification process, the Agency Official must consult with the SHPO/THPO* on the scope of its identification efforts and in fulfilling the steps in subsections (1) through (4). These steps include (1) determining and documenting the area of potential effects; (2) reviewing existing information about historic properties; (3) seeking information from parties likely to have knowledge of or concerns about the area; and (4) gathering information from Indian tribes and Native Hawaiian organizations about properties to which they attach religious and cultural significance, while remaining sensitive to any concerns they may have about the confidentiality of this information.

The SHPO/THPO* should be consulted at all steps in the scoping process. The determination of the area of potential effects is made unilaterally by the Agency Official, after such consultation. Where Federal agencies are engaged in an action that is on or may affect ancestral, aboriginal or ceded lands, Federal agencies must gather information from Indian tribes and Native Hawaiian organizations regarding

properties that may be of traditional religious and cultural significance to them, and that may be eligible for the National Register, on such lands.

Identify historic properties (800.4(b))

This section sets out the steps an Agency Official must follow to identify historic properties. Reminders scattered throughout the section emphasize the need for consultation with various parties.

800.4(b)(1) The standard for identification is a "reasonable and good faith effort" to identify historic properties, depending on a variety of factors (including, but not limited to, previous identification work). Appropriate identification may include background research, consultation, oral history interviews, sample field investigation, and field survey.

800.4(b)(2) Phased identification may be done when alternatives under consideration consist of corridors or large land areas, or where access to properties is restricted, and the nature of the undertaking and its potential scope and effect have therefore not yet been completely defined. Final identification and evaluation may also be deferred if provided for in an agreement with the SHPO/THPO* or other circumstances. Under this approach, Agency Officials are required to follow up with full identification and evaluation once project alternatives have been refined or access has been gained to previously restricted areas. Any further deferral of final identification would complicate the process and jeopardize an adequate assessment of effects and resolution of adverse effects.

Evaluate historic significance (800.4(c))

This section sets out the process for determining the National Register eligibility of properties not previously evaluated for historic significance.

800.4(c)(1) Federal agencies are required to apply the National Register Criteria to properties identified in the area of potential effects, and to acknowledge the special expertise of Indian tribes and Native Hawaiian organizations when assessing the eligibility of a property to which they attach religious and cultural significance. Old determinations of eligibility may need to be re-evaluated due to the passage of time or other factors.

800.4(c)(2) The Agency Official makes determinations of eligibility in consultation with the SHPO/THPO*. If there is disagreement or ACHP or Secretary of Interior so requests, the Agency Official must refer the matter to the Keeper of the National Register. If an Indian tribe or Native Hawaiian organization disagrees with a determination of eligibility involving a property to which it attaches religious and cultural significance, then the tribe can ask ACHP to request that the Agency Official obtain a determination of eligibility. The intention is to provide a way to ensure appropriate determinations regarding properties located off tribal lands to which tribes attach religious and cultural significance.

No historic properties affected (800.4(d)(1))

If no historic properties are found or no effects on historic properties are found, the Agency Official provides appropriate documentation to the SHPO/THPO* and notifies consulting parties. Members of the public need not receive direct

notification, but the Federal agency must place its documentation in a public file prior to approving the undertaking, and provide access to the information when requested by the public.

Once adequate documentation is received, the SHPO/THPO* has 30 days to object to the determination. ACHP may also object on its own initiative within the time period. Lack of such objection within the 30 day period means that the agency has completed its Section 106 responsibilities.

Historic properties are affected (800.4(d)(2))

The Federal agency must proceed to the assessment of adverse effects when it finds that historic properties may be affected or the SHPO/THPO* or ACHP objects to a no historic properties affected finding. The agency must notify all consulting parties and invite their views.

Assess adverse effects (800.5)

The SHPO/THPO*, and Indian tribes and Native Hawaiian organizations attaching religious and cultural significance to identified properties, must be consulted when agencies apply the criteria of adverse effect. The Agency Official also needs to consider the views of consulting parties and the public.

Apply criteria of adverse effect (800.5(a))

800.5(a)(1) Adverse effects occur when an undertaking may directly or indirectly alter characteristics of a historic property that qualify it for inclusion in the Register. Reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance, or be cumulative also need to be considered.

800.5(a)(2) Examples of adverse effects include physical destruction or damage; alteration not consistent with the Secretary of the Interior's *Standards*; relocation of a property; change of use or physical features of a property's setting; visual, atmospheric, or audible intrusions; neglect resulting in deterioration; or transfer, lease, or sale of a property out of Federal ownership or control without adequate protections.

If a property is restored, rehabilitated, repaired, maintained, stabilized, remediated or otherwise changed in accordance with the *Secretary's Standards*, then it will not be considered an adverse effect (assuming that the SHPO/THPO* agrees). Where properties of religious and cultural significance to Indian tribes or Native Hawaiian organizations are involved, neglect and deterioration may be recognized as qualities of those properties and thus may not necessarily constitute an adverse effect.

If a property is transferred leased or sold out of Federal ownership with proper preservation restrictions, then it will not be considered an adverse effect as in the past regulations. Transfer between Federal agencies is not an adverse effect *per se*; the purpose of the transfer should be evaluated for potential adverse effects, so that they can be considered before the transfer takes place.

Alteration or destruction of an archaeological site is an adverse effect, whether or not recovery of archaeological data from the site is proposed. ACHP has issued guidance to help agencies and others reach agreement on the treatment of such

properties.

800.5(a)(3) This section is intended to allow flexibility in Federal agency decision making processes and to recognize that phasing of adverse effect determinations, like identification and evaluation, is appropriate in certain planning and approval circumstances, such as the development of linear projects where major corridors are first assessed and then specific route alignment decisions are made.

800.5(b) The SHPO/THPO* may suggest changes in a project or impose conditions so that adverse effects can be avoided and thus result in a no adverse effect determination. This subsection emphasizes that a finding of no adverse effect is only a proposal when the Agency Official submits it to the SHPO/THPO* for review. This subsection also acknowledges that the practice of "conditional No Adverse Effect determinations" is acceptable.

800.5(c) ACHP will not review no adverse effect determinations on a routine basis. ACHP will intervene and review no adverse effect determinations if it deems it appropriate based on the criteria listed in Appendix A (circumstances warranting ACHP involvement), or if the SHPO/THPO* or another consulting party and the Federal agency disagree on the finding and the agency cannot resolve the disagreement. If Indian tribes or Native Hawaiian organizations disagree with the finding, they can request ACHP's review directly, but this must be done within the 30 day review period.

If a SHPO/THPO* fails to respond to an Agency Official finding within the 30 day review period, then the Agency Official can consider that to be SHPO/THPO* agreement with the finding. When the finding is submitted to ACHP, it will have 15 days for review; if it fails to respond within the 15 days, then the Agency Official may assume ACHP concurrence with the finding. When it reviews no adverse effect determinations, ACHP will limit its review to whether or not the criteria have been correctly applied. ACHP's determination is binding.

No historic properties are adversely affected (800.5(d)(1))

Agencies must retain records of their findings of no adverse effect and make them available to the public. The public should be given access to the information when they so request, subject to Freedom of Information Act (FOIA) and other statutory limits on disclosure, including the confidentiality provisions in Section 304 of NHPA. Failure of the agency to carry out the undertaking in accordance with the finding requires the Agency Official to reopen the Section 106 process and determine whether the altered course of action constitutes an adverse effect.

Historic properties are adversely affected (800.5(d)(2))

A finding of adverse effect requires further consultation on ways to resolve it.

Resolve adverse effects (800.6)

The process for resolving adverse effects has been changed to reflect the altered role of ACHP and the consulting parties.

Continue consultation

800.6(a)(1) When adverse effects are found, the consultation must continue among the Federal agency, SHPO/THPO* and consulting parties to attempt to resolve them. The Agency Official must always notify ACHP when adverse effects are found and must also invite ACHP to participate in the consultation when any of the circumstances in 800.6(a)(1)(i)(A)-(C) exist. A consulting party may also request ACHP to join the consultation. ACHP will decide on its participation within 15 days of receipt of a request, basing its decision on the criteria set forth in Appendix A. Whenever ACHP decides to join the consultation, it must notify the Agency Official and the consulting parties. It must also advise the head of the relevant Federal agency of its decision to participate. This is intended to keep the policy level of the Federal agency apprized of those cases that ACHP has determined present issues significant enough to warrant its involvement.

800.6(a)(2) New consulting parties may enter the consultation if the agency and the SHPO/THPO* (and ACHP, if participating) agree. If they do not agree, it is desirable for them to seek ACHP's opinion on the involvement of the consulting party. Any party, including applicants, licensees or permittees, that may have responsibilities under a Memorandum of Agreement must be invited to participate as a consulting party.

800.6(a)(3) The Agency Official is obligated to provide project documentation to all consulting parties at the beginning of the consultation to resolve adverse effects. Particular note should be made of the reference to the confidentiality provisions.

800.6(a)(4) The Federal agency must provide an opportunity for members of the public to express their views on an undertaking. The provision embodies the principles of flexibility, relating the agency effort to various aspects of the undertaking and its effects upon historic properties. The Federal agency must provide them with notice such that the public has enough time and information to meaningfully comment.

If all relevant information was provided at earlier stages in the process in such a way that a wide audience was reached, and no new information is available at this stage in the process that would assist in the resolution of adverse effects, then a new public notice may not be warranted. However, this presumes that the public had the opportunity to make its views known on ways to resolve the adverse effects.

800.6(a)(5) Although it is in the interest of the public to have as much information as possible in order to provide meaningful comments, this section acknowledges that information may be withheld in accordance with Section 304 of the NHPA.

Memorandum of Agreement (800.6(b))

If ACHP is not a part of the consultation, then a copy of the executed Memorandum of Agreement must be sent to ACHP so that ACHP can include it in its files to have an understanding of a Federal agency's implementation of Section 106. This does not provide ACHP an opportunity to reopen the specific case, but may form the basis for other actions or advice related to an agency's overall performance in the Section 106 process.

800.6(b)(1) When resolving adverse effects without ACHP, the Agency Official consults with the SHPO/THPO* and other consulting parties to develop a Memorandum of Agreement. If this is achieved, the agreement is executed between the Agency Official and the SHPO/THPO* and filed with required documentation with ACHP. This filing is the formal conclusion of the Section 106 process and must occur before the undertaking is approved. Standard treatments adopted by ACHP may set expedited ways for completing memoranda of agreement in certain circumstances.

800.6(b)(2) When ACHP is involved, the consultation proceeds in the same manner, but the agreement of the Agency Official, the SHPO/THPO* and ACHP is required for a Memorandum of Agreement.

800.6(c) The execution and implementation of a Memorandum of Agreement evidences an agency's compliance with Section 106. Failure to do so requires the Agency Official to reopen the Section 106 process and bring it to suitable closure as prescribed in the regulations.

800.6(c)(1) The rights of signatories to an agreement are spelled out, along with who is required to sign the agreement under specific circumstances. The term "signatory" has a special meaning as described in this section, which is the ability to terminate or agree to amend the Memorandum of Agreement. The term does not include others who sign the agreement as concurring parties.

800.6(c)(2) The Agency Official may invite certain parties to be signatories in addition to those specified in Section 800.6(c)(1). They include individuals and organizations that should, but do not have to, sign agreements. It is particularly desirable to have parties who assume obligations under the agreement become formal signatories. However, once invited signatories sign MOAs, they have the same rights to terminate or amend the MOA as the other signatories.

800.6(c)(3) Other parties may be invited to concur in agreements. They do not have the rights to amend or terminate an MOA. Their signature simply shows that they are familiar with the terms of the agreement and do not object to it.

800.6(c)(4)-(9) These sections set forth specific features of a Memorandum of Agreement and the way it can be terminated or amended.

Failure to resolve adverse effects (800.7)

What happens when the consulting parties cannot reach agreement? Usually when consultation is terminated, ACHP renders advisory comments to the head of the agency, which must be considered when the final agency decision on the undertaking is made. There may be circumstances where ACHP will recommend further discussion to try to resolve the matter.

ACHP comment and agency response

800.7(a)(1) The head of the agency or an Assistant Secretary or officer with major department-wide or agency-wide responsibilities must request ACHP comments when the Agency Official terminates consultation. Section 110(l) of the NHPA requires heads of agencies to document their decision when an agreement has not been reached under Section 106.

800.7(a)(2) ACHP and the Agency Official may conclude the Section 106 process with a Memorandum of Agreement between them if the SHPO terminates consultation.

800.7(a)(3) If a THPO* terminates consultation, there can be no agreement with regard to undertakings that are on or affect properties on tribal lands. In such cases, ACHP will issue formal comments. This provision respects the tribe's unique sovereign status with regard to its lands.

800.7(a)(4) In cases where ACHP terminates consultation, ACHP has the duty to notify all consulting parties prior to commenting. The role given to the Federal Preservation Officer is intended to fulfill the NHPA's goal of having a central official in each agency to coordinate and facilitate the agency's involvement in the national historic preservation program.

800.7(b) ACHP may provide advisory comments even though it has signed a Memorandum of Agreement. This provision is intended to give ACHP the flexibility to provide comments even where it has agreed to sign an MOA. Such comments might elaborate upon particular matters or provide suggestions to Federal agencies for future undertakings.

800.7(c) ACHP has 45 days to provide its comments to the head of the agency for a response by the agency head. When submitting its comments, ACHP will also provide the comments to the Federal Preservation Officer, among others, for information purposes.

800.7(c)(4) This section specifies what it means to "document the agency head's decision" as required by Section 110(1) when ACHP issues its comment to the agency head.

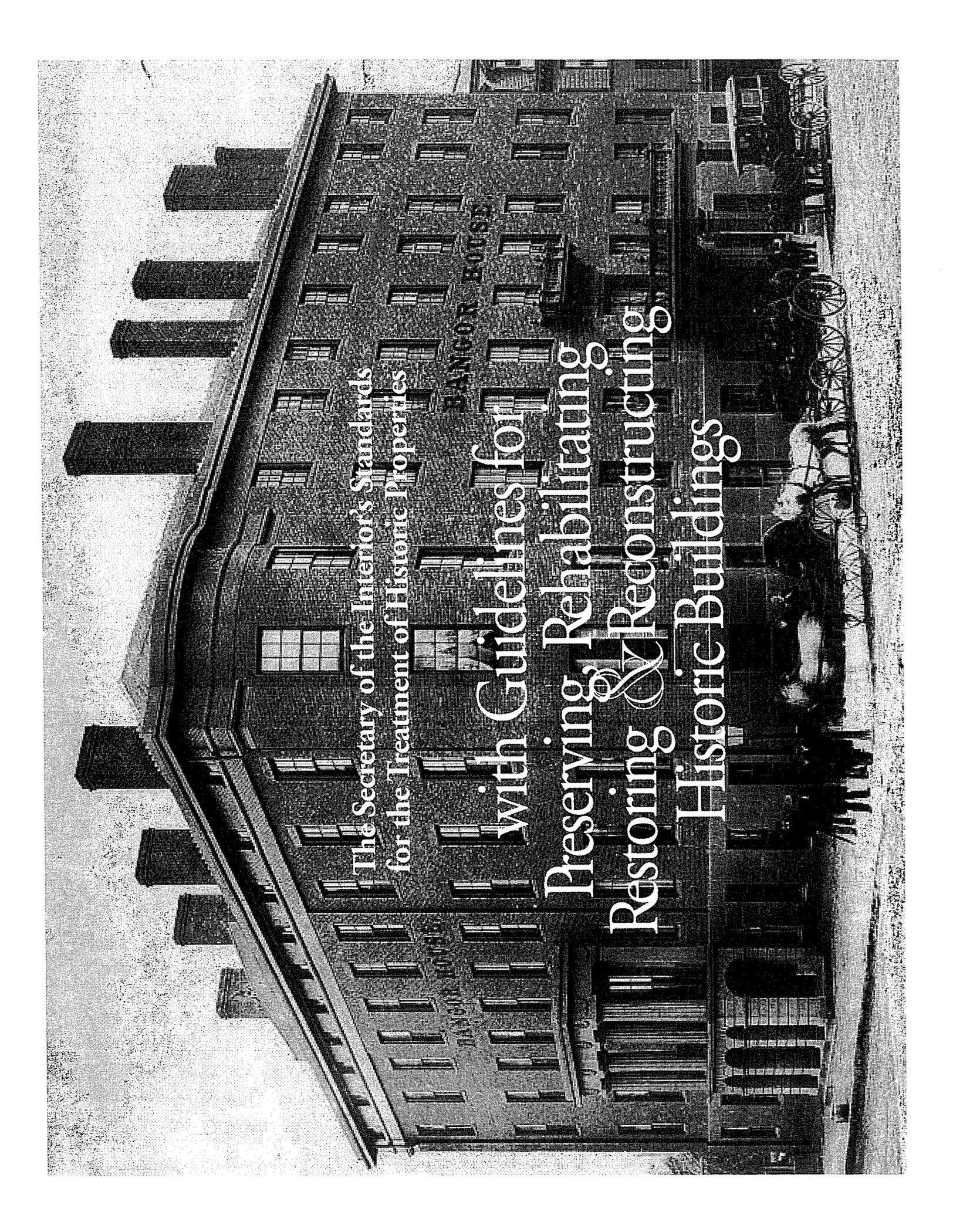
*** The regulations define the term "THPO" as those tribes that have assumed SHPO responsibilities on their tribal lands and have been certified pursuant to Section 101(d)(2) of the NHPA. Nevertheless, remember that tribes that have not been so certified have the same consultation and concurrence rights as THPOs when the undertaking takes place, or affects historic properties, on their tribal lands. The practical difference is that during such undertakings, THPOs would be consulted *in lieu of* the SHPO, while non-certified tribes would be consulted *in addition to* the SHPO.**

Updated February 12, 2001

[Return to Top](#)

**APPENDIX 7:
SECRETARY OF THE INTERIOR'S
STANDARDS FOR THE TREATMENT OF HISTORIC PROPERTIES: WITH
GUIDELINES FOR PRESERVING, REHABILITATING, RESTORING &
RECONSTRUCTING HISTORIC BUILDINGS**

**SECRETARY OF THE INTERIOR'S STANDARDS
NATIONAL PARK SERVICE
TECHNICAL PRESERVATION SERVICES**



The Secretary of the Interior's Standards
for the Treatment of Historic Properties

with Guidelines for
Preserving, Rehabilitating,
Restoring & Reconstructing
Historic Buildings

The Secretary of the Interior's Standards
for the Treatment of Historic Properties

with Guidelines for
Preserving, Rehabilitating,
Restoring & Reconstructing
Historic Buildings

Kay D. Weeks and Anne E. Grimmer

U.S. Department of the Interior
National Park Service
Cultural Resource Stewardship and Partnerships
Heritage Preservation Services
Washington, D.C.
1995

The Secretary of the Interior is responsible for establishing professional standards and providing advice on the preservation and protection of all cultural resources listed in or eligible for listing in the National Register of Historic Places. **The Secretary of the Interior's Standards for the Treatment of Historic Properties, apply to all proposed development grant-in-aid projects assisted through the National Historic Preservation Fund, and are intended to be applied to a wide variety of resource types, including buildings, sites, structures, objects, and districts. They address four treatments: Preservation, Rehabilitation, Restoration, and Reconstruction. The treatment Standards, developed in 1992, were codified as 36 CFR Part 68 in the July 12, 1995 *Federal Register* (Vol. 60, No. 133). They replace the 1978 and 1983 versions of 36 CFR 68 entitled, "The Secretary of the Interior's Standards for Historic Preservation Projects."** The Guidelines in this book also replace the Guidelines that were published in 1979 to accompany the earlier Standards.

Please note that **The Secretary of the Interior's Standards for the Treatment of Historic Properties** are only regulatory for projects receiving federal grant-in-aid funds; otherwise, the Standards and Guidelines are intended only as general guidance for work on any historic building.

Finally, another regulation, 36 CFR Part 67, focuses on "certified historic structures" as defined by the IRS Code of 1986. The "Standards for Rehabilitation" cited in 36 CFR 67 should always be used when property owners are seeking certification for Federal tax benefits.

Library of Congress Cataloging-in-Publication Data

Weeks, Kay D.

The Secretary of the Interior's standards for the treatment of historic properties: with guidelines for preserving, rehabilitating, restoring & reconstructing historic buildings / Kay D. Weeks and Anne E. Grimmer.

p. cm.

ISBN 0-16-048061-2

- I. Architecture--United States--Conservation and restoration--Standards. 2. Historic buildings--United States--Conservation and restoration--Standards. I. Grimmer, Anne E.
- II. United States, National Park Service. Preservation Assistance Division. III. Title.

NA106.W44 1995

720".28"8021873--dc20

95-23913

CIP

Rev.